# Transportation versus Imprisonment in Eighteenth- and Nineteenth-Century Britain: Penal Power, Liberty, and the State

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A wise and free people will never give their voluntary consent, in their collective capacity, to be burthen'd with oppressive taxes, bridled with penal law, and kept to subjection by a standing army . . . the power of the Crown is already so extensive, that we ought at least to guard against any further growth of it, for the reasons before-mention'd, unless in cases of the utmost extremity. (*Gentleman's Magazine*)

Enthusiasts however, are not wanting, who, without regarding this circumstance, condemn certain modes of punishment, as, for example, imprisonment accompanied with penal labour, as a violation of the natural rights of man. In a free country, like this, they say, it ought not to be tolerated, that even malefactors should be reduced to a state of slavery; the precedent is dangerous and pernicious; none but men groaning under a despotic government can endure the sight of galley-slaves. (Jeremy Bentham)

The attitude of all "democratic" currents, in the sense of currents that would minimize "domination," is necessarily ambiguous. (Max Weber)

Existing explanations for historical changes in punishment in Britain have tended to examine the replacement of disorderly prisons and public executions with national penitentiaries from the late eighteenth to the mid-nineteenth century. Despite their significant contributions to our understanding of how punishments operate in a broader social, political, and economic context, these scholarly accounts have narrowed debate on the mechanisms of penal change to the intentions of penal reformers. This analysis extends this time frame and uses historical data to compare the development of the penitentiary

in Britain to its primary, yet less studied, penal substitute, the transportation of felons to America and Australia. In doing so, it provides an alternative explanation for the ascendancy of national penitentiaries. I argue that the development of these penal institutions in Britain was historically made possible by two interdependent sets of changes: (1) changes in the structure and administration of the state's penal apparatus (from decentralized to centralized and patrimonial to bureaucratic); and (2) transformations in popular understandings of the state's power to punish in correspondence with the expansion of a broader and more equal definition of citizenship (democratization). In conclusion, I argue for the value of perspectives on punishment that identify the explicit relationships between state organization and social relations in order to clarify how culture inheres in material conditions to influence specific penal outcomes.

I n this article, I provide an alternative explanation for the development of national penitentiaries in Britain by comparing the emergence of these institutions to their primary penal substitute, the transportation of felons to America and Australia during the eighteenth and nineteenth centuries. Existing explanations for historical transformations in punishment have tended to focus on why the squalid conditions of local prisons and the spectacle of the scaffold were replaced with the sanitary and disciplinary regimen of the modern penitentiary from the late eighteenth- to the mid-nineteenth-century in France, England, and the United States. In doing so, they have identified the intentions of upper- and middle-class evangelicals, philanthropists, progressive political actors, and government administrators as an important mechanism of penal change. Where they differ is in their assessment of whether the penitentiary was an outcome of humanitarian (Webb & Webb [1922]1963; Radzinowicz 1948–86; Spierenburg 1984; Skotnicki 2000), or authoritarian impulses (Foucault 1979; Ignatieff 1978, 1983; Garland 1985; Dumm 1987).

Despite their significant contributions to our understanding of how reformers' intentions operated in a broader social, political, and economic context, few new insights into the development of the penitentiary have been offered since the 1970s, with the revisionist histories of Rothman (1971), Foucault (1979), and Michael Ignatieff (1983). Made twenty years ago, Philips's criticism still resonates today: that work in progress on the social history of crime and punishment is "[M]uch stronger on uncovering new sources of empirical material for the historian to use than on suggesting larger overviews, theoretical models, or methods of approach" (Philips 1983:67).

The now-dominant revisionist theory of penal change posits that the penitentiary, as a paradigmatic bureaucratic institution, arose due to a dramatic change away from inefficient punishments,

such as public executions and torture, toward a sensibility of effective control and widespread surveillance. The evidence for this view of the penitentiary (and bureaucracy) lies primarily in the observation that this institution developed between 1780 and 1840 in conjunction with new ideas about discipline, inspection, and expert knowledge—ideas that were animated by prominent and zealous prison reformers. However, this theory fundamentally distorts the historical evidence regarding the institutionalization of the modern prison and the demise of its alternatives. In Britain, the primary penal alternative was not torture or execution, but the expulsion or "transportation" of felons overseas (Innes & Styles 1986:417). In fact, reformers had articulated modern ideas about imprisonment, and complaints about public executions, torture, and transportation, many years *prior to* the construction of the first penitentiary (Beattie 1986; Spierenburg 1984:5–7). Moreover, older systems of punishment, especially transportation, existed for many years *after* the construction of the first penitentiaries. Indeed, the demise of transportation and the widespread acceptance of the penitentiary occurred virtually simultaneously in the latter part of the nineteenth century. Therefore, what structural processes and conditions converged by the late 1800s to contribute to the institutionalization of the modern prison and to the abandonment of transportation? I suggest that the key conditions were the development of central state capacities and the rise of a modern mass democratic sentiment favoring greater fairness and equal treatment of citizens. Thus the origins of the penitentiary do not lie in an ideology of conscience or control, but in the elective affinity of larger processes of centralization, bureaucratization, and democratization.

While scholarship on transportation as a form of punishment has been overshadowed by scholarship on the decline of capital punishment and the rise of the penitentiary, it has not been entirely neglected.[1] Recent studies on British penal history have emphasized transportation's significance for understanding penal change.

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[1]  Several prominent accounts on penal reform in Britain have paid short shrift to transportation. Beatrice and Sidney Webb "leave on one side the whole subject of transportation," and Radzinowicz devotes a single chapter to the subject in his three-thousand-page opus (Webb & Webb [1922]1963:44; Radzinowicz 1986: Vol. 5, Ch.14). Similarly, Foucault and Ignatieff largely ignore transportation and base their conclusions on the rise of the penitentiary. Foucault refers briefly to transportation, but only in terms of the element of corporal punishment that prisoners would be subject to in the course of being banished (Foucault 1977:33, 272). Ignatieff acknowledges transportation but provides no analysis of its function as a penal sanction (Ignatieff 1978:19–20, 200–4). This omission of transportation as an important explanatory variable brings into serious question the validity of existing general theories explaining historical transformations in punishment (Garland & Young 1983:9–10).

In his book on crime and punishment, Beattie writes, "The fundamental break with the penal practices and penal intentions of the past came with the introduction of transportation in 1718 as much as with the establishment of imprisonment in the last decades of the [eighteenth] century" (Beattie 1986:620). Subsequent accounts have provided a rich description of the origins and operation of the convict trade prior to the settlement of Australia (Beattie 2001: Ch. 9; Ekirch 1987), used transportation to illuminate the various rationales for the state's power to punish (retributive severity, deterrence, and reform) (Devereaux 1996:54), and discussed the experiences of female convicts overseas (Oxley 1996). These advances notwithstanding, far more energy has been expended on tracing transportation's historical lineage (Hughes 1986; Morgan 1987; Oldham [1933]1990; Robson 1994; Shaw 1966; Smith 1957[1965]) than on analyzing transportation in a broader explanatory context (but see Feeley 1999, 2002). By contrast, the more general question addressed here is: What can transportation tell us about the factors that influence the state to adopt a particular form of punishment at a specific point in time? Thus, while this research draws on prior historical scholarship, its purpose is to provide a new line of inquiry on the basis of which future research in the sociology of punishment can profitably proceed.

Although transportation has long been regarded as a historical curiosity rather than an object of continuous and intensive inquiry, its relevance to British penal history should not be underestimated. The organized transport of convicts pre-dated reformers' demands for national penitentiaries by about sixty years, and the British state relied heavily upon transportation for one hundred fifty years.[2] In fact, in contrast to imprisonment, transportation was the principal punishment of the eighteenth century. Using court records from the English county of Surrey, Beattie calculated that prior to the 1718 Transportation Act,[3] approximately 60% of those convicted of noncapital property offenses, the predominant crimes for which people were transported, would have expected to receive a punishment of branding on the thumb and be released (1986:507).[4] In

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[2]   Convicts had been transported in the seventeenth century, but the process was haphazard and the punishment was mainly limited to the deportation of convicted offenders as a condition of a royal pardon.

[3]   4 Geo. 1, c. 11 [1718].

[4]   This practice was known as "benefit of clergy." Following conviction for certain felonies (most often property offenses that did not threaten violence), but prior to sentencing, the offender could submit to a literacy test (after 1705 the literacy test was no longer required to grant clergy). By successfully reading a passage from the Bible, the offender would escape the mandatory death sentence for felony. This was a custom that originated in the ecclesiastical courts, but by the seventeenth century it was being employed so widely in the secular courts that it had significantly tempered the severity of the Common Law (Beattie 1986:141–2).

the generation after the passage of this act, this same proportion of offenders was deported and sold into indentured servitude for a minimum sentence of seven years. By contrast, within the same period (1722–49), less than 1% of these offenders were imprisoned (Beattie 1986:507). Offenders convicted of capital crimes and subsequently pardoned could expect a similar fate: They were transported and indentured for a minimum sentence of fourteen years. In all, some 50,000 British convicts were transported to the American colonies between 1718 and 1775 (Ekirch 1987:27).

After the War of Independence brought transportation to America to a close, it was soon resumed to Australia. Although it did not operate on the same scale as transportation to America, transportation was a crucial element of British penal policy throughout most of the nineteenth century: As many as one-third of all offenders convicted in British courts between 1787 and 1840 were deported, not imprisoned (Shaw 1966:161). It is estimated that when transportation eventually trickled to a halt in 1868, approximately 160,000 people had been shipped to Australia: "[T]he largest forced exile of citizens at the behest of a European government in pre-modern history" (Hughes 1986:2).

This article provides an alternative explanation for the development of the penitentiary by comparing this penal sanction with the British state's transportation of its convicts. I combine my analysis of parliamentary debates and reports, political commentaries in popular periodicals and newspapers, and contemporary essays on law and punishment with a more general examination of how the limits on the state's power to punish were signified and materially produced in the law, criminal justice system, and other formal mechanisms of social control. My central argument is that penitentiaries could only develop when the British state's penal apparatus became sufficiently centralized and bureaucratized in the nineteenth century. This increased the central government's capacity to overcome the opposition of local magistrates and systematically implement and enforce prison legislation on a national scale. Centralization and bureaucratization may have provided the necessary conditions for the development of the penitentiary, but the central government and its penal apparatus needed an additional motivational basis to make it operational.[5] This was provided by a change in social relations during these processes of state formation and administration. The centralization of state power transformed the capacity and willingness of broad segments of the populace to pressure national power-holders into protecting them

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[5] Deflem makes this distinction between structural conditions and motivations in his recent work on the historical formation of international police organizations (2000). I would like to acknowledge this influence in helping me to conceptualize my argument.

from arbitrary state actions, including punishments. As part of this process of democratic claim-making, Parliament was finally motivated to overcome the long-standing opposition of county magistrates and take control of a local prison administration distinguished by variability in prison conditions and in severity of punishment. As a further result of this significant shift in the relations between ordinary people and power-holders on a national scale, the British government was ultimately compelled to abandon transportation. Since it exposed convicts to unequal punishment at the hands of colonial settlers and infringed upon the will of the Australian people, it was no longer compatible with emergent democratic ideals.

Until this development of democratic claim-making, penal reformers had only achieved limited success in improving prison conditions and increasing central government control over local magistrates. Moreover, despite their ardent commitment to the penitentiary, reformers had failed to encourage Parliament to cease transportation. Thus, the ascendancy of the penitentiary, which promised the impartial and egalitarian punishment of all felons under the watchful eye of a central government, emerged as part of an expansion of the state's power "to penetrate and centrally coordinate the activities of civil society through its own infrastructure" (Mann 1988:7), and as part of the development of a set of mutual rights and obligations between the state and its publics.

Before examining existing accounts on the emergence of the penitentiary, I begin by clarifying the types of prison that existed in eighteenth- and nineteenth-century Britain. Since many readers will be unfamiliar with the history of Britain's penal administration, it is helpful to provide some terminology and to describe briefly how the prison system was organized. Furthermore, this summary affords an opportunity to explain why it is misleading to identify the mid-nineteenth century as the period when the penitentiary triumphed as Britain's punishment of unparalleled importance.

## The Prison System

It is important to define clearly what is meant by *penitentiary* in order to identify its chronology accurately and to avoid making overly broad generalizations about its use as a punishment. The timing of the penitentiary is crucial to understanding its distinctive features and to delineating the key historical conditions underlying its development.

In some respects, punishment in penitentiaries was not very novel since imprisonment had been used, albeit on a selective and modest scale, throughout the eighteenth century (Ignatieff 1983). However, a persuasive case can be made that the penitentiary

represented a distinctive shift in penal practice. In the eighteenth century, prisons (a convenient term for the combination of local gaols and houses of correction that were often indistinguishable in practice) had generally been used as a means to confine debtors, those awaiting trial, and felons awaiting the execution of their sentence (Ignatieff 1983). By contrast, the purpose of the nine-teenth-century penitentiary was to punish and reform criminal of-fenders. In addition to this change in function, the form this punishment took also differed. While prison management in the eighteenth century was relatively haphazard and prisons were fre-quently dilapidated, overcrowded, and chaotic, inmates in nine-teenth-century penitentiaries were increasingly subjected to a strictly enforced set of rules and regulations governing every as-pect of their punishment, including their diet, cell size, clothing, and discipline (McConville 1981).

Some of the most influential explanations for this transforma-tion in punishment have been based on one or two highly visible and controversial institutions that did not represent the vast ma-jority of prisons in which most inmates were confined. For exam-ple, Foucault and Ignatieff make general conclusions about penal change, yet they focus on the disciplinary regimens of two excep-tional penitentiaries constructed in the mid-nineteenth century: Mettray in France (1840) and Pentonville in England (1842) (Fou-cault 1979:193; Ignatieff 1978:293; DeLacy 1986). This tendency toward overgeneralization, exacerbated in Foucault's case by a se-lective and idiosyncratic use of historical data (Braithwaite 2003), distorts the nature and extent of penal developments by ignoring the strength of local opposition to a highly developed and coor-dinated system of prison discipline, and by overlooking the state's reliance upon transportation.

In light of these criticisms, *penitentiary* in this analysis refers to institutions used for the long-term punishment and reform of criminal offenders, operating according to strict rules and regula-tions under the auspices of a central government prison admin-istration. The centralization of control is key to understanding the development of the penitentiary since for most of this period, county magistrates, acting autonomously, owned and managed the majority of Britain's prisons. Millbank, the first prison to be con-structed and administered by the central government, was not completed until 1816, and by 1867 there were only nine of these ''convict'' or national prisons, compared to one hundred twenty-six local prisons (McConville 1995:119). Fiercely protective of their traditional authority, these local officials constantly thwarted at-tempts by the central government to interfere in prison adminis-tration. As a result, imprisonment in local jurisdictions was distinguished by a lack of uniformity in prison conditions, discipline,

and policy, and rarely resembled the penitentiary ideal embodied in the prison regimens of Mettray and Pentonville (McConville 1981:238; Webb & Webb [1922]1963:188). It was not until 1877, when control of local prisons was wrested from county magistrates, that the penitentiary was finally realized on a national scale. Instead of focusing on a single institution as emblematic of a sea change in punishment, this analysis attempts to avoid ''over-schematizing a complex story'' and capture more precisely the major shifts in the development of the penitentiary in relation to its penal alternatives (Ignatieff 1983:77).

It is equally important to acknowledge that the emergence of the penitentiary did not result in the sudden disappearance of transportation. These punishments coexisted throughout most of the nineteenth century, with the cessation of transportation to Australia (1868) roughly corresponding to the nationalization of local prisons (1877). Thus, the rise of the penitentiary to a position of unequaled prominence in British penal history was gradual and can be traced to the late 1860s and 1870s. Not only does this provide an important corrective to accounts that emphasize a rapid and decisive revolution in punishment by the mid-nineteenth century but, more important, it provides an opportunity to compare the underlying conditions that contributed to the rise of the penitentiary in relation to the demise of its closest penal relation, transportation. Such a comparison helps empirically uncover aspects of penal change that have been previously overlooked, or whose contributions have been underestimated.

In the next section, I examine existing explanations for the development of the penitentiary and argue that these accounts have failed to adequately examine how transformations in punishment were contingent upon historical dimensions of centralization and bureaucratization. An additional limitation of concentrating on the intentions of reformers is that these accounts have attributed too much significance to their influence on penal change and too little to how penal policy was affected by broader changes in the set of social relations between the state and its publics. My more general purpose is to lay the groundwork for an alternative explanation of penal change that delineates the explicit interrelationship between specific transformations in state organization and more general understandings of state power.

## Existing Explanations for the Emergence of the Penitentiary

### Reformist Explanations for Penal Change

Until the 1960s and 1970s, the history of prisons was written as a ''narrative of reform'' (Ignatieff 1983:75). The definitive studies

of the Webbs and Radzinowicz established what later became labeled the reformist approach to punishment. The Webbs' *English Prisons Under Local Government* [1922](1963) illuminates the emergence of the penitentiary within the context of administrative improvements in local government, and Radzinowicz's massive six-volume set, *A History of English Criminal Law and its Administration from 1750* (1948–1986), explores the legal reform of Britain's capital statutes and the institutionalization of national prisons and police forces. In assuming that central government control was necessarily superior to the inefficiencies of local prison administration, the Webbs attribute prison reform to the untiring humanitarian endeavors of the English gentry, Benthamite utilitarians, and religious philanthropists [1922](1963). Although much more comprehensive and fine-grained in his examination of the development of modern legal, penal, and police systems in Britain, Radzinowicz continues to focus on how the magnanimous efforts of reformers contributed to the emergence of a more humane criminal justice system (1948–1986). In equating reform with progress, these "enlightened statists" (Palmer 1988:7) established a research agenda throughout the 1950s that exerted a powerful influence on subsequent explanations for penal change (Fox 1952; Whiting 1975; Stockdale 1977).

Despite the wealth of historical material these researchers mine, key developments linking the emergence of the penitentiary with broader structural conditions, such as the formation of the modern bureaucratic state, are left unexplored. As a consequence, the penitentiary is presented as the inevitable and logical result of a particular moral vision, rather than an institution whose origins were contingent upon a particular form of state organization and administration. Furthermore, reformist approaches fail to take into consideration how more general attitudes toward punishment, the law, and state authority affected punishment. This is an insider's perspective: Ideas for reform originate from the consciences of those who have direct access to the corridors of power, and they are materialized within the institutional apparatus of the penitentiary itself (Ignatieff 1983). In failing to situate penal change in a broader social context, the reformist perspective has been widely criticized for being teleological and one-dimensional (Philips 1983:53).

## Revisionist Explanations for Penal Change

By the 1960s, either as a result of "libertarian, populist politics" (Ignatieff 1983:75–6) distrustful of government interference in citizens' lives, or as a consequence of rising crime and incarceration rates and a corresponding "collapse of faith in rehabilitation" (Garland 1990:4), historians and social scientists began to revise the

reformist approach to penal history The revisionist perspective of Rothman, Ignatieff, and Foucault questions the benevolent intentions of reformers and analyzes the origins of the penitentiary in relation to much larger social, political, and economic changes in the nineteenth century. Rothman argues that dominant social groups developed the modern prison in response to crises of poverty and crime associated with rapid population growth and the breakdown of community norms in post-colonial America (Rothman 1971:xvii). According to Ignatieff, the prisons in Britain represented an act of authority by industrial capitalists, evangelicals, and philanthropists to forge "a link of dependency and obligation between rich and poor" (Ignatieff 1978:153). Although class rule plays a more prominent role in Ignatieff's analysis than Rothman's, both contend that the nineteenth-century penitentiary was a new form of coercion and social control.

Probably the most ambitious and influential account of penal change from this revisionist perspective is Foucault's *Discipline and Punish* (1979). Foucault identifies the development of a punitive apparatus for the more meticulous regulation of offenders' behavior as part of a much larger theoretical project on the nature and practice of power. He examines the association between power's controlling effects and the development of the scientific disciplines (Foucault 1973, 1979, 1978). According to Foucault, the primary purpose of penal reform was to replace the disorganized and unpredictable displays of state power, demonstrated by public executions, with a form of punishment, the penitentiary, that punished offenders more effectively (1979:80–1). At its root, penal reform was not an attempt to construct cleaner healthier prisons and stricter regulatory codes for the successful rehabilitation of offenders. It was part of a political strategy that included the development of more proficient institutions, techniques, and discourses for controlling individuals' bodies and minds. In making a more concerted attempt to link the rise of the penitentiary to broader economic and political forces, revisionists pushed explanations for penal change beyond the more limited focus on the humanitarian concerns of prison reformers.

Nevertheless, similar to reformist accounts, an important component of revisionist accounts was the persistent examination of punishments from the viewpoints of the ruling gentry and emerging mercantile and industrial classes. Even though attributing agency to members of a dominant or middle class is anathema to Foucault, who employs a structural concept of power and suggests that everyone is complicit in its modern forms of discipline and surveillance, it is clear that class plays an integral role in his analysis. According to Foucault, the prison represented a "new political economy" of the state's punitive power, as those with property

sought to protect their interests (Foucault 1979:26, 47, 81, 84–7). Where reformist and revisionist accounts differ is in their interpretation of the function of the penitentiary as an ideological institution to legitimize and justify class rule. Both reformists and revisionists, however, fail to examine power within the broader context of shifting social relations between rulers and ruled. As a result, the capacity of ruling authorities and an increasingly influential middle class to implement specific penal strategies is presented as being neither unencumbered nor enabled by changes in more popular understandings of the state's power to punish.

In an attempt to avoid overgeneralizing how shifts in social relations, within which these shared and contested understandings inhered, influenced penal outcomes, it is necessary to categorize the competing social groups of this period. Although this can lead to charges of reductionism, it also helps identify key patterns of penal development while avoiding unnecessary oversimplification. Revisionist accounts, in particular those of Foucault and Ignatieff, have been criticized for failing to differentiate the ruling classes (country gentry, aristocrats, and wealthy merchants) from the middle classes (professionals, small manufacturers, independent artisans, and philanthropists) during a time when numerous social groups contended for economic and political power (Garland 1990:170; Ignatieff 1983:94). In this analysis, the term *ruling class* or *ruling authorities* includes the middle class, unless stated otherwise, since I am primarily concerned with distinguishing those who had systematic access to formal political structures and exercised social influence through their increasing wealth (ruling and middle classes) from the broad category of individuals who, throughout most of the eighteenth and nineteenth centuries, did not. I refer to the latter (approximately 80% of the British population) as non-elites, the lower orders, the populace, or the people. While there were undoubtedly divisions of interest between and within the ruling and middle classes, they shared a much closer affinity to one another than to the lower orders, whose interests were "dichotomous or potentially dichotomous to those in power" (Wilson 1995:17–8).

Since punishments are obvious and deliberate forms of state coercion, their institutional forms, at least in political systems that must be responsive to popular sentiment, represent a balance between the interests of ruling authorities and more general beliefs regarding the just, or morally acceptable, exercise of their power (Ewick 1998:36). In failing to address how punishments were shaped by popular conceptions of state power, reformist and revisionist accounts have not explored how nascent democratic systems in the nineteenth century affected penal outcomes by providing avenues of influence to the lower orders previously

excluded from the policymaking process. Thus, while it is true that penal legislation and policy are heavily imbricated with the concerns of the ruling classes, whether or not these classes are motivated by a desire to protect their propertied interests, it is important not to make this an a priori assumption when analyzing punishment as a social institution (Lacombe 1996). Doing so ignores punishment's relationship to the wider constellation of values, meanings, and emotions within which it is embedded (Garland 1990:249).

The importance of collective and contested meanings in shaping social relations cannot be overstated. Throughout much of this period, the British populace guarded its traditional freedoms with perpetual vigilance, and riots against intrusions of state power acted as a commonplace and potent "countervailing" force to government authority (Gilmour 1992:19–20). The omnipresent threat of riots to state power was exacerbated by the absence of any swift and reliable mechanism for quelling social disorder. Britain did not have an organized police until 1829 (even then it was unarmed and restricted to metropolitan London). Moreover, the use of the army against citizens was regarded with such general antipathy that the state was extremely reluctant to use it as a means of domestic control. As a last resort, the local militia could be called in, but they could not be depended upon to execute government orders. The actions and opinions of the "very large and powerful body," the common "Mob," were sufficiently influential on state actors that Henry Fielding, the famous English magistrate and novelist, called it the "fourth estate," along with the King, the House of Lords, and the House of Commons that made up Britain's government (Fielding 1752:1).

In summary, existing historical explanations for penal change have focused on the internal practices of the penitentiary and the influence of the ruling classes on penal legislation. This has fueled debate on the normative implications of penitentiary discipline (good or bad) but has hindered the development of alternative explanations for penal change. Studies that have re-examined revisionist accounts have only succeeded in qualifying their claims by arguing that reformers were probably motivated by both feelings of compassion *and* a desire for obedience (O'Brien 1982:29–30; Ignatieff 1983:83; DeLacy 1986:227; Follett 2001). By contrast, a comparison of transportation and imprisonment demonstrates that the emergence of the penitentiary was historically made possible by specific changes in the organization and administration of the state's penal apparatus and changes in the set of social relations between the state and its publics. Central to my analysis is the creation of a national prison inspectorate in 1835 and the significant expansion of democratic claim-making in England and

Australia between the 1820s and 1840s. To highlight the importance of these factors, I make frequent comparisons to other initiatives to develop penitentiaries that had only limited success. Of these, the 1779 Penitentiary Act provides one of the most useful cases. Promoted by the leading prison reformers of its day, this "seminal" piece of legislation called for the construction of two national penitentiaries and established more extensive and precise regulations for the organized and efficient management of British prisons than any previous legislation (Semple 1993:45).[6] However, neither penitentiary was constructed, and the detailed code of prison discipline did not "in respect to its immediate purpose ever become operative" (Webb & Webb [1922]1963:40).

In the following sections, I use the work of Weber to show how the organization and administration of the state's penal apparatus influenced penal outcomes. In addition to changes in the structure and administrative organization of the state, I apply Tilly's interpretation of the emergence of democratic claim-making in nineteenth-century Britain to illustrate how shifts in popular understandings about state power altered the state's capacity to punish. Finally, in the discussion I focus on the theoretical implications of this analysis and bring attention to the utility of using historical data to delineate the explicit interrelationship between structure and culture in explaining penal change.

## An Alternative Explanation for Penal Change

### The Structure and Administration of Britain's Penal Apparatus

To fully understand the underlying conditions that helped give rise to the penitentiary, we must go beyond an analysis of the rational organization of power within its walls. This tells us little about how changes in the organization (from decentralized to centralized) and forms of administration (from patrimonial to bureaucratic) of the state's penal apparatus transformed the state's capacity to punish. Using a Weberian perspective of bureaucratization, I argue that the decentralization of government power to local justices of the peace hindered the implementation and development of imprisonment in the eighteenth century and provided an organizational basis for transportation. Removed geographically from Parliament, these unpaid and voluntary magistrates were responsible for many administrative and burdensome tasks, including the punishment of offenders. Unlike an effective form of punishment in local prisons, transportation did not require

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[6] An Act to explain and amend the laws relating to the transportation, imprisonment, and other punishment of certain offenders, 19 Geo. 3, c. 74 [1779].

any central government interference in local affairs, nor did it demand that county justices regularly supervise and maintain the county's houses of correction. The removal and sale of felons overseas shifted the entire burden of their correction onto the shoulders of private citizens. The increasing centralization and bureaucratization of the state's penal apparatus, in large part due to the state's warmaking activities, shifted state power toward the center and increased the administrative capacity of the central government to overcome the opposition of local authorities and rationalize prison administration. The creation of a national prison apparatus in 1835 was crucial to this process. Its specific bureaucratic features allowed a degree of centralized policymaking and enforcement that had been unavailable to this point. After 1835, the central government was able to gradually increase its control over local prisons through its administrative apparatus and could successfully implement prison policies for the strict regulation of inmates' punishment and reform. Without this bureaucratic form of administration, prison conditions and the severity of punishment would have continued to vary according to the attitudes and practices of local authorities, and the state would have continued to rely upon transportation. Thus the rise of the penitentiary as a dominant punishment was contingent upon this development in state organization.

### Eighteenth-Century Patrimonial Administration

By the seventeenth century, England's judicial business was carried out by two sets of courts, the Quarter Sessions and the Assizes, which both operated at the county level. The assize judges were state officers who were usually judges in superior courts of common law and were responsible for trying the most serious, or capital, offenses (Cockburn 1972:92). Twice a year, two judges left London and visited one of England's six assize circuits, where they set up court. Aside from hearing pleas and delivering gaols, they played an important role in passing the concerns of central government into the localities and reporting county affairs back to the monarch (Sharpe 1984:23).

But it was in the Quarter Sessions that national power intersected most closely with local power. The county's Lord Lieutenant recommended powerful landowners to the Lord Chancellor. They were then appointed (on the Crown's behalf) to the commission of the peace, where as justices of the peace (JPs) their duties included implementing central government policies at the local level (Landau 1984:70). These amateur magistrates were granted tremendous judicial and administrative powers, and by the eighteenth century the Quarter Sessions, which met four times a year, had evolved into "local parliaments" (Stone & Stone 1984:30). According to Weber,

this form of government organization approximated his ideal-type of patrimonialism, since rule was divided between local officials, or "notables," and the rulers to whom they owed their personal allegiance (Weber [1922]1978:290–1). He suggests that this "radical" type of self-government, dependent upon the status and sense of duty of local justices, was inevitably characterized by "administrative minimization and *ad hoc* activities, which thus did not amount to a continuous and systematic operation" (Weber [1922] 1978:1061, emphasis in original). Transportation, which demanded that JPs occasionally rid the nation of its criminal offenders and absolved JPs of any further responsibility for their punishment, combined these qualities into a specific penal sanction.

JPs were responsible for numerous tasks that included setting wages, assessing rates, and levying taxes. Their extensive judicial powers included dealing with criminal complaints, issuing warrants for arrest, and presiding over the trial of those charged with non-capital property offenses that made up the bulk of all property crimes (Beattie 1986:5, 284–5; Thane 1990:6). In addition, a pair of justices, and in some cases three, had the power to punish a felon with imprisonment in the local house of correction or with transportation to the colonies. Furthermore, up until the early nineteenth century, they had the authority to impose the death sentence, although this was only used in exceptional circumstances (Cockburn 1972:92).

The extent to which eighteenth-century justices operated autonomously from central government control was remarkable. In fact they have been described as "[A] law to themselves" (Osborne 1960:179). Not only was this attributable to their wealth and status as local gentry, but also to the declining importance of the Privy Council (a committee of the monarch's principal advisors). The Privy Council, "*the* organ of central government" in the seventeenth century, had kept constant watch over local authorities and could issue an order at any time for the implementation of legal statutes (Innes 1994:98, emphasis in original). However, following the dramatic events of 1688 its power was tremendously curtailed. As a result of the Glorious Revolution, which secured Parliament's independence in relation to the Crown, the amount of business handled by Parliament increased significantly. Many of the matters dealt with by the Privy Council were dispersed among other centralized and specialized departments, including the Treasury, the Admiralty, and the Secretaries of State, and the supervision of justices, along with other Privy Council responsibilities, was "marginalized" (quote in Innes 1994:97–8; Landau 1984:7). This realignment of government power was accompanied with a change in the constitutional relations between central and local government. Parliament reacted strongly to the exercise of absolute power by

James II's Privy Council, and in the aftermath of the Glorious Revolution broke the council's stronghold. Constitutional objections to central government interference explain why assize judges, who supervised magistrates, rarely intervened in the administrative and legal affairs of county government throughout the eighteenth century (Landau 1984:8, 39).

JPs, of course, did not act entirely autonomously from Parliament since they were heavily influenced politically and socially by their party loyalties. Nevertheless, they still had an interest in preserving their regional authority and independence and, as local landowners, their decisions were influenced by provincial as well as national concerns. Included among their "mass of administrative duties" were the construction and administration of the local gaols and houses of correction (Osborne 1960:180). Despite being the "owners and managers" of these institutions, many justices were uninterested in assuming the burdensome and unpleasant task of prison management (Harding et al. 1985:84). Instead, they appointed a prison governor or master who was charged with overseeing the prison's disciplinary regimen. Throughout most of the eighteenth century, they permitted the prison master to run these establishments as a business. Since the master made his profits by cutting costs and extorting fees, prisons were often squalid and disorganized places, and prisoners were compelled to pay for their use of a cell, their bedding, and even for their release (Harding et al. 1985:90).

Due to the autonomy of local justices from central government control and their abundant responsibilities, numerous laws augmenting the justices' power to build, repair, regulate, and inspect gaols were rarely put into effect. As a result, imprisonment failed to develop as a practical penal option.[7] For example, Henry Fielding, the well-known JP for Middlesex County and the City of Westminster, noted that the passage of the 1744 Vagrant Act,[8] which ordered justices of the peace to report on the conditions of their local houses of correction, was too general to be put into practice: "For the business of the [Quarter] sessions is so complicated and various, that it happens, as in all cases where men have too much to do, that they do little or nothing effectually" (Fielding 1751:65).

Without any central government intervention in the governance of local prisons due to the distinctive characteristics of a decentralized and patrimonial form of administration, penitentiaries

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[7]    For example, Acts 11 & 12 Will. 3, c. 19 [1698] and 10 Anne, c. 24 [1711], empowering justices to build and repair gaols, were made permanent by 6 Geo. 1, c. 19 [1719]; see also 2 Geo. 2, c. 22 [1729] for the control of gaol fees and 32 Geo. 2, c. 28, s. 6 [1759], which gave justices power to draw up rules and regulations to be implemented in prisons (McConville 1981:66).

[8]    17 Geo. 2, c. 5 [1744].

failed to develop. The inability of the 1779 Penitentiary Act to provoke widespread change in the practice of imprisonment is testimony to the strength of this limitation. Not only did the Penitentiary Act have the support of the most prominent penal reformers of its day, including John Howard and Sir William Blackstone, but it also established a model for strict and precise prison regulations whose principles were made general to all prisons in 1791. Among its many provisions, the act advocated well-regulated labor accompanied with separate confinement, provided measurements for the exact size of separate prison cells, and recommended standards for cleanliness and prayer. It also called for the appointment of a prison inspector by the Crown who would report to Parliament (Semple 1993). Some magistrates took the initiative to adopt the act's guidelines, but generally it had a very limited effect on local prison administration. National prison inspectors were not appointed until 1835, and many local prisons remained poorly regulated and unsanitary (McConville 1981:224). The Lancashire magistrate and prison reformer T. B. Bayley criticized the inadequate response of his fellow local magistrates to the act by decrying their "aversion to any scheme which requires continued attention, watchfulness, and trouble" (quoted in Gillen 1982:743).

In sum, the structure and organization of Britain's penal apparatus in the eighteenth century affected the state's capacity to implement prison policies. Because being a JP was essentially a "part-time occupation for gentlemen" who were removed geographically and administratively from any central control, local penal administration was "technically unsuited to deal continuously and intensively with administrative tasks" (Weber [1922] 1978:1061–2). Without a means of mandating prison building and regulations, state penal policy could not reliably increase local prison capacity or the effectiveness of imprisonment. As a result, it did not invite a more frequent use of this form of punishment.

By contrast, transportation served the interests of JPs; it increased their existing discretionary authority, and it helped minimize the administrative burden of their office. Parliament's insistence upon the imprisonment of felons would have demanded a significant investment of JPs' efforts in the supervision and correction of criminal offenders on home soil. Given justices' continued lack of interest in implementing policies for the maintenance and regulation of their local prisons, the effective implementation of a punishment that "demanded systematic administrative activity"—an effective prison system—would have required that the central government take a much more active role in ensuring that justices were actually implementing national prison policies (Weber [1922]1978:1062). Increasing the scope of central

government supervision would have infringed upon justices' autonomy. In contrast, by merely expelling British offenders, both local and central government interests were fulfilled. Transportation expediently rid the nation of its felons; shifted the burden of penal administration onto private citizens, merchants, and colonists; and allowed Parliament to remain detached from local government. By the nineteenth century this would all begin to change: the central government would substitute local prisons and transportation with the centrally organized penitentiary.

### Nineteenth-Century Bureaucratic Administration

By the end of the eighteenth century, the structure and administration of the British state began to undergo a decisive shift. These changes facilitated the development of modern penitentiaries. The effective implementation of prison policies is an administratively *intensive* and *maximizing* task. Once specific rules have been legislated, their successful application demands a significant commitment of resources. Funds are necessary for turning policy into practice, and the appointment of bureaucratic officials with jurisdictional authority helps ensure that the new policies are being implemented successfully. Likewise, any changes to these policies require a level of administrative organization that is relatively rational and coherent. In failing to compare the distinctive characteristics of patrimonial and bureaucratic forms of administration, reformist and revisionist accounts are led to exaggerate the influence of reformers' intentions on penal change and to diminish the importance of this organizational shift as a transformative mechanism. A comparison of transportation to imprisonment reveals how the emergence of a powerful centralized state and the specific features of a central government prison bureaucracy contributed significantly to the penitentiary's development as a penal sanction.

Studies on the formation of states in Western Europe that have sought to explain increases in the state's administrative capacity to extract resources and to exercise control over a defined territory have identified warmaking as an important explanatory variable (Weber [1922]1978:212; Tilly 1975; Mann 1986, 1993). In response to the fiscal and organizational demands of its warmaking activities in the seventeenth and eighteenth centuries, the British state had developed a centralized and bureaucratized fiscal-military apparatus for the more effective raising of revenues and coordination of military campaigns (Brewer 1988). Larger wars demanded additional finances and organization, and the unprecedented cost and scale of Britain's wars against the French (1792–1815) necessitated an expansion in the administrative apparatus of the state (Tilly 1995:132). In turn, this expansion helped shift the weight of state power toward Parliament and central administration

and away from local authorities (Tilly 1995, 1997). These historical developments in the organization and administration of the state provided the necessary structural conditions for the advancement of a national prison system in two ways: (1) the concentration of capital and the growth of centralized state power increased the state's capacity to construct national prisons, and (2) this power was augmented by the bureaucratization of the state's penal apparatus, which enabled the state to overcome the resistance of JPs and implement national prison policies.

The cost of Britain's wars against Napoleon at the beginning of the nineteenth century and the sheer size of its military forces (army and navy) easily overshadowed those of previous wars (Brewer 1988). In addition to using customs and excise taxes to finance its wars, Britain introduced a national income tax for the first time between 1799 and 1803. Tilly estimates that tax collections quadrupled from about £17 million in 1790 to £80 million in 1815. Similarly, the size of Britain's army (237,000 men) against Napoleon dwarfed the 45,000 mobilized for the Seven Year's War fought fifty years earlier (Tilly 1995:130–2).

As the central state's power and its access to capital grew, central government broadened its scope of activities. Shortly after the end of the Napoleonic wars, Britain built its first national penitentiary, Millbank. This massive edifice was, at the time, twice the size of any existing provincial prison and one of the most expensive public buildings in England (McConville 1981:136, 138). Its completion in 1816 required that Parliament, for the first time, become directly involved in prison policy and administration. Over the next sixty years, government committees on punishment were formed frequently, and their reports invariably resulted in the passage of prison statutes. In comparison, between 1718 and 1778, the House of Commons only formed a handful of committees to examine existing penal sanctions (McConville 1981).

Commensurate with this shift in Parliament's capacity to fund, and its obligation to manage, national prisons, Parliamentary control over local prison management gradually increased. Although the state's fiscal apparatus was the quickest to bureaucratize (Kiser & Kane 2001), the principles of efficiency and rational calculation gradually affected the state's penal administration. It was only with the piecemeal development of a bureaucratic form of penal administration that the central government's was able to overcome the resistance of local magistrates and implement a national set of uniform prison regulations.

Weber believed that the rapid spread of bureaucratic administration could be attributed to its "technical superiority" over other forms of administrative organization (Weber [1922]1978:973). Several characteristics contribute to its machine-like efficiency,

including (1) the creation of offices staffed by full-time salaried officials selected on the basis of their qualifications; (2) the performance of specialized duties and the development of a body of technical knowledge; and (3) management based upon written rules. Furthermore, Weber notes that an important attribute of bureaucracy is a concentration of the means of administration ([1922]1978:956–8, 980–3). These characteristics, primarily "the role of technical knowledge," led him to conclude that the bureaucracy is "the most rational known means of exercising authority over human beings" ([1922]1978:223).

Organizationally, changes in Britain's penal administration—the appointment of national experts, the enhancement of technical knowledge through prison inspections, and the accumulation of written reports in the exercise of official business—matched Weber's pure or ideal-type. In addition, Parliament, through its provision of grants-in-aid, expropriated resources from the largely autonomous local justices and concentrated them in the hands of central government officials. This increase in central government authority due to bureaucratization made it possible for the state to overcome resistance from local justices and implement a centrally organized penitentiary system. The corresponding growth in prison construction and improvements in prison management decreased support for, and the state's reliance on, transportation.

In 1835, Parliament appointed five national prison inspectors who were responsible for inspecting local prisons to ensure that justices were executing prison legislation.[9] Members of Parliament decided that the position required a "high class" or "efficient person to perform a most important duty."[10] Those eventually selected possessed specialized knowledge because of their long and practical experience with prison reform. For example, William Crawford was a founding member and a secretary of the *Society for the Improvement of Prison Discipline*, and Reverend Whitworth Russell had been chaplain of the Millbank penitentiary (McConville 1981:171–2). Although none of the inspectors had any executive powers, i.e., the power to mandate that justices follow their recommendations, their official status as prison experts (domination through knowledge, in Weberian terms) and their direct access to both local prisons and central government gave them considerable authority. Furthermore, their meticulous and voluminous inspection reports provided a permanent and compelling record of any failures by local justices to improve prison conditions. Presented before Parliament and published annually, these reports exerted a

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[9] Prisons Act, 5 & 6 Will. 4, c. 38 [1835].

[10] House of Lords (1835): Vol. 11, p. 252 (in McConville 1981:170–1).

significant influence on the Home Secretary, and they became an effective means of effecting change in local prison administration (McConville 1981:170–1). The creation of another "expert" office in 1844, the solicitor-general, further involved central government in prison regulation. Included among the appointee's various prison management responsibilities were frequent consultations with local magistrates on prison conversion and construction.

Since the cost of local prison administration fell on the magistrates, the power of inspectors was constrained. However, when Parliament, as part of a more general pattern of fiscal reform in the 1830s, began to provide substantial subsidies toward local prison expenses, it was able to exercise greater control over their administration. Since magistrates were being asked to implement costly prison regulations espoused by national prison inspectors, Parliament reasoned that they were entitled to some financial relief. The Treasury provided grants-in-aid to cover half the expenses of prosecutions and the entire costs of conveying convicts from local to government prisons. In 1846, these grants were increased to cover between a quarter and a third of the total cost of the maintenance of local prisoners (McConville 1981:256–9). By permitting the Home Secretary to withhold these funds from local justices who failed to comply with prison regulations, the 1865 Prisons Act dramatically reduced local judicial autonomy.[11] This provision had originally been proposed by a Lords' Select Committee led by Lord Carnarvon in 1863. The Carnarvon Committee used evidence in inspectors' reports detailing the failures of local justices to comply voluntarily with inspectors' suggestions to support its recommendation.

In short, the increase in prison legislation due to the recommendations of central government inspectors led to a concentration of the means of expenditure. The Home Office then used these funds to regulate and control local prisons to promote widespread prison reform. With Parliament controlling the purse strings, it was not long before the regulation of local prisons was wrested entirely from the JPs' control. In 1877, Britain's prison system was nationalized, with ownership of all local prisons transferred to the Secretary of State for the Home Office. His appointment of a national board of prison commissioners permitted, for the first time, the uniform application of an elaborate code of standards for prison conditions and disciplinary measures under direct supervision from the center.

In sum, in the eighteenth century, the widespread imprisonment of felons was slow to develop, and Britain relied upon transportation as a form of punishment. In the absence of a centralized

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[11]  Prisons Act, 28 & 29 Vict., c. 126 [1865].

and professionalized administrative structure, Parliament was unable to enforce legislation that would have facilitated the development of the penitentiary on a national scale. As a consequence, the state relied upon expelling its felons overseas, a sanction that required little in the way of an administrative apparatus. Processes of centralization and bureaucratization in the nineteenth century enabled Parliament to gradually consolidate its authority over local authorities and to establish an extensive and rationalized prison system. Thus, this comparison of transportation's replacement with the modern penitentiary underscores how fundamental structural changes in the power and administrative apparatus of the state had profound effects on the social organization of punishment.

### Popular Understandings of the Limits to State Power

Changes in penal administration provided the structural preconditions for the development of the national penitentiary, but the capacity of Britain's centralized government for penetrating civil society and implementing its penal strategies can only be partially explained by this change. Since state punishments are some of the most brutal and conspicuous displays of state coercion, their application can generate questions about the nature of state authority and human freedoms. Should a state adopt a specific penal sanction that fails to correspond to more general attitudes and beliefs about the proper role and scope of the state, it risks undermining the voluntary compliance between rulers and ruled upon which legitimate state authority and a stable order are built (Weber [1922]1978:213–5). Thus, when punishments are unjustifiably cruel, implemented arbitrarily, or intended to serve the specific interests of certain social groups rather than, for example, to protect individuals from crime, they may "invite deep resistance and hostility" (Garland 1990:53).

One way of trying to uncover broader cultural understandings of the state's capacity to punish is to examine how transportation and imprisonment operated within collected and contested meanings of the limits to the state's power. These limits are amorphous since they often lack routine mechanisms for their expression, but they are partially revealed through more popular understandings of punishment's enabling mechanisms (the law and its administration in criminal courts). Actions of consent or disapproval toward expansions in centralized state power, such as through an increase in the state's administrative or social control apparatus, also help expose the boundaries of the punitively possible.

Transportation's succession by imprisonment was also influenced by a more general transformation in social relations centered on the practical experience of liberty. In the eighteenth century,

social relations in Britain between rulers and ruled were shaped by a powerful set of beliefs that focused on the importance of freedom *from* central government interference in local affairs. Since imprisonment at hard labor was a visible and continuous demonstration of state coercion whose effective management demanded greater involvement by central government officials in local penal administration, it was generally opposed on the grounds that it represented an arbitrary tool of executive oppression. In the nineteenth century, as the weight of state power shifted toward the center, broad segments of the populace, at home and in Australia, made claims on national power-holders demanding greater accountability and protection from the arbitrary actions of state agents (Tilly 1995:385).

Existing explanations for penal change have attributed the development of the penitentiary to the intentions and beliefs of upper- and middle-class penal reformers. But since reformers advocated punishment in penitentiaries and criticized the use of transportation in the eighteenth century (Harding et al. 1985), these accounts do not adequately explain why it took until the nineteenth century before the central government was willing to exercise effective control over local prisons and to decisively diminish its reliance upon transportation. While it is true that penal reformers played a role in bringing national attention to the merits of the penitentiary, they were generally much less successful in changing penal practices in local prisons and in regards to transportation until their efforts were augmented by popular demands for reform. Despite the best efforts of penal reformers in the eighteenth century, penal legislation in Britain remained permissive. As a consequence of central government's reluctance to interfere in local penal administration, prison policies, such as those embodied in the 1779 Penitentiary Act, rarely had much of a practical effect. Subsequent attempts to improve nineteenth-century prison conditions by a new crop of reforming members of Britain's ruling and middle classes, such as an 1815 Act prohibiting the taking of gaoler's fees, met with more success.[12] However, their gains were modest when measured against their goal of persuading Parliament to establish a more centralized and highly developed system of prison discipline (Ignatieff 1978:168; McGowen 1995:85–6). The condemnation of transportation by supporters of the penitentiary, such as Jeremy Bentham and Sir Henry Bennet, had a similarly muted result as the central government continued to ship many of its felons overseas.

The modest impact of penal reformers on penal practice between 1780 and 1840 suggests that in addition to changes in the

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[12]   Gaol Fees Abolition Act, 55 Geo. 3, c. 50 [1815].

structure and administration of the state's penal apparatus, another interrelated factor can help explain penal change. This analysis identifies a more general process of democratization as a decisive factor in the development of the penitentiary. The expansion of a more equal definition of citizenship compelled central government actors to take into account the demands of ordinary people when making their decisions and to place great value on the protection of citizens from the arbitrary actions of state agents (Tilly 1995). In this political climate, state actors could no longer ignore demands to reform punishments that were regarded as being capricious or unfair. Hence inmate complaints regarding the unwholesome conditions of prisons under the management of local magistrates, domestic criticisms of transportation for exposing convicts to unequal punishment at the hands of colonial settlers, and the condemnation of transportation by colonial settlers as an infringement upon the will of the Australian people all demanded some kind of national response. I suggest that it was this change in social relations between rulers and ruled that provided the motivation for the development of a centrally organized prison system.

### *Eighteenth-Century British Liberties—The Rights of the "Free-Born Englishman"*

Following the abdication of James II, who had tried to rule England autocratically, Parliament enacted the Bill of Rights in 1689, placing significant restrictions on the powers of the Crown and increasing Parliament's authority (Gilmour 1992:31). The monarch's right to suspend or dispense laws without Parliament's consent was taken away, the maintenance of a standing army in peacetime was made dependent upon Parliament's approval, and, most important, Parliament was put in charge of the nation's finances. In addition to ensuring Parliament a powerful and independent role in governing the nation, the Bill of Rights also limited the executive power of the monarch over the individual, stating that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted" (cited in Williams 1960:26–9). None of the ideas expressed in 1689 were particularly new (attempts to curtail the monarch's power had dominated English history throughout the seventeenth century), but they brought the constitutional limits of state power into sharp relief and changed English government and politics "profoundly and irrevocably" (Miller 1997:47).

In fact, eighteenth-century English politics was heavily influenced by a political outlook that was habitually suspicious of any increases in the executive power of the government, and which was committed to protecting the balanced constitution where government

power was divided between the King, Lords, and Commons (Dickinson 1977:102). This "country interest" was the dominant form of parliamentary discourse, and those politicians who espoused a country perspective were the first to contest any policies that increased the size and power of executive government (Pocock 1971:122).

Bills that attempted to increase the standing army during peacetime or to create a national police force were particularly likely to provoke strong opposition, since the Crown could use these institutions of coercion as instruments of repression "to suppress the subject at home" (Dickinson 1977:51). Eighteenth-century parliamentary debates contain numerous instances of hostility toward these measures. For example, in 1752, during a debate on the number of the land forces, Sir John Hyde Cotton argued that people were "mad" to consent to a continuous standing army, and Mr. William Thornton argued, "An army, Sir, was never kept up in any country, in any time of peace, but sooner or later it was used against the liberties of the people, and at last enslaved them."[13] Outside of Parliament, the anti-army tradition appeared in a variety of texts written by constitutional writers and historians, including Blackstone, Burgh, and Buchan (Schwoerer 1974). The practical effect of such opposition was to keep the size of the armed forces in check. Porter writes that Britain's peacetime standing army was "pygmy by continental standards": Until the mid-eighteenth century, the mainland army during peacetime comprised 10–15,000, men while the French army stood at 140,000 (Porter 1982:23).

A similar apprehension was leveled at the police. The presence of a centralized law enforcement agency to maintain order was regarded as a danger to cherished English liberties (Radzinowicz 1956: Vol. 3). As magistrates, the Fielding brothers (Henry and John) had pressed for a reform of the disorganized volunteer system of parish constables since mid-century, but with little success. Attempts at more sweeping reform in London were made in 1774, 1785, and 1792, but constitutional objections were so fierce that any attempt to form a professional police, i.e., paid law enforcers with extensive powers, were doomed to fail. Constitutional objections in the *Daily Universal Register* toward a 1785 bill that created three paid police commissioners within the city are emblematic of the resistance that police supporters faced during this period. Making an unfavorable comparison to the French police, the paper stated that the bill was an arbitrary use of executive power and threatened to destroy the "liberty of the subject" (cited in Philips 1980:168). Even when the London Metropolitan Police Act was

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[13]    *Parliamentary History*, Vol. 14 (1747–53), cols. 1089, 1125.

passed in 1829 it faced stiff opposition,[14] and concerns about the arbitrary use of state power significantly restricted this new agency's jurisdictional powers (Philips 1980).

In addition to their fears about government despotism, many members of Parliament, especially those who evinced Country views, associated standing armies and organized police forces with an expanding central government bureaucracy. The creation of offices provided the Crown with the opportunity to reward members of parliament with places or pensions in the administration. Constitutional objections were strenuous, since many members of Parliament believed the Crown would use "placemen" to exert its influence in Parliament (Speck 1979:15–6). Patronage threatened Parliament's independence and undermined a core conviction that only gentlemen of landed property should sit in Parliament (Dickinson 1977). A class of governors who derived their power from office and not their possession of land was particularly loathsome because it challenged the authority of the "natural rulers" of the country (Brewer 1988).

Increases in the size of the army and the appointment of salaried magistrates and police officials clearly provided opportunities for government patronage. Moreover, the latter directly challenged the authority of local JPs whose autonomy and reputation for impartial justice depended upon their status as wealthy landowners. In denouncing a 1792 police bill as a "dangerous innovation in principle," Sir Charles Edward Fox remarked, "The police of this country was well administered to in the ordinary mode by gentlemen who undertook to discharge the duty without deriving any emoluments from it, and in the safest way to the freedom of the subject."[15] Of course, constitutional arguments resonated much more powerfully with those inside and outside of Parliament than any admission that the appointment of stipendiary magistrates challenged the lucrative fee-for-service system enjoyed by local JPs (Philips 1980).

In this political environment, any policy that sought to expand the powers of central government, either through the creation of mechanisms of coercion or through administrative offices, "tended to escalate into larger issues about the structure and nature of government" (Brewer 1988:157). Any opposition was likely to be framed in country terms, which created an "anti-institutional bias which acted as a powerful counterweight to the growth of state power" (Brewer 1988:158). Nor was this merely confined to Parliament. This country discourse valorizing English liberties was widely disseminated in newspapers and pamphlets, and

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[14]   London Metropolitan Police Act, 10 Geo. 4, c. 49 [1829].

[15]   *Parliamentary History*, Vol. 29 (1791–2), cols. 1464–5.

"undoubtedly" fostered a large following among middle- and lower-class property owners (Dickinson 1977:191). Furthermore, this anti-interventionist perception of government was materialized in the law and criminal justice system and the willingness of the populace to riot.

E. P. Thompson argues that political conceptions of "liberties" were part of a broader "moral consensus" on the limits to government power "beyond which the Englishman was not prepared to be pushed around" (Thompson 1963:79–80). Since only the wealthy and privileged knew how to write, it is very difficult to capture these popular attitudes toward government authority. Nevertheless, we do know that this authority was derived and expressed through the law, and that it was the law that was "central to seventeenth- and eighteenth-century Englishmen's understanding of what was both special and laudable about their political system" (Brewer & Styles 1980:14). Its powerful effects originated from its "potency as a system of ideas" (the rule of law was inextricably intertwined with notions of popular right and justice) and from its "commonplace materiality" (the nation's judicial system, in particular the courts, was the state's primary means of exercising authority and control) (Ewick & Silbey 1998:16). By investigating how the law operated in relation to punishment and the rest of the criminal justice system, and by examining popular actions challenging government authority, we can try and establish the boundaries of central government power. Since punishments are obvious demonstrations of this power, we can get a sense of how they functioned within these limits.

Although law and the courts were governed by the ruling classes (Hay 1975), what is so striking about eighteenth-century Britain is the extent to which social order depended upon popular participation in the administration of justice. Without an organized police force, the government relied upon the initiative and the resources of the victim for bringing offenders to justice. It was the victim who had to present the case to the magistrate, gather evidence, recompense witnesses for the inconveniences of a court appearance, and pay prosecution fees (King 1984:27). In addition, the institutional autonomy of the trial jury, composed of local villagers and townspeople, checked the power of the state-appointed justice in the courtroom. The eighteenth-century jury was the "hallmark" of English liberty, and it often used its considerable power to either recommend acquittal or a return a partial verdict on a lesser charge (Green 1985:280). Independence from government interference in the criminal justice system established certain limits to state authority, as did the rhetoric of liberty that pronounced, among other rights, the importance of freedom from arbitrary arrest and equality before the law.

Nor were libertarian values and beliefs, hostile to arbitrary power and protected by the laws, to be taken lightly by state authorities. If sufficiently provoked, the populace might riot, and the frequency with which it did so was an ever-present threat to a state that had no effective organization for restoring order. There were all sorts of riots in the eighteenth century (including riots over turnpikes, impressment, taxes, and rising grain prices), but rioters' intentions were broadly similar: they sought "to defend traditional rights and civil liberties and resist intrusive state power" (Malcolmson 1981:133).

What emerges from this brief discussion on state power is that British libertarian values and beliefs placed real practical and constitutional constraints on the limits to central government authority. These strongly held beliefs in liberty, or freedom from central government interference in local affairs, influenced penal outcomes. Large-scale organized imprisonment was anathema to the British. Despite numerous criticisms of transportation as an ineffective deterrent and as failing to prevent convicts from returning before their completion of their sentence (Ekirch 1987), penal reformers' recommendations for imprisonment at hard labor were repeatedly rejected on the grounds that they infringed upon the liberties of "free-born subjects." For instance, a bill "to change the Punishment of Felony in certain cases . . . to Confinement, and hard Labour, in his Majesty's Dock Yards," or the "Hard Labor Bill," was not passed into law (Lambert 1975:357–67). Reflecting on its failure, Jonas Hanway, the late-eighteenth-century penal reformer, commented that this punishment was not "calculated for this *meridian of liberty*" (Hanway 1775:221, italics in original). Similarly, in opposing control of prisons by central government authorities at century's end, John Jebb, an overseer of a county House of Industry, warned, "Liberty, the choicest gift of man," could be destroyed by allowing court-appointed officials, rather than local magistrates, to inspect and manage the nation's prisons (Jebb 1786:564–5).

Transportation persisted because the creation of a national prison system was widely regarded as synonymous with executive tyranny. The construction of national penitentiaries, vast improvements in local prison administration, or both would have required that the central government play a much more visible and active role in the penal process, so there was little support for these measures. Many regarded the spectacle of prisoners forced to labor on public works as a form of slavery, and any increase in the government's administrative machinery as a threat to liberty. In regard to the latter, the creation of central government prison offices, whether for a more effective police or form of punishment, threatened parliament's independence and, more directly, encroached

on the sovereignty of local justices. By contrast, transportation allowed the state to remain largely absent from the administration of punishment. Writing in 1726, Robe was perplexed by the curious paradox that the British should "fear worse consequences" to their liberties from imprisonment at home than transporting convicts overseas where they would be sold into indentured servitude (Robe 1726:8). This paradox can be reconciled if we consider that transportation, just like many other eighteenth-century punishments (whipping, pillorying, and the stocks), was regarded as acceptable because it was generally a local and community affair that required minimal central government involvement.

*Nineteenth-Century British Liberties—Mutual Rights and Obligations.* In the nineteenth century, the concentration of state power at the center significantly changed existing social relations as broad segments of the populace began to make collective demands on national, not local, power-holders on issues that affected their ordinary lives (Tilly 1995:14–5). Obviously Britain was still far from being a democracy, and government officials were uninterested in ceding their power, but state actors increasingly took these demands into consideration in making their decisions. In providing new avenues for popular influence, state agents and their subjects created new opportunities for repression and reform. Claim-making on a national level required a national response, and penal developments were affected by this growing recognition of the consultative role of citizens in central government business; two other key elements of democratization—equality of citizenship and protection from arbitrary actions by agents of the state—accompanied this change (Tilly 1995:15). The abandonment of transportation and the development of a national bureaucratic system of prisons were due to: (1) mounting criticisms of local prison management as arbitrary and repressive; and (2) growing opposition to transportation as a violation of democratic sentiments within Britain and among its emancipated colonists. Thus, as liberties gradually began to be defined in terms of national government officials taking a more active role in expanding mutual rights and obligations, punishments that exposed citizens to capricious punishments (by local magistrates or colonial settlers), or were incompatible with popular freedoms (defined in terms of democratic rights), were no longer acceptable. Unlike transportation and local imprisonment, the penitentiary, although repressive, was considered a more equitable form of punishment administered under the watchful eye of a responsive national government.

Due to their political access, evangelicals, philanthropists, and middle-class reformers, such as William Wilberforce and Elizabeth Fry, were very successful at bringing attention to the plight of

British prisons and promoting the virtues of the penitentiary. They formed societies for the improvement of prison discipline and through campaigns of organized lectures, press conferences, and petitions made the penitentiary an issue of national importance. Furthermore, they published prison reports throughout the 1820s and 1830s, often criticizing local justices and urging national standards for prison discipline (Webb & Webb [1922]1963:72). But they were significantly less successful in compelling the central government to intervene directly in local prison management and to abandon transportation. As a result, their influence, although important, has been overstated.

A comparison of imprisonment to transportation suggests that it was not until the development of a more democratic process of collective claim-making that Parliament was pressured into providing a decisive national response to demands for prison reform and for the abandonment of transportation. Weber notes that mass democracy creates a "favorable situation" for the development of bureaucracy, since a bureaucracy promises everyone "formal equality of treatment" at the hands of officials selected according to their expertise, not social status, and in the form of impartial rules (Weber [1922]1978:226). Ironically, Parliament's repressive reaction to political unrest in the early nineteenth century contributed to the rise of a central government prison bureaucracy. Political activists confined in local prisons brought national attention to their squalid conditions and poor management under local justices. The well-publicized complaints of political radicals, such as Henry Hunt, who was imprisoned in Ilchester Gaol in 1819, were sufficiently embarrassing that Parliament appointed a Royal Commission to investigate his claims of the "corrupt and sadistic" practices of local magistrates (Belchem 1981:25). This, in turn, contributed to the passage of the 1823 Gaols Act consolidating twenty-three existing prison regulations, establishing more effective guidelines for local prison management, and requesting that JPs submit quarterly prison reports to the Home Secretary (McConville 1981:249).[16] The public crusades of other radicals in "many prisons" during the 1820s (DeLacy 1986:152) compelled magistrates to account for their actions to Parliament. As a general consequence, this activism "undermined confidence in the justices' commitment to administrative reform and contributed to the increased centralization of prison administration" (DeLacy 1986:135, 138–9).

It is likely that the appointment of national officials with the authority to intervene directly in local prison administration developed in response to this popular claim-making on central

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[16]   Gaols Act, 4 Geo. 4, c. 64 [1823].

government officials. In 1822 a Parliamentary committee acknowledged, for the first time, that it was the *duty* of government to take care of the nation's felons.[17] This recognition of the government's responsibilities to its citizens was broadened under the 1832 Reform Act, creating ''citizenship,'' or ''a greatly expanded set of mutual rights and obligations linking the state to a broad category of people'' (Tilly 1995:383).[18] Shortly after the passage of the act, the Parliamentary committee on punishment that had recommended a national inspectorate noted that in this new political climate members of the public would no longer ignore the abuses of unreformed prisons and ''leave their representatives to sleep.''[19]

In contrast to the eighteenth century, the central government was now expected to respond to demands that it intervene directly in the nation's prison administration. The appointment of prison experts charged with implementing and enforcing strict prison rules and regulations would help protect a prisoner's rights by subjecting them to a uniform and impartial system of discipline, hygiene, and hard labor and by protecting them, at least in theory, from the arbitrary actions of local prison officials. Justices' objections to government interference on constitutional grounds hindered centralization, but did not stop its progress. Despite numerous prison acts augmenting the central government's power over local justices, magisterial opposition to nationalization as a threat to local government autonomy was still sufficiently fierce in 1877 that *The Times* reported that ''the Prisons Bill affords a singular illustration of the tenacity of English habits and the spirit of local administration'' (*The Times* 1877:9). Despite these challenges, however, the bill passed and Britain finally had a national penitentiary system.

While the bureaucratic features of imprisonment encouraged government accountability and helped ensure equitable punishment, criticisms of transportation centered on the absence of these characteristics. By the 1830s, popular arguments for its termination were primarily concerned with the assignment of convicts to Australian settlers, since ideas about ''liberty'' or freedom were incompatible with a penal sanction that continued to transfer the administration of punishment to civilians. Public sentiment in Britain had influenced the abolition of slavery, and some of this opposition now targeted transportation, since any punishment that established a master-servant relationship constituted a form of slavery (Hirst 1995:256). The 1837 Molesworth Committee, whose members unanimously recommended the immediate abolition of

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[17]  Select Committee on Prison Laws (1822): Vol. 4, p. 69, emphasis added.

[18]  Reform Act, 2 Will. 4, c. 45 [1832].

[19]  Select Committee on Gaols and Houses of Correction (1835): Vol. 12, p. 204, 208.

transportation, focused its attack on this anachronism. The committee concluded that the assignment of convicts to settlers resembled slavery and was inherently unequal since the convict's servitude necessarily varied "according to the temper and character of the master to whom the convict is assigned."[20] In its place, the committee urged that the state adopt a national system of rational imprisonment where a felon's sentence would be under "the eyes of Government" and administered according to an impartial code of regulations enforced by state actors.[21]

Even though the British government ceased transportation to New South Wales in 1840, it continued to send convicts, albeit in rapidly declining numbers, to Van Diemen's Land (1840–52) and Western Australia (1853–68) (Radzinowicz 1986: Vol. 5, p. 468). The Molesworth Committee had hastened transportation's demise but, just as at home, it was the development of mass national politics and democratic claim-making between the British state and its emancipated colonists that ultimately brought it to a close.

Throughout the 1840s and 1850s, settlers from many of the Australian colonies formed anti-transportation leagues to oppose the dumping of British convicts on Australian shores. Through rallies and petitions they argued that transportation without their explicit consent contravened democratic values. The resolutions read out by one of the members of the New South Wales Legislative Council articulated their reasons for dissent. Transportation was: "(a) a violation of the will of the majority of the people," (b) "incompatible with our existence as a free colony, desiring a self-government, to be made the receptacle of another's felons," and (c) "to the highest degree unjust" since it sacrificed "the great social and political interests of the colony at large, to the pecuniary profit of a fraction of its inhabitants."[22] Certainly some colonists continued to support the provision of cheap convict labor, but these concerns did not resonate with the same intensity. In fact, a statement by Lord Palmerston, Britain's Home Secretary, demonstrated that the move toward democratic reform lay at the heart of the government's decision to end transportation: "We had conceded to those colonies the principle and rights of self-government, and that reason being made, we must . . . submit to its consequences" (quoted in Shaw 1966:351). Only with the end of transportation did the penitentiary become the punishment of unchallenged supremacy in Britain.

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[20]    *Accounts and Papers: Crime, Criminal, Convicts* (1839): Vol. 38, p. 3.

[21]    Select Committee to Inquire into the System of Transportation (the Molesworth Committee) (1837): Vol. 19, p. xliii.

[22]    *Convict Discipline and Transportation* (1850): Vol. 45, p. 48. For examples of other petitions see pp. 11, 19–24, 31–34, 45–52.

## Discussion and Conclusion

Rather than examine the replacement of local prisons or capital punishment with the penitentiary from the late eighteenth to mid-nineteenth century, I have extended this time frame (1718–1877) to compare the latter with its penal substitute, transportation. The relevance of the transportation of British convicts to America and Australia to theories of penal change has been overlooked, despite its prominence as a form of punishment. As a result, the focus of scholarly debate has revolved around the intentions of penal reformers as a mechanism for historical transformations in punishment. The purpose of this research is to show how penal outcomes were contingent upon broader changes in state organization and social relations. By comparing the specific organizational structures and cultural contexts within which transportation and imprisonment were embedded, I have proposed an alternative, two-fold explanation for the ascendancy of the penitentiary. I argue that the shift from a decentralized to centralized and patrimonial to bureaucratic form of penal administration was necessary for the central government to intervene directly and effectively in the management of local prisons. Once it was administratively possible for the central government to exercise its authority over previously autonomous local magistrates, the effective implementation of prison rules and regulation resulted in the development of an effective form of penitentiary discipline as a viable replacement for transportation.

Transformations in social relations between the state and its publics in response to this centralization of state power also affected penal outcomes. The development of democratic claim-making obligated national power-holders to assume much greater responsibility for responding to popular demands for protection from arbitrary authority and for equal treatment. Motivated by this general change in popular understandings of state power, the central government replaced imprisonment in local prisons and transportation overseas with the penitentiary. Exposing offenders to capricious punishments at the hands of local magistrates or colonial settlers and inflicting an unpopular punishment on a free colony were incompatible with the expanding set of mutual rights and obligations between the state and its publics.

In order to strengthen the theoretical argument of this historical analysis, I adhere to the specifics of chronology to show how, in the absence of broader changes in state organization and social relations, the efforts of ruling-class supporters of the penitentiary had only a modest effect on local prison reform and on influencing the state to cease transportation. An important objective of this article was to avoid an abstract conceptualization of culture by using historical records to empirically reveal changing attitudes

toward punishment within existing social relations between rulers and ruled. When these were not available, as is often the case when it comes to exploring the attitudes of those excluded from power, I have sought to provide an empirical basis for my theoretical argument by examining how popular attitudes toward the limits to state power, within which punishment operated, were signified and materially produced in the law, criminal justice system, and other formal mechanisms of social control.

Moreover, I use these historical data to explicitly delineate how understandings of state power inhered in concrete organizational structures and penal practices. This analysis rejects culture as a vague collection of meanings whose mysterious effects are detached from social life in favor of an approach that tries to demonstrate the practical effects of popular understandings of liberty on punishment. My hope is that by trying to identify the explicit interrelationship between material conditions and shared beliefs and its effect on punishment, I have demonstrated the importance of cultural influences on penal outcomes but have avoided overgeneralizing their impact.

The mystification of the explicit relationships between material and ideal conditions contributes to overgeneralizations about the impact of changing attitudes on punishment. This can undermine the explanatory power of otherwise invaluable studies on historical transformations in punishment. For example, Spierenburg, who, similar to this article, attempts to demonstrate the link between cultural mentalities and the monopolization of state power by central authorities, asserts rather than distinguishes the explicit connection between the two. It is simply not enough to state that the "link between the rise of imprisonment and changing sensibilities with regard to the physical treatment of convicts is largely *implicit*" (Spierenburg 1991:279, emphasis added). We need to know how attitudes toward punishment were specifically embedded in longer-term structural developments.

Of course, attributing the causes of historical transformations in punishment to specific changes in state organization and cultural understandings on the limits to state power can also lead to charges of reductionism. Yet trying to provide an explanatory model that seeks to identify causal relationships seems to me to be a worthy endeavor. Not to do so leads to the kind of multidimensionality and complexity that "merely end[s] up muddying our picture of the world" (Collins 1986:8). Thus, while I applaud Garland's clarion call to explore punishment as a cultural artifact and to embrace its complexities as a social institution, I am less convinced that what is needed is a "pluralistic approach" to understanding punishment that encapsulates "multiple causality, multiple effects, and multiple meaning" (Garland 1990:193, 280). What such an approach, no

matter how sophisticated, may gain in being comprehensive, it loses in intelligibility.[23]

Finally, I wish to make it clear that by examining changes in social relations, I am not arguing that there was a natural progression toward the penitentiary, nor am I arguing that it was a more advanced or less severe form of punishment than transportation. In addition, I am not attempting to glorify the freedoms of a political system where power was in the hands of a ruling elite that comprised only a very small proportion of the population. My point is that eighteenth-century relations between the British state and its publics operated within political limits that established what was "possible, desirable, or necessary" (Malcolmson 1981:131). Common attitudes toward liberty, although in flux, played a critical role in shaping these limits and influencing the behavior of rulers and ruled. Although transportation was a clear example of the state's power over its populace, it was also testimony to its constraints. As popular understandings of rights and liberties began to be redefined and reinterpreted, one of the outcomes of this process was not only a greater opportunity for different groups to articulate their own political demands, but also a greater opportunity for the state to increase its influence over civil society. The penitentiary is testimony to this dichotomy: not only are offenders ensured more uniform and equitable treatment in a carefully regulated environment, they are also subjected to a form of punishment that exposes them to the awesome power of the modern state.

Some of the implications of this historical case study might help us better understand recent changes in the relationship between state authority and penal policy in the United States. Rather than being immutable, popular understandings of liberties are responsive to a variety of social and political forces. Recent threats to security have provoked more punitive and retributive policies against terrorists and greater restrictions on the personal freedoms of U.S. and non-U.S. citizens. Not only have these events resulted in subjugations, they have also succeeded in bringing attention to the tensions between expansions in state power and individual rights. Future research should not be limited to exploring the relationship between punishment and crime but focus on identifying and explaining how ideas of freedom are part of set of broader

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[23]    This is a criticism that has been leveled against Garland's well-received new book, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001). "But while a strength of the book is a refusal to reduce crime control to an effect of one or two such processes, there are so many themes plausibly braided together in *The Culture of Control* that the overall case would be difficult to fracture. There will always be some strands that appeal to any critic and thus could be held to preserve the overall thrust of the thesis" (O'Malley 2002:259–61; see also Beckett 2001:910–1).

institutional patterns that link punishment with the rational-legal state. Written more than two hundred years ago, Montesquieu's statement, "It would be an easy matter to prove that in all, or almost all . . . governments . . . punishments have increased or diminished in proportion as these governments favored or discouraged liberty," continues to provide a useful point of departure for any contemporary analysis of penal change (Montesquieu 1762:8).

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