

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era – Criminal Justice/Punishments

Michigan Debates Capital Punishment (1844)

Michigan was the first state to abolish capital punishment. Debate over that sanction began when the state entered the Union. The proposed state constitution declared, "Capital punishment ought not be inflicted: the true design of all punishment being to reform, not to exterminate mankind." That provision was voted down. Opponents insisted, "Capital punishment . . . cannot be abolished without incurring the hazard of much greater evil." Proponents of abolition repeatedly tried to reinstate the ban on capital punishment. In 1846, they succeeded. The Michigan penal code, as revised, declared, "All [first-degree] murder . . . shall be punished by solitary confinement at hard labor."¹

The 1844 majority and minority reports of the Select Committee on the Abolishment of Capital Punishment are excerpted below. Compare these excerpts to contemporary debates over capital punishment and to other constitutional debates during the Jacksonian era. What claims are typical of arguments for and against capital punishment at any time? What claims seem distinctive to antebellum America?

Majority Report of the Select Committee on the Abolishment of Capital Punishment²

...

Your committee view the punishment of death as wrong in itself.

It, at once, deprives the state of a citizen, and, by no means, recompenses community for the commission of an offence.

... If, indeed, a member of the commonwealth manifest so violent a spirit as to disturb the public tranquility and transgress the rules established by his own consent, it is, then, proper that the conservative power of society should be exerted to restrain his insubordination, and prevent the ills which must inevitably result from impunity. By his own act, the offender has demonstrated his incapacity to enjoy the rights and privileges of association with his fellows; and, like a child or a lunatic, he must be placed under a guardianship that will correct and control him. Imprisonment is just, because it certainly prevents a repetition of the offence, and affords an opportunity of reformation to the criminal. The state is not bereaved of a citizen, and can yet derive advantage from his industry: whereas, to punish an offender with death, destroys, at once, both his life and his usefulness.

Besides, the infliction of this penalty is a usurped power of government. . . .

[I]t appears, that the law recognizes no right of taking away his own life as belonging to any man, and therefore no power to inflict death could be possibility surrendered by any man, nor delegated to any government.

...

As civilization has advanced in later times, the sense of community has become chocked at judicial torture, and the barbarous penalties of the code which terrified the people of the middle ages into

¹ This paragraph is taken from Eugene G. Wanger, "Historical Reflections on Michigan's Abolition of the Death Penalty," *Thomas M. Cooley Law Review* 13 (1996): 755.

² Michigan Legislature of 1844, "Majority Report of the Select Committee on the Abolishment of Capital Punishment" (Detroit: State of Michigan, 1844).

submission; and every century has been marked by the progressive and mild spirit of the Christian dispensation. Even under our own eyes, and within our remembrance, the pillory and the whipping post have been held disgraceful aids in the administration of justice; and the frequent discussion of the very question referred to your committee is a most signal evidence of a new and better spirit shed abroad in men's hearts. Your committee solemnly believe that public opinion is against the infliction of the penalty of death. We can observe this in every trial for a capital offence. The sympathies of community are almost invariably concentrated in behalf of the prisoner, and every legal subtlety is applauded or connived at, which can, in any manner, exculpate the criminal. . . .

. . .
Your committee do not wish to expatriate on the disgusting horrors of a public execution; and merely allude to it here to show that such spectacles are becoming less grateful to the public taste. In several states, executions are consummated privately, and thus, one of the strongest arguments in its favor, viz: the warning to spectators has been yielded up. . . .

The fallibility of human testimony is another reason which has influenced the mind of your committee. A volume might be collected of instances where, on incorrect evidence, innocent men have been convicted, sentenced and executed. . . .

. . . If the punishment of death be inflicted, how irreparable is the fatal mistake! There is no repentance when the victim is in the grave. . . . The state has lost a citizen and "inalienable rights of life, liberty and happiness" have been sacrificed to a slavish veneration of despotic and atrocious usages. Had imprisonment been substituted for death, justice might have awarded some recompense to the innocent convict.

. . .
[Y]our committee would respectfully observe that crime is frequently provoked by ignorance, poverty or passion; that neither imprisonment nor banishment preclude industry, instruction and reformation; and that it is certainly more human to enlighten the ignorant than suddenly cut him off with all his imperfections on his head.

. . .
*Minority Report of the Select Committee on the Abolishment of Capital Punishment*³

. . .
. . . If, then, some of the original rights of persons may and must be destroyed to secure the rest, it devolves on those who maintain that a community is morally incompetent to punish with death, to establish some ground for the distinction which the proposition involves. If the state for good cause may deprive persons of their natural liberties, the advocates of the bill are called upon to show that it cannot also for good cause deprive them of their natural lives. . . .

. . . The rights of personal security (which includes life) and personal liberty spring from the natural relations of mankind. Whatever violates either of these violates that relation. . . .

. . .
Personal security respects life, limbs, body, health and reputation. In the nature of things, some of these must suffer in every species of punishment; reputation or health, or person, or all of them together. If the state may, in a given case, deprive of one, why not, if occasion requires another or all? If human punishments are at all justifiable either of the primeval rights of right may, on this score, justly be made to yield to the benefit and exigencies of society.

The substitute proposed is solitary imprisonment. This, as also most kinds of corporeal punishment tends to shorten life. The stoutest frames, the strongest constitutions are often overcome in a little time by the toils and terrors of a prison. If the gallows may not be used to shorten life, how can the dungeon be employed for that purpose? . . .

Few, it is presumed, deny the right to take life in case of just wars. . . .

³ Ibid.

... If, therefore, a state may on the score of policy destroy human lives in the gross, why should it not on the same ground inflict death in detail? Indeed, all capital offenders, such as traitors and pirates, and murderers and robbers, may be deemed the common and mortal enemies of mankind, against whom society may wage a war of extermination.

The right to take life in self-defense has never, so far as I know, been questioned. Human punishments aim at prevention and are founded in a spirit of self-defense. Security could not exist—nay, society could not hold together were it not for the punishment of crimes. Penalties although retrospective in their application, are nevertheless prospective in their objects and benefits. We punish the burglar that he may in the future be deterred from the commission—and others dread the consequences of the crime. So of murder and the rest. The whole scheme, therefore, is defensive. . . .

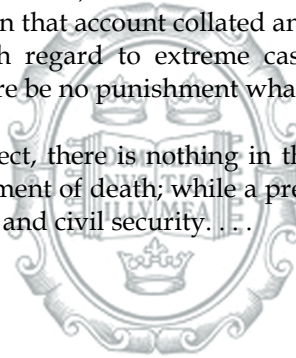
That capital executions are more dreaded, the evidence is partly intuitive and partly experimental. . . .

...
A main objection to capital punishment is, the possibility of convicting the innocent and the impossibility, in such cases, after the sentence has been executed, of making compensation.

In answer I would observe, in the first place, that such cases are exceedingly rare, and that laws should not, as a general rule, be made with reference to extreme cases. The instances where the innocence of the convict is discovered after his execution, are still more rare. It is true, we read of such occurrences, because, being extraordinary, they are on that account collated and published.

If laws were to be made with regard to extreme cases—as, for example, the possibility of punishing the innocent, then would there be no punishment whatever. . . .

...
If the foregoing views are correct, there is nothing in the relation which subsists between man and man incompatible with the punishment of death; while a pressing expediency demands it in cases of high crimes, as essential to human weal and civil security. . . .



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