



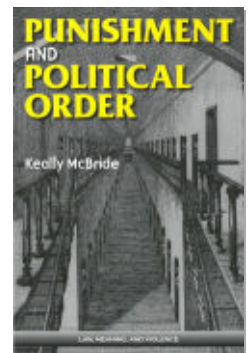
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## CHAPTER 4. Severing the Sanguinary Empire: Punishment and Early American Democratic Idealism

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## Severing the Sanguinary Empire

### *Punishment and Early American Democratic Idealism*

Lay then the axe to the root, and teach governments humanity. It is their sanguinary punishments which corrupt mankind.

—Thomas Paine, *The Rights of Man*

The opinion rendered by Justice Kennedy in *Roper v. Simmons* on March 1, 2005, that finds capital punishment for crimes committed while the offender was a juvenile to be cruel and unusual contains an unusually exact historical reversal. The ruling was bolstered by recent psychological research that establishes moral capacities are not fully developed in late adolescence. The decision was largely anticipated on the strength of this particular argument following the 2004 decision to stop execution of the mentally impaired. However, there is another line of argumentation advanced by Justice Kennedy. He notes that many states within the United States have banned capital punishment for juvenile offenses, but he also looks at the capital punishment practices of the entire world. Citing the universal movement away from the practice, Kennedy notes that “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”<sup>1</sup> Dissenting, Justice Scalia was outraged by the suggestion that the United States look to other countries as a guide for penal codes. Yet historical research into the origins of American penal practices reveals that from the very beginning they were formed in relationship to other countries, most specifically, in contrast to Great Britain.

Today, the United States stands apart from many countries in its sanguinary penal practices. This is a fascinating position to consider, as the founding of the country was in part inspired by the illegitimate penal practices of Great Britain, and early political philosophers saw leniency in punishment as the way to characterize the United States as a comparatively enlightened regime. For example, the charter statement of the

Society for Political Enquiries asserted that they had "grafted on an infant commonwealth, the manners of ancient and corrupted monarchies," by adopting many of the laws of the Crown. "In having effected a separate government, we have as yet effected but a partial independence. The Revolution can only be said to be complete, when we shall have freed ourselves, no less from the influence of foreign prejudices than from the fetters of foreign power."<sup>2</sup> The hearings in various states over capital punishment reflected the idea that the new republic could distinguish itself and define democracy through a starkly contrasting approach to penalty. While Britain's code still awarded death or transport for virtually all felonies, a few states in the new republic abolished the death penalty, and most of them severely restricted its use.

The fact that 210 years later the United States, in Kennedy's words, stood alone in the execution of juveniles shows how far we have come from that first impulse to set an example for the supposedly "enlightened" regimes of Western Europe. This lost moment of democratic idealism deserves to be resurrected as we contemplate the future of punishment in the United States. Here is one historical instance in which the character and philosophy of a country was defined in part through practices and ideals of punishment, and self-consciously so.

Most recent work on punishment emphasizes how punishment reflects and enforces particular social, political, and economic trends. I generally agree with the position articulated by, for example, Rusche and Kirschheimer that punishment often serves economic imperatives.<sup>3</sup> Similarly, Foucault's analysis of the growth of administrative power perceptible both in and outside the prison resonates. For those who see the use of punishment primarily being driven by politicized, economic, or institutional logic, the jurisprudence of the early American republic is a startling counterexample. This is not to say that this idealism is always long lasting, or strong enough to fight institutional logic that may run counter to the original intention. While the idealism may have been rapidly occluded, for a short period practitioners and philosophers tried to reconcile practices of punishment with genuine democratic fervor. We can learn more about democracy and punishment by revisiting it.

### *The Sanguinary Empire*

One of the most pressing duties of the convention assembled to write the Pennsylvania State Constitution in 1776 was reforming the criminal

code. An intensive debate about criminal law and punishment raged throughout the ex-colonies for the next twenty years, but it boiled with particular fervor in Philadelphia. The "sanguinary punishments" forced upon the state were a large point of resentment between the Quaker settlers and the Crown. In a study commissioned by the Pennsylvania Legislature, William Bradford argued that the death penalty needed to be abolished, as it was a remnant of a corrupt aristocratic regime. Allowing harsh punishment was sign that the new republic had not yet achieved full independence. "Hence sanguinary punishments, contrived in despotic and barbarous ages, have been continued when the progress of freedom, science, and morals renders them unnecessary and mischievous: and laws, the offspring of a corrupted monarchy, are fostered in the bosom of a youthful republic."<sup>4</sup>

The image is striking and appears repeatedly in documents from this era, as in the charter of the Society for Political Enquiries written by Thomas Paine. Law needs to be purified in order to have a truly clean foundation upon which to build American democracy. The psychology of the age was largely oedipal: there was a desire to break free from the rule of the Father, yet a terror of growing to become like him through independence. Jefferson worried about national debt and even the establishment of a permanent constitution, precisely because he did not want the mistakes or decisions of a previous generation to fetter the existence of the next: "no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation."<sup>5</sup> What a tremendous symbol of independence: to plant a tree of moral reform and optimism in human nature that would spring forth from the ground literally watered with the blood of English and Irish convicts. Dozens of commentators argued, and the legislators in Massachusetts, Virginia, and New Hampshire agreed, that the United States should stand alone in the world, turning its face from corporal punishment of all kinds. Finding inspiration from Montesquieu and even more from the Italian Cesare Beccaria, early American philosophers and penal practitioners engaged in an extended debate about how best to create a system of punishment that would serve as an instrument of democratic morality.

When Tocqueville and Beaumont came to study the Eastern State Penitentiary (or Cherry Hill as it was then called) in 1830, these ideas had found their institutionalization in a building similar to Bentham's panopticon. Foucault's *Discipline and Punish* famously examined the birth of the prison and the ideals of the penitentiary as the development

of the means of correct training—the individualism, behaviorism, and self-regulation that were required by mass democracies found their expression in schools, prisons, and the factory. While there can be no doubt that this less inspiring practice of punishment did ultimately emerge out of these institutions, research demonstrates that the initial impulse was far more idealistic. Behaviorism was explicitly rejected in favor of a more fundamental belief in human virtue.

Hence, this period of debate and penal practice between 1790 and 1810 displays a naïveté. But it also serves as a curious mirror, for many of the practices that were explicitly linked to despotism in England are now practiced in the United States. Perhaps in these foundational articulations of democratic ideology we can find a position from which to critique current penal practices. Have we become the sanguinary empire from which we broke? Did institutions take on a life of their own, creating practices and effects that were not intended? Or are the ideals of punishment always bound to be nobler than the practices, creating an inescapable chasm between ideals of justice and practices of power?

### *Transportation*

Australia's origins as a penal colony are well known; America's are not. European powers had long used punishment as a way to advance colonial ambitions, starting with the use of galley slaves in the sixteenth century. Rusche and Kirschheimer use the example of galley servitude as a demonstration of their argument that economic considerations rather than moral ones have historically determined the nature of punishment. They reprint a letter from a public prosecutor in Bordeaux to the national administration written in 1676.

You have frequently done me the honor of writing to me in connection with the supply of prisoners for the galleys and of transmitting to me the express orders of His Majesty relating to the use of such prisoners in the execution of his glorious projects. You will be gratified to learn that this Court has twenty prisoners who will be chained together this morning and sent off.<sup>6</sup>

Galley slaves were needed to power the fleets of the different crowns of Europe: 350 rowers were needed for the larger ships of the era, and 180

for the smaller ones.<sup>7</sup> Because of the dangerous and ghastly nature of the work, it was impossible to power the fleets with free men, so prisoners were found (some might even say, made) to do so. It is particularly vivid to realize that trade, war, and expansion were literally powered by thousands of enslaved prisoners at precisely the time that Grotius was penning "The Free Sea" providing the theoretical and legal justification for the expansion of free trade.

Technological innovation made galley slaves largely obsolete by the eighteenth century, but prisoners could be useful for the projects of empire in other ways. Settlers in Virginia asked the government to send them convicts to help with labor in 1611 but found their labor unreliable and their administration so difficult that they soon reconsidered this source of labor. In 1670 in Virginia and 1676 in Maryland, the colonists passed laws prohibiting the transport of convicts into their territory.<sup>8</sup> That such a measure was needed testifies to the commonality of the practice.

Eighteenth-century English penal laws were draconian. The death penalty was prescribed for virtually every felony, but jails were overcrowded nonetheless. Fewer people were convicted of crimes since the result would be death. While it might seem obvious that a reform of the penal code was required, instead in 1717 Parliament passed the Transportation Act. The act is remarkably frank about the failure of the English penal code and suggests a more productive alternative.

Whereas it is found by Experience, That the Punishments inflicted by the Laws now in Force against the Offences of Robbery, Larceny, and other felonious Taking and Stealing of Money and Goods, have not proved effectual to deter wicked and evil-disposed Persons from being guilty of the said Crimes. . . . And whereas in many of his Majesty's Colonies and Plantations in America, there is great Want of servants, who by their Labour and Industry might be the Means of improving and making the said Colonies and plantations more useful to the nation.<sup>9</sup>

This act of Parliament made it possible to commute the death penalty for felonies and substitute transportation to the colonies for either seven or fourteen years as the alternative punishment. The question of whether the transport sentence was to last seven or fourteen years depended upon if the crime was classified as a "clergy crime."<sup>10</sup> The

official rationale that colonists were anxious to receive these convicts was belied by the existence of laws in Virginia, Maryland, and Pennsylvania specifically barring the importation of convicts. The Transportation Act of 1717 made all these oppositional laws null and void, however, and the large-scale transport of convicts to America commenced.

Roger Ekrich's research provides a sketch of the practice. In the years between 1749 and 1771, 40 percent of those convicted of crimes at Old Bailey were transported into the American colonies.<sup>11</sup> Other research takes a longer period of focus and finds that between 1729 and 1770, 70 percent of convicts from Old Bailey were transported to the colonies. Clearly, the practice fundamentally changed criminal punishment in England as well as immigration into the colonies. Most notoriously, James Oglethorpe arranged for 16,000 debtors to be released from prison to go and settle in the newly founded colony of Georgia. In the eighteenth century, one-quarter of all immigrants from England and Ireland into the American colonies were convicts.<sup>12</sup>

The practice was wildly profitable, almost as much as the slave trade. Jonathan Forward was the London merchant who had a virtual monopoly on transport from 1718 until 1738.<sup>13</sup> The criminal justice system handed convicts over to Forward, who then loaded them into boats and shipped them to the American colonies. Upon arrival in North America, he sold the convicts to plantation owners, or any other masters, who would be able to use their labor for either seven or fourteen years depending upon their crime. Plantation owners liked to buy convicts, because they cost much less than a slave. The average cost of a slave was 50 pounds for an adult, while it was a mere 12 to 15 pounds for a convict. Because of procreation and permanent enslavement, the long-term economy of slaves may have been better. But because they were a short-term investment, convicts did not have to be treated as well. Fifty percent of convict laborers died within seven years, suggesting that they were worked to death.<sup>14</sup>

The reason convict labor was relatively inexpensive was that the transporters did not have to pay for their cargo as did slave traders, and they capitalized grandly upon the voyage back home as well. The government handed convicts over to the merchants for free, happy to be rid of the expense of execution or detainment. Balak and Lave closely examined the political economy of convict transportation and found that the profitability was also due to the "return cargo" such as sugar,

tobacco, and cotton that they brought back to London. This was a crucial factor in perpetuating the practice: transportation to the colonies of Canada failed when the War of Independence made transport impossible into the United States.<sup>15</sup> Because there weren't as many products available in Canada to make the return trip profitable, the transportation of convict labor across the Atlantic ceased to be a venture that attracted London businessmen.

Hence, the transport of convicts was a lucrative business that intersected well with the development of colonial products. The English criminal system soon found that transportation was an ideal solution to the overcrowding of jails. Between 1720 and 1765 Parliament passed sixteen different laws making transportation the required punishment for different crimes. This historical case study suggests that the practice of punishment at the time was developed according to economic principles, as Rusche and Kirschheimer argue throughout their classic book *Punishment and Social Structure*. From the galley slave system to transportation, one can see how England used the penal code as a way to promote imperial ambitions.

The transportation system allowed merchants to profit from the crime wave that accompanied industrialization in England, helped people the colonies, provided labor for tasks that even indentured servants were loath to take on, and provided an inexpensive way for England to rid itself of the "criminal classes" without having to kill them off one by one. Presented with a choice of execution or exile, convicts found little to resent in transportation. The only people who were less than enthusiastic about the entire system were the colonial administrators who complained about the disorder caused by transportation. They aptly perceived that they were bearing most of the unfortunate outcomes of this ingenious system of justice. Since they could no longer bar transport outright following the 1717 Transportation Act, instead they sought ways to regulate and curb it. They tried both taxation and red tape to strangle the practice. Some states required intensive registration procedures for transporters to be eligible to sell convicts. Others placed taxation per head on each convict sold, attempting to tip the economics that made the practice so profitable.<sup>16</sup>

However, the Crown was so supportive of the policy that soon transporters recognized that they could ignore the colonial administrators with impunity. The Crown wouldn't enforce these taxes or regulations, so transporters saw no need to pay them. This is but one place where



the sovereignty of the Crown was asserted over the colonies. However, this clash over transportation produced an interesting response in the colonies, and later the newly independent United States. The colonies, having played an integral role in bolstering a corrupt system of justice for many decades, were all the more eager to establish their moral superiority by establishing a code of punishment that served democratic ideals, rather than aristocratic corruption.

Intransigent in many things, England continued to try to ship convicts to the United States even after independence. In 1787, the Continental Congress passed a resolution urging all states to ban the transport of convicts from Britain as soon as possible. In Britain, the sudden closing of their primary release valve for the criminal justice system caused crisis and soul-searching. In 1779, Britain passed a resolution calling for transportation to resume elsewhere. When transport to Canada proved to be unfeasible for economic reasons, Lord Beauchamp was appointed to prepare reports examining the possibility of transport to other regions. In a report to Parliament in 1785 entitled "Recommendations for the Disposal of Convicts," Beauchamp noted the overcrowding of jails, which were bursting with prisoners who had been sentenced to transportation many years earlier but had not been able to be transported due to the American Revolution. Beauchamp suggests that transportation has the disadvantage of not providing the example to discourage future crime, since "his Sufferings are unseen. . . . His Chasm is soon filled up, and, being as soon forgotten, it strikes no Terror into the Minds of those for whose Correction it was intended to operate, though the Public may gain very importantly by his Removal." Nonetheless, the Lord recommends a coast of Africa (present day Namibia), which has a favorable climate and "A vein of Copper Ore which contains one third of pure metal," and furthermore would be an excellent stopping place for those returning to England from India. To establish the colony, the Lord suggests they land convicts in November as "they will have the whole Summer to raise Habitations, and make other preparations for their future Subsistence and Security." Happily, the administration of these convicts can be accomplished by loyalists from America who "are desirous of settling in any healthy Part of the Globe where they can rely upon the protection of the British Government."<sup>17</sup> Ideally, the colony would flourish and become the destination for all transportation and emigrants from England.<sup>18</sup> They hoped to provide ample economic opportunities for British sub-

jects to remain under the protection of the Crown, rather than being tempted to go to the United States.

New South Wales, Australia, became the location of choice instead, due to the fact that Namibia was considered "sandy and barren, and from other causes unfit for settlement," but the logic behind the argument for Namibia is revealing nonetheless.<sup>19</sup> One can see the colonial administration at work, trying to gain "The greatest national Advantages" from the system of criminal justice.

There were dissenters in the empire itself, the most well known to us today being Jeremy Bentham. In 1802 he wrote a long pamphlet arguing that Parliament should abandon the system of transportation to New South Wales in favor of expanding the penitentiary system of his device, the panopticon. In this pamphlet, Bentham proposes five criteria by which to measure the effectiveness of punishment: deterrence, reformation, incapacitation, compensation (satisfaction to the injured party), and economy. Interestingly enough, Bentham argues that the transportation system to America was effective, as the prevalence of law-abiding citizens and the purchase of convicts by one particular master who was to train the convict in the manners and habits of society fulfilled the need to have punishment serve as a transformative process. Yet transport to New South Wales accomplished no similar transformation, as the colony was overrun by convicts with no positive influence to offer one another. In his eyes, even more damaging is the fact that transport is not perfectly proportional to the crime committed, breaking one of his cardinal rules. Furthermore, sentences were frequently commuted, and those with means could buy their own way out of the servitude that was required of them. Therefore mere banishment became the punishment for the wealthy, while banishment combined with bondage became the fate of the poor, even though they had received the same sentence. Frequently convicts escaped and returned to Britain. Bentham argues that even though the system may be profitable, the price is too high to pay: "The price, in the way of injustice—the whole price is thus paid for the expected benefit; and it is but in an imperfect degree that the benefit is reaped. The proportions of penal justice are confounded; the poison of perfidy is infused into the system of government; and still the obnoxious vermin remain unextirpated."<sup>20</sup>

Bentham offers his penitentiary system as the favorable alternative, one that will serve the interests of justice rather than the purse. He proposes to see convicts as a "sort of grown children" that need the same

basic guidance as other children to attain the means of self-legislation. The penitentiary is perfectly poised to accomplish this task, "in its extraordinary and improved state, that principle of management carried to such a degree of perfection, as till then had never been reached even by imagination, much less by practice."<sup>21</sup> Bentham argues that the penitentiary system is superior to transport on every criterion except for economy. He clearly hopes that the advantages in terms of justice will persuade Parliament that the extra expense is justified. In the fifteen years following the breakdown of the transport system to the United States, Britain was involved in a period of self-scrutiny and had delegations report on the penal practices of the United States as a model to consider for adoption. Interestingly, Bentham felt compelled to send this particular pamphlet to a sympathetic fellow traveler in the United States, Caleb Lownes.<sup>22</sup> Lownes was the administrator of the Walnut Street Jail in Philadelphia. On the face of it, he may seem to be similarly inspired by Bentham's vision, but closer inspection reveals that the initial penal philosophies and practices in Philadelphia were derived from a different source and have a distinct character.

### *Beccaria*

Bernard Bailyn has noted that Cesare Beccaria's work was mentioned in pamphlet after pamphlet about criminal law in the new republic. John Adams, Thomas Jefferson, Thomas Paine, and Benjamin Franklin were all well acquainted with the work *On Crimes and Punishments*. It was published in Italy in 1764, and the English translation of the work was remarkably swift, appearing in 1767. Presses in the colonies reprinted it as early as 1773, and multiple editions appeared in South Carolina, New York, Boston, and Pennsylvania.<sup>23</sup> First editions of the Italian work appear in the American Philosophical Library in Philadelphia, as well as multiple copies of these eighteenth-century American editions. Beccaria is hailed as "wise," "immortal," and even saintly in different treatises immediately following the Revolutionary War.

Though Beccaria is often seen merely as a short detour on the way to Bentham, their ideas are actually quite distinct.<sup>24</sup> While the utilitarianism of Bentham may have finally triumphed in the practices of the penitentiary described by Tocqueville, Beaumont, and Foucault, Beccaria served as the initial inspiration behind the development of a new penal idealism. In Beccaria we find a unique vision of the utility of law in cre-

ating democratic virtue and citizens, an insight into the psychology of democratic nations that compares to Tocqueville's, and a vision of how democratic virtue, not merely behavior, can be created through public policy. Ultimately, Beccaria's work suggests why punishment is so dangerous in a democratic society, but it also offers suggestions for how it can be used to create equality.

One theme in Beccaria's work that found favor among the new legislators in the United States was the idea that bad laws are the source of criminality. This is different from claiming that laws are bad because they do not prevent criminality. On the contrary, poor laws produce criminality. They asserted that the criminals Britain had sent over to the American colonies were an effect of corrupt laws. People are not the source of criminality; rather, poor government is. The corollary to this proposition is that good laws can be a fount of virtue. Beccaria claimed that any law that goes against human sentiment would ultimately meet resistance. The surest way of generating resistance is to force adherence to a law that people find naturally abhorrent. On the other hand, making punishment perfectly just will create a sovereign that will never need to be overthrown. In this sense, punishment becomes the calibration between government and the people—the more closely the government matches what is in the human heart, the more likely that this government will never be deposed. Correct punishment becomes a way to ensure perpetuity of law, or even the end of all revolutions. This idea would have obvious appeal in a country seeking to establish a stable regime. But stability could not come at any price—for example, compelling obedience to a regime—at least, not at this historical juncture. Correct law was the way to achieve stability without sacrificing progress.

Beccaria extends this basic observation throughout his discussion of crime and punishment. What he seems to fear above all is the observation of laws, without a concurrent belief in their justice. He takes the highly unusual step of imagining what people who are being subjected to the law must think when they see that the law is applied irregularly or believe that the law is unjust. Both Beccaria and the political thinkers of the early American republic had seen quite clearly how English law was used as an instrument to increase the fortunes of the ruling classes. For colonists who had tried to resist transport, they had experienced the penal system as a clear affront to their ability to self-legislate. Because they had experienced firsthand how punishment can be a tool

that reflects and increases social inequalities, they recognized the need to guard vigilantly against this use of the criminal codes.

When a person, group, or entire population is forced to submit to laws that they recognize as unjust, the essence of the social contract is destroyed. Obedience to law without believing in the law only creates resentment, not the social cohesion that is intended. Beccaria acknowledges that punishment in a stratified society only leads to further disassociation from the state and justice. He imagines the calculations of someone facing the death penalty: "these laws are nothing but pretexts for power and for the calculated and cruel formalities of justice; they are nothing but a convenient language for killing us all the more surely, like the preselected victims of a sacrifice to the insatiable god of despotism."<sup>25</sup> Forcing blind obedience is the way to foment revolt, to undermine the political order entirely. Just as the son waits for the first opportunity to overthrow the tyrannical father, so punishments that create compliance but appear to be unjust are the most volatile element in the relationship between state and citizen. Beccaria's own relationship with his father has been documented as a particularly troubled one; who better to ruminate on the resentment caused by feigned obedience?<sup>26</sup>

This is the aspect of Beccaria's thought that most clearly separates him from Bentham. Bentham argued punishment should serve social cohesion and be gauged to be maximally useful in preventing future crimes. But Beccaria sees the origin of social cohesion as resting in the contract; therefore punishment must serve to enforce the contract, not simply social cohesion. Obtaining correct behavior through punishment without true acceptance of the society and government opens the road to revolt. Beccaria's tract contains a short précis on education. His ideas about education display exactly how distant he is from the "Means of Correct Training" at work in both prisons and schools described by Foucault in *Discipline and Punish*. Education should "replace copies with originals" in the minds of students and eschew "ordering them what to do, which gains only a feigned and fleeting obedience."<sup>27</sup> Learning happens when students think for themselves; they should not be encouraged to repeat the knowledge of others. Beccaria correctly foresaw that behaviorism would undermine the spirit of contractual government.

Punishment is useful in preventing future crime, but the principle of utility cannot be the guide in developing it. Instead, Beccaria asserts

that the proper way to determine a punishment is by the effect it has upon those administering and witnessing it. "The limit which the law-giver should set to the harshness of punishments seems to depend on when the feeling of compassion at the punishment, meant more for the spectators than for the convict, begins to dominate every other in their souls."<sup>28</sup> What is the punishment that brings out compassion? This seems to depend more upon the response of the person being punished than the actual punishment. Take, for example, sending a child to his or her room. If the child sorrowfully and dutifully goes to the room, stifling cries, and sits inside quietly moaning, compassion is felt much more easily than if the child resists, screams, and slams the bedroom door after yelling at you. The punishment is the same, but in one instance it seems harsh, in the other, perhaps too lenient.

Another factor that determines the level of compassion in spectators is whether the punishment itself corresponds to what they feel is correct. If we gather in public to watch a hand be slapped for an aggravated assault, we would have no compassion for the convict; instead we would only marvel or feel outrage at his luck in escaping something more severe. On the other hand, when punishments are harsher than seem appropriate, two events are likely to occur. First, we think the law is unjust and distance ourselves from it—it is the law of the regime, not the law of the social contract of which I am a part. But spectators will also be more likely to refuse identification with the person being punished. To convince oneself of safety even in the midst of an unjust law, we reason that the condemned must be of an entirely different sort of person than myself. There would be no empathy and hence no compassion. Beccaria argues against the public punishment of smugglers. "Smuggling is a real crime against the sovereign and the nation, but the punishment of it should not involve dishonour since it does not seem disgraceful in the eyes of the public. If humiliating punishments are given to crimes not held to be dishonourable, then the feeling of disgrace aroused by those that really are so diminishes." Instead of seeing the law as a reflection of innate human sensibility, it seems to be an instrument of humiliation, and "the moral sentiments are destroyed."<sup>29</sup>

The basic insight is interesting, as Beccaria observes that punishment can create a chasm in societies by developing a class that becomes untouchable, an entire category of people that we come to see as less than human as a result of their punishment. It is when punishments create different classes of citizens that they fail to reflect the unity of the

social body through contract but instead perpetuate the division. Once punishment serves to divide, all hope of justice is gone as the contract and law must be based upon unity. This idea of unity was to guide many practices of the Walnut Street Jail in Philadelphia, as I will discuss shortly.

Beccaria laments the uneven application of the laws to different social classes as well as the use of punishment in creating a permanent social schism. Once again, he puts himself into the head of a criminal being tried.

What are these laws which I have to obey, which leave such a gulf between me and the rich man? He denies me the penny I beg of him, brushing me off with the demand that I should work, something he knows nothing about. Who made these laws? Rich and powerful men, who have never condescended to visit the filthy hovels, of the poor, who have never broken mouldy bread among the innocent cries of starving children and a wife's tears. Let us break these ties, which are pernicious to most people and only useful to a few and idle tyrants; let us attack injustice at its source. . . . King of a small band of men, I shall put to rights the inequities of fortune, and I shall see these tyrants blanch and cower at one whom they considered, with insulting ostentation, lower than their horses and dogs.<sup>30</sup>

It may sound like *ressentiment*, but it is a jarring passage to find in the midst of an otherwise straightforward plea for the proper structuring of law in the purpose of punishing. In these passages, he strikes at the core of the problem of democracy and punishment: when we punish, we make someone less than ourselves. The paradox of punishment in a democracy is that punishment is ideally used to encourage and demand that someone act as one of the self-legislating individuals that form the basis of an equal society. Yet the very act of punishing makes someone inherently *less* than those others in the position of enforcing the contract. Today, most people accept the idea that once someone breaks the law, they fall outside of normal citizenship. Once a sentence is served, a fine paid, the offender is supposedly to be welcomed back into society. Yet Beccaria's work helps remind us why that is so difficult. The process of punishing makes someone less than equal, and the stigma remains. We cannot place someone in a prison and outside of society according to a time regulation and expect their reentry into soci-

ety to be seamless. Punishment can only work to promote democracy if it is circumscribed to very precise effect.

Beccaria saw the problem and tried to calculate a form of punishment that would maintain democratic citizenship. He concludes it is crucial for compassion to be maintained on the side of the onlooker, whether a passive observer of punishment or someone involved in the actual administration of it. He also insists that understanding must be established in the mind of the person being punished. If punishment is to maintain a democratic society, it must not break the bounds of natural compassion among fellow citizens, nor can it create the perception of privilege among different classes.

Beccaria's vision of punishment would not work in a society where there were different classes, for any criminal would then be able to blame his inequality for his penance. If there are already classes in society, practices of punishment will reveal the inequity starkly. Beccaria's work suggests why punishment and criminal codes must be reformed if democracy is to flourish. What had been the instrument of inequality must be wrested away, lest it corrupt the heart of the new republic. We might look at this idea today and say that such ideals are noble, but that the practice of punishment will inevitably create some sort of hierarchy between judge and defendant, guard and prisoner. Yet the practices of the Walnut Street Jail in Philadelphia in the years immediately following the American Revolution were closely aligned with Beccaria's ideas. They did try to create compassion between keeper and prisoner, and the goal of the system was to maintain every person's identity as a full citizen, even while they were in prison.

*Democratic Punishment: The Practices at Walnut Street Jail, 1790–99*

The Walnut Street Jail in Philadelphia was the first experiment in democratic punishment, and this is where the idea of the penitentiary was initially developed.<sup>31</sup> Settlers built the Walnut Street Jail in 1773. In 1777, the British army seized Philadelphia and used the jail to house prisoners of war. The notoriously cruel Captain Cunningham was charged with the administration of the jail and the rebel prisoners within it. When he was finally charged with numerous crimes in London in 1791, Cunningham confessed that he had "presided over the miseries of over two thousand prisoners in the New York and Philadelphia Provosts; how he had stopped the rations of his victims and sold



them for his own gain." A report on the jail holding colonial prisoners stated of Cunningham: "His chief amusement, when not in a sanguinary mood, was to defeat the benevolent intention of the people of the city who sent in food to the patriotic prisoners, by upsetting the utensils and scattering the food over the filthy floor. He would chuckle to witness the degrading scramble of the poor wretches as they gathered it up, dirt and all, to mitigate the pangs of starvation."<sup>32</sup> On average ten people a day died in the jail, and their bodies were unceremoniously dragged across the street and dumped in ditches in a field in the middle of Philadelphia.<sup>33</sup> Transforming the clear symbol of British malevolence was a victory for the administrators of the jail following independence.

In 1776, the new Constitution of Pennsylvania replaced the Code of the Duke of York, which had been foisted onto the colony in 1718, bringing the bloody criminal code of native England to Penn's territory. William Penn had successfully resisted this criminal code and had established a much more lenient and progressive penal code in 1682 under the name of "The Great Law." With the Transportation Act of 1717, however, the Crown was no longer going to allow colonies to have a criminal code separate from, and often in resistance to, its own. William Bradford noted that the criminal codes of much of the eighteenth century in Pennsylvania were "an exotic plant, and not the native growth of Pennsylvania. It has endured, but, I believe, has never been a favorite. As soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them."<sup>34</sup>

Thus, one of the first significant shifts from British law was the Pennsylvania penal code.

To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishment less necessary; houses ought to be provided for punishing at hard labor, those who shall be convicted of crimes not capital; wherein the criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons. And all persons at proper times shall be admitted to see the prisoners at their labour.<sup>35</sup>

It is important to recall that this was considered a great improvement in the penal codes, though the resulting practices were unsavory.

In fact, the Wheel Barrow Laws, as they came to be known, are remarkably similar to the description of punishment that appears in Sir Thomas More's *Utopia*. In *Utopia*, all people convicted of crimes became slaves to the state, doing public works and generally providing the difficult labor absolutely necessary for the maintenance of any society. The slaves are well treated, and the public display of their labor serves as a constant reminder that one must contribute to the collective endeavors of the commonwealth or become a slave to them absolutely.

In Philadelphia, prisoners working in public were shackled to a ball and chain and were subjected to taunts and abuses. The convicts fought back. "After they had swept around them as far as the ball and chain would permit, the manacled prisoners would pick up the balls and carry them to a fresh spot. The more malicious would often throw down the balls in such a manner as to injure passers-by."<sup>36</sup> There were several well-publicized escapes as well. On May 8, 1787, the Philadelphia Society for Alleviating the Miseries of Public Prisons was founded, and it still exists today under the name of the Philadelphia Prison Society. One of the founders, Benjamin Rush, presented a paper against the practice of public punishments at Franklin's salon, The Society for Political Enquiry. Rush's primary rationale against public punishment was that it created a permanent stigma attached to the criminal. Thus, the practice of punishment ultimately does more to break the harmony of society than the initial crime. "Crimes produce a stain, which may be washed out by reformation, and which frequently wears away by time; But public punishments leave scars, which disfigure the whole character; and hence persons, who have suffered them, are even afterwards viewed with horror or aversion."<sup>37</sup> After several months of lobbying on the part of Rush and the rest of the Philadelphia Society, the Wheel Barrow Laws were repealed on April 5, 1790. Private labor was established as an alternative to the public spectacle of hard labor. The Walnut Street Jail was to be the primary location for this private labor.

The administration of the Walnut Street Jail was turned over to the Philadelphia Society for Alleviating the Miseries of Public Prisons, and Caleb Lowmes, member of that society, became the primary administrator and designer of the jail, though there were other volunteer observers who met twice monthly to observe the workings at the jail and discuss reformation. There are two different detailed accounts of the workings of the Walnut Street Jail in the following years. Lowmes himself wrote one in 1793, which was attached to William Bradford's

proposal to end capital punishment in Pennsylvania. Robert Turnbull in 1796, a South Carolina native who was studying law in Philadelphia when he toured the jail, wrote the second. He later became a political reformer in the South. Both Turnbull and Lownes cite the ideas of Beccaria with particular favor.

Turnbull is an enthusiast for the system, describing the jail as the "wonder of the world." At this time, the jail held 250 convicts, who were segregated by sex. Everyone worked in the common yard of the jail and then retired to their individual cells to sleep. They ate meals in common. On Sundays ministers visited the jail, and there was some literacy instruction as well. The characteristics that distinguish the entire enterprise are the relationship between the keepers and the prisoners, the method of punishment, and the attitude toward criminality.

Lownes chastised those who "forget that the prisoner is a rational being of like feelings and passion with themselves." While Bentham was to later describe convicts and prisoners in the penitentiary system as children needing instruction, this view was not held at the Walnut Street Jail. Crimes were not understood as a result of individual moral or rational failings. Instead, Turnbull observes, "you attribute their situation to misfortune, to bad education, and other adventitious circumstances in life—not to any innate thirst for vice or villainy."<sup>38</sup> Every pain was taken to create a bond between rather than segregate the keepers of the jail and the prisoners. The companionship between the two was seen as an essential element in their reformation, as emulation rather than training or discipline was seen as the core of the prisoners' transformation. Prisoners need to have a reason to emulate the guards, and therefore their manners must be irreproachable. Corporal discipline would destroy the desire of the prisoner to identify with the keeper and was therefore completely forbidden. In a reversal of contemporary beliefs, Turnbull acknowledges the necessity of corporal discipline for a child who does not have a fully developed rational capability, while he spurns it for the convict. "With children or boys, no other principle than that of fear will govern, and perhaps no punishment avail more than whipping; but where reflection once holds a post in the mind, I have been always firmly persuaded, that mankind would more likely be reformed by almost any other mode."<sup>39</sup>

When Turnbull visited the jail, there were 250 prisoners who were administered by four guards and one female warden, none of who had weapons of any sort. Solitary confinement was administered to those

who refused to work or upset the order and harmony of the jail in any way. While Eastern State Penitentiary was to take solitary confinement as the fundamental experience of penance, here it was a form of discipline, not of complete reform. Interestingly, the goal of solitary confinement was to make the prisoner realize the power of his rationale, his mental capabilities. Solitary confinement might be understood as taking the presumed virtues of democratic individualism to its logical conclusion. Individuals, not society, are rational and moral. Therefore, removing the individual from all social intercourse will allow this individualism to blossom once more in its full promise. Benjamin Rush believed that the soul could recalibrate itself once removed from the overstimulus of modern sociability. On the other hand, there is an awareness of the psychological underpinnings of the experience revealed by the description provided by Turnbull.

We become by it gradually acquainted with a true knowledge of ourselves; with the purity of dictates prescribed to us by our consciences; and of course easier convinced of the necessity of conforming to them. It is in this state of seclusion from the world that the mind can be brought to contemplate itself—to judge of its powers—and thence to acquire the resolution and energy necessary to protect its avenues from the intrusion of vicious thoughts.<sup>40</sup>

Solitary confinement is where one can come to see that the mind can be one's most terrible enemy. It forces inmates to achieve mental discipline in a way similar to meditation if they are to survive intact.

Keepers were more than guards or bureaucrats. They were allowed to commute sentences when they thought that they saw true reformation in a prisoner. As opposed to the impartial administrators of Lockean liberalism, guards were encouraged to socialize and converse with the prisoners in order to gauge the convicts' progress. Turnbull recounts a discussion between a woman inmate and an inspector for the prison. She asks the inspector if her sentence might be commuted, and they discuss the matter for some time. When he concludes that as she has not served half of her sentence, it would be impossible, she reportedly "resumed her spinning with cheerfulness . . . perfectly satisfied with his reasoning." Given the context, it is tempting to conclude that the cheerfulness was artifice. However, Turnbull also recounts that convicts happily greeted one of the keepers who had been ill for a week

and away from the jail. Even the appearance, if not heartfelt sincerity, of such a sentiment is inconceivable today.

Lest we think that Turnbull was an overzealous enthusiast and Lownes a bureaucrat serving his own interest, we find other testimony to the spirit behind the jail. In 1798, an anonymous "Lady" wrote the following ode, "The Pennsylvania Prison," that was published in the *Philadelphia Monthly Magazine*.

It is a sort of little commonwealth (if I may be allowed the expression) which I shall entitle the commonwealth of nature—an excellent school to teach the utility of that government, which attends most to its operations, to the uniformity, beauty, and simplicity of her divine precepts,—health and contentment must exist, where wisdom and humanity reign, and the breast of the most hardened convict, will naturally admit contrition, and embrace reformation, while experiencing the bodily comfort, the mental satisfaction, and pecuniary benefit, that lead to, and is the foundation of them,—virtue *will* display her charms, to beings who never before beheld her, and they will instinctively be led to adore and follow what has afforded so much tranquil, solid pleasure—in pursuing industry and good order, they will *see* is the only roads that leads to happiness, while idleness, and its concomitant vice, they will feel, leads only to misery.—The Philadelphia prison, is one of the most striking emblems, of *progress* in refinement.<sup>41</sup>

The prison was seen as a microcosm of government, rather than a deviation from it. The prisoner was encouraged to see himself or herself as part of society, rather than apart from it. Inherent in the administration of the jail then was the goal of preventing a hierarchy developing between prisoner and administrator.

Yet this experiment was to last for only nine years. Thomas Dumm has brilliantly detailed the quick evolution toward the more behaviorist impulse in American penal theory in his book *Democracy and Punishment*. The change from the desire to reform to the goal of creating obedience is best captured by Tocqueville and Beaumont's observations about the distinction between the Pennsylvania Model of Penitentiary and the Auburn Model. The Pennsylvania system made labor within solitary confinement its primary method of reform. In every cell in Eastern State penitentiary, there is a gap in the ceiling called "the eye

of God." Every day the sun passed slowly over the cell, and the prisoner was to engage in an extended self-study, under the all-knowing eye of God. In Auburn, prisoners worked collectively, though in complete silence. The combination of collective work and silence displayed the virtues of sociality and obedience. Prisoners saw the benefits of collective endeavor, without speaking and contaminating each other's thoughts. The obedience required to be silent in a room full of other prisoners was much different than the ability to remain sane after seeing no one for an extended period of time. Tocqueville and Beaumont summarized the differences between the two systems as following: the Pennsylvania system produces more virtuous citizens, while the Auburn model produces more obedient ones.

Maybe the Walnut Street system was simply unsustainable because an institutional logic became more prominent as the founding ideas faded. Who is to remember the blueprint when the actual construction of a place deviates from it? The cost of the Pennsylvania system was also quite high. In fact the British government placed financial concerns over all others when choosing transportation to South Wales rather than Bentham's penitentiary. One other factor seems worth consideration. The existence of penal labor may have made the system too susceptible to appropriation by private interests, an issue that will be more fully explored in chapter 6, "Hitched to the Post: Prison Labor, Choice, and Citizenship." More likely, behaviorism and utilitarianism were much less difficult goals to achieve than moral reformation. The fervor of democratic sentiment faded, and the realities of creating democratic order grew more apparent.

In the end, the penitentiaries decided that the souls of prisoners could remain their own, as long as they were willing to obey their masters. Yet this is exactly what Beccaria and the founding fathers saw as the birth of tyranny as well as the betrayal of the social contract. As soon as the democratic society can be divided between those who believe in the rectitude of the code of law and those who are subject to it, law and society appears as a sham, an instrument. It is ironic that we have misread Beccaria for so long as a utilitarian, because he provides some of the most powerful arguments against the utilitarian version of punishment. Punishment will only be useful when it remains true to the ideal of the social contract—equally applied, transparent, and for the interest of self-regulation. Oddly, after reading Beccaria, we can see virtuous punishment as one of the pillars of a truly democratic society.

Beccaria realized that punishment could corrupt our perception and experience of the law, meaning that it is crucial to get the system right.

This does seem very idealistic, and some might claim that no person ever being punished would view their fate as deserved or legitimate without being lost in a blizzard of confusion or self-hatred. But every one of us has been punished in one way or another and recognized that we deserved it. When a person is pulled over for running a red light, she may hate to pay the fine but recognizes the need for traffic regulations and the penalties that accompany them. It is when the driver finds out that her friend was caught running a red light and did not receive the same penalty that indignation might arise. When the rule, law, or system appears as unjust, the punishment has a purely performative or tyrannical meaning. Similarly, when a punishment is clearly illogical or disproportionate, those who enforce it lose their authority and become tyrants instead, people who have power based upon coercion rather than as a result of perceived, legitimate means.

Every government needs a system of laws and a way to administer punishment. The challenge of democracy is to prevent the government and the penal system from creating a hierarchy among what should be equal citizens. Beccaria laid out the framework and rationale clearly. The moment serves as a sober reminder; perhaps the true test of whether a state can truly be considered democratic is if those sitting in the jails believe it is so. The most illuminating moments of Beccaria's text are the juxtaposition of principles of right and justice with the cynical, angry thoughts of those subject to the law. The penetrating anger of the offender makes the principles of justice seem a sham, or at least hopelessly abstract in comparison. How many prisoners in the United States today believe the laws are a manifestation of the social contract of which they are a part? How many citizens, when hearing of atrocities in prisons, feel proud or even comfortable in acknowledging that they have legislated these punishments as an equal member of the social contract? It isn't that criminality threatens our democracy; instead our punishments reveal how completely democratic idealism has disappeared.