

1889

A Historical Sketch of Capital Punishment with a Plea for Its Abolition

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Recommended Citation

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A N H I S T O R I C A L S K E T C H

O F

C A P I T A L P U N I S H M E N T

W I T H

A P L E A F O R

I T S A B O L I T I O N

James D. Pardee.

Cambyses flayed for bribery one of his judges and had his skin placed in the chair of judgment, that the others might sit in the same skin and take heed of the warning. The Persians were not therefor averse to the exercise of capital punishment. From their despotic form of government and the superior position which the State held relatively to that of the subject, we might also conclude that they were very sanguinary in their punishments. What the capital offences were, we do not know, but they probably included all, even to the most trifling.

The Greeks were also severe, at times, in their legal punishments. The general plan of their criminal law was, that any crime, even down to theft and robbery, which was committed with deliberation and premeditation was punishable with death; while crimes committed under a sudden impulse, or in a drunken brawl, though murder itself, could be atoned for by satisfying the injured or his relatives. The earlier Greek codes were more bloody than the later. Draco justified the extreme hardship of his laws, which were said to have been "written

in blood", by saying: "Small offences deserved death and that he knew of no severer punishment for great ones." At all times the state had the power of life and death over its subjects.

In Rome we find nearly the same condition of affairs with respect to punishments as we found in Greece. The State here also exercised the power of life and death over its subjects. Capital punishment was no less a potent factor to the Roman State than the guillotine was to Robespierre. Sulla's idea and method of exercising the civil service, was, however, peculiar to himself. He cut off the heads of his political enemies and piled them up on his porch. The twelve tables contained the following offences; "Libels and insulting songs shall be punished by death:" "Whoever by night furtively cuts or causes to be grazed, crops raised by ploughing shall be devoted to Ceres, and, if an adult, shall be put to death;" "Whoever burns as a stack of corn near a house maliciously shall be ~~put~~ **beaten** and burnt." "If a man is killed while committing theft by night, he is lawfully killed." "A thief

taken in the act, if a slave, shall be thrown from the Tarpean Rock." "A patron who cheats his client

is devoted to the Gods and may be killed by any one;"

"Whoever gives false evidence must be thrown from the Tarpean Rock;" "Whoever maliciously kills a free man

must be put to death;" and "No one is to make a disturbance at night in the city under pain of death."

In later times the Lex Julia Majestates punished all crimes against the State by death. By the "Lex Julia

De Adulteriis a father might kill his married daughter and her accomplice if taken in the act of adultery, but

the husband could not". By one of Justinian's Novels

"A man might kill any one found in company with his wife after having been thrice warned." "The Lex Cornelia

punished homicide in the time of the Republic by confiscation of goods and imprisonment on an island; under

the Antonines by death." "Killing by negligence did

not come within the Lex Cornelia. "There was no special

punishment for poisoners or homicides unless the person

killed was the parent of the offender, in which case he

was burnt, that punishment having been substituted for

the ancient one of drowning in a sack with a cock, snake and dog." The punishment of incendiaries was burning. Sacrilege or the stealing of public or sacred things was punished by death, burning or throwing to the wild beasts. Selling a free man as a slave was first punished by fines, afterwards by death. "The Digest says that the breach of the banks is punished at first by the mines and afterwards by burning alive." Those who plundered dead bodies were punished by death. "By a law of Hadrian's, stealing a horse or ox or four pigs or ten sheep was punished by the mines, if the offender was armed capitally."

Coming now to the English law on the subject, we find the law in the early Anglo-Saxon times very indefinite and carelessly executed. One of the laws of Ina says, "If a thief be seized, let him perish by death or let his life be redeemed by his wer (worth)" A law of Ethelstan was to the same effect. The laws of Cnut say housebreaking and arson and open theft and open worth and treason against a lord are by the secular law bot-less" (Capital offences). In general the Anglo-Saxon crimes of "plotting against the king's life or

or harboring of exiles or of his men",plotting against his lord," "fighting in a church or in the king's house," "breaking the king's peace," "offences against religion and morals," "different forms of in chastity," "making offerings to devils, " "homicide," "different kinds of wounds," "rape," "indecent assaults", "theft and robbery" were punished upon the first commission by fines,mutilation or flogging,on the second,by death.

In William the Conqueror's reign,offences formerly punished by death were punished mostly by mutilation.

Capital punishment existed in England at all times,except perhaps in early periods during the interval when no king was on the throne,for then there was no one against whom the offence could be committed. From Richard First's time down to 1826 capital punishment was the statutory penalty for all treasons and felonies,excluding only misdemeanors and a very few felonies. Treason has varied at different periods as to what offences it included. Edward Third made it include seven kinds,ranging from that of taking the king's life down to counterfeiting the king's money and slaying his high officers. Henry

Eighth increased the number ~~to~~ twenty-five, and held seventy two thousand public executions during his reign of thirty six years, and yet he was popular with the people. Edward Sixth changed treason back to what it was under Edward Third. This apparently total destruction of Human life was ameliorated somewhat by what is known as "benefit of clergy" Benefit of clergy in short, was the process of taking the convicted person, if he was a clergyman, before a bishop and jury of twelve clerks of the christian court. There he took oath as to his innocence of the crime, although perhaps convicted on his own confession, and several compurgators on their oath swore he spoke the truth. The accused was generally acquitted, if otherwise was made to do penance. The clergymen were about the only ones that could read. Reading then became the test as to whether a person was entitled to take benefit of clergy. When printing came into use the number of persons that could read was increased. Finally it was decided that reading was not a test of guilt, so all subjects were allowed the benefit. The clergy could take advantage of it for

any number of felonies; but the laymen, upon the second offence, were branded on the hand, as a sign that they had been purged of all felonies. Benefit of Clergy expended down to our own history. It was recognized in Massachusetts, North and South Carolina and Indiana. The privilege was effectively claimed upon the trial of the British soldiers in Boston in 1770 when upon a charge of murder the jury rendered a verdict of manslaughter, whereupon the prisoners prayed for a clergy, which was allowed, and they were each branded in the hand and discharged. Benefit of Clergy was thus a statutory pardon. So much for the persons entitled to clergy. Certain offences, however, were never admitted to clergy, which were; high treason against the king, highway robbery and willful burning of houses. Other offences were, from time to time, added to the list. During the reign of "the English Justinian", clergy was taken away in all cases of murder, burglary, housebreaking and horse stealing. Henry Eighth deprived of clergy murder committed in church, petty treason, robbing churches and chapels and piratical offences. In Elizabeth's reign,

clergy was abolished in case of felonious taking of any money, goods or chattels without ^{the owners} ~~his~~ knowledge, rape, abduction with intent to marry, stealing clothes off the racks and stealing the king's stores. In nearly every reign that followed some offence was deprived of clergy. When Blackstone wrote, 160 felonies were without benefit of clergy. In some cases felony without clergy was not necessarily punished by death but left to the discretion of the judge. An act was passed in 1827 abolishing benefit of clergy in all cases. Standing alone, this would have made every case of stealing above a shilling punishable by death. It was therefore provided that no one convicted of felony should suffer death except for felonies excluded from benefit of clergy or made punishable by death by subsequent statutes. Along in 1827 several acts were passed, punishing by death, robbery with force, sacrilege, burglary, housebreaking, stealing to the value of five pounds, stealing horses, sheep and other cattle, arson, destroying houses, ships &c. murder, attempts to murder by poisoning, stabbing, shooting &c., sodomy and rape. These acts were considered

excessive,so by a series of acts down to 1861,nothing was punished by death except treason,murder,piracy and setting fire to dock yards and arsenals. Some agitation has been made about abolishing capital punishment,but nothing so far has succeeded. Such,then,is the law in England with respect to capital punishment.

In America,the law on the subject has always tended towards the side of mercy. And to-day aside from the question of the abolition of capital punishment, the question is how to mitigate the rigors and hardships of an execution. On the statute books of Plymouth and Massachussets Bay Colonies we find the capital crimes of treason,rebbellion,murder,witchcraft or compact with the devil,arson,adultery,rape,sodomy,blasphemy,idolatry &c. In Massachusetts Bay Colony,robbery and burglary for the third offence,were capital. Theft of property worth forty shillings was made capital in 1736,but abolished in 1784. These laws are probably the most sanguinary of any ever passed in America,although South Carolina practiced under the laws of the thirteenth century till 1846. The first step taken towards the advancement

of the criminal laws of America was by Pennsylvania in the year 1682. All capital offences were then abolished except malicious murder. England again, in 1718, forced its own code upon her, and the legislature in 1794 passed a law, the first of the kind in this country, making a division of murder into degrees, and the entire rejection of capital offences except murder in the first degree. Maryland followed Pennsylvania in 1804 with respect to the division into degrees, but left the infliction of death to the discretion of the judge in all cases except murder in the first degree. The same division was followed by Virginia in 1819, and by Ohio in 1822. The other states of Maine, New Hampshire, New Jersey, Alabama, Mississippi, Louisiana, Tennessee, Missouri and Michigan followed in quick succession. New York divided murder into two degrees in 1860, - the first punishable by death. At present all of the states have the division of murder, and Wisconsin and Maine have no executions. Iowa abolished capital punishment from 1872 to 1878. Maine abolished it twice and Michigan for a time. The constitutions of New Hampshire, Maine and Maryland, declare that no sanguinary laws shall be passed. Several state Con-

II.

stitutions declare that unusual punishments shall not be inflicted; others, that all penalties and punishments shall be proportional to the offences. And several others provide that reformation, not vindictive justice is the principal of the criminal law. Capital punishment exists therefore in a majority of the states, but only for treason and premeditated murder. ^{if you please,} Granted that that is a historical synopsis of capital punishment, let us next consider the right to and the expediency of the death penalty. A crime has been defined to be any "act to which the law attaches a punishment without reference to its moral turpitude", and a "punishment inflicted by the state is some pain, loss or calamity inflicted upon an offender for some crime committed." From this we can draw the corollary that capital punishment is loss of life inflicted upon an offender for a crime. It is conceded that states have the right to punish for all crimes by a punishment less than capital, for without that right human laws and institutions would be idle and vain. It acquires the right from the nature and character of its own existence. But when it comes to the kind of

punishment, we must dissent from placing capital punishment in the same category; for instance, with imprisonment, and say the state has not the right to inflict the penalty of death. Governments may perhaps be the products of evolution, but they are the handiworks of man as distinguished from the works of nature. For that reason, they can be no more powerful than the workmen who created them, they can exercise no more rights and enjoy no more privileges than man could that made them, and bestowed upon them. Man cannot create life; neither can his government. Man can give up and receive privileges; his government can take back the privileges which it gives. Man has the power to take the life of another; weak is his government which cannot do it also. Man has not the right to take the life of another, though he has the power; neither has his government that right though its power be mighty. Blackstone says: "It is clear that the right of punishing crimes against the law of nature, such as murder and the like, is in a state of nature vested in every individual. For it must be vested in some one or the law of nature is in vain, because of no

one to execute it." "In a case of society this right is transferred from the individuals to the sovereign power;whereby men are prevented from being judges in their own cases,which is one of the evils that civil government was intended to remedy." "Whatever power therefore,individuals had of punishing offences against the law of nature,that is now vested in the magistrate alone,who bears the sword of justice by the consent of the whole community." Even if the law of nature did vest in every individual the right to punish,it would still be in vain,unless it was the duty of each individual to take the law in his own hands and punish,aside from the evils of his so doing. But the law of nature never vested that duty in each individual. Whenever the individual took the task to punish upon himself, it was through a spirit of revenge or retaliation that he did so,and not as a means to an end,to prevent crime. From the standpoint of natural science of to-day,the natural law permeating society is that,"of the survival of the fittest",which carries with it the corollary, that it is the duty of each individual to defend himself.

But wherein does this confer the right upon one to punish crimes committed **upon another**? And when the power of self defence in one has been overcome who is there left, who is bound to render justice? The government therefore could not have received the right from nature, even though, "the magistrate does bear the sword of justice by the consent of the whole community." The theory of this government is, that it is a social compact; that the individual gives up certain of his rights and privileges and receives in return certain other privileges. And from this compact the government receives the right to punish; but, as we have seen, it arises in the nature of the transaction, and is necessarily limited. The rights and privileges are corporate or contractual rights as distinguished from natural rights. For the government to receive the natural and inalienable rights of its subjects would be for it to receive the elements of its own destruction in its life principle. But the government's right to punish does not extend to the right of taking life, because it cannot receive that right. The government is inconsistent with itself when it proceeds to lay down the law that no individual can take

the life of himself nor allow any one else to take it for him;and then assumes the right in itself when it inflicts capital punishment. How can the government take that from an individual which it does not allow him to give?

The right to inflict capital punishment cannot come from the right of self-defence, arising by implication or otherwise. An individual has the inalienable **right** to defend his own life even to the extreme of taking the life of another, but that right ceases when his assailant is completely within his control. A man cannot take his enemy prisoner, so to speak, and then kill him, for then he is not acting in self-defence. By analogy the state has no more right than the individual. The instant the criminal is arrested, the state ceases to act on the defensive, although it had the right to take life when on the defensive. But when the state inflicts capital punishment after it has the criminal within its power, the shield is turned into a sword, and the state becomes a premeditated murderer in cold blood.

Thus for the right, here is for the expediency of capital punishment.

The object of all legal punishments is the prevention of crime. Punishments of all kinds are evils, and should not be used except to ameliorate a greater evil or to prevent it altogether. It will generally be found that the offences which the law declares to be criminal are also moral wrongs. But it is not because of their moral nature that the strong arm of the state interferes to punish them, but because of their injury to society. Offences which the law declares to be crimes ought to be moral wrongs as well, for if the two vary the law will suffer from want of support from the community. Wendell Phillips says, "Governments are authorized to inflict pain in order to prevent evils, not with any idea of punishing guilt. Until human government has the plummet of consciousness to sound the depths of the human soul, its weakness, its wickedness, its too ready yielding to temptation or its effort to resist it, - until then, the attempt on its part to punish guilt is idle, because out of its power, and criminal because sure to work injustice". The object of

punishment is not to improve the moral standard of society, although it follows as a result from the deterrent force of the punishment, because the law is not primarily the executor of moral laws. "Nor can vengeance ever properly be an object of punishment. To suppose this would be to clothe government with the attributes of a fiend." Contrary to this; Sir James Stephen says: "The criminal ^{law} proceeds upon the principle that it is morally right to hate criminals and it confirms and justifies that principle by inflicting upon criminals punishments which express it." This savors too much of the spirit of revenge. It follows therefore, that if a crime should be committed, no matter how willful and heinous, but if it was certain never to be repeated, it ought not to be punished by law. To the same effect, Judge Buller once remarked: "Prisoner, you are not hung for stealing this horse, but that horses may not be stolen." If a crime once committed could be undone, punishments might have a different object. Prevention, then, is the sole object. The question now fairly presents itself, what is the best legal mode of preventing murder and treason; or, in other words, is capital punish-

ment the most expedient method of preventing the highest crime? We must answer, No!

Prevention being the object of punishment, the law assumes that the fear of the punishment acts on the mind of the individual, and has the effect of deterring him from committing the crime. That this is so, is shown by the fact that the law does not punish a person legally incapacitated to commit a crime. In the mind, then, of every individual who thinks of committing a crime we find the two forces, one the desire to commit the crime, the other the fear of the punishment which follows the act. The greater or stronger of the two forces, or the one most persuasive, will be the controlling one. That is, if the desire to commit crime is stronger than the fear of the penalty, the crime will be committed. It may be and probably is in some cases committed by a person without his ever thinking of the penalty, or he may do it with the very penalty attached as his desire; but such cases do not invalidate the principle. If the penalty, then, prevents the crime, it may be said with truth, that the penalty is the cause of the prevention, which presupposes a theory of causation in the mind, the

principle upon which the law proceeds. The task then is, how to measure the penalty so that it overcomes the motive to commit crime? Believers in capital punishment say the only thing that will prevent murder is the life penalty; but we say something less, in this age of civilization, will be just as expedient. The situation resolves itself simply into this; - that some people, and the majority of them, will not commit murder even if no legal penalty is attached, the moral penalty being sufficient. Others will commit it, under certain circumstances, regardless of the penalty. A consoling proposition; but I believe it to be true. Bacon says: "It is worthy the observing, that there is no passion in the mind so weak but it mates and masters the fear of death. And therefore death is no such terrible enemy when a man hath so many attendants about him that can win the combat for him. Revenge triumpheth over death. Love slighteth it. Honor aspireth to it. Grief flyeth to it. Fear preoccupyeth it." It is with the middle class, then, that we have to contend, or those who are prevented by the fear of punishment. Prevention being

the object, only so much of it, for that penalty is to be required which will actually be necessary to satisfy the object, and all over that amount is incapable of justification. To inflict capital punishment when it is not absolutely required, is unworthy of a civilized State. "It is ever a rule that every great penalty, besides the acerbity of it, deadens the law." It follows from this that the measure of the penalty is not proportionable to the crime necessarily. The penalty, in order to be effectual, must be such as to overcome the motive in the mind of the individual. It may be greater or less than the crime itself. It can be asserted that the death penalty will deter some people from committing murder which imprisonment for life, for instance, would not, for the reason that one would have a greater effect upon the mind than the other. It can also be maintained that imprisonment would deter more people from crime than capital punishment, for a like reason. But when the Legislature affixes the penalty of death to murder and treason it is incumbent upon it to prove that capital punishment will prevent murder

which some other penalty will not; but that is impossible to do. It is possible, of course, that some might be prevented from murder if the death penalty is attached; but what Legislature can tell what kind of people they are, ^{or who they are} or that any such actually exist. Such may exist, but who can prove it? The reason for the existence is different from the existence itself. Phillips says: "Unless it can be shown to be absolutely necessary to inflict capital punishment, it has been well said that society in inflicting it commits a second murder." The same objection cannot be urged against imprisonment. Of course the Legislature ought not to inflict this punishment unless it thinks it is necessary to do so. But the same conclusive proof is not required, for here the Legislature is acting within its proper sphere, and is responsible only for a conscientious discharge of its duty. No life is here taken and no charge of murder can be laid at its door.

Inductively, or from a statistical basis, nothing of importance can be added to the argument. Either side to this question does not lack for figures to reinforce their positions. But the statistics are

incomplete, and even if full and accurate, would be destitute of logical proof. It is difficult to tell the effect where only a few causes are; but in a world of causes like the case at hand, no finite mind can conclusively say what is the effect from a certain cause. It is safe to say, however, that in the states which have abolished capital punishment, no perceptible change is noticed of murderers going there to carry on their nefarious business. The strongest argument in this connection is that of innocence! This is sufficient itself to turn the scale against capital punishment. The never failing patriot of liberty, Lafayette, says: "I shall persist in demanding the abolition of capital punishment until I have the infallibility of human judgment demonstrated to me". A human life once taken is taken forever. Livingstone says: "One such is remembered while twenty just punishments are forgotten". Furthermore, if it is so injurious for society to lose one of its members, why does the State repeat the offence by inflicting capital punishment, and rid society of another member? In every execution by the State, instead of making an example of the victim, the state sets

an example of murder itself, and then threatens to punish all who follow the example. Public executions have now become obsolete, for the reason that the sight inflamed the minds of the spectators rather than awed them. Let then the state be consistent and take away the knowledge of the execution by not executing, for knowledge gained by one perception cannot be much worse than that gained by another. Rantoul says: "The strongest safeguard of life is its sanctity, and this sentiment every execution diminishes." No other penalty but capital punishment decreased the sanctity of human life. Others rather increase it, by preserving life and holding out that to the public as an example of its own ~~sanctity~~ ^{reverence}. Another important matter, worthy the consideration is the fact that courts and juries are sometimes, unintentionally perhaps, influenced towards the side of the accused. Juries have frequently failed to bring in a verdict of "Guilty" in the first degree when the evidence was perfectly clear and convincing, because, for some reason, they shrank from the responsibilities reposed in them. A mistake on their part which sends their victim to an

untimely death they know to be irreparable. This makes the conviction uncertain and the law inoperative. It has long been an established principle that, "Certainty of conviction is a surer preventative of crime than severity of punishment." This keen appreciation of human life by juries shows ^{also} that the law is not in harmony with public sentiment, and the *law* will suffer unless capital punishment be wiped out..

For the penalty of capital punishment which we would displace, we would substitute that of imprisonment. It admits of different degrees of severity, and can be better suited to the exigencies of the case and the age. If life imprisonment is not severe enough, it can be made so by adopting the method which the Spaniards used in Mexico; that is, by walling the prisoner in his cell, with only an aperture large enough for the passage of food, and when he does not pass the plate back it can be asserted that he is not hungry. Imprisonment for life at hard labor would seem to be adequate for the most severe punishments. In such a case the prisoner

would not be a total burden upon the state, and he could commune with his conscience and receive the moral punishment for the remainder of his natural life.

In conclusion, we will say we have not made a plea for the criminal; but, viewed in the light of reason, for the transcendent idea of liberty.

