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John C. Hogan

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Joseph Story on Capital Punishment

Edited by John C. Hogan*

[Editor's note: this article, originally entitled “Death Punishment,” first appeared as an anonymous article in the first edition of the *Encyclopedia Americana* (1829-1833). Extensive research as to the circumstances of authorship of this, and other anonymous articles in the same edition, has been done and reported elsewhere by Mr. Hogan. See Hogan, *Joseph Story's Anonymous Law Article*, 52 Mich. L. Rev. 869 (1954). In view of the current controversy in California concerning capital punishment, it is the opinion of the California Law Review that the views on this subject of Mr. Story, first written more than one hundred years ago and reappearing here for the first time, are of considerable current interest.]

PUNISHMENT OF DEATH

1. The questions most commonly discussed by philosophers and jurists under this head are: (1) as to the right of governments to inflict the punishment of death; (2) as to the expediency of such punishment; (3) as to the crimes to which, if any, it may be most properly confined and limited; (4) as to the manner in which it should be inflicted. A few words will be said on each of these points.

   1. As to the right of inflicting the punishment of death. This has been doubted by some distinguished persons; and the doubt is often the accompaniment of a highly cultivated mind, inclined to the indulgence of a romantic sensibility, and believing in human perfectibility. The right of society to punish offences against its safety and good order will scarcely be doubted by any considerate person. In a state of nature, individuals have a right to guard themselves from injury, and to repel all aggressions by a force or precaution adequate to the object. This results from the right of self-preservation. If a person attempts to take away my life, I have, doubtless, a right to protect myself against the attempt by all reasonable means. If I cannot secure myself but by taking the life of the assailant, I have a right to take it. It would otherwise follow, that I must submit to a wrong, and lose my life, rather than preserve it by the means adequate to maintain it. It cannot, then, be denied that, in a state of nature, men may repel force by force, and may even justly take away life, if necessary to preserve their own.

   When men enter society, the right to protect themselves from injury and to redress wrongs is transferred, generally, from the individuals to the community. We say that it is generally so, because it must be obvious that, in many cases, the natural right of self-defense must remain. If a robber

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* Research Editor, the RAND Corporation, Santa Monica, California.

1 From IV *Encyclopedia Americana* 140–145 (1st ed. 1830).
attacks one on the highway, or attempts to murder him, it is clear that he has a right to repel the assault, and to take the life of the assailant, if necessary for his safety; since society, in such a case, could not afford him any adequate and prompt redress. The necessity of instant relief, and of instant application of force, justifies the act, and is recognized in all civilized communities.

When the right of society is once admitted to punish for offences, it seems difficult to assign any limits to the exercise of that right, short of what the exigencies of society require. If a state have a right to protect itself and its citizens in the enjoyment of its privileges and its peace, it must have a right to apply means adequate to this object. The object of human punishments is, or may be, three-fold: first, to reform the offender; secondly, to deter others from offending; and, lastly, to secure the safety of the community, by depriving the offender of the power of doing mischief.

The first consideration rarely enters into human legislation, because of the inadequacy of our means to produce great moral results by the infliction of punishment. The two latter considerations enter largely into the theory and practice of legislation. Who is to be the judge, in such cases, as to what is the adequate punishment for any offense? Certainly, punishments ought not to be inflicted, which are utterly disproportionate to the offence, and beyond the exigencies of society. No government has a right to punish cruelly and wantonly, and from mere revenge; but, still, the discretion must be vested somewhere, to say what shall be the degree of punishment to be assigned to a particular offence.

That discretion must be, from its nature, justly a part of the legislative power, and to be exercised according to the actual state of society. It may, nay, it must be differently exercised in different ages, and in different countries; for the same punishment which, in one age or country, may be sufficient to suppress an offence, or render it comparatively harmless, may, in another age or country, wholly fail of the effect. If mild punishments fail of effect, more severe must be resorted to, if the offence be of a nature which affects society in its vital principles, or safety, or interests. The very frequency of a crime must often furnish a very strong ground for severe punishment, not only as it furnishes proof that the present punishment is insufficient to deter men from committing it, but from the increased necessity of protecting society against dangerous crimes.

But it is often said, that life is the gift of God, and therefore it cannot justly be taken away, either by the party himself, or another. If he cannot take it away, he cannot confer that power on others. But the fallacy of this argument is obvious. Life is no more the gift of God than other personal endowments or rights. A man has, by the gift of God, a right to personal liberty and locomotion, as well as to life; to eat and drink and breathe at
large, as well as to exist; yet no one doubts that, by way of punishment, he
may be confined in a solitary cell; that he may be perpetually imprisoned
or deprived of free air, or compelled to live on bread and water. In short,
no one doubts that he may be restrained in the exercise of any privileges or
natural rights short of taking his life.

Yet the reasoning, if worth anything, extends to all these cases in an
equal degree. If, by his crimes, a man may justly forfeit his personal rights,
why not his life? But we have seen that it is not true, even in a state of
nature, that a man's life may not be taken away by another, if the neces-
sity of the case requires it. Why, then, may not society do the same, if its
own safety requires it? Is the safety of one person more important than
the safety of the whole community?

Then, again, as to a man's inability to confer on others a right which
he does not himself possess. Suppose it is so; the consequence which is
deduced from this does not, in fact, arise. Blackstone, indeed, in his Com-
mentaries (Vol. IV, p. 8), seems to deduce the right of society to punish
capital offences, in certain cases (that is, in cases of mala prohibita, and in
mala in se), from the consent of the offenders. The marquis Beccaria, on
the other hand, denies that any such consent can confer the right, and there-
fore objects to its existence.

But the notion of consent is, in nearly all cases, a mere theory, having
no foundation in fact. If a foreigner comes into a country, and commits a
crime at his first entrance, it is a very forced construction to say that he
consents to be bound by its laws. If a pirate commits piracy, it is almost
absurd to say that he consents to the right of all nations to punish him for it.
The true and rational ground on which the right rests, is not the consent of
the offender, but the right of every society to protect its own peace, and
interests, and property, and institutions, and the utter want of any right,
in other persons, to disturb, or destroy, or subtract them.

The right flows, not from consent, but from the legitimate institution of
society. If men have a right to form a society for mutual benefit and secur-
ity, they have a right to punish other persons who would overthrow it. There
are many cases where a state authorizes life to be taken away, the lawfulness
of which is not doubted. No reasonable man doubts the right of a
nation, in a just war, especially of self-defence, to repel force by force, and
to take away the lives of its enemies. And this right is not confined to re-
pelling present force, but it extends to precautionary measures, which are
necessary for the ultimate safety of the nation. In such a war, a nation may
justly insist upon the sacrifice of the lives of its own citizens, however inno-
cent, for the purpose of ensuring its own safety. Accordingly, we find that
all nations enroll militia and employ troops for war, and require them to
hazard their lives for the preservation of the state. In these cases, life is
freely sacrificed by the nation; and the laws enacted for such purposes are
deemed just exercises of power. If so, why may not life be taken away by
way of punishment, if the safety of society requires it? If a nation may
authorize, in war, the destruction of thousands, why may it not authorize
the destruction of a single life, if self-preservation require it?

The mistake, however, is in supposing that life cannot be taken away
without the consent of the party. If the foregoing reasoning is correct, such
consent is neither supposed nor necessary. In truth, the supposition of an
original compact between all the persons who are subject to the regulations
of a society, by their own free consent, as the necessary and proper basis
on which all the rights of such society depend, is, at best, a gratuitous sup-
position; and it sometimes leads to very incorrect results. It may be added,
that the Scriptures most clearly recognize and justify the infliction of capi-
tal punishment in certain cases.

2. As to the expediency of capital punishment. This opens a wide field
for discussion. Some able men, who do not doubt the right, do still deny the
expediency of inflicting it. It may be admitted, that a wise legislature ought
to be slow in affixing such a punishment to any but very enormous and dan-
gerous crimes. The frequency of a crime is not, of itself, a sufficient reason
for resorting to such punishment. It should be a crime of great atrocity
and danger to society, and which cannot otherwise be effectually guarded
against.

In affixing punishments to any offence, we should consider what are the
objects and ends of punishment. It is clear that capital punishment can have
no effect to reform the offender himself. It may have, and ordinarily does
have, the effect to deter others from committing a like offence; but, still,
human experience shows that even this punishment, when inflicted for small
offences, which are easily perpetrated, and to which there is great tempta-
tion, does not always operate as an effectual terror. Men sometimes are
hardened by the frequent spectacles of capital punishments, and grow in-
different to them. Familiarity deprives them of their horror. The bloodiest
codes are not those which have most effectually suppressed offences. Be-
sides, public opinion has great weight in producing the acquittal or con-
demnation of offenders. If a punishment be grossly disproportionate to the
offence, if it shock human feelings, there arises, insensibly, a sympathy for
the victim, and a desire to screen him from punishment; so that, as far as
certainty of punishment operates to deter from crimes, the object of the
legislature is often thus defeated.

It may be added, that a reasonable doubt may fairly be entertained
whether any society can lawfully exercise the power of punishing beyond
what the just exigencies of that society require. On the other hand, a total
abolition of capital punishments would, in some cases at least, expose so-
ciety to the chances of deep and vital injuries. A man who has committed murder deliberately, has proved himself unfit for society, and regardless of all the duties which belong to it. In his case, the *lex talionis* can hardly be deemed unjust.

The safety of society is most effectually guarded by cutting him off from the power of doing further mischief. If his life be not taken away, the only other means left are, confinement for life, or transportation and exile for life. Neither of these is a perfect security against the commission of other crimes, and may not always be within the power of a nation without great inconvenience and great expense to itself. It is true that the latter punishments leave open the chance of reform to the offender, which is, indeed, but too often a mere delusion; but, on the other hand, they greatly diminish the influence of another salutary principle, the deterring of others from committing like crimes.

It seems to us, therefore, that it is difficult to maintain the proposition that capital punishments are, at all times and under all circumstances, inexpedient. It may rather be affirmed that, in some cases, they are absolutely indispensable to the safety and good order of society. We should incline to say that, as a general rule, every nation, in its legislation on this subject, must be governed very much by the manners, customs, habits of thinking, and state of opinion, among the people upon whom it is to operate. In a rude and barbarous state of society, summary and almost vindictive punishments seem more necessary than in a highly polished and civilized state of society.

3. As to the *crimes* to which capital punishments may, most properly, be limited. From what has been already said, this must depend upon the particular circumstances of every age and nation; and much must be left to the exercise of a sound discretion on the part of the legislature. As a general rule, humanity forbids such punishments to be applied to any but crimes of very great enormity, and danger to individuals or the state. If any crimes can be effectually suppressed by moderate means, these ought, certainly, to be first resorted to.

The experience, however, of most nations, if we may judge from the nature and extent of their criminal legislation, seems to disprove the opinion so often indulged by philanthropists, that moderate punishments are sufficient to suppress crimes, and that capital punishments are rarely necessary. The codes of most civilized nations abound with capital punishments. That of Great Britain, a nation in which the public legislation has a deep infusion of popular opinion, is thought to be uncommonly sanguinary. Blackstone, in his *Commentaries* (Vol. IV, p. 18), admits that, in his time, not less than *one hundred and sixty* crimes were, by the English law, punishable with death. In the code of the United States, only *nine* crimes are so punishable, viz., treason, murder, arson, rape, robbery of the mail, fraudu-
lent casting away ships, rescue of criminals capitally convicted during ex-
ecution, and piracy, one species of which is the African slave-trade. In the
codes of the several states of the Union, still fewer crimes are generally
punishable with death.

It remains yet to be proved, whether the general mildness of our penal
code has afforded us any greater security against crimes than exists in other
nations. Hitherto, the temptations to commit them have been less here, than
in other countries less abundantly and cheaply supplied with the necessaries
of life. It is still a question, fit to exercise the solicitude and ingenuity of
our statesmen and philanthropists, whether we can safely carry on so mild
a system in a more corrupt and dense state of society. If we can, it must be
by a very sparing use of the power of pardoning; so that the certainty of
absolute, unmitigated punishment shall follow upon the offence.

Beccaria, with his characteristic humanity and sagacity, has strongly
urged that the certainty of punishment is more important to deter from
crimes than the severity of it. At present, there is great danger that the
pardoning power, in our free forms of government, will, in a great measure,
overthrow this salutary principle. Its exercise, therefore, ought to be
watched with the greatest jealousy and care, lest the abuse of it should lead
to the introduction either of absolute impunity for offences, or of more ex-
tensive capital punishments. It will probably be found, from the experience
of most nations, that capital punishment ought not wholly to be dispensed
with. On the other hand, it may be safely affirmed, that there is no positive
necessity to apply it to a very large number of crimes. Treason, murder,
arson, piracy, highway robbery, burglary, rape, and some other offences of
great enormity, and of a kindred character, are not uncommonly punished
in this manner; but beyond these, it is extremely questionable whether there
is any necessity or expediency of applying so great a severity. Still, how-
ever, as has been already intimated, much must depend upon the opinion
and character of the age, and the prevailing habits of the people, and upon
the sound exercise of legislative discretion. What may be deemed uselessly
severe in one age or country, may be positively required by the circum-
stances of another age or country.

4. As to the manner of inflicting the punishment of death. This has been
different in different countries, and in different stages of civilization in the
same countries. Barbarous nations are generally inclined to severe and vin-
dictive punishments, and, where they punish with death, to aggravate it by
prolonging the sufferings of the victim with ingenious devices in cruelty.
And even in civilized countries, in cases of a political nature, or of very
great atrocity, the punishment has been sometimes inflicted with many hor-
rible accompaniments. Tearing the criminal to pieces, piercing his breast
with a pointed pole, pinching to death with red-hot pincers, starving him to
death, breaking his limbs upon the wheel, pressing him to death in a slow
and lingering manner, burning him at the stake, crucifixion, sawing him to
pieces, quartering him alive, exposing him to be torn to pieces by wild beasts,
and other savage punishments, have been sometimes resorted to for the pur-
poses of vengeance, or public example, or public terror. Compared with
these, the infliction of death by drowning, by strangling, by poisoning, by
bleeding, by beheading, by shooting, by hanging, is a moderate punishment.

In modern times, the public opinion is strongly disposed to discounten-
ance the punishment of death by any but simple means; and the infliction
of torture is almost universally reprobated. Even in governments where it
is still countenanced by the laws, it is rarely resorted to; and the sentence is
remitted, by the policy of the prince, beyond the simple infliction of death.
In Prussia, where atrocious criminals are required, by the penal code, to
be broken upon the wheel, the king always issues an order to the executioner
to strangle the criminal (which is done by a small cord not easily
seen) before his limbs are broken. So, in the same country, where larceny,
attended with destruction of life, is punished by burning alive, the fagots
are so arranged as to form a kind of cell, in which the criminal is suffocated
by the fumes of sulphur, or other means, before the flame can reach him.
In England, in high treason, the criminal is sentenced to be drawn to the
gallows, to be hanged by the neck, and cut down alive, to have his entrails
taken out and burned while he is yet alive, to have his head cut off, and his
body divided into four parts, and these to be at the king’s disposal. But,
generally, all the punishment is remitted by the crown, except the hanging
and beheading; and when it is not, by connivance of the officers, the criminal
is drawn on a hurdle to the place of execution, and is not disembowelled
until actually dead. In other cases, the punishment is now simply by hang-
ing, or, in the military and naval service, by shooting.

In France, formerly, the punishment of death was often inflicted by
breaking the criminal on the wheel. (Damiens was torn to pieces by horses,
after he had been tormented with red-hot pincers, and had suffered other
horrid tortures.) The usual punishment now is beheading by the guillotine.
In cases of parricide, the criminal is conducted, barefooted, and covered
with a black veil, to the place of execution, where his right hand is cut off
just before he is beheaded. In Austria, the general mode of punishment is
by hanging. In Prussia, hanging is rarely inflicted; but the usual punish-
ment is beheading with a heavy axe, the criminal’s head being first tied to a
block. In other German states, the uncertain mode of execution by the sword
still exists. Sand was executed in this manner. It should be remarked, how-
ever, that, in Germany, hanging has always been deemed the most infamous
sort of punishment; and the sentence has often been commuted for behead-
ing by the sword, as a milder mode of punishment.
In the United States of America, hanging is the universal mode of capital punishment; and, indeed, the constitution of the United States contains a provision, declaring that "cruel and unusual punishments shall not be inflicted." In China, murderers are cut to pieces; robbers, not. In Russia, the punishment of death has been frequently inflicted by the knout. In Turkey, strangling, and sewing the criminal up in a bag, and throwing him into the sea, are common modes of punishment.

In the Roman code, many severe and cruel punishments were prescribed. During the favored times of the republic, many of these were abolished or mitigated. But again, under the emperors, they were revived with full severity. In the ancient Grecian states, the modes of punishment were also severe, and often cruel. But the most general mode of punishment, in ordinary cases, seems, both in Greece and Rome, to have been by hanging.

Whether the ancient Greek mode of capital punishment, by taking poison at such hour as the condemned party should choose, has ever been adopted in any modern nation, we are unable to say. As far as we have been able to learn, it is not in use among any Christian people; and the idea of suicide connected with it would probably prevent any such nation from adopting it.

Whether executions ought to be in public or in private, has been a question much discussed, and upon which a great diversity of opinion exists among intelligent statesmen. On the one hand, it is said that public spectacles of this sort have a tendency to brutalize and harden the people, or to make them indifferent to the punishment; and the courage and firmness, with which the criminal often meets death, have a tendency to awaken feelings of sympathy, and even of admiration, and to take away much of the horror of the offence, as well as of the punishment. On the other hand, it is said that the great influence of punishment, in deterring others from the like offence, cannot be obtained in any other way. It is the only means to bring home to the mass of the people a salutary dread and warning; and it is a public admonition of the certainty of punishment following upon crimes. It is also added, that all punishments ought to be subjected to the public scrutiny, so that it may be known that all the law requires, and no more, has been done. If punishments were inflicted in private, it could never be known whether they were justly and properly inflicted upon the persons condemned; or whether indeed, innocent persons might not become the victims.

In England, the court before which the trial is had, declares the sentence, and directs the execution of it; and its warrant is a sufficient authority to the proper officer to execute it. In the courts of the United States, there is a like authority; but in the laws of many of the states, there is a provision that the execution shall not take place except by a warrant from the gover-
nor, or other executive authority. In cases of murder and other atrocious crimes, the punishment in England is usually inflicted at a very short interval after the sentence. In America, there is usually allowed a very considerable interval, varying from one month to six months.

In England and America, there lies no appeal from the verdict of a jury and the sentence of a court, in capital cases. In France, there may be a review of it in the court of cassation. (q.v.) In Germany, there is, in criminal as in civil cases, a right of appeal; hence, in that country, few innocent persons have suffered capitally since the 16th century; and in England and America, the very fact that the verdict and sentence are final, produces great caution and deliberation in the administration of criminal justice, and a strong leaning towards the prisoner on trial.

Capital punishment cannot be inflicted, by the general humanity of the laws of modern nations, upon persons who are insane or who are pregnant, until the latter are delivered and the former become sane. It is said that Frederic the Great required all judgments of his courts, condemning persons to death, to be written on blue paper; thus he was constantly reminded of them as they lay on his table among other papers, from which they were readily distinguished. He usually took a long time to consider such cases, and thus set an excellent example to sovereigns of their duty.