

MICHIGAN Capital & Punishment[©]

BY EUGENE G. WANGER

Several years ago a legislator in Texas was asked if he would vote to abolish capital punishment. “No,” he replied, “capital punishment was good enough for my father and it’s good enough for me.”

That could not have happened in Michigan, for our state, by statute in 1846, was the first government in the English-speaking world to abolish capital punishment for murder and lesser crimes. Our state has never restored it. Since 1964, Michigan’s constitution has prohibited it.

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Today, following Michigan's lead, a majority of all the nations on earth—including Canada, Mexico, England, Scandinavia, and almost all of Europe—have abolished the death penalty, either de jure or de facto; but America (with the exception of Michigan and 12 other states) is one of the world's principal executing nations. Since 1998, only Communist China and the Congo have executed more people than the United States. Iraq and Iran are not far behind.

What has created this unique and paradoxical situation? How did Michigan come to abolish the death penalty so early, and how has that position been maintained?

The initial inspiration seems to have come from the eighteenth-century European Enlightenment. That was a time when the criminal law of civilized countries everywhere was ferocious, imposing torture and death for dozens—and in England as many as 200—of even the most trivial crimes.

Human life was cheap, especially if it was the life of the lowly. Executions were common entertainment. Men and sometimes women were executed without qualms and with dispatch, normally after rapid and perfunctory proceedings. As Alexander Pope said,

*The hungry Judges soon the Sentence sign,
And Wretches hang that Jury-men may Dine.*

Does all of this seem to you like a very long time ago? Then talk to Bette Hulbert, recently retired director of the Michigan Historical Museum, who remembers her great-grandmother telling her of being taken when she was a little schoolgirl in Northern France to the center of town with the other children to see a man have his limbs each tied to one of four “big white horses” that then “just kept going” until they pulled him apart.

*Put the scaffold on the Commons,
Where the multitude can meet;
All the schools and ladies summon,
Let them all enjoy the treat.*

In London, where picking pockets was a hanging offense, pickpockets plied their trade with greatest success at the public hangings, when everyone else was “looking



Lewis Cass. Black and white reproduction of a daguerreotype ca. 1855-1860. The photographer is unknown. (Courtesy of the Chicago Historical Society)

up”; and as late as 1807, at a triple hanging outside the Old Bailey, the pressure of the crowd to see the final struggles of the condemned was so great that 30 of the spectators were crushed to death at the foot of the gallows. A publication of the time even gives their names and addresses.

In combating these and other evils for almost a hundred years, the philosophes, as the leaders of the Enlightenment were called, assiduously promoted a highly critical attitude toward the authority of the past and inculcated a powerfully optimistic view that the lot of humanity could be vastly improved through the application of human reason.

When the ideas of the Enlightenment swept across the Atlantic Ocean, they became well known to the leaders of the American Colonies. Here, unlike in England, there were only about a dozen crimes punishable by death. And here in the Colonies it troubled many to think, or be told, that among other things the death penalty might violate fundamental principles of Christianity.

The death penalty abolition campaign was begun by the American patriot, staunch Christian, signer of the Declaration of Independence, and eminent physician, Benjamin Rush of Philadelphia. He was the first American to speak out against the penalty of death for murder, which he did in a paper he read at Benjamin Franklin's house on March 9,

1787, and in an essay published in *The American Museum* magazine for July of the following year.

Rush widely distributed these essays and the campaign to abolish the death penalty in America was on. Many brilliant and talented reform leaders joined the fray, concentrating mainly in New England, New York, and Pennsylvania. The first success, however, was achieved in the wilds of Michigan. Peopled largely by immigrants from New York and New England, and with little experience of executions, Michigan Territory held a disagreeably traumatic hanging in Detroit in 1830. The following January, Governor Lewis Cass—still considered Michigan's greatest public servant—told the Territory's Legislative Council, “The period is probably not far distant, when it will be universally acknowledged, that all the just objects of human laws may be fully answered, without the infliction of capital punishment.”

Four years later, Michigan initially grappled with the capital punishment question when writing its first state Constitution in 1835. On the fourth day of the Constitutional Convention, one committee proposed a constitution stating in part, “Capital punishment ought not to be inflicted; the true design of all punishment being to reform, not to exterminate mankind.”

But the proposal was not adopted, and a prevailing sentiment in the brief debate appeared to be that the state was as yet unprepared to “make all necessary and adequate provision for the safe and sure confinement of criminals.” Michigan's capital punishment abolitionists, however, would soon be back.

The next few years saw them conduct several legislative skirmishes without result, and in about 1840, Michiganians learned that the Canadians had hanged an innocent man three years before just across the river in what is now Windsor, the true culprit later having made a death-bed confession of his guilt.

In 1844, a joint committee of the Michigan Senate and House issued a report urging that the death penalty be abolished, but the committee's minority disagreed and the House sided with them by a vote of 34 to 10. In the report a substantial space is devoted to whether government has the

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theoretical right to impose the death penalty, a question involving the fundamental nature of government itself. Such basic questions were much on the minds of our American forebears as they settled this new land.

It is interesting that both sides went out of their way to support the religious argument (the majority taking over a page to do so), while at the same time saying that it was not really relevant to the debate. This argument, which was a dominant theme in the capital punishment abolition movement, generally pitted the hopeful injunctions of the four Christian Gospels against the an-

for governor, judge, and noted Michigan historical author and Senator William T. Howell, then president pro tem of the Senate, who was later appointed by President Lincoln to be Associate Justice of the Arizona Territory and who authored its first code of laws.

Even with such leadership, getting rid of “death” for first-degree murder was more easily said than done, but after much skirmishing, that penalty was finally fixed at “solitary confinement at hard labor in the state prison for life.” As long-time political observer and retired Wayne County judge James Lincoln said, it looked like the Senate

was the first Michigan public body to have its debates reported verbatim and several of them were lively. A committee proposed that the death penalty be prohibited, but the proposal was rejected.

The arguments most often voiced were that the subject should be left to the legislature and that including it in the constitution would cause the people to reject the document. One delegate noted that historically even Catherine the Great, of Russia, had to restore the death penalty, citing as his authority “Boccacio, on crimes.” Another delegate, with unblushing candor, said that he was mightily sorry the whole subject had come up, but that since it had he was going to vote for it anyway.

Between 1846 and the end of the century, several efforts to restore capital punishment in Michigan met with no success and the state’s officials were frequently asked for their views. Austin Blair was quoted at length by the great John Bright in the British House of Commons in 1864, and letters from several Michigan prison officials were published confirming that Michigan’s abolition had not raised the murder rate.

In 1881, an elderly black woman, perhaps Michigan’s all-time greatest fighter for human rights, the famed Sojourner Truth, told our legislature, which was then about to vote on whether to bring the death penalty back, “We are the makers of murderers if we do it.” And in 1891, Michigan’s greatest judge and legal scholar, the internationally renowned Thomas M. Cooley, wrote:

The fundamental objection to the taking of human life by law is found in the tendency to destroy in men’s minds the sense of the sacredness of life and to accustom them to regard without fear or horror its destruction. . . . Mankind are not to be impressed with the priceless value of existence by spectacles of deliberate executions, and so long as the state justifies the taking of life for crime against society, individuals will frame in their own minds excuses for taking it for offenses real or imaginary against themselves, or will take it without excuse when it stands in the way of their desires.

Sojourner Truth had said it all in 10 words the decade before.

No law shall be enacted providing for the penalty of death.

Original handwritten draft of the 1964 Michigan Constitution's death penalty prohibition.

cient and somber poetry of Genesis 9:6, which advises, “Whoso sheddeth man’s blood, by man shall his blood be shed.”

The abolitionist majority barely mentioned the deterrence argument at all, although they could have cited a number of authorities from the Eastern States. On the other hand, the committee minority, who favored the death penalty, expressly rested their entire case on the deterrence argument.

In 1846, victory in Michigan was at hand as the legislature undertook a general revision of all the state’s laws, including its lengthy criminal code. The state’s determined capital punishment abolitionists were ready. They were apparently led by Democratic Senator Charles P. Bush, later a prominent Lansingite, and by Whig House-member Austin Blair, who later became Michigan’s great Republican Civil War governor. Blair, who chaired the House Judiciary Committee, would later recall that his contribution to the death penalty’s demise was “among the best pieces of work” that he ever did.

Equally dedicated were Senator Flavius Littlejohn, who was later a Whig candidate

held the whole criminal code hostage until the House came around. One enthusiastic supporter from the Eastern States reported, “The sun has risen in the West!”

Shortly afterwards, a condemned murderer awaiting execution at Michigan’s new prison in Jackson was pardoned when the death-bed confession of the real killer showed he was innocent and the new law providing for life imprisonment for murder instead of death became effective on March 1, 1847.

How did this remarkable, unprecedented change happen? In the absence of better evidence, we seem to be forced back upon the eighteenth-century proposition that these abolitionists, following the tradition of the Enlightenment, were rational people who simply took the arguments and evidence for capital punishment, weighed them in the balance of human reason, and found them wanting. If this is so, the implications are profound.

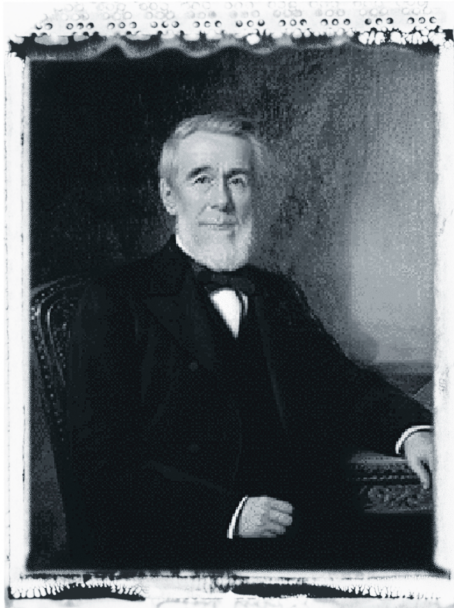
Four years after capital punishment was abolished, Michigan held its second constitutional convention. The “Con-Con” of 1850

The death penalty wasn't even mentioned at our state's constitutional convention of 1908. But as the flapper era dawned and prohibition put bootlegging on a business-like basis, crime rates began to rise. An irate Michigan legislature passed a death penalty bill with a referendum provision in 1931, which was soundly rejected by a vote of the people. Frank Murphy and Henry Ford were among the notable Michiganians against it.

By 1956, the Michigan House or Senate had voted eight times for capital punishment during the twentieth century. As the sixth decade of the century approached, voices began to be heard that Michigan's much-amended 1908 state constitution should be revised, and 144 delegates were elected by the people to a constitutional convention for that purpose in 1961.

Although the state's electorate was equally divided between the two major parties, two-thirds of the delegates it elected were Republican, most very conservative. So far as is known, neither the candidates nor anyone else had suggested that capital punishment was a subject for constitutional treatment. Certainly it had never entered the mind of the convention's youngest Republican delegate, who was elected from the city of Lansing.

Ignorant of almost all the foregoing history, this delegate, only three years a lawyer, inspired by a law journal article on the death penalty that he picked up at law school and now found in his file, drafted a proposal—the only one on the subject as it turned out—which by an unusual turn came before the committee he was on. He drafted the final language, wrote the committee report, and even organized the floor debate supporting it. It passed the convention with only three dissenting votes. This would not have happened without the steadfast support of convention vice-president and leader of the



Thomas M. Cooley. Oil on canvas portrait by L. T. Ives, presented on October 13, 1885. Photograph by Doug Elbinger, 1996. (Courtesy of the Michigan Supreme Court Historical Society)

Democratic delegates, Tom Downs, and the language, "No law shall be enacted providing for the penalty of death," became part of the Michigan constitution.

Eight years later, the United States Supreme Court decided *Furman v Georgia*, finding the death penalty as then administered in America to be unconstitutional. In another four years, the Supreme Court decided *Gregg*, legalizing that penalty under different procedures. During all these years, the crime rates had been rising and the public suddenly seemed more frustrated, fearful, and angry than it had been in a long time.

Calls for restoring the death penalty in Michigan were heard and after the proponents of execution failed in the legislature, the first of four statewide petition drives was started to repeal the constitutional ban. The State Board of Canvassers and the courts, however, aided by the volunteer legal services of election law expert Tom Downs, determined that the petitions lacked sufficient sig-

natures. About three years ago, another try was made in the legislature that resoundingly failed, and Michigan's historic ban of capital punishment remains.

Over the decades, more than a dozen principal arguments have been made against the death penalty in America; but for the past few years, most of the attention seems to be concentrating upon these three:

1. It now appears to be a moral certainty, especially in the light of recent DNA evidence, that we are occasionally executing the innocent.
2. Around the world, and especially in Europe, capital punishment is increasingly viewed as a violation of basic international human rights.
3. The death penalty in the modern world is being seen as contrary to fundamental principles of religion. Not only many Christian leaders, but also many Jewish and some Muslim leaders, have joined in this view.

In so controversial an area it is always good to find common ground. Most people would agree with the proposition that no question of public policy, except peace and war, is more important than whether or not, or under what circumstances, government should be authorized by its citizens to kill people. After all, in a democracy, where the people are sovereign, when the government kills, it kills for you. ◆

Sources and references will be found in the author's leading article in 13 *Thomas M. Cooley Law Review*, No. 3 (1996).

A member of the Michigan and Federal Bars, Eugene G. Wanger is the author of Michigan's constitutional prohibition of the death penalty and since 1972 has been co-chair of the Michigan Committee Against Capital Punishment. His library on the subject is perhaps the largest in America in private hands.

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