Chapter XI

THE IMMENSURABLE
JUSTICE OF DEATH

THUS far we have examined certain beliefs and values concerning the nature and causes of homicide which have been expressed in sixty years of American fiction, together with related assumptions in a roughly contemporary intellectual environment. Most of the problems that we have discussed reach a practical culmination with the disturbing question: what is to be done with a man guilty of culpable homicide?

At a time when most crimes were capital, though subject to the benefit of clergy and to a capricious pardoning power, the question of a murderer’s status involved little debate. If an Englishman had killed in a heat of passion, and if he had the good fortune to be literate, he received a burn on his hand and was dismissed; if he had murdered with stealth and deliberation, he was hanged, along with petty thieves, forgers, and poachers. According to Lockian
jurisprudence, which was generally accepted in America,\textsuperscript{1} every man had ceded his natural right of retribution to the state, which, as his legal agent, was duty bound to execute every "noxious Creature."

By 1800, however, a group of enlightened thinkers had challenged the criminal codes of France, Italy, and England, pioneer psychiatrists had widened the conception of insanity, explaining many morbid and aggressive actions in terms of mental disease, and a pietistic religious spirit had encouraged men to sympathize with their depraved brothers and to endeavor to reform the outcasts of society. Especially in liberal intellectual circles, there was a growing uncertainty regarding the justice and efficacy of retributive punishment. It was principally the Lockian psychology which contributed to a theory of punishment as social expedience, and if utility justified Bentham and Paley’s arguments for swift and harsh penalties, Beccaria combined the sensational psychology with the moral-sense philosophy and concluded that capital punishment was repugnant to "the indelible sentiments of the heart of man." \textsuperscript{2}

During the first half of the nineteenth century a basic conflict arose between those who thought of a murderer as a moral alien—a renegade from the human species, whose death secured virtue by destroying one more nest of evil—and those who considered the murderer as a physical alien, at least as a man alienated by physical causes, still capable of penitence and salvation. The arguments of Beccaria were soon accepted and expanded by Quakers, liberal Unitarians, and social reformers, who

\textsuperscript{1}Nathan Dane, \textit{A General Abridgment and Digest of American Law, with Occasional Notes and Comments} (Boston, 1824), VI, 626–637.

\textsuperscript{2}Cesare Beccaria, \textit{An Essay on Crimes and Punishments, Translated from the Italian; with a Commentary Attributed to Mons. De Voltaire . . .} (London, 1767), pp. 8–11, 43, 102, 112.
often found in phrenology and the moral-sense theory arguments against retributive punishment. But whether men attacked the death penalty as a vestige of barbarism or defended it as essential to the security of society, they evidenced emotions disproportionate to the rational arguments involved. It is doubtful that the preservation or abolition of capital punishment would greatly affect the security of society, were the issue confined to the fate of a small number of convicted murderers. Yet the debate over the penalty of death was soon confused by such considerations as the metaphysical struggle between good and evil, the ultimate source of justice, the degree of human responsibility, the fallibility of the courts, the progress or decline of society, and the authority of the Bible. The occasional hanging of a murderer seemed to have psychological implications tending either to unify or to disintegrate society, especially in a democracy destined to lead the world to moral perfection.

Psychologically, the punishment of death was a ritual demonstrating a united hatred of evil, the murderer being generally chosen as a symbol of the most wicked and depraved disposition that men could imagine. As a ritual the penalty was reassuring to normal, virtuous men, for it vindicated their own consciences, strengthening their self-imposed restraints and efforts to suppress aggressive impulses, not because average men feared a similar punishment, but because they identified themselves with a righteous cause. At the same time, a public hanging provided an approved outlet for collective revenge. The death of a criminal was a sacrifice which ensured the virtue of society, justified mankind in the eyes of God and all other paternal authorities, and allowed each frustrated individual to fortify his own antibodies against private aggression by a vicarious act of murder.
Yet executions could serve such a convenient purpose only so long as men believed in concrete, uncaused evil which might totally contaminate a member of the tribe. If a man murdered because of a warped disposition, itself the product of oppression, poverty, trauma, or faulty training, then, as Bulwer-Lytton's Paul Clifford said, “circumstances make guilt. . . . Let us endeavor to correct the circumstances before we rail against the guilt!”

The debate over the death penalty was, in short, one of the most significant points of conflict between empirical thought, with its skirmish line of social reformers leading the assault, and a great body of traditional values, which relied for support on the vulnerable outpost of capital punishment. At issue was not merely the disposal of undesirable criminals, but the preservation of public order and virtue, the responsibilities of society to its members, and the innocence or guilt of a time-honored method of releasing surplus aggression through the public hanging of a scapegoat.

From the 1820's to the Civil War, philosophic and religious theories of punishment were converted into a sustained social and political agitation for the abolition of the death penalty. The arguments of Edward Livingston, Thomas Upham, and Martin H. Bovee were based upon the premise that moral evil has external causes and is not the result of conscious and willful choice. Since man's passions were more powerful than was his reason, executions would not serve as a deterrent, but would rather stimulate more impressionable minds to similar violence:

If the sight of one capital execution creates an inhuman taste to behold another; if a curiosity, satisfied at first with terror, increases with its gratification, and becomes a passion by indulgence, we ought to be extremely careful how . . . we lay the foundation for a depravity the more to be dreaded, because, in our government, popular opinion must have the
greatest influence . . . and this vitiated taste would soon be discovered in the decisions of our courts and the verdicts of our juries.³

It is clear that this theory identified the will and moral sense with the passions, which, requiring careful nurture in a sheltered environment, would be only corrupted by spectacles of violence. In a society which offered individuals the opportunity for moral improvement, it was unthinkable to allow exhibitions that contaminated the more delicate feelings of humanity. According to Robert Rantoul in 1849, the United States had reached the “proud pre-eminence” of being able to realize Beccaria’s prophecy that hanging must disappear as soon as the mass of citizens had been raised from ignorance to enlightenment: “In the present state of refinement, every infliction of the Death penalty is a foul and frightful crime.”⁴

Before 1830 there had been a gradual reduction in the number of crimes punishable by death in most American states. Many legislatures followed Pennsylvania’s unique system, established in 1794, of dividing murder into two degrees, which further limited the use of capital punishment.⁵ If a man’s intellect had been only temporarily sub-

³Edward Livingston, A System of Penal Law, for the State of Louisiana . . . (Philadelphia, 1833), p. 27.
⁴An Exercise in Declamation; in the Form of a Debate on Capital Punishment. At the Boston Latin School, Public Saturday, March 3, 1849 (Boston, 1849), pp. 3-4.
⁵Francis Wharton, A Treatise on the Law of Homicide in the United States: To Which is Appended a Series of Leading Cases, 2nd ed. (Philadelphia, 1875), p. 171. Some states went still further and defined four degrees of manslaughter, which, along with excusable and justifiable homicide, allowed eight different interpretations of killing. Second-degree manslaughter included killing in a cruel and unusual manner, but with no design of effecting death; and third-degree manslaughter included unintentional killing with a dangerous weapon (The Revised Statutes of the State of New York Passed during the Years One Thousand Eight Hundred and Twenty-Seven . . . and Twenty-Eight . . . [Albany, 1829], II, 660-661; The Revised Statutes of the State of Missouri . . . [St. Louis, 1835], pp. 168-170).
verted, 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 that his moral sense had been completely destroyed, making him too dangerous to live.

Critics of capital punishment were not content, however, with a compromise which saved those who killed from anger, excitement, or drunkenness, but which condemned men suffering from physical or moral disease. During the 1830's and 1840's, the reform movement nearly triumphed in New York, Massachusetts, and New Hampshire, while Maine succeeded in making executions depend on an executive warrant, to be issued at the discretion of the governor one year after the date of sentence. Finally, Michigan in 1847 became the first governing state in modern times to abolish the death penalty permanently for all murder, though Rhode Island and Wisconsin followed her example in the early 1850's.

Although advocates of capital punishment usually began their argument by citing Old Testament authority

It is fairly obvious that if malicious intent could not be inferred from killing in a cruel and unusual manner, nor 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." There can be little doubt that the purpose of the degree system was actually to remove several types of murder from the list of capital offenses.


and by denying historical progress, the legal profession found a more persuasive doctrine in a new philosophy of justice. In 1843 George Barrell Cheever spoke of "intrinsic justice" and of "moral necessity," which required that murderers be punished invariably with death: "There ought to be such a penalty, high, awful, distinctive, to mark this crime in its retribution, as it stands in its guilt, paramount to every other." COMPARED WITH THE ARGUMENTS OF LOCKE, PALEY, AND BECCARIA, THIS WAS A NEW NOTE, deriving the right of retribution not from an individual's delegated right of self-defense, but from the moral dialectic of Being. When Francis Wharton later defended the death penalty, he pointedly rejected the theories that punishment was intended primarily to prevent crime, to reform offenders, or to incite terror. The justification 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." IN THE PHILOSOPHY OF KANT AND HEGEL, WHARTON FOUND VINDICATION 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. Hence man was to be given a power which heretofore had been at least theoretically

11 Francis Wharton, Philosophy of Criminal Law (Philadelphia, 1880), pp. 2-12. Wharton's monumental Treatise on the Criminal Law of the United States was published in 1846, and many of his other works appeared in their first editions before the Civil War. His later summary of legal philosophy is therefore pertinent to this discussion, since his views were largely a comment on the debate of the 1840's and 50's.
12 Wharton, Philosophy, p. 14. Wharton modified the absolute theory to some degree; he also interpreted the law as the united will of the people.
reserved for God, the measurement and negation of absolute guilt.

By a strange irony 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, justifying the infliction of punishments graded in exact proportion to guilt. With the rejection of the sensational psychology in favor of intuitive knowledge and complete moral freedom, men achieved in theory the power to punish those who were alienated, not from God's law, nor from the social compact, but from the universal rules of transcendental mind. As soon as the will was separated from the passions and inclinations, becoming an immaterial and autonomous force, the most depraved criminal was responsible for his acts, and there could be no protest against the intrinsic justice of death.

But it was not only a new moral philosophy which temporarily defeated the movement to abolish the penalty of death. The reform impulse was still vigorous, and legislatures in many northern states were still debating the question of capital punishment when the Civil War broke out. Martin H. Bovee, who had been primarily responsible for the Wisconsin law and who later fought for the cause in Illinois and New York, was convinced as late as 1860 that reasonable men could be persuaded to follow the enlightened example of Michigan, Rhode Island, and Wisconsin. Just before the war he finally completed a comprehensive treatise against capital punishment, a book which seemed to refute every possible argument of the opposition. The publication date had originally been set for the year 1861, but the book did not appear until 1876. Bovee later confessed, explaining why his treatise had not been published earlier, "To have
presented a work of this kind during the continuance of such a struggle, would have been 'ill-timed' to say the least.”  

It was difficult to arouse sympathy for a few murderers when the attention of sympathetic people was focused increasingly on a different and more numerous group of outcasts. It was difficult to preach against the violence of capital punishment when reformers themselves advocated the shedding of blood.

II

We may summarize the debate over capital punishment as a struggle between reformers who emphasized the effect of environment on moral behavior, arguing that criminals should be cured instead of being punished, and traditionalists who finally abandoned the rationalistic theory of deterrence and fell back upon a doctrine of intrinsic and absolute justice. American fiction in the second quarter of the nineteenth century reveals a curious synthesis of these two positions. It is probable that most popular literature has always tended to present morality in absolute terms, since virtue inevitably triumphs at the expense of evil. But if American writers accepted this ancient formula of intrinsic justice, they refused to extend its meaning to courts of law and to legal executions. Despite minor differences of opinion, early American novels show a surprising unanimity in their criticism of judicial procedure, of the corruption of justice by public prejudice, and of a system which forced innocent men to rely on accident for vindication. Much of this criticism was similar to the arguments of reformers who opposed the penalty of death.

We have already seen that many fictional accounts of murder and crime stressed environmental determinants,

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which would seem to imply that the death penalty was based on a false theory of freedom and responsibility. If a murderer's disposition had been corrupted by an indulgent mother, it was absurd and unjust to defend his execution as a warning to other potential killers. Yet this acceptance of environmental causes did not lead automatically to a theory of reformation and forgiveness. In previous discussions we have noted that the superman, the monomaniac, and the morally insane were generally considered too dangerous to live.

It might be a rule of fiction that the villain could escape neither exposure nor defeat, but, as Cooper observed, the courts assumed that a guilty man was virtuous if he could not be legally convicted.14 Whereas reformers used the fallibility of human justice as an argument against irredeemable punishment, imaginative authors enjoyed the advantage of attacking judicial imperfections without thereby endangering the inevitable triumph of virtue. Hence the attack was direct and unrestrained. If we may draw a composite picture of American justice from works of fiction, we find that jurors were usually gullible, ignorant men, who, if not susceptible to bribes, were easily swayed by subtle misrepresentation, sensationalism, and demagoguery.15 Public opinion, stirred to excitement by gossip and newspapers, was quick to condemn the innocent or to justify the guilty without adequate evidence.16 Al-

though judges were often kindly and well-meaning old gentlemen, they were powerless before the cunning of unscrupulous lawyers and the prejudice of juries. Since state governors were primarily concerned with political realities, they showed a tendency to abuse the pardoning power, so that a man with proper connections was safe even if convicted by an honest jury. But probably the most important agreement between writers of fiction and such legal reformers as Edward Livingston was their common belief that capital punishment corrupted the taste of the public and aroused violent passions in the spectators.

According to John Neal, the masses longed for excitement and revenge and looked upon executions as thrilling spectacles, rather than as vindications of divine and universal law. One day the mob would cheer at the hanging of a felon, and the next day plead for another's pardon. “I have seen ten thousand people in tears because some handsome boy was to be executed; and I have seen the officer who brought his pardon, hooted and pelted from the ground, by a part of the same mob.” But this public weakness did not mean that criminals should not be killed. One of Neal’s characters argued that there should be no reprieves and that executions should be private, though conducted at night with torch light and tolling bells, so that the people might be properly impressed.

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Mallory Curtis described a mob shouting for an innocent man's death, and a crowd in George Lippard's *Empire City* (1850) was furious when a hanging was canceled because the prisoner had supposedly died: "shocking, shocking—what an example lost!" Lippard suggested repeatedly that executions aroused the public's taste for blood, increasing the incidence of violent crimes.

For Simms capital punishment presented a sordid contrast to the chivalric ideal of immediate revenge: "You hear the cry of 'Murder!' Do you stop, and resume your seat, with the comforting reflection that, if John murders Peter, John, after certain processes of evidence, will be sent to the state prison or the gallows, and make a goodly show, on some gloomy Friday, for the curious of both sexes?" Simms observed that all killing was contrary to divine law, since human life was sacred, yet homicide was partly justified if it avenged "a crime beyond it, the shedding of that vital soul-blood, its heart of hearts, life of all life, the fair fame, the untainted reputation." Simms might doubt the ultimate legitimacy of capital punishment, yet he thought that "there are some honest impulses, in every manly bosom, which are the best of all moral laws, as they are the most certainly human of all laws." Hence young Beauchampe's private revenge was an expression of "the best of all moral laws," but his execution was an example of perverted justice, dominated by public passion: "Strange, that men should delight in such a spectacle—the cruel death, the miserable exposure,

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of a fellow-man!—that they should look on his writhings, his distortions, his shame and pain, with composure and desire!” In other words, vengeance was not something that could be rationally planned and regulated, as in a duel or legal execution. One might excuse only that violence which sprang from an immediate and passionate sense of injustice.

In *Margaret* (1845) Sylvester Judd expressed a similar protest against the morality of capital punishment, though unlike Simms he preached a doctrine of universal love and brotherhood, looking forward to a perfectionist dream, to a New England apocalypse and utopia. After describing a bitter enmity between some New England townsfolk and Margaret’s family, who lived on a wilderness pond, Judd embarked upon the subject of murder. A gross and drunken villager named Solomon Smith made indecent proposals to Margaret at a night husking bee. Margaret’s brother, Chilion, who had been drinking and who already had a grudge against Smith, picked up a file and threw it, killing the villager. Persecuted by the cruel townsfolk, who delighted in the spectacle of executions, Chilion was tried and hanged for murder, though the killing had been neither premeditated nor deliberate. After a symbolic fire consumed the decadent town and church, a utopian village appeared, where criminals were unknown and where the gallows were replaced by a statue of Moses kneeling to Christ and surrendering to him the Book of the Hebrew Code.

*Margaret* is an involved and sentimental novel which nevertheless offers an interesting comment on the state of American society in 1845. Judd recognized the existing divisions, the fierce hostility, between neighboring groups which stimulated acts of retributive violence. Legal executions involved vengeance and group conflict as much

as did illegal murder. Hanging was only murder by the majority. Possessing no impartial authority, no transcendent earthly power, society might be redeemed only by a spirit of love, by a recognition of man's universal brotherhood. If even the criminal belonged to the human family, the punishment of death could not be justified.

Public hangings not only gratified the mob's desire for blood and excitement, they also deprived sinners of the means of atonement. Simms's attitude toward the death penalty was clearly expressed in the advice given to Edward Clifford, the deluded and remorseful murderer in *Confession* (1841):

Life is a duty because it is an ordeal. You must preserve life, as a sacred trust, for this reason. Even if you were a felon—one willfully resolving and coldly executing crime—you were yet bound to preserve life! Throw it away, and though you comply with the demand of social laws, you forfeit the only chance of making atonement to those which are far superior.

. . . It was with this merciful purpose that God not only permitted Cain to live, but commanded that none should slay him.

Yet it is important to remember that this theory of reformation did not extend to villainous seducers.

 Whenever the novelist approached the subject of a criminal trial, it was almost a rule to make the hero a defendant, to portray his hopeless struggle against crafty lawyers and inflamed public opinion, and to save him from conviction or execution by the appearance of an unexpected witness or by the accidental discovery of new information. It would be difficult to find a fictional murder trial in which an innocent man was acquitted or a guilty one convicted on the basis of the original evidence and testimony. This fact may be explained by the writer's desire to create suspense and dramatic effect; but such an
explanation does not account for the running criticism of the judicial process, nor for the nearly universal assumption that justice triumphed only in spite of the courts. We may conclude, then, that many American writers from 1830 to 1860 accepted the belief of reformers that an innocent man might be convicted of murder and that the public anticipation of a hanging was evidence of depravity and not of Christian righteousness.

But literature was, as we have observed, a bridge between dominant values of tradition and the more temporary and changing values of special groups. Fictional plots and characters were often devices providing an opportunity for the examination of moral problems in concrete terms. If novelists sometimes explained the origins of human evil in accordance with theories of psychiatrists or reformers, they generally preserved the more traditional belief that evil, once created, must be destroyed. A man might be a villain because of faulty training, the environment of the city, or the corrupting effect of slavery, but as a villain he must die. When the struggle of competing brothers was transferred to the courtroom, the procedure of justice might be perverted by conspiracy, blinding the eyes of an ineffectual but well-meaning judge, but a higher justice was sure to triumph in the end; and death was the only positive symbol of an evil brother's defeat.

Unlike Simms, Cooper attacked the theory of reforming criminals as "mawkish philanthropy," but he was too skeptical to rely on human courts for absolute justice:

Bodies of men are proverbially heartless. They commit injustice without reflection, and vindicate their abuses without remorse. And yet it may be doubtful if either a nation, or an individual, ever tolerated, or was an accessory in, a wrong, that the act sooner or later did not recoil on the offending
party, through that mysterious principle of right, which is implanted in the nature of things, bringing forth its own results as the seed produces its grain.²⁶

In fiction, at least, the "mysterious principle of right" included the primitive law of retaliation—the belief that right could be vindicated only by the ultimate death of wrong. But if the source of justice lay in the individual's natural right of retaliation, a right which the courts could only imperfectly exercise, there remained the problem of how to kill an evil man without indulging in revenge and hatred. John Locke said that it should be done in accordance with the calm dictates of reason, and Timothy Dwight, representing traditional Protestant morality, ruled that criminals should be executed in the spirit of Christian benevolence. But it was evident that public executions, which as examples were intended symbolically to kill the evil impulses in spectators' hearts, actually aroused an aggressive passion, serving as a vicarious outlet for murderous desires. Hence writers of fiction attacked the bloodthirsty mobs who yearned for sensational spectacles, but searched, nevertheless, for means of justifying the penalty of death.

The murderer might have alienated his human rights and privileges, but his executioners, to absolve themselves from a similar guilt, were required to recognize his immutable status as a fellow man. Since this final sympathy was impossible in a public execution, many writers described the infliction of the death penalty as a primitive ritual, which, like lynching, was based on natural law. In Richard Hildreth's The Slave (1836) an overseer brutally killed the young wife of Thomas, a friend of the hero, Archy Moore. When Archy and Thomas captured the overseer in the wilderness, they decided to

²⁶ James Fenimore Cooper, The Wing-and-Wing; or, Le Feu-Follet: A Tale (New York, 1852), I, 71.
execute him for his crime, because southern justice was so corrupt that he could never be legally tried and convicted. Yet, when Thomas finally shot the overseer, Archy felt a revulsion and pity which evidenced moral sensibility.

In Cooper's *The Prairie* (1827) Ismael Bush knew that he must observe the law of God and Nature, but even this crude frontier patriarch did not enjoy the execution of his murderer brother-in-law. The hanging occurred in a bleak wasteland, far removed from shouting mobs and corrupt judges and governors. It was in such a spot, Cooper suggested, that justice was at once spontaneous and natural, and yet in harmony with the tribal laws of antiquity. When Abiram White had been placed on a rocky ledge, Ishmael tied a rope from his neck to a lonely willow tree. Thus the criminal was left to make peace with God and to execute himself by jumping from the ledge. Just as Deerslayer had embraced his first Indian victim, so Ishmael Bush forgave the murderer of his son and put a fragment of the Bible in his hand. Homicide was thus purified by a ritual which at once acknowledged the victim's essential humanity and made the executioner an agent of a higher power.

Along with the critics of capital punishment, American writers recognized the social and psychological origins of criminality, and they knew that the judicial process was not infallible and that executions gratified the worst passions of a depraved people. Yet they feared that without the certainty of a murderer's death, social order would collapse, leaving a land filled with blood. In our discussions of moral insanity, monomania, and revenge, we saw that there was a tendency to equate moral and physical alienation. Even though the murderer was influenced by external causes and did not consciously choose his own evil, he was nevertheless a renegade from the family, whose
example endangered fundamental bonds of unity. Once the chain of revenge had begun, the aggressive impulses which were universal in man would destroy the fragile web of brotherhood, together with the restraints and self-limitations imposed by family obligations. Thus the execution of an alienated man gave proof of a united purpose and of an allegiance to necessary laws of restriction. But the supreme penalty could be justified only when people acknowledged that it was essentially a sacrifice to the gods of stability and virtue.

Long after our period of discussion, Herman Melville explored the deeper implications of individual and group homicide. Billy Budd's offense could be easily explained and understood, and, in a very real sense, he had not been responsible. Yet it was necessary that he should die, despite his lack of moral guilt. Otherwise, we assume, all human relationships would lapse into the moral ambiguity of *Pierre*. But if the arbitrary unity and virtue of society could be preserved only by the death of a scapegoat, Captain Vere, the vindicator of the right, knew that Billy's execution was a sacrifice to an abstract rule, whose purpose was control and discipline; and in this realization, he sensed the full significance of law.
Conclusion

TIS not only the mischief of diseases, and the villany of poysons, that make an end of us; we vainly accuse the fury of Gunnes, and the new invention of death: it is in the power of every hand to destroy us, and we are behold-ing unto every one we meet, he doth not kill us.

—Sir Thomas Browne

Want of a common Judge with Authority, puts all Men in a State of Nature: Force without Right, upon a Man’s Person, makes a State of War, both where is, and is not, a common Judge.

—John Locke