

THE ABOLITION CLASSICS

COLLECTED EDITION VOL. III

THE AGE OF REFORM I

MONTAGU, ROMILLY, LIVINGSTON, O'SULLIVAN &
THE ENGLISH-AMERICAN CRUSADE

1809–1841



EDITED AND MODERNIZED BY

JEFF HOOD

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

THE AGE OF REFORM

Part One · 1800 – 1841

OMNIBUS III

THE ABOLITION CLASSICS
OMNIBUS III

THE AGE OF REFORM

Part One · 1800 – 1841

Montagu · Romilly · Shelley · Hugo · Livingston · O'Sullivan

Edited and Modernized by

JEFF HOOD

COMPLICIT PRESS

2026

This omnibus edition © 2026 Complicit Press

Editorial matter, forewords, editor's notes and modernization © 2026 Jeff Hood

Gathering Volumes 8, 7, 20, 9, 6 and 12 of The Abolition Classics, published separately in 2026.

The underlying works are in the public domain. The volumes gathered here are reproduced as published in the individual editions of The Abolition Classics; each retains its own front matter, pagination and apparatus.

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

Complicit Press · North Little Rock, Arkansas · complicitpress.org

THE ABOLITION CLASSICS

OMNIBUS III

CONTENTS

Each volume gathered here keeps the pagination of its own edition. The page numbers below, and those in the index, are the sequential pages of this omnibus

FRONT MATTER

Foreword	vi
Editor's Note: The Thread Between These Books	ix

THE WORKS

The Opinions of Different Authors upon the Punishment of Death	12
<i>Compiled by Basil Montagu · London, 1809–13 · V. 8</i>	
Observations on the Criminal Law of England	75
<i>Sir Samuel Romilly · London, 1810 · V. 7</i>	
On the Punishment of Death	129
<i>Percy Bysshe Shelley · c. 1815 · V. 20</i>	
Under Sentence of Death	172
<i>Victor Hugo, reset in contemporary Iran · Paris, 1829 · V. 9</i>	
Argument Against Capital Punishment	210
<i>Edward Livingston · Louisiana, 1833 · V. 6</i>	
Report in Favor of the Abolition of the Punishment of Death by Law	268
<i>John L. O'Sullivan · New York, 1841 · V. 12</i>	

EDITORIAL APPARATUS

Conclusion	332
Index	334

FOREWORD

*The same crime, under the same laws, could have produced either
result. This is not justice. It is lottery.*

— ROMILLY

In 1790 the criminal code of England prescribed death for one hundred and sixty offenses. By the time this omnibus closes, in 1841, a committee of the New York State Assembly had recommended abolishing the punishment altogether and the legislature had ordered ten times the usual number of copies printed.

That is the distance covered in these six books, and it was not covered by argument alone. It was covered by organization. This is the volume where the case against the death penalty stops being a thing people write and becomes a thing people do.

THE MACHINERY OF A MOVEMENT

Look at the shape of it. Basil Montagu does not write a treatise; he compiles one — he goes and finds sixty-two authors who have said something useful and prints them together, so that a member of Parliament can hold the whole tradition in one hand. Samuel Romilly does not publish and hope; he publishes and then stands up in the House of Commons, session after session, trying to take the capital sanction off pickpocketing and shoplifting and losing, and coming back, and losing again. Edward Livingston does not argue in the abstract; he drafts a penal code for the State of Louisiana with no gallows in it. John O'Sullivan does not appeal to conscience; he chairs a select committee and produces a hundred pages of evidence with a bill attached.

Compilation. Legislation. Codification. Committee report. This is what the argument looks like once it has learned to work a building.

I know these rooms. I have spent years in the modern version of them — the clemency hearing, the legislative subcommittee, the press

conference on the capitol steps with four reporters and a mother who has not slept. The romance goes out of the work very fast. What replaces it is what Romilly had: the willingness to lose the same vote eleven times and file it again.

THE TWO WHO WERE NOT IN THE BUILDING

And then there are the two who did it differently, and they are the reason this omnibus is not a policy anthology.

Shelley was twenty-two or twenty-three when he wrote his fragment on the punishment of death. He never finished it and he never saw an execution. He argued from imagination and he got to the hardest place in the argument anyway: nobody actually knows what death is, and a state that builds a punishment on that ignorance has lost before the first witness is called. I have stood closer to the machinery than a poet needs to stand. Thirteen times. It has taught me things Shelley could not have known. It has never taught me that he was wrong.

Hugo went the other way. In 1829 he took the whole apparatus of reform — the returns, the codes, the committee evidence — and threw it out, and wrote instead the diary of a condemned man with no name and no crime. No crime, so you cannot excuse yourself. No name, so you cannot make him somebody else's son. Just the days going by, and the lawyer, and the priest, and the paperwork, and the crowd assembling in the square. It did more than the returns did. It has been doing it for two hundred years.

In this series Hugo's novel is reset in contemporary Iran, in Evin, under a judiciary that hangs people from cranes in public. That decision has been questioned and I will defend it here: Hugo wrote about a state that killed in the name of order, and there is no honest way to resituate that book in 2026 without putting it somewhere the machinery is still running in the open. It runs in the open in Tehran. It runs behind a curtain in Huntsville. The book is about both.

WHAT CHANGED AND WHAT DID NOT

By 1841 the movement had learned three things it did not know in 1800.

It had learned that the numbers were on its side. Romilly showed that juries were refusing to convict, that prosecutors were declining to charge, and that severity was producing not deterrence but paralysis. O'Sullivan gathered the returns from England, from France, from the American states, and demonstrated that where executions fell, murder fell with them. The empirical case, which people still talk about as though it arrived with modern criminology, was substantially finished in 1841.

It had learned that the scriptural fight could not be avoided. O'Sullivan gives it a hundred pages: the Mosaic code, the covenant with Noah, the mark of Cain, the teaching of Christ. He had read Rush. Spear and Burleigh and Bovee will read him.

And it had learned that the argument travels. Livingston's code was praised across Europe. O'Sullivan quotes English returns to New York legislators. Dickens will quote O'Sullivan back across the Atlantic five years later. A movement that had no way to accumulate for two thousand years suddenly has a postal system.

What did not change is the thing that keeps me up. Romilly lost. Over and over. The Bloody Code came down slowly and it came down for reasons that had as much to do with transportation, policing and the cost of hanging as with anybody's conscience. Reform is not the same as abolition, and this omnibus is where the difference first becomes visible — and where the movement first learns how easily the one can be used to postpone the other.

Rev. Dr. Jeff Hood
North Little Rock, Arkansas
2026

EDITOR'S NOTE

Six volumes are gathered here: V. 8, V. 7, V. 20, V. 9, V. 6 and V. 12, arranged by the date of the underlying work. They are the most various group in the series — an anthology, a legal pamphlet, a poet's fragment, a novel, a legislator's argument and a committee report — and the variety is the point. This is the period in which the argument learned to travel in every available vehicle.

THE THREAD BETWEEN THESE BOOKS

Severity defeats itself. Montagu's compilation is built around it: Johnson, Goldsmith, Colquhoun, Blackstone and Beccaria all observing that a law which threatens more than the public will tolerate is a law that stops being enforced. Romilly turns the observation into evidence. Juries acquit against the facts. Prosecutors undercharge. Victims decline to press. The gallows does not produce order; it produces a lottery in which the same offense yields death or nothing depending on who is in the room.

The lottery is the argument. Romilly's word for the English system is discretion, and he means it as an accusation. Livingston makes the same charge against the American codes twenty years later. It is the direct ancestor of every modern arbitrariness claim, and it is the ground on which the death penalty was struck down in the United States in 1972 and then quietly reinstated.

Nobody knows what death is. Shelley's fragment, alone in this group, refuses the empirical terrain entirely. He grants nothing to the returns and asks what the state thinks it is inflicting. The volume prints his text in ten sections with an editor's note after each, because it is a fragment and needs one.

The condemned man is the argument. Hugo removes the crime and the name and leaves the days. Livingston's *Argument* and O'Sullivan's *Report* both reach, at their strongest, for the same move: make the legislator sit in the cell.

Scripture, again. O'Sullivan devotes the first and longest part of his report to it, and he is answering the same verse Rush answered in 1793 and the same verse Bovee will answer in 1869.

TWO VOLUMES THAT ARE NOT REPRINTS

Under Sentence of Death is not a translation of *Le Dernier Jour d'un condamné*. It is an original composition that resets Hugo's novel in contemporary Iran, preserving its structure, its premises and its argument. The reason is stated in that volume's own editor's note and repeated here: the public-domain English translations of Hugo are Victorian and read like museum pieces, and a novel whose entire method is immediacy cannot survive being embalmed.

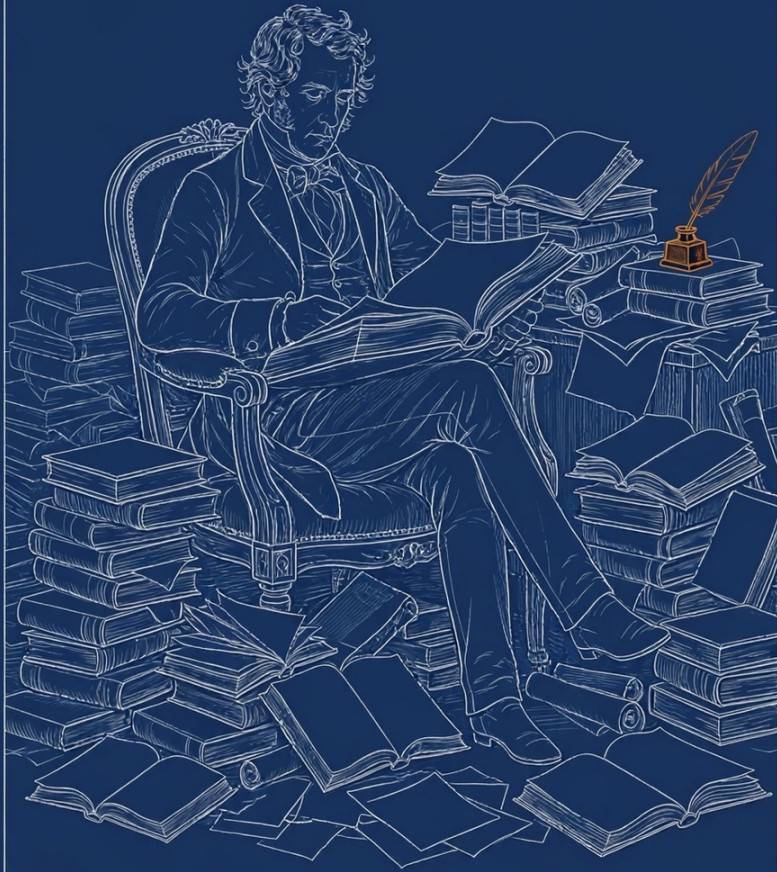
The Opinions of Different Authors presents twelve of the sixty-two authors Montagu collected across his three volumes of 1809, 1812 and 1813. The selection, the chapter divisions and the chapter titles are editorial. Nothing has been added to what those twelve authors wrote, but a reader should know that Montagu's own book is four times this size and includes voices on the other side, which he printed deliberately and at length.

Argument Against Capital Punishment is drawn from Livingston's introduction to the penal code he prepared for Louisiana, as printed in the 1843 New York pamphlet, with the testimonials that accompanied it. The volume carries a section titled *The Original Author Owned People*, and it is not an appendix. Livingston enslaved human beings while writing the most humane penal code of his century. The volume says so at the front, before the argument, where it belongs.

A NOTE ON DATES

The works are arranged by composition, not publication. Shelley's fragment was written around 1815 and not printed until 1840, in the collection Mary Shelley edited after his death. Montagu's anthology appeared over four years. Livingston's argument was written for Louisiana in 1833 and reprinted for a New York abolition society a decade later. Where the printed date and the written date diverge, this omnibus follows the pen.

THE ABOLITION CLASSICS. V. VIII



THE OPINIONS OF DIFFERENT AUTHORS UPON THE PUNISHMENT OF DEATH

THE COMPILATION OF BASIL MONTAGU

England, 1809-1813

EDITED AND MODERNIZED BY

JEFF HOOD

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

Copyright © 2026 by Jeff Hood

Published by Complicit Press

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.

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.

C O M P L I C I T P R E S S

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

COLQUHOUN

CONTENTS

Foreword	vi
A Note on This Edition	ix
THE OPINIONS OF DIFFERENT AUTHORS	1
I. Dr. Samuel Johnson: The Failure of Severity	2
II. Sir William Blackstone: On the State's Right to Punish	6
III. Marquis Beccaria: The Case Against Capital Punishment	9
IV. Dr. William Paley: In Defense of the Present System	13
V. Baron Montesquieu: On Proportionality and the Spirit of Law	16
VI. Thomas Clarkson: The Philadelphia Experiment	19
VII. Patrick Colquhoun: A Catalogue of Capital Crimes	22
VIII. The Administration of Justice: Two Voices	26
IX. Dr. Oliver Goldsmith: How Severity Breeds Crime	29
X. William Eden and Jeremy Bentham: Disproportionate Laws	32
XI. John Howard: The Evidence from Abroad	36
XII. William Turner: Against the Biblical Defense	39
EDITORIAL APPARATUS	42
Definitions and Terms	43
Further Reading	48

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.

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.

THE ABOLITION CLASSICS. V. VII



OBSERVATIONS ON THE CRIMINAL LAW OF ENGLAND

THE ARGUMENT OF SIR SAMUEL ROMILLY

England, 1810

EDITED AND MODERNIZED BY

JEFF HOOD

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

V. 7

OBSERVATIONS
ON THE CRIMINAL
LAW OF ENGLAND

A Modern Adaptation

SIR SAMUEL ROMILLY

Edited and modernized by
JEFF HOOD

COMPLICIT PRESS

Copyright © 2026 by Jeff Hood

Published by Complicit Press

Newly set and modernized from *Observations on the Criminal Law of England, as it Relates to Capital Punishments, and on the Mode in Which it is Administered*, first published at London by T. Cadell and W. Davies in 1810. The underlying text is in the public domain.

The chapter divisions and titles are editorial. 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.

C O M P L I C I T P R E S S

*The same crime, under the same laws, could have produced
either result. This is not justice. It is lottery.*

R O M I L L Y

CONTENTS

Foreword	vi
A Note on This Edition	x
OBSERVATIONS ON THE CRIMINAL LAW OF ENGLAND	1
Advertisement	2
I. The State of English Criminal Law	3
II. The System Was Never Intentional	5
III. The Evidence of History	7
IV. The Arbitrariness of Discretion	9
V. Against Dr. Paley: The System Defended	11
VI. Against Dr. Paley: The Net and the Few	13
VII. Against Dr. Paley: The Unknowable Law	15
VIII. Against Dr. Paley: On Pardon and Mercy	17
IX. The Innocent	19
X. Conclusion	22
SUPPLEMENTARY OBSERVATIONS	24
A Note on the Statistical Tables	25
A Note on the Paley Passage	27
On the Bills Themselves	29
On the Honor of the Law	31
EDITORIAL APPARATUS	33
Definitions and Terms	34
Further Reading	38

FOREWORD

There is a question buried inside Romilly's argument that I have been turning over for years, and it goes like this: what does it mean to have a law that everyone knows will not be enforced?

England in 1810 had more capital offenses on its statute books than any other country in the world. Stealing five shillings from a shop was, technically, a hanging offense. So was stealing forty shillings from a dwelling. So were a dozen other acts of petty theft and minor property crime. These laws were on the books. They were real. They had been passed by Parliament with the intention—always, Romilly argues, with the intention—that they would be enforced.

They were not enforced. By 1810, the execution rate for property crimes was something like one in twenty of those convicted, and for certain specific offenses—shoplifting—it was essentially zero. The judges, the juries, the prosecuting victims, and the king's pardoning power had conspired to make England's official criminal law into a kind of fiction: a set of threats so severe that no one would actually carry them out.

Romilly's argument is that this state of affairs is not a humane middle ground between severity and leniency. It is something much worse: an arbitrary, unknowable, and ultimately unjust system in which the same crime produces death for one person and freedom for another, depending on which judge hears the case, which jurors are selected, whether the victim chooses to prosecute, and whether the king's advisors happen to be in a merciful mood. The law that supposedly governs these decisions is not written anywhere. It exists only in the unrecorded and unchallenged discretion of individual officials, exercised in secret and unaccountable to anyone.

I think about this argument in relation to the American death penalty, and the parallels are uncomfortable. The American system does not have anything like England's 1810 statute books — we do not execute people for shoplifting. But we do have a system of capital punishment whose application is, by every serious study, arbitrary. Whether a person is sentenced to death in America depends less on the nature of the crime than on the county where it was committed, the race of the victim, the quality of the defense attorney, and a dozen other factors that have nothing to do with the gravity of the offense. Two people who commit equivalent crimes, in equivalent circumstances, with equivalent culpability, will receive radically different sentences based on which courthouse they stand in. This is not justice. This is the English system Romilly described, translated into American terms.

Romilly's specific argument — against the use of discretion as a substitute for clear law — is the most powerful part of his treatise. He takes aim at William Paley, the influential moral philosopher who had defended the English system on the grounds that it was, in effect, ingenious: you create a large net of capital offenses, and then you use discretion to pull out only the ones that really deserve death. The net catches everything; the hand selects carefully. The result, Paley argued, is a system that combines maximum deterrent effect with maximum humane flexibility.

Romilly destroys this argument with admirable precision. If the selection is left to discretion, then the potential criminal cannot know in advance whether his act will result in death or freedom. If he cannot know this, the deterrent effect is undermined — you cannot be deterred by a threat whose application you cannot predict. If the deterrent effect is undermined, the large net of capital offenses is serving no purpose. And if the net serves no purpose except to give officials unchecked power over life and death, it is not ingenious — it is tyrannical.

But the philosophical point Romilly is making goes deeper than the mechanics of deterrence. He is arguing that the rule of law is not compatible with the rule of discretion. A system in which punishment depends not on written law but on the unwritten preferences of officials is not a legal system at all, in the philosophically meaningful sense. It is a system of power dressed in the language of law. The criminal stands before the court not to have his guilt or innocence determined by reference to a known standard, but to have his fate decided by processes he cannot examine, by criteria he cannot know, through deliberations he cannot challenge.

This is a philosophical claim about what law is and what it is for. Law, on Romilly's implicit account, must be public, must be known in advance, and must be applied consistently. A rule that is applied inconsistently, in secret, based on unannounced criteria, is not a rule — it is a preference. And preferences, unlike rules, cannot be just, because justice requires treating like cases alike, and you cannot treat like cases alike without a public standard for what makes cases alike.

The American death penalty fails this test as completely as England's 1810 system. We have the written laws, the trials, the appeals, the due process protections. But beneath all that procedural machinery, the actual decision of who lives and who dies is made by processes that cannot be reduced to any consistent standard, that vary enormously by geography and by the identities of the parties, and that leave identical cases with radically different outcomes. This is Paley's "net" in American form: we have capital statutes for serious crimes, and we apply them to a small, arbitrary subset of those who commit those crimes, by a selection process no one can articulate or defend.

Romilly wrote at a moment when England was beginning to reconsider its criminal law, and when the accumulated weight of absurdity had made the existing system untenable. He was part of a reform movement that eventually transformed English criminal law — not immediately, not completely, but significantly and permanently. The number of capital offenses in England fell from

FOREWORD

over two hundred to a handful over the following decades, and eventually to none.

That transformation happened because people like Romilly were willing to stand up in Parliament and say: this system is not what it pretends to be. It is not humane flexibility. It is not enlightened discretion. It is arbitrary power, and arbitrary power is incompatible with justice, regardless of how carefully it is wrapped in the language of law.

That is the argument this book makes. It is as relevant today as it was in 1810.

JEFF HOOD

North Little Rock, 2026

A NOTE ON THIS EDITION

THE AUTHOR

Sir Samuel Romilly (1757–1818) was one of the most distinguished lawyers and legal reformers of the early nineteenth century. The son of a jeweler of Huguenot descent, he was called to the bar in 1783 and rose quickly to prominence in Chancery. He was appointed Solicitor General in 1806 and served in that office until 1807, when the change of government ended his tenure. Throughout his career he combined a distinguished legal practice with an active legislative effort to reform England's criminal law. He succeeded in repealing several capital statutes, including the laws against soldiers and sailors returning from transportation and the law against pickpocketing. His efforts were often frustrated by the House of Lords, but the principles he established shaped the more sweeping reform that followed his death. He died in 1818, three days after his wife Anne, in a period of severe grief from which his friends feared he would not recover. He was sixty years old.

Romilly was personally acquainted with many of the leading figures of the Enlightenment, including Jeremy Bentham, whose influence on penal reform is evident throughout the *Observations*, and the Genevan philosopher Dumont, who had edited Bentham's work and with whom Romilly maintained a long correspondence. The *Observations* belong to the tradition of Enlightenment legal criticism that includes Beccaria's *Essay on Crimes and Punishments* (1764), which Romilly had read.

THE TEXT

The *Observations on the Criminal Law of England* was published in 1810, timed to appear before Parliament voted on the bills Romilly had introduced to repeal three specific capital statutes: the acts making it a hanging offense to steal five shillings privately from a shop, to steal forty shillings from a dwelling-house, or to steal goods of stated values from ships on navigable rivers. The *Observations* contains the substance of the speech he delivered in the House of Commons in moving these bills, considerably expanded, with additional arguments and with an extended refutation of William Paley's philosophical defense of the existing system.

Romilly succeeded in the House of Commons but failed in the House of Lords. The bills were defeated, as similar bills would be defeated for years to come. He continued to introduce reform legislation until his death.

WILLIAM PALEY

William Paley (1743–1805) was an English moral philosopher and theologian whose *Principles of Moral and Political Philosophy* (1785) had achieved great popularity and whose defense of the existing English criminal system Romilly undertakes to refute at length. Paley's argument — that a large body of capital statutes, combined with wide discretion in their enforcement, produced a system both flexible and effective — was the most intellectually serious defense of the status quo available. Romilly's point-by-point refutation of it is the philosophical center of this volume.

MODERNIZATION

The prose of the *Observations* reflects the conventions of early nineteenth-century parliamentary discourse: long, carefully balanced sentences; elaborate qualification; extensive quotation and direct refutation. This edition modernizes that prose throughout. Sentence

structures have been simplified, archaic constructions updated, and the text organized into numbered chapters with descriptive headings. The chapter divisions are editorial; Romilly's original is a continuous argument organized around specific topics, and the headings in this edition indicate the logical structure of that argument rather than creating new divisions.

What has not been changed: Romilly's arguments. Every position he takes, every example he adduces, every passage from Paley that he quotes and answers, every statistical observation he makes — all are preserved exactly as he set them down. The quotations from Paley are rendered as Romilly quoted them, with minor modernization of spelling.

THE ARRANGEMENT OF THIS EDITION

Romilly's original is a continuous argument, not a book of chapters. The ten numbered chapters here are editorial, and so are their titles. Four further passages stand apart from the main line of the argument: two extended notes, on the statistical tables and on the Paley passage, and two sections that take up the particular bills and the standing of the law itself. These are gathered at the end as Supplementary Observations rather than forced into the numbered sequence.

Collation. The figures in this volume have been checked against Romilly's speech of 9 February 1810 as recorded in Hansard, and corrected where the modernization had departed from them. Readers using this edition for scholarly work should still collate against the first edition of 1810.

OBSERVATIONS ON THE
CRIMINAL LAW OF ENGLAND

Sir Samuel Romilly, 1810

ADVERTISEMENT

The following Observations contain the substance of a speech delivered in the House of Commons on the 9th of February, 1810, on moving for leave to bring in bills to repeal the Acts of 10 and 11 William III, 12 Anne, and 24 George II, which make the crimes of stealing privately from a shop goods of the value of five shillings, or stealing from a dwelling-house or on board a vessel in a navigable river property of the value of forty shillings, capital felonies. Some arguments are added here that were suppressed on that occasion, so that the patience of the House might not be put to too severe a trial. The attempt to refute Dr. Paley in particular is here considerably enlarged.

The arrangement of these observations is certainly very defective; they contain repetitions that might have been avoided, and inaccuracies of style that might have been corrected, if the Author's occupations had allowed him to render this pamphlet as little unworthy of being offered to the public as he could have wished. But to be useful, it was necessary that this publication should appear before the fate of the bills now depending in Parliament was decided; and his only object in publishing it is that it may be useful.

CHAPTER I

THE STATE OF ENGLISH CRIMINAL LAW

There is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England. These sanguinary statutes, however, are not carried into execution.

For some time past, the sentence of death has not been executed on more than a sixth part of all the persons on whom it has been pronounced — even taking into the calculation crimes the most atrocious and the most dangerous to society: murders, rapes, the burning of houses, coining, forgeries, and attempts to commit murder. If we exclude these from our consideration, we shall find that the proportion of those executed to those convicted is perhaps as one to twenty. And if we proceed still further — laying out of account burglaries, highway robberies, horse-stealing, sheep-stealing, and returning from transportation — and confine our observations to those larcenies unaccompanied by any circumstance of aggravation for which a capital punishment is appointed by law, such as stealing privately in shops, and stealing in dwelling-houses and on board ships property of the value mentioned in the statutes, we shall find the proportion of those executed reduced very far indeed below even one to twenty.

This mode of administering justice is supposed by some persons to be a regular, matured, and well-designed system. They imagine that the state of things we see existing is exactly what was originally intended: that laws have been enacted that were never meant to be

regularly enforced, but were to stand as objects of terror in the statute-book, to be called into action only occasionally, and under extraordinary circumstances, at the discretion of the judges. Such being supposed to be our criminal system, it is not surprising that ingenious men have been found to defend and applaud it.

Nothing, however, can be more erroneous than this notion. Whether the practice which now prevails be right or wrong, whether beneficial or injurious to the community, it is certain that it is the effect not of design, but of that change which has slowly taken place in the manners and character of the nation — a change now so repugnant to the spirit of these laws that it has become impossible to carry them into execution.

CHAPTER II

THE SYSTEM WAS NEVER INTENTIONAL

There probably never was a law made in this country that the legislature which passed it did not intend should be strictly enforced. Even the Act of Queen Elizabeth, which made it a capital offense for any person above the age of fourteen to be found associating for a month with persons calling themselves Egyptians — the most barbarous statute, perhaps, that ever disgraced our criminal code — was executed down to the reign of King Charles I, and Lord Hale mentions thirteen persons having been executed upon it at one assizes in his time. It is only in modern times that this relaxation of the law has taken place, and only in the course of the present reign that it has taken place to any considerable degree.

If we look back to remote times, there is reason to believe that the laws were very rigidly executed. The materials from which we can form any judgment on this subject are extremely scanty — for in this, as in other countries, historians occupied with recording the actions of princes, the events of wars, and the negotiations of treaties have seldom deigned to notice those facts from which the state of the morals of the people, and the degree of happiness that a nation has enjoyed at any particular period, can best be collected.

From what we can gather, however, it appears that in the reign of Queen Elizabeth about three hundred persons were executed annually on average. The statistical tables from more recent periods tell a very different story. In the years around 1800, of those convicted at the Old Bailey, roughly one in nine was executed. In the years 1802 to 1804,

the ratio was approximately one in ten. For property crimes specifically — those which are the subject of the bills I have introduced — the proportion is far smaller still.

There is no instance in which this alteration in the mode of administering the law has been more remarkable than in those of privately stealing from a shop goods of the value of five shillings, which is punishable with death by statute. Of the persons committed for trial in London and Middlesex within the last seven years for stealing in a dwelling-house, 1,802 in number, eight have been executed. Of those charged with privately stealing in a shop I cannot learn that one has suffered death in all that time. The law, as written, says they should hang. The practice, as administered, says they should go free or be transported. These two things cannot both be right.

CHAPTER III

THE EVIDENCE OF HISTORY

It deserves particular attention that, at those times when our criminal laws were more strictly enforced, crimes were not more frequent than they are now — and there is strong reason to believe they were less frequent. This observation strikes at the root of the argument that the present system is both necessary and effective. If England managed with strict enforcement in past centuries and maintained social order, the argument that terror must be held in reserve cannot be sustained.

In those years when the death sentence was carried into execution in a much larger proportion of cases, and when stealing five shillings privately from a shop was treated as the law directed — as a capital felony for which the penalty would actually be paid — juries still convicted. Witnesses still came forward. Prosecutors still proceeded. Society functioned. It is only when the law became both severe and unenforced that the current incoherence arose.

The history of jury behavior under the present system is instructive on another point. Juries have long understood that a verdict of guilty on a shoplifting charge would not result in execution. They have therefore used the one tool available to them — the valuation of the goods stolen — to bring the offense below the capital threshold. Cases are on record in which a man indicted for privately stealing forty-three dozen pairs of stockings worth more than three pounds was found by a jury to have stolen goods worth thirty-nine shillings — a valuation so plainly absurd that it can only be explained by the jury's determination not to be the instrument of a sentence they regarded as disproportionate and unjust.

This behavior on the part of juries is not corruption. It is conscience. It is the response of ordinary people confronted with a law so severe, and applied so arbitrarily, that compliance with it would make them complicit in what they recognize as injustice. But it produces its own serious consequences, which I shall address in turn.

CHAPTER IV
THE ARBITRARINESS OF DISCRET
ION

The system that prevails in the administration of our criminal law subjects the fate of every accused person to a degree of uncertainty and dependence upon accident that cannot be reconciled with any principle of justice. Not only do different judges act upon different principles, but the same judge, under the same circumstances, will act differently at different times.

Consider what the present system requires of those who contemplate crime. If a man is weighing the risk of stealing from a shop, what standard can he apply? He cannot know whether he will be prosecuted. He cannot know whether, if prosecuted, he will be convicted. He cannot know whether, if convicted, he will be hanged, transported, or discharged. He knows that the written law says death. He knows that death is rarely inflicted. He does not know, and cannot know, whether he will be among the rare exceptions. He must speculate upon which judge will hear his case, upon the mood of the jury, upon the inclination of the prosecutor, upon the state of public sentiment at the moment of his trial.

This uncertainty does not deter. Dr. Paley would have us believe that the dread and danger of death hanging over crimes committed by many is a sufficient deterrent even if death falls upon very few. But this argument requires that the potential criminal be ignorant of the odds. He is not. The man who lives in the neighborhood of the Old Bailey, who sees his neighbors convicted and transported but not hanged, who knows that the execution of a man for shoplifting is now

a matter of remark and surprise — that man has learned the true probability of the law's application to him. And the probability, as experience has shown him, is approximately zero.

The randomness of the system has a further consequence: it creates obvious distinctions between the rich and the poor, the connected and the unprotected, in a matter upon which all agree there should be none. A wealthy defendant can retain counsel, produce favorable witnesses, and present his case in the most advantageous light. A poor defendant, represented by no one, produces no witnesses, and leaves the court knowing nothing of what has been said about him in his absence. If the discretion to show mercy turns, as it inevitably must, on the impressiveness of the defense, then the exercise of that discretion will consistently favor the wealthy over the poor, the articulate over the inarticulate, the connected over the friendless.

Not a great many years ago, on the Norfolk circuit, a larceny was committed by two men in a poultry yard. Only one of them was apprehended and tried. He was convicted and sentenced to death. The judge, upon reflection, found circumstances in his case that seemed to justify a recommendation to mercy, and he was eventually transported. Whether the other man, had he been apprehended, would have been hanged or transported, no one can say. The same crime, under the same laws, could have produced either result. This is not justice. It is lottery.

CHAPTER V

AGAINST DR. PALEY: THE SYSTEM DEFENDED

With all the objections to this mode of administering justice, it has long prevailed, and consequently it has many defenders. The most distinguished of them, and the one whose arguments most deserve an answer, is Dr. William Paley.

Dr. Paley sets out by observing that there are two methods of administering penal justice. The first assigns capital punishment to few offenses and inflicts it invariably. The second assigns capital punishment to many kinds of offenses but inflicts it only upon a few examples of each kind. The latter of these two methods, he says, has been long adopted in this country, where scarcely one in ten of those who receive sentence of death is executed.

He then gives his preference to the second method, and after stating what he supposes to be its advantages, he sums up his argument by saying: "The law of England is constructed upon a different and a better policy. By the number of statutes creating capital offenses, it sweeps into the net every crime which, under any possible circumstance, may merit the punishment of death; and then, by the number of its pardons, it redeems from this sentence such as have been convicted without the aggravating circumstances which, in the judgment of the law, render that punishment necessary."

Before proceeding to examine this argument in detail, there is a preliminary observation to be made. Dr. Paley speaks of the system of capital punishment and its administration in England as if it were a deliberate and well-designed plan. I have already shown that it is nothing of the kind. It is the accidental result of a change in public

manners, not the product of legislative design. The founders of these laws intended them to be strictly enforced. They have not been enforced because public sentiment made enforcement impossible. To praise the resulting chaos as a wise policy is to mistake a failure for a success.

CHAPTER VI

AGAINST DR. PALEY: THE NET AND THE FEW

The first objection to Dr. Paley's argument is that it rests on the assumption that capital punishment, even when applied only occasionally, retains its deterrent power because the threat hangs over all who commit the relevant crimes. "Few actually suffer death," he says, "whilst the dread and danger of it hang over the crimes of many."

This argument would be sound if the few who suffer were selected by a visible, consistent, and announced principle — if the criminal could look at the published rules of the system and know in advance precisely what would make his crime capital. But this is not the case. The selection is made in secret, by principles unknown, upon grounds that are never published and seldom consistent.

The potential criminal who knows that one in twenty of those convicted of his offense is hanged does not know whether he will be that one. He may calculate the probability as roughly what it is. If he has the experience of his neighborhood before him — if he has seen men convicted of the same offense transported but not hanged — he will discount the threat further. And if he sees that the selection appears to depend on factors having nothing to do with the gravity of his offense — on which judge hears his case, on whether the prosecutor presses for severity, on the mood of the court — he will treat the threat as what it is: a remote, uncertain, and unpredictable hazard, much smaller than the hazard of many honest occupations.

It is, moreover, universally agreed that the certainty of punishment is far more efficacious than any severity of punishment. A punishment

that is certain and moderate will deter far more effectively than a punishment that is severe but rarely inflicted. The present system combines maximum severity with minimum certainty. It is, therefore, from the deterrent standpoint, the worst possible system: it inflicts all the costs of severity — the resistance of juries, the reluctance of witnesses, the sympathy of the public — without obtaining any of its supposed benefits.

But there is a further objection, and it goes to the heart of the matter. The law of England, he says, "sweeps into the net every crime which, under any possible circumstance, may merit the punishment of death," and then discretion selects from among those caught the ones that deserve it. But how is this selection made? By what principle are some pulled from the net and others left to drown?

Dr. Paley says the selection is made by reference to aggravating circumstances: the worst cases are executed, the others pardoned. But this requires that the aggravating circumstances be identifiable in advance and consistently applied. They are not. They are never defined in any written law. They are left to the unguided judgment of individual judges, who apply them differently from one another and differently from one term to the next. The net, in short, exists. The principle of selection from the net does not.

CHAPTER VII

AGAINST DR. PALEY: THE UNKNOWABLE LAW

There is another consequence of the present system that makes it indefensible, and that is this: it deprives the community of any means of knowing what the law actually is.

When a man is publicly put to death, something is communicated to all who witness it or hear of it: that a certain act has been punished in a certain way. But when a man is convicted of shoplifting and hanged — which today almost never occurs — the spectators do not know why. They do not know what distinguished his case from the hundreds of other shoplifting cases that ended in transportation or imprisonment. No published rule tells them. The judge's reasoning, whatever it was, is not communicated to the public. The precedent, if it is one, is nowhere recorded.

The consequence is that the law actually administered in our criminal courts is wholly different from the law to be found in the statute-books, and yet no means has been adopted for making the administered law known. The public cannot know it. The criminal cannot know it. The victims who must decide whether to prosecute cannot know it. The juries who must decide how to value stolen goods cannot know it officially, though they have learned it from experience and act accordingly. This is a state of affairs that cannot be defended as a system. It can only be excused as an accident.

Dr. Paley anticipates this objection and addresses it by arguing that the circumstances which aggravate a crime to the point of requiring execution are "easily perceived after the act has been done" even if they "cannot be defined beforehand." This is a remarkable concession.

He is admitting that the law cannot be stated in advance. He is defending a system in which the citizen cannot know before he acts whether his act will result in death or in freedom. He is, in other words, defending a system in which the rule of law, in its most basic sense, does not exist.

The practical consequences of this are serious. Another consequence of the present system is that it deprives juries of the most important of their functions — that of deciding upon facts on which the law, if clearly understood, ought to operate. When the jury knows that a verdict of guilty on a shoplifting charge will not result in execution, they may convict. But they also know — or strongly suspect — that the judge may send the man to the gallows if he chooses. Their decision is no longer a simple finding of fact; it has become a judgment about the appropriate punishment, a judgment they are neither qualified nor entitled to make, and which they make imperfectly, in ignorance of the considerations that will actually govern the judge's decision.

This is what the present system has produced: a jury that does not decide according to the law, because the law is unknown; a judge who decides by principles he has not announced; and a public that has no means of knowing what conduct will result in what consequences. It is a system in which justice is not administered but improvised.

CHAPTER VIII

AGAINST DR. PALEY: ON PARDON AND MERCY

Dr. Paley, recognizing some of the difficulties with unlimited judicial discretion, attempts to resolve them by locating the pardoning power in the king's prerogative — a power formally separate from the judicial function. "The prerogative of pardon," he says, "is properly reserved to the chief magistrate. The power of suspending the laws is a privilege of too high a nature to be communicated to inferior magistrates." This distinction, Paley argues, is what saves the system: judges find guilt or innocence, and the executive decides who lives and who dies.

This distinction is illusory in practice. The judge who recommends a capital convict for pardon does not merely communicate a finding of fact — he communicates a judgment about whether the man should live or die. The recommendation is virtually always followed. The judge who chooses not to recommend, knowing the recommendation will not be made by anyone else, has made the same decision in the opposite direction. Whether we call this the exercise of judicial discretion or the informal guidance of executive discretion, the substance is the same: one official, accountable to no one for this particular decision, determines whether a convicted person lives or dies.

"But let this power be deposited where it will," Dr. Paley adds, "the exercise of it ought to be regarded as a judicial act — as a deliberation upon the question, not whether the rule of law has been violated, but whether the rigor of law ought to be relaxed." In thus requiring that the pardoning discretion be exercised as a judicial act, Paley actually

imposes upon it the same standard of deliberation and reason-giving that he has just finished arguing cannot be required of judges. He is pulling in opposite directions: defending judicial discretion on the grounds that no standard can be prescribed for it, and then requiring that the pardoning discretion conform to a standard of deliberate, principled reasoning.

The truth is that in the present system, neither judicial discretion nor executive discretion is exercised in the way Paley describes — carefully, on deliberated principles, with reasons that could in theory be stated and defended. They are exercised by officials who are under no obligation to state their reasons, who apply no announced criteria, and whose decisions are subject to no review. This is not the administration of law. It is the administration of fate.

Of all the duties, indeed, that a judge has to discharge, the exercise of this discretion must be the most painful. There are no other duties from which a conscientious mind might not find relief in the clear rule of law. Here there is no such relief. The judge must decide, on his own judgment, whether a man lives or dies, by criteria that he has not announced and that no one will review. If he decides that the man shall die, he must live with that decision. If he decides that the man shall live, he must live with the knowledge that he may thereby have encouraged others to commit the same crime who, under another judge, will not meet with the same lenity.

CHAPTER IX

THE INNOCENT

I have hitherto been considering only cases where the persons who have suffered are in fact guilty of the crimes laid to their charge. But it would be unpardonable to omit the consideration of those cases — cases that are by no means rare — in which persons are condemned who are in fact innocent.

The maxim that it is better for ten guilty persons to escape than for one innocent man to suffer has been accepted for centuries as a fundamental principle of criminal justice. Dr. Paley, however, takes a different view. He acknowledges the possibility that innocent persons may be condemned and executed, and he argues that this misfortune must be weighed against the general benefit produced by the system. "The misfortune of an individual," he says, "for such may the sufferings, or even the death, of an innocent person be called, when they are occasioned by an adherence to rules to the general effect and tendency of which are beneficial — the misfortune of an individual, engaged in a criminal prosecution, may, in some cases, be the necessary price of the public advantage."

To understand the full import of this argument, let us translate it plainly: Paley is saying that it is acceptable for innocent people to be executed, provided the system that produces their executions is, on the whole, beneficial. This is an argument that would justify almost any atrocity, provided its architects could point to some general benefit on the other side of the ledger. It is not an argument for justice; it is an argument for utility, of a very crude kind, dressed in philosophical language.

But beyond this fundamental philosophical objection, the argument is empirically defective. Paley treats the execution of the innocent as a rare and isolated misfortune, acceptable precisely because it is exceptional. The evidence suggests otherwise. False convictions are not rare. Cases in which persons condemned to death by a lower court are afterward acquitted on review by a superior one occur often enough to be recorded, and these are only the cases that were caught — the ones where the error came to light before the sentence was carried out. The cases in which the error was not discovered until afterward, or not discovered at all, must be far more numerous.

And here is the crucial point, which Paley almost completely evades: when we are weighing the evil of the punishment of one innocent man against the impunity of ten who are guilty, we ought to reflect that the suffering of the innocent is generally attended, in the particular instance, with the escape of the guilty. The same uncertainty of evidence that leads to the false conviction of an innocent person generally means that the actual criminal has not been found — that he is still free, still dangerous, possibly present among the crowd watching the wrong man go to the gallows.

Instances have occurred — like the case of Calas in France, where a man was offered up as a sacrifice to the laws even though the laws had never been violated, where the tribunals committed the double mistake of supposing a crime where none had been committed and finding a criminal where none could exist — where the error was gross enough and the publicity sufficient that it was eventually exposed. But these are very rare examples of judicial error. In most cases the error is quieter: the crime was real, the perpetrator unknown, and the innocent person who suffered most resembled the criminal, or was least able to prove his innocence, or had the worst reputation in the neighborhood, or attracted suspicion by the very strength of the evidence that happened to point at him.

For these cases, the punishment of death provides no remedy. Imprisonment, if unjust, can be ended; the prisoner can be freed and

compensated; the record can be corrected. Execution cannot be undone. The man hanged in error stays hanged. No remedy, however earnest, can reach him. The system that produces such irreversible consequences must be held to a standard of certainty proportional to the gravity of the consequence, and capital punishment fails that standard at every point in its administration.

Perhaps among the crowd gazing upon the supposed criminal when he is led out to execution there may be lurking the real murderer — who, while he contemplates the fate of the wretch before him, reflects with triumph upon the weakness of the law, and becomes hardened in and more daring in the dangerous career upon which he has entered.

CHAPTER X

CONCLUSION

For the honor of our national character — for the prevention of crimes — for the maintenance of that respect which is due to the laws and to the administration of justice — I call upon Parliament to repeal these capital statutes.

The case against the present system is threefold. First, it does not deter. The evidence of statistics makes this clear: crimes punishable by death continue to be committed, and at rates that have not diminished but increased as the execution rate has fallen. The threat of a penalty almost never inflicted cannot deter those who know it is almost never inflicted. If deterrence is the purpose of criminal law, these statutes have failed at it.

Second, the system is unjust. It is unjust in its arbitrariness — that the same crime may bring death to one and freedom to another, depending on factors having nothing to do with the guilt of the accused. It is unjust in its inequality — that wealth and connection protect some from consequences that fall on the poor and friendless. It is unjust in its unknowability — that no citizen can learn from any published source what the actual law is, as administered by the courts, as distinct from the law as written in the statute-book.

Third, and most gravely, the system kills innocent people and provides no remedy when it does so. As long as the sentence of death is attached to crimes that are common, that are difficult to prove, and that are tried by processes imperfect enough to produce erroneous convictions at a rate that can be measured, innocent people will be executed. They have been executed. They will continue to be

executed until the law is changed.

The bills I have introduced do not abolish capital punishment. They remove the penalty of death from three specific statutes — stealing five shillings from a shop, stealing forty shillings from a dwelling-house, and similar property crimes — where the death penalty is manifestly disproportionate to the offense, where it is almost never inflicted, where it serves no deterrent purpose, and where its retention serves only to make the law absurd in the eyes of those who must administer it and to make juries into *de facto* legislators who nullify the statute whenever they dare.

The principle I am defending — that the punishment should be proportionate to the offense, that it should be defined with precision, that it should be applied consistently, and that it should be capable of correction when applied in error — is not a radical principle. It is the foundation of any system of law worthy of the name. A system that has wandered as far from this foundation as the present English criminal law has wandered is not a system to be defended. It is a system to be reformed.

I press these bills with the full awareness that they will not prevail today. The forces of habit and inertia are powerful, and the argument that what has always been done must be right has a strength that cannot always be overcome by reason alone. But reason will eventually prevail. The arguments made here will be made again, by others, in other sessions, until they are heard. The laws that make it a hanging offense to steal five shillings from a shop will not long survive serious examination. They cannot.

SUPPLEMENTARY
OBSERVATIONS

A NOTE ON THE STATISTICAL TABLES

Dr. Paley's argument, and the argument of every defender of the present system, depends ultimately on the claim that the existing practice works — that it deters crime effectively while avoiding the harshness of universal execution. The statistical evidence he adduces for this claim is, however, remarkably thin, consisting mainly of assertion. The actual tables of conviction and execution tell a different story.

In the years from 1749 to 1756, of persons tried at the Old Bailey, those convicted numbered 428 and those executed numbered 306 — rather less than three-quarters. From 1756 to 1764, of 236 convicted, 139 were executed — a markedly lower proportion, though still more than half. But by 1802, the ratio had fallen to roughly one in ten: 97 convicted, 10 executed. By 1803, 81 convicted, 9 executed. By 1804, 66 convicted, 8 executed.

The trend is unmistakable, and its significance is profound. At the commencement of the present reign, the number of those convicted who were executed considerably exceeded the number of those who were pardoned. Now the ratio is reversed by a factor of nine to one. This change has not been accompanied by any deliberate policy decision, any parliamentary debate, any public announcement that the laws relating to capital punishment were to be enforced differently. It has happened through the accumulation of individual decisions by judges, juries, prosecutors, and the executive, each responding to the felt impossibility of enforcing laws that the public would not support.

No instance of this alteration has been more remarkable than in those offenses which are the specific subject of the bills I have introduced. Within the last several years, no person convicted of privately stealing from a shop has been executed. The law says death; the practice says transportation or imprisonment; and between these two there is no published explanation, no announced principle, no criterion that the citizen can discover and apply.

A NOTE ON THE PALEY PASSAGE

It may be useful to set out the complete passage in Paley that forms the object of the extended refutation in this volume, so that the reader can judge whether the refutation addresses Paley's argument fairly.

"There are two methods of administering penal justice. The first assigns capital punishments to few offenses, and inflicts it invariably. The second assigns capital punishment to many kinds of offenses, but inflicts it only upon a few examples of each kind. The latter of which two methods has been long adopted in this country, where, of those who receive sentence of death, scarcely one in ten is executed.

"The wisdom and humanity of this design furnish a just excuse for the multiplicity of capital offenses which the laws of England have established. The terror of the law is maintained by the possibility of suffering; the selection of proper objects for actual punishment is regulated by rules of equity and discretion.

"The charge of cruelty is answered by observing that these laws were never meant to be carried into indiscriminate execution; that the legislature, when it appointed the punishment, confided in the lenity of the crown to make the necessary discriminations; and that the efficacy of the law depends upon the impression it makes, not upon the frequency of its execution.

"The law of England is constructed upon a different and a better policy. By the number of statutes creating capital offenses, it sweeps into the net every crime which, under any possible circumstance, may merit the punishment of death; and then, by the number of its pardons, it redeems from this sentence such as have been convicted without the aggravating circumstances which, in the judgment of the law, render that punishment necessary. By this expedient, few actually suffer

death, whilst the dread and danger of it hang over the crimes of many."

This passage, taken in its entirety, illustrates the central incoherence of Paley's position. He praises the multiplicity of capital statutes as wise and humane, because the selection of cases for execution is "regulated by rules of equity and discretion." But these rules are nowhere stated. They are not published. They are not known. He then says that "the efficacy of the law depends upon the impression it makes, not upon the frequency of its execution" — a claim that, as I have shown, depends on the potential criminal's ignorance of the actual probability of execution, an ignorance that daily experience is rapidly erasing.

The prerogative of pardon, on Paley's account, is "properly reserved to the chief magistrate." But the chief magistrate, in practice, follows the recommendation of the trial judge. The trial judge's recommendation, in practice, depends on considerations he has not stated and cannot be required to state. Paley has moved the locus of the discretion from the court to the executive without eliminating the discretion or making it accountable.

ON THE BILLS THEMSELVES

Something should be said in this place about the three specific statutes that the bills introduced are intended to repeal.

The first is the Act of 10 and 11 William III, making it a capital felony to steal privately in a shop goods of the value of five shillings. The second is the Act of 12 Anne, making it a capital felony to steal money or goods in a dwelling-house, the person therein being put in fear, the goods being of the value of forty shillings. The third extends similar provisions to goods stolen on board ships in navigable rivers.

These statutes are old. The oldest dates from the reign of William III, more than a century ago. They were enacted at a time when the population of England was smaller, when property relations were different, and when the system of criminal justice was administered by people who fully intended these laws to be enforced. The men who passed them believed they were providing effective protection for property. They were not designing a system of arbitrary terror in which shoplifters would be nominally subject to death while actually being transported.

The gap between what these laws say and what they mean in practice is now so vast that it has become a standing embarrassment. Juries systematically undervalue stolen goods to bring cases below the capital threshold. Prosecutors frequently decline to proceed with capital charges they know will not result in execution. Witnesses are reluctant to testify when their testimony may send a man to the gallows for stealing a piece of cloth.

The consequence is that the actual protection afforded to property by these statutes is significantly less than it would be under a non-capital regime honestly enforced. A theft that might result in

certain transportation under a clear and consistently enforced law results instead in either acquittal — because the jury refuses to find the capital offense — or in a nominal conviction that leads to transportation anyway, but only after considerable delay and uncertainty. The law's pretense of severity has produced, in practice, a system less severe than what a rational and honestly enforced scheme of property protection would provide.

The argument that to repeal these statutes would be to encourage theft by removing the threat of capital punishment rests on the assumption that thieves know of and are deterred by that threat. The evidence shows they are not. The execution rate for these offenses is approximately zero. What deterrent effect zero executions provides is a matter that answers itself.

ON THE HONOR OF THE LAW

There is one further argument for reform that I have not yet stated explicitly, though it runs through everything I have written: the argument from the honor and authority of the law itself.

A law that is not enforced, and that everyone knows is not enforced, is not merely an ineffective law. It is a corrupting one. It teaches those who live under it to regard the law as something other than what it claims to be — as a form of words attached to penalties that will not be imposed, as a theatrical backdrop against which the real drama of discretion and pardon plays out. It teaches juries to believe that their proper function is not to find facts and apply the law but to exercise a kind of covert legislative power, determining by their verdicts what the practical law shall be, regardless of what the statute says. It teaches prosecutors and victims to treat the formal legal proceedings as negotiations rather than determinations — as occasions for bargaining over outcomes rather than for the authoritative resolution of questions of guilt and punishment.

These lessons, once learned, do not remain confined to the specific cases that teach them. They spread. A people accustomed to seeing its criminal law treated as a system of empty threats and discretionary exemptions will eventually treat all its laws as subject to the same negotiation and evasion. The respect for law that is the foundation of ordered society does not survive the spectacle of law's systematic hypocrisy.

For the sake of this respect — for the sake of that vital public confidence in the administration of justice that makes the law not merely an external constraint but an internal commitment — these statutes should be repealed. The law should say what it means and

mean what it says. When it cannot enforce a penalty, it should not prescribe it. When it will not hang a man for stealing five shillings from a shop, it should not threaten to hang him for it. The credibility of all law depends, in part, on the credibility of each law; and these particular laws, which have been publicly reduced to empty threats, are draining that credibility at a rate that no reform of other parts of the system can restore.

EDITORIAL
APPARATUS

DEFINITIONS AND TERMS

Capital felony: In English law of the period, a felony (a serious crime) punishable by death. England in 1810 had more than two hundred capital felonies on its statute books, encompassing crimes ranging from murder to the theft of goods worth five shillings from a shop. The central argument of this volume is that this accumulation of capital statutes, combined with their near-universal non-enforcement, produced a system that was both unjust and ineffective.

Benefit of clergy: A historical provision in English law allowing those who could read — originally restricted to clergymen, but extended over centuries to any literate person — to claim a reduction in sentence for certain offenses. By the early nineteenth century, "benefit of clergy" had been removed by statute from the most serious capital offenses, leaving those offenses subject to mandatory death sentences. The Act of 10 and 11 William III, which Romilly sought to repeal, made stealing five shillings from a shop a capital felony without benefit of clergy.

"Egyptians" (Act of 39 Elizabeth I): The Elizabethan statute Romilly cites in Chapter II used "Egyptians" to mean Romani people, on the false belief that they had come from Egypt. The Act made it a capital felony for anyone over fourteen to remain a month in the company of Romani people, so that association itself was punishable by death, and Lord Hale records thirteen people hanged under it at a single assizes. Romilly calls it the most barbarous statute ever to disgrace English law and uses it to prove that

Parliament meant its capital statutes to be enforced. It is worth naming what it was: a law that made an ethnic group capital by existing. The English gallows was turned on a people before it was turned on shoplifters, and the reform movement Romilly led inherited both.

Transportation: The sentence of banishment to a penal colony — primarily to Australia from 1788 onward — used as an alternative to execution in many cases where the death sentence was imposed but not carried out. Transportation for seven years, fourteen years, or life was the most common alternative. It functioned, in practice, as the actual penalty for most capital offenses, since pardon was almost always conditioned on a sentence of transportation.

Discretion (judicial): The power of a judge to exercise judgment in applying the law, including the decision whether to recommend a convicted person for pardon. Romilly's central argument against the existing system concerns the exercise of this discretion: it is unlimited, unannounced, inconsistent, and unaccountable. Different judges apply different criteria; the same judge applies different criteria at different times; the criteria are never stated in any form that would allow them to be examined or challenged.

Dr. William Paley (1743–1805): English moral philosopher and theologian whose *Principles of Moral and Political Philosophy* (1785) contained an influential defense of the English system of capital punishment. Paley argued that the combination of many capital statutes with wide discretion in their enforcement was a rational and humane system: it created a large net of potential capital offenses, from which discretion selected only the most egregious for actual punishment, while the threat of death served as a deterrent for all. Romilly's sustained refutation of this argument is the philosophical center of the *Observations*.

Jean Calas: A French Protestant merchant executed in 1762 on a false charge of murdering his son to prevent him from converting to Catholicism. The case became famous throughout Europe when Voltaire took it up, demonstrated the falsity of the conviction, and secured a posthumous rehabilitation for Calas. Romilly cites the case as an example of judicial error resulting in the execution of an innocent person — the kind of error for which, under a system of capital punishment, no remedy is possible.

The statute-book: The collection of all acts passed by Parliament that remain in force. Romilly's complaint is that the statute-book as written — declaring hundreds of offenses capital felonies — bears no resemblance to the law as actually administered, in which almost none of those offenses results in execution. The gap between the written and the administered law is the source of the injustice he describes.

Jury nullification: The practice of juries returning verdicts inconsistent with the evidence — in particular, valuing stolen goods at amounts below the statutory threshold for a capital offense, even when the actual value clearly exceeded that threshold. Romilly documents several cases in which juries valued obviously expensive property at thirty-nine shillings precisely to bring the offense below the forty-shilling threshold for the capital statute. This practice was a rational response to a system in which the written law, if applied literally, would require hanging for petty theft.

The prerogative of pardon: The power of the monarch — exercised through the Home Secretary and the Privy Council — to pardon convicted criminals or commute their sentences. In practice, the decision to recommend pardon was largely made by the trial judge, whose recommendation was almost invariably followed. Dr. Paley argued that lodging the pardoning power in the executive rather than the judiciary preserved the integrity of the judicial system.

Romilly argues that this distinction was illusory: the judge who made the recommendation was exercising the same discretion, whether it was called judicial or executive.

The Old Bailey: The Central Criminal Court of London, whose records provide the statistical basis for much of Romilly's argument. The tables he cites from the Old Bailey records show the dramatic decline in execution rates for capital offenses over the preceding century, demonstrating that the current near-total non-enforcement of capital statutes is a relatively recent development, not a long-established and deliberate policy.

Sir Samuel Romilly (1757–1818): The author of this work. Romilly was called to the bar in 1783, appointed Solicitor General in 1806, and served in Parliament as Member for Horsham and later for Westminster. He is best remembered for his sustained campaign to reform England's criminal law, particularly the reduction of capital offenses. He succeeded in repealing several capital statutes, though the bills described in this work were defeated by the House of Lords. He died in 1818, three days after his wife, in circumstances suggesting profound grief.

FURTHER READING

ON ROMILLY AND HIS WORLD

- Romilly, Samuel. *Memoirs of the Life of Sir Samuel Romilly*. 3 vols. London: John Murray, 1840. Edited by his sons after his death, this work combines autobiography with letters and journal entries covering his legal and political career. It is the primary source for his biography and contains extensive material on the criminal law reform campaign.
- Hostettler, John. *The Politics of Criminal Law Reform in the Nineteenth Century*. Barry Rose Law Publishers, 1992. Places Romilly's reform campaign in the broader context of English legal change and traces its consequences through the nineteenth century.
- Devereaux, Simon. "The making of the Penitentiary Act, 1775–1779." *Historical Journal* 42 (1999). Background on the criminal justice system that Romilly was responding to.

ON ENGLISH CRIMINAL LAW REFORM

- Radzinowicz, Leon. *A History of English Criminal Law and its Administration from 1750*. Vol. 1: *The Movement for Reform*. London: Stevens, 1948. The standard scholarly history of the period; essential background for understanding the argument of the *Observations*.
- Beattie, J. M. *Crime and the Courts in England, 1660–1800*. Princeton University Press, 1986. Provides the statistical and social-historical context for understanding crime rates, conviction rates, and execution rates in the period Romilly discusses.

ON THE PHILOSOPHY OF PUNISHMENT

FURTHER READING

Paley, William. *Principles of Moral and Political Philosophy*. 1785. The work Romilly is primarily responding to; the chapters on criminal law and punishment are directly relevant and should be read alongside this volume.

Beccaria, Cesare. *An Essay on Crimes and Punishments*. Edited and modernized by Jeff Hood. Complicit Press, 2026. The foundational Enlightenment argument for criminal law reform, published in 1764, which influenced both Romilly and Paley. It is V. 5 in *The Abolition Classics*, and the companion volume to this one.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. 1789. Bentham and Romilly were close friends and intellectual allies; Bentham's utilitarian framework provided the philosophical foundation for much of Romilly's practical reform work.

ON THE CALAS CASE

Voltaire. *Treatise on Tolerance*. 1763. Voltaire's extended argument for religious tolerance, written immediately after the Calas execution, which also contains the fullest account of the case as Voltaire understood it. The Calas case became the defining example of judicial murder in the Enlightenment reform tradition.

RELATED VOLUMES IN THIS SERIES

Spear, Charles. *Essays on the Punishment of Death*. Edited and modernized by Jeff Hood. Complicit Press, 2026. The American abolitionist argument from 1844: a survey of the case against capital punishment, theological and philosophical.

Livingston, Edward. *Argument Against Capital Punishment*. Edited and modernized by Jeff Hood. Complicit Press, 2026. V. 6 in this series. Livingston's 1833 argument from Louisiana, on the right of the state to take life and the historical evidence that capital punishment is unnecessary for social protection.

THE APOLOGY

Socrates

THE ABOLITION CLASSICS. V. XIX



ON THE PUNISHMENT OF DEATH

A FRAGMENT

THE ESSAY OF PERCY BYSSHE SHELLEY

England, 1815

EDITED AND MODERNIZED BY JEFF HOOD

ON THE PUNISHMENT OF DEATH

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

V . 2 0

**ON THE PUNISHMENT
OF DEATH**

A Fragment

PERCY BYSSHE SHELLEY

With an Introduction and Notes by
JEFF HOOD

THE ABOLITION CLASSICS
V. 20

COMPLICIT PRESS

On the Punishment of Death was composed around 1815
and first published, as an unfinished fragment, in *Essays,
Letters from Abroad, Translations and Fragments*
(London: Edward Moxon, 1840), edited by Mary Shelley.

The original text is in the public domain
and is reproduced here in full.

This volume is not a reprint alone. It is an annotated edition:
Shelley's text is arranged into ten sections,
each followed by an editor's note.

Foreword, editor's note, annotations and apparatus
copyright © 2026 by Jeff Hood.

All rights reserved.

C O M P L I C I T P R E S S

C O N T E N T S

FRONT MATTER

Foreword

Editor's Note

ON THE PUNISHMENT OF DEATH

I. THE FIRST LAW

II. THE FOUR IDOLS

III. WHAT DEATH IS

IV. THE ACCIDENT OF CIRCUMSTANCE

V. THE DOOM OF DEATH

VI. THE MARTYR'S DEATH

VII. THE COMMON CRIMINAL

VIII. THE MARK OVERSHOT

IX. MILD LAWS, RARE CRIMES

X. THE TOWER OF SILOAM

Afterword

EDITORIAL APPARATUS

Definitions and Terms

Further Reading

About the Editor

FOREWORD

Percy Shelley never stood where I have stood. This fragment was written at a table, not in a witness room. Nobody handed him a phone at midnight and told him the stay had been denied. So far as history records, he never watched a single execution in his twenty-nine years. I have watched thirteen.

That contrast could sink this fragment. It does not. Shelley built his case for abolition almost entirely from the imagination, and the case holds anyway, which tells you something about the case and something about the limits of witness itself. I have stood closer to the machinery than any poet needs to stand. Closeness has taught me things Shelley could not have known. It has not taught me that he was wrong.

His argument does not depend on having seen the room. It depends on a harder, plainer claim: that no one, close or far, actually knows what death is, and that a state building a punishment on that ignorance has lost the argument before the first witness is ever called. I have watched the state kill thirteen people with the practiced confidence of an institution that believes it knows exactly what it is doing. It has never once convinced me that it does.

I have not smoothed this text for you. Shelley was twenty-two or twenty-three, wealthy, English, and it shows, nowhere more than in the paragraph on the poor and the men who guard them, which I have printed whole and flagged rather than cut. An

abolitionist text that hides its author's failures from the reader has already started lying to it about something larger, and I did not want this volume lying to you about anything, including itself.

What is left, once you have made room for the century that produced him, is a young man who looked directly at the one question underneath the whole death penalty and refused to let the state answer it for him. What is death? He does not know. Neither does anyone signing a death warrant. That gap, between the sentence and the knowledge required to justly hand it down, is the argument this whole series exists to make. Shelley found it a century before anyone built a movement to stand inside it.

Rev. Dr. Jeff Hood
North Little Rock, Arkansas
2026

EDITOR'S NOTE

THE AUTHOR

Percy Bysshe Shelley was born in Sussex, England, on 4 August 1792, heir to a baronetcy he would spend his short life offending. Oxford expelled him in his first year, 1811, after he co-authored a pamphlet titled *The Necessity of Atheism*. His father disowned him not long after. He eloped that same year with sixteen-year-old Harriet Westbrook; the marriage collapsed within a few years, and in 1814 he left her for Mary Wollstonecraft Godwin, daughter of the philosopher William Godwin and the feminist Mary Wollstonecraft. Harriet drowned herself in London's Serpentine in December 1816. Percy and Mary married three weeks later.

He spent his adult life a kind of exile, first from his own family and class, then, from 1818 onward, from England itself, living in Italy among a circle that included Byron and Leigh Hunt. He wrote continuously and radically: *Queen Mab*, *Prometheus Unbound*, *A Defence of Poetry*, with its claim that poets are the unacknowledged legislators of the world. In August 1819, cavalry rode down a crowd of unarmed reformers in Manchester, an event that came to be called Peterloo. Shelley answered from Italy with *The Masque of Anarchy* and sent it to Leigh Hunt at *The Examiner*. Hunt, who had already served two years for libelling the Prince Regent and was writing under the new Six Acts, judged the moment too dangerous and held it back; the poem waited

thirteen years and did not reach print until 1832, a decade after Shelley was dead. It still ends, in every movement that has since borrowed its final stanza, with the many told to rise like lions against the few.

He drowned on 8 July 1822, sailing home across the Gulf of Spezia in a boat named the *Don Juan*, four weeks short of his thirtieth birthday. Byron, Leigh Hunt, and Edward Trelawny cremated his body on the beach at Viareggio, under the quarantine laws of the region. He did not live to see a single one of his political causes won.

THE FRAGMENT

Editors, following William Michael Rossetti's dating in his 1878 edition of the poems, place the composition of *On the Punishment of Death* around 1815. Shelley set the pages down unfinished and, so far as anyone has established, never returned to them. His widow found the manuscript afterward and published it in 1840, eighteen years after his death, in *Essays, Letters from Abroad, Translations and Fragments*, a collection she assembled to keep his prose from disappearing along with him. In her preface she called it a fragment carrying the value of a philosopher and a poet reasoning in favor of humanity, and said she hoped it might yet reach the legislators shaping English law in a milder direction than her husband had known. A later editor, H. Buxton Forman, restored one dropped word, *punishment*, to the opening lines from Mary Shelley's own earlier reprints. Even this text's smallest details carry a history of being rescued.

The fragment did not arrive from nowhere. Basil Montagu, a penal reformer who moved through Shelley and Godwin's circle in these years, had already compiled a multi-volume anthology of argument against capital punishment, drawing on more than a century of legal opinion. Montagu was a friend of Sir Samuel Romilly, the law reformer who spent his parliamentary career stripping capital offenses off the English statute books one felony at a time, and Montagu was himself a student of William Godwin, the philosophical anarchist whose daughter Shelley had married. Abolition was a live argument at Shelley's own dinner table years before it reached this page.

I have arranged the fragment into ten sections for this edition, each followed by my own note. Shelley wrote no such divisions; the original runs as a single continuous argument, broken only by his own paragraphing. The section titles, and everything printed as an editor's note, are new to this edition and mine alone.

**ON THE PUNISHMENT
OF DEATH**

A Fragment

I

THE FIRST LAW

THE TEXT

The first law which it becomes a Reformer to propose and support, at the approach of a period of great political change, is the abolition of the punishment of death.

EDITOR'S NOTE

Shelley opens with the boldest sentence in the fragment and spends the rest of it trying to earn the right to have said so plainly. Abolition, in his ordering, is not one reform among many others waiting their turn. It is the first reform, the one every other reform depends on, the hinge the whole door swings from.

He wrote this at "the approach of a period of great political change." England in 1815 was bracing for exactly that kind of change: Waterloo that summer, a country exhausted by war and hungry for something new. Four years later the government would answer that hunger with cavalry sent into a crowd at Peterloo. Shelley would answer Peterloo with a poem telling the crowd to rise like lions after slumber.

I know something about writing at the approach of a period of great political change. I have watched states race to kill people faster, before a court or a

governor or an election could get in the way. Urgency runs in both directions. Shelley understood that it could belong to the reformer first, if the reformer would only claim it.

II

THE FOUR IDOLS

THE TEXT

It is sufficiently clear that revenge, retaliation, atonement, expiation, are rules and motives, so far from deserving a place in any enlightened system of political life, that they are the chief sources of a prodigious class of miseries in the domestic circles of society. It is clear that however the spirit of legislation may appear to frame institutions upon more philosophical maxims, it has hitherto, in those cases which are termed criminal, done little more than palliate the spirit, by gratifying a portion of it; and afforded a compromise between that which is best;—the inflicting of no evil upon a sensitive being, without a decisively beneficial result in which he should at least participate;—and that which is worst; that he should be put to torture for the amusement of those whom he may have injured, or may seem to have injured.

EDITOR'S NOTE

Four words carry the whole rotten architecture of capital punishment on their backs: revenge, retaliation, atonement, expiation. Shelley refuses all four a seat at the table of "enlightened political life," then names what they actually produce when they are allowed to legislate anyway: miseries in

the domestic circle, torture offered up as amusement to whoever feels wronged.

I have sat in clemency hearings where the word used was “closure” instead of “expiation.” Same theology, cheaper paint. Killing a man in a cell down the hall does not return anyone’s daughter and does not un-kill anyone’s father. It performs a return. Shelley saw the performance for what it was two centuries before Alabama built a nitrogen mask to update the costume.

III

WHAT DEATH IS

THE TEXT

Omitting these remoter considerations, let us inquire what Death is; that which is applied as a measure of transgressions of indefinite shades of distinction, so soon as they shall have passed that degree and colour of enormity, with which it is supposed no inferior infliction is commensurate.

And first, whether death is good or evil, a punishment or a reward, or whether it be wholly indifferent, no man can take upon himself to assert. That that within us which thinks and feels, continues to think and feel after the dissolution of the body, has been the almost universal opinion of mankind, and the accurate philosophy of what I may be permitted to term the modern Academy, by showing the prodigious depth and extent of our ignorance respecting the causes and nature of sensation, renders probable the affirmative of a proposition, the negative of which it is so difficult to conceive, and the popular arguments against which, derived from what is called the atomic system, are proved to be applicable only to the relation which one object bears to another, as apprehended by the mind, and not to existence itself, or the nature of

that essence which is the medium and receptacle of objects.

EDITOR'S NOTE

Here is the whole argument distilled to a single dare: what if the state does not actually know what death is?

Shelley builds his case on honest agnosticism, not on the confident afterlife theology his century preached from every pulpit in England. He will not say death is a doorway. He will not say it is an ending. He says, correctly, that no living mind has ever verified either claim, and that a state which cannot answer the question has no business handing down the sentence.

I am a theologian. I believe things Shelley the atheist did not. But on this single point we arrive at the same place from opposite directions: any institution that claims the authority to kill is claiming a knowledge it does not have. I have watched the state fumble that claim from three feet away, behind glass, more than a dozen times. It never once looked like it knew what it was doing.

IV

THE ACCIDENT OF CIRCUMSTANCE

THE TEXT

The popular system of religion suggests the idea that the mind, after death, will be painfully or pleasurably affected according to its determinations during life. However ridiculous and pernicious we must admit the vulgar accessories of this creed to be, there is a certain analogy, not wholly absurd, between the consequences resulting to an individual during life from the virtuous or vicious, prudent or imprudent, conduct of his external actions, to those consequences which are conjectured to ensue from the discipline and order of his internal thoughts, as affecting his condition in a future state. They omit, indeed, to calculate upon the accidents of disease, and temperament, and organisation, and circumstance, together with the multitude of independent agencies which affect the opinions, the conduct, and the happiness of individuals, and produce determinations of the will, and modify the judgment, so as to produce effects the most opposite in natures considerably similar.

EDITOR'S NOTE

Read this paragraph again, slowly. Shelley is describing mitigation a hundred years before the word existed in American capital defense. "Accidents of disease, and temperament, and organisation, and circumstance" could be lifted whole into any competent sentencing-phase closing argument today. Untreated illness. Childhood trauma. The accident of which house a person happened to be born into.

He is not excusing the crime. He is asking why a system willing to calculate every other variable of human behavior refuses, at the one moment the calculation costs a life, to calculate this one. I have read hundreds of pages of mitigation evidence that arrived at trial too late, filed by lawyers carrying too many cases, for men the state killed anyway. Shelley's circumstance is still most people's sentence.

V

THE DOOM OF DEATH

THE TEXT

To compel a person to know all that can be known by the dead, concerning that which the living fear, hope, or forget; to plunge him into the pleasure or pain which there awaits him; to punish or reward him in a manner and in a degree incalculable and incomprehensible by us; to disrobe him at once from all that intertexture of good and evil with which Nature seems to have clothed every form of individual existence, is to inflict on him the doom of death.

A certain degree of pain and terror usually accompany the infliction of death. This degree is infinitely varied by the infinite variety in the temperament and opinions of the sufferers. As a measure of punishment, strictly so considered, and as an exhibition, which, by its known effects on the sensibility of the sufferer, is intended to intimidate the spectators from incurring a similar liability, it is singularly inadequate.

EDITOR'S NOTE

"The doom of death." Three words, and Shelley has said more than most sentencing statutes manage in three hundred. To sentence someone to death is to sentence them to full and final knowledge of the one subject on which no living witness can testify.

Then, in the same breath, he turns to the practical case and finds it just as hollow. Death, he says, is “singularly inadequate” even as a deterrent, because terror is not evenly distributed among human beings, because some men do not fear it and some are made braver by it. I have stood with people three hours before their deaths who were steadier than the guards assigned to walk them there. Terror is not a policy. It is a guess about the inside of a stranger’s chest.

VI THE MARTYR'S DEATH

THE TEXT

Firstly,—Persons of energetic character, in whom, as in men who suffer for political crimes, there is a large mixture of enterprise, and fortitude, and disinterestedness, and the elements, though misguided and disarranged, by which the strength and happiness of a nation might have been cemented, die in such a manner, as to make death appear not evil, but good. The death of what is called a traitor, that is, a person who, from whatever motive, would abolish the government of the day, is as often a triumphant exhibition of suffering virtue, as the warning of a culprit. The multitude, instead of departing with a panic-stricken approbation of the laws which exhibited such a spectacle, are inspired with pity, admiration and sympathy; and the most generous among them feel an emulation to be the authors of such flattering emotions, as they experience stirring in their bosoms. Impressed by what they see and feel, they make no distinction between the motives which incited the criminals to the actions for which they suffer, or the heroic courage with which they turned into good that which their judges awarded to them as evil, or the purpose itself of those actions, though that purpose may happen to be eminently pernicious. The laws in this case lose

that sympathy, which it ought to be their chief object to secure, and in a participation of which, consists their chief strength in maintaining those sanctions by which the parts of the social union are bound together, so as to produce, as nearly as possible, the ends for which it is instituted.

EDITOR'S NOTE

This is Shelley predicting the martyr before the word attaches itself to anyone in particular. Kill a person for their politics and you may not extinguish the politics. You may consecrate them. The crowd does not always leave an execution convinced of the state's virtue. Sometimes it leaves in love with the one the state killed.

Every abolition movement carries its own list of the dead it did not set out to make into saints, but made into saints anyway, because the state insisted on killing them in public. I am careful with this passage. Sanctifying anyone the state executes, guilty or innocent, is its own kind of danger. It can excuse what a person did, or worse, romanticize the very machinery that killed them. Shelley is naming a fact about spectacle here, not issuing an altar call. I try to hold the passage the same way.

VII

THE COMMON CRIMINAL

THE TEXT

Secondly—persons of energetic character, in communities not modelled with philosophical skill to turn all the energies which they contain to the purposes of common good, are prone also to fall into the temptation of undertaking, and are peculiarly fitted for despising the perils attendant upon consummating, the most enormous crimes. Murder, rapes, extensive schemes of plunder, are the actions of persons belonging to this class; and death is the penalty of conviction. But the coarseness of organisation, peculiar to men capable of committing acts wholly selfish, is usually found to be associated with a proportionate insensibility to fear or pain. Their sufferings communicate to those of the spectators, who may be liable to the commission of similar crimes, a sense of the lightness of that event, when closely examined, which at a distance, as uneducated persons are accustomed to do, probably they regarded with horror. But a great majority of the spectators are so bound up in the interests and the habits of social union that no temptation would be sufficiently strong to induce them to a commission of the enormities to which this penalty is assigned. The more powerful, the richer among them,—and a numerous class of little tradesmen are richer and

more powerful than those who are employed by them, and the employer, in general, bears this relation to the employed,—regard their own wrongs as, in some degree, avenged, and their own rights secured by this punishment, inflicted as the penalty of whatever crime.

EDITOR'S NOTE

I will not smooth this paragraph over for the reader, and I will not pretend Shelley's own class did not shape it. "Coarseness of organisation." The "little tradesmen" who feel richer and safer watching a poor man hang. This is a twenty-two-year-old aristocrat's language for people he had likely never sat across a table from, and it carries every prejudice of an Englishman who never once faced the workhouse or the noose himself.

And yet buried inside the condescension is a diagnosis I recognize from every jury pool I have watched seated in an American courtroom. The people with the least to fear from the system are often the ones most certain the system is protecting them. Security purchased with someone else's death still feels, to most of the people buying it, like a fair bargain. Shelley got the why right even where he got the who wrong. I have printed the passage whole, prejudice and all, because an abolitionist text that hides its author's failures from the reader has already started lying to it about something larger.

VIII

THE MARK OVERSHOT

THE TEXT

In cases of murder or mutilation, this feeling is almost universal. In those, therefore, whom this exhibition does not awaken to the sympathy which extenuates crime and discredits the law which restrains it, it produces feelings more directly at war with the genuine purposes of political society. It excites those emotions which it is the chief object of civilisation to extinguish for ever, and in the extinction of which alone there can be any hope of better institutions than those under which men now misgovern one another. Men feel that their revenge is gratified, and that their security is established, by the extinction and the sufferings of beings, in most respects resembling themselves; and their daily occupations constraining them to a precise form in all their thoughts, they come to connect inseparably the idea of their own advantage with that of the death and torture of others.

The passion of revenge is originally nothing more than an habitual perception of the ideas of the sufferings of the person who inflicts an injury, as connected, as they are in a savage state, or in such portions of society as are yet undisciplined to civilisation, with security that that injury will not be repeated in future. This feeling, engrafted

upon superstition and confirmed by habit, at last loses sight of the only object for which it may be supposed to have been implanted, and becomes a passion and a duty to be pursued and fulfilled, even to the destruction of those ends to which it originally tended.

The savage and the illiterate are but faintly aware of the distinction between the future and the past; they make actions belonging to periods so distinct, the subjects of similar feelings; they live only in the present, or in the past as it is present. It is in this that the philosopher excels one of the many; it is this which distinguishes the doctrine of philosophic necessity from fatalism; and that determination of the will, by which it is the active source of future events, from that liberty or indifference, to which the abstract liability of irremediable actions is attached, according to the notions of the vulgar. This is the source of the erroneous excesses of Remorse and Revenge; the one extending itself over the future, and the other over the past; provinces in which their suggestions can only be the sources of evil.

EDITOR'S NOTE

Revenge, Shelley says, begins as something almost reasonable, a settled expectation that the harm will not repeat itself, and then overshoots that mark until it becomes a passion pursued for its own sake, cut loose from the safety it was ever meant to secure. He closes the passage by setting revenge beside remorse: the one extends itself over the

past, the other over the future, and neither, left ungoverned, does the living any good.

This is where a poet's psychology gets ahead of two centuries of restorative-justice literature. I have sat with murder victims' family members who wanted the execution and got it, and I have sat with murder victims' family members who wanted the execution and got it and found that the wanting did not stop the day the man died. The mark, once overshot, does not travel back to where it started. Shelley knew that before anyone had a clinical name for it.

IX

MILD LAWS, RARE CRIMES

THE TEXT

Nothing is more clear than that the infliction of punishment in general, in a degree which the reformation and the restraint of those who transgress the laws does not render indispensable, and none more than death, confirms all the inhuman and unsocial impulses of men. It is almost a proverbial remark, that those nations in which the penal code has been particularly mild, have been distinguished from all others by the rarity of crime. But the example is to be admitted to be equivocal. A more decisive argument is afforded by a consideration of the universal connexion of ferocity of manners, and a contempt of social ties, with the contempt of human life. Governments which derive their institutions from the existence of circumstances of barbarism and violence, with some rare exceptions perhaps, are bloody in proportion as they are despotic, and form the manners of their subjects to a sympathy with their own spirit.

EDITOR'S NOTE

Shelley makes an empirical claim here and has the honesty to call it "equivocal" in the very next sentence: mild penal codes, he says, correlate with rarer crime. Modern criminology has spent two

centuries testing that claim with better data than Shelley had, and the finding holds up better than most nineteenth-century social science generally does. Certainty of consequence deters more reliably than severity of consequence, and the harshest available penalty tends to buy very little marginal safety over a merely serious one.

What Shelley saw without the data was the second half of his own argument, the half that matters more to me: violent states make violent subjects. He calls it a “sympathy” between despotic governments and the manners of the people they govern. I have watched states execute people at record pace and then act surprised when their own prisons and streets do not get gentler for it. Shelley was not surprised. He told them so first.

X

THE TOWER OF SILOAM

THE TEXT

The spectators who feel no abhorrence at a public execution, but rather a self-applauding superiority, and a sense of gratified indignation, are surely excited to the most inauspicious emotions. The first reflection of such a one is the sense of his own internal and actual worth, as preferable to that of the victim, whom circumstances have led to destruction. The meanest wretch is impressed with a sense of his own comparative merit. He is one of those on whom the tower of Siloam fell not—he is such a one as Jesus found not in all Samaria, who, in his own soul, throws the first stone at the woman taken in adultery. The popular religion of the country takes its designation from that illustrious person whose beautiful sentiment I have quoted. Any one who has stript from the doctrines of this person the veil of familiarity, will perceive how adverse their spirit is to feelings of this nature.

EDITOR'S NOTE

An atheist reached further into the Gospel here than most preachers I have shared a pulpit with. Shelley pulls the tower of Siloam out of Luke thirteen, the eighteen killed when it collapsed, the

ones Jesus refused to call more sinful than anyone left standing, and sets it against a crowd outside the gallows congratulating itself on its own survival. Then he reaches for John eight, the stone no one in that crowd around the accused woman was fit to throw, and asks what kind of Christian nation builds a public spectacle out of exactly the gesture its own scripture forbids.

I have stood outside those walls. I have watched people gather in lawn chairs to celebrate a death, and I have watched other people gather across the road to grieve one, and both crowds believed they knew something the other did not. Shelley is right about the meanest wretch in his tower-of-Siloam crowd: he is comforted less by his own goodness than by his own survival, and mistakes the second feeling for the first. I have felt the temptation myself, walking back to my car after a killing I could not stop. It is not virtue that lets you drive home.

The fragment ends here. Shelley never told us what it is instead.

Afterword

The manuscript simply stops. There is no concluding paragraph, no closing argument gathered up and handed to the reader, because Shelley set the pages down one day in 1815 and, as far as anyone has ever established, never came back to them. Seven years later the sea did the same thing to him that his fragment describes doing to everyone eventually: it disrobed him, without warning, of every certainty he had been building toward. Mary Shelley found the pages afterward and refused to let the unfinished stand for the unimportant.

I have organized a great many unfinished things in the years I have spent on this work. Appeals cut off mid-argument by a clock nobody agreed to. Clemency petitions filed and answered with silence. Letters from men who did not live to read my reply. The fragment is not a lesser form for this subject. It may be the truest one available to it. Nobody who has stood where an execution happens gets to walk away with a tidy final paragraph. The sentence just stops, and somebody else has to decide what comes next.

Shelley handed that decision to whoever found the pages after him. I am handing it to you. The tower falls on someone new most weeks in this country. The crowd still gathers, still measures its own goodness by its own survival, still mistakes the one for the other. Finish the sentence he could not.

It is still, in the places that matter, exactly as unfinished as he left it.

Rev. Dr. Jeff Hood
North Little Rock, Arkansas
2026

EDITORIAL APPARATUS

Definitions and Terms

Reformer. Shelley's own capitalized term for the political radical seeking structural change; in his usage a specific vocation, not a vague sentiment.

the modern Academy. Shelley's phrase for the skeptical philosophy of his own moment, invoked to argue that materialist science cannot rule out the survival of consciousness after death.

the atomic system. The materialist doctrine, descending from ancient atomism through eighteenth-century philosophy, which Shelley argues addresses only the relations among objects as perceived by the mind, not the nature of existence itself.

Basil Montagu (1770-1851). English lawyer and penal reformer, a friend of Shelley's circle who compiled a multi-volume anthology of writing against capital punishment.

Sir Samuel Romilly (1757-1818). Whig law reformer who spent his career in Parliament reducing the number of offenses punishable by death under English law.

William Godwin (1756-1836). Philosophical anarchist, author of *Political Justice*, and Shelley's father-in-law by his marriage to Mary Wollstonecraft Godwin.

Peterloo. The 16 August 1819 cavalry charge on a peaceful reform rally in Manchester, which killed at least eleven people and occasioned Shelley's poem *The Masque of Anarchy*.

the tower of Siloam. A reference to Luke 13:4, in which Jesus refuses to call eighteen people killed by a collapsing tower more sinful than anyone left standing.

philosophic necessity. The determinist position, associated with Godwin, which Shelley distinguishes from fatalism in Section VIII: the will remains the active source of future action even though it is itself shaped by prior causes.

nitrogen hypoxia. A method of execution by inert-gas asphyxiation first used by the state of Alabama in January 2024, referenced in this volume's notes.

mitigation. In American capital defense, the evidence offered at sentencing about a defendant's history, circumstances, and character, intended to weigh against a death sentence.

clemency. An act of mercy by a governor or other executive authority, commuting a death sentence or, more rarely, granting a full pardon.

Further Reading

ON SHELLEY

Holmes, Richard. Shelley: The Pursuit. 1974; NYRB Classics. The standard biography.

Shelley, Mary, ed. Essays, Letters from Abroad, Translations and Fragments. Edward Moxon, 1840. The volume in which this fragment first reached print.

"On the Punishment of Death. A Fragment." Wikisource. The public-domain text, with Rossetti's and Forman's editorial notes on its dating and transmission.

ON THE FRAGMENT'S CONTEXT

Montagu, Basil, ed. The Opinions of Different Authors upon the Punishment of Death. London: Longman, Hurst, Rees, Orme, and Brown, 1809–1816. The anthology Shelley's circle was reading, three volumes gathering more than a century of argument.

Radzinowicz, Leon. A History of English Criminal Law and Its Administration from 1750. Stevens and Sons, 1948–1968. The standard scholarly account of Romilly's campaign and the century of reform that followed it.

ON THE DEATH PENALTY IN AMERICA

Prejean, Helen. Dead Man Walking. Random House, 1993. The accompaniment tradition in which this editor stands.

Stevenson, Bryan. Just Mercy. Spiegel and Grau, 2014. The memoir of the capital defense attorney whose work has produced more death row exonerations than any other single advocate in American history.

Death Penalty Information Center.
deathpenaltyinfo.org. The essential clearinghouse for data on American executions, state by state.

RELATED VOLUMES IN THIS SERIES

Hugo, Victor. Under Sentence of Death. 1829. Edited and reset by Jeff Hood. Complicit Press, 2026. V. 9.

Sergeant, Adeline. A Life Sentence. 1889. Edited and reset in Florence, Alabama by Jeff Hood. Complicit Press, 2026. V. 15.

Dunbar, Paul Laurence. The Sport of the Gods. 1902. Edited and reset in Pine Bluff and Little Rock, Arkansas by Jeff Hood. Complicit Press, 2026. V. 16.

Bye, Raymond T. Capital Punishment in the United States. 1919. Edited and condensed by Jeff Hood. Complicit Press, 2026. V. 17.

Wilde, Oscar. The Ballad of Cummins Prison. 1898.
Reset in Grady, Arkansas by Jeff Hood. Complicit
Press, 2026. V. 18.

Dreiser, Theodore. An American Tragedy. 1925.
Edited and condensed by Jeff Hood. Complicit
Press, 2026. V. 19.

About the Editor

The Rev. Dr. Jeff Hood is an author, activist and death row spiritual advisor. He is the founder of the Execution Intervention Project and serves as Dean of The New Theology School, where he is the Rev. Charles Moore Professor of Prophetic Theology. He has accompanied condemned men across multiple states and has witnessed thirteen executions. He lives in North Little Rock, Arkansas.

COMPLICIT PRESS

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

THE ABOLITION CLASSICS. V. IX



UNDER SENTENCE OF DEATH

or

THE LAST DAY OF A CONDEMNED MAN

(Reset in Iran, 2026)

THE NOVEL OF VICTOR HUGO

Paris, 1829

EDITED AND MODERNIZED BY JEFF HOOD

UNDER SENTENCE OF DEATH

Victor Hugo

A Novel
Set in Contemporary Iran

Edited and reset by
Jeff Hood

V. 9

THE ABOLITION CLASSICS
The texts that built the case against the death penalty

Complicit Press

UNDER SENTENCE OF DEATH
A Novel Set in Contemporary Iran

This edition © 2026 Complicit Press

Editorial matter and contemporary setting © 2026 Jeff Hood

Victor Hugo's *Le Dernier Jour d'un condamné* was first published in Paris by Charles Gosselin in February 1829 and is in the public domain. This volume is not a translation of that text. It is an original composition by the editor that resets Hugo's novel in a contemporary context, preserving its structure, premises and argument.

All rights reserved. No part of this book may be reproduced in any form without written permission from the publisher, except by a reviewer quoting brief passages.

Published by Complicit Press

THE ABOLITION CLASSICS
The texts that built the case against the death penalty

CONTENTS

FRONT MATTER

Foreword

Editor's Note

UNDER SENTENCE OF DEATH

- I. Sentenced
- II. The Trial
- III. Evin
- IV. The Walls
- V. The Execution Yard
- VI. Transfer
- VII. Morning
- VIII. The Mullah
- IX. Maryam
- X. The Square

EDITORIAL APPARATUS

Definitions and Terms

Further Reading

FOREWORD

I have sat in the chair where someone will sit tomorrow and wait to die. Not the condemned person's chair — their cell, their waiting room, whatever space the state has designated as the last stop before the machinery of execution takes over. I know the quality of that particular silence. I know how time moves in those rooms — not slowly, as you might expect, but in fragments, lurching and stuttering, an hour gone before you noticed it passing, then thirty seconds that refuse to end. I know what it costs a person to maintain their dignity in a room like that, knowing what is coming, knowing that nothing they do or say or pray will change the arithmetic of the calendar.

Victor Hugo knew that room too. He had been inside French prisons. He had watched men condemned to the guillotine. He had seen the crowd gather in the Place de Grève. When he wrote this novel in 1829 — quickly, in something close to one continuous burst, at the age of twenty-seven — he wrote from something more than imagination. He wrote from witness.

The novel is a diary. No name is given for the narrator. No crime is specified. This is deliberate. Hugo understood that naming the crime would allow the reader to exclude themselves — to say, I would not have done that, therefore this does not concern me. By leaving the crime unnamed, he forces the question: not whether this particular man deserves to die, but whether any person's death can be managed, bureaucratized, scheduled, and carried out by the state without an act of profound moral violence being done — not only to the condemned, but to everyone who participates, everyone who watches, everyone who consents.

The argument is the same in Tehran in 2026 as it was in Paris in 1829. The mechanism is different — hanging rather than the guillotine, a mobile crane rather than a wooden scaffold, a mullah

rather than a priest, the Supreme Leader rather than the king who will not act — but the essential situation is identical. A human being has been processed by a legal system, sentenced to death, and is now sitting in a cell counting the remaining hours of his life. The state has decided that this death will serve a purpose. Hugo spent his entire life arguing that it would not.

Iran executes more people than any country on earth except China. In 2025 the documented total passed sixteen hundred, the highest annual figure recorded there since 1989. The charges are frequently elastic to the point of meaninglessness — *moharebeh*, enmity against God; *efsad-e fel-arz*, spreading corruption on earth — categories capacious enough to include political dissidents, religious minorities, people who posted something online during a protest, people whose confessions were extracted under duress in Ward 209 of Evin Prison. Since the uprising that began at the end of December 2025, and the killings that followed it in January, the Revolutionary Courts have been running a conveyor. Most of the hangings are carried out inside prison walls at dawn and announced afterward, if they are announced at all. Some are carried out in public squares, the body left suspended for hours as a message to the living. The Islamic Republic frames all of them as divinely sanctioned — as acts of justice endorsed by God and required by the Quran. This is the additional cruelty of the Iranian context that Hugo did not face: not only does the state kill you, but it kills you in God's name, and the mullah who comes to your cell in the final hours tells you to make your peace with the God whose law demands your death.

I want to say something about the daughter. Hugo's narrator has a three-year-old daughter named Marie. In the penultimate scene, she comes to the prison — brought there by her grandmother, who does not know who has asked to see her. The child does not recognize her father. He has been so changed by the months in prison, so hollowed out, that his own daughter looks at him and sees a stranger. He does not identify himself. He holds her briefly, weeps into her hair, and lets her be taken away. It is the most devastating scene in the novel because it shows what the death penalty actually

costs — not the moment of death, which is brief, but the long destruction of the person before that moment arrives.

The daughter in this edition is named Maryam. She is three years old. She has her father's eyes and her mother's stubborn mouth. She does not recognize him either. He lets her go. That scene is the same in every language.

I have been in the rooms where men wait to die. I have held their hands. I have said whatever words seemed most honest and most kind, knowing they were not enough. I have walked out of those buildings into the living world and felt the dissonance of being a person who goes home afterward. Hugo's novel is about that dissonance — about the obscenity of the fact that while one man sits counting hours, the rest of the city is going about its business, drinking tea, watching television, arguing about politics, putting children to bed. The state has arranged a death. The city does not stop. The state calls this justice.

It is not justice. It is killing. The method, the justification, the jurisdiction — these are details. The killing is the constant.

Rev. Dr. Jeff Hood

North Little Rock, Arkansas

2026

EDITOR'S NOTE

The Author

Victor Hugo (1802–1885) is one of the great figures of French literature — the author of *Les Misérables*, *The Hunchback of Notre Dame*, and an enormous body of poetry, drama, and political writing. He was also a lifelong opponent of capital punishment who used every form available to him — fiction, polemic, public address, personal intervention — to argue for its abolition. He appealed personally to authorities in France, Belgium, and the United States on behalf of individual condemned prisoners. Writing from exile on Guernsey, he sent an open letter in defense of John Brown on 2 December 1859, not knowing it was the day Brown would hang. He appealed again in 1867 on behalf of Maximilian of Mexico. The campaign he joined as a young man was still unfinished when he died; France did not abolish the guillotine until 1981.

Under Sentence of Death (in French: *Le Dernier Jour d'un condamné*) was written in 1829, when Hugo was twenty-seven years old. He began it, by his own account, the day after passing a public square where an executioner was greasing the guillotine in preparation for a scheduled killing, and he finished it very quickly. Charles Gosselin published it in Paris in February 1829 without the author's name. Reviewers initially debated whether it was fiction or an actual document — a genuine prisoner's diary — a confusion Hugo later treated as evidence that the book had achieved what he intended. On 15 March 1832 he added a long preface and his signature to the second edition, and there he was explicit about his purpose. The book, he wrote, was a plea for the abolition of the death penalty: not the defense of any particular criminal, but *the general and permanent plea for all the accused, present and to come*.

The Novel

The novel takes the form of a diary kept by a condemned man from the day of his sentencing to the final moments before his execution. No name is given. No crime is specified. The anonymity is the point: Hugo refuses to give the reader a way to distinguish himself from the narrator, refuses to allow the comfortable moral distance of “I would not have done that.” The narrator is simply a human being who has been sentenced to die, who loves his daughter, who has memories and fears and a body that will cease to function on a specific date already written in a ledger somewhere.

Hugo structures the diary around the psychological reality of waiting — the way the knowledge of a fixed execution date colonizes every thought, corrupts every pleasure, makes time itself a kind of torture. The novel moves from the Bicêtre prison to the Conciergerie to the final journey through the streets to the Place de Grève. In the penultimate scene the narrator’s three-year-old daughter is brought to see him; she does not recognize him.

The Contemporary Setting

This edition moves the story to Tehran in 2026 and sets the execution by public hanging rather than guillotine.

Iran executes more people annually than any country except China. Iran Human Rights and ECPM documented at least 1,639 executions there in 2025, a sixty-eight percent increase over the previous year and the highest recorded figure since 1989. Roughly half were for drug offenses. The charges most commonly brought against political prisoners are *moharebeh* — enmity against God, or waging war against God — and *efsad-e fel-arz*, spreading corruption on earth. Both are hadd offenses. Both are broad enough to encompass virtually any form of political opposition, and both routinely produce death sentences, though neither carries a mandatory one: under Articles 282 and 286 of the Islamic Penal Code the court chooses among several prescribed punishments, of which execution is one.

The setting is specific to this moment. Nationwide protests erupted at the end of December 2025. Security forces answered them with lethal force on a mass scale on 8 and 9 January 2026 and arrested tens of thousands. In the months since, the Revolutionary Courts have issued and carried out death sentences against people detained in those protests at a pace without recent precedent — some for alleged violence, some for transporting the wounded, some on charges that were never made public because the hearings are closed and the judgments are not published. Amnesty International documented dozens of such executions in the first half of 2026 alone, following what it described as torture-tainted and grossly unfair trials. The narrator of this edition is a man swept up in the long tail of that crackdown.

He is held in Ward 209 of Evin Prison, the wing controlled by the Intelligence Organization of the Islamic Revolutionary Guard Corps and used primarily for political prisoners and those charged with offenses against the state. His crime, like the original's, is not specified. His daughter is named Maryam. The mullah who comes to attend him in his final hours holds the same role as Hugo's priest.

The novel's argument requires no translation. The Islamic Republic's claim that its executions are divinely sanctioned is the same claim that every state apparatus of execution has made in every era — that God, or nature, or justice, or necessity demands this particular death. Hugo's answer to that claim in 1829 is the same answer this edition makes in 2026: no authority — divine, legal, or political — can transform the killing of a human being into an act of justice. It remains killing. And the person dying in the last cell at the end of the corridor feels every second of it.

A Note on the Form and on Three Choices

Hugo's original is divided into short chapters, most of them only a page or two, each a dated or timed entry in the narrator's diary. This edition condenses them into ten, each covering the same essential ground. The narrator's voice — educated, lyrical, increasingly

desperate, capable of terrible clarity and moments of almost unbearable tenderness — is preserved throughout.

Three choices in this adaptation are deliberate and worth naming.

The first is the public execution. The overwhelming majority of executions in Iran are carried out inside prisons at dawn. Public hangings are a small fraction of the total, and public hangings of political prisoners are rarer still. But they are not hypothetical: three protesters were hanged publicly in Qom in March 2026, and two more were publicly executed that July. When the state chooses to kill someone where people can watch, that choice is itself an argument, and the narrator recognizes it as one.

The second is the hour. Hugo's condemned man goes to the Place de Grève in the late afternoon, and this edition keeps his clock. An Iranian execution would ordinarily come at dawn. The final day is compressed here as Hugo compressed it, because the shape of that day — the warden's visit, the cleric, the child, the transport — is the architecture of the book.

The third is that the narrator has read Hugo. He recalls the novel from university and quotes it once. This is not an accident of the reset. He is a literate man detained on political charges in a country where such men are routinely detained, and the tradition he is dying inside of is one he can name. Hugo wrote a plea for all the accused, present and to come. The narrator of this edition is one of the ones to come.

I. SENTENCED

Sentenced to death.

For five weeks I have lived with this single thought — always alone with it, always frozen by its presence, always crushed beneath its weight.

Before, I was a man like other men. Each day had its own texture, its own particular quality of morning light through the apartment window, its own arguments and small pleasures. I had a wife, a daughter, a career I had managed with some care, opinions about things that seemed important. The future was a space I occupied with reasonable confidence, a country in which I had citizenship.

Now that country has been revoked.

Now I have one thought only, and it is this: that I have been sentenced to death. It is not a thought that one can place beside other thoughts and compare. It is not a thought at all, in the ordinary sense — it is a condition, a weather, a gravity that acts on every other thing. When the guard brings my food I see it on his face — the slight shift in how he holds himself before a man who will not be alive in three weeks. When I read (they have given me books, a small mercy I did not expect) I find after a paragraph that I have not read but rather stared, that the words have passed through my eyes without registering, because the sentence was there again, between me and the page.

Sentenced to death.

I say it to myself sometimes, deliberately, as an experiment. I try to make it mean what it says. I cannot. The mind refuses. There is something in the structure of human consciousness — some deep assumption of continuation — that the sentence cannot penetrate. And yet it is true. A judge in a robe read it from a paper, in a room full of people, and everyone wrote it down, and now it is in a ledger

somewhere, and in less than three weeks they will come and carry it out.

I write this from my cell in Evin Prison, Ward 209. The ward is controlled by the Intelligence Organization of the Revolutionary Guards. The ceiling is low. The walls are white. There is a drain in the floor and a camera in the corner and a slot in the door through which a tray appears three times a day. I am not permitted to know what time it is. I am not permitted natural light. I have been here two and a half months, and the sentence was read to me on the forty-third day.

My crime is written in the papers. I will not write it here. It does not matter, in the end, what the papers say. What matters is that a court has decided the state requires my death, and that the state has found language in scripture to say so. God's law is clear, the judge told me. Your life is forfeit. God's mercy is not yours to claim.

II. THE TRIAL

The trial lasted three days. I call it a trial in the way one uses words conventionally, to indicate that a proceeding took place in a room with a judge and a defendant and an outcome. Whether it was a trial in any sense that the word is supposed to carry — a genuine inquiry into truth, a genuine weighing of evidence — this I do not know. I was present for most of it, and I cannot tell you.

On the first morning they brought me in handcuffs and sat me in a chair behind a metal rail. The room was small, with painted walls and fluorescent lights and portraits of the Supreme Leader and the founder of the Republic on the wall behind the bench. The judge was a cleric in a black turban. He had a neat beard and reading glasses and the manner of a man who has done this many times before and finds it neither pleasant nor unpleasant — simply the work in front of him. The hearing was closed. No one was there for me.

The prosecution was presented by a man who spoke quickly and with apparent certainty. He had documents and testimony and a video that had been played on state television, in which I appeared to confess to what I was accused of. I will not say the confession was false. I will say that it was obtained after fourteen days in which I did not sleep for more than two hours at a time, and that certain things that look like choices, when a person is that tired, are not choices in any meaningful sense.

My lawyer — a young man assigned to me by the court — had been given my file the morning of the trial. He asked for a postponement. The judge denied it. He asked several questions in cross-examination that seemed to confuse the prosecution's witnesses. The judge struck most of his questions from the record as irrelevant or as contrary to the dignity of the court. He was, I think, genuinely trying to help me. I did not blame him for what happened.

He was doing what he could in the time available, and the outcome was never in question.

On the third day the judge read the verdict. Guilty of *moharebeh* — enmity against God. Guilty of *efsad-e fel-arz* — spreading corruption on earth. For each of these the court may choose among several punishments, and the court chose death. He delivered the sentence in a voice that I noticed, with the strange detachment of shock, was entirely ordinary — the voice one uses to give directions, or to describe the weather. He may have said something about God's mercy. I believe he did. The words reached me and passed through without leaving any mark.

I looked at the portrait of the Supreme Leader on the wall as the guard came to take me back to my cell. I thought: there is a man who could stop this. He is alive in this city at this moment, perhaps twenty kilometers from where I am sitting. He could make a call. Nothing would happen to him if he made the call — the opposite. He would be praised for his mercy, his wisdom, his Islamic compassion. He will not make the call. I know this without needing to be told.

III. EVIN

Evin Prison sits at the northern edge of Tehran, against the foothills of the Alborz Mountains. From the main road it looks unremarkable — concrete walls, surveillance cameras, an entry gate with guards. The Alborz rises green and white behind it. On clear days you can see the snow on the peaks. I know this because a guard described it to me once, in an unguarded moment of something that might have been pity. I have not seen the mountains. I have not seen natural light since the day they brought me here. The window in my cell is painted over.

The cell is four paces wide and six paces long. I have measured this many times. A sleeping mat on the floor, a thin blanket, a small squat toilet and a tap that produces water that is sometimes warm. The camera in the corner has a red light that stays on. I have learned not to look at it, the way one learns not to look at a wound. A slot in the door. Fluorescent light twenty-four hours a day. The light never changes; there is no way to tell day from night except by the regularity of the meal trays.

In the first weeks after sentencing they gave me paper and a pen, which I believe they have since come to regret. I began to write, not because I thought it would do any good, but because the alternative was to sit on the mat and think, and thinking had become a form of torture too refined to endure indefinitely.

I have written about my daughter. I have written about my wife. I have written about the morning the guards came to our apartment, the particular way the light was coming through the kitchen window when the knock came, which I remember precisely and which I know I will be thinking about when they come for me on the last morning. I have written about my parents, who are old, and who have been told nothing — I have been told nothing about whether they have been told anything. I have written, in the night watches

when the corridor outside goes quiet, about the nature of death, which I cannot comprehend no matter how deliberately I approach it, as a mathematician approaches a problem — systematically, from all angles, with patience — and which refuses to yield any meaning at all.

I write now because not writing is worse.

IV. THE WALLS

I was taken once, briefly, to a larger cell while mine was searched. In that cell the walls were covered with writing — names, dates, fragments of prayer, lines of poetry I recognized and some I did not, numbers that might have been dates or sentences or ages. Many generations of condemned men had left their marks in the plaster, and subsequent coats of paint had not entirely covered the deeper cuts. I pressed my fingers into the grooves of the letters and thought about the hands that had made them.

One inscription was a name and a date from 2009 — the year of the Green Movement, when hundreds of protesters were arrested after the disputed election. One was a line of verse in a careful hand, something about waiting for morning, with no poet's name beneath it and no name of its own. I did not recognize it. It may have been the man's own. He had begun to scratch it out again and then stopped partway, as though he had thought better of hope and then thought better of that.

One was a number — 22 — which might have been an age, the age at which its author was executed. If it was an age then he was twelve years younger than I am. My daughter will one day be older than he ever became.

I found, in the lower corner behind the toilet, a small drawing of a bird in flight. It had been made with great care — you could see from the fineness of the line that it had taken time, that whoever made it had worked on it over many sessions, returning to add detail, refine the wing angle, add a suggestion of wind in the feathers. The bird was rising. It was not a symbol I could interpret with confidence. It was simply a bird, drawn by a man in a cell who wanted to make something beautiful before he died.

I did not add my name to the walls. I thought about it. But I did not want to leave only a name. A name without context is nothing —

just proof of presence, a mark an animal might make on a tree. If anything remains of me, I want it to be something that explains, that gives weight to the name. I want Maryam, when she is old enough, to know who I was — not just that I existed, but what it felt like to exist, inside this particular body, during these particular weeks, in this particular cell at the end of the corridor in Evin Prison.

This is what it feels like. It feels like being alive while knowing, with increasing certainty, that the aliveness will be terminated on a specific date by a specific mechanism. The specific mechanism is hanging. I have tried not to think about the specific mechanism. I have not succeeded.

V. THE EXECUTION YARD

One week ago I was permitted into the courtyard for exercise — forty minutes, the first time I had been outside the cell since the sentencing. The courtyard was a concrete rectangle with high walls and a narrow rectangle of sky above. Three other men were there, each with his own guard, none of us permitted to speak to the others.

I knew, looking at them, that they were also under sentence. There is something in the posture of a man waiting to be executed that distinguishes him from a man serving a term, even a long one. A term has an end that the man will reach. These men moved with the particular economy of people who had stopped planning for a future.

One was young — perhaps twenty-five. He had dark circles under his eyes and a recent bruise on his jaw, yellowing. He walked in careful circles near the wall on the far side of the courtyard. At one point he stopped and pressed his forehead against the concrete of the wall and stayed that way for perhaps thirty seconds. No one interfered. The guard looked at the sky.

I wanted to speak to him. I wanted to say — I don't know what I wanted to say. That I see you. That whatever brought you here, I do not think it makes your life worth less than mine. That the young man you were before all this is still the person I see in this courtyard, not the charge in the court document. But I was not permitted to speak, and perhaps even permitted I would have found no words adequate to what I wanted to say.

Through a door in the far wall I heard, once, a sound I recognized and then immediately tried to un-recognize. A voice beginning something — a prayer, I think — and then cut short. Then silence. Then ordinary prison sounds again, as if nothing had occurred.

UNDER SENTENCE OF DEATH

I went back to my cell and I wrote nothing for two days.

VI. TRANSFER

This morning, without warning, they moved me.

The guard came at what I estimated to be five in the morning and said: gather your things. I had very little — the paper I had been writing on, a Quran they had provided, a photograph of Maryam that my wife sent and that was somehow permitted. I held the photograph for a moment before putting it in my pocket. She is three years old in the photograph. She is sitting on the floor with her legs out in front of her and she is laughing at something off to the right of the frame. Her hair is dark and curly and her eyes are my eyes and she is the most beautiful person I have ever seen.

They put me in a van with blacked-out windows. I could not tell the route we took. After perhaps thirty minutes, a door opened, and I was brought into a building that I did not recognize. They put me in a room that was larger than my cell at Evin — a table, a chair, a bed with an actual mattress, a window with bars that looked into a concrete airshaft rather than the painted-over glass I had been living with. I could not see the sky, but I could tell from the quality of the light reflected in the airshaft that it was daylight outside.

A guard told me the date. I had lost count and did not know if he was telling the truth, but I believed him because there was no evident reason to lie. The date he gave me means that I have been in detention for ninety-three days total, and that the execution is now four days away.

Four days. I said it to myself several times. I tried to make it feel like something. It felt like nothing. The mind refuses, as I have written before. The mind takes the number and turns it over and cannot find purchase on it.

I asked the guard for more paper. He said he would see. I asked if I could receive a visitor — my wife, my mother, anyone. He said he would pass on the request. He did not say it in the way of a man who

intends to pass on anything. He said it in the way of a man concluding a conversation.

VII. MORNING

It is morning. I know this because the light has changed in the airshaft — it has shifted from the gray of early dawn to something fuller, with actual color, a pale orange that touches the upper edge of the concrete wall. I have been awake since the middle of the night. There is no clock in this room. I know only that the call to prayer reached me at some point in the dark, from a loudspeaker somewhere beyond the walls, and that I was already lying there awake when it came.

The guard who brought my morning tray said nothing unusual. He set the tray on the table and left. But when he came for the tray an hour later, the warden came with him — a man in a dark suit who had been to my cell once before, shortly after my arrival, to ask if I had complaints. He asked again whether I had complaints. He asked how I had slept. He called me *Agha* — Sir. He left.

This is the ceremony of the final day. I know it because I have read Hugo's novel, years ago, in university — the governor who visits on the morning of the execution, the suddenly ceremonious courtesy, the implicit apology that is not quite an apology. When Hugo's condemned man receives that visit, he writes: *It is for today*. That entry is two lines long, and the two lines contain everything.

It is for today. I write this at mid-morning, I believe. The tray with breakfast has been taken. The warden has made his visit. The mullah who has come to my cell twice in the last four days has not yet arrived, but I expect him. Somewhere in this building there are preparations being made — not the scaffold-building that Hugo describes, the carpenters working in the night — but their modern equivalent. Administrative preparations. Paperwork. The coordination of officials and vehicles and the particular machinery

that will be used to end my life. All of this is happening now, in other rooms, while I sit here and write.

I asked the guard, when he came for the tray: has anything come from the Supreme Leader's office? He did not answer. He looked at a point slightly to the left of my face and waited for me to say something else. When I said nothing more, he left.

Nothing will come from the Supreme Leader's office. I knew this before I asked. The asking was not hope; it was ritual, the last motion of a form that had become meaningless.

VIII. THE MULLAH

He came at midday. An older man, with a white beard and the slow, deliberate movements of someone who has made peace with most things — the kind of person who in another context you might find reassuring. He sat across from me at the table and placed his hands on the surface between us. He asked if I had made my peace with God.

I told him I had been trying to pray and that the words would not come in the right order. He said that was common, and that God understood the disorder of the condemned heart. He recited some Quran — a passage from Al-Baqarah, about God being with the patient. He spoke about the mercy of martyrdom, about how the moment of death is also the moment of release, about how the brief passage of dying opens into an eternity that our finite minds cannot conceive.

I listened. I have not been violent or uncooperative with anyone in this building. I have no interest in making their work harder than it is; they are doing what the state has assigned them, just as the state assigned me this cell and this date.

But I found, listening to him, that what I could not accept was not the dying, precisely — it was the framing. The Islamic Republic had charged me with enmity against God. The Revolutionary Court had convicted me of spreading corruption on earth. The mullah was now telling me to make peace with God. All of this assumed that God was on their side — that the state and its courts and its execution chamber were instruments of divine will, and that I was the party who had been distant from God, and that death would bring me back to him.

I said to the mullah: do you believe this execution is what God wants?

He looked at me for a moment. He said: the law is the law.

I said: I know the law. I am asking about God.

He said: they are the same.

I did not argue further. He stayed another half hour, praying and reciting, and I sat with him and let him do his work, because it seemed to give him comfort, and comfort is not a thing I am in a position to deny anyone today.

After he left I remained at the table for a long time. The light in the airshaft had moved to the right, which meant it was afternoon. I thought about God. I have believed in God, in the approximate and unexamined way of people who grew up in religious households and absorbed belief along with everything else. I did not stop believing when I was arrested. I did not stop believing when I was sentenced. I have been trying to find, in whatever remains of my faith, something that resembles peace, and what I have found instead is a question that will not resolve: if God is merciful, why has God made me capable of counting the hours until I am killed, and why has God given me a three-year-old daughter who will grow up without knowing me?

I have not answered this question. I have run out of time to answer it.

IX. MARYAM

They told me at two in the afternoon that I would have a visitor. I was not told who. I assumed my wife; I hoped for my mother. When the door opened and the guard brought in a woman I did not immediately recognize — my wife's mother, older and thinner than the last time I had seen her — and then a small child holding the woman's hand, I understood what was happening before I had time to prepare for it.

My wife was not with them. I did not ask why. There are a hundred reasons in this country why a woman married to a condemned man might not be permitted through a door, and I did not want to spend the minutes I had on any of them.

Maryam is three years old. She was wearing a red coat that I did not recognize — it must be new since the last time I saw her, which was the morning of the arrest, three months ago. She had my eyes. She had her mother's particular expression of cautious assessment when faced with something unfamiliar. She looked at me with exactly that expression.

She did not know me.

I understood this in the first two seconds. The three-year-old mind holds what it sees daily and lets the rest dissolve. I had been gone three months, which at her age is long enough for a face to go. And the man in front of her was thin and pale, with a beard he had not worn before, in a room that smelled of disinfectant and fear. She looked at me and then looked up at her grandmother.

I said her name. She looked back at me. Something moved across her face — not recognition exactly, but a willingness to consider. She was trying to locate me in her memory, and finding something approximate there, something that resembled what I had been, close enough to make her tilt her head.

I could not say: I am your father. I could not do that to her — bring her all the way to recognition and then take myself away from her in the same day. What would it cost her, to know her father's face clearly and then lose it?

I held out my hand. She came to me, one step, then two, and I took her up in my arms and she let me hold her. She smelled of the outdoors, of cold air and something sweet, and she weighed almost nothing, and I pressed my face into her hair and I shook, and she put her small hand on my cheek with an expression of solemn concern, as children do when they encounter adult distress they cannot explain.

I held her for what I was allowed — four minutes, perhaps five. Then the guard said it was time. I put her down and straightened her red coat and said: goodbye, little one. She said: bye. She turned and took her grandmother's hand. At the door she looked back at me once, with an expression that I cannot describe and that I will carry with me to the end.

My mother-in-law looked at me for a moment, and in her face I saw: she knows. She knows what today is. She brought the child today because it was the last day. She nodded at me, very slightly. I nodded back. The door closed.

I sat on the floor and did not move for a long time. There is nothing left to write. All the pages I have filled mean nothing beside the weight of that child in my arms and the coolness of her hand on my cheek. She touched me as if I were real. As if I were still here. And I was, for those minutes. I was absolutely and entirely here.

X. THE SQUARE

From the van. They are taking me across the city.

I can see Tehran through the tinted window. It is late afternoon — the light is low and golden, the specific light of Iranian autumn that I have loved my whole life without knowing I was capable of loving it so much, the light that turns the mountains behind the city purple and makes the traffic seem beautiful from a distance.

The streets are full. People walking, driving, buying fruit from a cart, talking on their phones, doing all the ordinary things of a Wednesday afternoon. A man in a suit argues with a taxi driver at an intersection. Two women laugh at something between them. A child is asleep in the back seat of a car beside us, cheek pressed against the window. None of them know what is in this van. The van does not announce itself. The state does not advertise; it simply arrives.

I try to look at everything. I have been trying, since I understood that this was the last time, to look at everything — really look, as if I could keep it by looking. The mountains. The sky. The light on the buildings. The faces of people living their lives at four o'clock on a Wednesday who will not remember today as anything particular, because for them it was not particular. For them it was a Wednesday.

They tell me the execution will be public. A mobile crane in a square. I have seen photographs of this — the condemned man on a truck or a platform, the rope, the crane that lifts rather than drops, the death that comes slowly.

Almost everyone who dies in this country dies inside a wall at dawn, and the family is informed afterward, if they are informed. A public execution is a decision. Someone above the warden, someone above the judge, decided that my death should be watched. That is not a sentence. That is a message, and I am the paper it is written on.

I am trying not to think about the method. I am thinking about Maryam's hand on my cheek. I am thinking about the bird drawn on the wall of the cell. I am thinking about the twenty-five-year-old man in the courtyard pressing his forehead against the concrete.

I want to say something about the state that is doing this. Not in anger — I am past anger, or anger is beside the point now. I want to say: the Islamic Republic has told its people, and tells itself, that these executions are divine justice. That God requires them. That the deaths it carries out in public squares, on cranes, in front of crowds who are sometimes compelled to attend, are acts of piety. I want to say to anyone who will read this: ask the question Hugo asked nearly two hundred years ago. Ask it seriously. Ask it without the answer already prepared.

What purpose does this serve?

Not the stated purpose — not the deterrence that statistics have consistently failed to demonstrate, not the closure that never quite arrives for the victims' families who are also watching a human being die in a square. The real purpose. Why does the state need this? What does the state require that can only be obtained through killing?

I believe the answer is what it has always been: not justice but power. The demonstration of the willingness to kill is itself the point. The crane in the square says: we can do this. We have the authority and the apparatus and the will. We can make a person disappear — first into a cell, then into a verdict, then into a rope — and the world will continue around the gap.

They are slowing down. I can hear the crowd before I can see it.

I am thirty-four years old. I have a wife I love and a daughter who touched my cheek this afternoon. I have done things I regret and things I am proud of, in the same proportions as most people. I was a man like any other man. What is about to happen to me will be called justice.

It is not justice. It is killing. And I am asking anyone who reads this — now or in fifty years, in Iran or anywhere — to keep asking the question. To refuse the state's answer. To stand in the square and refuse to call it justice.

UNDER SENTENCE OF DEATH

My name is—

[The diary ends here.]

DEFINITIONS AND TERMS

Victor Hugo (1802–1885): The author of this work — French poet, novelist, playwright, and political activist, widely regarded as the greatest French-language writer of the nineteenth century. His opposition to capital punishment was lifelong and sustained: he wrote *Under Sentence of Death* at twenty-seven, intervened personally on behalf of condemned prisoners across his career, and continued to press the case for abolition through his years in the French Senate. He did not live to see the guillotine abolished in France; abolition came in 1981, nearly a century after his death.

Evin Prison: The principal political detention facility in Tehran, operated in part by the Islamic Revolutionary Guard Corps. Ward 209, where the narrator is held, is controlled specifically by the Intelligence Organization of the IRGC and is used for prisoners charged with national security offenses, political crimes, and crimes against the state. Evin has held journalists, lawyers, human rights activists, dual nationals, and political dissidents. Conditions in Ward 209 include extended solitary confinement, sleep deprivation, and forced confessions.

***Moharebeh*:** An Arabic term, used in Iranian law, meaning enmity against God or waging war against God. It is one of the charges most commonly brought against political prisoners in Iran. Under Article 282 of the Islamic Penal Code the court may impose one of several punishments on a person convicted of moharebeh, of which execution is one; in political cases execution is the usual outcome. The charge has been applied to members of political opposition groups, armed insurgents, protesters, and individuals whose connection to any organized resistance is tenuous or nonexistent.

***Efsad-e fel-arz*:** An Arabic term meaning spreading corruption on earth, and the other charge routinely producing

death sentences in Iranian political cases. Article 286 defines it expansively — offenses against persons, property, or internal or external security, committed on a large scale, or acts causing public anxiety or disorder — and prescribes execution as one of the available hadd penalties. Like moharebeh, it is applied broadly: to drug traffickers, to people convicted of repeated moral offenses, and to political opponents of the government. The breadth of the definition gives courts wide latitude.

The Revolutionary Court: The judicial body in Iran that handles cases involving national security, political crimes, and crimes said to be against God. Its judges are appointed by the Head of the Judiciary; some are clerics and some are not. Trials are frequently conducted without adequate access to defense counsel, without meaningful discovery of evidence, and with confessions obtained under duress given significant evidentiary weight. The branches handling political cases sit in closed session, and their judgments are not published — a practice UN human rights experts have criticized directly, noting that in some 2026 cases the precise charges against the condemned were never made public.

The Supreme Leader: The head of state of the Islamic Republic of Iran, holding authority over all branches of government including the judiciary, the military, and the security services. Clemency in capital cases involving offenses against the state passes through the Head of the Judiciary, who is appointed by the Supreme Leader, and ultimately rests with the Supreme Leader himself. In the novel, the narrator's awareness that one man could stop the execution and will not is the Iranian equivalent of Hugo's condemned man contemplating the king who will not intervene.

Public hanging by crane: A method used in Iran's public executions. A mobile crane is positioned in a public square or street; the condemned person is placed in a noose attached to the crane's arm and lifted, dying by slow strangulation rather than the rapid cervical dislocation of a measured drop. Bodies are sometimes left suspended for hours. Public executions are a small fraction of Iran's total — roughly a dozen a year against well over a thousand carried out inside prisons — which is precisely what makes them

significant. The state uses them to deter and to display, and attendance has at times included children.

The mullah: In this adaptation, the clerical official who comes to the narrator's cell in his final hours, the equivalent of Hugo's prison chaplain. The Iranian context adds a layer unavailable to Hugo: the mullah represents a state that has fused religious and political authority, and he comes to tell the condemned man to make peace with a God whose law the state claims to be enforcing. The narrator's question — *do you believe this execution is what God wants?* — and the mullah's answer — *they are the same* — is the novel's clearest statement of what is wrong with theocratic capital punishment.

Maryam: The narrator's three-year-old daughter, named for the Quranic figure of Mary, mother of Jesus, a figure of profound reverence in Islam. Her name carries the weight of all the Islamic Republic's claims to piety and mercy against the reality of a child who will grow up without her father. In Hugo's original she is named Marie; the adaptation preserves both the name's religious resonance and the scene in which she fails to recognize her father and he does not identify himself to her.

Hugo's preface of 1832: Hugo added a long preface, and his name, to the second edition on 15 March 1832. He was explicit there that the book was not a defense of any particular criminal but a plea on behalf of every accused person, present and to come, and that its object was the abolition of the death penalty in any form and in any society. The plea is the same in every edition — Paris, 1829; Tehran, 2026.

The diary's last entry: The narrator begins to write his name and stops. The sentence is unfinished. In Hugo's original, the diary ends as the narrator is taken to the scaffold. The incompleteness is not a literary device — it is the argument. The life was cut short. The sentence was not finished. There was more to say.

FURTHER READING

Hugo's Own Work

Hugo, Victor. *The Last Day of a Condemned Man and Other Prison Writings*. Translated and edited by Geoff Woollen. Oxford: Oxford University Press, World's Classics, 1992. The standard English scholarly edition of the novel, printed with the 1832 preface, *Claude Gueux*, and Hugo's own diary entries from his visits to La Roquette and the Conciergerie. The best single volume for readers who want Hugo's prison writing gathered in one place.

Hugo, Victor. *Claude Gueux*. 1834. A short work of documentary fiction published five years after *Under Sentence of Death*, following the case of a French prisoner driven to kill and then executed for it. Hugo regarded it as the companion piece to this novel; it is included in the Woollen edition above.

Hugo, Victor. *Les Misérables*. 1862. The great novel that grew, in part, from Hugo's sustained meditation on crime, punishment, and the question of what society owes the people it has failed. Jean Valjean is the extended version of the condemned man in this diary — a person processed by a penal system and stripped of his humanity by that processing.

On Iran's Death Penalty

Iran Human Rights and ECPM. *Annual Report on the Death Penalty in Iran*. Published jointly each year; the eighteenth edition, covering 2025, appeared in 2026. The most rigorous available count of executions in Iran, broken down by charge, province, and demographic, with methodology stated. The figure of at least 1,639 executions in 2025 comes from this report.

Amnesty International. *Iran: Death Penalty and Executions*. Ongoing reporting at [amnesty.org](https://www.amnesty.org). Amnesty's 2026 coverage documents the wave of death sentences and executions arising from the January 2026 protests, including the use of national security charges, closed Revolutionary Court hearings, and torture-tainted confessions.

Center for Human Rights in Iran. Ongoing reporting at iranhumanrights.org. Case-level documentation of political prosecutions, named defendants, named judges, and named courts — the granular record behind the aggregate numbers.

Abrahamian, Ervand. *Tortured Confessions: Prisons and Public Recantations in Modern Iran*. Berkeley: University of California Press, 1999. The standard scholarly account of the Islamic Republic's use of detention, forced confession, and public recantation — the system within which the narrator's confession in Chapter II would have been obtained.

Memarian, Omid, ed. *Sketches of Iran: A Glimpse from the Front Lines of Human Rights*. International Campaign for Human Rights in Iran, 2013. Forty commentaries paired with drawings by Iranian artists, on imprisonment, forced confession, and the silencing of writers and lawyers. Memarian was himself detained in 2004 and forced to confess on state television.

The Broader Tradition

Darrow, Clarence. *An Eye for an Eye*. Edited and reset by Jeff Hood. Complicit Press, 2026. The companion fiction volume in this series — Darrow's 1905 novel, reset in St. Louis in 2026. Where Hugo's condemned man is educated and lyrical, Darrow's is working-class and plain-spoken. Together they make the same argument.

Spear, Charles. *Essays on the Punishment of Death*. Edited and modernized by Jeff Hood. Complicit Press. The 1844 American abolitionist argument that anticipates many of Hugo's themes.

Bovee, Marvin H. *Christ and the Gallows; or, Reasons for the Abolition of Capital Punishment*. New York: Masonic Publishing

Company, 1869. The nineteenth-century American work that addresses most directly the claim that capital punishment is divinely sanctioned — the same claim the Islamic Republic makes in the narrator's Revolutionary Court.

Fiction and Testimony

Nemat, Marina. *Prisoner of Tehran: A Memoir*. New York: Free Press, 2007. An account of detention in Evin Prison in the 1980s — the institution in which this novel is set — and one of the most detailed descriptions of that place available in English.

Satrapı, Marjane. *Persepolis: The Story of a Childhood*. New York: Pantheon Books, 2003. A graphic memoir of growing up in Iran during and after the Revolution, providing essential context for the Islamic Republic's relationship to execution, repression, and the lives of ordinary Iranians.

Kafka, Franz. *The Trial*. 1925. The greatest fictional treatment of the person processed to death by an opaque and unaccountable legal system. Hugo and Kafka are the poles of the genre: one lyrical and romantic, one bureaucratic and uncanny. Between them they have described every courtroom in which the outcome was never in question.

THE ABOLITION CLASSICS. V. VI



ARGUMENT AGAINST CAPITAL PUNISHMENT

THE ARGUMENT OF EDWARD LIVINGSTON

Louisiana, 1833

EDITED AND MODERNIZED BY

JEFF HOOD

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.

C O M P L I C I T P R E S S

*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,

FURTHER READING

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.

THE ABOLITION CLASSICS. V. XI



**REPORT IN FAVOR OF THE ABOLITION
OF THE PUNISHMENT OF DEATH
BY LAW**

THE REPORT OF JOHN L. O'SULLIVAN

New York, 1841

EDITED AND MODERNIZED BY

J E F F H O O D

COMPLICIT PRESS

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

REPORT IN FAVOR OF THE
ABOLITION
OF THE PUNISHMENT OF DEATH
BY LAW

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

V . 1 2

**REPORT IN FAVOR OF
THE ABOLITION OF THE
PUNISHMENT OF DEATH
BY LAW**

New York State Assembly, April 14, 1841

JOHN L. O'SULLIVAN

Edited and Modernized by
JEFF HOOD

THE ABOLITION CLASSICS
V. 12

COMPLICIT PRESS

This edition © 2026 Complicit Press
Editorial matter and modernization © 2026 Jeff Hood

Original text first published New York, 1841.
J. & H. G. Langley. Second edition.

This edition newly set and modernized from the original.

All rights reserved.

COMPLICIT PRESS

CONTENTS

FRONT MATTER

Foreword

Editor's Note

THE REPORT

Preface to the Second Edition

Opening: The Solemn Magnitude of the Question

I. The Scriptural Argument Examined

The Mosaic Code

The Noahic Covenant

The New Testament

The Character of Cain

II. The Right of Society to Take Life

The Social Compact

The Limits of Delegated Authority

III. The Moral Effect on Society

The Corruption of Witnesses and Juries

The Execution as Public Spectacle

The Effect on the Criminal Class

IV. The Inefficacy of Death as Deterrence

Evidence from Parliament and the Courts

Life Imprisonment as Superior Deterrent

V. The Occasional Execution of the Innocent

VI. Ancient Usage and the Progress of Reform

VII. The Harmony of Mercy and Justice

Conclusion: Summary of the Argument

EDITORIAL APPARATUS

Definitions and Terms

Further Reading

FOREWORD

In the spring of 1841, a twenty-seven-year-old assemblyman from New York City stood up before the New York State Legislature and delivered the most comprehensive argument for abolition of the death penalty that had yet been made in America. John L. O'Sullivan was not primarily an abolitionist. He was a Democrat, a journalist, a nationalist—the man who would coin the phrase “Manifest Destiny” four years later to describe American continental expansion. He was a man of enormous rhetorical energy and considerable political skill, and he had been appointed to chair a select committee of the Assembly examining capital punishment, formed in response to Governor William Seward's message to the Legislature. He took the assignment seriously. The report he produced ran to more than a hundred pages of argument, evidence, and legal and theological analysis. The Legislature ordered ten times the usual number printed.

O'Sullivan's report belongs in this series because it is, in many respects, the definitive American statement of the abolitionist argument in the pre-Civil War era. He knows everything. He has read Beccaria, he has read Livingston, he has read the British parliamentary testimony, he has read the European criminologists. He has obtained the actual records of every capital case tried in New York over the previous two years, and he analyzes them in detail. He has examined the scriptural arguments for capital punishment with more

thoroughness than almost any secular document before or since, and he dismantles them with methodical care. He understands the deterrence literature before deterrence research was a recognized field. He makes the argument from wrongful conviction with the precision that would not be widely available again until the Innocence Project began its work a hundred and fifty years later.

I came to O'Sullivan through the legislative history of abolitionism—through searching for the moments when the argument broke into formal public life, not just into philosophical essays and private correspondence, but into the chambers where laws are made. This report is one of those moments. It came close. The bill it accompanied carried the procedural vote ordering it to a third reading, fifty-seven to fifty-two. It failed on the final vote, forty-seven to fifty-two, taken at a late-night session when enough of its friends had gone home to turn the count. Five votes carried it forward and five votes killed it. Five votes, in 1841, might have made New York the first American state to abolish capital punishment—five years before Michigan did it, and eleven years before Rhode Island became the first state to abolish it for every crime.

What strikes me most, reading the report across nearly two centuries, is the quality of the outrage. O'Sullivan is not a sentimentalist. He frames his argument explicitly as a matter of policy rather than mercy, of "a wise and severe justice" rather than "a compassionating mercy." He knows that the legislative chamber is not the place for tears. But underneath the careful legal and empirical argument runs something that I recognize from my

own years on death row: the shock of someone who has looked directly at what the state is doing and cannot make himself stop seeing it. Eleven executions in two years. Eleven times a man was brought to the scaffold. Eleven times the image of God, as O'Sullivan puts it in a phrase that stops me cold, was desecrated.

He was writing to legislators who had the power to end this. He failed, narrowly, to persuade them. His report descended to those who came after, which is us. The argument is as complete and as sound in 2026 as it was in 1841. What has changed is the accumulation of evidence—two centuries more of data confirming every empirical claim he made. What has not changed is the fundamental situation: the state is killing people, and the question of whether it has the right to do so has not been adequately examined. O'Sullivan examined it. We are still not done answering him.

Rev. Dr. Jeff Hood
North Little Rock, Arkansas
2026

EDITOR'S NOTE

The Author

John Louis O'Sullivan (1813–1895) was a New York journalist, editor, Democratic Party operative, and political essayist who played a significant role in the intellectual life of Jacksonian America. He was the founder and editor of the *United States Magazine and Democratic Review*, which published early work by Nathaniel Hawthorne, Walt Whitman, Edgar Allan Poe, and Henry David Thoreau, among others. He is best known today for coining the phrase “Manifest Destiny” in 1845, though his broader significance lies as much in the progressive causes he championed before that phrase appeared.

O'Sullivan was elected to the New York State Assembly as a Democrat and served from 1841 to 1842. During his term he was appointed to chair the select committee on capital punishment, established in response to Governor William Seward's message to the Legislature. He threw himself into the work with characteristic intensity, producing a report of unusual depth and ambition. The report was accompanied by a bill to abolish capital punishment and replace it with life imprisonment at hard labor in solitary confinement, placed beyond the reach of executive clemency. The bill passed the first procedural vote by five votes, fifty-seven to fifty-two, and failed the final vote by the same margin, forty-seven to fifty-two,

the latter loss occurring at a late night session when many of its supporters had gone home.

O'Sullivan's subsequent career took him in other directions. He became deeply involved in the expansionist movements of the 1840s, coined the phrase Manifest Destiny, supported the annexation of Texas, and eventually became a diplomat and a Confederate sympathizer during the Civil War—a trajectory that sits uneasily alongside the moral seriousness of the 1841 Report. He died in New York in 1895, largely forgotten by the time of his death. The Report, meanwhile, had quietly become one of the foundational documents of the American abolitionist tradition.

The Report

The Report in Favor of the Abolition of the Punishment of Death by Law was submitted to the New York State Assembly on April 14, 1841. Ten times the usual number of copies were ordered printed, an indication of the significance the Legislature attached to the subject. A second edition followed later in 1841, accompanied by a preface describing the bill's narrow defeat. The text runs to approximately 130 pages of argument, evidence, quotation, and legislative analysis, followed by an appendix containing summaries of the capital cases reviewed by the committee. That appendix, a docket of two years of New York murder convictions with the committee's notes on each, is not reproduced here.

The report's structure is unusually comprehensive for a legislative document. O'Sullivan addresses, in turn: the scriptural

argument for capital punishment (the Mosaic code, the Noahic covenant, the New Testament passages); the philosophical argument from the social compact and the limits of delegated governmental authority; the moral effects of execution on society and on the jury system; the empirical evidence on deterrence, drawn from British parliamentary testimony and European criminological research; the problem of wrongful execution; the argument from ancient usage and the progressive reform of criminal law; and the harmony of mercy and justice as twin aspects of a single truth. Each section is exhaustive within its genre.

The report is also, at the level of prose, one of the finest pieces of abolitionist writing in the American tradition. O'Sullivan was a professional man of letters, and the Report shows it. The description of a hanging in the opening pages—the scaffold, the condemned man, the image of God desecrated—is as powerful as anything in the literature. The analysis of the deterrence evidence is as rigorous as a modern empirical argument. The scriptural exegesis is careful and learned. And the original closes on an image of Christianity and democracy as fair twin sisters walking hand in hand over the earth, a peroration of the kind a Senator might have given on the floor. The present edition ends where the committee ended its own argument instead, with the recapitulation.

The Modernization

This edition presents O'Sullivan's Report in modernized form. The original text is dense with

the rhetorical conventions of early nineteenth-century American political writing: very long sentences, elaborate subordinate clauses, frequent quotation in Latin and French, and the assumption of a classical education that the reader may or may not bring. The present edition simplifies the sentence structures, translates the foreign-language passages, provides context for the historical references, and reorganizes the text under explicit section headings that make the argument's structure more visible to a contemporary reader. The Report's arguments, positions, and evidence are preserved, with the single exception noted below; otherwise only the presentation has been updated.

The original text also contains lengthy quotations from British parliamentary testimony, European legal writers, American legislators, and scriptural commentators, all of which are woven into O'Sullivan's argument. Most of these passages have been condensed and paraphrased with attribution, both to clarify the structure of the argument and to keep the reader's attention on O'Sullivan's own voice rather than on the voices he marshals as evidence. Where the exact words of a witness carry weight that paraphrase would lose—the Governor's message, the testimony of the Ordinary of Newgate, Lafayette's formulation before the Chamber of Deputies—the quotation has been retained.

Two features of the original require comment rather than silent modernization. The first is O'Sullivan's treatment of the Jewish people. In arguing that the Mosaic code cannot bind a modern legislature, he reaches for the supersessionist

commonplaces of his century, characterizing the Jews of the biblical period as a people at an early and savage stage of moral development and offering that supposed backwardness as the reason their law was severe. Those characterizations have been removed from this edition. They are not incidental to the sentences they appear in, but they are incidental to the argument, which stands entire without them: a legal code written for one people in one century, under conditions of war and scarcity, does not thereby govern another people in another. O'Sullivan needed no slander to make that point, and this edition does not print his.

The second is a tension the reader will find in the deterrence argument and should not be talked out of. Sections III and IV hold that the passions producing grave crimes are not the passions of calculation, and that the man in the grip of rage or desperation is not weighing penalties at all. Section IV then argues that perpetual imprisonment deters better than death because the criminal, asked to choose, would take death. The second claim assumes the weighing that the first denies. Livingston's answer, which O'Sullivan adopts, is that a sufficiently concrete and durable suffering speaks to the passions in terms they can hear even when reason is not consulted. Whether that answer holds is a question the Report leaves open. It is left open here.

The Series

This volume is part of The Abolition Classics, published by Complicit Press to make the essential texts of the abolitionist tradition available in

contemporary language. O'Sullivan's Report belongs in this series because it is the most comprehensive legislative abolitionist argument produced in America before the Civil War, a document that came within five votes of making New York the first state to abolish execution, and that has influenced every subsequent American abolitionist argument whether or not its authors knew its name.

*“The divine impression of the image of
God, stamped on the humanity of which
the murderer partakes in common with
his executioner, his judge, and his
legislator, has been desecrated.”*

— John L. O’Sullivan

*Report in Favor of the Abolition of the Punishment of
Death by Law, 1841*

THE REPORT

**REPORT IN FAVOR OF THE
ABOLITION OF THE
PUNISHMENT OF DEATH BY LAW**

*Made to the Legislature of the State of New
York, April 14, 1841, by John L. O'Sullivan,
Member of the Assembly from the City of
New York. Second Edition.*

PREFACE TO THE SECOND EDITION

A second edition of this Report being called for by public demand, it seems right to add a brief account of what happened to the bill it accompanied.

The great press of business before the Assembly made it impossible to bring the bill up for consideration until within a few days of adjournment. The same pressure forced its supporters to allow it to go to the vote without debate—without even a reply to three speeches in opposition, which were calculated to do serious harm to its prospects. Despite these difficulties, the first procedural vote, ordering the bill to its third reading, passed in the affirmative, fifty-seven to fifty-two.

The bill could not then be brought to the final vote until a late hour of a night session, when the physical exhaustion of many members had thinned the attendance severely. It was lost by the same margin of five votes: forty-seven in favor, fifty-two against. Among those absent, the friends of the bill outnumbered its opponents substantially. Had the House been full, it would have passed by a clear majority.

These facts are mentioned to prevent discouragement among those who care about this reform. Every reason exists to expect the bill's passage in the next session, and to that end it is earnestly hoped that as many citizens as possible will petition the next Legislature in its favor.

New York, October 1st, 1841.

OPENING

The Solemn Magnitude of the Question

The select committee of the Assembly, charged with examining the Governor's message on capital punishment and the petitions of citizens praying for the repeal of all laws authorizing death as a punishment, submits the following report.

Profoundly aware of the gravity of the subject, the committee has approached its task with the most earnest desire to understand, and to present correctly to the Legislature, the full force of the arguments and evidence bearing upon it—arguments drawn from revelation, reason, and experience alike. The committee has endeavored to lay aside prejudice, and to set aside those natural feelings of sympathy and sensibility which, however common to all, ought not to intrude into the chambers of legislation when a subject of such vital consequence to human life is under consideration.

The portion of the Governor's message referred to the committee is worth quoting at length:

Sixteen convictions for murder have been reported to me within the last two years. Of these, one conviction was reversed on appeal; one convict was pardoned because, though he had pleaded guilty, the court certified he was insane when the crime was committed; three sentences were commuted to life

imprisonment on the grounds of doubt about the justice of the conviction or of mitigating circumstances; nine have suffered the penalty prescribed by law; and two are now awaiting the same fearful punishment. While many citizens deny the absolute right of government to inflict capital punishment, all agree that its too great frequency operates as an encouragement rather than a preventive of crime.

The question the Governor thus raises, whether the frequency of execution is itself a cause of crime, is, when its full implications are drawn out, nothing more nor less than the question of whether capital punishment ought to be totally abolished. If all agree that too great a frequency encourages rather than deters crime, it becomes a pressing question whether any frequency at all can serve the purpose punishment is meant to serve.

The two persons awaiting execution at the time of the Governor's message have since been put to death. Eleven persons, therefore, have been sent to their final account by the penal justice of this State within two years. Eleven times the gloomy and revolting spectacle has been re-enacted—the gathering of the law's agents and representatives around the bound and helpless man, his forced ascent of the scaffold steps, the fatal cord adapted to his neck by the reluctant hands of another human being. Eleven times the shuddering shock has run through the community, that the divine image of God, stamped upon the humanity of the murderer no less than upon that of his executioner, his judge, and his legislator, has been desecrated.

The sacred breath of life has been trampled out in the dust, and a living soul sent to a future state of which the imagination shrinks back appalled from venturing to conjecture.

The committee's conclusion, after the most mature and careful investigation it could bring to the subject, is that the punishment of death by law ought to be forthwith and forever abolished by the State of New York. The substitute proposed is life imprisonment with labor, in solitude, placed permanently beyond the reach of executive clemency. The committee proceeds now to set out the reasons—reasons it presents as more of policy than of sentiment, of wise and severe justice rather than of compassionating mercy—which have brought it to that conclusion.

I

The Scriptural Argument Examined

The first question the committee is bound to address is the scriptural aspect of the subject. The opinion is widely held, among those who have not specifically investigated the question, that the practice of capital punishment has not only the sanction but the express command of Scripture—and this opinion is the basis of nine-tenths of the opposition one encounters, in ordinary society, to abolition. If this opinion were well-founded, if Scripture truly enjoined death as the punishment of murder in terms obligatory not only on the ancient nation to which the injunction was first addressed but on the more advanced civilization of our own age, the committee would consider its task at an end, and would not presume to go further in consulting the uncertain conclusions of human reason.

But after the fullest investigation in their power, the committee has been brought to the opposite conclusion: that so far from any such mandate being found in the pages of Holy Scripture, the very reverse is there impressed, in both its earliest and latest portions, in terms that have been too long obscured by inveterate errors of translation and application.

The Mosaic Code

The defenders of capital punishment rest their case, in the Old Testament, primarily on the Mosaic code and on the Noahic covenant. It is not disputed that the code of laws given through Moses to the Jewish people recognized, and for certain offences prescribed, the punishment of death. The authorization of death for the crime of deliberate murder is perfectly clear. But who at this day would look to that extraordinary code—framed under the most peculiar circumstances, for purposes awfully mysterious in their distant working out—as a model for the institutions of a Christian nation?

The code of Moses was hardly less sanguinary than the code of Draco, which history remembers as having been written in blood. It was framed for a particular people, in a particular century, under conditions of scarcity, danger, and constant war that no legislature of our own day has to govern, and it carries the severity those conditions produced. It is worth being specific about what the Mosaic code actually prescribed death for, since its defenders frequently cite only the murder prohibition:

Death was the prescribed penalty for idolatry; for enticing others to idolatry; for intermarriage with idolaters; for false prophecy; for witchcraft; for consulting witches; for blasphemy; for the violation of the Sabbath, including the “gathering of sticks” on the day of rest; for striking or cursing a father or mother; for being a “stubborn and rebellious son, a glutton and a drunkard”; for adultery; for incest and other offences of similar character; for kidnapping; for perjury involving life; for allowing a dangerous ox to kill someone after its viciousness was known; for a priest’s daughter’s

unchastity; for any woman's lack of chastity before marriage; for eating blood; and in general for breaking any commandment or disobeying any priestly judgment.

This catalogue is a long one. And if the authority of the Mosaic code is divine and binding upon us who live under the Christian dispensation, it is equally binding with respect to all of these offences, not merely the one of murder. Who among us would now dream of applying the death penalty to witchcraft, to violation of the Sabbath, to being a rebellious son, to adultery? The universal moral sense of all Christian nations would regard such applications as insanity. But the argument from the Mosaic code proves nothing by proving a great deal too much: if its authority extends to the murder provision, it extends to all the rest equally; and if all the rest are properly set aside as belonging to a particular people at a particular moment of their development, why should the murder provision alone be extracted and perpetuated?

There is a further point about the Jewish institution of blood vengeance that is essential to this discussion. Among the Jews, the execution of the murderer was not, as with us, an act of the society in the administration of impassioned penal justice. It was the act of the next of kin, the "Avenger of Blood," in the licensed exercise of private revenge. The Mosaic institution had direct reference to the peculiar theological idea, pervading the entire Mosaic theocracy, of defilement and expiation rather than to any principle recognized by modern civilization as the proper basis of punishment. Blood spilled worked a

pollution of the land, an “uncleanness,” which was to be purified by the sacrifice of retribution.

When we consider the conditions under which that code was framed, together with the restrictions it placed upon this private right of vengeance, the institution should be regarded as an attempt to mitigate a practice that was irrepressible rather than as the original sanction of the practice itself. It was a mitigation—the utmost mitigation practicable under those conditions—of the blood feud. It was not a model for Christian legislation two thousand years later.

The Noahic Covenant

The second scriptural authority invoked by the defenders of capital punishment is the covenant made with Noah and his descendants: “Whoever sheds the blood of man, by man shall his blood be shed.” This is presented as a universal and perpetual command binding all nations and all ages.

The committee’s analysis of this passage leads to a different conclusion. The most careful reading of the text finds in it not a command but a prophecy, a declaration of what will generally happen rather than an instruction for what must. The form of expression is identical to that used in other passages that no one reads as mandatory commands: “He who leads into captivity shall go into captivity.” “He who takes the sword shall perish by the sword.” No one argues that these passages bind any magistrate to act; they are understood as descriptions of the natural

consequences of certain courses of conduct, or as divine warnings rather than human prescriptions.

But even if the Noahic passage be taken as a command, the context explains and limits it. In the infancy of the world, after the flood, there existed no organized society capable of punishing murder by confinement. The available options were death or impunity. Under those conditions, God may have permitted the lesser evil of retributive killing to prevent the greater evil of lawless violence. The precept belongs to that moment of human history. It does not bind societies that possess every other means of addressing violent crime, including secure and permanent confinement.

The New Testament

The defenders of capital punishment occasionally cite passages from the New Testament as collateral support for their reading of the Old, though these passages are fewer and less directly on point. The committee has examined the principal ones, and finds that on careful reading they rather support the abolitionist position than undermine it.

Paul's statement in Romans 13 that the governing authority bears the sword as "the servant of God" to execute judgment on wrongdoers is the most frequently invoked. But that statement follows immediately upon Paul's injunction, at the close of the preceding chapter, that we must "never avenge ourselves, but leave room for the wrath of God, for it is written, Vengeance is mine, I will repay, says the Lord." Vengeance belongs to God. The passage that is cited to authorize human execution is immediately

preceded by a passage that reserves vengeance to the divine. The two cannot be read in isolation from each other.

The thief on the cross, who acknowledges that he receives a “just” punishment in his execution, is sometimes cited as a New Testament endorsement of capital punishment. But this proves only that death was the punishment prescribed by Roman law, not that such prescription is approved by the gospel. The same logic would make the Roman use of crucifixion for slaves a divinely approved method of punishment.

The Character of Cain

Perhaps the strongest scriptural argument in favor of the abolitionist position is the one that its defenders most rarely discuss: the response of God himself to the first murder in human history.

Cain killed his brother Abel. God confronted him with this: “The voice of your brother’s blood cries out to me from the ground.” And then God’s judgment was pronounced. What was that judgment? Not death. Cain was expelled from the agricultural life he had known, condemned to be a wanderer, marked with a sign that would prevent anyone from killing him. God himself—the injured party, the one whose creature Abel was—declined to impose the death sentence. More than that, God actively prevented others from imposing it, declaring that whoever slew Cain would face sevenfold vengeance.

If the proper response to the first murder in biblical history is exile, labor, the torment of a guilty conscience, and divine protection of the

murderer's life from those who would avenge the victim, this seems like stronger evidence of God's will on the subject than any number of passages from the Mosaic code.

The Right of Society to Take Life

The Social Compact

Having examined the scriptural question, the committee turns to the philosophical. Does society possess the right to take the life of any of its members? If it does, from what source does this right derive?

The theory of government that has prevailed among the most enlightened political thinkers of the modern era is that of the social compact: that organized society originates in an agreement, express or implied, among its members for their mutual protection and benefit. The authority of the government thus constituted is derived from and limited by that compact. The powers it possesses are those, and only those, which the individuals who constitute it have delegated to it.

The critical question, then, is what powers individuals actually possess in the state of nature which they may have transferred to the government they created. Does any individual, in the natural condition, possess an absolute power over his own life? Does he possess a right to consent to his own destruction, or to authorize another to destroy him? The answer, on any serious examination, must be no. No rational individual, entering into the social compact, would consent to

a condition in which his life itself was subject to forfeiture for any violation of law. He enters society precisely to secure his life against destruction, not to expose it to a new risk of destruction at the hands of the government he is creating.

The Limits of Delegated Authority

The power of a government is bounded by the authority conferred upon it. If individuals possess no absolute right over their own lives—and they do not, for the very premise of the social compact is the desire to preserve life—then no assembly of individuals can delegate to a government a power that none of them singly possesses. A million people cannot collectively grant what none of them individually possesses. The right to destroy, which would in individuals be the right of murder, cannot become legitimate simply because it is exercised by the social will acting through the machinery of law.

The committee acknowledges that governments have always, in practice, claimed and exercised this power. But practice is not right, and long practice is not ancient right. The practice of slavery was universal; its universality did not make it legitimate. The practice of torture was universal; its universality did not make it right. The question of whether the state possesses the right to take life is not answered by observing that states have always taken life. It requires an examination of the foundations of governmental authority and the conditions under which the compact establishing that authority can legitimately authorize this ultimate act.

The compact theory of government, properly understood, supports abolition. A government created to preserve life, whose authority rests on the consent of people who joined together precisely to protect themselves from violent death, cannot consistently claim a general power to kill its own members as an instrument of policy. The emergency case—killing in immediate defense of another's life—is different in kind from the institutional practice of executing prisoners who are already captured, confined, and rendered harmless. The gap between these cases is one of principle, not merely of degree.

III

The Moral Effect on Society

The Corruption of Witnesses and Juries

Capital punishment does not merely fail to prevent crime. It actively produces conditions that make the prosecution of crime more difficult and less reliable. The moral revulsion that most people feel, however suppressed it may be by habit and familiarity, at the prospect of being directly responsible for the death of a fellow human being, is a constant and powerful force working against the effectiveness of the criminal justice system whenever death is the penalty at issue.

Witnesses are reluctant to testify in capital cases with the same candor and completeness they would bring to a case involving lesser penalties. The knowledge that their testimony may send a person to the gallows causes them to qualify, to hesitate, to soften, to find in memory a more charitable version of what they actually observed. This reluctance is not dishonesty; it is the natural operation of a moral instinct that the law has planted in every human heart, that instinct against becoming the instrument of another person's death.

Juries are subject to the same influence, and with even greater force. The uncertainty of conviction by jury in capital cases has grown almost into a proverb, and no experienced criminal lawyer in this State will dispute it. Even after every juror

who has expressed a principled objection to capital punishment has been removed from the panel by challenge, juries are always powerfully swayed, in their judgment as well as their feelings, by the horror of sending a man to his death. In the clearest cases, it is constantly seen that juries will not convict; the criminal, however heinous and however certain his guilt, is singularly unfortunate if an able defense counsel cannot find some point, great or small, on which to press such appeals to the hearts or the imagination of the jury as cannot be answered by the sober voice of truth and justice.

The result is a systematic distortion of the administration of justice. The penalty that was intended to be the most severe and most certain response to the gravest crimes becomes, in practice, the least certain of all penalties. Juries that would readily convict if the penalty were life imprisonment refuse to convict when the penalty is death. Defendants who are guilty, sometimes dangerously guilty, are set free because the jury cannot bring itself to impose the ultimate sanction. The community is thus exposed to greater risk from these individuals than it would have been under a system of certain non-lethal punishment.

This is not a correctable imperfection of the jury system; it is a permanent feature of human nature. The laws of God have planted the horror of directly causing another person's death too deeply in the hearts of ordinary people for any law of man to eradicate it, however that law may weaken it. And the jury that will not send a man to the gallows will often convict him of a lesser offense carrying a lesser penalty, or acquit him altogether on grounds that any candid juror will acknowledge, in private,

to be flimsy—technical deficiencies of evidence that the same juror would disregard in a case not involving death. The death penalty thus produces exactly the opposite of what its defenders intend. It reduces rather than increases the effective severity of the law's response to the worst crimes, by making conviction for those crimes less likely.

The Execution as Public Spectacle

The public execution was intended, by its architects, to convey reverence for the law and to deter, by vivid example, those who might be contemplating similar crimes. The committee's examination of the evidence reveals that it accomplishes neither purpose, and accomplishes instead the reverse of both.

Far from inspiring reverence for the law, executions have been documented, repeatedly, to be occasions at which crime is committed. It is a well-established observation that pickpockets regularly work the crowds that gather to watch hangings, and are active at the very moment when the crowd's attention is fixed on the scaffold. The Ordinary of Newgate, the prison chaplain who attended condemned men to their deaths for decades, testified before a parliamentary committee that executions produce, in their spectators, "shock and horror at the moment, upon the inexperienced and young; but immediately after, forgetfulness altogether." Among older criminals, the effect was even less: they regarded the condemned man's fate as simply bad luck, no different from their own risks, and returned to their occupations unimpressed.

The committee heard testimony from a clergyman of this city who described a meeting in which the question of the deterrent efficacy of executions was under discussion, when a newspaper arrived carrying an account of the recent execution in England of two persons convicted of pickpocketing. Forty arrests for that same crime were made in the crowd that gathered to watch. The thieves went to work while the two men hanged above them, and the hanging was the warning the crowd had supposedly come to receive.

More alarming still are the documented cases of persons who first conceived the idea of committing a crime while watching an execution for that very crime. The banker Fauntleroy, executed for forgery in 1824, is said to have first turned the thought over on his way home from an execution he had come upon by chance in the street outside Newgate, where another forger was being hanged. One of the jurors who convicted and sentenced the unfortunate Dr. Dodd to death for forgery was himself subsequently tried and executed at the same court and on the same gallows, for the same offence, within two years.

These are not isolated anecdotes. They reflect a pattern that the evidence consistently shows: the spectacle of execution does not deter, and may actively attract, those already inclined toward the crimes for which execution is the penalty. There is something in the nature of certain minds that, rather than being restrained by the threat of a grim penalty, is drawn toward it, the penalty investing the forbidden act with a fascination that the imagination cannot resist brooding upon until it

generates a temptation more powerful than the deterrent threat intended to prevent it.

The Effect on the Criminal Class

Among hardened criminals, the evidence is even clearer. Prisoners in Newgate, interviewed about the effects of executions on their own thinking, consistently reported that the prospect of death held no particular terror for them. Their characteristic responses were variants of “we must all take our chance” and “I never thought it would fall on me.” They were not deterred by what they had seen; they were not even particularly impressed. The schoolmaster of Newgate testified that in the days following an execution, a common amusement among the boys in the prison was to act out the scene—one boy playing the condemned man, another the chaplain, a third the sheriff, a fourth the hangman—sometimes while the bodies of the hanged men were not yet removed from the scaffold.

Among those whose criminal activity tends toward lesser offenses, execution may actually produce a hardening effect. Criminals who have watched friends and associates die on the gallows and have not been deterred from their own crimes have demonstrated to themselves that the threat of death is not, in practice, a barrier to conduct. Having survived that demonstration, they carry forward a certain recklessness that makes them more dangerous, not less, than they would have been had the execution not occurred.

IV

The Inefficacy of Death as Deterrence

Evidence from Parliament and the Courts

The committee has gathered extensive testimony on the question of whether the death penalty actually deters crime. This testimony comes from sources that would not ordinarily be suspected of sympathy for abolition: prison administrators, criminal court magistrates, parliamentary witnesses, and the recorded observations of those who had the most sustained contact with the criminal world.

Montesquieu had observed that highway robbery, which had been suppressed for a time by the introduction of a particularly severe punishment, returned to its former frequency shortly afterward when the severity of the punishment became familiar. He noted the same pattern with desertion from the military: the introduction of death as the penalty for desertion did not reduce the incidence of desertion, and when a later administration substituted six years' imprisonment, the rate did not increase. The experiment of substituting a non-lethal penalty for death demonstrated, in a controlled setting, that the death penalty was not necessary to maintain the same or better compliance with military discipline.

British parliamentary testimony from those with the most direct experience of the criminal justice system is even more specific. One solicitor who had practiced in the criminal courts for more than twenty years testified that “the punishment of death has no terrors for the common thief; it is much more the subject of ridicule among them than of serious deliberation.” He described a client the day before his execution who, when the solicitor offered condolences, replied with an air of complete indifference that players at bowls must expect rubbers, and characterized death as only a few minutes, a kick and a struggle, and all was over.

A London magistrate, asked by a parliamentary committee whether capital punishment had much tendency to deter criminals from crime, answered simply that he did not think it did. He then described sitting as a magistrate while three persons were brought before him for circulating forged banknotes. In the course of the investigation he discovered that the forged notes had been obtained from a room in which the body of a man named Wheller lay, a man who had been executed the preceding day for the same offence, the notes being delivered for circulation by the woman with whom he had been living.

The English one-pound banknote forgery prosecutions of the 1810s provide perhaps the clearest statistical evidence of all. During the period of these prosecutions, the Bank of England discovered forged notes in the amounts of ten thousand pounds in 1814, fourteen thousand in 1815, twenty-one thousand in 1816, and twenty-eight thousand in 1817, an almost threefold increase over four years of active prosecution and

execution. The faster the government executed forgers, the more rapidly the supply of forgeries increased. There is no cleaner refutation of the deterrence hypothesis than this sequence of numbers.

Life Imprisonment as Superior Deterrent

If the fear of death does not reliably deter, what does? The committee has found extensive evidence and argument, particularly in the work of Edward Livingston, the Louisiana legislator and criminal law reformer, that the answer is sustained, certain, and visible suffering—not the quick and sometimes almost dignified death of the scaffold, but the unremitting, perpetual, laborious imprisonment that offers no escape and no relief.

The committee puts this question plainly to every member of the Legislature: if you were to present to any criminal contemplating a grave crime the choice between being sentenced to death and being sentenced to life imprisonment at hard labor, in solitary confinement, with no possibility of pardon or release, which fate would he prefer? The answer is not in doubt. Every criminal who has encountered the question answers it the same way: give me death rather than that. The very opponents of this reform, who exclaim against the cruelty of a “philanthropy” that would spare the criminal from death only to plunge him into such a fate, make precisely the argument for the committee’s position. They concede, by their objection, that life imprisonment is the more feared of the two penalties.

Livingston's analysis of this point is worth developing at some length. The passions that drive men to great crimes, he observes, are not the passions of rational deliberation but of the moment: ambition, avarice, rage, desperation. A man maddened by a sense of intolerable insult, or driven by consuming greed, or goaded beyond endurance by accumulated injury, is not, at the moment of decision, performing the rational calculation that the deterrence theory assumes. What he may be able to feel, even in the grip of these passions, is the prospect of a specific and concrete suffering more powerful and more durable than any he has yet experienced. Life imprisonment at hard labor, in isolation from every person and pleasure that gave his former life its meaning, is such a suffering. It speaks to the passions rather than to the reason, and it speaks to them in terms they can hear.

There is another dimension to the deterrent comparison. The certainty of punishment matters more than its severity. A criminal who knows with near-certainty that he will face a long imprisonment is more deterred than one who knows there is a significant chance of acquittal followed by the small chance of death. And the uncertainty of conviction in capital cases, as the committee has already shown, is very high. Weighing the severity of a punishment against the likelihood of ever suffering it, the criminal has less to fear under a capital system than under a system of certain but non-lethal punishment. The death penalty, by making conviction less probable, reduces the deterrent effect of the criminal law rather than increasing it.

V

The Occasional Execution of the Innocent

All human judgment is fallible. This is not a contested proposition; it is the premise of every system of appellate review, of every doctrine allowing the modification of sentences, of every provision for the correction of judicial error. Legal systems have always been designed, however imperfectly, on the assumption that the judgments they produce will not all be correct, and that some mechanism must exist for identifying and remedying the incorrect ones.

The death penalty is absolutely incompatible with this premise. An executed person cannot be exonerated. An innocent person killed by the state's machinery cannot be restored to life, cannot be compensated, cannot be given back what was taken. The only form of remedy available, the posthumous acknowledgment that the execution was wrong, is an acknowledgment that comes too late to do the person killed any good, and serves primarily to multiply the injustice by adding the acknowledgment of irreparable error to the original act.

That innocent people have been executed is not a hypothesis but a fact of historical record. In every period of active capital punishment, in every jurisdiction, the evidence of wrongful execution accumulates. The committee has been informed of

specific cases, in this State and in England, in which executions were carried out on perjured testimony, and in which the perjury was discovered only afterward, in some cases the perjurer having fled the jurisdiction before justice could reach him, leaving behind the death of the person his false testimony had condemned.

Edward Livingston, whose work on criminal law reform the committee has relied upon throughout this Report, witnessed such a case directly. He observed a condemnation under what he believed to be a false construction of the law or perjured testimony, a sentence that would have been reversed, he writes, if the unfortunate sufferer had remained within the reach of mercy. He heard the prisoner's earnest asseverations of innocence, made in tones that no art could imitate, and listened with awe to what he describes as a "dreadful adjuration," the prisoner summoning his false accuser and mistaken judge to meet him before the throne of God. The perjury was discovered; the witness fled; the prisoner was dead.

Lafayette, speaking in the French Chamber of Deputies in 1830, put the matter with characteristic directness: "Till the infallibility of human judgments shall have been proved to me, I will persist in demanding the abolition of the punishment of death." The committee can add nothing to this formula. Infallibility of human judgment has not been proved; it cannot be proved; it is contrary to all experience and to every principle of jurisprudence. Therefore the punishment of death cannot be justified by any system of justice that acknowledges, as all serious

systems do, the fallibility of those who administer it.

There is a further practical consequence of the occasional execution of the innocent that the committee wishes to note. Every known instance of a wrongful execution casts doubt, in the public mind, on the entire system of capital justice. A single innocent man executed is remembered long after twenty merited executions are forgotten. When such an event becomes known, the best impulses of the public, its horror at the destruction of innocent life and its indignation at the failure of the legal system to prevent it, are arrayed against the law rather than in its support. The authority of the law is damaged, not reinforced, by each wrongful execution that comes to light. And those that do not come to light, because no one continues to investigate after the sentence is carried out, are an unknown and unknowable addition to the toll.

VI

Ancient Usage and the Progress of Reform

It is sometimes urged in behalf of capital punishment that the ancient and universal usage of all nations speaks in its favor. The committee will not spend much time on an argument whose legitimate extension would require the restoration of idolatry and human sacrifice in religion, of despotism in government, and of torture in jurisprudence. If ancient and universal usage is the standard of legitimacy, these practices have stronger claims than capital punishment, for they were more widely practiced and more durably maintained.

The history of human progress is a history of the slow and successive conquest of reason over error. The strongest resistance that error has always made against reform is the appeal to the authority of venerable antiquity. This has been the argument against every amelioration of criminal law that we now celebrate as progress. Torture was ancient and universal before it was abolished. The burning of heretics was ancient and universal. The practice of executing people for theft, for debt, for dozens of offences now treated as misdemeanors or not crimes at all—all of this was ancient and universal before it was reformed away. The appeal to antiquity has never yet established the legitimacy

of any practice that reason and experience condemned.

In England, at the beginning of the present century, a very great number of separate offences—by the common reckoning of the reformers, above two hundred, and by some counts nearer three hundred—carried the death penalty. That number has since been reduced, by successive legislative reforms, to a very small fraction of what it was. Each of these reductions was resisted with the argument that the practice was ancient and had served its purpose; and each reduction has been followed, not by an increase in the offences thus affected, but by improvements in the administration of justice. The committee is unaware of any proposal, in any jurisdiction that has reduced the scope of capital punishment, to restore the penalty to the offences from which it was removed. The reductions have been universally regarded, after the fact, as improvements. What reason can there be to suppose that the completion of this process, the removal of capital punishment from the last remaining offences, would produce different results?

The State of New York has itself been in the vanguard of this progressive reform. The number of capital offences recognized by our law has been steadily reduced over the course of the State's history, and each reduction has been accompanied by improvement rather than deterioration in public order. If we had restored capital punishment to those offences from which we removed it, public opinion would regard us as having returned to barbarism. We see no reason why the extension of

the same reform to its logical completion should be regarded differently.

The specific objection to change, that it is untried and therefore dangerous, is fairly answered by Livingston: all punishments are but experiments to determine what will best prevent crime. The punishment of death has been tried for six thousand years, across the full variety of forms that human ingenuity could devise, in every culture and legal system. And by the admission of its own defenders, it has not succeeded. The more severe and spectacular the execution, the more crime has followed it. The experiment has been run; it has failed; the evidence has accumulated. What is proposed is not a new and untried experiment but the abandonment of an old and failed one.

VII

The Harmony of Mercy and Justice

The committee has endeavored throughout this Report to present the case for abolition as a matter of policy, of evidence, and of justice rather than of sentiment. The Legislature is not a court of appeals to human feeling but a body charged with the administration of law for the public good, and the committee has attempted to address it in those terms. It therefore refrains, now that its argument is substantially complete, from dwelling at length on the agonies of the families and friends of the condemned, the parents, brothers, wives, and children upon whom the shame and grief of execution falls as heavily as upon those who die. The case has been made without recourse to these considerations, and the committee trusts it is the stronger for it.

But having said this, the committee wishes to challenge the assumption that mercy and justice are distinct and potentially opposed qualities, that the abolitionist argument is an appeal from justice to mercy, from the requirements of reason to the promptings of sentiment. This distinction, the committee believes, is false. Justice and mercy are not antagonists. They are twin aspects of a single truth.

Franklin put the point simply: "The virtues are all parts of a circle. Whatever is humane is wise;

whatever is wise is just; and whatever is wise, just, and humane will be found to be the true interest of states." Humanity and reason are never ultimately at variance with each other. Nothing that is contrary to the principles of eternal justice can be sustained by any argument of real utility. The abolition of capital punishment is just, in the sense that it removes from the law a practice that lacks adequate foundation in right and produces demonstrable harm. It is also humane, in the sense that it prevents the deliberate destruction of human beings who bear the image of God no less than their executioners do. And it is wise, in the sense that it will improve the administration of criminal justice, increase the certainty of conviction, and produce a more effective deterrent against serious crime.

These three qualities—just, humane, and wise—are not in tension with each other in this case. They point in the same direction. The committee has found, in the course of its work, that every serious examination of this question arrives at the same place from whichever side it begins, and that the moral examination arrives there last and hardest: a society whose legal system maintains the practice of deliberate killing corrupts itself in ways it does not fully recognize, until the capacity for mercy that is the highest expression of civilized life has been so habituated to death that it no longer recognizes what it has lost.

The committee is not unaware that this reform will face opposition: from those who believe, however incorrectly, that Scripture commands the practice; from those who have not examined the deterrence evidence; from those who confuse the vengeance that is natural to the human heart with

the justice that is the law's proper object; and from those who simply find it difficult to believe that a practice so ancient and so universal can be wrong. To all of these the committee commends the evidence and arguments it has assembled. It trusts that those who differ with its conclusions will at least offer a satisfactory reply to its reasoning—for the subject is too important, the lives at stake too precious, and the risk of irreversible error too great, for the argument to be settled by anything less than the full force of careful thought.

CONCLUSION

Summary of the Argument

The committee offers the following recapitulation of the leading conclusions of this Report.

Scripture does not require the death penalty. The authority of the Mosaic code, invoked to justify capital punishment for murder, is equally authoritative for practices—executing witches, stoning Sabbath-breakers—that no Christian nation would now contemplate. The Noahic covenant is properly read as a description of consequences rather than as a legislative command. The weight of the New Testament, read as a whole, points toward mercy, forgiveness, and the sanctity of human life. The character of God's response to the first murder in the biblical narrative is not death but exile and conscience. The scriptural argument for capital punishment, examined fully, fails.

The right of society to take life cannot be derived from the social compact. The compact is made precisely to protect life from violent destruction. No individual enters it with an unconditional power over his own life to transfer to the government he is creating. A government cannot possess, by delegation, what none of its constituent members individually possessed. The power to kill a captured and confined human being as an instrument of policy is not among the legitimately delegated powers of a government created to preserve life.

Capital punishment does not effectively deter crime. The evidence from the criminal courts, from parliamentary testimony, from the records of criminal behavior at executions, and from the comparative history of jurisdictions that have modified or abolished the penalty, consistently shows that the threat of death does not reliably arrest those impulses—of passion, desperation, or recklessness—from which the gravest crimes proceed. The certainty of sustained, visible, permanent suffering, the fate of the person imprisoned for life, deters more effectively than the prospect of a brief death. The death penalty, by making conviction less certain, reduces the expected severity of the law's response to capital crimes rather than increasing it.

Capital punishment produces systematic injustice. It makes witnesses reluctant to testify. It makes juries reluctant to convict. It allows dangerous criminals to escape punishment or to plead to lesser charges, returning them to society less securely confined than they would have been under a non-lethal system. It corrupts the moral imagination of society by normalizing the deliberate destruction of human life. And it creates, inevitably and irreparably, the occasional execution of persons who are innocent, an error that no subsequent act of justice can undo.

The proposed substitute—imprisonment for life at hard labor, in solitude, beyond the reach of executive clemency—accomplishes every legitimate goal of criminal justice. It permanently removes the offender from society. It provides a punishment genuinely feared by those who might contemplate serious crime. It allows for the

correction of wrongful convictions. It is consistent with the foundation of governmental authority in the social compact. And it is consistent with the teachings of Scripture, with the demands of justice, and with the requirements of mercy, which are, when properly understood, the same requirements.

The State of New York has the honor and the opportunity to complete the progressive reform of criminal law that every civilized nation is in the process of accomplishing. The abolition of capital punishment from its remaining few applications is the logical culmination of a series of reforms that this State, like every other, has already substantially made. There is no rational stopping point between the reduction of capital offences from hundreds to a handful, and the reduction from a handful to none. The committee recommends the bill that accompanies this Report, and prays that the Legislature will give the argument the consideration that the gravity and sacredness of the subject demands.

DEFINITIONS AND TERMS

John L. O'Sullivan (1813-1895): New York journalist, editor, and Democratic politician. Founder of the United States Magazine and Democratic Review, which published early work by Hawthorne, Whitman, Poe, and Thoreau. Member of the New York State Assembly 1841-1842, during which he chaired the select committee on capital punishment and produced the Report that is the subject of this volume. He later coined the phrase "Manifest Destiny" (1845) and became a diplomat and, controversially, a Confederate sympathizer during the Civil War. The Report of 1841 is his most lasting contribution to American public life.

The Select Committee: The legislative committee appointed by the New York State Assembly in 1841 to examine the Governor's message on capital punishment and to consider petitions from citizens for the repeal of laws authorizing the death penalty. O'Sullivan chaired the committee and wrote the Report. The accompanying bill passed the first procedural vote fifty-seven to fifty-two and failed the final vote forty-seven to fifty-two, the latter defeat occurring when exhaustion and late hour had depleted the chamber of the bill's supporters.

Governor William H. Seward (1801-1872): Governor of New York from 1839 to 1842, later United States Senator and Secretary of State under Lincoln. His message to the Legislature reported

the State's recent capital convictions and questioned whether the frequency of execution encouraged rather than prevented crime. That message, referred to a select committee, is the immediate occasion of this Report.

The Mosaic Code: The system of laws given through Moses to the Jewish people, recorded in the first five books of the Hebrew Bible. O'Sullivan devotes extended attention to the Mosaic code in his scriptural analysis, arguing that its authority cannot be selectively invoked for capital punishment without also applying it to the dozens of other offences—idolatry, witchcraft, Sabbath-breaking, filial disobedience—for which it prescribed death and which no Christian nation would now execute.

The Noahic Covenant: The covenant recorded in Genesis 9:6: "Whoever sheds the blood of man, by man shall his blood be shed." Defenders of capital punishment invoke this passage as a universal and perpetual divine command. O'Sullivan argues it is better read as a prophecy or a description of natural consequences, not a legislative mandate, and that even if it were a mandate, it belongs to the specific conditions of a world without organized law rather than to a society possessing every other means of addressing violent crime.

The Social Compact: The theory, associated with Locke and Rousseau among others, that organized government originates in an agreement among individuals for mutual protection. O'Sullivan uses social compact theory to argue that the state

cannot possess, by delegation from its members, any power that those members did not individually possess, and that no individual possesses an unconditional right to surrender his own life, or to authorize the government to take it, since preservation of life is the very purpose for which the compact is made.

Edward Livingston (1764-1836): American statesman, jurist, and criminal law reformer. Livingston produced comprehensive proposed criminal codes for the State of Louisiana (1821-1826) that were among the most advanced criminal law reforms in the world at the time. His work on capital punishment anticipated many of the arguments O'Sullivan makes in the Report, and O'Sullivan draws on him extensively. Livingston also served as Secretary of State and Minister to France under Andrew Jackson. His *Argument Against Capital Punishment* appears as V. 6 of this series.

Avenger of Blood: The Hebrew institution by which the nearest male relative of a murder victim possessed the right and responsibility to kill the murderer. O'Sullivan argues that this institution, which forms the basis of the Mosaic authorization of death for murder, was not a model of public justice but a licensed form of private revenge, an attempt to mitigate the blood feud that was irrepressible in the social conditions of the time, rather than a foundation for modern criminal law.

The Ordinary of Newgate: The chaplain who attended condemned prisoners at Newgate Prison

in London, staying with them before their executions and recording their final statements. The Ordinary had unparalleled access to the criminal world and served as a source of testimony before parliamentary inquiries into the effects of capital punishment. Several Ordinaries testified that executions had no reliable deterrent effect on either the prisoners they attended or the crowds that gathered at the hangings.

Henry Fauntleroy (1784-1824): London banker executed for forgery in 1824, one of the last high-profile capital forgery cases in England. His case circulated widely in abolitionist literature, both as evidence of the penalty's indiscriminate reach and, in the anecdote O'Sullivan repeats, as evidence that the spectacle of execution can suggest the crime rather than prevent it.

Deterrence: The theory that punishment prevents crime by creating a rational calculation in potential offenders that the risk of punishment outweighs the anticipated benefit of the crime. O'Sullivan's Report anticipates the findings of modern criminology: the certainty of punishment matters more than its severity; most serious crimes are committed under conditions of passion or desperation that do not permit rational calculation; and the evidence consistently fails to show that capital punishment reduces the crimes for which it is imposed.

FURTHER READING

ON O’SULLIVAN AND THE 1841 REPORT

O’Sullivan, John L. Report in Favor of the Abolition of the Punishment of Death by Law. New York: J. & H. G. Langley, 1841. Second edition. The original text, available through Google Books and the Harvard University Library Digital Collections. The second edition includes the preface describing the bill’s narrow defeat.

Sampson, Robert D. John L. O’Sullivan and His Times. Kent, OH: Kent State University Press, 2003. The standard biography of O’Sullivan, covering his journalistic career, his role in Manifest Destiny, and the political career that produced the 1841 Report.

RELATED VOLUMES IN THE ABOLITION CLASSICS

Plato. The Apology. V. 1. Edited and modernized by Jeff Hood. Complicit Press, 2026. The founding document of the tradition O’Sullivan inhabits. His Report is, among other things, a Socratic document: it examines a universal assumption that has never been adequately questioned and finds it wanting.

Pelli, Giuseppe. Against the Death Penalty. V. 3. Florence, c. 1760–1761. Recreated, edited, and modernized by Jeff Hood. Complicit Press, 2026.

The earliest known systematic abolitionist treatise in Western history, predating both Beccaria and O'Sullivan. The structural parallels between Pelli's thirteen numbered proofs and O'Sullivan's sections of argument are striking.

Rush, Benjamin. Considerations on the Injustice and Impolicy of Punishing Murder by Death. V. 4. 1792. Edited and modernized by Jeff Hood. Complicit Press, 2026. The founding document of American abolitionism, written fifty years before O'Sullivan's Report. O'Sullivan stands in direct continuity with Rush.

Beccaria, Cesare. An Essay on Crimes and Punishments. V. 5. 1764. Edited and modernized by Jeff Hood. Complicit Press, 2026. The foundational Enlightenment argument for abolition. O'Sullivan knew Beccaria and works within the tradition his essay established.

Livingston, Edward. Argument Against Capital Punishment. V. 6. 1833. Edited and modernized by Jeff Hood. Complicit Press, 2026. The single source O'Sullivan draws on most heavily. Livingston's account of the passions that drive great crimes, and his argument that perpetual imprisonment is the more feared penalty, run through Sections IV and V of the Report.

Romilly, Samuel. Observations on the Criminal Law of England. V. 7. 1810. Edited and modernized by Jeff Hood. Complicit Press, 2026. The English parallel to O'Sullivan's work: a legislator making the case for reducing capital offences to a parliamentary audience. O'Sullivan relies on

Romilly and on the parliamentary investigations that followed him.

Montagu, Basil. The Opinions of Different Authors Upon the Punishment of Death. V. 8. 1809–1813. Edited and modernized by Jeff Hood. Complicit Press, 2026. The anthology that assembled the English case against the gallows and shaped the debate O’Sullivan inherited.

Spear, Charles. Essays on the Punishment of Death. V. 10. 1844. Edited and modernized by Jeff Hood and Kat Bodrie. Complicit Press, 2026. The American argument that follows O’Sullivan’s by three years, carrying the case out of the legislature and into the churches.

Darrow, Clarence. An Eye for an Eye. 1905. Edited and reset by Jeff Hood. Complicit Press, 2026. The companion fiction volume. O’Sullivan’s Report provides the legislative argument; Darrow’s novella provides the human face of the condemned man to whom the argument applies.

ON AMERICAN CRIMINAL JUSTICE HISTORY

Banner, Stuart. The Death Penalty: An American History. Harvard University Press, 2002. The definitive historical account of capital punishment in the United States. Covers the antebellum reform movement of which O’Sullivan’s Report was a part, and traces the argument’s long aftermath.

Masur, Louis P. Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865. Oxford University Press, 1989. Examines the period during which O'Sullivan was writing, tracing how public attitudes toward execution changed and how the reform movement he contributed to eventually succeeded in moving executions from public spectacle to private ceremony.

Friedman, Lawrence M. Crime and Punishment in American History. Basic Books, 1993. A broad history of American criminal law that situates O'Sullivan's reform effort in the context of the antebellum reform movement more generally.

CONCLUSION

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

— LIVINGSTON

Between Montagu's first volume and O'Sullivan's report, the argument against the death penalty acquired everything it would need for the next two hundred years except one thing: a majority.

It had the philosophy, inherited from the last omnibus. It now had the statistics — committals against executions, decade by decade, in England and France and the American states. It had the legal analysis: arbitrary discretion, jury nullification, the impossibility of correcting a mistake. It had the theology, worked through verse by verse. It had the literature. It had committees, societies, pamphlets, and men in Parliament and in state legislatures who would take the vote and lose it and take it again.

What it did not have — what it has never had in this country — was the moment when the counting stopped mattering less than the killing.

Romilly is the figure I keep returning to, because his career is what this work actually feels like. He rose in the House of Commons and asked that stealing five shillings from a shop should stop being a hanging offense. The Lords refused him. He asked again. They refused him again. He carried a handful of small repeals across a decade of defeats, and he did not live to see the Bloody Code fall. The men who ran that code were not monsters. They were distinguished lawyers who had spent their lives inside a system and could not imagine the sky staying up without it, and Dickens will name that failing exactly, five years after this omnibus closes: a criminal judge is an excellent witness against the punishment of death and a bad witness in its favor.

I have sat across the table from that man in every state I have worked in. He is courteous. He is competent. He has seen more of this than I have. And he cannot get outside it, because the thing I am asking him to abolish

is the thing he has spent thirty years administering well.

The other lesson of this omnibus is harder, and I put it here because the series is about to enter its most hopeful decade and I do not want the hope to be cheap. Every victory recorded in these six books was a narrowing. Fewer capital offenses. Better juries. Degrees of murder. The reformers won those fights honestly and they were right to fight them, and each one made the surviving gallows more respectable. By 1841 England hanged for murder alone, and hanged for it more certainly than ever. The list got shorter and the rope stayed.

O'Sullivan's report is where the American movement stops asking for a shorter list. Read the last part of it, the summary of the argument, and notice what he is requesting: not fewer executions. None.

The next twenty-five years are the ones where that demand comes closest to winning.

INDEX

*Page numbers refer to the
sequential pages of this omnibus,
not to the internal pagination of
the individual volumes*

B

Beccaria, Cesare, 17–19, 22, 33–36, 68, 72,
85, 126, 218, 221, 266, 267, 276, 329
Bentham, Jeremy, 17, 18, 20, 23, 56–59, 70,
72, 85, 126, 222, 266
Blackstone, William, 17, 18, 22, 30–32
Bloody Code, 22–329 passim

C

Cain, mark of, 274, 298
Colquhoun, Patrick, 16, 17, 19, 20, 23,
46–50, 68, 70

D

deterrence, 22–327 passim
discretion, arbitrary, 27–124 passim

E

England, criminal law of, 19–329 passim
Evil Prison, 43, 59, 175, 177, 181, 184, 187,
190, 193, 198, 204, 209

F

forgery, 47, 67, 90, 237, 306, 309, 310, 327
France, 69, 107, 123, 176, 179, 204, 207, 218,
222, 244, 249, 263, 282, 313, 326

G

Goldsmith, Oliver, 17–20, 23, 53–55
guillotine, 176, 179, 180, 204, 249

H

Howard, John, 17–20, 23, 60–62, 70, 72
Hugo, Victor, 168, 173, 174, 176–182, 195,
202, 204–209, 222

I

innocence, execution of, 35, 106, 107, 109,
123, 218, 245, 246, 251, 261, 266, 277,
281, 312, 314, 323
Iran, 173, 174, 176, 177, 180, 182, 187, 201,
202, 204–209

J

Johnson, Samuel, 17–19, 22, 26–29, 256,
257
juries, nullification by, 19–322 passim

L

Livingston, Edward, 74–329 passim
Louisiana, 126, 213, 222, 223, 233, 253, 257,
263, 265, 310, 326

M

Mackintosh, James, 68
Montagu, Basil, 14, 15, 18–22, 24, 25, 67,
68, 72–74, 139, 165, 167, 330
Montesquieu, 17, 19, 23, 40–42, 69, 73, 266,
308
Mosaic law, 64, 65, 274, 281, 282, 293–295,
299, 321, 325, 326

N

Newgate, 282, 305–307, 326
New York, legislature of, 208, 209, 213,
222, 223, 255–257, 272, 273, 276, 277,
279, 280, 284, 287, 289, 292, 316, 323,
324, 328
Noahic covenant, 274, 281, 294, 296, 297,
321, 325

O

Old Bailey, 92, 96, 112, 124
O'Sullivan, John L., 272, 276–285, 287,
324–331

P

Paley, William, 17–126 *passim*
Parliament, 68–330 *passim*
penal code, Louisiana, 40, 57, 158, 180, 204,
228
pickpockets and shoplifting, 27, 48, 67, 81,
82, 85, 93, 94, 96, 102, 103, 113, 116, 122,
236, 305, 306
Place de Grève, 176, 180, 182
prisons and imprisonment, 18–329 *passim*
public executions, 62, 160, 182, 201, 205,
236, 237, 242, 305

R

Romilly, Samuel, 68–330 *passim*
Rush, Benjamin, 73, 221, 267, 329

S

scaffold, the crowd at, 102, 107, 108, 141,
149, 152, 153, 160, 162, 176, 202, 237,
305, 306, 327
scripture, appeals to, 24, 40, 63–65, 71, 161,
184, 252, 274, 276, 280–282, 293, 296,
298, 300, 319, 321, 323, 325
Seward, William, 276, 279, 324
Shelley, Percy Bysshe, 132–167 *passim*
slavery, 23, 34, 69, 220, 263–265, 301
social contract, 31–33, 68, 219, 227, 260,
274, 281, 300, 301, 321, 323, 325

T

transportation, penal, 31, 47, 48, 52, 57, 62,
85, 90, 102, 113, 117, 122

V

vengeance, 30–32, 63, 143, 155, 156, 216,
219, 249, 257, 295–298, 319, 326

THE ABOLITION CLASSICS

The complete series, gathered in five omnibus volumes.

I·Origins 250 BCE – 1631

V. 1 Socrates, *The Apology*

V. 0 *Before Abolitionism* — Arguments Against Death, 250 BCE to 1631

V. 2 Lactantius, *On the Sacred Animal*

II·The Enlightenment 1760 – 1799

V. 3 Giuseppe Pelli, *Against the Death Penalty*

V. 5 Cesare Beccaria, *An Essay on Crimes and Punishments*

V. 24 Bentham, Robespierre & Haughton, *An Excerpt, a Speech & a Pamphlet*

V. 4 Benjamin Rush, *Considerations on the Injustice and Impolicy of Punishing Murder by Death*

III·The Age of Reform, Part 1 1800 – 1841

V. 8 Basil Montagu, *The Opinions of Different Authors upon the Punishment of Death*

V. 7 Samuel Romilly, *Observations on the Criminal Law of England*

V. 20 Percy Bysshe Shelley, *On the Punishment of Death*

V. 9 Victor Hugo, *Under Sentence of Death*

V. 6 Edward Livingston, *Argument Against Capital Punishment*

V. 12 John L. O'Sullivan, *Report in Favor of the Abolition of the Punishment of Death by Law*

IV·The Age of Reform, Part 2 1842 – 1870

V. 10 Charles Spear, *Essays on the Punishment of Death*

V. 22 Charles C. Burleigh, *Thoughts on the Death Penalty*

V. 23 Charles Dickens, *Capital Punishment*

V. 25 Frederick Douglass, *Capital Punishment Is a Mockery of Justice*

V. 11 Fyodor Dostoevsky, *Crime and Punishment*

V. 13 Marvin H. Bovee, *Christ and the Gallows*

V·The Modern Era 1889 – 1925

V. 15 Adeline Sergeant, *A Life Sentence*

V. 18 Oscar Wilde, *The Ballad of Cummins Prison*

- V. 16 Paul Laurence Dunbar, *The Sport of the Gods*
V. 14 Clarence Darrow, *An Eye for an Eye*
V. 21 Gabriel Alomar, *The Death Penalty*
V. 17 Raymond T. Bye, *Capital Punishment in the United States*
V. 19 Theodore Dreiser, *An American Tragedy*

The Rev. Dr. Jeff Hood is an author, activist and death row advocate. He is the founder of the Execution Intervention Project, a 501(c)(3) organization dedicated to the abolition of the death penalty, and serves as Dean of The New Theology School, where he holds the Rev. Charles Moore Professor of Prophetic Theology chair. He has served as spiritual advisor to condemned people across the United States and has witnessed thirteen executions.