

ROMILLY AND RUSH: THE PARALLEL PATHS OF
PENAL REFORM IN BRITAIN AND
AMERICA, 1780 - 1830

by

WENDELL ALLEN HUNNICUTT

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ABSTRACT

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Wendell Allen Hunnicutt, PhD

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Supervising Professor: Steven G. Reinhardt

After the end of the American Revolution, efforts were made in both American and in Britain to alter the penal code in order to reduce the number of offenses that carried the death penalty and to replace capital punishment with incarceration in a penitentiary. In Pennsylvania, Dr. Benjamin Rush achieved apparent success in this matter since, by the time of his death, the local jail was well on its way to being transformed into the total penal institution recognizable in the nineteenth-century penitentiary. Sir Samuel Romilly, on the other hand, faced relentless opposition in Parliament in his efforts to repeal the numerous statutes that constituted England's "Bloody Code." The revolutionary spirit in America allowed for the alteration in the penal code and the experimentation with less severe forms of punishment. In Britain, the spirit of revolution seemed too real and threatening to the entrenched elites and therefore efforts to alleviate the law's harshness came to naught as long as Napoleon Bonaparte remained in power. By the 1820s American interests had changed and penal reform slowed; in Britain, the absence of revolutionary threat allowed Britons to establish a police force and to relax their harsh laws.

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CHAPTER I

RUSH AND ROMILLY: PARALLEL LIVES – INTERSECTING REFORMS

Capital punishment was enshrined as the cornerstone of the eighteenth-century penal apparatus in the Anglo-American world. It was ironic, then, that exactly in the same era the movement to abolish or at least reduce the death penalty found its public voice in Great Britain and the United States. Whether one fixes 1776 or 1787 as the date of separation of Britain from its American colonies, thereafter calls for reform were voiced, with increasing volume and intensity, on both sides of the Atlantic for several years. Therefore, the early changes effected in the British and American penal systems necessarily should be examined in the context of the transatlantic world in which they were but parts of a larger whole. Gradually and with increasing acceptance, transatlantic history, as a discrete field within the discipline, has proven valuable as a means of understanding the past. Bernard Bailyn has placed the origins of the concept of Atlantic history around 1917, at a time when America was becoming more conscious of what bound it to its North Atlantic neighbors and was abandoning its isolationist policies prior to entering World War I. Bailyn contends that the international role played by the United States in World War II and the post-war years further heightened the consciousness of the “Atlantic community” and further paved the way for a transatlantic interpretation of history.¹

Transatlantic history does not, however, refer to a collection of individual, national histories of the countries counted among the Atlantic members. In his introductory remarks about the revolutions that swept the Atlantic world, R. R. Palmer suggested that despite the transient and perhaps arbitrary political boundaries, the cultural similarities shared by American and European nations transcended political borders and even spanned oceanic divisions.² Events in one nation did not pass unnoticed in other countries. Political methods, solutions to problems,

and philosophical musings found their way from one nation to the others.³ Thomas Bender argues that the significance of Columbus's discovery lay less in the land that he found than "in the ocean that had made it accessible"; he describes "the revolutionary transformation of the ocean from a barrier into a connector of continents, a medium for the global movement of people, money, goods, and ideas."⁴ Moreover, the reaction of one nation to events occurring in other nations sometimes had profound consequences, e. g., chief among the causes of the unsuccessful English attempt to repeal laws that carried an inappropriate capital penalty was the fear engendered among members of Parliament by events first in revolutionary America and then in revolutionary France.

The concept of connections must be at the center of transatlantic history. In his preface to *Transatlantic History*, Steven G. Reinhardt stresses the "interconnectedness of human experience over the centuries in the Atlantic Basin."⁵ While local, minute history inarguably has its virtues, such an approach has limits in its use just as it has limits in its focus. While a physician may specialize in a specific part of the body, no responsible doctor would think of ignoring the interconnectedness of the part to the whole. Daniel T. Rogers deplores historians' tendency to focus on the nation, calling it "an analytical cage"; instead, he emphasizes the value in examining connections.⁶ Similarly, Alison Games points out that transatlantic history is not just substituting a larger geographical unit for the more narrow one; instead, transatlantic history is a style of inquiry that intentionally deemphasizes any single space.⁷

Examination of the local consequences of global, or at least transatlantic, political and intellectual currents forms the heart of this dissertation. I shall explore the movement to change punishment from being overwhelmingly based on the death penalty to one that substituted incarceration in view of rehabilitating the criminal. Specifically, this dissertation argues that the early success of penal reform manifested in Pennsylvania during the half-century following the American Revolution derived primarily and directly from the fact that there had been a revolution and, secondarily, from the fact that both European Enlightenment philosophy and Christian

evangelical movements had a pervasive influence on *both* sides of the Atlantic. In addition, I shall contend that during this same time, many members of the British elite resisted change in its penalty and judicial punishment principally in reaction and resistance to these same movements.

As an entrée into the age of transatlantic revolutions and reforms, as well as into the minds of those involved in changing the methods of punishment in Britain and America, this study examines the lives and work of Sir Samuel Romilly of England and Dr. Benjamin Rush of Pennsylvania. This approach also serves as a means of imposing organization and structure on several diverse aspects of the topic. Each of these men was at the core of the movement to reform the nature of punishment in his respective country. Each man left letters, published pamphlets, and personal memoirs touching on this subject. One of Romilly's earliest entrances onto the stage of public life was his 1786 pamphlet, "Observations on a Late Publication, Intituled, Thoughts on Executive Justice . . .," in which he squarely established himself as an opponent of harsh penalties for relatively minor offenses.⁸ In addition, he wrote three volumes of memoirs, edited and published in 1840 by his sons.⁹ In those memoirs he recounts his efforts to pass legislation to repeal specific laws bearing the death penalty; he also provides insightful observations on the thinking of those who opposed his bills. Writing more extensively than Romilly, Rush also published pamphlets containing his views on capital punishment and the treatment of criminals.¹⁰ Rush also wrote memoirs in which he recalls his efforts to eliminate capital punishment and to improve the reformatory aspects of incarceration.¹¹ While this dissertation will not be a full biographical treatment of either man, it will analyze their personal papers to discover their thinking and understanding of the nature of punishment at the time they were writing. Moreover, examination of the writings of contemporary authors on capital punishment will further illuminate the wide debate on the perceived effects and value of the death penalty in America, Britain, and Europe; specifically, the writings of Martin Madan, William Paley, Thomas Jefferson, William Bradford, Thomas Eddy, Césaire Beccaria, William Eden, and Jeremy Bentham

will be brought to bear.¹² In addition, the records of Britain's Parliament provide invaluable insight into the British side of the equation.

Changing Approaches to Punishment

Although Bailyn, Bender, and Palmer were not specifically writing about penology, their observations on the interconnectedness of the Atlantic community hold true on that subject. A brief summary of the methods of dispensing legal justice will not only illustrate the common roots of punishment as it was practiced in America, Britain, and much of the Atlantic world, but will also serve a background for the subsequent discussion of punishment in the age of Atlantic revolutions.

Historically, fines – whether monetary or in kind – were numerically the chief form of punishment. Dating from ancient times, fines were levied across the entire spectrum of wrongdoing, from minor infractions such as accidental damage to a neighbor's property all the way to what would today be called first-degree murder. As a form of punishment, fines allowed great flexibility to the imposing authority. Fines could be varied over time in response to economic conditions, the nature and severity of the offense, and the local sensibilities regarding crime and the criminal. Yet a constant truth remained: some calculus of justice could be devised to assign monetary value to the wrongs committed by one person to another.

This method incorporates two of three major goals of punishment: retribution and deterrence.* Retribution plays a central role in the usefulness of fines as a form of punishment. The injured party, his or her family, or the legal entity itself is literally repaid by the malefactor. There is a neat satisfaction to this arrangement, very much like any financial transaction. The shared sense of justice as well as personal honor can be maintained as long as the fines are more or less in alignment with accepted values. Moreover, if the levying authority has discretionary power, then the fines may be calibrated to a degree of appropriateness in order to mitigate

* The third goal, reformation or rehabilitation, is not addressed by any method under discussion prior to the introduction of the workhouse.

the tendency for flat, fixed fines to punish the poor disproportionately while allowing the rich to act with virtual impunity.

Fines can also hold a deterrent power if set at appropriate levels. As suggested above, the flat fine carries less deterrent value to the rich than it might to the poor; paradoxically, the exorbitantly high fine may hold more ability to stop a wealthy man than a poor one in that there comes a point of diminishing returns in placing the fine so far from his ability to pay it as to render it essentially meaningless.

Although not a primary consideration or guiding force in penology, fines also offer an additional benefit in that they afford a better chance of reversal and restitution in cases of miscarriages of justice – superior to incarceration and clearly superior to corporal and capital punishment. While this aspect has never been, nor is it likely ever to be, the main impetus behind the use of fines, it is of no small importance to the victim of injustice.

Physical punishments captured greater attention and occupied the collective imagination to a greater degree than financial penalties, largely because they were intentionally designed to do so. Physical punishments ranged from various forms of shaming, which are necessarily public, to corporal forms usually involving mutilations or some temporary but intense pain, up to an array of capital punishments. Corporal punishment, like fines, could be carefully calibrated. In Britain, as in most of Europe, physical punishments were inevitably public in the early modern period. The detection of crime was crude, the apprehension of the accused was unreliable, and the conviction by the jury was unpredictable; therefore, in order to derive maximum deterrent benefit from the punishment, the penalties were exacted in public so that all could witness the power of the state and the reparation of the damage done to the social fabric.

The number of capital statutes began to grow as early as the Tudor dynasty; certainly there was a pronounced increase in the sheer number of executions during that time. It was not so much that crime increased during that time, nor were Tudor magistrates more successful in

apprehending criminals. The categories of executions accounting for the numerical increase during this period may be classified as political or religious in basis.

First, the Tudors effected the consolidation of monarchical power over the nobility. Effectively, there were no more serious threats to the throne such as the rival branches of the Plantagenets offered in the fourteenth century. However, these threats were eliminated by eliminating the very candidates themselves, along with many of their supporters. By the end of the reign of Henry VIII, the Plantagenet family tree had been successfully pruned to no more than a bonsai. Although political disposal of the Plantagenets and other rivals accounted for only a part of the executions during Tudor period, those executions were high-profile affairs. The condemned were well-known public figures and, by design, their deaths were arranged to produce high visibility and maximum spectacle for purposes of deterring others. This resulted in a perception of numerous executions beyond the sheer numbers. However, the second cause, religious strife, produced a far larger number of executions. Arising originally from the Protestant Reformation that was changing people's hearts and minds throughout Europe, English religious values were completely thrown into upheaval with Henry VIII's break with Rome and the formation of the Church of England. The dissolution of the monasteries, the movement to purify the church, and the political requirement to adhere to and to profess the King's religion set individuals at odds with the Church and the king. As the official religious stance shifted across the spectrum under the reigns of Edward VI and his half-sister, Mary I, people struggled to exhibit acceptable religious observances and avoid running afoul of the law. The persecution of Catholics under Henry VIII and Edward VI and of Protestants under Mary I resulted in a larger number of deaths than the political persecutions had done. Moreover, the religious persecutions extended to the non-elites, bringing almost all levels of society into their scope. In addition, records suggest high rates of indictment for mundane crimes such as homicide, infanticide, sexual offenses, property offenses, coining, and arson during this same time.¹³

The sheer pace of executions abated under the stabilizing, conciliating influence of Elizabeth. Even under the Stuarts, whose regimes were not exactly free from religious controversy, the rate of execution did not match the Tudor numbers. Significantly, however, religious reasons still played a large part in the charges brought to bear, with heresy and witchcraft remaining high in the list of convictions. Not until the latter part of the sixteenth century, when religious fervor had somewhat spent itself, did crimes against property rather than against spirituality garner the greater attention. French sociologist Emile Durkheim (1858—1917) contends that crimes against ideas, property, or things are each a form of religious crime in contrast to crimes against the human body; however, for the purposes of this study, by the late seventeenth century crime against material things came more into the purview of the increasingly prosperous elites who controlled the legislative and judicial system in Britain.¹⁴

The Bloody Code that Romilly fought against arose from the numerous statutes enacted as England became a prosperous nation of trade. While no single year marks the beginning of this era of prosperity, the Glorious Revolution of 1688 serves as a useful working date. More willing now to tolerate some religious differences, English people found it more advantageous to make more money in trade than to devote their attention to each other's religious views. Concomitantly, they became increasingly fearful for and worried about their property. With the moneyed and landed classes well in control of the country after the Glorious Revolution, Parliament passed one capital act after another in an effort to shore up existing protections for property owners, thereby creating numerous, discrete, capitally punishable offenses.¹⁵ Part of the reason for the proscription of so many specific activities was the specificity itself. Instead of well-written, generalized law that could be interpreted and applied broadly, the body of acts that constituted the Bloody Code were mostly quite detailed, usually stating what could not be stolen or damaged and under what circumstances. A cunning criminal, for example, might evade conviction if he could show that he had not stolen a turnip from a man whose shop was closed for business at the time of the theft, but rather had committed the act during normal business

hours, which was not punishable by capital law. This, in turn, might result in an additional, similarly over-specific, act being passed to plug that narrow gap, thereby adding yet another capital offense to the corpus of law considered the Bloody Code!¹⁶

By Romilly's time, a century after the Glorious Revolution, it was increasingly evident that the harsh code, as actually applied by judge and jury, was not fully effective. Opinions varied on how to remedy the situation, with some claiming the law was not strong enough while others maintained it was far too severe. It is important to remember that there were not merely two sides to the question. Those who argued on the issue held opinions at almost all points along the broad continuum. Some thought the law should be severe and the application should be as well, while others held that the law should be severe but tempered by liberal use of judicial discretionary clemency. Still others felt that the answer was to alleviate the harshness of the law but to increase the certitude of its enforcement – less severity with greater certainty.

The American colonies, in theory, were obligated to uphold the Bloody Code as part of their law.¹⁷ In practice, however, there were several reasons why those laws were essentially ignored. As mentioned, some of the laws were so specific as to be inapplicable outside the geographic locale. More importantly, the range in American society was not as large as in Britain. The gap between the upper, propertied class and the lowest indigents was larger and more layered in England than in the American colonies, where most people were untitled. Lacking a noble class, America had only an oligarchy to serve as its uppermost level. In addition, opportunities for land ownership were relatively plentiful in America, compared with England; while a man might not be rich in America, he could at least aspire to owning a small plot. In other words, the lowest in America tended not to be as destitute or as despairing as their British counterparts.¹⁸ Taken in sum, American property owners did not exhibit the same degree of defensiveness about their property as was manifest in Britain. Whether the property owners were more comfortable and less threatened or the criminals were less driven to desperate extremes, the need for numerous, severe laws protecting property did not arise in America. Even among

the American colonies, these differences played out regionally in that Pennsylvania, which had a flatter social structure than the more hierarchical societies of New England or the plantation South, also had the mildest judicial punishments.¹⁹

Bibliographic Survey

In spite of a growing acknowledgement of the importance of the Atlantic community as a whole, it is surprising how little comparative research has been done on the movement to abolish capital punishment and to establish incarceration as a primary punishment in its stead in Britain and in America. Significant work has been done on penology within the national contexts, some quite recently even, but precious little attention has been paid to the transnational developments. The huge majority of works on the subject has focused on a single side of the Atlantic and has dealt with matters as if they existed in isolation. This narrow focus holds true across the range of topics that this dissertation examines, including: judicial punishment, crime, police, and incarceration. Clearly these are overlapping in scope, yet still distinct areas of study. Scholars research and write about one or more of these as suits their purposes and interest. The following overview of the literature pertinent to the present dissertation is arranged by surveying the works on British and then American topics in rough chronological order.

Foundational to any examination of British penology and punishment is the work of Leon Radzinowicz beginning in 1948.²⁰ In detailing the change from the Bloody Code and public executions to transportation and eventually to private executions primarily limited to murder, Radzinowicz suggests that the old system simply failed to be effective. Other methods necessarily had to be found to replace the public display of execution. He cites the overwhelming number of offenses that carried the capital penalty, the inefficiency of detection and prosecution, the reluctance of juries to convict, and the lack of lesser penalties. Radzinowicz presents Romilly in the best possible light as champion of the movement to eliminate or reduce capital offences, yet a champion who did not personally witness the success of his efforts because of

Parliament's reluctance to relax the law during the Napoleonic struggles. Radzinowicz's thorough account is purely positivist in approach and shows little of the social interpretations of subsequent historians. In 1967, J. J. Tobias upholds Radzinowicz's interpretation, asserting that crime abated during periods of war and spiked in the ensuing years.²¹ Tobias agrees that the severity of the Bloody Code actually led to a low rate of prosecutions and convictions. Bernard L. Sheintag falls in line with Radzinowicz, as well, in his 1968 portrayal of Romilly as a champion of legal reform who sowed the seeds of reform, the benefits of which would be reaped by his successors.²²

Also writing in 1968, Nigel Walker takes a more structural approach to the theory and practice of the penal system in Britain. He explores the functional values of punishment and attributes the movement away from capital punishment toward incarceration to utilitarian reasons – old methods were perceived as ineffective and new methods were sought in the hope of better results.²³ A decade later, the analysis by W. R. Cornish, Jennifer Hart, A. H. Manchester, and J. Stevenson contends that the delay in removing the capital status from so many crimes primarily stemmed from the lack of an acceptable alternative.²⁴ Roger Ekrich shows that opinion on the efficacy and propriety of transportation was sharply divided. He argues that it was the abrupt end of transportation to America and the stopgap solution of prison hulks that helped expedite the use of prisons as a principal form of punishment.²⁵ Writing in 1979, J. J. Tobias also contends that transportation, and especially the hulks, were disliked by both the utilitarian-minded reformers and those whose motives stemmed from religious origins, thus providing common cause to two disparate groups seeking to replace those punishments with penitentiaries.²⁶ In 1981, Victor Bailey echoes the recognition of the influences of both the utilitarian and the evangelical reformers; he also points out that it was only with the advent of proper, reliable police that the Bloody Code could be relaxed and penitentiaries could become the primary punishment for crimes other than murder.²⁷

In his 1985 and 1990 explorations of punishment, David Garland takes a larger, more social, view of the matter, raising questions such as the state's right to punish, the nature of criminality, and the individual's rights and dignity in relation to the penal process.²⁸ Harry Potter's 1993 work, *Hanging in Judgment*, focuses specifically on the Church of England's role in the retention of capital punishment.²⁹ Potter asserts that the church continually upheld and bolstered capital punishment providing divine support and scriptural authority for its application. Moreover, as the specifics of the process changed over time, such as eliminating the ritualized progress to Tyburn and, much later, removing hanging from public view entirely, the Church readily supplied justification for these changes. Potter argues that while religious motives may have been at the heart of many reformers, the Church of England's official stance remained staunchly supportive of the death penalty. Similarly, Charles Campbell's 1994 analysis of the prison hulks argues that much of the opposition to these floating prisons originated from the Wesleyan Methodists.³⁰

Peter Linebaugh published *The London Hanged: Crime and Civil Society in the Eighteenth Century* in 1992, a work of enormous insight and influence.³¹ As the subtitle suggests, Linebaugh is concerned with the nature of crime within society. He explores the context of the criminal, from the gallows backwards to the lives and social conditions of individuals. While his work is informative and thorough, his focus is more on the social context of crime than on punishment and penology. V. A. C. Gatrell's *The Hanging Tree: Execution and the English People 1770-1868*, which appeared in 1994, analyzes non-elites' roles in and responses to execution in Britain.³² Ultimately, Gatrell rejects earlier theories that the crowd exercised complete autonomy in its responses to the rituals of execution.³³ Gatrell posits that squeamishness on the part of the elites and bourgeoisie, more than humanitarianism, accounts for the elimination of the process to Tyburn and later public execution.

Peter King's publications between 2000 and 2006 offer a close look at the actual trials and convictions of criminals in our period.³⁴ He corrects Radzinowicz's statistics, finding them

skewed in that they were drawn almost exclusively from London; King notes that convictions and executions were more numerous elsewhere. He supports the view that there existed a complicated, complex balance of harsh law and humane mercy. He pays particular attention to the role of the individuals in bringing charges and in serving on juries.

Georg Rusche and Otto Kirchheimer interpret the changes in British penology from capital and corporal punishment as overwhelmingly economic in basis in their 2003 publication, *Punishment and Social Structure*.³⁵ In his 2004 study of the London police, Andrew T. Harris avers that the desire for relaxation of the harsh criminal code was inseparable from the need for efficient police.³⁶ Boyd Hilton rightly reminds us that the issues of penal reform were complex and nuanced and that rarely, if ever, were there merely two sides to the question. He shows the existence of an intricate and complicated intertwining of individuals and groups who supported various aspects of reform but hardly ever agreed on the particulars or the reasons.³⁷

Dana Y. Rabin explores the evolving role of identity and the concept of self, particularly during the eighteenth century, within the legal process.³⁸ The sense of an individual's worth had to become established as a generally accepted idea in order for the notion of reform to be meaningful. Similarly, she argues that it was not until individuals had a sense of liberty as a personal right that deprivation of that liberty could be an effective penalty.

As insightful and scholarly as the contributions are in the works mentioned in the previous paragraphs, they all share a common trait: Anglocentrism. In most cases, these authors intentionally narrowed their purview to the British Isles, so one cannot fairly count as a fault the achievement of their stated purpose. However, within a wider conceptual framework of "transatlanticism", their works inevitably fall short in that regard. There are few moments when any of these writers make the transatlantic connection.

Scholars who focus on the American side of the Atlantic also display a range of interests and interpretation regarding American penology and legal justice. From 1937 to 1955, Negley K. Teeters examines, perhaps too reverentially, the contributions of Rush and the Phila-

delphia Society for Alleviating the Miseries of Public Prisons, an organization that Rush helped found.³⁹ Teeters almost unquestioningly credits Rush and the Philadelphia Society for Alleviating the Miseries of Public Prisons [PSAMPP] with the movement to replace capital punishment or public hard labor with the “modern” penitentiary. By contrast, W. David Lewis’s 1965 study of the origins of penitentiary in New York acknowledges the Pennsylvanian contributions to the penitentiary but recognizes other, even transatlantic, factors as well.

A more thorough and innovative analysis of the origins of the American penitentiary appears in David J. Rothman’s *The Discovery of the Asylum* in 1971.⁴⁰ Rothman concludes that the penitentiary arose from the desire to impose order on a world that was increasingly perceived to be chaotic and out of control. More specifically, Rothman argues that the penitentiary was American in origin as part of patriotic reaction to the Bloody Code of Britain.⁴¹ Another American perspective on penology comes from Thosten J. Sellin’s 1976 monograph, *Slavery and the Penal System*, in which he explores slavery’s impact on American attitudes toward incarceration, deprivation of liberty, and forced hard labor.⁴² Edward L. Ayres examines the American South in his 1981 book; he attributes deep-seated differences between New England and the South to the demographics of the colonists who settled the two regions.⁴³ More to the point, he argues that the Calvinist attitudes of New England shaped vastly different responses to crime and violence than occurred in the South, where honor and dignity played a larger role in the culture.

Louis P. Masur provides a close analysis of capital punishment in early American history; he demonstrates the availability and influence of Beccaria on the thinkers and shapers of American thought.⁴⁴ Unlike Masur, who maintains his focus on the American side of the Atlantic, Adam J. Hirsh’s 1992 book, *The Rise of the Penitentiary: Prisons and Punishment in Early America*, does look across the ocean for explanations of cause.⁴⁵ Specifically, Hirsh rejects Rothman’s location of the origin of the penitentiary in Calvinist New England; he places it in the Elizabethan bridewells, or workhouses.

Michael Meranze synthesizes the work of Michel Foucault, David Rothman, Michael Ignatieff, *et al.* in his 1996 study on the development of penology in Pennsylvania.⁴⁶ Meranze is particularly interested in the theories of Foucault about the shift in punishment from the body to the spirit and in Rothman's link of the penitentiary to capitalism's increasing demand for conformity and adherence to societal standards. In his 2000 work, Andrew Skotnicki also ties the development of the penitentiary to American religious attitudes. While he acknowledges the link to capitalism, he insists that it is capitalism that proceeds from Protestantism and not the other way around, thereby making the religious element the more fundamental determinant in American penology.⁴⁷

Mark E. Kann extended Foucault's notions of power and applied them specifically to early American institutions of incarceration.⁴⁸ He interprets the movement toward incarceration as an attempt to increase the power of the ruling patriarchy. Most recently, Randall G. Sheldon's writes in 2008 that penitentiaries originated from capitalism's need to impose order and discipline on the unemployed and other "dangerous" classes.⁴⁹

As a whole, these contributors to American penology and judicial thought succeeded in their efforts to reveal useful ways of interpreting events, *within the scope of the United States*. Like their British counterparts, they tended to confine themselves to one side of the Atlantic. If they made transatlantic connections slightly more than their British colleagues, it may be explained by the fact that British influence on American institutions and practices is so strikingly obvious in so many areas.

Important and famous counter-examples to the accusation of "monolittorality"* include Michel Foucault and Michael Ignatieff. Writing in a way that is difficult to classify solely as history, Foucault theorizes that a Great Confinement occurred in Europe beginning in the seventeenth century⁵⁰. He attributes the origins of this movement to the beginnings of systemized capitalism, the need for increased regularity, conformity, and discipline. Foucault observes that

* Being limited or concerned exclusively with a single shore, as contrasted with multilittorality.

the movement to confinement and control included the physically ill, the mentally ill, unemployed, and the criminal. He builds a compelling and influential case for the efflorescence of controlling institutions and the simultaneity of the rise of capitalism.⁵¹ Historian Michael Ignatieff built upon Foucault's work but focused more closely on punishment in Britain and America and wrote more in keeping with traditional historiographical methods.⁵² Ignatieff contended that the development of the controlling institutions, especially the penitentiary, lay in the expansion and consolidation of central government and the diminution of local control.

Yet even Ignatieff did not make the transatlantic *connection*. He did not demonstrate that events on one side of the ocean influenced events on the other, nor that societies on the east or west side of the ocean responded in quite different ways to the same events. I intend to illustrate that the American Revolution, and later, the French Revolution elicited very different responses in America from those in Britain. However, these responses to shared events still connect American and British penology in that one may see them as different solutions to a common problem. Indeed, Britain's solution to penal reform differed relatively little once the immediate threat of French invasion was removed from the equation. Viewing the course of penology in American and Britain through a transatlantic lens reveals the similarities of their responses; when examined separately, their solutions may appear different and unconnected.

Scope and Scheme

The period from 1770 to 1820 saw many changes to Britain and America, some of which were literally revolutionary. This study will explore the careers of two individuals – one English, one American – who lived during that era. This exploration will frame and organize the larger examination of the changes in penology, specifically the movement to abolish or reduce capital punishment and the related movement to establish penitential incarceration as the central form of severe punishment during that time.

Signer of the Declaration of Independence and eminent physician, friend of Benjamin Franklin, John Adams, and Thomas Jefferson, Philadelphia's Benjamin Rush involved himself avidly in the reform of legal justice in America. He lent his name, time, property, and money to the abolition of the death penalty, the reform of jails and prisons, and the establishment of true penitentiaries as a preferred alternative to capital punishment. Rush personally visited jails, attended to the needs of prisoners – beyond mere medical attention, which might be expected from him in his capacity as physician – and actively sought to alleviate the degrading, humiliating conditions he found. As one trained in medicine in Scotland, educated, well-read, well-traveled, a member of elite society, Rush knew many famous and influential people in America, Britain, and Europe. Although America was nominally egalitarian, the opinions of some mattered more than those of others; Rush was one whose opinion carried some weight.

On the other side of the Atlantic, Romilly, born eleven years after Rush, rose from middle-class obscurity to national (and international) prominence as a barrister, and later as a Member of Parliament groomed for the premiership. He was almost universally liked by members of not just his own party, and indications were that he might have been prime minister had it not been for his untimely death. Romilly's successes in politics came almost in spite of himself, inasmuch as he allowed himself to follow his *idée fixe* of overturning laws carrying the death penalty. Perhaps even more than Rush, Romilly was in a position of power and influence. He was personally acquainted with most important men in Britain, as well as many in America and in Europe.

When I decided to use Rush's and Romilly's lives as a framework for exploring the movement toward abolition of capital punishment in Britain and America, knowing each only superficially, I fully expected to find points of intersection in their lives. They sought the same, or at least very similar goals, albeit for quite different reasons. Each spent years struggling to eliminate or reduce incidences of capital punishment and to move instead to the use of the penitentiary as a means of high punishment. Each actively sought to associate his name with the

cause and to use whatever influence he had to achieve those goals. Each was a highly educated, well-placed man of influence, personally familiar with or acquainted through literature with philosophers and moralists who theorized on the nature of legal reform. I expected to show the influence of one upon the other. While I was uncertain which way the initial influence would turn out to be, I anticipated that the subsequent effects would be more or less mutual.

As my readings and research progressed, I daily felt sure that this would be the day I would find the document that linked these two giants in the movement for judicial overhaul. As the days lengthened into weeks and months, my original raw zeal waned and my naïveté yielded to the reality that neither Rush nor Romilly seemed to be aware of the other's existence or similar work. I uncovered no evidence that either man had any idea of the other's efforts. Clearly there was no question of one influencing the other, or at least not in the conscious and intentional manner I had assumed, if neither knew of the other.

This seemed to be a serious setback. How could their parallel lives be put to use when they worked entirely independently of one another? After thinking about this and benefiting from discussions with colleagues and advisors, a very literal interpretation of "parallel lives" emerged as a useful model upon which to build. Rush and Romilly truly did lead lives that were parallel; by definition, parallel lines never intersect. It was I who was trying to force an intersection where there was none and, in a framework of parallel lives, there need not be one.

Perhaps making a virtue of necessity, further reflection on the matter suggested even richer transatlantic connections than those I originally sought. Instead of highlighting the points of intersection and direct connection between Romilly and Rush followed with a facile inference of mutual influence, the larger notion of the existence of a transatlantic intellectual atmosphere favoring penal reform took shape. Moreover this approach more closely mirrored the reality of the effort to reform penal administration in America and England because while Romilly and Rush were truly important agents for change, there is no reason to believe that either man was so crucial to the movement that it would not have been successful without him. Rather, many

individuals, *on both sides of the Atlantic*, were thinking along these lines. In addition, as an organizational motif, their lives still served the purposes of this study.

This new model proved useful. Thinking of parallel lines allowed concepts to be cast in geometrical terms; extending the metaphor leads to the useful image of intersecting lines, of which there were plenty of cases. Both men knew Franklin and Jefferson personally and corresponded with them; both read Beccaria and Rousseau; both responded to Madan's work, albeit in entirely different ways. Given that Rush spent considerable time in London and Paris and had the benefit of Franklin's introduction into society, it is possible that the number of mutual contacts and acquaintances between Rush and Romilly was high.

The lack of intersection in their careers becomes understandable after exploring their lives and their work, particularly in regard to capital punishment. At the time of Rush's sojourn in Britain, both he and Romilly were very young men who were very much still in the process of discovering who they were and what they intended to do with themselves. Neither was yet involved in the cause of abolition of the death penalty. By the time each had taken up that standard, the American Revolution had occurred, Rush was a prominent doctor and civic figure in Philadelphia, and Romilly's star was rising in Parliament.

Rush and Romilly personally faced different challenges and circumstances in their drive to change penal conditions, many of which were grounded in the very nature of law as it existed in their respective societies. While derived from and based largely on English law, American law differed from English law not so much in its heritage as in its methods, application, and aims. By the time the United States was an independent nation, state law had been developed in thirteen separate legislative bodies. Unless a national movement for the abolition of capital punishment could be mounted, the only way to eliminate it in America was on a state-by-state basis. On the other hand, the extent of capital punishment, i.e., the sheer number of acts that were punishable by death, was much smaller in the United States than in Britain. So the strategy for abolishing the death penalty differed for Rush and Romilly. Rush acted at the state level,

influencing the broad scope of law but ultimately being geographically confined and legally constrained to one state; Romilly addressed the law of an entire nation but dealt with single and specific laws, one by one. Ultimately, each chose to focus narrowly on what could be achieved in a circumscribed set of conditions, preferring to do at least something toward the end of reducing the application of capital punishment if outright wholesale elimination proved elusive.

In his own lifetime, compared to Romilly, Rush saw more apparent success from his efforts to prevent the application of the death penalty. Pennsylvania proved to be fertile ground for progressive thinking and socially experimental ideas. Moreover, Pennsylvania led the nation in its willingness to try a new method of penology, one believed to be more humane and less harsh. In addition, other states, New York in particular, showed signs of adopting a penitentiary system, which, although differing in some details from Pennsylvania's, shared the goal of reforming the prisoner rather than exacting retribution by means of his death. In contrast, Romilly managed to overturn only three of the hundreds of statutes bearing the capital penalty. At the time of his death, Romilly found little reason to believe that his arguments were prevailing. Yet, within the two decades following their deaths national outcomes changed course. Britain made enormous strides in dismantling its Bloody Code, retaining only four crimes bearing the death penalty, while the drive to abolish capital punishment in America effectively stalled.

The subsequent success in ending capital punishment in Britain and its continued retention into the twenty-first century in the United States stems in large part from differences in the nature and structure of the legal system in the two nations. In historical context, it is possible that Rush viewed Pennsylvania as a sovereign entity roughly the equivalent of England, that is, an important legal entity within a larger sovereign body. In other words, it may be anachronistic to compare the movement to end capital punishment in America and Britain at that time, since Romilly was solely concerned with English law and Rush made little effort beyond the borders of Pennsylvania. Yet, today, it is impossible to ignore the fact that England and Pennsylvania are not and were not equivalent legal entities. Pennsylvania is but one of several

states and has never had any claim to preeminence among the others. England, on the other hand, made little pretense of being the equal of Scotland, Wales, or Ireland; it was ever *primus inter pares*. So the very conditions that seemed to give Rush and his colleagues an advantage in opposing the death penalty in Pennsylvania, also proved to be factors that effectively limited their efforts to that single state. Likewise, once that great difficulty which Romilly faced in his efforts to abolish the death penalty was overcome by his successors, the rest of the process became smoother.

So in spite of the expected mutual influences between Rush and Romilly, their lives and their struggles to end capital punishment truly followed parallel courses. There were shared events that intersected both paths; there were informed travelers who spread reports of conditions in both nations; there was even some mutual cooperation between Britain and America in the hopes of learning from each other's successes and failures in penal structures. But the actual legal efforts to reform the penal code remained exclusive to their respective sides of the Atlantic.

In conclusion, it is significant that even if Rush and Romilly remained unaware of and unaffected by each other, their efforts did lead to changes in the approach to capital punishment by their respective governments, and their successors did take active cognizance of the happenings on the opposite side of the Atlantic. This influence operated especially West to East in that both the French and the English sent formal and unofficial observers to report on the details of the American penitentiaries in the 1830s and 1840s. While neither Rush nor Romilly can be directly credited with inventing the notion of the penitentiary, the widespread use of that institution in the place of the death penalty is attributable to their crusading efforts. Furthermore, examination of their individual efforts toward similar ends reveals some of the nuances and undercurrents at work among the movement for or against capital punishment.

The Way Ahead

At the risk of violating the transatlantic considerations stated above, I shall discuss the British and the American developments in penology in turn rather than as a monolithic entity. Just as the right hand and the left hand are inarguably part of the body as a whole, one hand may be injured while the other is perfectly healthy; belonging to the same corpus does not confer identity or make them interchangeable. Britain and America momentarily pursued apparently different courses in penal reform before resuming a more transparently similar path after the time examined in this study. Therefore, the consecutive approach proves useful in illustrating the overarching connectedness that influenced penological developments both in Britain and America and in showing how, despite differences in detail, the larger picture reveals significant changes in judicial punishment on both sides of the ocean. Geography, chronology, and biography will all serve as a means of organizing the chapters that follow.

Chapter Two recounts the early life and career of Romilly, then proceeds to a larger discussion of the context of Romilly's work, especially the French and British Enlightenments. A summary of Enlightenment thought on penology shows Romilly largely as a product of that school of thought. In addition, this chapter more fully examines the state of British judicial punishment as Romilly found it upon his entry into public life.

Chapter Three discusses the early life and career of Rush. While Rush was influenced by Enlightenment thinkers, he was equally shaped by Christian thought, including evangelical movements, such as Methodism, that emphasized personal, experiential conversion. The chapter briefly recounts the development and influence of Methodism, a religious development that, by Rush's time, had become a powerful force in both Britain and its American colonies. The transatlantic role of religion in the move toward penal reform is examined.

Chapter Four discusses the role of Rush in the abolition of capital punishment in Pennsylvania, the transformation of the jail into the true penitentiary, and the spirit of prisoner rehabilitation that drove these changes.

Chapter Five returns to Britain in order to examine Romilly's crusade to overturn specific laws, namely those bearing the death penalty for relatively trivial offenses. Reasons for his limited success or complete lack thereof are directly related to Britain's "siege mentality" as it struggled for decades against Revolutionary France.

Finally, Chapter Six summarizes the immediate legacies of Romilly and Rush and the penological changes accomplished in the early nineteenth century. By this time, large-scale penitentiaries were in operation in America and were being studied by Europeans as models for their own reforms. In Britain, there emerged a new willingness to change its penology once the threat of revolution had abated. Changes in punishment on both sides of the Atlantic were directly facilitated or retarded by the experience of, or reaction to, the great revolutions that swept across the Atlantic world.

Notes

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CHAPTER II

ROMILLY: ENLIGHTENMENT AND PENALTY

The single most important individual in abolishing Britain's sanguinary approach to punishment was Samuel Romilly. In Sir Leon Radzinowicz's magisterial review of British law and penology, "Sir Samuel Romilly" are the very first words of the book.¹ Biographers of Romilly and historians of law, penology, and police all refer to Romilly as a pivotal character in the development of penology in Britain and the keystone to the dismantling of the Bloody Code. Yet, at the time of his death in 1818, Romilly would not have recognized these attributes. More likely, he would have regarded all his efforts as having been in vain. Therefore, avoiding a sense of inevitability in writing about Romilly is essential to the understanding of the urgency of the work as he saw it. By no means was he assured of success; indeed, he despaired of achieving his goals. This chapter will examine Romilly's youth and formative years; it will place him in the context of contemporary attitudes toward law and penology, specifically among Enlightenment philosophers.

Childhood and Youth

Samuel Romilly was born in London, on March 1, 1757, to Peter and Margaret Romilly. His was the third generation of the family in England. His grandfather had emigrated from France following the revocation of the Edict of Nantes.² Although religiously excluded, Huguenots were not overtly persecuted in England. In his memoirs, posthumously published by his sons, Romilly states that his father was a jeweler and watchmaker, a kindly man who believed in doing good to fellow creatures.³ Samuel was the second surviving son; his parents experienced the deaths of six of their children before Romilly's older brother Thomas was born. Samuel Romilly had a younger sister, Catherine. The three siblings formed very close bonds;

the brothers particularly doted on and protected their sister. Relations with his mother were distant, however; although she lived until Romilly was nearly forty, Patrick Medd, Romilly's biographer and distant descendant observes, "[T]here was a remarkable lack of any affection between the mother and her son. . . . One would have expected to find some record of his feelings for her."⁴

Romilly received scant formal education as a boy. In his memoirs, he characterized his teacher, Mr. Flack, as "ignorant, severe, and brutal."⁵ Fortunately, he was keenly curious and loved reading. His father felt it was important that his children not forget their French heritage so they spoke in that language at home. Every Sunday, the family dutifully attended Church of England services, which were routinely followed by attendance at Huguenot / Calvinist services in French. Whether such was the his father's intention, Romilly believed that sharpening his French language skills was the primary purpose of the latter, rather than bolstering his religious heritage.⁶ In any case, young Romilly excelled at French, reading it for pleasure and speaking it as a native. His facility in French allowed him to access the writings of the *philosophes* and positioned him to observe and even indirectly participate in events of the French Revolution with nuanced insights in a way that contrasted sharply with Benjamin Rush's abilities.

He records in his memoirs that his "father was particularly desirous that [he] should learn Latin."⁷ No thanks to Mr. Flack, he turned his mind to Latin and devoured the works of Horace and Juvenal. His biographer reports:

He made translations, first from Latin into English and later back again, of all the main Latin authors and within three years had read every prose writer of importance. He later somewhat priggishly recorded how he once translated into verse a piece previously translated by Dryden and read the two versions to his family who agreed with him that he 'had left poor Dryden at a most humiliating distance'. He was later modest enough to write of this incident that it was 'a proof certainly, not of the merit of my verse, but of the badness of my judgment, the excess of my vanity and the blind partiality of my friends'.⁸

The elder Romilly specifically wanted the boy to learn Latin in order to pursue a legal career. Romilly, *père*, had decided that the elder son, Thomas, should follow in the family business while Samuel should be a lawyer. His father was not without feeling for his son's wishes,

however; Romilly reflects, “[T]hose plans . . . were formed in perfect subordination to what might be our own choice; it being a fixed opinion of his that few men succeed in any profession which they have not themselves chosen.”⁹

He was articled to Mr. Liddel of Threadneedle Street, but Romilly reports that he found Liddel so personally odious and boring that he could not apply himself to the law. Romilly could not disassociate his negative feeling about his erstwhile mentor from the subject of law itself; because he could not tolerate the one, he felt compelled to forswear the other.¹⁰ Abandoning the study of law, he returned to his father’s business, resigned to a future as a tradesman, a condition that held little appeal for him personally. He was apprenticed to learn bookkeeping or managing business accounts with distant but prosperous relations. However, their untimely deaths shortly thereafter sent Romilly back to his father’s fold at age fourteen with little prospect for success but with a good foundation in accounting and an aptitude for numbers.¹¹

According to Romilly, his father made a modest living at his jewelry business, and so the family was never in want. Though business held no attraction for the boy, he did manage to make himself genuinely useful in organizing and maintaining his father’s account books. He even found ways to reduce some unnecessary expenses and eke out a slightly higher margin of profit from the family’s concern. Still, the future as either a jeweler or a bookkeeper held little allure for the youngster. Nevertheless, he found the abundance of free time his work afforded him useful for self-education; during these two years Romilly aggressively pushed himself to master Latin.¹²

In his memoirs, he records that a fortuitous event occurred that changed his life, an event that, if presented in a novel, would seemed contrived, a *deus ex machina* device. A Mr. de la Haize, “a very rich relation of [his] mother’s,” and whom he did not personally know, died and left the Romillys individually large legacies totaling around £15,000. Overnight, his horizons broadened beyond his imagination.¹³ His increasingly refined education, albeit self-taught, had gradually rendered his father’s business a completely unsatisfying course as an occupation.

With financial means now available to him on a scale heretofore unimagined, Romilly resolved to return to the serious study of law. This time he articulated himself to Mr. William Michael Lally, one of the sworn clerks in Chancery, for a period of five years.¹⁴ Happily, he confirmed that his earlier reluctance toward the legal profession had originated primarily from personal dislike of Mr. Liddel rather than from distaste for the law itself. During his time with Mr. Lally, not only did he learn the intricacies of the legal profession but also found himself with a surprising amount of free time which he filled by attending "lectures at the Royal Academy on painting, architecture and, in odd contrast, anatomy."¹⁵

Romilly's sister, Catherine, in whom he apparently delighted, grew into an alluring young woman of charm and intellect. She had many admirers, including one of Romilly's closest friends who threw himself into rigorous and treacherous military and colonial service in an effort to assuage his unrequited love.¹⁶ Catherine had fallen in love with John Roget, a Huguenot with a keen mind and a zeal for his faith. In Roget, Romilly found an intellectual sparring partner. The two exchanged letters filled with philosophical and theological ideas. They tested and sharpened their inchoate notions of the world against one another; each read avidly the new, exciting, even revolutionary ideas produced in France and America. In particular, Romilly credits Roget for introducing him to the writings of Rousseau. Their minds sparkled with the hope of a better future here on Earth.

After Catherine married Roget and gave birth to a son, Roget was "seized with an inflammation of the lungs, attended with a violent spitting of blood [so that] his life appeared to be in the most imminent danger."¹⁷ It was determined that only a return to his native Switzerland would save Roget; therefore, the young couple set out for Geneva, leaving the infant with its grandfather. The departure of his sister and brother-in-law deeply saddened Romilly. At this same time, he too fell ill. He records, "My stomach was particularly disordered, and my physician advised me to try the waters of Bath; and accordingly, in the spring of 1780, I passed six weeks at that place."¹⁸ Typical of the industrious young man, Romilly used his time in

further intense reading. He felt well enough to return to London in June, though he notes the heat still wearied his body.

He had little time to reflect on his own bodily weakness due to the occurrence of the Gordon Riots.¹⁹ Although written long after the events, Romilly's recollections are worth noting:

In the beginning of June broke out that most extraordinary insurrection, excited by Lord George Gordon, which has hardly any parallel in our history. In a moment of profound peace and of perfect security, the metropolis found itself on a sudden abandoned, as it were, to the plunder and the fury of a bigoted and frantic populace. The prisons were broken open and burned; and their inhabitants—debtors, men accused of crimes, and convicted felons—indiscriminately turned loose upon the public, and received into the first ranks of their deliverers to assist in further acts of devastation. One night, the flames were seen ascending from nine or ten different conflagrations, kindled by these unresisted insurgents. The Inns of Court were marked out as objects of destruction; and Gray's Inn, in which many Catholics resided, was particularly obnoxious. Government, which had acted with extraordinary irresolution at first, took at last very vigorous measures to put a stop to these disgraceful outrages. In the mean time [*sic*], however, it had become necessary for every man to trust to himself for his security; and the barristers and students of the different Inns of Court determined to arm themselves in their own defence. The state of my health rendered me quite unequal to so great an exertion. I was ashamed, however, of being ill at such a season. I did therefore as others did; was up a whole night under arms, and stood as sentinel for several hours at the gate in Holborn.²⁰

Romilly was no admirer of Catholicism, as will be made evident below in discussing his travels in France. Yet clearly he had little sympathy for the anti-Catholic agitators. His could not countenance their illegitimate actions and violent methods that made mockery of the law.

Physically depleted and seeming to languish without direction, he was urged by his father to travel to Geneva to convey John and Catherine's young son to them. Romilly followed his father's advice and set out across Europe. The stay in Switzerland was bittersweet; it was good to see his sister, though sad to leave her. He thought it likely he would not see her again. However, he relates that he intended "to return home by way of Paris, which I was desirous of seeing."²¹ Upon his first visit, Romilly allowed himself to see Paris primarily as a tourist: "I saw all that common travelers see, the theatres, the palaces, the public buildings, collections of pictures, and other objects of curiosity."²²

His sojourn in Paris happened to coincide with the long-anticipated birth of the Dauphin. Naturally this momentous occasion was marked by fireworks and other outpourings of nationalistic or dynastic pride. Romilly, however, almost priggishly, remained aloof and obdurate in the face of these quite understandable celebrations. He believed the Parisians' display of joy was coerced; he related, "[I]n many a house I observed one solitary lamp at each window glimmering, not in token of joy, but in reluctant obedience to the pleasure of the government."²³ Such an interpretation seems to attribute too much significance to the burning of a candle. Parisian frugality and the dearness of candles may have played a significant role in the degree of illumination displayed. Similarly, while at Versailles, Romilly had occasion to attend a Mass at which Louis XVI was present. A letter to Roget, written at the time, focused on the king's inattentiveness and lack of reverence and decorum. More importantly, Romilly observed that people in attendance clearly cared more about the king than the real presence of their God. He asked Roget rhetorically:

How can a king of France ever be brought to regard his subjects as his equals, when, even before the throne of heaven, he maintains so high a superiority over all around him? What an idea must he not conceive of his own importance, when he thus sees his God less honoured than himself?²⁴

Whether Romilly's criticism sprang from nationalistic pride, religious prejudice, or class consciousness is difficult to determine.

Although a child of recent French immigrants and steeped in French language and culture, he reacted to Paris as an Englishman would. His disdain for the luxuries and extravagances of Versailles betrays a middle-class sensibility. Because his religious background stemmed from both Huguenot and Church of England origins, he clearly saw himself as Protestant and unequivocally rejected Roman Catholicism. However, he did not display a correspondingly strong attachment to Protestant religious views. He observed the outer forms of the Church of England and continued to do so for most of his life. But it would be a mistake to attribute religious fervor or reforming zeal to Romilly. Even his objections to Catholicism seemed based more on humanitarian reasons. He believed the Roman Church promoted

ignorance, idolatry, and personal licentiousness and laziness; therefore, he regarded Catholicism as inherently harmful to both an individual and a nation. While it is likely that his family's personal sufferings at the hand of the Catholic Church played at least some part in his disaffection for that institution, he never developed a corresponding positive attachment of equivalent strength to any other religion. In his travel, the contrast between Catholic France and Calvinist Switzerland only served to heighten his disdain for Popish religion. Despite his lack of ostentatious religious practices, Romilly's career taken in sum, suggests that his Calvinist background may have had more impact than he consciously realized.

Fiat Lux!

Romilly's lack of active engagement in religion did not place him in an unusual position among people of his education and social class. David Hume, the Enlightenment philosopher who was better known in his own time as a historian of England, recorded:

[W]e may observe that our ancestors, a few centuries ago, were sunk into the most abject superstition, last century they were inflamed with the most furious enthusiasm, and are now settled into the most cool indifference with regard to religious matter, that is to be found in any nation of the world.²⁵

Religious fervor among the elite had expressed itself in violence and intolerance throughout much of the seventeenth century but those passions had cooled by the end of that century. In part, the sheer impracticality of continued fighting and the negative effect intolerance had upon business helped reverse those trends. Writing about the Toleration Act of 1689, historian G. M. Trevelyan cautions, "Toleration was introduced as a practical necessity not as an accepted principle."²⁶

The overriding practicality or utility of tolerance caught Voltaire's attention when he traveled in Britain (1722 – 1734). He reported:

Take a view of the Royal-Exchange in London, a place more venerable than many courts of justice. . . . There the Jew, the Mahometan and the Christian transact together, as tho' they all profess'd the same religion and give the name of Infidel to none but bankrupts. There the Presbyterian confides in the Anabaptist, and the Churchman depends on the Quaker's word. At the breaking up

of this pacific and free assembly, some withdraw to the synagogue, and others to take a glass. This man goes and is baptiz'd in a great tub, in the name of the Father, Son, and Holy Ghost: That man has his son's foreskin cut off, whilst a set of Hebrew words (quite unintelligible to him) are mumbled over his child. Others retire to their churches, and there wait for the inspiration of heaven with their hats on, and all are satisfied.

If one religion only were allowed in England, the government would possibly become arbitrary; if there were two, the people wou'd cut one another's throats; but as there are such a multitude, they all live happy, and in peace.²⁷

Though clearly amused by the English religious accommodation, Voltaire seems to admire the usefulness of this arrangement.

The exhaustion of religious zeal and the substitution of practical forbearance may be seen as both a cause and effect of the movement collectively referred to as the Enlightenment. The decline in British religious enthusiasm between the Restoration (1660) and the Glorious Revolution (1688) occurred at the same time usually recognized as the beginning of the Enlightenment; the lines of influence between the religious decline and the rise of the Enlightenment are blurred in that the two movements were mutually reinforcing. The questioning attitude and the desire for empirical proof in all matters helped to undermine the acquiescent faith that characterized religious belief; relaxed attitudes about religion opened the door to philosophical inquiry that was previously considered heretical.

Immanuel Kant famously answered the question, "What is Enlightenment?" succinctly in a single sentence: "Enlightenment is mankind's exit from its self-incurred immaturity."²⁸ A deceptively massive world of change is encapsulated in that compact definition. Mankind's "self-incurred immaturity" applied to many disciplines and the Enlightenment extended to almost every aspect of human thought and achievement. The core of the Enlightenment concerned philosophy and easily spilled over to government, religion, and science. These integral collections of knowledge underwent complete reexamination at the hands of Enlightenment thinkers.

Central to the concept of the Enlightenment is the notion that everything should be questioned and nothing should be taken as given. This spirit of empiricism, whereby knowledge

is accepted only if borne out by measurable, observable experience, stemmed from the writings of John Locke, George Berkeley, and David Hume. They applied the rigorous methods of scientific objectivity that served Isaac Newton so well to the world of philosophy. While their musings can trail off into arcane epistemological morasses, the practical results of their work helped to bring order and scientific rigor to thought. Specifically, to followers of Enlightenment principles, claims of divine will or revelation no longer sufficed as justification for holding a statement to be true. Empirical proof became necessary in order to demonstrate the validity of a given position.

In an environment that fostered skepticism and promoted the questioning of established ideas, the erosion of faith as the guiding principle seems unsurprising. While it would be a mistake to assume that all Enlightenment figures were atheist or agnostic, many, if not most, did not exhibit the all-encompassing faith characteristic of those who swallowed the teachings of the church without reservation. For many, Deism proved to be an acceptable accommodation between blind credulity and atheism. Deists believed that a god exists but they relegated “God” to the role of prime mover or first cause. Scientific methodology in general and Newton’s theories in particular required that every effect have a cause; tracing this backwards to the mists of prehistory a first, “uncaused cause” was defined as the Creator or Supreme Being. More to the point, Deists believed that the Creator did not intervene in human events. Instead of relying on prayer or miracles to effect change, Enlightenment deists believed humans had the power, right, and duty to ameliorate their own situation. Thomas J. Schlereth states, “[An] . . . important manifestation of the Enlightenment [deist’s] spiritual faith was his promotion of philanthropic humanitarianism toward the brotherhood of mankind.”²⁹ Human life and conditions are what we make of them and humans owe it to themselves and others to improve their lots. Historian J. M. Golby summarizes:

The secular, humanitarian nature of Enlightenment thought had far-reaching implications. Essentially it proposed that the poverty, drunkenness, cruelty and promiscuity of the lower orders were not God-given but were rather the result of

human error in the ordering of society. Problems were soluble if man and government would only apply reason.³⁰

Among the many issues to which Enlightenment thinkers addressed their efforts were crime and penology.

That the issue of crime would come under close scrutiny was a logical consequence of the Enlightenment's reexamination of the nature of government and the individual's rights and role therein. Societies' struggles to contend effectively with crime are perhaps a universal feature of their systems of laws, rules, and customs. Law not only addresses crime; in many instances, it also creates it. For example, murder is acknowledged as a crime in every culture, even though the limits of what type of killing constitutes a murder may vary slightly. Murder was considered a crime before there was written law, in that it violated acceptable behavior within a society. But other crimes are completely created and defined by law, usually by the legislative body's effort to shape social behavior; in other words, today it is a crime for individuals below a certain age to drink alcohol, while in Romilly's time there was no legal limit on the practice. In addition, crime is socially constructed in that different societies define crime differently from one another.³¹ Crime is at the very heart of law and therefore garnered significant attention from Enlightenment writers.

Prior to the Enlightenment, the penological response to crime sought to satisfy two goals: retribution or vengeance and deterrence. Retribution may be considered as righting the wrong that has been done, mending the tear in the social fabric, restoring the imbalance created by the criminal action. Foucault argues that vengeance is not limited to an individual who was wronged but extends to the state or monarch as well:

The right to punish, therefore, is an aspect of the sovereign's right to make war on his enemies But punishment is also a way of exacting retribution that is both personal and public, since the physico-political force of the sovereign is in a sense present in the law In the execution of the most ordinary penalty, in the most punctilious respect of legal forms, reign the active forces of revenge.³²

The desire for retribution is a common, normal, perhaps visceral, human reaction. Rare indeed is the individual who can suffer wrongs at the hands of others without some desire for

retribution. Old Testament support for retributive justice in the form of the *Lex Talionis* added weight to the desire to wreak vengeance on wrongdoers.³³ Despite Jesus' rejection of retribution and his admonition to "turn the other cheek,"³⁴ to say nothing of his personal example of meek submission, the Church and Christian individuals tended to emphasize and support the notion of retribution in matters of crime. The relationship between the image of the scales of justice and the concept of "getting even" is not coincidental. In his exploration of retributive justice, William Ian Miller contends:

To this day we find it hard to conceptualize corrective justice independently of the language of the marketplace, of debts incurred and accounts settled, of setting value and establishing prices, and obligations discharged in full, of paying for and paying back, and of satisfaction.³⁵

Yet, be it ever so engrained, retribution has long been recognized to be of limited value and perhaps even can cause more harm than good. In Plato's *Protagoras*, Socrates points out that the only useful purpose of punishment is deterrence of future crime and that retribution offers no real value. Moreover, in practical terms, a key element of retribution or "getting even" is that the result should be approximately *even*. To punish relatively minor infractions with death does not restore the scales of justice to an even position; instead, they are merely tipped disproportionately in the opposite direction.

The other major goal of punishment prior to the Enlightenment was deterrence. Gruesome, painful, or humiliating punishments performed with as much publicity and before as large a crowd as could be assembled were thought to provide maximum deterrent value. Recognizing that many criminals went unapprehended, authorities sought to extract optimal deterrent value from those they did catch. The spectacle of pain and humiliation served to demonstrate the strength and legitimacy of the state as well as to admonish any would-be malefactor to conform to the law. That public punishment did deter some people from committing crimes seems reasonable to accept, although even an approximate number would be impossible to know. More importantly however, public punishment clearly did not deter crime to the extent that authorities hoped it would. At any given time in English history, numerous crimes were

committed and reported; throughout the eighteenth century authorities displayed the hangings or lesser corporal punishments of criminals for public instruction and edification. Not only did crime not abate, it was perceived to thrive at the very site of these rituals of punishment.

Enlightenment thinkers approached the matter of crime and punishment from a different perspective. They sought to apply reason and base their decisions on empirical observations. Thus, in 1748 Montesquieu argued that societies with severe penalties and those with mild penalties displayed little difference in the amount or degree of crime because, over time, criminals and would-be criminals became desensitized to the harsh penalties.³⁶ In Italy, having absorbed Montesquieu's theories, Beccaria published a slim volume, *Dei delitti e delle pene* (1764), that focused specifically on crime and punishment. Beccaria sought to rationalize and humanize punishment. Discounting the emotional element that characterized retributive punishment, he asked, "Can one suppose that the shrieks of some poor wretch will call back out of ever-advancing time actions already accomplished?"³⁷ He contended that deterrence was the only worthy goal of punishment; by deterrence he meant both the prevention of future crimes by the criminal at hand and the prevention of crimes committed by others. He echoed Montesquieu's comparison of two countries, one with mild punishments, the other with harsh ones; not only did he concur that people become habituated to their environment of harsh punishment, he also argued that people living under harsh penal regimens committed more and worse crimes due to their fear of the severe punishments combined with their desensitized condition.³⁸ Beccaria specifically rejected capital punishment because it failed to deter crime. He posited that the impression made by the spectacle of execution, though gruesome, was ephemeral. Instead, he claimed that the prospect of imprisonment and hard labor, unlike execution, provided long and continuous examples of the consequences of crime and would be of greater deterrent value, besides avoiding taking a human life.³⁹ However, in place of the severity, Beccaria advocated both celerity and certainty of punishment.⁴⁰ Mild punishments both swift and sure would hold superior deterrent value.

Beccaria's work found a receptive audience among educated and influential readers. Significantly, Voltaire embraced it, contributed a lengthy commentary to future editions of the work, and recommended it to his numerous well-placed friends. Beccaria's work is known to have influenced Empress Catherine II of Russia, King Gustavus III of Sweden, Emperor Joseph II of Austria, Grand Duke Leopold of Tuscany, King Christian VII of Denmark, Pope Clement XIV, King Frederic II of Prussia, and in America Thomas Jefferson, John Adams, and Benjamin Franklin.⁴¹ The English and French monarchs were distinguished by their absence from the list of those inspired by Beccaria's writings. Both Romilly and Rush referred to Beccaria in their writings, the former being more influenced than the latter.⁴² Another Englishman who was receptive to Beccaria's message was Jeremy Bentham.

Bentham extended the scientific principles that guided Enlightenment thinkers to their logical, sometimes extreme, conclusions. He reasoned that if the purpose of punishment is to deter crime and that if temperate punishments can be equally effective as cruel ones, then the mildest effective punishment possible would be the most desirable. He advanced the notion of a calculus of punishment in which the perfect punishment would afflict just enough but no more pain than the projected pleasure afforded by the crime in question to render commission of the crime undesirable to the potential criminal. Specifically, Bentham delineated twelve rules to determine the appropriate punishment for a given crime; the fifth rule states, "The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given."⁴³ The principle that underlay all his choices and recommendations was utility. Was an action positively effective? Did the beneficial results of a process outweigh the harmful results? Moral judgments played no part in his analysis. Bentham's method approached a pure application of scientific reasoning to crime and the human condition.

Among Bentham's proposals was something he called the Panopticon. Having evaluated the concept of imprisonment and finding its benefits to outweigh those of most other forms of punishment, Bentham characteristically pushed the concept to its logical conclusions.

He theorized that the ideal, that is most efficient, prison would afford the maximum opportunity for surveillance with the minimal amount of staff. He concluded that a circular architecture in which prisoners resided around the periphery with the guard[s] at the center provided the optimal ratio of the ability to observe and monitor the inmates to manpower requirements. He stipulated that the ability to observe should be one way, *i.e.*, the guard or inspector, should be able to see the convicts without being seen to observe. He further added that it was important that the inmates know they are monitored yet explicitly do not see the monitoring occur. The inspector should never be visible to the prisoners. Therefore, he posited, eventually, when prisoners were accustomed to the endless and ubiquitous observation, the actual observation could in fact be lessened or even eliminated.

Beyond differentiating *real* surveillance from *apparent* surveillance, Bentham argued that the same distinction should be made for punishment. Deterrence has two components: to prevent the convicted criminal from committing further crimes and to discourage other potential criminals from committing crimes. In terms of the deterrent value for the second component, Bentham believed that the *apparent* punishment was more important than the *actual* punishment. Consistent with utilitarian economy, he reasoned that it sufficed that others perceive the punishment of the convict in order to achieve deterrent value of the second type. Along those same lines, Bentham proposed three types or degrees of prisons: first, for insolvents or others whose imprisonment is brief; second, for criminals whose imprisonment may be longer but not endless; third, for malefactors whose crimes are of a severity to render their incarceration permanent. Applying his principle of the value of apparent punishment compared to real punishment, Bentham argued that the punishment of criminals in the second degree of incarceration should be greater than that of those in the third because those in the maximum level will not be released to describe their treatment to others, while those in the middle level will eventually spread the word of the consequences of crime.⁴⁴

As a side note, subsequent to the latter half of the twentieth century, the Panopticon seems to epitomize the Orwellian nightmare of the nominally benevolent yet ultimately oppressive Big Brother. When reading descriptions of the Panopticon's inspector, J. R. R. Tolkien's all-seeing eye of the Dark Lord of Mordor comes to mind more readily than does the gaze of a harmless Barney Fife of Mayberry. Objectivity on the matter comes with difficulty to those familiar with the twentieth century's dismal experiences with dictatorships, many of which cloaked their oppressive actions in honeyed terms of acting for one's own good or for the greater good of society as a whole. Aside from the ahistoricity of such a view, Bentham did not intend for the Panopticon to be oppressive; instead, he envisioned that the very transparency of the prison would improve and guarantee to the conditions of the prisoners. Historian Cyprian Blamires questions whether inmates locked away in dark, unobserved dungeons might not be a greater risk of maltreatment than those in well-lighted conditions with ample opportunity for observation.⁴⁵ Integral to Bentham's plan was the ready ability to observe the inspector. Bentham believed that making the Panopticon visible on demand at any time served to prevent abuse and neglect on the part of the inspectors and would help ensure reasonable treatment of the convicts. Although it was Bentham who put such a fine point on the matter, Montesquieu and Beccaria also had focused on what was effective more than what was moral. All three of these men influenced Romilly.

Moving in Legal Circles

When Romilly read law, newly minted barristers customarily spent at least a part of their time on the circuit. The term "circuit" referred to a periodic, peripatetic judicial apparatus that administered justice in matters beyond the power and competency of neighborhood authorities. Villages, towns, and cities beyond London did not have their own fully powerful set of courts and judges; instead they had their local justices of the peace who dispensed rudimentary and low-level justice. These justices of the peace, or JPs as they were commonly known, were only

authorized to rule in lesser offenses, like robbery of small sums, very minor property damage, various misdemeanors, or civil matters. Even in these cases where the JPs could dispense summary justice, the right to appeal still remained. For these appeals or for any original case involving felony charges, higher judicial authority was necessary. However, it was deemed unnecessary or inappropriate to maintain a full-fledged, permanent judicial apparatus throughout England and Wales in the various local seats of government. Thus, the circuit had developed to serve the need for local but powerful justice in the areas beyond London. The usual plan called for the circuit judges – along with a small army of attorneys, barristers, solicitors, lawyers, clerks, as well as their various servants, sometimes family members, and other divers hangers-on – to pass through a given locale four times a year. These were known as Quarter Sessions courts.

Since the courts were only in session approximately every three months, chances were that someone apprehended for committing a crime would have to wait a month or two before trial could possibly be arranged. In the meantime, the accused remained in jail awaiting the arrival of the peripatetic justices. The time spent in jail rarely counted toward any reckoning of the debt the accused owed to society, should he or she be found guilty. In fact, jail sentences as punishment *per se* were not common when Romilly began his legal practice. Instead, the eighteenth-century English penal system relied on three main methods of meting out punishment: capital, corporal, and monetary. Transportation, which had been in use since the early seventeenth century, halted rather awkwardly when the American revolution eliminated Britain's principal receiving ground for criminals. The hulks – old, decommissioned, unseaworthy vessels – were designated as a temporary solution; it turned out to be a temporary solution that lasted three quarters of a century. From the 1780s Botany Bay, and later Australia generally, provided an outlet that allowed large-scale transportation of criminals to resume. Both transportation and the hulks were regarded as a form of capital punishment in that the criminal reached that punishment as a result of a conviction of a capital crime, for which mercy

was granted. That is, sentencing to the hulks or transportation was tantamount to legal or literal death.

Eighteenth-century England experienced a remarkable increase in the number of actions that carried a capital penalty. In the beginning of the century, there were approximately seventy-five crimes for which the condemned might suffer death as a penalty; nearly 350 crimes bore the capital penalty by the time Romilly took up legal practice.⁴⁶ Much ink, and perhaps a little blood, has been spilled trying to account for this sharp rise in the number of statutes bearing the death penalty. The religious and dynastic conflicts of the previous centuries had quieted down by the eighteenth century. Occasional Jacobite threats or rumblings occurred but no large-scale, sustained religious upheaval seemed likely when compared with earlier years. Witchcraft and blasphemy no longer seemed as prevalent or perhaps as important as it had previously. Instead, the eighteenth century saw the coalescence and growth of capitalism along with the beginnings of industrialization. Concomitantly, elites became increasingly obsessed with property and crimes against property. Closely connected was a continued trend toward enclosure of land by elite landowners, thereby depriving increased numbers of people of access to the common lands on which they had depended for sustenance. This trend created an increased number of poor, dissatisfied people, some of whom seemed likely to commit crimes against property.⁴⁷

Britain cut an increasingly important figure on the world stage. After the Glorious Revolution removed any vestigial doubt about the centrality of Parliament, the tamed Stuarts and the cooperative Hanoverians engaged in a century of wars collectively referred to as the Wars of Empire. Direct and indirect results of these wars were the expansion of the Empire, the increased power and influence of Parliament, and the growth of the merchant class and even industrial magnates. Trade became an avenue to amassing a fortune in addition to the more time-honored and respectable means – land. Individuals – merchants, gentry, gentlemen farmers, members of Parliament – grew prosperous, even wealthy, during this time as

commerce expanded along with Empire.⁴⁸ This newly acquired wealth did not find its way to all members of society; the working poor and the indigent found themselves only tangentially better off (if at all) as the fortunes of their betters soared. The newly prosperous upper and middle classes noticed the disproportionate distribution of wealth; however, their response was not to remedy the situation by a more equitable distribution of their bounty. Instead, as the wealthy became materially better off, their legal focus shifted from religious crimes, which had previously been their main concern, to material crimes. Conveniently enough (for them), the same people who controlled the money and the land filled the seats in Westminster.

Specifically, Parliament criminalized detailed and particular actions along with detailed and specific punishments, very often death. Although the Wars of Empire granted prosperity for the few, they seemed to spur crime waves as well. Without exception, the perception, if not the reality, was that crime increased significantly in the two-to-five-year period following major wars. A pamphlet that followed on the conclusion of the War of the League of Augsburg (1688-1697) lamented:

We need not go far for Reasons of the great Numbers and increase of these Vermin: for tho' no times have been without them, yet we may now reasonably believe, that after so many Thousands of Soldiers disbanded, and Mariners discharged, may of them are driven upon necessity, and having been used to an idle way of living, care not to work, and many (I fear) cannot, if they would.⁴⁹

Similarly, Henry Fielding's 1751 pamphlet, *An Enquiry into the Causes of the Late Increase of Robbers, with Some Proposals for Remediying This Growing Evil*, followed close onto the conclusion of the War of the Austrian Succession (1740-1748).⁵⁰ Men who may have otherwise been committing crimes had been enlisted or impressed into service during the war. At the conclusion of these wars, men returned more or less suddenly, thus contributing to real and perceived increases in crime. From the end of the American Revolution until the outbreak of hostilities with France, that is, from 1782-1793, Britain did indeed experience a crime wave.⁵¹ Opportunity for transportation to America was no longer an option.⁵² Contrariwise, crime

seemed to decline during wars, possibly due to some of the so-called 'criminal element' being engaged in the military and therefore not available for their usual activities.⁵³

In addition to an increase in the number of felonious actions carrying a capital penalty,⁵⁴ the proportion of such crimes rose as well due to a simultaneous decrease in the number of crimes that enjoyed benefit of clergy.⁵⁵ If an offense's punishment were tempered by benefit of clergy – considered "clergyable" – the condemned would routinely be allowed a lighter penalty for the first offence by claiming to be a clergyman, which meant in practice reciting the 51st Psalm, which became known as the "neck verse." Since it had become habitual for criminals to memorize the psalm against such an occasion, Parliament and the judges had become increasingly disenchanted with this legal loophole and had resolved to stop it up. Historian Bernard L. Shientag nevertheless reminds readers that

The emphasis was always placed upon the sacred right of property. Thus, it was a capital offense to steal sheep or cattle, to destroy a turnpike gate, or to possess moulds for counterfeiting notes. But manslaughter, however heinous, remained a clergyable felony until 1832, and an attempt to murder was merely a common law misdemeanor until 1803.⁵⁶

Gertrude Himmelfarb suggests that the increased attention paid to the poor and the increased harshness of laws involving crimes against property was also influenced by the increased role of Puritan, and later, Wesleyan morality.⁵⁷

By the time Romilly entered legal practice, harsh, seemingly arbitrary laws existed that showed little consistency in origin or application. Picking a pocket was punishable by death, though stealing a child was not.⁵⁸ These laws showed no overarching system; instead, they were little more than ad hoc solutions to immediate problems. Historian Radzinowicz observed:

Although regarded as temporary and provisional at the time of their enactment, statutes of this type soon came to be looked upon as essential bulwarks of public order, the very fact of their being capital helping to consolidate the belief that they were indispensable. For if the offenses covered by any one of such Acts were decreasing in number, there was an inclination to attribute this to the death penalty having been appointed in time; while if they were becoming more numerous, any proposal to relax the law was inevitably denounced as weakness and fresh incentive to crime.⁵⁹

Moreover, once harsh laws were in place for some types of minor crimes, it seemed curiously logical and consistent to extend harshness to other petty crimes. If stealing some wood found in a park was capital, should not stealing a purse be punishable by death as well? An inflation of punishments resulted from these severe penalties.⁶⁰ Radzinowicz notes, "For once the death penalty is established as the most effective instrument of crime-prevention, there can be no valid reason for invoking it to suppress one offense and not another."⁶¹

This increasing number of harsh laws was tempered by various factors. First, there was no police force in England in the eighteenth century. Although it is impossible to know for certain how much crime went undiscovered or how many criminals remained at large, the lack of an organized body dedicated to apprehending criminals virtually guaranteed that it was far larger than current rates. Individuals were expected to bring charges personally and, although they may not have been personally responsible for catching and incarcerating the accused, neither was it clear that anyone else was. So with such a haphazard means of catching criminals, a large number of them evaded charges entirely. Second, judges exercised discretion in sentencing.⁶² They did not always find that the accused deserved death; even more often, the sentence of death was pronounced but almost immediately commuted to transportation to the colonies for a period usually seven, fourteen, or sometimes twenty-one years.

Some people evidently did commit crimes in hopes of being transported, thereby escaping unfavorable conditions at home and starting a new life overseas. It is evident that the view of transportation as a soft or mild punishment existed among some members of Parliament and justices who opposed any relaxation of the severity of punishments in practice. Charles Campbell relates, "Lord Ellenborough, Lord Chief Justice of England, saw fit to describe transportation as 'a summer's excursion in an easy migration to a happier and better climate.' Needless to say, he had never undergone the experience."⁶³ For most people, transportation did indeed hold sufficient dread to be reasonably effective as a deterrent to crime. Moreover,

the penalty for returning from transportation early was death with little chance of further reprieve. By the time Romilly began legal practice, however, Britain's thirteen American colonies were in revolt and refused to accept criminals and other undesirables sent their way. Condemned who would have otherwise faced transportation were sent to the hulks, naval vessels no longer fit for service that were positioned along the Thames, for similar periods of confinement. This measure, intended as a temporary stop-gap until the insurrection in North America could be quelled, lasted until the middle of the nineteenth century.

Besides mere evasion of the law or hopes of judicial clemency, people accused of crimes sometimes avoided the full weight of the law from the phenomenon known as "pious perjury". This custom developed gradually and increased in practice as more and more acts carried the capital penalty, and juries became less and less willing to mete out death for relatively minor offenses. Many of the crimes punishable by death were property crimes, specifically with monetary amounts involved. Thus stealing property valued at more than four shillings would get a man hanged while stealing 3s.11½ d. would not. Increasingly, juries found that property – be it ever so valuable and rare – was only worth three shillings, eleven pence. Radzinowicz noted that this even extended to cases where the property stolen was itself six shillings, and yet the jury determined that its value was less than four shillings! Another, even more extreme form of pious perjury manifested itself as jurors simply refused to convict the accused even when incontrovertible evidence supported a guilty verdict.⁶⁴ Jurors clearly were reluctant to condemn their peers to the gallows to the full extent called for in the Bloody Code.

As this practice spread, the harsh penalties set forth in the letter of the law were now widely diluted by the possibility of juries' sympathy. Moreover, the prevalence of the habit bore testimony to the public's increasing distaste for the application of capital punishment in cases less serious than murder, especially if the accused were a woman, or very young, or very old, or possessed of other appealing qualities or extenuating circumstances.⁶⁵ In short, the criminal may not have been caught, or, having been caught and convicted, may not have been

sentenced to death through the mercy of the judge or the sympathy of the jury. For a nation that was so cruel and fearsome on paper, criminals in England stood a fairly good chance of escaping the hangman's noose.⁶⁶ Such were conditions of the penal code that Romilly found when he took up the circuit.

In addition to the legal aspects of the circuit, the periods of the assizes were occasions of much activity. Besides the obvious transaction of pending legal matters and the resolution of issues that had waited for months, the sessions were times of fervent entertaining and social activity as well. The gentry gave balls and banquets; the social calendar closely reflected the judicial calendar. Many a man made his future from his experiences and contacts in the course of his circuits. Romilly was not unique in this aspect.

Romilly brought a servant to attend him in his travels along the circuit – a Mr. Bickers, who was a devoted, ardent follower of John Wesley. He was an equally devoted adherent to John Barelycorn. Often as not, Romilly tended to him rather than the more customary and expected servant - master relationship. It speaks to Romilly's character that he hired and kept such a servant. Romilly apparently was kind-hearted and forgiving, willing to offer repeated opportunities for a fellow man to reform, to make something of himself.⁶⁷ A more cynical interpretation is that Romilly was eminently practical and thrifty. A manservant like that worked cheaply; knowing he deserved to be fired allowed his wages to be kept low and made discipline a non- issue, assuming he was sober.

As a circuit barrister, Romilly found modest success. While he did not turn the legal profession on its ear with his courtroom flair or penetrating arguments, neither did he suffer the fate of some of his colleagues who traveled the circuit for years without acquiring a single brief. He did attract favorable attention from some in position to help him along in his career. A particularly valuable acquaintance was the Marquess of Lansdowne, also known as Earl of Shelburne. This powerful, liberal man's coterie included such influential thinkers as Benjamin Franklin, Joseph Priestley, David Hume, and Richard Price.⁶⁸

In addition to these important contacts, Romilly was widening his circles of acquaintance abroad as well. He traveled to Paris in 1783 and again in 1789. By way of introductions from political associates of his brother-in-law, Roget, he met Honoré, Comte de Mirabeau. Although Romilly found Mirabeau intellectually stimulating and shared some of his desires for reforming France, he was not blind to the many coarse or disagreeable aspects embodied in that same noble frame.⁶⁹ Eager to help Mirabeau politically, Romilly maintained personal distance, wisely refusing to be drawn into the less reputable aspects of the man. Romilly translated Mirabeau's *Considérations sur l'ordre de Cincinnatus* into English shortly after their initial meeting in 1784. In 1789 when the Estates General convened, it was Romilly to whom Mirabeau turned to provide a short handbook of parliamentary practices on which the French body of representative could model their actions.⁷⁰ Although Romilly produced and delivered such a guide, it never saw use by its intended recipients. Recalling his own attendance at the French National Assembly, Romilly wrote, "When I was afterwards present, and witnessed their proceedings, I had often occasion to lament that the trouble I had taken had been of no avail."⁷¹

By the mid 1780s Romilly had established a solid reputation for his legal insights and personal integrity. His years on the circuit had exposed him to the vagaries of English penal law, which he found both unnecessarily harsh and woefully inadequate and ineffective. This sense of the law's ineffectiveness was widespread. People perceived that criminals roamed the streets and countryside, committing felonious acts and destroying or stealing property with impunity. Crime seemed rampant while criminals too often went free.⁷² Politicians and philosophers called for sterner penalties. Yet such a call was clearly ridiculous in that numerous acts were already legally punished by death. How could there be a harsher punishment than death? Besides, juries were already reaching a saturation point when it came to meting out the death penalty. How could enacting more cruel laws possibly improve the situation?

There were, however, people advocating just that. Martin Madan, a clergyman with Methodist leanings, believed that English law was characterized not by severity but by wholesomeness. He argued that honest, law-abiding citizens had nothing to fear from the law but much to hope for and that only criminals had any need to consider the laws' severity.⁷³ Madan stressed that punishment should be not only severe but also certain. He wrote:

[T]he day of execution arrives – the wretches are led forth to suffer, and exhibit a spectacle to the beholders, too awful [sic] and solemn for description. They now *see*, that certainty of punishment must await the guilty, and the whole *county feels* a lasting benefit, in the security and protection which such an example of punitive justice has procured them. These impressions will last their time, and carry their salutary effects, perhaps, for years together.⁷⁴

Madan addressed his work to the justices themselves. His contentions were two-fold: that the crimes should bear harsh punishment, set in law by statute; and that judges should act according to the penalties specified and not be quick to allow the condemned to receive anything less than the full measure of the law. Pardons should be truly exceptional.

When Madan published his views on the need for more certain and more severe penalties in 1785, the work received widespread attention. Although his publication advocating stiffer penal laws played a significant part in Romilly's life, Madan gained far greater notoriety for his writings that advocated polygamy as a means of keeping wayward women off the streets. Once these unorthodox views became public, Madan lost credibility as well as his pastorate at Epsom.⁷⁵ At the time of its publication, however, Madan had not yet supported such eccentric notions and therefore bore the cloak of respectability. Lord Lansdowne urged Romilly to refute Madan. Both Romilly and Lansdowne believed that Madan's book did have the effect of stiffening the resolve of the justices towards handing down the death penalty without respite to transportation.⁷⁶ Peter King found that pardon rates decreased around the time of Madan's publication and attributes the change, at least in part, to that work.⁷⁷

Romilly had seen first-hand the justice system in operation. He well understood the many loopholes and opportunities for discretion that could allow a convicted felon to avoid the gallows. He knew equally well the miscarriages of justice that occurred and recognized that a

penalty as permanent as death for the many minor crimes to which it was applied punished too harshly and too unfairly. Moreover, he grasped the utilitarian argument that wholesale application of capital punishment was ineffective in that it made people reluctant to prosecute, juries hesitant to convict, and judges squeamish to sentence as the law stipulated.

In 1796 Romilly published his reply to Madan's call for severe penalties and stricter enforcement of existing laws. He blatantly challenged Madan's position. Although Romilly published anonymously, he made no secret that it was Madan's work to which he was responding; his own title, *Observations on a Late Publication, Intituled [sic] Thoughts on Executive Justice . . .*, leaves no room for doubt. Romilly stated that he agreed that Britain's legal system needed change in order to bring about a more just system, but added that the author of *Thoughts on Executive Justice* had produced a work advocating precepts which, if followed, would introduce greater harm.⁷⁸ By addressing Madan's arguments, Romilly pointed out absurd inconsistencies in English penal law. He described the hodge-podge of laws as, ". . . severe where they should be mild, mild where they should be severe and, . . . for the most part, the fruits of no regular design but the sudden angry fits of capricious legislators."⁷⁹

Specifically, he noted that stealing a sheep or a horse, stealing property worth forty shillings privately or worth five shillings from a shop, or picking a pocket of more than twelve pence were each punishable by death.⁸⁰ Yet burning down a house, stabbing someone and causing him or her lasting agony, attempted parricide, or destroying someone's life by premeditated perjury only merited a fine.⁸¹ Warming to his subject, Romilly noted:

. . . [T]o steal fruit ready gathered is a felony; but to gather it and steal it is only a trespass: . . . to force one's hand through a pane of glass, at five o'clock in the afternoon, in winter, to take out any thing that lies in the window, is a burglary, even if nothing be actually taken; though to break open a house with every circumstance of violence and outrage, at four o'clock in the morning, in summer, for the purpose of robbing, or even murdering the inhabitants, is only a misdemeanor: . . . to steal goods in a shop, if the thief be seen to take them, is only a transportable offence; but, if he be not seen, that is, if the evidence be less certain it is a capital felony, and punishable with death.⁸²

Aside from the law's inconsistency, Romilly argued that the proliferation of executions had the opposite of the intended deterrent effect. He claimed that instead of frightening potential malefactors away from crime, the ubiquity of the gallows inured them to violence. Even if they, themselves, did not become criminals, at the very least the capital code brutalized them and detracted from their humanity.⁸³ He opined, "[T]he frequent exhibition of these horrid scenes cannot be indifferent; if they do not reform they must corrupt."⁸⁴

Romilly proposed a prolonged incarceration as an alternative to the wholesale, yet inconsistent, slaughter that the existing legal system demanded. He argued that such institutions would be more humane. Moreover, in the case of a person being wrongly convicted, at least partial restitution and remedy could still be achieved. He even suggested that the cost of maintaining the criminals not only could be minimal but also might be profitable.⁸⁵

After questioning and rebutting Madan's call for unwavering certainty of application of the death penalty when the law allowed, Romilly concluded by focusing on the judges themselves, as Madan's tract purported to do. Romilly stated that extending clemency was a function of the judges' role and was appropriate in that capacity as well as to their humanity.⁸⁶ Moreover, Romilly argued that in exercising mercy, the judges acted as agents of the crown. He coyly accused Madan of seeking to abridge royal prerogative. He showed Madan to be disingenuous in seeming to compliment the judges for their sagacity and competency yet "stab[bing] those venerable magistrates to the heart, with the insolent reproach, that 'they are little better than accessories before the fact'"⁸⁷

This work brought Romilly recognition within Britain and abroad as well. He became noticed and recognized by influential men in government, particularly members of the Whig party. With a gap of twenty years from the publication of his response to Martin Madan until his first election to parliament, one cannot claim that his writings turned him into an overnight sensation. The publication, though, did make people notice him where previously he might have served out his days as a capable but nondescript official on the Midland Circuit. Instead of

hanging back, Romilly intentionally placed himself such that he could gain maximum exposure to the trial process. Before long, he had as much or more business than any man on the circuit.⁸⁸ His increasing first-hand experience with the law and his widening circle of influential acquaintances made his entry into parliament unsurprising, perhaps inevitable. In 1806 he did enter Parliament as a Whig, joining Charles James Fox, William Wilberforce, and other liberals who hoped to change some longstanding government policies. Romilly would find Parliament a difficult sea to navigate. But it was in Parliament that his true life's work lay.

Notes

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- ¹ Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: The Movement For Reform 1750-1833* (New York: Macmillan, 1948), 1.
- ² Samuel Romilly, *Memoirs of the Life of Sir Samuel Romilly, Written By Himself; With a Selection from His Correspondence; Edited By His Sons*, Vol I (London: John Murray, 1840), 3.
- ³ *Ibid.*, 4-7.
- ⁴ Patrick Medd, *Romilly: A Life of Sir Samuel Romilly* (New York: Crane, Russak and Company, 1968), 23.
- ⁵ Romilly, *Memoirs*, Vol I, 16.
- ⁶ *Ibid.*, 14.
- ⁷ *Ibid.*, 17.
- ⁸ Medd, 30.
- ⁹ Romilly, *Memoirs*, Vol I, 17-18.
- ¹⁰ *Ibid.*, 18.
- ¹¹ *Ibid.*, 20.
- ¹² *Ibid.*, 21-24.
- ¹³ *Ibid.*, 25-26.
- ¹⁴ *Ibid.*, 28.
- ¹⁵ Medd, 31.
- ¹⁶ Romilly, *Memoirs*, Vol I, 33-38.
- ¹⁷ *Ibid.*, 48.
- ¹⁸ *Ibid.*, 49.
- ¹⁹ The Gordon Riots were anti-Catholic, popular reactions against a bill that extended limited toleration to Roman Catholics. This period of wide-spread violence and instability is so-named because Lord George Gordon inflamed people into action. The violence lasted at least seven days before control and order were restored. Isser Woloch, *Eighteenth-Century Europe: Tradition and Progress, 1715-1789* (New York: W. W. Norton, 1982) 313.
- ²⁰ Romilly, *Memoirs*, Vol I, 50-51.
- ²¹ *Ibid.*, 60.
- ²² *Ibid.*, 61.
- ²³ *Ibid.*, 62.
- ²⁴ *Ibid.*, 178.
- ²⁵ David Hume, Essay XIX, "Of National Characters," in *Essays and Treatises on Several Subjects. By David Hume, Esq.: In Four Volumes Containing Essays, Moral, Political, and Literary*, Vol I (London: 1760), 334-335.
- ²⁶ G. M. Trevelyan, *England Under the Stuarts* (London: 1904; reprint, London: Methuen, 1965), 432 (page citations are to the reprint edition).

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- ²⁷ Voltaire, *Letters Concerning the English Nation* (London: 1760), 36-37.
- ²⁸ Immanuel Kant, "An Answer to the Question: What Is Enlightenment," trans. James Schmidt, in *What is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Questions*, Philosophical Traditions, ed. Amélie Oksenberg Rorty, no. 7 (Berkeley: University of California Press, 1996), 58.
- ²⁹ Thomas J. Schlereth, *The Cosmopolitan Ideal in Enlightenment Thought: Its Form and Function in the Ideas of Franklin, Hume, and Voltaire, 1694-1790* (Notre Dame, Indiana: The University of Notre Dame Press, 1977) 90.
- ³⁰ J. M. Golby, *The Civilisation of The Crowd: Popular Culture in England 1750-1900* (New York: Schocken Books, 1985) 54-55.
- ³¹ Keith F. Otterbein, "Crime" in *Encyclopedia of Cultural Anthropology* (New York: Henry Holt and Company, 1996) 254.
- ³² Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1978), 48.
- ³³ Leviticus 24:19-21; Exodus 21:22-25; Deuteronomy 19:21.
- ³⁴ Matthew 5:38-39.
- ³⁵ William Ian Miller, *Eye For an Eye* (Cambridge: Cambridge University Press, 2006) 5.
- ³⁶ Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws. In Two Volumes. Translated from the French of M. De Secondat* (London: S. Crowder, C. Ware, and T. Payne, 1777), 88.
- ³⁷ Beccaria, 49.
- ³⁸ *Ibid.*, 50-51.
- ³⁹ *Ibid.*, 54-58.
- ⁴⁰ *Ibid.*, on promptness of punishment see 65-67; on certainty of punishment see 68-70.
- ⁴¹ Marvin E. Wolfgang, "Introduction" in Césaire Beccaria, *Of Crimes and Punishments*, trans. Jane Grigson (New York, Marsillo Publishers, 1996) xi-xv.
- ⁴² Romilly, *Memoirs*, Vol I, 278; Romilly, *Observations*, 24; Romilly's biographer, G. C. Oakes states that during his convalescence following the Gordon Riots, "confin[ing] his mind to something light, he studied Italian, read . . . more than once, Beccaria, whom he eager absorbed". Sir Samuel Romilly 1757-1818: 'The Friend of the Oppressed' His Life and Times—His Work His Family and His Friends (London: George Allen and Unwin Ltd., 1935), 22; Rush, *Considerations*, 13.
- ⁴³ Jeremy Bentham, *The Rationale of Punishment*, Great Books in Philosophy (Amherst, New York: Prometheus Books, 2009) 72.
- ⁴⁴ *Ibid.*, 136-137.
- ⁴⁵ Cyprian Blamires, *The French Revolution and the Creation of Benthamism* (Houndmills, Basingstoke, Hampshire, UK: Palgrave Macmillan, 2008), 23-24.
- ⁴⁶ In his 1786 pamphlet, *Observations*, which will be discussed more extensively below, Romilly quoted Blackstone, "In entering upon this task [examining the state of British statutory law], the first thing which strikes one is this 'melancholy truth, that, among the variety of actions, which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worth of instant death.'" In his attributing citation, Romilly added, "The number of felonies has been considerably increased since [Blackstone] wrote." 16.

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- ⁴⁷ E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Random House, 1975), 190-218.
- ⁴⁸ R. K. Webb, *Modern England: From the Eighteenth Century to the Present*, Second Edition (New York: Harper and Row, 1980). 14.
- ⁴⁹ J. R. *Hanging not Punishment Enough for Murderers, Highway Men and House Breakers, Offer'd to the Consideration of the Two Houses of Parliament* (London, 1701) 21.
- ⁵⁰ Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers, with Some Proposals for Remediating This Growing Evil* (London, 1751).
- ⁵¹ Andrew T. Harris, *Policing The City: Crime and Legal Authority in London, 1780—1849*. History of Crime and Criminal Justice Series (Columbus: The Ohio State University Press 2004) 38-40.
- ⁵² *Ibid.*, 41.
- ⁵³ J. J. Tobias, *Crime and Industrial Society in the Nineteenth Century* (New York: Schocken Books, 1967) 40.
- ⁵⁴ Peter Ackroyd, *London: The Biography* (New York: Doubleday, 2000) 259. "By the middle of the eighteenth century the number of offences, for which men and women could be hanged had risen from 80 to over 350."
- ⁵⁵ J. M. Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford: Oxford University Press, 2001) 19.
- ⁵⁶ Bernard L. Shientag, *Moulders of Legal Thought* (Port Washington, New York: Kennikat Press, 1943; Revised 1968) 206.
- ⁵⁷ Gertrude Himmelfarb, *The Idea of Poverty: England in the Early Industrial Age* (New York: Knopf, 1981) 25-26.
- ⁵⁸ Radzinowicz, 20-22.
- ⁵⁹ *Ibid.*, 17.
- ⁶⁰ *Ibid.*, 18.
- ⁶¹ *Ibid.*, 49.
- ⁶² Harry Potter, *Hanging in Judgment: Religion and the Death Penalty in England* (New York: Continuum, 1993) 9-10.
- ⁶³ Charles Campbell, *The Intolerable Hulks: British Shipboard Confinement 1776-1857* (Bowie, Maryland: Heritage Books, 1994), 62
- ⁶⁴ W. R. Cornish, Jennifer Hart, A. H. Manchester, and J. Stevenson *Crime and Law in Nineteenth Century Britain. Government and Society in Nineteenth Century Britain. Commentaries on British Parliamentary Papers* Introduction by P. and G. Ford (Dublin: Irish Academic Press, 1978) ,16-17.
- ⁶⁵ Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford: Oxford University Press, 2000) 330.
- ⁶⁶ Douglas Hay, "Property, Authority and the Criminal Law" in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Random House, 1975), 22.
- ⁶⁷ Romilly, *Memoirs*, Vol I, 76-77.
- ⁶⁸ H. W. Carless Davis, *The Age of Grey and Peel: Being the Ford Lectures for 1926* (New York: Russell and Russell, 1964), 54.

⁶⁹ Romilly alluded generally to the “disorders of his [Mirabeau’s] tumultuous youth,” (*Memoirs*, Vol I, 78-79), and to his reputation “as a monster of vice and profligacy,” (*Memoirs*, Vol I, 81). More specifically, Romilly found Mirabeau excessively vain and full of himself (*Memoirs*, Vol I, 80; 108). Romilly stated that Mirabeau was “a great plagiarist,” (*Memoirs*, Vol I, 109). More importantly, Romilly disapproved of Mirabeau’s lack of scruples in pursuing goals. Romilly wrote, “[M]ore than once I have heard him say that there were occasions upon which ‘*la petite morale était ennemie de la grande.*’” (*Memoirs*, Vol I, 80). In a 1789 letter to Étienne Dumont, Romilly refers to Mirabeau’s “impetuous disposition, his rage for domination,” and his “impatient ambition,” (*Memoirs*, Vol I, 380).

⁷⁰ Romilly, *Memoirs*, Vol I, 101-103.

⁷¹ *Ibid.*, 103.

⁷² Martin Madan, *Thoughts on Executive Justice, with Respect to Our Criminal Laws, Particularly on the Circuits. Dedicated to the Judges of Assize; ... By a sincere well-wisher to the public.* (1785), 4.

⁷³ Madan, 8-9.

⁷⁴ *Ibid.*, 33. Emphasis in original.

⁷⁵ Coincidentally, Madan was among the people Benjamin Rush came into passing contact with during his travels in England. Rush recorded that he heard Madan preach. In the same passage, Rush also noted that he heard Dr. Dodd preach, who would shortly be executed in one of the most infamous cases of the century. As usual, Rush betrayed no recognition that he had brushed against anyone of any note. Benjamin Rush, *The Autobiography of Benjamin Rush: His Travels Through Life Together with his Commonplace Book for 1789-1813*, Edited by George W. Corner (Princeton: Princeton University Press, 1948) 57. In his *Commonplace Book* entry for December 15, 1798, Rush discussed Madan’s writings on polygamy with no mention of his views on capital punishment or even the awareness that Madan had famously written on the subject. 244-245.

⁷⁶ Radzinowicz, 88-89. Ironically, Radzinowicz observed that, at the time of Madan’s writing, executions were carried out in more than half of the cases of serious crimes. He implied that Madan was substantially wrong, flawed in his underlying perceptions. Radzinowicz, 242.

⁷⁷ King, *Crime, Justice, and Discretion in England*, 276.

⁷⁸ Samuel Romilly, *Observations on a Late Publication, Intituled Thoughts on Executive Justice, To Which is Added A Letter Containing Remarks on the Same Work* (London: T. Cadell, 1786), 2-8.

⁷⁹ Romilly, *Observations*, 15.

⁸⁰ *Ibid.*, 18-19.

⁸¹ *Ibid.*, 19.

⁸² *Ibid.*, 21-22.

⁸³ *Ibid.*, 29-30.

⁸⁴ *Ibid.*, 30.

⁸⁵ *Ibid.*, 60-61.

⁸⁶ *Ibid.*, 131-136.

⁸⁷ *Ibid.*, 134-135.

⁸⁸ Romilly, *Memoirs*, Vol I, 93-94.

CHAPTER III

RUSH: EVANGELICALISM AND PENALTY

One of the earliest, most influential, and widely respected proponents of penal reform in the United States was Benjamin Rush. Like Romilly, Rush was influenced by Enlightenment philosophy. Historians routinely include Rush among representatives of the Enlightenment. Unlike Romilly, however, Rush's reform impulse was also motivated by strong religious conviction. This chapter will examine Rush's youth, early career, and intellectual formation, locating him in the context of contemporary attitudes toward law, penology, and the development of the penitentiary, situating him in relation to both Enlightenment philosophers as well as the emerging evangelical Christian movement.

Childhood and Youth

Rush was born in the colony of Pennsylvania on Christmas Eve, 1745 (January 4, 1746, new style)¹. His earliest years were spent in the countryside, on the family farm less than ten miles from Philadelphia. When he was six, his father died. Describing the family's subsequent move to Philadelphia, Rush relates in his memoirs that his mother, unable to support herself and her six children, "removed from her own house, and opened a grocery shop in a public street in which she sold, among other things, liquours by wholesale and retail."² Rush's mother later met and married a distiller whom Rush described as "rough, unkind and abusive in his treatment of her."³ Although the young Benjamin traveled abroad for studies and occasionally did so later as an adult, the remainder of his life was bound to and centered upon Philadelphia. In his memoirs, Rush recalls fondly his early years on the family farm. Even though the ancestral farm he and his mother were forced to vacate was nearby, Rush never returned to

visit his cherished childhood home until the final year of his life (by which time he experienced only disappointment in the changes time had wrought).⁴ Nevertheless, Rush associated rural life with wholesomeness and health. He opined, “The country life is happy, chiefly because its labourious employments are favourable to virtue and unfriendly to vice.” He added, “I consider them [cities] in the same light that I do abscesses on the human body, viz., as reservoirs of all the impurities of a community.”⁵

As a small child, Rush was baptized in the Church of England. As an adult, he recalled that his father, a dissenter, “had been persecuted for his religious principles and left his native country [England] in a fit of indignation at its then intolerant government.”⁶ The Rush family was devoted to Christianity, if unsure exactly what form that devotion should take. “[T]hrough the years the Rush clan virtually boxed the compass of Protestantism,” biographer David Hawke summarizes.⁷ This staunch yet mutable position on religion became characteristic of Rush in several aspects of his life. Around age nine, Rush was sent to school under the direction of Reverend Samuel Finley, who had married Rush’s mother’s sister; this family connection enabled Rush to receive a premium education at minimal cost. Finley had a reputation for demanding scholastic excellence and later became president of the College of New Jersey (later Princeton University) in 1761.⁸ Although Rush did not stress the point in his memoirs, Finley was among the most inspiring young evangelists in the American colonies and most certainly influenced Rush in those impressionable years.⁹

Among his recollections of Finley, Rush specifically mentions the elder man’s approach to punishment. He relates a story of a student who was made to select a switch by which he expected to be punished for a small infraction. However, when the student presented the limb to Finley after sufficient mental anguish, Finley let him off the hook after enjoining him to go and sin no more. “There, go about your business (said the Doctor). I mean shame, and not pain to be your punishment in the present instance.”¹⁰ Rush drew the explicit lesson that punishment was effective in a purely mental and emotional respect and did not require physical pain to be

inflicted in order to be effective. While it is difficult to know if this was the origin of Rush's penological views, clearly he retained a vivid memory of the scene into his advanced adulthood by which time his own view of punishment was in accord with Finley's.

Rush prospered under Finley's tutelage. At age fifteen, he entered the College of New Jersey.¹¹ Originally, he hoped to study law but allowed himself to be persuaded to pursue a career in medicine. At this early stage in his life he seemed ambivalent about the particular field he would follow. Once he finally settled into the study of medicine, however, he developed a passion for it. Looking back, Rush observed:

On what slight circumstances of our destinies in life seem to depend! All my friends objected to my choice. One of my classmates wrote me a long letter full of remonstrances against it, and reminded me of the credit I had acquired at the College as a public speaker. There were periods in my life in which I regretted the choice I had made of the profession of medicine, and once, after I was thirty years of age, I made preparations for beginning the study of law. But providence overruled my intentions by an event to be mentioned hereafter. I now rejoice that I followed Dr. Finley's advice. I have seen the hand of heaven clearly in it. This fact is recorded to shew that our feelings sometimes mislead us, as well as our reason, and that we often regret having done or omitted doing things which time discovers to have been most for our interests, or of the benefit of our fellow creatures. I might have acquired more fortune and rank in life in the profession of the law, and probably have escaped much of the vexation and distress that are connected with the practice of medicine, but I am sure I have been more useful in the latter profession, and therefore acquiesce in my lot, and were I to chuse an employment again, a conviction of suffering all the persecution that has followed me for my opinions and practice would not alter my predilection for medicine.

Not only does this passage reflect Rush's mature reminiscences of his medical career, it also reveals his tendency to imbue events with divine purpose and significance.

After graduating from the College of New Jersey, Rush apprenticed himself to Dr. Redman for five years; Rush recalled, with perhaps understandable pride, "During this period I was absent from his business but eleven days, and never spent more than three evenings out of his house."¹² Rush avows that he applied himself with diligence with the result that "diseases in all their forms and symptoms [were] familiar to me, and gave me a facility in knowing them which is to be acquired in no other way."¹³ In 1766 the young student journeyed to Edinburgh, Scotland, to extend and complete his medical education. At that time, the University of Edinburgh was

regarded as among the finest medical schools in Europe. In addition, the cost was inexpensive, there were no particular religious requirements or tests, and lectures were in English.¹⁴

During his time in Edinburgh, Rush grew into his role as a doctor. He gained exposure to some of the foremost medical instruction of the time and assimilated the teachings he heard, making them his own. He demonstrated aptitude at chemistry and he ultimately presented his final dissertation on the chemical reactions of gastric juices. Interestingly, Rush used his own stomach for much of his research; he ingested various substances and regurgitated his stomach's contents at precisely controlled times in order to compare the state of digestion and decomposition. By comparative analysis of the effluvia, he concluded that gastric digestion is a chemical process akin to fermentation.¹⁵ In order to produce his dissertation in Latin, as required at the time, Rush relied heavily upon others to translate his work for him.¹⁶ Historian Richard M. Gummere contends that Rush neither enjoyed nor excelled at Latin.¹⁷ Indeed, mastery of languages other than English remained an elusive goal for Rush. During his voyage across the Atlantic on his way home from Edinburgh, Rush set himself the ambitious task of learning German by means of reading Scriptures in that language and comparing the results to known English. He claims that he began to understand what he read but became distracted upon the sighting of the North American land mass. He recalled, "This at once dissipated all my ardor in the pursuit I was engaged in . . ."¹⁸ During his time in Edinburgh, he nevertheless recorded in his autobiography, "I likewise made myself master of the French language, and acquired so much knowledge of the Italian and Spanish languages as to be able to read them."¹⁹

Although Rush's use of his own body as an object for clinical experimentation was by no means uncommon among physicians at the time. Indeed there was a fascination generally with human anatomy which inspire a trend toward experimenting on and examination of human cadavers.²⁰ Rush participated in – either directly or, at the very least, by observation – human dissection, or anatomization as the technique was then termed. Although considered a routine and generous practice today, the prospect of having one's corpse used for medical dissection

and instruction was still fraught with shame and dishonor in the eighteenth century. Unlike today, people did not donate their bodies to science.²¹ They did not yield to an altruistic desire to add to the “body” of medical knowledge in that particular way, nor did they hope for a simple, economical method of avoiding exorbitant funeral expenses by such donation. Instead, such corpses as were supplied to the medical profession were derived entirely from convicted criminals who had been executed legally.

Historian Ruth Richardson records, “In Scotland, dissection received royal recognition and patronage in 1506, when James VI granted the Edinburgh Guild of Surgeons and Barbers the bodies of certain executed criminals for dissection.” She notes that in 1540 England’s Henry VIII granted the companies of Barbers and Surgeons the bodies of four hanged felons per year.²² Peter Linebaugh adds that Charles II increased the number to six felons per annum.²³ These laws, Richardson argues, forged a relationship “between the medical profession, the ruling elite and the judiciary on the one hand, and between dissection and exemplary punishment on the other.”²⁴ The law’s efficacy may be measured by the fact that evidence suggests that criminals seemed to dread the anatomization that occurred after their execution as much or more than the actual hanging. Richardson contends this dread stemmed from beliefs regarding the nature of the corpse itself:

The significance of the human corpse in popular death culture [in the mid-eighteenth century] seems to have been coloured by a prevailing belief in the existence of a strong tie between body and personality/soul for an undefined period of time after death. This belief . . . gained added power from confusion and ambiguity concerning both the definition of death and the spiritual status of the corpse. The result was an uncertain balance between solicitude towards the corpse and fear of it.²⁵

This uncertainty related to the lack of accuracy in determining whether someone was truly dead, as well as to the ambivalence of Christianity’s teachings on the matter of death. Among Protestants, the elimination of Purgatory led to vagueness on the point of when the deceased entered into Heaven. Some believed entrance to paradise was immediate, while others believed the dead “slept” until the last judgment at which time they would be reunited with their terrestrial

bodies prior to their relocation to Heaven. To subscribers of the latter theory, the condition of the corpse assumed tremendous importance.²⁶ Early eighteenth-century criminals routinely sought to arrange with their cohorts for their rescue – not a prison-break to save the criminals from death at the hands of the hangman, but to abscond with their corpse before it could be handed over to the “ghouls” of the medical profession. Crowds witnessing public executions often supported the criminals’ resistance to dissection.²⁷

Lawmakers understood the popular dread of anatomization and consciously sought to strengthen the terror dissection offered as a means of exemplary, deterrent punishment.²⁸ In 1725 philosopher Bernard Mandeville argued for the routine anatomization of all hanged felons, citing the additional deterrence thus offered as well as the benefit to science.²⁹ By the mid-eighteenth century, the demand for medical cadavers was far greater than imagined in Henry VIII’s time. In 1751 Parliament passed the Murder Act “for better preventing the horrid crime of murder,” which made dissection applicable to all hanged felons. However, even factoring in the high rate of executions that the Bloody Code theoretically made possible, the growing demand for pedagogic corpses outstripped the supply. As legally obtained cadavers were in short supply, obsessed and driven medical men turned blind eyes to the sources of their dissection material. A black market for grave robbers developed which supplied medical students their grim research fodder. Rumors persisted that practices even worse than grave-robbery occurred – that some suppliers of cadavers did not scruple to hasten a person’s death in order to meet their quotas and make their deliveries. In the late 1820s the rumors proved to be true; William Burke and William Hare were discovered to have murdered seventeen people to sell the corpses for dissection.³⁰ This resulted in the passage of the Anatomy Act of 1832 which provided that unclaimed bodies of indigents would be available for dissection, thereby increasing the supply of cadavers available for medical purposes and eliminate the need for murder. Drawing on the close parallels to Mary Shelley’s *Frankenstein*, literary analyst, Tim Marshall notes, along with Ruth Richardson, that Bentham’s utilitarian ideas had triumphed and England

had transitioned toward modernity. With the passage of the Anatomy Act, the poor were to be systemically punished as well.³¹

In the world of medicine, a clear distinction existed in Rush's time that is non-existent or at least quite blurred today. Physicians and surgeons did not move in the same circles. Physicians were respectable and honorable. They examined patients and prescribed medicines. They did not soil themselves overly with human effluvia. At most, they may have dressed and sutured wounds, or cauterized abscesses. They were addressed as individuals of importance; the honorific "Doctor" preceded their name. Surgeons, by contrast, were sullied by their constant contact with the human body and its fluids.³² Roy Porter points out, "The formal separation in 1745 of the Surgeons from the Barbers did at least establish that surgery was a craft in itself, a cut above mere hairdressing."³³ In any case, they were addressed as merely "Mister." Although by Rush's time these distinctions were beginning to blend, they still existed quite clearly. Those physicians and particularly surgeons who dealt with cadavers were considered tainted by the contact. It is interesting that the anatomizing process was viewed as diminishing the honor of both the surgeon and the criminal and that, of the two, it was the convict who felt more shamed by the contact with the surgeon than the other way around.

Rush remembered his years in Edinburgh as "the most important in their influence upon my character and conduct of any period of my life."³⁴ He stated that an acquaintance brought to his attention the political philosophy of Algernon Sidney (1622-1683) and thereby led him to think in republican terms. Rush declared:

Never before had I heard the authority of Kings called in question. I had been taught to consider them nearly as essential to political order as the Sun is to the order of our Solar System. For the first moment in my life I now exercised my reason upon the subject of government. . . . This great active truth became a ferment in my mind. I now suspected error in every thing I had been taught, or believed, and as far as I was able to try the foundations of my opinions upon many other subjects.³⁵

Despite Rush's stated opinion of the extent of his skepticism, he never gave evidence of questioning basic Christian principles. He never did become agnostic or even a deist. In fact, he

later lauded the superior moral order he found in Edinburgh: no swearing, no card playing, rarely any drunkenness or dishonesty. He attributed this moral rectitude to the “parochial instructions of the clergy, who were *at that time* a regular and conscientious body of men.”³⁶ However, he followed this comment by lamenting the subsequent decline in morals and manners. He asserted, “Nor was I surprised at it when I heard that the works of several of the most popular writers against Christianity were to be met with in the hands of journeymen mechanics of all descriptions.”³⁷

In 1768 Rush received his degree and completed his training in Edinburgh. He now determined to travel awhile before returning to Pennsylvania. First he went to London where he attended medical lectures and dissections, even participating in the latter. As a fellow Pennsylvanian, Rush benefited from his acquaintance with both Benjamin Franklin and Benjamin West. Through West, Rush gained entrée to Dr. Samuel Johnson’s establishment, where he met Joshua Reynolds and Oliver Goldsmith. He reported dining with Goldsmith on multiple occasions.³⁸ Rush portrayed Franklin as graciously taking him under his aegis and conducting him to Court.³⁹ More importantly, Rush stated that Franklin provided him with letters of introduction “to several of his philosophical friends” and advanced him a line of credit for the next leg of his journey, which was to Paris.⁴⁰ Although Rush did not emphasize the point, the memoirs make clear that had Franklin not pressed him to accept the loan, the stay in Paris would have been meager and brief.⁴¹

As it was, Rush enjoyed his visit to Paris. His letters of introduction and connection with Franklin gave him access to many important people, most notably, Denis Diderot.⁴² He stated that Diderot gave him a letter to convey to Hume upon his return to London, but says nothing more about their meeting.⁴³ He visited churches and galleries, admiring the artwork and sculpture, and evidently was impressed by the salons and Court at Versailles. Rush observed Louis XV and the future Louis XVI as well as other members of the royal family. He recorded, “The King was at this time the idol of the nation. He was called ‘Lewis the well beloved.’”⁴⁴ What

Rush really thought about the French nobility and royal family is difficult to know but one must remember his exposure to republicanism was only recent. Although his memoirs were written after the French Revolution, it seems unlikely that Rush would have been able to detect sentiments of discontent considering his contacts in France were among the elites. He concluded his observations on the French with a long comparison of American Indians to the French, finding many points of similarity between the two, in contrast to the English.⁴⁵ Rush made only slight reference to his deficient French; indeed, one suspects that Rush thought himself reasonably adept at the language. However, based on his observations about French manners and customs vis-à-vis those of England, a more likely explanation may be that Rush simply failed to understand much of what was being said.

Regarding Rush's experiences in Paris and in London, assessing their real impact on the young man is difficult. Although he remarks on many famous, influential individuals, he rarely reveals any sense of realization that he is describing a "great" person. This could be attributable to modesty and a confident assumption that any reader would understand their importance. Yet in some cases, he seems almost ebullient with enthusiasm such as when he describes specific surgeons or physicians he was able to meet. Compared with Romilly, Rush seems to be mechanically fulfilling expectations of what the cultured young man of the time did. On the other hand, Rush readily absorbed religious influences to which Romilly was impervious.

Throughout his time in Edinburgh and London, Rush attended the orations and sermons of the various speakers who preached the evangelical message. Evidently, he was quite impressed. In Edinburgh, he particularly admired John Erskine and William Witherspoon.⁴⁶ Witherspoon had been offered the presidency of Princeton University but had refused because his wife feared the Atlantic crossing. Rush stated that while he stayed several days with the Witherspoons, "In the course of our conversation I lamented often in the presence of his wife his not accepting of the charge of the Jersey College, and obviated such of the objections as she had formerly made to the crossing of the ocean."⁴⁷ He also recorded that he heard the "unfor-

tunate Dr. Dodd” (William Dodd 1728-1777), who became subsequently famous when he became a victim of the Bloody Code.⁴⁸ Although Dodd’s was a *cause célèbre*, actively pursued by Samuel Johnson, the hangman’s noose tightened around his neck nonetheless. Rush also noted that he heard the preaching of Madan, the same Madan whose polemical work helped launch Romilly into the forefront of those who opposed the Bloody Code. Rush passed lightly over Madan’s name; the inflammatory pamphlet, as well as Madan’s foray into polygamy, were in the future at the time Rush heard him. Unlike his comment on Dr. Dodd, his memoirs are silent on the point.⁴⁹

Perhaps most important among the preachers Rush heard was George Whitefield (1714-1770). Rush recorded, “I had been introduced to the Revd. Mr. Whitefield when a boy in America. I saw him occasionally in Edinburgh and visited him frequently in London.”⁵⁰ Rush visited him on terms of easy familiarity, joining him for breakfast. In his autobiography, he stated:

In breakfasting with him I was much struck with the inscriptions in the bottom of his cups and saucers. They consisted of verses extracted from the Bible, all of which were expressive of the resemblances of water or food to the blessing of the Gospel. In my cup was the following verse, “With joy will we draw water out of the wells of salvation” and in my saucer the following “Ho, every one that thirsteth, come [ye to the waters.]”⁵¹

Rush exuberantly praised Whitefield; he declared, “I have always thought it a peculiar happiness to have known him.”⁵² He added, “He and Mr. Westley [sic] constituted the two largest and brightest orbs that appeared in the hemisphere of the Church in the 18th Century. Probably they were exceeded only by the apostles in zeal and usefulness.”⁵³ Rush stated that although he was not personally acquainted with “Mr. Westley,” he heard him preach on two occasions. Rush found Whitefield to be the better orator, though he conceded that Wesley was the more learned of the two.⁵⁴ Although obviously receptive and sympathetic to Methodists and Methodism, Rush apparently never felt the need to formally adopt that creed as his own.

Evangelical Christianity in the Eighteenth Century

Rush's claims of a wide personal exposure to varieties of religion boiled down to Episcopal, Presbyterian, Quaker, and various dissenting sects. Based on various remarks throughout his *Commonplace Book*, he understood the tenets and practices of Catholicism, however he offered no judgment on that denomination. Like many people in the eighteenth century, Rush's religious experience was shaped by the movement known as the Great Awakening.

The Great Awakening refers to the explosive growth in active participation in religion, particularly among persons not belonging to the elite social classes. At the very least, this participation was manifested in frequent, regular attendance at church services; often, it took the form of attending revival meetings.⁵⁵ As stated above, active involvement in religion among the elites had declined significantly by the end of the seventeenth century. Even within the Church of England, the level of vibrancy of spirituality had deteriorated, leading Voltaire to describe an English sermon as a "solid but sometimes dry dissertation which a man reads to the people without gesture and without particular exaltation of the voice."⁵⁶ The intellectually rich but emotionally sterile atmosphere left multitudes of people, who did not have sufficient education to derive stimulation from the dry offerings the Church of England provided, hungering for spiritual fulfillment. Religious historian Thomas S. Kidd posits that the continuous tension between Protestant Great Britain and Catholic Spain and France contributed to sating that hunger. He argues that the revival movement had, in part, its origins in anti-Catholic, pro-Protestant, pro-British meetings organized to keep the church pure and free of foreign, Catholic influences.⁵⁷

Because this movement touched a sympathetic chord among so many people who were effectively marginalized by the Church of England, the response proved to be large. More and more people found satisfaction among dissenting preachers than they ever had from more traditional vicars. However, the phenomenon was not limited to the Church of England. The Presbyterian Church also faced breakaway preachers, still nominally in the fold but clearly fol-

lowing a new path of their own. Moreover, the Awakening movement did not manifest itself in a uniform way among these various preachers and their followers. This variety of expression and experience soon led to conflict, some of which was sharp and bitter. Although there were numerous fine points of contention, two salient points are relevant to this study: predestination, and revivalism or enthusiasm. The differences over these two issues may be illustrated by the teachings of two of the most prominent preachers, George Whitefield and John Wesley, the founders of Methodism.

Although the Great Awakening occurred in both Britain and America, historian J. M. Morris points out that “the growth of revivalist Protestantism in America was due first and foremost to the Methodists.”⁵⁸ John Wesley, along with his brother Charles, were members of a pious society at Oxford whose members included George Whitefield. Elie Halévy explains, “They were dubbed ‘the Methodists’ because of the rigorously ‘methodical’ and regulated character of their ascetic practices.”⁵⁹ The Wesley brothers and Whitefield traveled to America to preach. Whitefield was enormously popular and drew huge crowds but John Wesley failed to attract large audiences and even found himself in such personal difficulties as to force him to cut his trip short. As Rush hinted at in his memoirs, Wesley’s talents lay not so much in oratory as in organization. Wesley’s organizational ability resulted in the aggressive expansion of the Methodist movement.⁶⁰ Although Wesley’s skills at leadership and organization provided the overarching structure necessary for the growth of Methodism, Whitefield’s charismatic attraction of large numbers cannot be denied. Franklin attested to Whitefield’s oratorical powers both as a charismatic speaker and as an orator physically able to be heard by crowds of more than 30,000.⁶¹ However, Whitefield and Wesley disagreed on the issue of predestination and on revivalism or, more specifically, on enthusiasm.

The Great Awakening is an umbrella term covering a variety of individual beliefs and practices that were by no means uniform. Calvinist members of the movement, of which Whitefield was one, tended to retain their belief in predestination. Wesley, on the other hand,

represented the Arianist point of view, which held that humans can be saved at any time. Historian Liam Iwig-O'Byrne summarizes:

The characteristically long period of repentance in seventeenth-century Puritanism was shortened. People did not have to wonder all of their lives whether they were part of the elect, since in Methodism God could supernaturally empower anyone to freely choose to become one of the elect. Assurance of being one of the elect was not simply gained by reasoning from one's experience that salvation was likely. Rather, assurance was a certainty to Methodists and typically came in a dramatic moment, seen as the result of a direct act of God rather than the efforts of the human mind.⁶²

Ultimately, no matter how appealing Whitefield's powers of oratory were, Wesley's philosophy of redemption being readily available to all attracted and retained members and built the Methodist Church. More importantly, for the purposes of this argument, the notion of individual salvation available to any person at any time in his or her life had important implications in matters of penology. If an individual could be redeemed, if no one was beyond hope, then reformation and rehabilitation assumed enormous importance in the sentencing of convicts. According to Wesleyan believers, every individual is capable of redemption and therefore should be given an opportunity to reform.

However, on the matter of revivals, Whitefield, more than Wesley, prevailed. The term for those infused by the Holy Spirit and led to public testimony and other displays of faith was "enthusiasts." Enthusiasm literally refers to the indwelling of God, or put in a negative light, possession by a spirit. Wesley always sought to downplay religious histrionics and to avoid being seen as an enthusiast. Historian David Hempton notes that, "Wesley's writings contain more than two hundred references to enthusiasm. Most are carefully argued refutations of charges made against him"⁶³ He had less success in eradicating enthusiastic tendencies among his followers. Indeed, the revivals were one of the main reasons for the growth of the Methodist church.

Samuel Finley, Rush's early mentor, was one of the most ardent supporters of the revivalist movement. Unlike the picture of the soft-spoken man portrayed in Rush's autobiography, historian Frank Lambert declares:

Finley published a blistering polemic against John Thomson, one of the leading revival opposers in the Philadelphia Synod. Ridiculing Thomson's explanation of doctrinal matters, Finley called his equating repentance and conviction "an Imposition on the Ignorant and Credulous, and a manifest Perversion of the Use of Language."⁶⁴

The revivalists accused anti-revivalists of having fallen into heresy or not being led by God.⁶⁵ Knowing sheer numbers of revivalists and anti-revivalists may be impossible, but clearly the revivalist point of view garnered the most attention and carried the day in the long run. Methodism, which had been in Philadelphia since Whitefield's arrival in 1739, grew dramatically from the 1760s to the 1790s, and included an estimated 60,000 members by 1800.⁶⁶ Moreover, Philadelphia as a centrally located major port served as a key link in the connections between American and British Methodists. By 1790, the Methodist Conference had determined to open a school for children of the indigent in Philadelphia.⁶⁷ This dynamic environment of religious dissent among Methodists as well as other evangelical sects was the religious atmosphere imbibed and accepted by Rush from the time he was a boy and on into adulthood.

Philadelphia and Penn's Penology

Returning to Philadelphia in 1768, Rush settled down and married, and his family eventually had nine children who survived infancy. He established his medical practice and grew his clientele by working hard, making himself available long hours, and treating marginalized patients. Rush actively tended to the poor and routinely offered his services to those in jail. During this time, Rush became personally aware of and gradually involved in the workings of the jail and, by extension, legal practices that brought people to jail and beyond.

The jail in Philadelphia, even at this point, differed markedly from other jails in the colonies and in England. Pennsylvania in general and Philadelphia in particular may be regarded as an experiment in reform, much of which manifested itself in the approach to legal justice; moreover, this experiment had begun with the founding of the colony. When William Penn founded the Pennsylvania colony in 1681, his original intention included changes to the ways

people lived. He sought to establish an administration that permitted people to live in comparative freedom relative to the conditions they had experienced in Britain. Penn had been jailed several times; this personal experience no doubt informed his attitudes towards penal processes. In his discussion of Penn's role on penology reform, historian David M. Horton states:

He believed that the barbarous criminal codes of his day should be ameliorated, and that imprisonment at hard labor should be substituted for the death penalty, mutilation, and the other brutal, dehumanizing, and humiliating punishments which were so common in the seventeenth century.⁶⁸

Men and women in Penn's colony enjoyed a degree of equality and women participated actively in church as teachers, preachers, and individuals of authority. Penn insisted that Native Americans be treated with respect; relations between colonists and Indians continued on good terms while he remained in charge. His vision of legal justice bore this same hallmark of mild wisdom.

Few crimes were punished by death in Penn's colony. Jock D. Marietta and G. S. Rowe contend that Pennsylvania's originally codified laws were the "mildest criminal code of any continental English colony and one much milder than England's."⁶⁹ Only murder was specifically a capital crime.⁷⁰ Treason was punished by death by virtue of English common law, though not explicitly included in writing.⁷¹ "Forfeitures, corporal punishment, and imprisonment," they continue, "were substituted for capital sanctions for such offenses as rape, sodomy, bigamy, and incest. A second conviction for these offenses carried with it life imprisonment." Attacks on property drew fines. Judges did have discretion to impose harsh, severe penalties. Fines could be paid in lieu of many corporal punishments or imprisonment.⁷² These punishments were a significant deviation from legal practice in Great Britain.

In fact, from Britain's point of view, this deviation was too significant to be ignored or allowed to continue. Although Pennsylvania had been established as a proprietary colony – meaning that the proprietor, Penn and his successors, had powers almost monarchical in scope – the colony was still considered a British possession. Furthermore, over time conditions on both sides of the Atlantic changed from those at the time of the colony's founding. When King

Charles II had allowed Penn to establish a colony in America, the king had been restored to his throne after years in exile. To say he paid no attention to his American colonies would be too strong, but he did not regard such matters with the same urgency or importance as he did conditions close to home and within his immediate purview. In addition, William Penn, *père* had been a loyal supporter of Charles II both during his exile and after the Restoration. Granting William Penn *fills* the right to settle a few religious dissenters and malcontents across the Atlantic solved problems for king, for the loyal subject, for his son, and for the marginalized but troublesome Quakers.

However, by the time a generation or more had passed, Pennsylvania was no longer a backwater populated a few religious dissidents; the colony had prospered under Penn's benign patriarchal guidance. Already by the early 1700s Philadelphia began surpassing Boston as the preeminent port among Britain's North American colonies. Philadelphia enjoyed a milder climate than Boston's harsh New England winters. It also offered a more protected harbor and provided less exposure to the elements than Boston's open coastline. In addition, Philadelphia's position, approximately centered among the colonies, made for a more convenient, more efficient, and therefore cheaper distribution and collection of goods. Furthermore, the vast western lands of Pennsylvania afforded better opportunity for farming than the colder and already comparatively crowded lands of Massachusetts and New England.

On the British side of the equation, the troubled reigns of Stuart monarchs and the religious conflicts of the seventeenth century were over. The Protestant Succession seemed to be well established. Parliament had firmly established its increased, indeed central role in government. As Parliament became more aware of and interested in the details of the affairs of the American colonies, the lax judicial practices of Pennsylvania caught Parliament's attention.

As the mild methods of Pennsylvania's judicial procedures became increasingly obvious to Parliament, they became the more unacceptable to that body. Parliament contended that, proprietary colony or not, Pennsylvania was a part of the British holdings and enjoyed no spe-

cial right to ignore or abrogate British law.⁷³ This mild approach to criminal justice probably seemed all the more unwelcome at a time when Parliament was actively adding to the number and type of acts that were to be punished harshly, often by death. For Pennsylvania to move toward a mild and tolerant judicial code at the very time Parliament was stiffening English law rendered the colony's position untenable. Reluctantly, Pennsylvania made its penal code more severe.⁷⁴ In 1705 Pennsylvania's law was reversed to satisfy the Privy Council. Capital punishment was introduced specifically for blacks committing rape or murder.⁷⁵ The Test Acts gradually were enforced more assiduously and with greater frequency thereby disenfranchising the generally milder, more tolerant Quaker administration in favor of a more hard-line Anglican one.⁷⁶ Although Pennsylvania remained the colony least adhering to the strict Bloody Code, from the early eighteenth-century until the American Revolution, it no longer enjoyed its former obscurity or immunity. Such were the conditions Rush encountered as he began treating prisoners held in Philadelphia's jail.

British jails (gaols) at that time existed primarily to hold people awaiting trial. Individuals accused of serious crimes such as murder, assault, rape, or robbery were placed in jail until their case could be heard by a judge and jury. Besides suspects of such crimes, individuals accused of lesser crimes but who were deemed at high risk for flight might be similarly detained. Rarely was time spent in jail awaiting trial considered to be any form of punishment or even related to punishment. Debtor's prison was the closest practice akin to the modern notion of sentencing someone to prison as a form of punishment. Individuals unable to meet their debts were incarcerated in a debtor's prison as a means of punishment but also as a means to curtail their activities and to keep close account of their whereabouts. Debtors were expected to remain until they paid off the money they owed rather than merely having been incarcerated for a prescribed amount of time. However, there was much coming and going compared to a modern prison. In order to pay their debts, it was necessary for prisoners to be able to leave and en-

gage in work or transact business. The eighteenth-century prison was a permeable institution compared with its later incarnations.

The jail in Philadelphia was ahead of the penal developmental curve. Since Pennsylvania already had a tradition of punishing crime without resorting to the death penalty, other means of punishment were required in lieu of capital ones. Fines were favored since they were highly flexible to meet the individual's circumstances as well as the circumstances of the crime. However, some crimes required more severe punishment than mere loss of money. Moreover, some crimes were by their nature so violent that regardless of money's ability to satisfy justice, the criminal still needed to be removed from society in order to prevent further harm. Incarceration as punishment, not mere detention, seemed well suited to serve that purpose. By the time the Continental Congress met in 1774, Philadelphia already had a history of the use of punitive incarceration.

When the American Revolution broke out, Rush was highly involved. He had been a participant in the Continental Congresses that met in Philadelphia and was one of the signers of the Declaration of Independence. Even before those events, Rush had exercised a guiding hand behind the scenes in that it was he who spurred Thomas Paine to write and publish the enormously influential pamphlet *Common Sense*. After the official break with Britain and the sustained hostilities had commenced, Rush served as a military medical advisor, endeavoring to ensure that the troops received adequate and prompt medical treatment as well as basic supplies such as food and blankets. Shocked by the shoddy physical state of the American soldiers and the deplorable conditions in which they served, Rush laid the blame squarely at the feet of General George Washington. In letter after letter, as well as pamphlets and articles, Rush criticized Washington, charging him with mismanagement to a degree that is surprising to the modern reader. Rush's accusations stop just short of claiming treason on Washington's part.⁷⁷ That such a high placed and prominent individual could be allowed to criticize the commander of the American armies so vehemently suggests remarkable strength of character on

Washington's part. But it may also suggest that Rush was not taken as seriously as he supposed.

Over his long career, Rush experienced lack of support or trust from those he had reason to expect would support him. As shall be illustrated below, on several occasions Rush felt his efforts went unrecognized and his prognostications went unheeded. When his efforts did succeed, credit was often accorded in other directions. This particularly vexed Rush. Although he stressed in his memoirs that he did not care for worldly acclaim, the subtext argues otherwise. He devoted far too much space to defending himself, clearing his name, and ensuring his place in history for someone who did not care what others thought, especially in an autobiography that he stated should not be published. Rush was no Benjamin Franklin who could be contented and amused by achieving his goals yet allowing others to take credit. Rush basked in glory when his efforts came to happy fruition, and he chafed and sulked when he believed himself wronged. Rush bore his convictions boldly. He did not easily abandon opinions he formed. Although he was a man of contradictions and hypocrisies, he held his beliefs consistently and did not conceal them to make himself more palatable to others. Any man prepared to proclaim himself the enemy of General Washington was certainly no sycophantic Milquetoast.⁷⁸

In the medical world, Rush achieved prominence and respect in Philadelphia and beyond. His practice grew from the modest tending of the city's marginalized citizens, the poor, the indigent, the incarcerated, and the insane. He met with such success that eventually his practice grew to include respectable and paying patients as well. Besides his expanding practice, he was invited to be among the founding faculty of the medical school in the college that is now the University of Pennsylvania. This helped spread his fame and added to his reputation. However, it was the plague of 1793 that fully earned him widespread celebrity as a result of his heroic efforts in combating the disease that ravaged the city.

At the time the yellow fever struck, the concept of germs and microbes was still decades from being discovered and almost a century from being widely accepted. Causes, and

therefore cures, of devastating diseases were not known or understood. Periodic fevers swept through Philadelphia from time to time, and with each occurrence controversy resurfaced as to the source of the infection. Generally speaking, two theories on the source of the diseases existed. One group believed the fevers were passed from person to person. Close contact with an infected person was the most obvious method of acquiring the malady. Followers of this theory attributed the introduction of disease to the sailors arriving in Philadelphia's great harbor and the spread of the disease to the close, cramped quarters frequented by these sailors while in port. The disciples of this hypothesis were called "contagionists." The other group believed that the climate or air was the cause. They argued that people who did not come into contact with sailors or anyone else from the lower and crowded classes fell ill as readily and as quickly. Devotees of this model ascribed the source of the illness to the bad air that was produced by the swamps and marshes. Particularly, they contended that the warmer times of the year seemed to give rise to more of the miasmatic conditions associated with the outbreak of the fevers. Clearly, they asserted, sailors came and went all year round, but the fevers seemed to arrive and dissipate with the warm months rather than with foreign sailors. These believers were termed "climatists."

With the benefit of modern medicine, it is apparent that both theories were partially correct, and the apparent exceptions and discrepancies were because some diseases are communicated by personal contact while others are transmitted by the mosquitoes that attend warm, swampy conditions. In the particular case of the yellow fever, the climatists were more nearly correct than the contagionists, albeit for incorrect reasons. Both camps had their pet methods which, they assured the public, would remedy these recurring diseases that occasionally struck the city. The contagionists succumbed to xenophobia as they strove to effect a ban on foreign sailors within the city. On the other hand, the climatists, historian John Harvey Powell states, "would purify the city and society itself by sanitary measures."⁷⁹ Rush was among the climatists, and he garnered great acclaim on the strength of having been considered correct on this matter.

Much more importantly, Rush remained in the city and treated victims of the fever not only personally but also by means of aggressive dissemination of his treatments and cures in order that others could mimic his methods and be saved. In his own lifetime, Rush's actions during this plague earned him far more renown than his participation in the American Revolution or his having signed the Declaration of Independence. It also brought him tremendous criticism. Rush's treatment of the fever victims consisted of aggressive bleeding of the patient and the administration of large doses of mercury and sulfur. If the fever persisted and these two poisons did not kill the patient, he administered great dowses of cold water several times a day. While the cold water may have been effective in lowering the body's temperature, the treatment, in modern understanding, was clearly flawed. If Rush's patients recovered, it was in spite of his treatment more than because of it. Moreover, Rush stubbornly refused to listen to his colleagues. The learned faculty members of his own college were unable to dissuade him from this treatment. Rush did not shrink from playing God when it came to medicine.⁸⁰ Nevertheless, because a significant number of his patients did recover his personal heroism proved beyond the reproach of his fiercest critics.

Although no one could fault Rush's bravery in the face of the plague, the actual treatments he prescribed and his high-handed, self-assured methods were quite another matter. Pamphlets and articles attacked his medical abilities and referred to him as a quack. The most scathing, persistent, and to Rush the most irritating criticism came from a single quarter, the British political observer and critic William Cobbett (1763-1835), who happened to live in Philadelphia at the time. Cobbett branded Rush as a murderer.⁸¹ At times Rush tried to rise above these attacks; at other times he tried to defend himself. In all times, he felt wounded and betrayed. Never did he lose confidence in his diagnoses, prescriptions, or treatments. Eventually, Rush successfully sued Cobbett for libel, resulting in the latter's precipitous return to Britain.⁸²

Similarly, he also never wavered in his commitment to the poor and the imprisoned. Even after his practice grew large and profitable, he did not abandon his habits of dispensing

low-cost, or even occasionally free, treatment to Philadelphia's poorest inhabitants. And he made sure to call upon the inmates at the Walnut Street Jail, regularly tending their needs. In treating the prisoners, he not only saw to their medical condition, but increasingly became involved with their specific life circumstances. Moreover, he raised his sights to address the systemic issues he saw in the legal justice system of Pennsylvania. As Rush gained greater exposure to conditions in Philadelphia's jail and grew increasingly dissatisfied with the treatment of prisoners and the effects of capital punishment on society, he became convinced not only that something must be done but also that he must personally act to effect the changes. Early in his involvement with legal justice, he concluded that capital punishment was a moral wrong. Although he was not a Quaker, his attitude toward capital punishment, particularly his view that it was a sin, perhaps shows the *influence* of his Quaker surroundings. In addition, the Methodist belief that all people could select redemption and reformation clearly shaped Rush's views of punishment.

Immediately after the end of the Revolutionary War, several of Philadelphia's foremost citizens – including Rush, Franklin, William Bradford, and Caleb Lownes – organized a pressure group to reform the harsh penal code of 1718, which had remained in effect by default. Rush went so far as to advocate the total abolition of the death penalty. Their efforts resulted in the law of September 15, 1786, which substituted for the death penalty, in the case of some of the lesser felonies, 'continued hard labor, publicly and disgracefully imposed.'⁸³ The changes failed to be as thorough as the reformers had hoped and the results were disappointingly small. A contemporary observer, Robert D. Turnbull, observed in 1797, "Unfortunately however, for the friends of humanity, the new system of mildness was far from having the justice of a fair experiment, and was found by no means to embrace the view of its supporters."⁸⁴ However, the public exposure of the convicts in their labor focused the attention of a larger number of people on the distressing condition of prisoners than would have been possible had they remained sequestered behind prison walls. The continued defects of the penal administration, combined

with the added publicity given to these abominable conditions, triggered the formation in 1787 of “The Philadelphia Society for Alleviating the Miseries of Public Prisons” (hereafter referred to as PSAMPP).⁸⁵

PSAMPP’s constitution required that members visit prisons:

. . . at least once a month, enquire into the circumstance of the Prisoners, and report such abuses as they shall discover, to the proper officers appointed to remedy them. They shall examine the influence of confinement or punishment upon the morals of the Prisoners.⁸⁶

Although PSAMPP was concerned with eliminating the physical suffering of the inmates, its primary interest lay in the wholesale reformation of the entire system of criminal jurisprudence and penal administration, which would result in the disappearance of the incidental evils and pains caused by the old system.⁸⁷ PSAMPP was not officially affiliated with the Society of Friends, the Quakers, however, there was a strong Quaker influence in its membership and in its beliefs and methods.

The Walnut Street Gaol Act providing for the establishment of that facility was passed by Pennsylvania’s legislative body on February 26, 1773. Originally the jail had been characterized by severe and inhumane treatment. There was no segregation or classification – murderers were housed with debtors. There were inadequate rations, minimal sanitation, and no employment.⁸⁸ In addition to moral and criminal contagion, the close quarters and unsanitary conditions facilitated the spread of disease. However, under the close scrutiny of the members of PSAMPP and other concerned citizens, the Walnut Street Gaol developed into a model of advanced penology. Prisoners were put to useful employment. The facilities were kept clean. Disease was almost eliminated. In 1797 Turnbull reported the mortality and morbidity rate was exceptionally low and that even during the yellow fever plague only six inmates died.⁸⁹ Interestingly, the jailer died during that plague. His widow, Mary Weed, became the jailer and retained the post until 1796, when she resigned. Turnbull states that conditions in the prison were excellent during her tenure.⁹⁰

In summarizing the early attempts at reforms of institutions of incarceration, historian Michael Meranze argues that “Prison reform was first of all a question of medical police.”⁹¹ In other words, notes Meranze, John Howard (1726-1790), the giant among eighteenth-century advocates for prison reformation, primarily sought change in terms of better hygiene.⁹² As a doctor attending inmates medically, Rush would have concurred, but he also carried the desire for reform beyond mere physical sanitation. Rush saw crime through medical eyes. He imagined crime itself as a disease or epidemic and he proposed to treat it the same way.⁹³ He regarded wrongdoing to be contagious and saw immorality and mental disorders as different aspects of the same thing. Evangelical Christianity clearly contributed to shaping his attitude toward crime. His medical training and his religious beliefs melded together so that both scientifically and religiously, he believed no one was beyond help. In the same way that he rarely abandoned or dismissed patients as hopeless, he regarded criminals as individuals not beyond hope of redemption and rehabilitation. He believed religion and industry (hard labor) would form good habits and good character; he believed his “scientific” methods could reform individuals. As a scientist, he contended that controlled experiments would produce predictable results. Control was key.

The historian Foucault has written at length about the imposition of control on individuals. He contends that a Great Confinement occurred in the seventeenth century, a consequence of which was the growing acceptance of institutions of confinement as means of control and punishment. He states:

The walls of confinement actually enclose the negative of that moral city of which the bourgeois conscience began to dream in the seventeenth century; a moral city for those who sought, from the start, to avoid it, a city where right reigns only by virtue of a force without appeal—a sort of sovereignty of good, in which intimidation alone prevails and the only recompense of virtue (to this degree its own reward) is to escape punishment.⁹⁴

Foucault argues that it was precisely around the end of the eighteenth century that penal thought turned from focusing on punishing the body to punishing the soul. Referring specifically to the jails in Philadelphia, he writes that “reformers” believed that “Work on the soul must be

carried out as often as possible. The prison, though an administrative apparatus, will at the same time be a machine for altering minds.”⁹⁵ The situation Foucault describes came about as the result of the efforts of the PSAMPP and Rush. Historian Mark E. Kann states that “One of Rush’s major accomplishments was to propose the humane treatment of criminals but show how that treatment could be made to appear terrifying to both criminals and the public.”⁹⁶ Although Rush, unlike Romilly, did not make penal reform the focus of his life’s work, his contributions and those of individuals who shared his views had revolutionary, transformative effects on penology both in the United States, in Britain, and beyond.

Notes

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- ¹ Nathan G. Goodman, *Benjamin Rush: Physician and Citizen, 1746-1813* (Philadelphia: University of Pennsylvania Press, 1934), 3.
- ² Benjamin Rush, *The Autobiography of Benjamin Rush: His 'Travels Through Life' Together with his Commonplace Book for 1789-1813* ed. George W. Corner (Princeton: Princeton University Press, 1948), 27.
- ³ Rush, *Autobiography*, 167; Carl Binger, *Revolutionary Doctor: Benjamin Rush, 1746-1813* (New York: Norton, 1966), 20 – 21.
- ⁴ David Freeman Hawke, *Benjamin Rush: Revolutionary Gadfly* (New York: Bobbs Merrill Company, 1971), 8.
- ⁵ Donald J D'Elia, *Benjamin Rush: Philosopher of the American Revolution*, Transactions of the American Philosophical Society Held at Philadelphia for Promoting Useful Knowledge (Philadelphia: The American Philosophical Society, 1974) 13.
- ⁶ Alyn Brodsky, *Benjamin Rush: Patriot and Physician* (New York: St. Martin's, 2004), 10.
- ⁷ Hawke, 10.
- ⁸ Rush, *Autobiography*, 28-29; Goodman, 5.
- ⁹ Alan Heimert and Perry Miller, *The Great Awakening: Documents Illustrating the Crisis and Its Consequences* (Indianapolis: Bobbs Merrill Company, 1967), 152-153.
- ¹⁰ Rush, *Autobiography*, 29-30
- ¹¹ *Ibid.*, 35.
- ¹² *Ibid.*, 38.
- ¹³ *Ibid.*, 38-39.
- ¹⁴ Lawrence I. Conrad, Michael Neve, Vivian Nutton, Roy Porter, and Andrew Wear, eds., *The Western Medical Tradition: 800 BC to AD 1800* (Cambridge: Cambridge University Press, 1995), 454.
- ¹⁵ *Ibid.*, 43; n. 12.
- ¹⁶ *Ibid.*, 44.
- ¹⁷ Richard M. Gummere, *Seven Wise Men of Colonial America* (Cambridge: Harvard University Press, 1967), 71.
- ¹⁸ Rush, *Autobiography*, 77.
- ¹⁹ *Ibid.*, 42-43.
- ²⁰ Jordan Goodman, Anthony McElligott, and Lara Marks *Useful Bodies: Humans in the Service of Medical Science in the Twentieth Century* (Baltimore: Johns Hopkins University Press, 2003), 2.
- ²¹ Bentham's donation of his own body to science stands as a singular counter-example.
- ²² Ruth Richardson, *Death, Dissection and the Destitute*, 2d ed. (Chicago: Chicago University Press, 2001), 32.
- ²³ Peter Linebaugh "The Tyburn Riot Against the Surgeons" in Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow, eds. *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Random House, 1975), 70-71.

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- ²⁴ Richardson, 32.
- ²⁵ *Ibid.*, 7.
- ²⁶ *Ibid.*, 15-17.
- ²⁷ Linebaugh, "Tyburn Riot," 74-79; Bernard Mandeville, *An enquiry into the causes of the frequent executions at Tyburn: and a proposal for some regulations concerning felons in prison, and the good effects to be expected from them* (London: J. Roberts, 1725), 26.
- ²⁸ Richard Sugg points out that this dread has "survived well into twentieth-century Europe: as the Allied powers closed in on Berlin in 1945, the Russians in particular were keen to take Hitler alive, in order that his archenemy, Stalin, could ultimately have his body treated and preserved by a taxidermist for public display." Richard Sugg, *Murder After Death: Literature and Anatomy in Early Modern England* (Ithica: Cornell University Press, 2007), 17.
- ²⁹ Mandeville, 26-28.
- ³⁰ R. Michael Gordon, *The Infamous Burke and Hare: Serial Killers and Resurrectionists of Nineteenth Century Edinburgh* (Jefferson, North Carolina: McFarland, 2009).
- ³¹ Tim Marshall, *Murdering to Dissect: Grave-robbing, 'Frankenstein' and the Anatomy Literature* (Manchester: Manchester University Press, 1995), 21-23; Richardson, back cover blurb.
- ³² Roy Porter, *The Cambridge History of Medicine* (Cambridge: Cambridge University Press, 2006), 189-190.
- ³³ Roy Porter, *Disease, Medicine and Society in England, 1550-1860*, 2d ed. (Cambridge: Cambridge University Press, 1995), 28.
- ³⁴ Rush, *Autobiography*, 43.
- ³⁵ *Ibid.*, 46. Editor, George W. Corner points out that Rush actively participated in the resistance to the Stamp Act (1765). Either Rush was forgetful at the time of writing his autobiography or was being disingenuous.
- ³⁶ *Ibid.*, 51-52, emphasis added.
- ³⁷ *Ibid.*, 52.
- ³⁸ *Ibid.*, 58-60.
- ³⁹ *Ibid.*, 55.
- ⁴⁰ *Ibid.*, 66.
- ⁴¹ *Ibid.*, 74.
- ⁴² *Ibid.*, 67.
- ⁴³ *Ibid.*, 69.
- ⁴⁴ *Ibid.*, 71.
- ⁴⁵ Rush stated the French and Indians lacked delicacy in the interactions of the sexes; both cultures painted their faces to excess; both ate their principal meal very late; both were fond of fishing and hunting; both avoided direct use of their names in conversation; and both held military prowess in high regard. *Ibid.*, 71-73.
- ⁴⁶ *Ibid.*, 46-47; 50.
- ⁴⁷ *Ibid.*, 50-51.
- ⁴⁸ *Ibid.*, 57.

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- ⁴⁹ *Ibid.*, 57. In his *Commonplace Book*, Rush discussed Madan's tract in favor of polygamy. Rush outlined Madan's argument but offered neither praise nor condemnation of the provocative stance. *Ibid.*, 244-245.
- ⁵⁰ *Ibid.*, 55.
- ⁵¹ *Ibid.*, 56.
- ⁵² *Ibid.*, 56.
- ⁵³ *Ibid.*, 56.
- ⁵⁴ *Ibid.*, 56-57.
- ⁵⁵ Heimert and Miller, xv-xvi.
- ⁵⁶ Voltaire, *An essay upon the civil wars of France, extracted from curious manuscripts. And also upon the epick poetry of the European nations, from Homer down to Milton. By Mr. de Voltaire. To which is prefixed, a short account of the author. By J. S. D. D. S. P. D.*, (Dublin, 1760).
- ⁵⁷ Thomas S. Kidd, *The Great Awakening: The Roots of Evangelical Christianity in Colonial America* (New Haven: Yale University Press, 2007), xvii.
- ⁵⁸ J. N. Morris, *Renewed By the Word: The Bible and Christian Revival Since the Reformation* (Peabody, Massachusetts: Hendrickson, 2005), 75.
- ⁵⁹ Elie Halévy, *The Birth of Methodism in England* (Chicago: University of Chicago Press, 1971), 36.
- ⁶⁰ Liam Iwig-O'Byrne, *How the Methodists Were Made: The "Arminian" Magazine and Spiritual Transformation in the Transatlantic World, 1778-1703* (PhD Dissertation, University of Texas at Arlington, 2008), 8.
- ⁶¹ Benjamin Franklin, *The Autobiography of Benjamin Franklin* Harvard Classics vol. I (New York: P. F. Collier and Son, 1909), 107-108.
- ⁶² Iwig-O'Byrne, 9-10.
- ⁶³ David Hempton, *Methodism: Empire of the Spirit* (New Haven: Yale University Press, 2005), 35.
- ⁶⁴ Frank Lambert, *Inventing the "Great Awakening"* (Princeton: Princeton University Press, 1999), 236-237.
- ⁶⁵ *Ibid.*, 239-241.
- ⁶⁶ Iwig-O'Byrne, 224-225; Kidd, xv.
- ⁶⁷ Goodman, 319.
- ⁶⁸ David M. Horton, *Pioneers in Penology: The Reformers, The Institutions, and the Societies 1557-1900, Book 1* (Lewiston, New York: Edwin Mellen Press, 2006) 62.
- ⁶⁹ Jock D. Marietta and G. S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania 1682-1800* (Philadelphia: University of Pennsylvania Press, 2006) 12.
- ⁷⁰ Robert J. Turnbull, *A Visit to the Philadelphia Prison; Being an Accurate and Particular Account of the Wise and Humane Administration Adopted in every Part of that Building; Containing also an Account of the Gradual Reformation and Present Improved State of the Penal Laws of Pennsylvania; with Observations on the Impolicy and Injustice of Capital Punishments* (London: James Phillips & Son, 1797), 5.
- ⁷¹ Marietta and Rowe, 12.

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- ⁷² *Ibid.*, 12-13.
- ⁷³ Turnbull, 5.
- ⁷⁴ Marietta and Rowe, 16-18.
- ⁷⁵ *Ibid.*, 19-20.
- ⁷⁶ *Ibid.*, 182.
- ⁷⁷ Rush, *Autobiography*, 135-137.
- ⁷⁸ *Ibid.*, 137-138.
- ⁷⁹ John Harvey Powell, *Bring Out Your Dead: The Great Plague of Yellow Fever In Philadelphia In 1793* (New York: Arno Press, 1970), 14.
- ⁸⁰ Powell, 85.
- ⁸¹ William Cobbett, "The Rush Light", vol 3, March 1800, 117.
- ⁸² Winthrop Neilson and Frances Neilson, *Verdict for the Doctor: The Case of Benjamin Rush* (New York: Hastings House, 1958), 195.
- ⁸³ Horton, 215.
- ⁸⁴ Turnbull, 6.
- ⁸⁵ Horton, 215-216.
- ⁸⁶ "Constitution of the Philadelphia Society of Alleviating the Miseries of Public Prisons".
- ⁸⁷ Horton, 218.
- ⁸⁸ *Ibid.*, 250.
- ⁸⁹ Turnbull, 21.
- ⁹⁰ Turnbull, 46.
- ⁹¹ Michael Meranze, *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835* (Chapel Hill: University of North Carolina, 1996), 175.
- ⁹² John Howard, *The State of the Prisons in England and Wales, with Preliminary Observations and an Account of Some Foreign Prisons and Hospitals* (London: 1780), 3. See Chapter 4 for a fuller description of Howard's role in prison reformation.
- ⁹³ Mark E. Kann, *Punishment Prisons, and Patriarchy: Liberty and Power in the Early American Republic* (New York: New York University Press, 2005), 91.
- ⁹⁴ Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* trans. by Richard Howard (New York: Random House, 1988), 61.
- ⁹⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* trans. by Alan Sheridan (New York: Random House, 1978), 125.
- ⁹⁶ Kann, 101. For specifics of Rush's proposed changes in the prisons see his "An Enquiry Into the Effects of Public Punishments Upon Criminals, and Upon Society" (Philadelphia: Joseph James, 1787), 9-16. These will be discussed in detail in Chapter 4.

CHAPTER IV

RUSH: REFORM AND PENITENCE

Among Benjamin Rush's wide-ranging and varied interests, penal reform was neither his first nor his most important project, which reflects more on the enormous scope of Rush's interests and involvements more than on any lack of concern for the state of punishment. Indeed, Rush was at the forefront of the concerned citizens of Philadelphia by whose efforts Pennsylvania's penal system adopted significant and progressive changes. Although Rush himself died before the full implementation of these changes and the full efflorescence of the modern penitentiary, the trail of attribution leads directly to his doorstep.

For Benjamin Rush, a man of many interests and many social connections, Philadelphia proved to be a fortuitous place of residence. As a physician, his range of contacts within Philadelphia was extensive; his patients ranged the entire gamut of Philadelphia's social strata. More importantly, he was asked to join the faculty of the school of medicine at the College of Philadelphia, which soon merged with Franklin's State University of Pennsylvania to become the University of Pennsylvania.¹ As instructor of Chemistry, Rush was an important and respected faculty member whose influence spread exponentially through his students; in his eulogy of Rush, David Ramsay calculates that Rush personally taught and trained 2,250 physicians.² Collegially, he often engaged in heated, sometimes rancorous debates with his fellows. While it is probably not possible to determine if Rush would have been a delegate representing Pennsylvania at the Continental Congresses had those gatherings not been held in Philadelphia, Rush was of sufficient prominence and respect to hold his own with the likes of Adams, Franklin, and Jefferson. Perhaps not the star of the show, he was certainly not an embarrassment to his delegation or his community.

At the First Continental Congress, Rush met Adams for the first time and became better acquainted with Jefferson. Rush recorded:

I waited upon nearly all the members of this first Congress, and entertained most of them at my table. John and Samuel Adams domesticated themselves in my family. . . . Patrick Henry from Virginia was my patient under the inoculation for the small pox.³

Rush's friendship with John Adams and Thomas Jefferson later proved pivotal in their relationship, as revealed by the subsequent publication of the Adams-Jefferson correspondence. After the animosity that accrued between Adams and Jefferson during Adams's administration and the bitter contention of the election of 1800, it was solely through Rush's personal intervention that good will was re-established between those two giants and a long-sustained, mutually beneficial correspondence initiated. Similarly, it would be through Rush's personal encouragement and unremitting goading that Thomas Paine eventually produced and published his crucial pamphlet that helped rally support for the colonial cause of liberty and focus the struggle on the need for independence. Rush even suggested the name, *Common Sense*.⁴

In his own right, Rush participated actively in the Revolutionary War as a physician and medical advisor to the army, in which capacity he proved a keen observer of the sanitary condition of the soldiers. Not only did Rush take his duties seriously, he executed them fearlessly. He followed his private convictions, perhaps to a fault. His deprecations of George Washington as the man he believed responsible for the deplorable physical condition of the army doomed Rush to ignominious dismissal from his post as advisor. Flying fearlessly headlong into the face of conventional and popular wisdom characterized Rush's approach in many aspects of his life. His stubborn determination and unwavering conviction of the efficacy of his method of treating yellow fever has been discussed above. His confidence in his own ability made him closed to the possibility that others might be right or have valuable insights into the matter. Rush's attitude probably exasperated friends and colleagues, and various explanations can be found. He may have been the kind of personality that enjoys a certain level of contrariness, deriving some satisfaction from being "on the outs" with conventional wisdom, thereby being able to cast

himself as a poor, misunderstood victim. His responses to accusations regarding the dangers of his treatment of yellow fever patients support this interpretation. More likely, Rush sincerely believed he was right and – armed with the confidence of moral or scientific (whichever applied in the given situation) superiority – saw no need to waver in his course or fear for the outcome. Complete assurance of rectitude can impart steady impetus to persevere – even in the most wrongheaded of policies – that those of less secure conviction do not enjoy.

Among the controversial causes that Rush championed was the abolition of capital punishment. Personal experience as a physician treating the incarcerated, combined with his insights into the human mental condition gained as a physician, not to mention his strong religious conviction, convinced Rush of the practical importance of treating the criminal in a more humane and enlightened way in order to achieve reform. Capital punishment, as practiced in Britain and America, more particularly in Pennsylvania, was having little good effect in Rush's view. It failed to prevent crime. Although it has always been impossible to determine the exact extent to which the threat of capital punishment suppresses crime, Rush was convinced that the continued proliferation of crime suggested that the death penalty provides far less deterrent value than its advocates claimed. Rush endorsed incarceration as the more humane and more effective alternative.

In contrast to eighteenth-century Britain where the emphasis on property issues had resulted in an explosion of laws that carried the capital penalty, the flatter, less hierarchical social structure of Pennsylvania in combination with the apparently limitless availability of land and other resources led civil authorities to adopt a milder approach to penology in terms of applying the death penalty. Ownership in real property was widespread in America; the possibility of land ownership was within the reach of almost every white person. Furthermore, the distance between the highest and lowest members of society was less extreme in America. Most importantly, besides the relatively narrow range of social status, Pennsylvanian society was primarily middle class with few poor or extremely wealthy compared to England. Historian Michael

Meranze contends that capital crimes are more associated with greater divisions in class.⁵ In addition, Meranze argues, the Quaker foundation that imbued the spirit of Pennsylvania did not emphasize material prosperity as a sign of divine selection as was the case in Calvinist New England.

Although the Philadelphia Society for Alleviating the Miseries of Public Prisons (PSAMPP) was nominally chartered in 1787 to relieve the suffering of the inmates at The Walnut Street Jail, the group's aim was nothing less than a rethinking of the core of the penological philosophy. No longer would society be called upon to witness, corroborate, and validate execution. No longer would benefits to society be deemed to accrue by the public spectacle of execution. Instead, the reformers argued, society was liable to be contaminated by the criminal element present at executions and criminal tendencies were actually even fostered and inflamed by witnessing such events.⁶ Many individuals who shaped the earliest years of the new nation espoused ideas associated with the Enlightenment – men such as Franklin, Jefferson, Hancock, Adams, Jay, and Madison. Each of these men favored the abolition or at least a severe curtailment of capital punishment.⁷ Most radical of them all was Rush who advocated total elimination of the death penalty.⁸

Although not a zealous devotee of any particular denomination of Christianity, Rush did respond sympathetically, even eagerly, to the more evangelical, low-church blends. Based on the preachers he praised in his writing, it is clear that the more emotional varieties of evangelical Christianity appealed to him in preference to the deistic approaches favored by Jefferson and Franklin. Central to the evangelical Christians' efforts was the belief that humans could be redeemed at any time. Acceptance of Christ and a 'transformative' experience could occur regardless of one's physical or social condition, regardless of one's previous moral life. Coupled closely to this concept of spiritual salvation was the belief that the human condition in this life could be improved. Unlike Calvinists who regarded earthly prosperity as an indication of God's favor and election, Methodists believed that there was no limit or impediment between

the individual and Christ nor any reason why earthly suffering should not be alleviated. Just as it was up to the individual to choose Christ, it was the individual's duty to make the best of his or her lot in this life. For many adherents to evangelical Christianity, physical expression of their belief played an important role and these manifestations sometimes took the form of organized charitable or benevolent societies dedicated to righting some perceived wrong or evil – slavery, drunkenness, inequality, or capital punishment. Rush joined and supported a few of these causes. He participated actively, producing pamphlets, for instance, that advocated the abolition of slavery. Most importantly, he founded and worked tirelessly in the area of penal reform.

As a direct result of the work of Rush and others who would subsequently join PSAMPP, a new law in 1786 substituted an alternative to the death penalty. In the case of some of the lesser felonies, the law imposed continued hard labor, the punishment to be publicly and disgracefully performed.⁹ Prior to this time, having executions in public established a connection between the condemned and the witnesses, between the places of everyday life and the places of criminal activity and criminal justice. In other words, there was no liminal division, no separation and the barrier between criminal and average citizen was perilously, transparently thin.¹⁰ In similar fashion, after 1789 the places of non-capital punishments such as pillorying and whipping, were still in high-traffic locations and were specifically chosen for maximum visibility. Punishment remained well-integrated into Philadelphia's public life.¹¹ When hard labor supplanted execution as a primary punishment, it was not surprising that the public aspect of the punishment was retained. As Meranze states, "Visibility and corporality were the true coin of that penal realm."¹²

The movement toward public labor instead of capital punishment seemed to be a good beginning toward dismantling the ubiquity of the scaffold. Moreover, with public labor as a part of the penal system, the system moved a step further in the desacralization process. In place of stylized rituals that echoed the sufferings of Christ and could easily make martyrs of those who were being punished, the new plan substituted the banality of work. This punishment was

clearly less special and spectacular; instead, it was intentionally ordinary and mundane, though still enacted in public. "Time and labor," notes Meranze, "would lead to reformation; the expiation of crime would be linked to the rebirth of character."¹³ Public labor drawing upon Protestantism's belief in the positive qualities of labor offered a prolonged and attenuated example of punishment, rather than a brief and spectacular one.¹⁴ Nevertheless, Pennsylvania's hard labor punishment occurred inarguably within the persistent context of public punishment as example and deterrent.¹⁵

Decent, law-abiding citizens of Philadelphia may well have been accustomed to seeing public executions and even corporal punishment for lesser crimes. These punishments did share a more or less fixed place of exhibition. In other words, while they certainly were public, their location was known and just as easily avoided as viewed. In contrast, the nature of the new public labor imposed on felons sent the criminals throughout the city performing public works, thereby bringing the worst of society directly into contact with the city's best. Avoidance proved virtually impossible since the criminals seemed ubiquitous in the scope of their labor. Respectable people found themselves in propinquity with coarse men who had little to lose from amusing themselves by hurling insults, abuse, and innuendo at their social betters.¹⁶ This situation was a complete reversal of the abuse prisoners in the stocks or pillories received from the law-abiding burghers; now it was the law-abiding denizens who suffered from the crude epithets hurled at them by the shackled dregs of the city.¹⁷ Rush particularly loathed this turn of events and found the situation deplorable. In March 1787, he published a pamphlet, "An Enquiry into the Effects of Public Punishments upon Criminals and upon Society," that squarely tackled this situation. Rush noted that degrading public punishments failed to improve the prisoners, associated labor with infamy, and excited both sympathy and shame among the honest citizens.¹⁸ Rush and other respectable citizens of Philadelphia petitioned the state's legislature to change the law of 1786.¹⁹

Overall, this reforming law did not yield the anticipated satisfactory results. Nevertheless, the public exposure of convicts at their labor did produce a heightened awareness of the distressing conditions of prisoners among a much larger number of persons than could have been the case had they remained secluded within the dismal High Street and Walnut Street Jails. The continued problems plaguing the penal administration, in tandem with this additional publicity given to these deplorable conditions, impelled the formation of the PSAMPP in 1787.²⁰ The Society was formally organized on Tuesday, 8 May 1787, in German School House on Cherry Street, near Rush's house. In his history of the organization, Negley K. Teeters asserts that the reading of Rush's pamphlet, "An Enquiry into the Effects of Public Punishments upon Criminals and upon Society" at Franklin's house two months prior to the formation of the Society was at least partially responsible for the group's establishment.²¹

Resulting in part from Rush's personal experiences in his visits to the Walnut Street Jail, article six of the constitution of PSAMPP required that members visit prisons "at least once a Month, enquire into the circumstance of the Prisoners, and report such abuses as they shall discover, to the proper Officers appointed to remedy them. They shall examine the influence of confinement or punishment upon the morals of the Prisoners."²² PSAMPP's constitution reflects thinking similar to Bentham's in ensuring oversight of the carceral process. Roberts Vaux (1786-1836), Secretary and Commissioner of the Philadelphia Prison Society, writes in his summary of the efforts of penal reform:

The [jail's] keeper derived his appointment from the Sheriff of the city and county of Philadelphia; and had been for many years retained in office, on account of his supposed competency for a charge so disagreeable, as to excite neither desire nor competition on the part of persons better qualified to occupy the station. Indeed the circumstances, under which the incumbent had been long connected with criminals, caused him to be suspected of a more intimate knowledge of the depredations committed in the city, than comported with that unblemished reputation which ought to belong to such an officer.²³

Rush and his colleagues believed that surveillance, not only of the prisoners but of the jailers as well would result both in greater efficiency and a reduction in corruption and abuse.

Beside the practical arguments of the utilitarians, who claimed that “Capital punishment does not work,” and the moral arguments of those motivated by Christian zeal, who insisted that “Capital punishment is inhumane,” citizens of the new republic in America were motivated to replace the death penalty as the principal form of punishment because hanging was closely associated with English law. Hanging was seen as the method most favored and vigorously applied by the English, *i. e.*, the monarchists from whom the colonists wished to separate. In his account of the reformation of New York’s penal system, Thomas Eddy, who was Rush’s contemporary and inspector of New York’s prisons, observed in 1801:

It was not to be expected that a people enamoured of freedom and a republic, should long acquiesce in a system of laws, many of them the product of barbarous usages, corrupt society, and monarchial principles, and imperfectly adapted to a new country, simple manners, and a popular form of government.²⁴

Symbolically, rejection of Britain’s favored form of punishment appealed to Americans in Rush’s time on a visceral level; in times of a nation’s crisis, people who wish to demonstrate their patriotism sometimes ostentatiously reject anything associated with the enemy no matter how slight or tenuous the connection. As an act arising from patriotic, revolutionary zeal, the abandonment of hanging in favor of milder, more humane incarceration served Americans as yet one more explicit means of distinguishing themselves from their British oppressors. Specifically, the notion of imprisonment in place of hanging spoke to a democratic sense of the value and dignity of the individual as well as the possibility of his redemption and reformation. By contrast, the arbitrary, even capricious, dispensation of death by English law ran contrary to the Americans’ notions of a well-ordered, egalitarian society in which accidents of birth or position should have no bearing on an individual’s right to a full measure of justice.

Rush understood and promoted the view that a new government based on republican ideals in which the individual served as a the basis of authority had no business retaining forms of punishment that smacked of monarchial, autocratic forms of power. He wrote, “We have changed our forms of government, but it remains yet to effect a revolution in our principles,

opinions, and manners so as to accommodate them to the forms of government we have adopted.”²⁵ Masur notes that Rush believed that “this experiment in government and society, frightfully tenuous as it was, could never succeed as long as it retained the gallows, a device antithetical to the principles and goals of a republican nation.”²⁶

On May 4, 1792, Rush published a pamphlet, titled “Considerations on the Injustice and Impolicy of Punishing Murder by Death” in which he clarified his views on capital punishment and its place in the American nation.

[C]apital punishments are the natural offspring of monarchical governments. Kings believe that they possess their crowns by a *divine* right; no wonder, therefore, they assume the divine power of taking away human life. Kings consider their subjects as their property; no wonder, therefore, they shed their blood with as little emotion as men shed the blood of their sheep or cattle. But the principles of republican governments speak a very different language. They teach us the absurdity of the divine origin of kingly power. . . . They appreciate human life, and increase public and private obligations to preserve it. They consider human sacrifices as no less offensive to sovereignty of the people, than they are to the majesty of heaven. They view the attributes of government like the attributes of the deity, as infinitely more honoured by destroying evil by means of *merciful* than by exterminating punishments. The united states have adopted these peaceful and benevolent forms of government. It becomes them therefore to adopt their mild and benevolent principles. An execution in a republic is like a human sacrifice in religion. It is an offering to monarchy, and to that malignant being, who has been stiled a murderer from the beginning, and who delights equally in murder, whether it be perpetrated by the cold, but vindictive arm of the law, or by the angry hand of private revenge.²⁷

Concomitant with his belief that capital punishment was ineffective and inappropriate in the new American republic, Rush also contended that *public* punishment of any kind was wrong. In both its English heritage and in its own colonial experiences, America had a history of publicly dispensing punishment, be it corporal or capital, in order to maximize the deterrent value of the ritual. Rush came to believe that public punishment not only failed to serve as a chastening and monitory example but it also debased everyone associated with it: condemned, legal magistrates, executioner, and certainly the crowds of witnesses it was intended to improve.

Having already witnessed the effects of forced public labor on the prisoners at Walnut Street Jail, Rush wrote in 1787:

But may not the benefit derived to society by employing criminals to repair public roads, or to clean streets, overbalance the evils that have been mentioned? I answer, by no means. On the contrary . . . the practice of employing criminals in public labour, will render labour of every kind disreputable, more especially that species of it which has for its objects the convenience or improvement of the state. It is a well known fact, that white men soon decline labour in the West-Indies, and in the southern states, only because the agriculture, and mechanical employments of those countries, are carried on chiefly by Negro slaves. But I object further to the employment of criminals on the high-ways and streets, from the idleness they will create by alluring spectators from their business; and thereby depriving the state of greater benefits from the industry of its citizens, that it can ever derive from the public labour of criminals.²⁸

In his study of comparative punishments in America and Europe, modern historian James Q. Whitman observes that public corporal punishment was a degrading, low-status punishment under any conditions. “[B]ut in the early American Republic,” notes Whitman, “its status connotations came to be especially pronounced. For a simple reason: corporal punishment was associated with the definitionally low-status in America, the status of black slaves.”²⁹ Although public convict labor was used in both Old Regime and Republican France, the risk of associating labor in general with demeaning status was not as significant because black slavery did not exist in the same space. The coexistence of slavery and forced labor in America proved to be the sticking point for some opponents of public forced labor. The overlapping interests of eliminating capital punishment and abolishing slavery manifested themselves on both sides of the Atlantic and continued to coincide throughout the nineteenth century. Historian Mary Welek Atwell attributes this union of interests to individuals who were unwilling to accept “the state’s right to participate in legalized violence and killing.”³⁰

Rush saw the corrosive and degrading effects of forced public labor on both the workers and the observers. He regarded this penal experiment as a failure in that it did not improve the criminals; it tended to weaken them by reducing their sense of shame.³¹ Moreover, it brought criminals into close and continued proximity with honest citizens who risked being contaminated either by direct contact or by the criminals’ serving as an example of the wrong type. Rush agreed, asking rhetorically, “How often do we find pockets picked under a gallows, and highway-robberies committed within sight of a gibbet?”³² In his methodology for evaluating

the relative merits of various forms of punishment, Rush explicitly acknowledged his medical point of view and actively credits such a view as being a positive good.³³ To Rush, contagion of crime mirrored the contagion of disease. True to his medical background, he proposed to treat criminal contagion in the same way one dealt with a contagious disease: quarantine. He also correlates the cutting off, or amputation, of the criminal from the healthy part of society as a whole, to the surgeon's saving the body by removing the part that is diseased.³⁴

Although germ theory was not yet understood, people did clearly grasp that certain diseases could be contracted by proximal contact and similarly that they could be avoided or limited by isolating the sufferers and reducing contact between the diseased and the healthy. Rush held that removing criminals from contact with normal, "healthy" society would help prevent the spread of the disease of crime by eliminating the opportunity for the good citizen to acquire bad habits from the criminal. In addition, Rush argued that the extended deprivation of liberty was a punishment far worse than death.

An attachment to kindred and society is one of the strongest feelings in the human heart. A separation from them, therefore, has ever been considered as one of the severest punishments that can be inflicted upon man. Personal liberty is so dear to all men, that the loss of it for an indefinite time, is a punishment so severe, that death has often been preferred to it.³⁵

As a signer of the Declaration of Independence and personal participant in the Revolutionary War, it is not difficult to understand Rush's view of liberty as something so precious that death was preferable to its loss.

This exalted view of liberty led Rush into a paradoxical view of the relative merits of capital punishment and imprisonment. On the one hand, Rush clearly contended that capital punishment is morally wrong, that no man has the right to usurp the privileges reserved to the Deity, and criminals deserved humane treatment.³⁶ On the other hand, in order to promote the efficacy of incarceration as a viable means of punishment, he asserts that imprisonment is ever so much *worse* than capital punishment.³⁷ Otherwise stated, capital punishment is too good for criminals. In short, arguments against capital punishment tended to take two main forms: it is

morally wrong or it is not effective.³⁸ Rush clearly made use of both of these as well as his appeal to patriotism.

Rush's medicalized approach to penology extended further than maintaining the health of persons not yet contaminated by prophylactic isolation of criminals. Indeed, Rush regarded the separation of the criminal from the public as a positive step toward reforming him and restoring him to the legal equivalent of health. Instead of perpetuating and increasing murder by punishing that crime with legally sanctioned murder, he stressed that individuals, the state, and society as a whole would profit more from redemption of the criminal and his reformation into a productive, contributing citizen.³⁹ Historian Mark Kann praises Rush, stating that "One of Rush's major accomplishments was to propose the humane treatment of criminals but show how that treatment could be made to appear terrifying to both criminals and the public."⁴⁰ While he sought to promote an outward sense of foreboding and even terror, it was a spirit of penitent reverence that Rush envisioned evoking by his dicta for the specific operations of the jail and treatment of the prisoners.

Let the avenue to [the prison] be rendered difficult and gloomy by mountains or morasses. Let its doors be of iron; and let the grating, occasioned by opening and shutting them, be encreased by an echo . . . that shall extend and continue a sound that shall deeply pierce the soul. . . .⁴¹

The punishments should consist of BODILY PAIN, LABOUR, WATCHFULNESS, SOLITUDE, and SILENCE. They should all be joined with CLEANLINESS and a SIMPLE DIET.⁴²

As a direct result of PSAMPP's influence and efforts, the experiment of using criminals in public labor in Philadelphia came to an end. Instead, initially a small section was added to the Walnut Street Jail in 1790 specifically for penitential reform of criminals, i.e., solitary confinement.

In 1794 Pennsylvania abolished the death penalty for all crimes except first-degree murder. Historian Thosten J. Sellin explains:

The courts of all the counties of the state were authorized to commit felons to the Philadelphia institution where at least one-twelfth and not more than one-half of their sentences should be spent in the solitary cells, unless they were sentenced to life or twenty-five years for a second offence, previously capital, in which case they might have to serve their entire term in solitary.⁴³

Rush's emphasis on solitude and silence derived from his view of imprisonment as purposely more penitential than punitive. He understood that no one – not the criminal, nor the victim of the crime, nor society as a whole – actually gained anything by punishment *per se* if it were not accompanied by an actual transformation of the malefactor into a person who might be made a useful, contributing member of the community.

Rush firmly believed in the benefits of control of the body and the reduction of sensory stimuli as an effective means of treating and curing mental disturbances. In his 1812 observations on diseases of the mind he opined:

Before we proceed to mention the remedies for mania, . . . it will be necessary to mention the means of establishing *complete government* over patients afflicted with it, and thus, by securing their *obedience*, respect, and affections, to enable a physician to apply his remedies with ease, certainty and success.⁴⁴

He states that the first step towards establishing total control is to remove the patient from familiar surroundings and company.⁴⁵ Lest it seem like his methods relied solely on terror or intimidation, Rush also stressed the importance, both morally and therapeutically, of the doctor's benevolence.⁴⁶ He famously developed and promoted a confining chair in which the individual was unable to move, including motion of the head. Rendering the patient helpless and dependent, Rush believed, promoted a proper therapeutic attitude in which restoration to health could occur.⁴⁷ Rush found the enforced stillness promoted a calming of the mental storms that had raged inside the patients prior to their restraint in his therapeutic device.⁴⁸ Consider the long use of the straight-jacket as a means of inhibiting a mental patient's ability to move. Such confining measures are not used just to prevent the patient from injuring himself or others; the very act of reducing movement and physical agitation was, and still is, believed to lower mental agitation proportionately. Current nursing practice calls for positive measures to eliminate or reduce physical and sensory stimuli in the mentally agitated patient as a part of treatment to restore calm, although physical restraints are increasingly being replaced by chemical restraints.⁴⁹ Looking at the problem as a man of medicine, Rush believed that the effectiveness

of his restraining chair stemmed from the systematic removal of all options available to the patient. When the patient had no recourse but to cooperate, then restoration could begin.

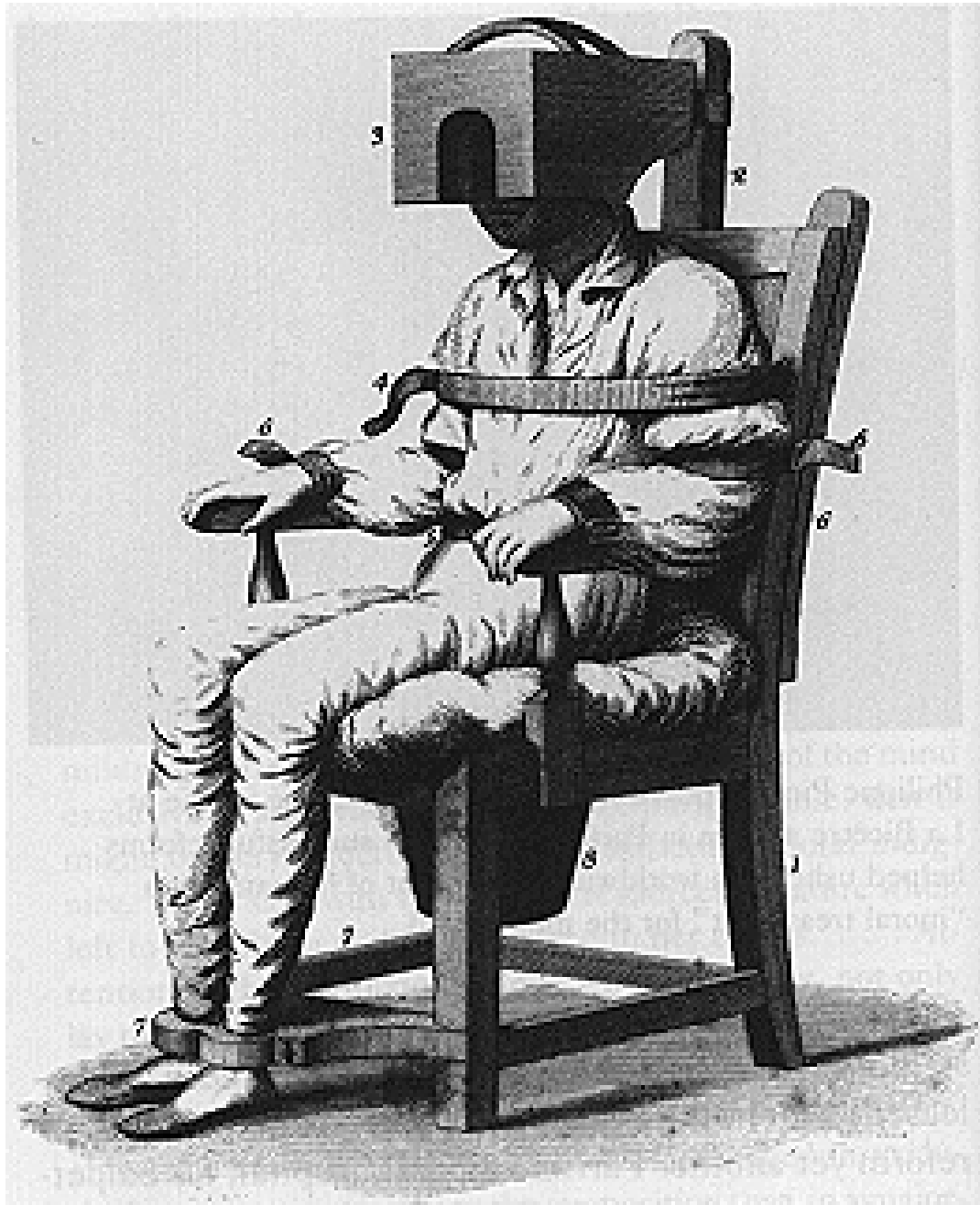


Figure 1. Rush's Tranquilizing Chair. University of Pennsylvania Medical School.
<http://www.uphs.upenn.edu/paharc/features/brush.html>

Similarly, Rush felt confident that deprivation of external stimuli – particularly conversation and society, even of the jailers or fellow prisoners – would promote a profound, life-altering introspection that must inevitably lead to a repudiation of the wayward acts and manners that had brought the prisoner to that position. Likewise, Rush favored cleanliness, both medically and morally. Silence – absence of sound – was the audible equivalent to cleanliness. Uncleanliness fostered disease, epidemic, and crime. Rush’s remedy for moral uncleanliness was to promote solitude, silence, temperance, and abstemiousness.⁵⁰ He wrote:

Do we prevent disease, by removing the body out of the way of its exciting causes acting upon debility? In a like manner, we prevent vice, by removing the mind, in its debilitated state, out of the way of bad company, and thus abstract it from the stimulus of vicious motives upon the will.⁵¹

Invariably, marginal, unclean people were blamed when outbreaks of crime or epidemic occurred. By his long association with the prisoners and the poor people of Philadelphia, Rush believed that the establishment of environmental controls and environmental cleanliness could treat both crime and disease. He unequivocally avowed, “Too much cannot be said in favor of CLEANLINESS as a physical mean of promoting virtue.”⁵²

Rush intended labor to serve multiple purposes. On a basic level, Rush expected a prison to be more or less economically self-sustaining. Convict labor would either directly feed the inmates or else contribute to the funds available to purchase food and other necessary items. Rush advocated that prisoners be denied the right or privilege of labor for the worst offenders. “[F]or the first or highest degree of guilt,” Rush opined, “let the punishment be solitude and darkness, and a total *want* of employment.”⁵³ In his 1786 address to the American Philosophical Society, he declared:

Idleness is the parent of every vice. . . . Labor of all kinds, favors and facilitates the practice of virtue. The country life is a happy life; chiefly, because its laborious employments are favourable to virtue, and unfriendly to vice. It is a common practice, I have been told, for the planters in the Southern States, to consign an house slave, who has become vicious from idleness, to the drudgery of the field, in order to reform him. The Bridewells and workhouses of all civilized countries prove that LABOR is not is not only a very severe, but the most benevolent of all punishments, in as much as it is one of the most suitable means of reformation.⁵⁴

Moreover, Rush attributed both “unnatural vice” and “solitary vice” to excessive idleness. He was among the few of his contemporaries who addressed the issues of masturbation and homosexual behavior among the prisoners.⁵⁵ Clearly, Rush’s endorsement of labor and admonitions against idleness indicate that he viewed labor as a positive good, both from the perspective of the utilitarian benefits resulting from products or services rendered as well as an activity that prisoners would actively desire for their own ends. Furthermore, depriving the prisoners of labor would therefore be sufficiently punitive to them to justify the state’s foregoing the fruits of that labor. In addition to the tangible rewards accruing from convict labor, personal improvement was an expected byproduct. New York’s prison inspector Eddy shared this view of the multifaceted benefits of labor. “While the punishment operates towards the amendment of the criminal,” notes Eddy, “it should by its example produce a salutary dread on the minds of others.”⁵⁶ Historian Adam Jay Hirsh observes, however, that “Hard labor in prison was believed to instill a habit of industry; on the other hand, slaves were commonly believed to exhibit a propensity for idleness and theft.”⁵⁷

Bodily confinement, physical restraint, deprivation of liberty, and enforced labor together formed the cornerstone of the idea that prolonged incarceration was a preferable punishment to the death penalty. A fine line existed between the humanitarian belief that imprisonment presented a more humane option for dealing with criminals and the concept that it may truly have led to a fate worse than death, thereby rendering those supporting carceral over capital punishment the crueler. Few confronted the issue head-on, preferring instead to emphasize the humanity of not taking a human life and the noble aspiration of rehabilitation as opposed to mere infliction of bodily pain. This is not to suggest supporters of the penitentiary were intentionally disingenuous or hypocritical; rather, their enthusiasm for the benefits they foresaw tended to blind them to some of the logical implications and real consequences of the plan. Rush did not differ from his fellows in skirting those difficult questions.

The shift from harsh punishments aimed at the body, whether capital or corporal, to the less overtly physical punishments afforded by long-term incarceration reflect a shift in the way the body itself was viewed. Foucault observes:

In the old system, the body of the condemned man became the king's property, on which the sovereign left his mark and brought down the effects of his power. Now he will be rather the property of society, the object of a collective and useful appropriation. This explains why the reformers almost always proposed public works as one of the best possible penalties.⁵⁸

However, Foucault was referring to the transitional period during which the public aspect of the punishment was still emphasized. After reiterating the old penal philosophy that depended upon publicity and spectacle for its deterrent value, he remarked, "The idea that imprisonment might as it does today cover the whole middle ground of punishment, between death and light penalties, was one that reformers could not arrive at immediately." However, Rush, truly ahead of his colleagues in this matter, had anticipated this development. In 1787 he wrote:

If society can be secured from violence, by confining the murderer, so as to prevent a repetition of his crime, the end of extirpation will be answered. In confinement, he may be reformed—and if this should prove impracticable, he may be restrained for a term of years, that will probably be coeval with his life.⁵⁹

Clearly Rush had no problem conceiving of life imprisonment, if necessary, as an appropriate and sufficient form of punishment.

As Rush indicated in his description of the meticulous regimen to be applied to the prisoners, the central feature of incarceration was control. Every meal, every ablution, the sleeping, waking, rising, and retiring, all came under the control and regimentation of the prison. This minute control was the legal equivalent of the restraints Rush advocated for the mentally ill. The first step in the restoration of order and health was the imposition of control over the body, which is *not* to say the infliction of pain. By means of minutely controlling the prisoner's body and all actions regardless how trivial, reformation of his or her spirit was believed to occur. Foucault notes, "Work on the prisoner's soul must be carried out as often as possible. The prison, though an administrative apparatus, will at the same time be a machine for altering minds."⁶⁰ In addition, for treatment of this sort to be effective both to the criminal enduring it and

as a deterrent to others, punishment had to be executed in private. “Though the sentence and the reasons for it should be known to all,” writes Foucault, “the penalty should be carried out in secret.”⁶¹ He later adds:

The training of behaviour by a full time-table, the acquisition of habits, the constraints of the body imply a very special relation between the individual who is punished and the individual who punished him. It is a relation that not only renders the dimension of the spectacle useless: it excludes it.⁶²

Historian David J. Rothman argues that the penitentiary did not emerge as a total, controlling institution until the Jacksonian era; he locates its origin in the erosion of control and stability commonly experienced during the turbulent times of the new republic’s adolescence. While his points about Jacksonian Americans’ attempt to restore order and impose control on a world that some viewed as spinning out of control may be valid, they do not account for Rush’s writings and advocacy of such measures which pre-date the Jacksonian Era by several decades. Nor does Rothman’s explanation account for the work of Romilly, Bentham, and others in Britain.⁶³

Although Rush died in 1813, the penitentiary portion of the Walnut Street Jail was well established by that time. Writing the year before his death, Rush remarked on the success of the penitentiary system as it existed at the time:

In vain have legislators substituted the exterminating axe and halter, and the influence of ignominious or painful corporeal punishments, for this divine mode [forgiveness] of curing moral evil. The danger and mortality of the venereal disease were increased, in former times, by the contempt, neglect, and corporeal chastisement, to which persons affected with it were exposed. Since the pain and shame of the disease have been considered as its ample punishments, and the subjects of it restored to public favour, the disease has every where declined, and is now rarely attended with danger, or the loss of life. The abolition of the punishment of death, and of cropping, branding, and public whipping, and substituting for them, confinement, labour, simple diet, cleanliness, and affectionate treatment, as means of reformation and forgiveness, have produced similar moral effects in the jail of Philadelphia. . . . May this christian [*sic*] system of criminal jurisprudence spread, without any of its imperfections, throughout the world! and may the rulers of nations learn from it, that the reformation of criminals, as well as the prevention of crimes, should be the objects of all punishments, and that the latter can be effected much better by living than by dead examples!⁶⁴

Indeed, its population had grown to the extent that keeping the prisoners separate and isolated in accordance with the original spirit of the project proved almost impossible in such a small

edifice.⁶⁵ (The inability to provide separate accommodations for all prisoners was one of the “failures” Rush alluded to in the previous passage.) These crowded conditions were directly responsible for the building of Eastern State Penitentiary in Philadelphia, beginning in 1822. The Pennsylvania System – Separate and Silent – became one of the two primary competing philosophies of penal methodology in America, the other being the Auburn System, which was practiced in New York. The Auburn System differed from the Pennsylvania System in that it permitted the convicts limited contact with each other, such as at meal times or brief periods of rest. The Pennsylvania System derived almost entirely from the practices described and advocated by Rush. In eulogizing Rush, David Ramsey, a prominent physician in South Carolina and one of Rush’s former students, praised the success of the prison system in Pennsylvania and envisioned its spread. He wrote optimistically, “This good example, as in the case of the dispensary, was successfully followed by several of the states, and bids fair to become general throughout the United States.”⁶⁶ Moreover, Rush’s system remained in force for most of the nineteenth century, and although it was not widely adopted by other penitentiaries within the United States, European penal institutions came to favor it over the Auburn System.⁶⁷

Notes

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- ¹ Benjamin Rush, *The Autobiography of Benjamin Rush: His Travels Through Life Together with his Commonplace Book for 1789-1813* ed. George W. Corner (Princeton: Princeton University Press, 1948), 81, 93.
- ² David Ramsay, *An Eulogium upon Benjamin Rush, M. D., Professor of the Institutes and Practice of Medicine and Clinical Practice in the University of Pennsylvania, Who Departed This Life April 10, 1813, in the Sixty-Ninth Year of his Age* (Philadelphia: Bradford and Inskeep, 1813), 19.
- ³ Rush, *Autobiography*, 110.
- ⁴ *Ibid.*, 114; Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776—1865* (Oxford: Oxford University Press, 1989) 62.
- ⁵ Michael Meranze, *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1845* (Chapel Hill: University of North Carolina Press, 1996) 21—22.
- ⁶ Mark E. Kann, *Punishment, Prisons, and Patriarchy: Liberty and Power in the Early American Republic* (New York: New York University Press, 2005), 220-221.
- ⁷ Masur, 62.
- ⁸ David M. Horton, *Pioneers in Penology: The Reformers, The Institutions, and the Societies 1557-1900, Book 1*. (Lewiston, New York: Edwin Mellen Press, 2006), 215.
- ⁹ Horton, 215.
- ¹⁰ Meranze, 44.
- ¹¹ *Ibid.*, 45-46.
- ¹² *Ibid.*, 54.
- ¹³ *Ibid.*, 55.
- ¹⁴ *Ibid.*, 71.
- ¹⁵ *Ibid.*, 62.
- ¹⁶ Roberts Vaux, *Notices of the Original, And Successive Efforts to Improve the Discipline of the Prison at Philadelphia and to Reform the Criminal Code of Pennsylvania: With a Few Observations on the Penitentiary System* (Philadelphia: Kimber and Sharpless, 1826), 21-23.
- ¹⁷ Meranze, 87.
- ¹⁸ Benjamin Rush, “An Enquiry into the Effects of Public Punishments upon Criminals and upon Society” (Philadelphia, 1787), 4, 5, 8, 15.
- ¹⁹ Vaux, 22-23.
- ²⁰ Horton, 215.
- ²¹ Negley K. Teeters, *They Were In Prison: A History of the Pennsylvania Prison Society 1787-1937, Formerly The Philadelphia Society of Alleviating the Miseries of Public Prisons* (Chicago: John C. Winston Company, 1937), 37.
- ²² “Constitution of the Philadelphia Society of Alleviating the Miseries of Public Prisons”.
- ²³ Vaux, 14-15.

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- ²⁴ Thomas Eddy, "An Account of the State Prison or Penitentiary House, in the City of New-York" (New York: Isaac Collins & Son, 1801) 9. Similarly, William Bradford wrote, "[S]anguinary 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." William Bradford, "An Enquiry How Far the Punishment of Death Is Necessary In Pennsylvania. . . ." (Philadelphia, T. Dobson, 1793), 5.
- ²⁵ Rush, Benjamin, *Letters*, Vol. I, to John Adams (American Philosophical Society, Princeton University Press), 523.
- ²⁶ Masur, 65.
- ²⁷ Benjamin Rush, "Considerations on the Injustice and Impolicy of Punishing Murder by Death" (Philadelphia, 1792), 18-19.
- ²⁸ Rush, "Enquiry", 9.
- ²⁹ James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (Oxford: Oxford University Press, 2003), 172.
- ³⁰ Mary Welek Atwell, *Evolving Standards of Decency: Popular Culture and Capital Punishment*, Politics, Media and Popular Culture (Series Title) David A. Schultz, General Editor, Volume 10 (New York: Peter Lang, 2004), 9.
- ³¹ Rush, "Enquiry", 4.
- ³² Rush, "Enquiry", 8.
- ³³ Rush, "Enquiry", 3.
- ³⁴ Rush, "Enquiry", 19.
- ³⁵ Rush, "Enquiry", 9.
- ³⁶ Rush, "Considerations", 13-14; Rush, "Enquiry", 15.
- ³⁷ Rush, "Enquiry", 9.
- ³⁸ Karl Shoemaker, "The Problem of Pain in Punishment: Historical Perspective." n *Pain, Death, and the Law* (Ann Arbor University of Michigan Press, 2001), 37-38.
- ³⁹ Rush, "Considerations", 16.
- ⁴⁰ Kann, 101.
- ⁴¹ Rush, "Enquiry", 9-10.
- ⁴² Rush, "Enquiry", 11.
- ⁴³ Thosten J. Sellin, *Slavery and the Penal System* (New York: Elsevier, 1976), 139.
- ⁴⁴ Benjamin Rush, *Medical Inquiries and Observations upon the Diseases of the Mind* (Philadelphia: Kimber and Richardson, 1812), 174, (emphasis added). In its online history of the Pennsylvania Hospital, the website of the University of Pennsylvania refers to this book as "the first psychiatric textbook printed in the United States." <http://www.uphs.upenn.edu/paharc/features/brush.html> (accessed 10 April 2010).
- ⁴⁵ Rush, *Medical*, 174-175.
- ⁴⁶ *Ibid.*, 175-179.
- ⁴⁷ *Ibid.*, 180-181.
- ⁴⁸ *Ibid.*, 181-182.

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- ⁴⁹ Glenn W. Currier and Michael H. Allen, "Physical and Chemical Restraint in the Psychiatric Emergency Service," *Psychiatric Services* 51 (June 2000) : 717-718; Janet V. Kow and David B. Hogan, "Use of Physical and Chemical Restraints in Medical Teaching Units," *Canadian Medical Association Journal* 163 (February 2000) : 339.
- ⁵⁰ Rush, *Medical*, 349-356.
- ⁵¹ *Ibid.*, 361.
- ⁵² Rush, "Oration," 38.
- ⁵³ Rush, "Considerations", 13. Emphasis in the original.
- ⁵⁴ Rush, "Oration," 34-35.
- ⁵⁵ Rush, *Medical*, 349-356. William Bradford wrote, "Of the Crime Against Nature. This crime, to which there is so little temptation, that philosophers have affect to doubt its existence, is , in America, as rare as it is detestable. In a country where marriages take place so early, and the intercourse between the sexes is not difficult, there can be no reason for severe penalties to restrain this abuse. The wretch, who perpetrates it, must be in a state of mind which may occasion us to doubt, whether he be *sui Juris* at the time; or, whether he reflects on the punishment at all. The infamy of detection would, of itself, be a punishment sufficient to restrain any one who was not certain of being undiscovered; and what terror has any punishment to him who believes that his crime will never be known? The experiment that has been made, proves that the mildness of the punishment has not encreased the offense. *In the six years preceding the act, and while the crime was capital, there are on record two instances of it; in the same perios since, there is but one.* It was impossible this last offender could be seduced by the mildness of the punishment, because at the time, and long after his arrest, he believed it to b a capital crime. These facts prove, that to punish this crime with death would be a useless severity. They may teach is, like the capital punishments formerly inflicted on adultery and witch-craft, how dangerous it is rashly to adopt the Mosaical institutions. Laws might have been proper for a tribe of ardent barbarians wandering through the sands of Arabia which are wholly unfit for an enlightened people of civilized and gentle manners." William Bradford, "An Enquiry How Far the Punishment of Death Is Necessary In Pennsylvania. . . ." (Philadelphia, T. Dobson, 1793), 20-21. Bradford's denial of the existence of "the crime against nature" in the United States adumbrates, similar statements made at New York's Columbia University by Iran's leader, Mahmoud Ahmadi-nejad: "In Iran there are no homosexuals," 24 September 2007.
- ⁵⁶ Eddy, 35.
- ⁵⁷ Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* (New Haven: Yale University Press, 1992), 87.
- ⁵⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1978), 109.
- ⁵⁹ Rush, "Enquiry", 16.
- ⁶⁰ Foucault, *Discipline and Punish*, 125.
- ⁶¹ Foucault, *Discipline and Punish*, 124.
- ⁶² Foucault, *Discipline and Punish*, 129.
- ⁶³ See chapters 3, "The Challenge of Crime," and 4, "The Invention of the Penitentiary," for the period in question. Rothman, 57-108.
- ⁶⁴ Rush, *Medical*, 365-366.
- ⁶⁵ Meranze, 189-190, 256.
- ⁶⁶ Ramsay, 117.

⁶⁷ Norman Johnston, *Forms of Constraint: A History of Prison Architecture* (Urbana: University of Illinois Press, 2000), 88.

CHAPTER V

ROMILLY: REFORM, ONE STATUTE AT A TIME

As a liberal-minded barrister and a devotee of Enlightenment thought, Samuel Romilly consistently sought ways to improve the efficacy of the law in reducing crime. While Romilly was by no means one-dimensional in his interests nor monomaniacal in his passion to overturn laws bearing the death penalty, unlike Rush, he did focus his efforts in a more concentrated manner, making him more memorable to history for this singular purpose. Unfortunately for Romilly, not to mention the many condemned under the Bloody Code, his efforts came at a time when England was in the grip of reaction to revolutionary ideas. The nation was afraid of republican social ideas, and felt its very survival under siege from Napoleonic France. By the time these worries had abated enough to allow Parliament to entertain genuine reform, Romilly had died by his own hand. Nevertheless, the ultimate success of England's effort to abandon the Bloody Code owes a substantial debt to the unflagging bravery and perseverance of Romilly.

Even though he had not yet been elected as a member of Parliament, Romilly served in the British Cabinet of 1806 as Solicitor General. A member of the Whig party, Romilly enjoyed the support and confidence of Charles James Fox, William Wilberforce, and other liberal and progressive members. His personal integrity and reputation had also earned him respect among Tory members as well. William Pitt the Younger, in particular, regarded him with approbation. The high esteem with which he was regarded boded well for the new cabinet member. His prospects for a successful career seemed promising.

Lord Grenville was appointed Prime Minister upon the untimely death of Pitt in January 1806. Grenville assembled his cabinet across a broad political spectrum, thereby earning for his cabinet the name Ministry of All the Talents. The Parliament that Romilly served was an

exciting and dynamic body that grappled with multiple, sometimes competing, issues. Since 1789, a considerable portion of Parliament's attention had been allotted to France's situation and to Anglo-Franco relations. As one of the main sources of political, economic, and military power in Europe, as Britain's near neighbor, and as her traditional enemy, France's internal struggles to re-invent itself could no more be ignored than a fire in a neighbor's apartment. Historian J. H. Plumb writes, "Apart from the Industrial Revolution, there was no profounder influence than the French Revolution in moulding the course of English history in the eighteenth century, and the development of its political expression in the nineteenth."¹ A political revolution does not occur in a vacuum. In the case of England, everyone understood that there would be consequences to the upheaval in France, even though the exact nature of those consequences was unknowable in advance.

Responses to the French Revolution varied in Parliament, both among individuals and over time. The Revolution itself altered over time as well, thereby making change in people's opinions hardly surprising. Initially, the Revolution met with considerable approval, even delight, among the British. Writers such as Thomas Paine, William Blake, William Wordsworth, Mary Wollstonecraft, and William Godwin praised the revolutionary cause.² Historian Jonathan Sperber contends, "[I]n 1790 there was probably a larger and better organized network of [Jacobin] political clubs in England than in France."³ Reasons for British support were as varied and nuanced as the people involved. In broad terms, Britons who regarded the French Revolution as a good thing, may be classified into two groups: those who saw it as liberating for the French lower classes, and, by extension, as a step toward greater equality for mankind; and those who saw the revolution as damaging to French power and hegemony and therefore beneficial to Britain.⁴ It was, of course, possible to entertain both views since they were not mutually exclusive. However, the first view seemed to appeal to the romantics, the dreamers, those of noble and idealistic motives, whereas the second view appealed to more practical individuals whose sights were clearly set on business or empire.⁵

Parliament had its share of romantics, idealists, and dreamers. Initially, some extolled the changes in France as the beginning of a new chapter in human liberty and the end of an antiquated, oppressive regime. Notable among those taking such a view were Charles James Fox and Richard Brinsley Sheridan.⁶ Similarly, others welcomed the Revolution with scarcely concealed glee at the opportunities unleashed by the momentary power vacuum created by the turmoil in France, and the prospect of France's being of little threat to British interests. English foreign secretary Lord Carmarthen wrote in 1789, "I defy the ablest Heads in England to have planned, or its whole Wealth to have purchased, a Situation so fatal to its Rival, as that to which France is now reduced by her own intestine Commotions."⁷

In his memoirs, Romilly acknowledges that he was one of the idealists in regard to the Revolution. He writes, "I was among those who, in the early stages of the French Revolution, entertained the most sanguine expectations of the happy effects which were to result from it, not to France alone, but to the rest of the world."⁸ As we have seen in Chapter II, his narrative depiction of Versailles, Paris, Louis XVI, and the Old Regime in general reveals much about his opinion of the pre-revolutionary French government as a corrupt, indulgent monarchy weighing needlessly heavily on the people who only begrudgingly accepted that weight. At the initial stages of the Revolution, Romilly was eager to help France establish a new, more democratic and representative body to guide the nation. Romilly relates that he was approached by Pierre Samuel du Pont de Nemours (1739-1817), a member of the National Assembly, for assistance in developing procedural rules by which debate could be managed.⁹ Romilly states that du Pont informed him that, "It was once . . . pleasantly proposed by one of the members to establish as a rule, that there should never be more than four members speaking at once." He translated British parliamentary rules into French as an operational guide to govern the course of deliberations in that assembly. Romilly suggests that he felt some degree of personal responsibility in the terrors that followed because his writings never were properly introduced and certainly not followed.¹⁰

Regardless what one's original opinion of the French Revolution had been, 1806 seemed a long way from 1789. The excesses of the Terror persuaded all but the most resolute English republican that the Revolution had failed to deliver its promise. Composing lurid tales of revolutionary horrors was not difficult when the reality truly could be horrifying. In the hands of a master of polemic and propaganda such as William Cobbett, a few chapter titles or a glance at the title suffice to demonstrate the frenzy of fear and reaction that he evoked. Among Cobbett's chapters are found: "A lad cuts a hole in the cheek of a priest, to hold up his head by, while another cuts it off;" "Women roasted alive, and their flesh cut off and presented to men for food;" and, "Two women tied naked to the guillotine, while their husbands are executed."¹¹ Historian E. P. Thompson opines that although, "It is not difficult to show that Cobbett had some very stupid and contradictory ideas, and sometimes bludgeoned his readers with specious arguments," Cobbett's barrage of alarm found a steady readership.¹²

Fear-mongering aside, Revolutionary France posed a danger to Britain beyond that of France under Louis XIV. Far from representing the removal of France as a threat to British interests, France under Napoleon Bonaparte showed itself to be the greatest, strongest enemy Britain had ever faced until that time. France was a power that did not just threaten to impinge on trade or reduce profits, but a menace that could conceivably produce an end to the British Empire and / or bring upheaval to the nation's internal structures. By 1806 those who had regarded the Revolution with disapproval found many of their fears either coming true or looming ever more likely to do so. Although Britain's control of the seas remained unchecked, the terrestrial power remained entirely in the hands of the French.¹³ More importantly, despite the initial interpretation of France's internal troubles as beneficial to England on a certain level, many within England interpreted the rise of their own lower classes at the expense of the nobility as a direct threat to the English structure of power.

Although Britain had already transformed itself into a constitutional monarchy in which real power lay principally with Parliament, Britain made no pretense of being an egalitarian so-

ciety. Parliament was entirely controlled by the aristocracy and the oligarchy. Women could not vote, religious exclusions existed, and only a handful of voters were allowed to exercise their franchise for a candidate, whom they had no part in selecting. Those who cast ballots had to do so in a public manner threatened with overtones of personal repercussions should they do so incorrectly. Many of those who held entrenched positions of power in English politics feared the spread of democratic notions and the egalitarian spirit from across the Channel. In light of Britain's recent experience with its North American colonies, that possibility seemed all too real. Although elites in Britain may have abhorred some of excesses of the Old Regime in France, they deplored the excesses of the *sans-culottes* and the Revolution even more.

By the latter part of the eighteenth century, Britain joined with Prussia, Austria, and others to curtail French republican power. The ascendancy of Napoleon, riding the crest of French national zeal in conjunction with his own personally cresting political and military successes, transformed France from the supposedly weakened enemy into Britain's deadly nemesis. Bonaparte had enjoyed almost unrelieved success on the continent. Referring to a map of Europe, Pitt was famously alleged to have remarked after Napoleon's victory at Austerlitz, "Roll up that map; it will not be wanted these ten years."¹⁴ By 1806 French armies had brought the majority of Europe either under Bonaparte's direct control, or through the nominal rule of one of his puppets, or as his coerced ally. Indeed, only Nelson's naval victory at Trafalgar dimmed the glow of French success; it was the single bright spot that Great Britain focused on as hope for future relief.

When examining behaviors and actions during the tumult of the French events, the tensions and pressures in and on Parliament in 1806 must be borne in mind. Analysis of the legislature's actions and statements must be considered in the context of a nation at war with a formidable enemy that showed every sign of unbroken success. Historian Jonathan Sperber argues the French Revolution caused the English to reinterpret their own social and political conflicts in terms of the Revolution.¹⁵ Any original optimism that the Revolution portended a new

dawn of freedom had vanished from the minds of most members of Parliament by 1806 – after all, Napoleon had reigned as an Emperor since 1804. Instead, Parliament's focus had shifted to effecting military and naval success against France, maintaining open routes for trade of food and other goods, and most importantly for the purposes of this study, preserving the politico-social status quo at home.

During the early years of the French Revolution, William Pitt served as Prime Minister (1783-1801) and for many years he enjoyed the confidence of the King and Parliament in matters of opposition to France. Under Pitt's leadership, Britain resisted the revolutionary zeal that it perceived as aggression, even joining with Austria, Prussia, Sardinia, Spain, and the Low Countries in the First Coalition to stem the tide of French activities. Despite the combined efforts of virtually all the states surrounding France, victories went more often to the revolutionary side than to the reactionary one. In England, Pitt's government eventually encountered criticism and abuse for failing to wage more successful war against the revolutionary upstarts. Moreover, Pitt, although conservative in as much as he opposed the liberal French, favored several progressive causes, including relaxation of some of the prohibitions and restrictions placed on Roman Catholics. Pitt's goal was to bring the Irish more securely into the fold of British rule by reducing the religious animosity between Catholic Ireland and Protestant England, thus removing the natural affinity between Ireland and France based on religious grounds. However, England proved to be in no frame of mind to see rights extended to Catholics. The idea was opposed on the streets, in Parliament, and particularly by King George III in his lucid moments. Pitt resigned in 1801 as a result.

Pitt was followed by Henry Addington who concluded a highly unpopular peace with France with the Treaty of Amiens in 1802. This peace did not last long, nor was the resumption of the war any more successful for the English. Addington's ministry fell in 1804, and Pitt was returned to power. During his second ministry, the spectacular victory of Trafalgar encouraged the British that they could prevent an armed invasion by the French. Yet, also during this time

Napoleon's pivotal victories at Ulm and Austerlitz left no illusion as to where the land power lay on the continent of Europe. Shortly after Austerlitz, Pitt died. With no leader enjoying a clear majority of seats, a coalition government was assembled under William Grenville, including supporters of Grenville, those of Henry Addington, and Foxite Whigs – among the latter, Romilly as Solicitor General¹⁶. Precisely because of the cobbled-together nature of the coalition and because Grenville intentionally sought to include men of the best ability with little regard for their politics, this administration became known by its famous nickname. However, Pitt's biographer Robin Reilly points out that the new government included none of Pitt's followers and gave the lie to this description.¹⁷

In 1807 Romilly entered Parliament representing Horsham, his seat a benefice from the Duke of Norfolk.¹⁸ Romilly showed a newcomer's enthusiasm for righting injustices and alleviating abuses of power that came to his attention. Like many others, he supported the abolition of slavery and the slave trade. He found little to question in the matter, seeing slavery as a self-evident abomination that should be stopped.¹⁹ He recorded in his memoirs that when a bill to abolish slave trade with foreign colonies had passed the House of Commons, the vote in the House of Lords was 53 for the bill and 18 against it. He seemed to delight in noting, "Of this 18 one third were the King's sons; the Dukes of York, Clarence, Cumberland, Kent, Sussex, and Cambridge, having all voted against it."²⁰ Unlike many individuals who, particularly when new to the public service, pursued safe courses and avoided making enemies or giving cause for offense, Romilly did not shrink from taking the unpopular stance or from delivering judgments against some of the very people to whom he might be beholden. Notably, he prosecuted those he believed guilty of sale of military appointments, including the mistress of the Duke of York, brother of the Prince of Wales, even though the Prince "had made it known that he would consider an attack on the Duke as an attack upon himself."²¹ Romilly observed, "I knew that I was provoking the strongest resentment of all the persons upon whom my ever being in office must depend."²² In addition, almost immediately in his public career Romilly served on the parlia-

mentary commission that conducted the delicate investigation into the circumstances of Caroline, Princess of Wales, and the birth of a child who was disavowed by her husband, the Prince.²³ Romilly refused to toe the line and savage the character of the Princess for the political expediency of satisfying the Prince. Moreover, he refused to have any subsequent consultation with the Prince of Wales on the subject of relations with Caroline.²⁴

By far, however, the most unpopular position Romilly took was his stance against capital punishment. Whatever initial sympathies the French Revolution may have stirred in the hearts of English liberals had, by 1806, been overshadowed by fears of the spread of revolutionary insurgency within England, by disgust with the events during the Terror, and by the very real threat of Bonaparte's armies to isolate and strangle England's power, perhaps her very existence. Furthermore, during the prolonged war with France, the general perception among the middle and upper classes was that crime was on the increase. Unlike the usual patterns of crime relative to war and peace in which crime decreases during wartime and surges after the end of hostilities, during the wars with France from 1795 to 1805 crime actually did increase, contends historian Frank McLynn.²⁵ He cites the economic turmoil, high inflation, the shortages of food and other basics of life – in addition to the unusual stationing of so many in the military within England – as likely factors contributing to this atypical pattern.

The propertied, classes had long viewed the poor as dangerous. The growth of laws that carried the death penalty for crimes against property reflects this fear. The hope that selective application of the law's terror would frighten potential criminals enough to hold them in check caused the conservative elites to cling to the Bloody Code. Even though larger numbers of people were coming to realize the ineffectiveness of the Bloody Code and the futility of the hope that had created it, public attitudes rose, fell, and changed with the course of events both within England and abroad. As is often the case with large social issues, there was an ebb and flow of support for the abolition of capital punishment. The fear that gripped the nation while England fought for its life did not predispose members of Parliament to entertain bills to relax

the punishment of criminals whom the lawmakers thought intent on breaking down the structures of well-ordered society. The threat of French invasion, the menace of French-sponsored Irish or Jacobite rebellion, and the fear of internal republican uprising essentially ensured that those in power would not relax the sanguinary laws.²⁶ Although many sincerely embraced those fears, some politicians more cynically played upon the general sense of alarm and apprehension for their own political purposes. Edward Coxe wrote in 1805:

To make the wrong appear the right,
An keep our ruler in;
In Walpole's time, 'twas Jacobite,
In Pitt's, 'tis Jacobin!²⁷

Fear of the enemy has long been, and continues to be, a useful ploy in the short term for gaining and retaining power.

One of the reasons that English laws were so harsh is that it was felt necessary to make the greatest example of those criminals that were apprehended. Since there existed no organized means for detecting and capturing criminals, authorities sought to make the most of those who did come into their hands. By Romilly's time, however, more than a century's evidence showed that such an irregular, inconsistent ferocity did not appreciably deter criminals or prevent crime. A simple solution to this situation, seemingly logical to the twenty-first century observer, might have been to create a police force empowered to discover criminal activity and to bring the accused in for questioning and, possibly, for trial. By its very presence an organized police force would have some deterrent value, and its practical experience combined with its body of accumulated observations and knowledge would aid in apprehending criminals more quickly and in greater relative numbers than the old hit-or-miss method already in place. Surprisingly, historian Stanley H. Palmer points out:

Samuel Romilly, the advocate of criminal law reform, and Henry Brougham, the Whig reformer, were among those who not only objected to the infringement of local liberties but even questioned the constitutionality of the Police Offices founded in 1792.²⁸

Looking back with twenty-first century eyes, it is difficult to appreciate their objections to adopting such a straightforward solution. The noble traditions of the London Bobby, the heroic exploits of Scotland Yard, plus 150 years of scintillating detective fiction, in which the police are almost always the heroes, serve to obscure the point of view held by the early-nineteenth-century Englishman.

Just as the passage of the Bloody Code was based on fear – the elite’s fear of property damage or loss and the culprit’s fear of the gallows – the resistance to a properly organized police agency stemmed from fear. The English had a collective cultural fear of surrendering any iota of personal liberty even in the face of overwhelming evidence of the greater collective good. Since the conflicts under the Tudors and especially the Stuarts – conflicts of religion, politics, and power – the English were hesitant to surrender any liberty to the government for fear of abuse and misuse. English people jealously guarded their rights and had no wish to allow any part of them to slip away, even at the cost of perpetuating an antiquated, ineffective system that terrorized the few, protected still fewer and allowed most to get away with their crimes.

In addition to the fear of transferring personal rights to government control, Britons feared the police force because it was identified with, indeed was almost synonymous with, France.²⁹ Under the Old Regime, the French monarchy had established policing agents who made it their business to know the activities of the people within their area of surveillance. Historian of the French police Philip John Stead contends that:

Individual liberty was also encroached upon by the extraordinary degree of surveillance exercised by the police. . . . Throughout the eighteenth century the French had been uncomfortably conscious of domestic espionage by the authorities, the all-pervasive presence of spies at all levels making secret and uncontrolled reports on everyone and everything.³⁰

No doubt abuses existed – it is almost a certainty that when there are police, there is also police abuse. During the Revolution and afterwards, under Napoleon, the police maintained their existence, their function, changing only a few of their methods and the person to whom they reported.³¹ Some structures of government, like executioners, are so fundamental that, despite

sweeping changes at almost every level, they remain almost impervious to innovation and continue as though nothing happened. As a result, the English associated police not only with agents of the old French monarchy, the traditional enemy of England, but also with agents of Bonaparte, the new, more dangerous enemy. Members of Parliament assured their constituents that they would not agree to the establishment and proliferation of a police force.

Romilly's Calvinist background seemed to imbue him with a strong sense of right and wrong, which evidently he considered to be so obvious as to require little or no discussion. His memoirs are filled with statements for or against particular issues, but invariably he offers no reasons behind his position. He seems to have assumed the matter was patently evident. Moreover, Romilly believed that questions of right and wrong should not be subject to the vagaries of fashion. He refused to accept that fickle opinion should dictate such an important matter as addressing penal reform and therefore he did not shrink from introducing unpopular bills solely because of their unpopularity. He did not believe that England's decisions to chart the right course in terms of legal reform should be led by reaction to French politics or fears of social upheavals. This does not suggest that he was a fool or an idealistic dreamer, blind to practical political reality – quite the opposite. As a Member of Parliament, Romilly devised a strategy to deal with the Bloody Code calculated to raise little opposition and avoid inflaming emotions. He was careful to argue for change in terms of its practical benefits. He sought to dismantle the Bloody Code in a manner that mirrored the way it had been built – one law at a time.

Out of convenience and custom the scholar may couch Romilly's actions in terms of "penal reform" because that would have been the *result* of the total effort if he had been successful. Had Romilly been able to pass his entire agenda through Parliament, the death penalty would have been eliminated for all crimes except murder and treason. However, that theoretical outcome would have only been a byproduct of his plan. Reducing the level of crime was Romilly's goal, not abolition of capital punishment. Unlike Rush, who believed that capital punishment was morally wrong and based his efforts to eliminate it on moral grounds, Romilly did not object

to capital punishment on a moral basis. He was prepared to retain it for murder, treason, and a few other particularly heinous offenses. His reasons for seeking its elimination were purely utilitarian. He was entirely persuaded that it was ineffective in deterring crime. It seems likely that if statistics convincingly showed that hanging reduced the incidence of shoplifting, for example, he would have rallied to the support of hanging *as a penalty for shoplifting*. Where Romilly failed miserably was in communicating this fine distinction between his goal and the collateral results of his plan. In other words, his own contemporaries, as well as many historians, saw his actions in terms of penal reform, not crime prevention. The sparkle of significantly reducing capital punishment dazzled the eye so much that the real gem of crime deterrence was overlooked. Even now, writing about Romilly as a penal reformer seems natural and right, when in fact, he would have rejected that appellation. The opposition he encountered in Parliament nearly always came in terms of accusations of being too sensitive to the plight of the criminals or too concerned with humanitarian issues. As will be seen below, Romilly invariably rebutted those charges with his true purpose of reducing crime.

Although he was eager to overturn the laws carrying the death penalty for relative minor property crimes, Romilly came to realize that he stood no chance of passing a sweeping bill that would abolish or reduce capital punishment as a whole and thus change or supersede hundreds of separate parliamentary acts. He knew that to do so would stir up a firestorm of criticism over the abstract issue of the death penalty, which was not an issue he wished to raise or promote. In his diary on 23 January 1808, he recorded:

I have for the present given up the intention I had entertained, of bringing a Bill into Parliament to make some improvements in the Criminal Law. George Wilson has dissuaded me from it. He thinks that, unless I first consult the judges upon it, not only am I not likely to carry it, but I shall in all probability prejudice any attempts at improving the law, which I may make at any future time, and under more favourable circumstances. A better judgment than Wilson's upon such a subject there cannot be, and I reluctantly submit to be governed by it. I cannot think of consulting the judges; I have not the least hope that they would approve of the measure; besides, before I could get their opinion on it, the petition may be decided against me and I may be out of Parliament.³²

Romilly soon regretted his decision, however, and felt that he should have taken some action, if only symbolically. On 20 April, only three months later, he wrote:

It appeared to me that merely to have brought the subject under the view of the public, and to have made it a matter of parliamentary discussion, would, though my motion had been rejected, have been attended with good effects. I determined to resume my original design. In the meantime, I had had some conversation with my friend Scarlett; and he had advised me not to content myself with merely raising the amount of the value of property, the stealing of which is to subject the offender to capital punishment, but to attempt at once to repeal all the statutes which punish with death mere thefts, unaccompanied by any act of violence, or other circumstance of aggravation. This suggestion was very agreeable to me. But, as it appeared to me, that I had no chance of being able to carry through the House a Bill which was to expunge at once all these last from the statute book, I determined to repeal them one by one; and to begin with the most odious of them, the Act of Queen Elizabeth, which makes it a capital offense to steal privately from the person of another.³³

He reasoned that by introducing proceedings to repeal these acts singly, he could focus the debate on the merits of the particular act – stealing cloth, breaking into a shop – and so successfully argue that those particular petty crimes did not merit punishment by death.

Indeed, Romilly's goal or motivation in reforming the law appears to have been grounded in utilitarian practicality. He took a common-sense approach to the laws he regarded as ineffective and even absurd. He seems not to have opposed capital punishment for murder, when properly proved, but found that the wholesale and inconsistent application of the death penalty made a cruel joke of the law.³⁴ Early in his parliamentary service he recorded his attitude toward a case where a man was accused of "firing at a man a gun loaded with shot, which is made capital by the statute [43] Geo. III, c. [58] commonly called Lord Ellenborough's Act." Romilly continues with barely concealed irony, ". . . [I]f the man had been killed, it would not have been murder, but only manslaughter. I therefore thought . . . the Act is in this respect very defectively expressed . . ."³⁵

On 18 May 1808, Romilly sought permission to introduce a bill to repeal the statute 8 Elizabeth c. 4, which carried a capital offense for stealing privately from another person. The House of Commons considered the bill on 15 June. Romilly recorded that opposition to the bill came from Burton and Plumer, both of whom lamented that the crime would default to larceny

punishable by seven years' transportation. Both men also argued that such crimes were on the rise and that relaxation of the punishment would only spur still more crimes of that nature. Romilly related:

It appeared to me, and I stated, that these were rather arguments for, than against the Bill. What better reason can be given for altering the law, than that it is not efficacious; and that instead of preventing crimes, crimes are multiplied under its operation. And if an alteration there must be, what can it be but to render the punishment less severe but more certain in its operation? To add to its severity is impossible, since we already provide the same punishment for pickpockets and or murderers.³⁶

Not only these specific objections, but also the more generally entrenched reluctance even to consider the possibility of penal reform came to Romilly's attention. He recorded bitterly:

If any person be desirous of having an adequate idea of the mischievous effects which have been produced in this country by the French Revolution and all its attendant horrors, he should attempt some legislative reform, on humane and liberal principles. He will then find, not only what a stupid dread of innovation, but what a savage spirit it has infused into the minds of many of his countrymen. I have had several opportunities of observing this.³⁷

Nevertheless Romilly's bill was accepted in the House of Commons. In spite of the opposition to his bill, and regardless of the perceived "savage spirit," he coolly observed in his diary on 4 July 1808, "The Bill I brought in to take away the punishment of death for the crime of privately stealing from the person passed . . . into law." He continued, "In the House of Lords it passed without opposition, and without a word being said upon it."³⁸ Romilly had won his first victory in his fight against excessive and indiscriminate use of the death penalty. Future successes would not come without opposition.

Romilly's next attempt to repeal statutes that bore the death penalty for relatively minor crimes aroused the vocal opposition of Lord Ellenborough and other influential members of the House of Lords. They opposed it on the grounds that it would provide precedent for relaxation of numerous other laws. Moreover, they contended that prosecutions for pickpocketing had increased since the repeal of the law that punished that crime with death.³⁹ The fear of unleashing a torrent of crime by the relaxation of the severity of the punishment outweighed, in

their minds, the likelihood of increased prosecution and conviction that a milder but more certain punishment afforded.

Central to the ongoing debate over the role of capital punishment was the question of alternative means of retribution. In opposing Romilly's bill to repeal the capital statute against shoplifting, MP Mr. Herbert argued:

Before we abolish existing punishments we ought well to consider how the deficiencies which we may occasion can be supplied. If the punishments in use are not to be retained, what substitute will be recommended by the learned and honourable gentleman who is so desirous for their abolition? – Will he introduce the knout from Russia? I hope before this horrid expedient is adopted, there will be a careful examination of the evidence of those who have witnessed its infliction; who are unanimous in declaring it is more horrible than death itself? Will he, with Beccaria, recommend perpetual imprisonment? Is he desirous to revive the practice of nailing ears to the pillory? Or would he resort to solitary confinement as a milder substitute? Whether milder, whether more merciful or not, I am not disposed now to inquire.⁴⁰

Unlike in America, where the only alternative seriously considered was long prison sentences in penitentiaries, England grappled with two options: prisons and transportation. In practice, the hulks constituted an additional alternative method of punishment. For more than a century, transportation had been a favored method of disposing of criminals. Sending criminals to the American colonies had had the advantages of ridding England of undesirables while helping to populate portions of the North American colonies to provide a bulwark against encroachments from Spanish or French interlopers. The practice provided cheap labor in the form of indentured servants who preferred that lot to facing the gallows. Moreover, it genuinely allowed judge and jury to end a case with a clear conscience knowing that punishment had been delivered while not resorting to death.

This tidy solution was lost for a time with the American Revolution. In its place, the hulks came to be used as a temporary response. The hulks were ships that were no longer sea-worthy and so could be used to house convicts. Prisoners in the hulks performed useful labor such as cleaning and dredging the Thames. Since these floating prisons were never intended to be a long-term solution, little care was given to the conditions of the prisoners. The

ships were cold, draughty, damp, and over-crowded. Disease periodically ravaged the population of these dismal, anchored vessels. However, the practice of transportation had been interrupted only briefly; the penal colony of Botany Bay in Australia, was receiving English convicts by 1787. The sentence of transportation, be it to Australia or to the hulks, usually was seven or fourteen years, or, less commonly, for the rest of the convict's natural life. Romilly writes in his memoirs:

Mr. Justice Chambre told me that the Judges frequently sentenced a man to a longer transportation than they otherwise would do, or than they think the crime deserves, in order to secure his being transported; it being very usual, where a prisoner is sentenced only to seven years' transportation, not to transport him at all, but to keep him for the whole term on board the hulks.⁴¹

Prisons, as distinct from jails, serving as temporary holding locations for persons awaiting trial, had been provided for by law but had not yet achieved large-scale, practical realization. Romilly's diary reveals his desire to see penitentiaries built and used instead of capital punishment or transportation.⁴² It is, however, silent on his specific reasons. One may infer that he based his position on humanitarian reasons although he refrained from publicly employing such reasoning when supporting the building of penitentiaries. Romilly is even less revealing on the subject of reformative characteristics of penitentiaries. Neither his memoirs nor his speeches suggest that he saw the penitentiary as anything other than a means of punishment that was less severe than death or transportation.

Predictably, Romilly clamored for this lapse in application of the law – the funding and construction of penitentiaries – to be resolved. On 5 June 1810, Romilly records that he sought to petition the king to execute existing acts for erecting penitentiaries.⁴³ In his speech to Parliament he objected:

That plan, however, has remained on the statute book for upwards of 30 years, without any effectual step having been taken to carry it into execution. In the mean time the want of it has been severely felt, and all have confessed that the inconvenience and inefficacy of other punishments have rendered but too sensible the impolitic and injurious tendency of the present system.⁴⁴

Although he failed in his immediate attempt, the Commons did resolve to take up the matter early in the next session. By the time the next session began, however, the Regency Crisis diverted Parliament's attention. Ever practical, Romilly recognized the futility of successfully arguing his case for penal reform among those circumstances.⁴⁵

The general movement away from the death penalty toward long-term incarceration reflected changes in the socio-economic structures and the power of the rulers in relationship to the ruled. Throughout the eighteenth century, industrialization had been transforming the way people lived in America and England; industrial development altered the mode of the economy and the individual's place in the economic scheme. Industrialization discouraged the idiosyncratic, individual behavior that one finds readily in literature into the eighteenth century. One's fellows might show social disapprobation of eccentric behavior, but individuals could retain their livelihood while freely displaying a range of odd manners and proclivities that would be astonishing today. Industrialized work finds little value in this kind of original behavior and prizes conformity for practical purposes. Effective industry presupposes a more or less steady workforce that is trained and can be relied upon to be available at the time and choosing of the employer. Although this is more than a century before Henry Ford's mechanized assembly line, essential elements of that process were already coming into play and influencing the decisions of employers and, therefore by extension, employees too.⁴⁶ Subtly, there was a shift away from emotional, individualized approaches and responses toward more practical, utilitarian means of organizing work and economy. Significantly, great institutions that already existed were affected by this change; in other cases, the change itself triggered the creation of the institutions. Such entities as schools, hospitals, and prisons began to take shape in ways that people in twenty-first century America or England would recognize.

As a part of state formation, the exclusive right to exercise legitimate violence was appropriated by the governing force as part of the pacification of the feudal upper classes. Arguing more strongly, Ethan Blue and Patrick Thomas maintain:

[I]n the modern world, *the health of the state is predicated on the death or deathlike incapacitation of its enemies*, foreign and domestic, through the paired practices of warfare and punishment. Civic cohesion among citizens is forged in the crucible of hatred of criminals – those who reject the state from within – as well as among those foreign states whose armies threaten the state from without.⁴⁷

By the time of the Hanoverian monarchs, generous and excessive use of the state's right to violence characterized eighteenth-century England. But writers like Beccaria, Bentham, and Romilly observed that crime was still a problem. Unlike their contemporaries, their response was not to enact greater numbers of laws punishing with death; rather, they pointed out that capital punishment was *not* effective in deterring crime in the expected manner. They argued that milder but certain punishment would have greater efficacy.

Long-term incarceration fit the need for a newly industrialized society to punish in a fair and quantifiable manner. Instead of a number of lashes to be endured, punishment could be inflicted in units of time. Time as it is experienced and understood today is almost entirely a construction resulting from the Industrial Revolution. Time zones did not exist before railroads made travel fast enough for people to notice differences in time. Mechanized work environments made punctuality a prized characteristic. Even later along the continuum of industrialization, workers were compensated in money per hour, as they sold their sole possession, their time, to their employer.⁴⁸ A person's time is the one thing he or she has that is entirely irreplaceable. Therefore, for the state to declare its right to dictate how and where that time is spent as a form of inflicting punishment was an appropriate and logical progression toward industrialization.

In addition to using time as the measure of punishment, separation, ordering, and classification characterized the new approach to carceral punishment. Older systems of imprisonment combined all sorts and degrees of prisoners. People being held for trial might be placed with convicted murderers awaiting execution. The insane, the sick, young, and old all shared common areas. Penitentiaries, however, served to separate and segregate prisoners – not only

from society at large but also from each other. Modern historian Kelvin Santiago-Valles observes:

Enlightenment thinkers (Jean-Jacques Rousseau, Cesare Beccaria, John Howard, Montesquieu, Jeremy Bentham) promoted humanitarian ways of punishing the so-called idle poor via the detailed classification and separation of the 'dangerous classes' and their social regulation through productive labor.⁴⁹

Foucault locates the origin of the continued trend toward segregation in a medical context. Originating from a need to isolate those suffering from leprosy or the plague, individual confinement came to be viewed as beneficial for promoting the reformation of the criminal as well as for prevention of the contagion of criminal thought. Foucault speaks of imposing "subtle segments of discipline onto the confused space of internment" by means of "disciplinary partitioning."⁵⁰

Along with utilitarianism, which may be generally associated with industrialization, evangelicalism also moved some people to oppose capital punishment. Depiction of carceral conditions by the great advocate of prison reform, John Howard, influenced many to work to alleviate the deplorable conditions in English jails. Victor Bailey contends, "The early decades of the nineteenth century saw the development, under the twin influences of utilitarianism and evangelicalism, of a reform campaign, which sought to bring order, hygiene and discipline to the unreformed local prisons."⁵¹ Moreover, this campaign was accompanied by the growth of a segment of the population of England and America that could not accept the state's right to inflict violence on the body of a citizen. These people opposed capital punishment and slavery based on this belief.⁵²

Romilly's push to follow through on the promise to construct and maintain modern prisons incorporating new concepts stalled, in part from political opposition to himself and to the points of view he represented. Lord Ellenborough, a powerful member of the House of Lords, rejected Romilly's philosophical position regarding capital punishment, so he stubbornly refused to lend any support to the cause; indeed, he often actively opposed any such bill. In fact, during the very time that Romilly steadily persevered in introducing bills to repeal existing legislation that carried the death penalty, Lord Ellenborough was almost as tireless bringing in new bills

making additional actions into crimes punishable by death.⁵³ In addition to political opposition, a far more mundane obstacle lay in the way of prison construction – money. As England fought year after year with France, struggling to maintain its existence, the war effort required a large portion of the available money. Seen in that light, spending money to house criminals seemed like folly and waste, if not outright mollycoddling.⁵⁴

The fear of being too lenient on convicts played a significant role in Parliament's hesitancy in repealing the Bloody Code. Historian Janet Semple rightly observes, "The tension between a benevolent concern for the welfare of inmates and the need to inflict misery upon them has underlain the public debate on penal reform since the time of Howard."⁵⁵ Members did not want to be, or be perceived to be "soft on crime." This was not mere posturing for the sake of constituencies; rather, the issue of crime genuinely concerned English lawmakers. However, few were able or willing to understand the utilitarian argument that less severity and greater certainty would result in a lowered crime rate or at least a greater conviction rate.

Measuring crime is an elusive, perhaps even, chimeral task. To the uninitiated, crime statistics would seem to be one of those rocks of relative certainty in this sea of historical ambiguity. One should be able to say that murder rates are higher in place X than in place Y; or that in place Z murder was ten percent lower ten years after passage of a certain law. In his rejection of such an approach, historian J. A. Sharpe notes, "Superficially, the study of crime statistics would seem to be the logical initial task of the historian of crime."⁵⁶ Indeed, people do bandy about such statistics and use them to argue whatever hobby-horse they are riding. J. J. Tobias provides an amusing illustration of the difficulty of determining the real meaning of crime statistics:

The Chaplain of Wandsworth Prison argues that crime had increased, the Chairman of the Prison Commissioners argued that it had decreased, and the Chief Constable of Staffordshire argued that it was substantially unchanged in amount. The statistics provided ammunition impartially for all three, and the welter of figures leaves none of us the wiser.⁵⁷

Quite the opposite of certainty, crime statistics depend so heavily on thorough contextualization as to render comparison difficult at best. So many factors influence what is recorded as a crime and most of these significantly affect the outcome.⁵⁸ As shall be seen below, Romilly experienced the slippery nature of crime statistics first-hand when he tried to use them to support his agenda. Their ambiguity proved too great for him to master.

Speaking in the House of Commons on 18 February 1811, Romilly rose to propose three bills to remove the death penalty from three crimes: for stealing goods valued more than forty shillings from a home, for stealing goods valued more than forty shillings on a navigable river, and for stealing goods valued more than five shillings from a shop.⁵⁹ He specifically stated, "It was not from light motives that I ventured to suggest any improvement to the criminal law of England: *nor was it from any fanciful notion of benevolence.* . . ."⁶⁰ He concluded his speech citing the improvement that had occurred as a result of his successful repeal of the death penalty for pickpocketing. He argued:

It did not require much knowledge of human nature to predict that an increase of convictions would attend the mitigation of the law, and that offenders, instead of escaping with impunity, would be detected in the commencement of their career. This has followed. *Since the alteration of this law there have been more convictions for stealing from the person than at any former period.* It seems, therefore, evident that we may expect more certainty of punishment from the adoption of the laws which it is my wish now to introduce.⁶¹

As a skilled barrister and orator, Romilly understood the importance of stating his case in terms that would persuade his colleagues. Regardless of his own moral belief, he was always careful to pitch his argument for legal reform in terms of improved crime control and was equally careful to avoid seeming motivated for humanitarian reasons.

Opponents of Romilly quickly attacked his efforts by using the same statistics he had employed. The Chancellor of the Exchequer spoke against Romilly's bills. Referring to Romilly's interpretation of the increase in convictions as evidence of the previous bill's success, he asked, "Is it not within the limits of possibility that, since the alteration of the law, the number of

offences may have increased?”⁶² The Solicitor General expressed more forceful objections to Romilly’s statistical evidence. He argued:

My honourable and learned friend has stated that, since the alteration of the law, there have been more prosecutions for this offence and that there have been more convictions in a given number of prosecutions. From these premises it is inferred that, from the salutary effects of the measures proposed by my honourable and learned friend, prosecutors are no longer averse to appearing, witnesses from giving evidence, or juries from convicting offenders. I should have thought and I must still think that if my honourable and learned friend did not surrender his excellent judgment to his own measures, he would concur with me in opinion that an increase in the number of prosecutions and of convictions for the same offence ought to be ascribed, not to remote causes discovered by my learned friend’s ingenuity, but to the obvious and real cause – which is indisputably an increase in the crime or in the audacity of the criminals. If the number of prosecutions and of convictions had diminished, I ask my honourable and learned friend, whether we should not again and again have heard that, from the certainty of punishment, the crime was rapidly decreasing?⁶³

When he rose to reply, Romilly did not address the Solicitor General’s objections.

He related in his diary that among the reasons cited by Lord Ellenborough in opposing a bill to remove the death penalty from another crime were the increase in pick pocketing after the repeal of the law punishing that offense with hanging.

But how . . . do they know that the crime has increased? All they can know is, that prosecutions are much more frequent than they were before the act passed; and this, instead of affording any argument against the Bill, proves its efficacy. It was stated, when the Bill was proposed, that the inordinate severity of the punishment appointed by law prevented those who had been robbed from prosecuting, and by that means procured complete impunity to the offenders. Take away, it was said, this most severe punishment, and you will have many more prosecutions. The punishment is taken away; many more prosecutions are preferred and this is the very fact which these men, blinded by their gross prejudices, put forward as proof that the measure has been unsuccessful. It is, on the contrary, the strongest proof of its success; and would afford us a triumph, if we were capable of enjoying it on the justness of our speculations.⁶⁴

Romilly seemed as blind to the ambiguity of crime statistics as were his opponents. Both camps remained convinced that they were right and that their opponents were bent on subverting the penal process. As debate for introducing the three bills closed, Romilly stated, “I explicitly stated that the prevention of crime by the detection of criminals was my chief motive for re-

commending this alteration of the law.” He added that he was acting “without any pretension to extraordinary benevolence.”⁶⁵

The desire to avoid seeming to be too lenient on crime or pampering convicts appeared in Britain in the aftermath of the American rebellion and French Revolution. The course of penology shows reaction to events in the political world, sometimes even beyond the nation’s borders. America shaped its penal methods at least in part due to its reaction against English penology. Rush and other Americans had commented that too much discretion in the hands of the judges was inappropriate in a democracy; this sentiment was in clear reaction to the extraordinary judicial latitude exercised by English justices. In addition, Rush believed that in a republic, the state had no right to deprive the individual of life. He explicitly linked the death penalty to monarchical power and felt that its use smacked of the trappings of monarchy. Similarly, in the aftermath of the French Revolution, it was considered inappropriate for the citizens of the French Republic to maintain the multi-tiered system of death in which people of high rank were beheaded while those of lower rank were hanged. Famously, in France it was decided to extend the privilege of beheading to all citizens equally.

Historian Deane Seamus points out the symbiotic nature of the relationship between Britain and France.⁶⁶ For England, Beccaria’s notion of less severity but greater certainty, especially in the wake of these specific revolutionary applications of the precept, bore too strong a flavor of revolutionary egalitarianism for many in Parliament.⁶⁷ They cherished the peculiar and arbitrary nature of English justice, specifically valuing it for its high degree of discretion. In speaking against a bill that Romilly proposed to remove the death penalty from the crime of stealing in a bleaching grounds, M.P., Mr. Frankland, in a statement reminiscent of Edmund Burke, declaimed:

Attempts to make material alterations in the penal code of every nation from the speculations of theorists and the schemes of Utopian perfection ever have been and ever will be productive not of national blessings but of national evil and public calamity. Let us not be deluded by the supposition that the alterations are apparently trivial. By taking out a single peg from the wheels of the mighty machinery of a nation’s happiness it may run back and the accumulated

wisdom of ages be dashed to pieces in a moment. But, Sir, dangerous as I consider all reform; suspicious as I am of the spirit of reform, I have long considered that *attempts to repeal existing regulations are of all reforms the most to be dreaded.*⁶⁸

As Plumb observed, “In spite of the divergent effects of the French Revolution on English society, its major influence was to strengthen the Englishman’s sense of tradition.”⁶⁹

The long war with France – for reasons of money, time, material resources, resistance to innovation, particularly revolutionary innovation, sheer stubbornness and inertia – prevented Parliament from taking up the matter of penal reform or construction of penitentiaries in a thorough, whole-hearted manner. Although Romilly dutifully continued to push for reform for the duration of the war, Parliament remained in no mood or position to make Romilly’s project a serious priority. Only after Napoleon was dispatched to St. Helena did it appear feasible for the legislature to address penal reform and fund the construction of penitentiaries.⁷⁰

Romilly would not personally see success from his immense effort to overhaul English penal practice. Although he repeatedly introduced bills to repeal individual laws that carried the death penalty and managed to get them approved in the House of Commons, invariably the bills were opposed in the House of Lords and came to no fruition. Lord Ellenborough remained opposed to any innovation in the law; he managed to carry his case and block each of Romilly’s proposed reforms. Amazingly enough, Romilly’s diary reveals ongoing personal contact with Lord Ellenborough suggesting a greater degree of friendship, or at least respect, than might be expected under the circumstances.

In the matter of Romilly’s continued presence in public service, he received both challenges and support from surprising quarters. He stood for Bristol in a parliamentary election but was defeated. The ubiquitous Cobbett, editor and publisher of a weekly paper, played a large role in persuading public opinion away from Romilly and toward his opponent. This is of course the same Cobbett who had made Rush his personal *bête noir* when Cobbett had previously published a paper in America. In 1818, he was drafted to stand for Westminster in the coming elect. However, he was opposed by Sir Francis Burdette who received enthusiastic support and

advocacy from Romilly's own close friend, Jeremy Bentham. As a good lawyer, Romilly took Bentham's support for his opponent in stride and betrayed nothing but continued admiration for Bentham's strong principles that allowed him to ignore personal friendship. Romilly never served for Westminster due to his untimely death.⁷¹

Romilly's personal life apparently had remained happy enough until the end of his life. Specifically, his children gave him no more trouble than any person's, his sister's son had grown into a fine man who became a frequent companion in Romilly's later years, and his beloved wife remained the anchor of his happiness. Unfortunately, Anne Romilly became ill in September 1818. Romilly's diary in which he typically made entries that were multiple paragraphs in length per day, dwindled to terse fragments. Read with unavoidable hindsight, the final entries are sad and chilling.

Sept. 3d. Arrived at Cowes
12th. Anne went to the sea bath.
13th. Taken ill.
14th. Sailed with Mr. Fazakerley to Southampton.
16th. Consulted Mr. Bloxam.
19th. Roget and William arrived, and Mr. Nash.
Oct. 9th. Slept for the first time after many sleepless nights.
10th. Relapse of Anne.⁷²

Lady Romilly died 29 October 1818. In despair and grief, unable to imagine a continued existence without her, Samuel Romilly cut his throat with his shaving razor three days later on 2 November. Reactions to his death were profound. Historian Donna T. Andrew writes, "Seldom has the demise of a nonroyal receive so much public attention."⁷³ The suicide of such a prominent, well-respected and well-loved individual, Andrew argues, forced Britons to reexamine their attitudes toward suicide and to reevaluate the opprobrium that inevitably attached to that act.⁷⁴ Although Romilly gave no hint to the matter in his diary, others in prominent political leaders revealed that they had expected he would eventually become prime minister. He had been widely respected by members of his own party and by his opposition. His death was generally and genuinely lamented.

In the matter of penal reform, both in reducing the severity of the law and in the use of penitentiaries, colleagues who had supported him took up his cause. The Judgment of Death Act in 1823 transformed the penalties for numerous capital statutes from mandatory to discretionary, thereby enabling English judges to do legally what they had been doing in practice for much of the previous century. Moreover, the Metropolitan Police Act of 1829 established a police agency that could help guarantee the certainty of punishment by providing better apprehension of criminals, to say nothing of affording greater deterrence to crime. In short, within barely more than a decade following his death, Romilly's agenda had been adopted as the standard for legal justice and penal procedure in England.

Notes

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- ¹ J. H. Plumb, *England in the Eighteenth Century (1714-1815)*, The Pelican History of England (Baltimore: Penguin Books, 1950), 155.
- ² William Heath, ed., *Major British Poets of the Romantic Period* (New York: Macmillan, 1973), 7-12, 163-167.
- ³ Jonathan Sperber, *Revolutionary Europe, 1780-1850*, Longman History of Modern Europe, eds. M. J. Rodriguez-Salgado and H. M. Scott (New York: Longman, 2000), 136.
- ⁴ Sperber, 112.
- ⁵ J. H. Plumb, *In the Light of History* (Boston: Houghton Mifflin Co., 1973), 92-93.
- ⁶ C. H. Gifford, *History of the Wars Occasioned by the French Revolution, from the Commencement of Hostilities in 1792, to the End of the Year 1816; Embracing a Complete History of the Revolution, with Biographical Sketches of Most of the Public Characters of Europe; Comprising Also in its Proper Order the History of the Wars in Spain and Portugal, the American War, the Campaigns of the Duke of Wellington, Bonaparte, &c. and Every Particular Relative to the glorious Battle of Waterloo and those Interesting Events which Terminated a Long and Desolate War and Produced the General Peace of Europe* (London: W. Lewis, 1817), 23.
- ⁷ Robert Tombs and Isabelle Tombs, *That Sweet Enemy: The French and the British from the Sun King to the Present* (New York: Knopf, 2007), 190.
- ⁸ Samuel Romilly, *Memoirs of The Life of Sir Samuel Romilly, Written by Himself; With a Selection from His Correspondence, Edited By His Sons*, vol. I (London: John Murray, 1840), 103.
- ⁹ Du Pont de Nemours was among the Assembly of the Notables called by Louis XVI in 1788. As a member of the National Assembly he sought exert a moderating influence. He was awaiting decapitation at the time Robespierre was overthrown and the Terror subsided. He emigrated to America with his son, who founded du Pont chemical industries. Simon Shama, *Citizens: A Chronicle of the French Revolution* (New York: Knopf, 1989). 656.
- ¹⁰ Romilly, *Memoirs*, I, 101-103.
- ¹¹ William Cobbett, *The Bloody Buoy, Thrown Out as a Warning to the Political Pilots of America, or A Faithful Relation of a Multitude of Acts of Horrid Barbarity, Such as the Eye Never Witnessed, the Tongue Never Expressed, or the Imagination Conceived Until the Commencement of the French Revolution; To Which is Added an Instructive Essay Tracing These Dreadful Effects to their Real Causes* (London: Philadelphia printed; London reprinted, J. Owen, 1796?), 19; 25; 35. Had he lived in the twenty-first century, Cobbett could have pursued a lucrative career working for either the Weekly World News tabloid or Fox News.
- ¹² E. P. Thompson, *The Making of the English Working Class* (New York: Random House, 1966), 749.
- ¹³ Tombs and Tombs, 253-274.
- ¹⁴ Philip Henry Stanhope, *Life of the Right Honourable William Pitt*, vol. 4 (London: J. Murray, 1867), 369. As for Pitt's clairvoyant abilities, Tombs and Tombs note that Pitt also declared in the House of Commons in 1792, "Unquestionably, there never was a time in the history of this country, when, from the situation of Europe, we might more reasonably expect fifteen years of peace than at the present moment," (Tombs and Tombs, 202).
- ¹⁵ Sperber, 111.

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- ¹⁶ Bernard L. Shientag, *Moulders of Legal Thought* (Port Washington, New York: Kennikat Press, 1943; Revised 1968), 203.
- ¹⁷ Robin Reilly, *William Pitt the Younger* (New York: G. P. Putnam's Sons, 1979), 447.
- ¹⁸ Romilly, *Memoirs*, II, 201-202.
- ¹⁹ In a letter to Étienne Dumont, dated 18 April 1789, Romilly refers to the growing support in both England and France for abolition of the slave trade and mentions that the Spanish appear set to continue the trade. Romilly writes, "[T]he argument which is used with most force here, and indeed the only argument from which any thing can be feared, is that, by our abolishing the trade, we shall give no relief to the negroes, but only transfer to our neighbours the advantages which we derive from that commerce. I believe that argument admits of a very easy refutation; but, if it did not, I should have no objection to making such a transfer, when I must at the same time transfer all the guilt of so abominable a traffic," (Romilly, *Memoirs*, I, 344).
- ²⁰ Romilly, *Memoirs*, II, 140.
- ²¹ Romilly, *Memoirs*, II, 267; Shientag, 203—204.
- ²² Romilly, *Memoirs*, II, 267.
- ²³ Romilly, *Memoirs*, II, 142, 144.
- ²⁴ Romilly, *Memoirs*, III, 94; Sheintag, 204—205.
- ²⁵ Frank McLynn, *Crime and Punishment in Eighteenth-century England* (London: Routledge, 1989), 334.
- ²⁶ Stanley H. Palmer, *Police and Protest in England and Ireland: 1780-1850* (Cambridge: Cambridge University Press, 1988), 141-142.
- ²⁷ Quoted in McLynn, 340.
- ²⁸ S. Palmer, 165.
- ²⁹ S. Palmer, 13, 18.
- ³⁰ Philip John Stead, *The Police of France* (New York: Macmillan, 1983), 31.
- ³¹ Alan Williams, *The Police of Paris: 1718-1789* (Baton Rouge: Louisiana State University Press, 1979), xvi; Stead, 35.
- ³² Romilly, *Memoirs*, II, 235—236.
- ³³ Romilly, *Memoirs*, II, 239.
- ³⁴ Basil Montagu, *The Opinion of Different Authors Upon the Punishment of Death*, vol. 3 (London: Longman, 1813), 81, 82-83.
- ³⁵ Romilly, *Memoirs*, II, 231—232.
- ³⁶ Romilly, *Memoirs*, II, 243—244.
- ³⁷ Romilly, *Memoirs*, II, 247.
- ³⁸ Romilly, *Memoirs*, II, 252.
- ³⁹ Romilly, *Memoirs*, II, 325—328.
- ⁴⁰ Basil Montagu, *The Opinion of Different Authors Upon the Punishment of Death*, vol. 2 (London: Longman, 1812), 257-258.
- ⁴¹ Romilly, *Memoirs*, III, 71.
- ⁴² Romilly, *Memoirs*, II, 319, 332, 367.

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- ⁴³ Romilly, *Memoirs*, II, 332.
- ⁴⁴ Montagu, vol. 2, 340.
- ⁴⁵ Romilly, *Memoirs*, II, 367.
- ⁴⁶ Thompson, *Making of the English Working Class*, 401-404.
- ⁴⁷ Ethan Blue and Patrick Thomas, eds., "Editors' Introduction" *Radical History Review*. (1-8), Issue 96, 2006, 3-4. (Emphasis in the original).
- ⁴⁸ E. P. Thompson, "Time, Work-Discipline, and Industrial Capitalism" *Past and Present* 38 (December 1967): 89.
- ⁴⁹ Kelvin Santiago-Valles, "'Bloody Legislations,' 'Entombment,' and Race Making in the Spanish Atlantic: Differentiated Spaces of General(ized) Confinement in Spain and Puerto Rico, 1750-1840" *Radical History Review*. (33-57), Issue 96, 2006, 35.
- ⁵⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1978), 198-199.
- ⁵¹ Victor Bailey, ed., *Policy and Punishment in Nineteenth Century Britain* (New Brunswick: Rutgers University Press, 1981), 16.
- ⁵² Mary Welek Atwell, *Evolving Standards of Decency: Popular Culture and Capital Punishment*. Politics, Media and Popular Culture (Series Title) David A. Schultz, General Editor, Volume 10 (New York: Peter Lang, 2004), 9.
- ⁵³ W. R., Cornish, Jennifer Hart, A. H. Manchester, and J. Stevenson, *Crime and Law in Nineteenth Century Britain*. *Government and Society in Nineteenth Century Britain*. *Commentaries on British Parliamentary Papers*, Introduction by P. and G. Ford, (Dublin: Irish Academic Press, 1978), 14-15.
- ⁵⁴ W. [William] Branch-Johnson, *The English Prison Hulks* (London: Christopher Johnson, 1957), 27.
- ⁵⁵ Janet Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Oxford: Clarendon Press, 1993), 113.
- ⁵⁶ J. A. Sharpe, *Crime in Early Modern England, 1550-1750*, Themes in British Social History, ed. J. Stevenson (London: Longman, 1984), 41.
- ⁵⁷ J. J. Tobias, *Crime and Industrial Society in the Nineteenth Century* (New York: Schocken Books, 1967), 15.
- ⁵⁸ Bruce Lenman and Geoffrey Parker, "The State, the Community and the Criminal Law in Early Modern Europe" in *Crime and the Law: The Social History of Crime in Western Europe since 1500*, ed. V. A. C. Gatrell, Bruce Lenman and Geoffrey Parker (London: Europa, 1980), 17.
- ⁵⁹ Montagu, vol. 3, 3-9.
- ⁶⁰ Montagu, vol. 3, 5, emphasis added.
- ⁶¹ Montagu, vol. 3, 9, emphasis added.
- ⁶² Montagu, vol. 3, 10-11.
- ⁶³ Montagu, vol. 3, 14-15.
- ⁶⁴ Romilly, *Memoirs*, II, 326-327.
- ⁶⁵ Montagu, vol. 3, 17.
- ⁶⁶ Deane Seamus, *The French Revolution and Enlightenment in England, 1789-1832* (Cambridge: Harvard University Press, 1988), 1.

⁶⁷ James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (Oxford: Oxford University Press, 2003) 50—51.

⁶⁸ Montagu, vol. 3, 31, emphasis added.

⁶⁹ Plumb, *England in the Eighteenth Century*, 162.

⁷⁰ J. J. Tobias, *Crime and Police in England 1700-1900* (New York: St. Martin's Press, 1979), 171.

⁷¹ Romilly, *Memoirs*, III, 357; 365-367.

⁷² Romilly, *Memoirs*, III, 386.

⁷³ Donna T. Andrew, "The Suicide of Sir Samuel Romilly" in *From Sin To Insanity: Suicide in Early Modern Europe* ed. Jeffrey R. Watt (Ithaca, New York: Cornell University Press, 2004), 175.

⁷⁴ Andrew, 187-188.

CHAPTER VI

ROMILLY AND RUSH: THE UNEVEN PATH OF REFORM

When Samuel Romilly committed suicide in 1818, his efforts to reshape Britain's penal system appeared to have stalled and his immense effort seemed to have had scant returns. He had managed to repeal only three of the hundreds of statutes that bore the death penalty. Penitentiaries were still not widely funded in Britain. London still lacked a fully organized police force to guarantee apprehension of criminals. By contrast, when Benjamin Rush died five years earlier in 1813, his labors looked fruitful indeed. The death penalty had been abolished in Pennsylvania for all offenses except murder in the first degree. The Walnut Street Gaol had adopted many of Rush's schemes toward inmate reformation. Moreover, other states seemed to be interested in adopting some or all of Pennsylvania's penal methods.

Yet within a few years, less than two decades, the situations in both countries had reversed. Britain ceased to apply the death penalty to crimes other than murder, even though the laws would not be officially changed until the mid-nineteenth century. Penitentiaries were opened that were conspicuously modeled on the Pennsylvania plan, which had been greatly influenced by Rush's work. At the same time, however, hangings in Pennsylvania were lurid, public events that transpired in numbers disproportionate to the other states, a condition quite contrary to Rush's reform efforts.¹ What happened to reverse to the positions in both countries? Were Rush and Romilly truly influential and effective in their campaigns for penal reform? Are the parallel lives of these men worthy subjects of historical study?

The explanation for changes in the penal systems after the deaths of Rush and Romilly is multicausal in nature. Moreover, the reasons for the changes are both deep and complex as well as superficial and facile. To begin with an easy answer: reaction. Social and political force

may be conceptualized as forces in physical nature. Actions have reactions. Force, when pent up or restrained, accrues energy. The changes in the penal systems in both America and especially in Britain in the 1820s can be explained as reaction or an achieving equilibrium. To borrow from twenty-first century parlance, there was “a correction.” Britain had been in almost constant war with France from 1792 through 1815. These wars were crucially important to the continued existence of the British Empire as a major Atlantic, even global, power. Immediate military needs understandably assumed and retained a high priority throughout the course of the conflict. Moreover, Britain’s financial and economic systems experienced significant upheaval during the period. Exports plummeted, resulting in economic depression and unemployment.² Food and other basic resources as well as money remained scarce, provoking social unrest. “High food prices, reduced wages, and rising unemployment,” explains Stanley H. Palmer, produced popular disturbances and protest such as Luddism in 1811-1812.³ This unrest, especially when interpreted through the lens of revolutionary insurrection, did not promote or foster an inclination among members of Parliament to address matters of penal reform. In addition, the scarcity of money virtually guaranteed that any proposal that diverted funds from the war effort, such as schemes to build penitentiaries, received a chilly reception. While Britain’s immediate military concern significantly dwindled with Bonaparte’s exile to St. Helena, the economic situation required more than the signing of a peace treaty to regain a steady footing; again this context caused penal reform to be deferred. Moreover, contrary to the usual pattern in which crime decreases during wartime, Britain experienced both a real and perceived increase of criminal activity during the decades of war. The fear of a post-war surge in crime persisted and caused hesitation among members of Parliament to consider changes to the penal code. Referring to the late 1820s, Palmer explains, “Since 1793 Englishmen had been living in a protracted crisis: first the long wars on the Continent and then the severe postwar depression at home.”⁴

America, while not as directly involved in the Napoleonic Wars as Britain, nonetheless experienced significant effects from the conflict that consumed all of Europe and its many colonies. The economic situation in the United States suffered from the embargo Congress passed in response to Britain's and France's efforts to thwart trade with each other by blockading the other's ports and controlling shipping on the open seas of the Atlantic.⁵ The desperate economic situation and anger over continued British interference with American shipping eventually led the United States and Britain into open war, the War of 1812 (1812-1815). Although from the British point of view this war could not be regarded as much more than an annoying distraction, to the Americans it was practically a second War of Independence. Besides the obvious pattern of alignment of combatants – America versus Great Britain, with France vaguely supporting America – this war finally forced Britain to take American independence seriously.⁶ The aftermath of the war in America played out in wild swings of the economy. Whereas Britain's long period of financial flux began its climb back to stability, the United States experienced significant volatility in its economy. The postwar restoration of the British and French economies contributed to the Panic of 1819 and subsequent economic depression in the United States.⁷ These booms and busts caused fear and uncertainty to be rife.

In the same way that fear had kept a tight lid on the spirit of reform in Britain, it began to exercise a similar chilling effect in America. Moreover, in the larger sense, America was growing up. By the 1820s, the experience of the Revolutionary War was almost fifty years in the past. The heady atmosphere of the Enlightenment that had inspired much of the rhetoric if not the reality of political and social experimentation in America had yielded to the more conservative, nostalgic spirit of Romanticism.⁸ The appeal of lofty reason as manifested in the Enlightenment had succumbed to baser or at least more practical concerns like commerce, property, and exploration. Historian Thomas Bender states, "Attention shifted to social and economic issues. . ."⁹ Just as the removal of the threat of Napoleonic France thawed frozen attitudes among the British, the security of America's independence, the surge of the post-war economy,

and generally buoyant zeitgeist known as the Era of Good Feelings led Americans to reconsider their policies regarding punishment.

The period of James Monroe's presidency (1817-1825) may be more aptly termed, "The *End of the Era of Good Feelings*." As the last founding father to be president, the termination of his administration and be seen as a symbolic turning point when America left behind the revolutionary or infancy period and entered into its childhood. The exhilarating economic boom of the immediate post-war years gave way to the cold reminder of reaction that came in the form of the panic of 1819. The temporary abeyance of contentious partisan strife was followed by the bitterly close and contested elections of 1824 and 1828.¹⁰ Moreover the very nature of the elections changed as the older voting restrictions, which tied enfranchisement to property ownership, were relaxed or eliminated. The extension of voting rights to almost all adult white males altered the nature and the outcomes of elections. Elites feared that the elections would be vulgarized; the 1828 election of Andrew Jackson with the obvious and prominent participation of "King Mob" confirmed their misgivings.¹¹

As was the case in England throughout much of the eighteenth century and into the Napoleonic period, a nervous, propertied elite class did not favor a generous and lenient penal system. Such persons were more interested in preserving their holdings and position and consequently, less receptive to social experimentation that involved criminal rehabilitation and reform of punishment. Historian David Rothman explains:

Citizens found cause for deep despair and yet incredible optimism. The safety and security of their social order seemed to them in far greater danger than that of their fathers, yet they hoped to eradicate crime from the new world. The old structure was crumbling, but perhaps they could draw the blueprints for building a far better one.¹²

Moreover, the experiments were not without their setbacks. The Walnut Street Gaol was not the maximum security facility that would emerge in the twentieth century. Escapes were common and recapturing the criminal was neither guaranteed nor inexpensive. In addition, costs mounted as the logistics of operation revealed unforeseen consequences.

The Pennsylvania System or Separate and Silent System was particularly expensive, for it required a massive logistical investment in order to operate it according to its basic principles. Maintaining each prisoner in near total isolation required the building and maintaining of hundreds of individual cells. In addition, with capital punishment significantly reduced in application, the number of people imprisoned for long periods rose faster than anticipated and certainly faster than the availability of separate cells.¹³ As the need for additional cells to accommodate prisoners rose, so did the reluctance and resentment from taxpayers, who questioned the wisdom of increasing public funds to house criminals. The logical leap to advocating the return of capital punishment was not a difficult one to make; elite citizens, who bore the brunt of the tax burden and who were already uneasy about the perceived leniency of the new penal methods, argued that criminals were supported in luxury while honest people did without. This sentiment recalls Lord Ellenborough's characterization of transportation as "a summer's excursion in an easy migration to a happier and better climate."¹⁴

Another issue that cannot be ignored in examining America's response to penology in the nineteenth century is slavery. Slavery was already a contentious and divisive issue when the constitution of the United States was written. Today's hindsight is not required to appreciate its polarizing nature – even in Rush's time, people understood that the matter would someday come to a head. The Compromise of 1820 or Missouri Compromise brought about a relatively calm period until the Mexican-American War would undo the uneasy truce. However, sentiments for or against slavery were always growing and becoming ever more congealed. As Rush had warned, the conflation of attitudes towards criminals and the performance of hard labor as punishment with attitudes regarding slavery proved impossible to avoid. Southerners in particular regarded state-imposed deprivation of personal liberty as a form of punishment to be an insupportable violation of the individual's personal honor. They understood the deprivation of liberty as being far too close to the institution of slavery for their comfort. Historian Edward L. Ayres contends that Southerners' association of crime with race made it difficult for

them to acknowledge a white criminal class or to legislate for its control or reformation. Retribution remained more important in the South.¹⁵ As a result, penitentiaries as places of institutional punishment were only reluctantly accepted in Southern states compared to the Northern ones.

A more fundamental reason for changes in punishment on both sides of the Atlantic also occurred in this period. Beyond the fluctuations of economics and the fortunes of war, political philosophers had slowly been developing new attitudes toward the relationship between the government and the individual. The relative position of the individual who was once a member of a body politic subservient to a monarch had evolved into the individual who was a citizen of a government that was at least theoretically answerable to the individual. With reading, rudimentary education, and a sense of liberty and individuality fostered by the Protestant Reformation and various political revolutions, Europeans no longer regarded themselves as the subject of the king. Along with this change in attitude, governments had subtly shifted from treating the body of the subject as property to be used as the crown saw fit to regarding the individual's body as inviolable. This process was by no means complete in the 1820s but was clearly under way. Concurrent and inextricably linked with that trend, however, was the inverse perception that the soul or spirit of the individual was fair game for governmental intrusion.

Governments, monarchs in particular, had long been involved in interfering with and controlling the souls of their subjects. A few examples – Henry VIII's break with Rome, "Bloody" Mary and the fires of Smithfield, and Puritan New England's rough treatment of non-Calvinists – illustrate governmental efforts to shape religious expression. However, the key term is "expression". Outward conformance sufficed to satisfy governmental strictures regarding religion. While Mary's insistence on Catholicism may have been chafing and confining, external adherence to the forms of Roman Catholicism allowed one to escape persecution. Similarly, swearing to the Thirty-nine Articles would have qualified one as loyal to the Church of England and to the King in the two previous reigns. In other words, external display of religious orthodoxy would, in most cases, be sufficient to avoid governmental meddling; and to the extent the gov-

ernment did intervene, that intervention would be only to effect the restoration of the *external* compliance. In sum, these examples reveal a “checklist mentality” in which the individual was expected to demonstrate compliance to the satisfaction of the authorities and his or her neighbors by the performance of or adherence to all the stipulated requirements. This may be thought of as an enumerated and finite conformity.

By Rush’s time a more invasive intervention was conceived. Let us return to Rush’s tranquilizing chair as an example. Rush understood that mere external control alone was not the end but only the beginning. The *external* control that his contraption offered was only a means to bring about *internal* control and thereby achieve a genuine and lasting change. Control and constraint of the body were secondary to Rush’s primary purpose. If the external control served to reduce harm to the patient and others, that was a happy by-product of the treatment. The real goal, however, involved a fundamental and lasting transformation whereby further restraint would no longer be required. Similarly, with the penitentiary as a form of punishment, the isolation of the criminal served not so much to remove him or her from doing immediate harm to others, but to bring about a penitential reformation of total behavior in order to become a productive member of society. In short, Rush sought deep internal alteration of the person’s core. This attitude far transcended the notion of signing a statement of intention or swearing to an oath. This was not an enumerated or finite conformity, rather this was total conformity that the individual assimilated and lived. Every action, no matter how minute, demonstrated the depth of the lesson and the degree to which it had been absorbed. This mentality strove to educate and mold individuals according to the perceived ideal. Although the individual was ostensibly “free,” he or she was increasingly disciplined and constrained. Whatever pain or harm that was inflicted on the body of the individual was regrettable and incidental; the target was the spirit, not the flesh *per se*.

Foucault locates this shift in focus from body to the spirit in the growth and spread of the industrialized, capitalist state. He finds that the trend manifests itself in practices relating to

organization of work, education, medicine, and punishment.¹⁶ According to Foucault, the factory system emerged in the late eighteenth century as a means of organizing resources to meet the demands of efficient work. Production of a product became the goal around which human and material resources were marshaled to achieve ever-increasing productivity. In such a system, the human elements, every bit as much as raw materials or tools, were commodified and expected to contribute to the pace of production. Directly related to this concept of production, both as a result and a support, education of the worker assumed greater importance. Over time, the minimal skills necessary for workers increased. Reading became more important in order to operate machinery and to follow work assignments. But more so than mere instruction in skills, the molding and shaping of people as citizens and workers took on greater significance as the need for compliant human resources grew. The free-form individuality of the eighteenth century became increasingly intolerable in the regimented workplace of the nineteenth century. Factory owners expected workers to conform to established hours and conventions of behavior in order to ensure maximum capacity of output. To that end, penitentiaries were microcosms of the larger system. The penitentiary was itself a factory whose intended product was productive citizens. The holding or carceral function of these institutions was – at least in the beginning – incidental to the loftier goal of transforming the miscreant and maladjusted into contributing, conforming citizens. In the true penitentiary, in its ideal state, there was no punitive element. It served but to temporarily isolate the criminal from honest society while transforming him or her prior to eventual release.

This proliferation of industrialized capitalism as a force in the state occurred in Britain and the United State at approximately the same time. It may be fair to observe that the competition between the two nations contributed to the advancements each nation made. Considering the effects on the penal institution described above, it is hardly surprising that penitentiaries would be tried in both countries within the same era. Both nations, albeit for different specific reasons, reached a point when the construction of facilities to hold and reform (re-form) crimi-

nals seemed useful and worthwhile. Similarly the trajectory of the use of the death penalty led both nations to effectively similar positions. Although Pennsylvania pushed ahead and abolished the death penalty for a time, by the 1820s it was restored as a penalty for murder. Britain, on the other hand, retained the death penalty for numerous offenses officially until the mid-nineteenth century, but in practice seldom hanged people for anything other than murder after the 1820s. In effect, both America and Britain were on parallel tracks, headed in the same direction but proceeding at different speeds.

Indeed, in taking the larger view of the events of the period under discussion, it can be seen that Enlightenment philosophy as well as religious evangelicalism shaped attitudes toward the application of penal practice in both America and Britain. While in the short term, the particular differences of circumstances regarding the wars of 1776-1783 and from 1792-1815 brought about different responses in America and Britain, the decade following these conflicts witnessed these two countries practicing closely similar penal measures. In spite of Romilly's opponents, the fabric of the English judicial system did not unravel with the removal of wholesale application of hanging. And despite Rush's argument for America to turn away from the monarchical habit of hanging, the propertied elites in the United States were no more ready than their English brethren to abandon entirely the ultimate threat of death for the most heinous crime(s).

Besides affording a glimpse into both the biographic details of eighteenth-century life and an over-arching transatlantic continuity of thought, the careers of Romilly and Rush serve as marvelous counter-examples of the "great man" style of history. Romilly labored for years, arguing many a long night in Parliament for the repeal of harsh statutes that could inflict death on the poor lawbreaker for relatively trivial offenses. Almost without exception, he failed to persuade and met with resistance at every turn. Yet, within a decade of his death, the resistance evaporated and his agenda was adopted. While those who carried through the changes in the judicial practice acknowledged Romilly's contributions to the cause, there was no reason to suppose that the change was completely attributable to his effort. Put another way, if his efforts

had not happened to coincide with the aftermath of the French Revolution, he would probably have seen his plan enacted with little opposition because, in the broad scheme of things, people were ready for the dismantling of the Bloody Code. That dismantling was delayed only by the last minute fears caused by Bonaparte. Similarly, in America, Rush met with success at least in part because America was still in the throes of revolutionary idealism. However, when its initial enthusiasm subsided and the long-term practical business of business asserted itself, there proved to be no unique “American” propensity for humanitarianism or leniency. The powers that be in America found the same harsh solutions to be persuasive as did their counterparts in Britain.

However, the foregoing does not undermine or refute the existence of a transatlantic spirit of judicial reform during the period of 1770 to 1820. Indeed it serves more to confirm its existence in that the desire to reform was observed in Britain and in America, as well as in other nations beyond the scope of this study. The fact that the reforming spirit took different courses in the different nations only shows that such a spirit did exist and was itself subject to other forces. Had this study included a French axis along with its Anglo-American ones, the events of the Terror would have seemed strange and alien compared to the American and English portions. In other words, the American and British experiences with penal reform are not so vastly different from each other when compared to the dramatic events of the French Revolution. Yet by the 1820s, all three – America, Britain, and France – were settled into roughly equivalent forms of practice regarding the extent of the application of capital punishment and the adoption of the penitentiary as an alternative to the death penalty.¹⁷

Historian Patricia O’Brien warns of the perils of studying prison reform through the lens of the reformers as individuals. She writes:

One popular approach in analyzing developments in the modern prison system has been to focus on the activities of the men and women responsible for reforms. In such an approach, the historian is likely to assign particular importance to the motives and beliefs of the individual reformers. The often unavoidable result is to center on the good will and philanthropic impulses of the men and women who devised new and just punishments. . . . Such a treatment nec-

essarily tends to ignore the social context of the institutional change and development and to ignore as well the existence of prisoners in the penal process. Yet to take the opposite extreme and to overlook completely individuals . . . would constitute an error perhaps as great as that of making them central in a study of the prison. Instead of rejecting the role of the reformers in the process of punishment, we must define their place in it.¹⁸

Both Romilly and Rush labored valiantly for the cause of reform and met with varying degrees of success. Ultimately, they were very much men of their time who were responding to a cause whose time was ripe. Certainly neither man invented the cause of judicial reform, nor was either unique in taking up the cause at that time. Beccaria and Bentham were far more original and innovative. Both Rush and Romilly were influenced by Beccaria, and Romilly's long friendship with Bentham is reflected in his arguments grounded in utility. Moreover, neither Rush's nor Romilly's efforts had the depth of effect either hoped for in their lifetimes. This paucity of effect only suggests that they were involved in a change that may now be seen as far larger in scope than they understood it to be. Both men focused narrowly on their particular portions of the penal system and sought to effect reform within their limited range. However, to attribute the alteration in the penal system to their efforts would stretch credibility and veracity.

At first, the imagery of the mirror seemed useful; Romilly and Rush *reflected* the spirit of reform that existed on both sides of the Atlantic. While that is true, it is also inadequate. A mirror does little else besides reflect. That which a mirror reflects exists independently of the mirror and is unaffected by the act of reflection. Such language ignores the genuine contributions these individuals made. Romilly and Rush did more than reflect; they amplified. The image of a piano's soundboard seems more appropriate. A soundboard enriches, enhances, and even modifies the sound. While a piano's sound would exist without the presence of the soundboard, it would not possess the expected richness and volume. Only a fool would fault the soundboard for not creating the sound by itself. Rush and Romilly were soundboards for reform. They did not create the transatlantic spirit of penal reform; they promote and enhance it.

Changing attitudes regarding capital punishment and the innovation of the penitentiary as an institution for reform resulted from the larger changes brought about by the maturation of

the capitalist economy and society and were not the work of any two individuals, no matter how deeply their convictions ran. Romilly and Rush were timely crusaders who responded to the clarion call for reform issued by Evangelicalism and the Enlightenment. The fact that larger societal forces propelled that cause neither diminishes nor invalidates their contributions.

Notes

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- ¹ Jock D Marietta and G. S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania 1682-1800* (Philadelphia: University of Pennsylvania Press, 2006), 3, 189, 214.
- ² Owen Connelly, *French Revolution / Napoleonic Era* (New York: Holt, Rinehart and Winston, 1979), 256-257.
- ³ Stanley H. Palmer, *Police and Protest in England and Ireland, 1780-1850* (Cambridge: Cambridge University Press, 1988), 178.
- ⁴ Palmer, *Police and Protest*, 288.
- ⁵ Paul S. Boyer and others, eds., *The Enduring Vision: A History of the American People* (Boston: Houghton Mifflin Company, 2004), 239-240, 243-245.
- ⁶ Thomas Bender, *A Nation Among Nations: America's Place in World History* (New York: Hill and Wang, 2006) 115.
- ⁷ John M. Murrin and others, eds., *Liberty Equality Power: A History of the American People*, (Fort Worth: Harcourt Brace, 1999), 406.
- ⁸ Historian Norman Hampson points out the idealized nature of the Romantics' view of the past. He writes: "Moreover, the past that appeared so picturesque in retrospect had not seemed particularly idyllic to those who had had to live in it and the Romantic imagination was no more historically accurate than the Enlightenment's sweeping dismissal of 'centuries of monkish dullness'." Norman Hampson, *The First European Revolution 1776-1815* (New York: Harcourt, Brace and World, 1969) 195.
- ⁹ Bender, 113.
- ¹⁰ Boyer *et al.*, 287-289.
- ¹¹ Edward L. Ayers and others, eds., *American Passages: A History of the United States* (Fort Worth: Harcourt College Publishers, 2000), 330.
- ¹² David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown, 1990), 62.
- ¹³ Michael Meranze, *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1845* (Chapel Hill: University of North Carolina Press, 1996), 224-225.
- ¹⁴ Charles Campbell, *The Intolerable Hulks: British Shipboard Confinement 1776-1857* (Bowie, Maryland: Heritage Books, 1994), 62.
- ¹⁵ Edward L. Ayres, *Vengeance and Justice: Crime and Punishment in the Nineteenth-Century American South* (New York: Oxford University Press, 1984), 35-38.
- ¹⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1978), Part 3, Chapter 2, 170-194.
- ¹⁷ For a summary of France's experience in transitioning from the *Bagnes* (roughly equivalent to England's hulks), which were punitive, and the fortress-like prisons of the Old Regime, which were carceral, to the reformatory penitentiary see Patricia O'Brien's *The Promise of Punishment: Prisons in Nineteenth-Century France* (Princeton: Princeton University Press, 1982). Chapter 1, "The Science of the New Punishment" (13-51), is particularly applicable.
- ¹⁸ O'Brien, 29-30.

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BIOGRAPHICAL INFORMATION

Wendell Hunnicutt (Alex) entertained corporate America for years with his financial, health care, and inventory control applications. Eventually, he followed his life-long interest in history and received his Master of Arts, History in May 2003, after which he entered the doctoral program. He plans to teach and pursue his studies in history, especially in early modern studies. In addition, he anticipates exploring aspects of gay and lesbian studies in modern Europe and America.