The Movement to Abolish Capital Punishment in America, 1787-1861

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David Brion Davis

INTEREST in the history of American feminism, temperance, abolitionism, and utopianism, has obscured the fact that for a generation before the Civil War the movement to abolish the death penalty was an important reform enterprise which aroused violent debate over the ultimate source of justice, the degree of human responsibility, the fallibility of the courts, the progress or decline of society, the metaphysical origins of good and evil, and the authority of the Bible. Although seldom mentioned in the standard social and intellectual histories of the period,[1] the antigallows movement won the support of prominent ministers, reformers, and men of letters and for over thirty years was a subject of heated controversy in the legislatures of many Northern states. Moreover, the movement was moderately successful, since three of these legislatures became the first governments in modern times to abolish the death penalty permanently. The purpose of this essay is to examine the background and implications of the capital punishment controversy in America and to trace the history of the movement before the Civil War.

Infliction of the death penalty for certain secular crimes, such as murder and robbery, was associated historically with the rise of the modern state, whose sovereign was both authorized and obligated to maintain peace within his particular domain.[2] In England the number of capital crimes multiplied in the sixteenth and seventeenth centuries, as the increasing power of the state blurred the ancient distinction between public and private offenses. Executions were frequently justified by the rational arguments that they prevented victims from committing further crimes and that they served as a deterrent to potential criminals. But though the death penalty was rationally defended as a means for protecting the king's peace, it was never entirely

[1] The bibliography of secondary works on the history of the movement is surprisingly small. There is much sociological literature on the subject, but practically all of this concerns the contemporary problem. Louis Filler's "Movements to Abolish the Death Penalty in the United States," in *Annals of the American Academy of Political and Social Science,* Vol. 284, 124–36, sketches the major developments over a period of two centuries, but the only detailed studies are a number of articles by Albert Post on early state movements.

[2] George W. Kirchwey, "Capital Punishment," in *Encyclopedia of the Social Sciences,* ed. Edwin R. A. Seligman (New York, 1930), III, 192.

dissociated from the primitive doctrine of retaliation for private wrongs. In primitive and modern societies alike, capital punishment seems to afford an emotional release from the profound anxiety and resentment often excited by crime,[3] although such release through projected aggression is usually given the sanction of religion or natural law. Thus by the eighteenth century the acceptance of capital punishment in Western nations involved both a rational theory of society's self-defense and an emotional belief in retributive justice.

The persistence of belief in revenge as the basis for punishment may be seen in John Locke, who was considered a fundamental authority on jurisprudence in America as late as the 1820's.[4] Ironically, Locke not only failed to apply the principles of empirical psychology to crime and punishment, but he sought to combine the ancient, irrational doctrine of retribution with the rational concept of a social compact, wherein the state chooses the most expedient means to protect life and property. He assumed that retribution was an inherent right of man when dictated by calm reason and conscience, which meant when in accordance with natural law. Locke did not inquire how a human being, whose mind began life as *tabula rasa,* became a "noxious Creature" deserving death. Yet he ruled that under the social compact, as in the state of nature, natural law demanded that an act of murder, for which no reparation could compensate, be invariably punished with death. Although the state might withhold punishment designed for the restraint of criminals, since this was essentially a function of government, no magistrate had the right to omit retributive punishment, thereby depriving injured citizens of reparation.[5]

Locke might try to preserve the ancient doctrine of "blood for blood" within his theory of social compact, but his sensational psychology was soon to undermine belief in retribution. For eighteenth-century liberals, who found the origins of evil in the human environment and not in agents of the devil or in man's innate depravity, retributive punishment violated both natural law and Christian sensibility. When the human mind was conceived as a plastic substance molded by accidental forces of experience, the criminal no longer seemed an alien from God's law, but rather an unfortunate victim of circumstances, perhaps still capable of penitence and salvation.

In the utilitarianism which emerged from Locke's sensational psychology, swift and harsh punishments were sanctioned in the name of

[3] J. C. Flugel, *Man, Morals and Society* (New York, 1945), pp. 143–74.
[4] Nathan Dane, *A General Abridgment and Digest of American Law, with Occasional Notes and Comments* (Boston, 1824), VI, 626–27.
[5] *The Works of John Locke . . .* (2d ed.; London, 1722), II, 161.

deterrence and expediency. Jeremy Bentham and William Paley advocated penalties of such a degree as to outweigh the imagined profit or enjoyment derived from each offense, but their rejection of retributive punishment represented a significant departure from Lockian theory.[6] As reformers of the Enlightenment increasingly attacked cruel and barbarous punishments, conservatives found comfort in Paley's philosophy of social expediency, which justified capital punishment for any crime difficult to detect or prevent.[7] Without Locke's belief in an inherent right of retribution, however, the sensational psychology could also be used to demonstrate the essential guiltlessness of criminals and, combined with a compassionate sympathy for human suffering, could justify a humanitarian protest against the penalty of death.

In 1764 Cesare Beccaria, who was strongly influenced by Montesquieu and Voltaire, published his monumental *Essay on Crimes and Punishments.* The first systematic application of the principles of the Enlightenment to criminal law, Beccaria's treatise aroused the enthusiasm of reformers in Europe and America and strongly influenced Catherine II of Russia and Grand Duke Leopold of Tuscany, both of whom abolished capital punishment. Because Beccaria's *Essay* was reprinted in America as early as 1773 and thereafter provided arguments for reformers, it is necessary to outline his position on capital punishment with some care.

Beccaria assumed that individuals were compelled by a uniform and incessant desire to act in their own self-interest, unless this selfish force were met with some opposing obstacle. Unlike Locke, he held that men had not voluntarily submitted to the social compact but were prevented only by force from regressing to barbarism and anarchy.[8] Punishments should, therefore, be "political obstacles," designed by the legislator to promote the greatest happiness for the greater number of citizens.[9] By dispensing with the voluntary social compact, Beccaria could avoid Locke's deduction that the natural rights of self-defense and retribution had been ceded to society by each individual.

But if the state was bound to enforce social harmony by associating "last-

[6] Bentham, *An Introduction to the Principles of Morals and Legislation* (London, 1879), pp. 170, 179, 193; Paley, *The Principles of Moral and Political Philosophy* (7th ed.; Philadelphia, 1788), pp. 400–405.

[7] Paley, p. 403. He argued, of course, that God punished in exact proportion to guilt, which left human law to deal with external circumstances. He thus approved the English penal code, which held the threat of death for nearly any crime but was executed without justice or consistency, because its very uncertainty restrained potential criminals. If an innocent man occasionally suffered, he would at least know that he had died gloriously for his country's security (p. 421).

[8] Beccaria, *An Essay on Crimes and Punishments* (London, 1767), pp. 9–11.

[9] *Ibid.*, p. 22.

ing impressions" of pain with improper acts, it would seem that Beccaria might join Paley in advocating harsh and terrifying penalties. Despite his emphasis on reason, however, Beccaria's primary appeal was to feeling and sentiment. After formulating an abstract social theory which was typical of the Enlightenment, he went on to anticipate the romantic protest against all unnecessary pain and suffering. The foundation of a sovereign's right to punish, he said, lay in "the indelible sentiments of the heart of man," and whatever deviated from this innate moral sense was unnatural and tyrannical.[10]

We find, then, that the first important treatise on criminology combined the sensational psychology with an emotional belief in an inherent and inalienable moral sense. In addition to his rational argument that capital punishment gave only a momentary example which could never improve mankind, whereas a criminal in prison made a "lasting impression" on his fellow countrymen, Beccaria concluded that since society lacked any right to kill a human being, such punishment was "a war of a whole nation against a citizen," which stimulated barbarity by teaching murder and violence to the people.[11]

When we turn to America we find that the new states, faced by the necessity of formulating their own laws, were reluctant to abandon so traditional a practice as capital punishment. Yet there was considerable interest in constructing a rational and humane system of penal law. Benjamin Rush, whose studies in pathology had convinced him that crime resulted from a disease of the moral sense, gave an address in 1787 advocating the total abolition of the death penalty. Borrowing from Beccaria's *Essay,* Rush answered critics in 1792 with his *Considerations on the Injustice and Impolity of Punishing Murder by Death.* Joined by William Bradford,[12] the attorney general of Pennsylvania, Rush was instrumental in achieving a compromise between total abolition and regulation of executions.

The Pennsylvania legislature adopted a law on April 22, 1794, which divided murder into two degrees, providing a unique system for diminishing the number of cases to which the death penalty might be applied and setting an example to be followed by other states during the next half century.[13]

[10] *Ibid.,* p. 8.

[11] *Ibid.,* p. 102.

[12] Bradford felt that Pennsylvania's act of 1786 reducing the number of capital crimes proved that hanging was unnecessary as a deterrent; yet he also believed that the punishment for murder should be radically different from that for all other crimes. He favored varied penalties, graded precisely according to guilt (Bradford, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* . . . [Philadelphia, 1793], pp. 20–36).

[13] *The Statutes at Large of Pennsylvania from 1682 to 1801,* comp. James T. Mitchell and Henry Flanders (Harrisburg, 1911), XV, 174–81. In 1682 Penn's famous law had abolished

When malice or intent, giving evidence of "a depraved mind, regardless of human life," could not be inferred from the circumstances of a common law murder, it was generally defined as murder in the second degree.[14] Adoption of the degree system was associated with a reduction in number of other capital crimes, and both reforms made considerable progress during the early nineteenth century.[15]

When states went still further and defined four degrees of manslaughter, which, along with excusable and justifiable homicide, allowed eight different interpretations of killing, juries were, in effect, given the power to commute the penalty for almost any specific act of homicide.[16] Although American legislators had preserved the common law distinction between murder and manslaughter, they also, by a redefinition of relative guilt, had limited the use of capital punishment to those murderers who supposedly evidenced a total moral alienation. If a man's intellect had been only temporarily ignored or subverted, or if he had acted from great provocation, there was hope that he might be saved. But when a murderer's entire personality had consented to the crime, it was evident to American jurists that his moral sense had been completely depraved, making him too dangerous to live.

These changes in American criminal law had several important implica-

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capital punishment for all crimes except murder, but in 1718 Pennsylvania had been forced to accept the English code. After 1794, as new states were formed, they tended to adopt the division of degrees of murder modeled on the example of Pennsylvania's law. Ohio had the degree system in 1824; New York did not define degrees of murder and manslaughter until 1827; Missouri adopted the system in 1835, Michigan in 1846, and Texas in 1848.

[14] Francis Wharton, *A Treatise on the Law of Homicide in the United States: to Which is Appended a Series of Leading Cases* (2d ed.; Philadelphia, 1875), pp. 135, 153–62; *The Revised Statutes of the State of New York* . . . (Albany, 1829), II, 656–57.

[15] In 1815 Ohio reduced the number of capital crimes from four to two and in 1824 limited the death penalty to willful murder (Albert Post, "The Anti-gallows Movement in Ohio," *Ohio State Archaeological and Historical Quar.*, LIV [Apr.–June, 1945], 105). Capital punishment was restricted to murder in Kentucky in 1800 and in New Hampshire in 1842. In 1841 New York lowered the number to three, treason, murder, and arson in the first degree. On the other hand, North Carolina's revised statutes of 1837 listed twenty-two capital crimes. In Virginia there were at least seventy-one crimes for which slaves could be executed, but from which whites were exempt (Charles Spear, *Essays on the Punishment of Death* [8th ed.; Boston, 1844], pp. 221–27, app.).

[16] Degrees of manslaughter were usually defined in the following ways: first degree—when the victim was engaged in a misdemeanor at the time of his death, when assistance was given to a suicide, when death resulted from abortion (this was second degree murder in some states, but second degree manslaughter in Missouri); second degree—when the defendant killed in a cruel and unusual manner, but had no design to effect death; third degree—when the defendant used a dangerous weapon but did not intend to kill, or when a drunken doctor killed a patient through negligence (Missouri), or when a steamboat captain's negligence caused a fatal accident; fourth degree—everything not included in the other categories, when neither excusable nor justifiable. See *Revised Statutes* (New York), II, 660–61; *The Revised Statutes of the State of Missouri* . . . (St. Louis, 1835), pp. 168–70. It is fairly obvious that if malicious intent could not be inferred from killing in a cruel or unusual manner, or from the use of a deadly weapon, it would be very difficult to prove in any case of homicide involving a sudden "heat of passion."

tions for the antigallows movement. For one thing, states like Kentucky and Pennsylvania had abolished capital punishment for every crime except murder at a time when Sir Samuel Romilly was desperately trying to persuade Lord Ellenborough that the British character would not be hopelessly corrupted if Parliament repealed the death penalty for thefts from bleaching grounds or for stealing five shillings from a shop.[17] This meant that the advocates of reform in America were free to strike at the vestiges of "barbarism" without first clearing away the thick deposits of legal cruelty and violence. On the other hand, the fact that many American states had reduced the number of capital crimes and had further softened their penal codes by defining degrees of murder and manslaughter, produced a mood of self-satisfaction, which is always a bulwark against reform. Jurists might applaud the efforts of Bentham and Romilly in England, but the Whig reformers were seen struggling toward a goal already achieved in the United States.

Outside of Pennsylvania, where in 1809 and 1811 the governor urged the legislature to abolish the death penalty,[18] the early protest against hanging was confined to Quaker periodicals or to occasional pamphlets combining New Testament charity with a Jeffersonian view of ethics and society.[19] In one of these booklets, published in 1821 after a prominent doctor's young son had been executed for murder, we find the theory that crime is prevented not by law, but only by "a healthful state of public morals." Severe punishments corrupted this state of public morals, as could be seen by the increase in crime under the sanguinary laws of England; yet perpetual and solitary confinement in prison would, as Beccaria and Rush had maintained, be a "lasting monument of the ignominious effects of crime." The most significant arguments, however, did not concern theories of deterrence or natural rights. If the pamphlet echoed the rationalism of the Enlightment, it also gave expression to the evangelical faith in universal brotherhood which was gradually undermining the cultural and psychological dominance of the Old Testament. Americans had traditionally justified capital punishment by citing God's injunction to Noah: "Whoso sheddeth man's blood, by man shall

[17] *The Debates in the House of Commons, During the Year 1811, Upon Certain Bills for Abolishing the Punishment of Death,* comp. Basil Montagu (London, 1812), *passim.* Romilly cited William Bradford and pointed to the favorable results of Pennsylvania's legislation (p. 105).

[18] Albert Post, "Early Efforts to Abolish Capital Punishment in Pennsylvania," *Pennsylvania Magazine of History and Biography,* LXVIII (1944), 42–43.

[19] Elisha Bates, a Quaker, was the first to fight capital punishment in Ohio. Many of the early petitions to the New York legislature were from Quaker groups, but since the yearly meetings were generally silent on the issue, it is difficult to measure the Quaker influence on the reform. The Progressive Friends, who broke away from the Hicksites in 1848, strongly supported abolition of the death penalty, along with other reforms (*ibid.,* p. 50).

his blood be shed: for in the image of God made he man." The author of the 1821 pamphlet argued that this was a prophecy, addressed to Noah before the formation of government or society, simply reminding man of the natural tendency for one act of violence to produce another. To justify the death penalty by appealing to the Old Testament was to violate the spirit and teachings of Christ. Moreover, the preservation of a "bloody fragment of Jewish institutions" identified religion with injustice and thus strengthened the hand of deists and atheists. Executions outraged the moral sentiments of Christians, for whatever the guilt of the victim, "his sufferings alone are enough to call for the compassion of the sensible heart."[20]

Such emphasis on the personal suffering of a condemned criminal, as opposed to more theoretical discussions of deterrence and responsibility, signified the growing importance of romanticism for the antigallows movement. Because the death penalty was associated with both Old Testament brutality and the cold utilitarianism of conservative rationalists, it was attacked by those who yearned for an emotional and pietistic brotherhood, for an all-inclusive love which would embrace the wayward murderer as well as the suffering slave and degraded drunkard. Although leaders of the antigallows movement relied heavily on the rational arguments of Montesquieu, Voltaire, and Beccaria, they also profited from the rise of evangelical religion and from the romantic sympathy for criminals and outcasts expressed in the fiction and poetry of Bulwer-Lytton, Dickens, Victor Hugo, William Gilmore Simms, Sylvester Judd, and John Greenleaf Whittier.

This romantic literature conveyed two ideas which are important for the history of the capital punishment controversy. First, the sensitive reader was frequently aroused by a vivid and emotional identification with a condemned criminal and his family. In *The Last Days of a Condemned* (1829) Hugo pictured the "intellectual dissection" and drawn-out agony of a criminal about to be executed, dwelling particularly upon the prisoner's memories of happiness and his horror at the thought of his grief-stricken family: "If the Jury had seen thee, my pretty little Mary, they would have understood it was wrong to kill the Father of a child three years old."[21] Although *The Last Days* was not translated until 1840, Hugo's thesis was popularized by English reviewers and lent emotional force to the antigallows movements in both England and America.[22]

[20] [Anon.], *Remarks on Capital Punishment* (Utica, 1821). The argument was not original with the author of this pamphlet.

[21] (London, 1840), p. 99.

[22] Long before it was translated, Hugo's book was well known and discussed in England. American readers of *Blackwood's Magazine* and other English journals would have become acquainted with Hugo's theme. Sir P. Hasketh Fleetwood, who edited one of the English edi-

Whittier repeated Hugo's theme in "The Gallows" (1842) and "The Human Sacrifice" (1843), wherein he contrasted the joy and vital spontaneity of life ("Again with merry heart he threw / His light line in the rippling brook. / Back crowded all his schoolday joys; / He urged the ball and quoit again, / And heard the shout of laughing boys.") with the prisoner's agony before the "black, giant-like" gallows. When readers became convinced that even the condemned murderer was a human being with cherished memories, a loving family, and tender feelings, they might reflect bitterly at Whittier's lines: "Not by the Koran and the Sword, / But by the Bible and the Cord!"[23]

The second romantic idea, expressed in many tales and novels, was that true repentance atoned for even the worst of crimes and that such repentance came not from fear, but from harmony with nature. By depriving the criminal of contemplation and gradual regeneration, capital punishment interfered with the natural balance of guilt and remorse. At the conclusion of Simms's *Confession* (1841) a murderer is spared from arrest and prosecution because, we are told, life is a sacred trust and only by living may a criminal make atonement to a higher law: "It was with this merciful purpose that God not only permitted Cain to live, but commanded that none should slay him."[24] In one of his short tales Walt Whitman also asked whether an unpunished murderer might not receive more justice at the hands of God than from human tribunals: "Involuntarily, he bent over a branch of red roses, and took them softly between his hands—those murderous, bloody hands! But the red roses neither wither'd nor smell'd less fragrant. And as the young man kiss'd them . . . it seem'd to him that he had found pity and sympathy from Heaven itself."[25] Romantic writers sometimes pictured the murderer not as an evil villain, but as a man of unusual sensitivity whose remorse was proportionate to the enormity of his crime. Capable of both sudden anger and profound compassion, he occasionally seemed to have been prepared by his offense for a nobler life than that of average men. To convict him of an

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tions, used Hugo's arguments to arouse support for the antigallows movement (Kenneth Ward Hooker, *The Fortunes of Victor Hugo in England* [New York, 1938], pp. 22, 25). In 1855 *The North American Review* spoke of the work as a great success and recommended it as one of the most powerful indictments of capital punishment ever written ("Genius and Writings of Victor Hugo," *NAR,* LXXXI [Oct., 1855], 334). However, Hugo's works were not generally popular in America before the Civil War. Bulwer-Lytton, Eugène Sue, Dickens, and G. W. M. Reynolds were more important in shaping the image of the criminal in popular literature.

[23] *The Complete Poetical Works of John Greenleaf Whittier* (Cambridge ed.; Boston, 1894), pp. 355–56.

[24] *Confession; or, the Blind Heart* (Chicago, 1890), pp. 397–98.

[25] *The Complete Poetry and Prose of Walt Whitman* (New York, 1948), II, 361.

infinite and irremediable guilt was to usurp the functions of God and nature and to ignore the divine potentialities within every human being.

Perhaps worst of all for the romantic writer was the unnatural regulation of human death. It was a usurpation of divine prerogative to assign a given day, a given moment in time, for the death of a human being; even a soldier in war or a victim of incurable disease was spared from anticipating the exact moment of his dying. Hugo, Dickens, and Whittier emphasized the horror of approaching a scheduled execution.

Such a mixture of romantic sentiment and evangelical doctrine formed an important part of the argument against capital punishment and doubtless helped to win the support of such figures as Longfellow, Theodore Parker, Horace Greeley, and Henry Ward Beecher. But the major source of inspiration to the antigallows movement was neither a romantic poem nor an evangelical sermon, but rather a pragmatic system of penal law.

Edward Livingston, who corresponded with Bentham and with Continental legal theorists, and was said by Sir Henry Maine to have been the first legal genius of modern times,[26] formulated in the 1820's a systematic set of arguments against capital punishment that were later expanded and adapted by Thomas Upham, Robert Rantoul, Jr., and John L. O'Sullivan, in their various efforts to reform the penal codes of American states. In drawing up his famous criminal code for Louisiana,[27] Livingston agreed with Rush that prison, by depriving a criminal of pleasure, would mortify the original passions and lead to repentance. Yet England's example proved that the threat of death was no deterrent even to minor theft. This was to assume that ideas, such as the abstract idea of death, had little influence on human behavior.

If Livingston's naturalistic view of the mind implied that the idea of death was no restraint to criminals, his belief in an inherent moral sense led him to fear the social consequences of public executions. Like Rush and Beccaria, he felt that man's natural sensitivity might easily be blunted or perverted by the environment. Public hangings were barbarous spectacles which might well deprave the public taste, stimulate violence, and corrupt juries.[28] To prove his argument, Livingston cited examples of murders and other crimes committed immediately after executions.

In an appeal which assumed a Jeffersonian philosophy of human nature and society, Livingston also warned that all nations were subject to political

[26] John F. Dillon, *The Laws and Jurisprudence of England and America* (Boston, 1894), pp. 337–38.
[27] *A System of Penal Law, for the State of Louisiana . . .* (Philadelphia, 1833).
[28] *Ibid.*, p. 27.

disorder, party warfare, and dictatorship. When civil discord exploded into violence, as Paine had previously remarked, "new punishments are not invented, but those already known are rigorously enforced against the innocent."[29] The dangerous process of condemning and executing men as aliens from God and society might not, in other words, be limited to a few isolated criminals: "Beware then, how you sharpen the axe, and prepare the other instruments of death, for the hand of party violence."[30]

Livingston stressed the uncertainty of a punishment the severity of which caused juries to hesitate and governors to exercise their power of mercy, but the codifier's most dramatic plea was patriotic. The eyes of the world, he said, were focused upon the United States. Experiments in Russia and Tuscany had been successful, but despite the rapid spread of world sentiment against hanging, reaction had prevented reform from sweeping Europe. Should Louisiana be the first state to make the enlightened experiment, she would reflect glory upon the whole nation, giving the United States a reputation for moral progress and benevolence among civilized peoples for centuries to come.[31]

Livingston's appeal was ignored by the Louisiana legislature, but his lucid arguments were reprinted and distributed in the Northeast, where they proved an impetus to legislative action. The New York Assembly appointed a committee in 1832 to inquire into the expediency of abolishing capital punishment; its report echoed Livingston's legal philosophy as well as his specific arguments.[32] In response to this report, bills opposing the death penalty were introduced in the Assembly in 1832 and 1834, and though they failed to progress to a final reading, they provoked agitation and debate.[33] Livingston's influence was also felt in Pennsylvania, where the issue excited more interest than before, and in Maine, where a compromise measure was finally enacted.

On December 30, 1835, Livingston wrote a letter to Tobias Purrington, a member of the Maine legislature, deploring the fact that Louisiana had failed to act and urging Maine to set an example for the other states.[34] Copies

[29] *Ibid.*, p. 124.
[30] *Ibid.*, p. 125.
[31] *Ibid.*, p. 116.
[32] *Journal of the Assembly of the State of New York, 1832* (Albany, 1832), p. 44; *State of New York, Assembly Doc. No. 187* (Mar. 7, 1832), pp. 22–23. Since this report appeared before the major counterattack by defenders of capital punishment, little space was devoted to theological debate. In the Massachusetts General Court agitation began in 1828 and the first bills were introduced in 1832 (*The Prisoners' Friend, A Monthly Magazine,* VI [Boston, Sept., 1853], 197–98).
[33] *Journal of the Assembly, 1832,* p. 354; *Journal of the Assembly, 1834,* p. 410.
[34] Purrington, *Report on Capital Punishment, Made to the Maine Legislature in 1836* . . . (3d ed.; Washington, 1852), pp. 30–31.

of Livingston's code were distributed to the governor and to each state senator, and Purrington wrote a report to the legislature incorporating the arguments of Livingston, together with phrenological evidence proving that faulty cerebral organization, not conscious choice, was the cause of criminality.[35] The movement in Maine was led by several able men, including Thomas C. Upham, professor of mental and moral philosophy at Bowdoin, who was also a supporter of temperance, universal peace, and colonization of American Negroes. In 1837 Upham and Purrington succeeded in obtaining a law which virtually abolished the death penalty. Under the so-called "Maine law" (not to be confused with the later prohibition law), every criminal sentenced to death was to be confined in the state prison for one year after the date of sentence and could be executed only upon a written warrant issued at the discretion of the governor.[36]

The Maine law was something more than a compromise between opponents and defenders of the death penalty. Despite their occasional statements that crime was a disease and that criminals did not deserve punishment, critics of capital punishment were not primarily concerned with the welfare of felons. Just as abolitionists had seldom associated with slaves, so those opposing the death penalty had seldom mixed with rapists and murderers. Their proposals for reforming criminals were singularly naïve, being based on the assumption that isolation and restraint of passions would revive the debilitated moral sense. While reformers were shocked by the thought of executions, they did not question the cruelty of solitary confinement for life. As we have seen, arguments against capital punishment centered on the corrupting example of public hangings and on the social guilt of depriving an individual of his inalienable right to live. It was this profound sense of guilt, resulting from "legal murders," which drove reformers to action. If the guilt could be transferred to the shoulders of a state governor, however, then society might rest with an easy conscience. It was generally assumed that the governor would never use his power to kill a condemned man, but if he did, the burden would rest on him alone.

A similar compromise, adopted first by Pennsylvania in 1834 and by New York the following year, was the abolition of public executions. By eliminating the fearful spectacle of a tense and ribald crowd, hooting and cheering a criminal at the gallows, these states removed one of the more

[35] *Ibid.*, pp. 8–10.

[36] *Ibid.*, pp. 41–42. Governor Dana said in 1849 that he interpreted the law as inferring that the legislature did not desire enforcement. However, as similar statutes were adopted by other states, they did not always result in fewer executions. Maine totally abolished capital punishment in 1876, reinstated it in 1883, and abolished it again in 1887.

powerful arguments advanced by Rush and Livingston.[37] The guilt felt by sensitive men at a public execution and the horror aroused by a bloodthirsty mob were considerably lessened when hangings occurred in the remote sanctity of a county jail.

Yet many reformers were not content with compromises which merely obscured communal guilt. We have seen that when Beccaria attacked the social compact theory, he went so far as to deny society's right to take human life. In the 1830's Beccaria's secular argument was reinvigorated by an upsurge of religious sentiment against violence of all kinds. By 1838 a minority of extreme radicals in the American peace movement had concluded that total nonresistance was the only Christian answer to evil.[38] For such advocates of nonresistance as William Lloyd Garrison and the Reverend Henry Clarke Wright, war could be abolished only by first eliminating the "man-killing principle" from human society and by substituting in its place the Christian principle of sympathetic love.[39] So long as men used self-defense as a justification for aggression, revenge and retaliation would continue to destroy social harmony. Wright, Garrison, and other radical pacifists, who opposed not only war and capital punishment but also legal suits for the redress of injuries, formed in 1838 the New England Non-Resistance Society, most of whose objectives were supported by Samuel May, Gerrit Smith, and Theodore Parker.[40] Although the society was repudiated by many members of the American Peace Society and was violently attacked by the orthodox clergy, it gave added significance to the antigallows movement. Regardless of one's views on the causes of criminality or the expediency of punishments, it was troubling to think that the death penalty might violate fundamental principles of Christianity. If few Americans were willing to accept the extreme position that society should renounce all resistance to evil, the sermons, speeches, and editorials of radical pacifists aroused thought and debate and thus helped to spread the belief that capital punishment could not be justified by the state's alleged right of self-defense.

In his annual address of 1836, Governor Edward Everett of Massachusetts noted that "an increasing tenderness for human life is one of the most decided characteristics of the civilization of the day . . ." and suggested that as an experiment the punishment of death be dispensed with for all crimes

[37] In 1832 Massachusetts recommended private hangings and by 1849 fifteen states had adopted the reform (*The Prisoners' Friend,* I [Mar., 1849], 317). However, some states held public executions as late as the 1930's.

[38] Merle E. Curti, "Non-Resistance in New England," *New England Quar.,* II (Jan., 1929), 40–45.

[39] *Ibid.,* pp. 40–57; Curti, *The American Peace Crusade, 1815–1860* (Durham, N. C., 1929), pp. 71–72, 81–83.

[40] "Non-Resistance in New England," p. 53; *American Peace Crusade,* p. 84.

except murder.[41] The legislature appointed a select committee, headed by Robert Rantoul, Jr., whose subsequent report became something of a classic for the leaders of the movement in the next decade. Whereas Governor Everett had touched only on the possible inexpediency of capital punishment, Rantoul was directly concerned with the inalienable rights of citizens and the limitations of governmental power. He agreed with Non-Resistants that the state had no sanction to take the life of a criminal, but he based his argument on the political theory of Paine and Jefferson. From them he drew his belief that legitimate government was limited in its powers to protection of property and opportunity and to provision for the common defense. Prisons, said Rantoul, were adequate to protect society, but governments, always tending to exceed their proper limits, attempted to judge the hearts and consciences of men as if degrees of moral guilt could be infallibly determined. Since no power was more flattering to ambition than that of disposing at will of human life, capital punishment represented a dangerous intrusion into the sphere of individual rights. The political and ecclesiastical butchery of past ages, which had been allowed under pretense of legal forms, showed that such an unnecessary power might easily be used to subvert republican society.[42]

In contrast to pacifists like Wright or to romantic poets like Whittier, Rantoul represented the spirit of the Enlightenment. He attacked capital punishment for the secular reason that it violated natural law as interpreted by reason. Yet even Rantoul was aware that in America rational theory had to be supplemented with appeals to Scripture. After observing that Old Testament laws were addressed to a people whose hearts were not softened even by stupendous miracles, a people "but a few removes from the condition of savages, and almost universally addicted to the most heinous acts of wickedness," Rantoul went on to argue that God's covenant with Noah concerned the relation between men and animals and should therefore be read: "Whatsoever sheddeth man's blood, by man shall its blood be shed." By interpreting Scripture within a broader contextual meaning, Rantoul arrived at the conclusion that God's communication with Noah was intended to "inculcate the sanctity of human life."[43]

Rantoul's report of 1836 was valuable because it attempted to answer

[41] *Resolves of the General Court of the Commonwealth of Massachusetts* . . . (Boston, 1836), pp. 280–81.

[42] *Commonwealth of Massachusetts, House Doc. No. 32* (Feb. 22, 1836), pp. 10–14, 24.

[43] *Ibid.*, pp. 79–80. Adapting his arguments from the German scholar, Michaelis, Rantoul said that the Hebrew participle translated "whoso sheddeth" was closer to the English "shedding" and might be logically rendered "whatsoever sheddeth." Orthodox ministers and scholars treated this argument with icy contempt. See George Barrell Cheever, *A Defence of Capital Punishment* (New York, 1846), pp. 127–36.

every possible objection to the abolitionist position. It is significant that while the main argument was couched in terms of Jeffersonian political theory and drew liberally from Beccaria and Livingston, Rantoul felt compelled to resort to ingenious interpretations of Scripture. This indicated the source and strength of his major opposition. Despite the power of his several reports, agitation in the Massachusetts House was unsuccessful, and in 1836 and 1837 Senate committees vindicated the death penalty. The one tangible result of years of debate was the final abolition in 1839 of capital punishment for burglary and highway robbery.[44]

Meanwhile, similar reform efforts had failed in Michigan. After Ohio's Governor Joseph Vance had urged repeal in 1837 and 1838, legislative committees in that state defended the death penalty and refused to act.[45]

In New York the enthusiasm originally inspired by Livingston's code had waned, and the issue aroused little interest in the years immediately following the depression of 1837.[46] In reply to petitions claiming that the state had no right to kill, the New York Assembly judiciary committee made a report in 1839 defending existing laws as necessary for social order. Ironically, the authors of this report accepted the assumption of Beccaria, Rush, and Livingston that "lasting impressions," not abstract ideas, were the only force which restrained criminals. But they argued that the destitute criminal would look upon prison as a blessing, since there he would enjoy food, clothing, and physical security, while the fear of death, which was as universal as the desire for life, would strike terror in even the most depraved and hardened soul: ". . . the great body of people are affected only by what is palpable. . . . It is only what is plain and evident that is tangible to their gross conceptions."[47]

It was not enough, however, to defend capital punishment in terms of utilitarianism and Lockian psychology. The committee was obviously perplexed by the fact that its opponents had used religious and philosophical arguments to challenge the state's right to take human life. Although they observed that harsher punishments were necessary in a free society than in an authoritarian country where perpetual police control and regulation reduced crime by infringing on the rights of every citizen[48]—a utilitarian argu-

[44] *Commonwealth of Massachusetts, House Doc. No. 149* (Apr. 24, 1851), p. 4.

[45] Post, "The Anti-gallows Movement in Ohio," pp. 106–107.

[46] No petitions or proposed bills were reported in 1837. In 1838 the only debates were over a committee resolution favoring capital punishment, and in 1839 petitions against the death penalty were tabled after the Assembly judiciary committee reported against the reform. See Assembly journals for 1837, 1838, 1839.

[47] *State of New York, Assembly Doc. No. 378* (Apr. 16, 1839), p. 7.

[48] *Ibid.*, pp. 11–12. The committee reported that in Tuscany, where capital punishment had been temporarily abolished, the "common people were prohibited from wearing arms,

ment that had been used against Sir Samuel Romilly's reforms[49]—they fell back for ultimate justification upon the Noachic covenant and the instinctual "sentiment" of blood for blood.

It is important to note, however, that the committee report of 1839 was tentative, uncertain, and poorly organized. The case for capital punishment had not yet been stated clearly, and the members of the New York judiciary committee were groping for arguments. So weak a document was little protection against the mounting number of petitions which began to flood the legislature in 1840.[50]

Partly in response to these petitions, Governor Seward's message of January 5, 1841, suggested that capital punishment was being inflicted so frequently as to become "an encouragement, rather than a preventive of crime."[51] This portion of Seward's message was referred to an Assembly committee headed by John L. O'Sullivan, dynamic editor of the *United States Magazine and Democratic Review,* a fiery reformer, literary critic, and ultimate supporter of the Confederacy, who, according to his friend, Nathaniel Hawthorne, had a genius for embracing lost causes. The cause of abolishing capital punishment was not yet lost, however, for O'Sullivan collected facts and statistics, borrowed heavily from Rantoul and Livingston, and produced what was perhaps the most distinguished document of the entire controversy. He infuriated his opponents by flatly denying the authority of the Old Testament as a guide for contemporary legislation. Ignoring subtle distinctions between the Noachic covenant and Mosaic code, he reasoned that if the Old Testament was to be taken as a model for legislation, the death penalty might be applied to unconfessed impurity before marriage, witchcraft, blasphemy, or the gathering of sticks on the Sabbath.[52] In addition to the usual arguments, he also drew on the recent writings of the English alienist, James C. Prichard, whose theory of moral insanity, or psychopathic personality, suggested that many criminals suffered from a diseased or atrophied sensibility.[53] Since the subject of insanity was charged with uncertainty, O'Sullivan warned that legal tests might be faulty, that the

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or even carrying a knife." But in a democracy it was necessary to place trust in punishments and not restrictions.

[49] *Debates in the House of Commons, 1811,* p. 35. In a similar vein, Frankland argued that England might have milder punishments if the people were "so swathed, and swaddled, as not to be able to commit crimes."

[50] *State of New York, Assembly Doc. No. 363* (May 14, 1840), pp. 1–2.

[51] *Journal of the Assembly of the State of New York, 1841,* p. 16.

[52] O'Sullivan, *Report in Favor of the Abolition of the Punishment of Death by Law . . .* (2d ed.; New York, 1841), p. 11.

[53] *Ibid.,* pp. 111–13. Prichard's *Treatise on Insanity* had been published in Philadelphia in 1837. His concept of a diseased moral sense was a more systematic development of earlier theories of Rush, Phillipe Pinel, and Jean Esquirol.

state might be executing irresponsible men. Had his opponents limited their case to expediency, O'Sullivan's argument would have been superfluous, but since the defenders of capital punishment presumed that guilt could be determined, the question of moral insanity became increasingly important.

When O'Sullivan's bill for total abolition of the death penalty was rejected by a close vote of 46 to 52,[54] defenders of tradition rose to meet the challenge. In 1842 the legislature was besieged by an array of petitions, memorials, and remonstrances both for and against abolition,[55] the most remarkable being a lengthy document from J. S. Van Rensselaer and other leading citizens of Albany. Van Rensselaer's memorial was a caustic refutation of O'Sullivan's report, but more than that, it was a clear and forceful defense of legal executions. Previously, such justifications had been strongly influenced by Lockian psychology and by Paley's doctrine of social expediency, but Van Rensselaer gave notice of his new approach by launching a bitter attack against the shallow and mechanistic philosophy of Bentham.[56]

Since the time of Beccaria, reformers had charged that executions violated man's inherent sense of justice. Now, however, their opponents appropriated the moral sense philosophy and transformed it into a weapon for the defense of tradition. According to Van Rensselaer, the moral sense for men like O'Sullivan was a sentimental emotion, which, if consistently applied to social problems, would logically result in the abolition of prisons.[57] Yet the true moral sense was not an effeminate emotion but an inherent, necessary, and absolute sense of duty. "That the criminal should be punished for his crime, is not a truth, summed up from the tardy teachings of experience; it is an immediate, and peremptory decision of the moral sense." Thus the Albany memorial abandoned both the compact theory and the

[54] *Journal of the Assembly, 1841,* pp. 1179–80, 1362. O'Sullivan later gave the vote as 47 to 52. The first vote had been in favor of the bill by 57 to 52, and O'Sullivan claimed that because the final vote had come at an evening session, attendance was light and some of his friends were absent (O'Sullivan, *Report,* pref.). On May 26 *The Albany Daily Argus* reported that O'Sullivan's actions in behalf of a general election law had incensed the Whigs and caused them to defeat his capital punishment bill: "Some of them, as we are informed, even expressly declared to the mover that they would *now* vote against his bill for the Abolition of Capital Punishment, though before in favor of it!" This was probably just anti-Whig propaganda, since the *Argus* had been actively pushing the election reforms and had portrayed the Whig opposition as allied with thugs, criminals, and crooks.

[55] *Journal of the Assembly of the State of New York, 1842.* Petitions in favor of abolition far outnumbered those opposed, and also outnumbered petitions concerning slavery and temperance.

[56] *State of New York, Senate Doc. No. 97* (Apr. 9, 1842), p. 1.

[57] *Ibid.,* pp. 18–19. O'Sullivan and Rantoul were accused of gross inconsistency, since they sometimes argued that prison was more terrifying than death and thus made a more "lasting impression" on society, and at other times claimed that criminals should be cured and not punished. This dilemma, as we have seen, resulted from the abolitionists' principal concern with escaping communal guilt. Their opponents charged them with using capital punishment as a means for political advancement, without really caring about the welfare of criminals.

sensational psychology of Locke, Paley, and Beccaria, justifying punishment by a moral sense whose rational and absolute content suggested the transcendental reason of Hegel. Society had no right to punish criminals as an example, for "The attempt to found justice upon utility is only another effort of a low material philosophy, seeking to solve a problem that lies as high above its reach as the heavens above the earth." Hence the English system of law, by ignoring "the intrinsic ill-desert of the offender," was based on an untenable philosophy of social expediency, which opened the way for reckless reformers:

> Nothing but guilt can break down the defences which stand around every moral being, and permit us to subject him to suffering for the advantage of others. It is from this prior consideration of justice that the penalties of law derive their utility. . . . Punishment is not just because it is useful; but it is useful because it is just.[58]

Henceforth, the debate over capital punishment would not be a dispute between Locke and Beccaria but would rest on a philosophic division between naturalistic and idealistic interpretations of the innate moral sense, the former emphasizing environmental causes of crime and the latter stressing intrinsic guilt and justice.

The Albany memorial was the most powerful attack on reform yet to appear. Condemning both the mawkish sentimentality of the romantics and the implied materialism of reformers who based their arguments on the theories of Locke, Montesquieu, and Beccaria, it furnished a new philosophy for defenders of tradition. The final insult was to identify O'Sullivan and Rantoul, who had frequently appealed to the enlightened example of Catherine of Russia, with the corruptions of godless Europe: "And if we are to be influenced by imitation, if 'patterns of noble clemency' are to be sought, we shall go somewhere else than to an Empress who was twice, at least, a murderer of the foulest degree, and always a loathsome adulteress."[59]

During the 1840's the issue of capital punishment kindled the passions of the orthodox clergy, who brought forth a mass of articles, pamphlets, and books echoing the philosophy of the Albany memorial. Although a few conservatives like William T. Dwight continued to struggle for the theory of deterrence, opposing the enemy's statistics with charts and percentages of their own,[60] the argument of "intrinsic justice" and "moral necessity" increasingly dominated the debate.

The doctrine of divine retaliation was most closely associated with the

[58] *Ibid.*, pp. 22–23.
[59] *Ibid.*, p. 34.
[60] Dwight, *A Discourse on the Rightfulness and Expediency of Capital Punishments* (Portland, Me., 1843), pp. 25–27.

Reverend George Barrell Cheever, later prominent in the antislavery movement, who in 1843 confronted O'Sullivan in public debate at the Broadway Tabernacle and in 1846 published *A Defence of Capital Punishment,* which established him as the acknowledged leader of the opposition. Drawing from Schlegel the concept of innate reason serving as divine regulator, Cheever spoke of the "intrinsic enormity" of murder and rejected the utilitarian defense of punishment.[61]

There was a direct line of development between Cheever's theology and the philosophy of Francis Wharton, whose monumental *Treatise on the Criminal Law of the United States* was published in 1846, at the height of the capital punishment controversy. When Wharton later defended the death penalty, he pointedly dismissed theories that punishment was intended primarily to prevent crime, to reform offenders, or to incite terror. The justification for punishment was simple and absolute: government was the vindicator of right, crime was a violation of eternal moral law, and "crime as crime must be punished."[62] In the philosophy of Kant and Hegel, Wharton found justification for a theory of punishment as categorical imperative, demanded by the laws of reason. Penalties, as Hegel had said, were agencies with which to annihilate wrong in its continual effort to annihilate right.[63] Hence man was to be given a power which heretofore had been at least theoretically reserved for God—the measurement and negation of total guilt.

In the erratic course of ideas, the moral sense theory, which had at first reinforced the efforts of reformers to reclaim their deluded and erring brethren, had now been expanded into an inherent and absolute knowledge of right and wrong, vindicating the infliction of punishment graded in exact proportion to guilt. With the repudiation of sensational psychology in favor of intuitive knowledge and complete moral freedom, men achieved the power to punish those who were alienated, not from the social compact, but from the universal rules of transcendental mind. Thus was idealistic philosophy gradually converted into the strongest intellectual bulwark against reform. Only the sanction of a higher and absolute law could repress the guilt which drove reformers into action.

In 1846, the year of Cheever's *Defence,* an English phrenologist named M. B. Sampson published *The Rationale of Crime,* in which frank materialism offset the scriptural and philosophical arguments of the opposition.

[61] Cheever, *Defence,* pp. 14–16.

[62] Wharton, *Philosophy of Criminal Law* (Philadelphia, 1880), pp. 2–12. Since Wharton's views were largely a comment on the debate of an earlier period, his summary of legal philosophy is relevant to this discussion.

[63] *Ibid.,* p. 14. Wharton also interpreted law as the united will of the people.

Applying "modern science" to the theories of Rush and Prichard, Sampson gave a physiological basis to moral insanity and stated flatly that all crime was the result of disease.[64] Moreover, since murder evidenced a perversion of the criminal's organs of destruction, which included a propensity toward self-destruction as well as outward aggression, capital punishment only gratified his morbid passions. Phrenology solved the ancient problem of gauging responsibility by simply eliminating it. When crime was conceived as merely the outward manifestation of a diseased brain, punishment became a frightful barbarism. Indeed, executions stimulated the destructive organs of ordinarily normal people, arousing them to acts of cruelty and depravity and inducing waves of suicide and violent crime.[65] Sampson's book was soon quoted extensively in legislative documents, making phrenology an integral part of the debate.

The significance of Sampson's book was that it pushed the naturalism of Rush and Livingston to a logical extreme, directly opposed to the position of Cheever and Wharton. By the 1840's reformers like Theodore Parker could assert that since individuals possessed different capacities for responsible action, and since crime was essentially a disease, it was no more rational for society to kill offenders than it would be for doctors to execute as an example a "patient sick of a disease which he had foolishly or wickedly brought upon himself. . . ."[66] But if reformers stressed the physical and psychological differences between men, their opponents held that by sharing a divine faculty, all men were equally responsible. Ironically, those who emphasized human differences sought to redeem their depraved brethren, while those who believed in an equal and common divinity would have destroyed the total outcasts, the hopeless aliens.

Meanwhile, the antigallows movement stimulated controversy and aroused increasing resistance. After two governors of New Hampshire had urged that the death penalty be abolished, the legislature in 1844 agreed to a referendum, in which the citizens voted nearly two to one in support of capital punishment.[67] Five years later the Reverend Samuel Lee warned the legislature that to reject the Noachic covenant was to say that God was a

[64] Sampson, *The Rationale of Crime, and its Appropriate Treatment; Being a Treatise on Criminal Jurisprudence Considered in Relation to Cerebral Organization* (New York, 1846), pp. 11–17.

[65] *Ibid.*, pp. 80–83, 104–18.

[66] Parker, *A Sermon of the Dangerous Classes of Society* (Boston, 1847), p. 45.

[67] *Journal of the Senate of the State of New Hampshire, November Session, 1844* (Concord, 1845), p. 19. Governor Steele made a strong speech against the decision. In 1842 an abolition bill had been rejected in the House by the narrow margin of 104 to 109, and a law had been passed empowering the governor to commute sentences of death. Public opinion was excited by a murder case at the time of the referendum, and Governor Steele, disregarding the popular

liar.[68] The Pennsylvania House, after being swamped with petitions in 1843 and 1844, finally voted to maintain the death penalty for murder.[69]

In 1844 a Boston Universalist minister named Charles Spear published *Essays on the Punishment of Death,* which was dedicated to Thomas Upham and gave thanks to Rantoul and O'Sullivan. In addition to publicizing the arguments of Rantoul and Livingston, Spear edited a monthly magazine, *The Prisoners' Friend,* which dramatized the plight of condemned criminals and printed articles by prominent reformers, along with highly sentimental poems and illustrations attacking brutal punishments. The only magazine of its kind in the country, *The Prisoners' Friend* helped to coordinate the movements in various states; it furnished statistics on crime and reports of legislative debates and organized public protest against executions of specific criminals.[70]

The movement reached its zenith in the mid-1840's. Charles Spear, together with Rantoul, Wendell Phillips, and Whittier succeeded in 1844 in founding a Massachusetts society for the abolition of capital punishment.[71] The same year a similar organization appeared in New York, led by Samuel May, Greeley, William Balch, and others. In October, 1845, a national society convened in Philadelphia and elected as president George M. Dallas, who was also Vice-President of the United States.[72] By 1850 state societies were reported in Tennessee, Ohio, Alabama, Louisiana, Indiana, Iowa, Pennsylvania, New York, and Massachusetts.[73] In addition to this organizational activity, Theodore Parker thundered against the barbarity of executions at Boston's Melodeon, Horace Greeley supported the reform in the *Tribune,* and pamphlets and public letters by Rantoul and Charles E. Burleigh were distributed to legislative committees. By 1846 even the staid *North American Review* printed a long article which sought to chart a middle course between the extremes of Parker and Cheever but concluded with a stirring plea for abolition based on the uncertainty and inexpediency of executions.[74]

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verdict, commuted the prisoner's sentence. See my article, "Murder in New-Hampshire," *New England Quar.,* XXVIII (June, 1955), 147–63.

[68] Lee, *Capital Punishment* (n.p., n.d.), p. 9.

[69] Post, "Capital Punishment in Pennsylvania," p. 45.

[70] The magazine had begun in 1845 as a weekly paper, *The Hangman;* it was rechristened *The Prisoners' Friend* in 1846 and began as a monthly in 1848. Spear corresponded with British reformers and reprinted their articles; he listed Dickens, Elizabeth Pease, John Bright, Richard Cobden, and the Howitts as friends of the cause (*The Prisoners' Friend,* I [Mar., 1849], 317).

[71] *Ibid.,* II (Feb., 1850), 281.

[72] Post, "Capital Punishment in Pennsylvania," p. 49.

[73] *The Prisoners' Friend,* II (Feb., 1850), 282.

[74] "The Punishment of Death," *NAR,* LXII (1846), 42–44, 52. When the humane, rational tone of the article is compared with the radical Non-Resistants and romantic writers on the one hand, and with the almost hysterical defense of tradition on the other, it is clear how far the controversy had moved from the sober utilitarianism of the eighteenth century. The *Review* did

Yet the movement lacked the concentration of effort which characterized antislavery and temperance reform. Parker, Greeley, and Upham were mainly preoccupied with other causes. By the mid-1840's O'Sullivan was absorbed by extravagant dreams of manifest destiny, and Rantoul was to find western speculation more enticing than the fate of murderers. Even Charles Spear divided his energies between capital punishment and prison reform.[75]

Throughout the Northeast, however, an increasing number of people accepted the belief that executions were illegal and involved society in an unbearable guilt. In 1847 petitions bearing nearly 12,000 signatures flooded the Pennsylvania legislature. The previous year a select committee in New York reported signatures running 7,580 to 113 in favor of abolition,[76] but the efforts of New York reformers were unsuccessful in the constitutional convention of 1846 and again in 1847, when an abolition bill nearly passed in the Assembly.[77]

The memorable year for reformers was 1846, when, according to James H. Titus, leader of the movement in the New York legislature, the sun had risen in the West and its light had finally penetrated the darkness of the East.[78] It was in Michigan that the first success was staged. There had been no execution in that state since 1830, but despite petitions and the efforts of a few reformers in the Michigan legislature, the majority of citizens seemed definitely opposed to abolition.[79] In 1843 a bill had passed in the House but had been defeated in the Senate. Throughout March and April, 1846, the issue continued to provoke violent debate. This time the House resisted a Senate bill substituting solitary confinement for the penalty of death. After an amendment had been added providing for hard labor in solitary confinement, the legislature voted in May to abolish capital punishment for first degree murder.[80] On March 1, 1847, when the law went into effect, Michigan became the first English-speaking state to adopt the reform.

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not sympathize with reformers who denied the right of society to defend itself, but it was incensed by the doctrine of Old Testament retaliation.

[75] Spear's first paper had been devoted solely to the abolition of capital punishment, but *The Prisoners' Friend* became increasingly concerned with prison reform, temperance, and romantic literature. Spear claimed a circulation of 3,000 for *The Hangman,* but by 1854 *The Prisoners' Friend,* despite its wider range of interests, had only 1,500 subscribers (*The Prisoners' Friend,* VI [Jan., 1854], 216).

[76] *State of New York Assembly Doc. No. 213* (May 4, 1846), p. 2. Documents on both sides spoke of the increasing interest and active discussion of the subject in all parts of the state.

[77] *Journal of the Assembly of the State of New York, 1847,* pp. 1618–19, 1687.

[78] *State of New York Assembly Doc. No. 191* (Apr. 12, 1848), p. 53.

[79] Post, "Michigan Abolishes Capital Punishment," *Michigan History Magazine,* XXIX (1945), 49.

[80] *Journal of the Senate of the State of Michigan, 1846* (Detroit, 1846), pp. 241–357; *Journal of the House of Representatives of the State of Michigan, 1846* (Detroit, 1846), pp. 498–515, 548, 575, 599, 613.

In 1852 Rhode Island followed the example of Michigan,[81] and when Wisconsin adopted a similar law the next year, many believed that the gallows was doomed in the North.[82] Tobias Purrington proclaimed with confidence: ". . . it will not be long before capital punishment will be banished from every State of this great and glorious Union—the consummation of which is an event devoutly to be wished by every true christian, statesman, and philosopher."[83]

During 1849 and 1850 reformers were inspired by Michigan's success and by Sampson's phrenological writings. Public debates, such as one held at the Boston Latin School in 1849,[84] helped to arouse popular interest, and more people were becoming involved in the controversy. The orthodox clergy, however, were more and more successful in their effort to identify abolition with materialists, Unitarians, and Harvard intellectuals: "On a more noxious set of human beings the sun never shines; a company more accursed of the Lord, does not probably pollute the air. . . . Atheism is entitled to profound respect, in comparison with their insolent exhibitions of falsehood, in the name of religion."[85] When in 1850 liberals and intellectuals protested the execution of Harvard's Professor John W. Webster, the identification was complete. Despite the growing number of famous and respectable men supporting the cause, the opposition could rely on a traditional current of anti-intellectualism and religious orthodoxy: "Thou College of the Puritans, begun in prayer, reared for the glory of Father, Son and Holy Ghost; dedicated to Christ and the Church; thou has greater cause of grief than that one of thy Professors has gone from the gallows to eternity; the blessed Redeemer is daily crucified in thee!"[86]

In Ohio the turning point came in 1850, when reformers were defeated at the constitutional convention. The agitation of Clement Vallandingham had produced close votes in the 1840's, but petitions and interest subsided after 1850.[87] A bill modeled on the Maine law missed enactment by one vote in the

[81] Five years later Rhode Island's secretary of state reported that an increase in murder had aroused public opinion against the new law, and an effort to restore capital punishment had been defeated by a narrow vote (*State of New York Assembly Doc. No. 170* [Mar. 16, 1857], pp. 24–25).

[82] William Tallack, *The Practical Results of the Total or Partial Abolition of Capital Punishment in Various Countries* (London, 1866), p. 20. Reformers thought that Maine and Louisiana had practically abolished the penalty, the latter by empowering juries to render verdicts of guilty "without capital punishment" (*The Prisoners' Friend,* IV [Apr., 1852], 160–62).

[83] *Report,* p. 47.

[84] *An Exercise in Declamation; in the Form of a Debate on Capital Punishment . . .* (Boston, 1849).

[85] Timothy Alden Taylor, *The Bible View of the Death Penalty: Also, a Summary of the Webster Case* (Worcester, 1850), p. 23.

[86] *Ibid.,* p. 34.

[87] Post, "The Anti-gallows Movement in Ohio," pp. 109–11.

New York Senate in 1851, but in the following years there was a gradual ebbing of the reform tide.[88] In 1852 Massachusetts adopted a similar law delaying executions for one year and requiring the issuance of an executive warrant for each hanging. However, reformers were disheartened in 1854 when Governor John H. Clifford, backed by the Supreme Judicial Court, ruled that the statute did not modify an earlier law requiring the death of murderers. After ordering an execution the Governor justified himself at state expense in *The Prisoners' Friend,* claiming that he had been obliged by law to issue the order.[89] When accused of violating the spirit of the new law, he argued that the Commonwealth should follow the example of Rhode Island if the majority of citizens actually desired the abolition of capital punishment. In 1857, however, the General Court repealed the law altogether.[90] Thus, despite success in Rhode Island and Wisconsin, and despite the triumph of Tobias Purrington when he induced President Fillmore to commute the penalty of a condemned Marine,[91] there was a lessening of interest in capital punishment from 1852 to 1860.

However, a final burst of agitation stirred the New York legislature in 1860. Committee reports favorable to abolition had been made in 1857 and 1859, and the flow of petitions increased in 1860. After receiving encouraging letters from officials in Wisconsin and Michigan, the legislature passed a law on April 14 delaying executions for one year from date of sentence, when they could be carried out only upon receipt of an executive warrant.[92] The law also repealed previous sections of the criminal code which prescribed the mode of execution, thereby effectively abolishing the death penalty. But the 1860 law, which was greatly misunderstood and at best had struck an ambiguous compromise, was repealed the following year. For the duration of the Civil War there was no mention of capital punishment in the legislative journals.[93]

It was difficult for romantic poets to evoke sympathy for a few murderers when the attention of sympathetic people was focused increasingly on a differ-

[88] *Journal of the Senate, 1851,* pp. 688, 936.

[89] VI (Feb., 1854), 273–78.

[90] *Acts and Resolves Passed by the General Court of Massachusetts, in the Year 1857* (Boston, 1857), pp. 427–28.

[91] Purrington, *Report,* p. 38.

[92] *Journal of the Senate of the State of New York, 1860,* p. 876; *Journal of the Assembly of the State of New York, 1860,* pp. 1310, 1337.

[93] *State of New York Senate Doc. No. 40* (Feb. 7, 1862), p. 2; *Journal of the Senate of the State of New York, 1862,* p. 12. In 1861 an act revived all provisions of the earlier statutes, but there remained great uncertainty about the effective date of the repeal. In 1862 a new law was passed which clarified this matter and provided instructions on the method of executions. In the later nineteenth and early twentieth centuries, many states abolished capital punishment, only to follow this example of repeal, usually after a sensational murder.

ent and more numerous group of oppressed aliens. It was difficult for rationalist reformers to preach against the violence of capital punishment when reformers themselves advocated the shedding of blood. At the height of the controversy over the death penalty in 1860, Martin H. Bovee, who had been primarily responsible for the Wisconsin law and who worked for reform in New York and Illinois, was struggling to complete what he hoped would be the definitive work against capital punishment. Drawing on arguments and statistics of earlier legislative reports, the book would present a final and unanswerable case against hanging, a case which could not fail to persuade reasonable men to follow the enlightened example of Michigan, Wisconsin, and Rhode Island. But the publication date had been set for the year 1861. As Bovee later confessed, explaining why his book had not appeared: "To have presented a work of this kind during the continuance of such a struggle, would have been ill-timed,' to say the least. . . ."[94]

After the Civil War, men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and blunted. In the 1870's and immediately prior to World War I, many states would at least temporarily abolish capital punishment, but the movement failed to recapture the widespread enthusiasm and evangelical fervor of the 1830's and 1840's.

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[94] Bovee, *Reasons for Abolishing Capital Punishment* (Chicago, 1876), p. viii.