evidence that the state's criminal code was too severe. A decade after that, when the reformer Charles Spear needed an example of the harshness of capital punishment, he too turned to Clark. Had Clark been imprisoned for his fire no one would have remembered him a year later, but because of his death sentence Clark dangled in public memory far longer than he had lived on earth, as an image invested with meanings of which he himself could never have dreamed. He was not the first person converted into a debating point after having been punished with death, and he would certainly not be the last.

1

TERROR, BLOOD, AND REPENTANCE

ENGLISH COLONISTS of the seventeenth and eighteenth centuries came from a country in which death was the penalty for a list of crimes that seems shockingly long today. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, theft—all were capital crimes in England. All became capital crimes in the American colonies as well.

Today even capital punishment's most ardent supporters would recoil at the notion of executing thieves or counterfeiters. We have a consensus that if the death penalty is to be used at all it should be reserved for those who commit the gravest crimes. Until the late eighteenth century, however, the consensus was very nearly the opposite. Colonial Americans put crimes in the same hierarchy we do—everyone agreed that murder was more serious than theft, for instance—but there was scarcely any disagreement that death was the proper punishment for many of them.

How can we understand a society—our society—that executed burglars and horse thieves? The standard approach to the history of the death penalty in the United States has been a smug condescension to the past, a refusal even to try to understand. The times were rude and life was cheap, we tell ourselves. The people of the seventeenth and eighteenth centuries did not think as independently as we do; they were still shackled by oppressive political and religious traditions they were not yet able to throw off. But this story is a caricature of early modern thought, invented (as we will see) by capital punishment's later opponents. Executing a fellow human being was just as momentous in the seventeenth and eighteenth centuries as it is today. Colonial Americans were not blindly following tradition. They pondered the death penalty and the purposes it served, just as Americans do today. But because of the institutional structure and

prevailing religious beliefs of their time, capital punishment could serve a broader set of purposes than it serves today.

The Bloody Code

England's North American colonies exhibited significant regional variation in their criminal codes right from the beginning.[1] The early northern colonies were far more lenient than England for crimes against property. Burglary and robbery, for instance, were not capital crimes under the initial criminal statutes of Connecticut, Massachusetts, Plymouth, or Pennsylvania, and were capital only on the third offense in the initial codes of New York, New Hampshire, and New Haven. Arson was not a capital crime in early Connecticut, Massachusetts, New York, or Pennsylvania. The law in the early northern colonies was closer to English law for crimes against the person, but was less harsh in several respects. Murder was capital everywhere, but rape was not capital in the first codes of Massachusetts, New York, or Pennsylvania, and even manslaughter was not capital in the early Quaker colonies of Pennsylvania and West New Jersey, which for a time gave the Delaware Valley the most lenient punishments in the English world.[2]

For what would today be called consensual crimes or crimes against morality, by contrast, the early northern colonial penal codes were often harsher than English law, because of the religious origins of many of these colonies. Blasphemy and idolatry were in principle capital crimes in Connecticut, Massachusetts, and New Hampshire; adultery was capital in early Connecticut, Massachusetts, and New York; sodomy and bestiality were capital throughout the region, even for the animals involved. In practice, however, these statutes were rarely enforced. Massachusetts executed four Quakers in the mid-seventeenth century who returned to the colony after having been banished, but these are the only people known to have been hanged in the colonies for their religious beliefs. James Britton and Mary Latham, hanged by Massachusetts in 1645 for adultery, are the only two known to have been executed for the offense in any of the colonies. As the New England colonies lost their original sense of a religious mission, they abandoned the death penalty for some of these moral crimes. Massachusetts decapitalized blasphemy, adultery, and incest in the late seventeenth century, and New Hampshire decapitalized blasphemy in the early eighteenth. Hangings for sodomy or bestiality were more common; there were at least three in Massachusetts,

four in Connecticut, and three in New Jersey. The last American jurisdiction to hang someone for one of these crimes was the state of Pennsylvania, which executed Joseph Ross for "buggery" in 1785.[3] South of Pennsylvania, with the exception of a single execution for sodomy in Virginia in 1624, there are no known executions for any of these crimes against morality.

Except for a very brief period in early seventeenth-century Virginia, the early southern colonies did not enact criminal codes as the northern colonies did, but simply used English law. In the seventeenth century the law in the southern colonies thus included capital punishment for more property offenses and fewer morality offenses than in the northern colonies. As the northern colonies gradually decapitalized blasphemy and the like, the southern colonies were left with the greater number of capital crimes, particularly where property was concerned. Property tended to be distributed less evenly in the South than in the North—the southern pattern of wealth distribution was closer to that of England—which may have caused southern elites to see a need to maintain the English capital property offenses. Southerners also tended to come from regions of England that were more violent than the regions from which northerners emigrated, a cultural difference that possibly reinforced southerners' preference for a greater number of capital offenses.[4]

The period of American colonization coincided with a stiffening of English criminal law, as Parliament created myriad new capital offenses in the late seventeenth and eighteenth centuries. Most of these were for crimes against property that in retrospect seem trivial, and indeed seemed trivial to many at the time—poaching deer, stealing small sums of money, and so on. By the second half of the eighteenth century English lawyers counted nearly two hundred capital statutes, although most of these defined very narrow and local property offenses with no application to the colonies. But while a simple count of statutes could overstate the severity of the law, that law became more severe in substance as well as form. Over the course of the eighteenth century England's criminal code became the harshest in Europe.

The American colonies experienced a milder version of this trend. The newer southern colonies, established while this process was under way in England, began their existence with many capital crimes. The older colonies, both northern and southern, all added to their list of capital crimes. Massachusetts made robbery a capital crime upon a third conviction in

1642, upon a second in 1711, and upon a first in 1761. New Hampshire reduced the number of burglary convictions necessary for the death penalty from three to two in 1682, and then to one in 1718. Connecticut and Massachusetts both made arson a capital crime in the second half of the seventeenth century. In Pennsylvania, where murder had been the only capital crime for over three decades, pressure from the imperial government resulted in 1718 in the introduction of the death penalty for manslaughter, rape, highway robbery, maiming, burglary, arson, witchcraft, and sodomy. Later in the century the colony would add counterfeiting, squatting on Indian land, and prison-breaking to the list. New York added piracy, counterfeiting, and certain forms of perjury. Actual practice often lagged behind legislative change. Pennsylvania took eighteen years and nine capital burglary convictions, for instance, before hanging its first burglar.[1] But practice often caught up: in the next twenty-eight years, twenty-two more Pennsylvania burglars are known to have died on the gallows.

In the South the colonies followed England in capitalizing minor property crimes. Virginia imposed the death penalty for all sorts of crimes relating to the tobacco trade—including embezzling tobacco, fraudulently delivering tobacco, altering inspected tobacco, forging inspectors' stamps, and smuggling tobacco—as well as for stealing hogs (upon a third conviction), receiving a stolen horse, and concealing property to defraud creditors. Delaware made it a capital offense to steal £5 from a house, and then imposed the death penalty upon the third conviction of any theft, regardless of location or amount. South Carolina copied the English statute providing death for those convicted of burning the timber intended for house frames.[2] By the end of the colonial period both northern and southern colonies punished many more offenses with death than they had in 1700, and the southern codes were still harsher than the northern.

England's "bloody code" (as it was widely called by its detractors) had its eighteenth-century American counterpart in the swelling number of capital statutes applicable only to blacks. The first of these appears to have been enacted in New York, which in 1712, alarmed by a slave revolt, capitalized attempted murder and attempted rape committed by slaves. Most of these race-dependent capital crimes, unsurprisingly, were created in the southern colonies. Slaves made up more than half the population of South Carolina by 1720 and nearly half that of Virginia by 1750. To manage these captive workforces the southern colonies resorted to ever-increasing lists of capital statutes. In 1740 South Carolina imposed the

death penalty on slaves and free blacks for burning or destroying any grain, commodities, or manufactured goods; on slaves for enticing other slaves to run away; and on slaves maiming or bruising whites. Virginia, fearing attempts at poisoning, made it a capital offense for slaves to prepare or administer medicine. The Georgia legislature determined that crimes committed by slaves posed dangers "peculiar to the condition and circumstances of this province," dangers which meant that such crimes "could not fall under the provision of the laws of England." Georgia accordingly made it a capital offense for slaves or free blacks to strike whites twice, or once if a bruise resulted. "The Laws in Force, for the Punishment of Slaves" in Maryland, its legislature found, were "insufficient, to prevent their committing, very great Crimes and Disorders." Slaves were accordingly subjected to the death penalty for conspiring to rebel, rape a white woman, or burn a house.[3]

Colonies with large numbers of slaves expedited the procedures for trying them. As early as 1692 Virginia began using local justices of the peace rather than juries and legally trained judges to try slaves for capital crimes. South Carolina adopted a similarly streamlined procedure in 1740. These systems remained intact as long as slavery existed. Execution rates for slaves far exceeded those for southern whites. In North Carolina, for instance, at least one hundred slaves were executed in the quarter-century between 1748 and 1772, well more than the number of whites executed during the colony's entire history, a period spanning over a century.[4]

The long list of capital crimes for slaves is, paradoxically, more readily understandable today than the shorter list for whites. Harsh punishments were obviously useful to those in power for disciplining a captive labor force. People who were already enslaved had little to lose and were understood to have less incentive than whites to follow the law. People who were believed to have less faith than whites in the Christian system of eternal rewards and penalties were thought to need more conspicuous penalties in this life. But how can we explain the death penalty for so many crimes committed by whites?

See and Fear

In 1700 the governor and Council of Maryland considered the fate of two men sentenced to death for burglary. It was the first offense for both. "What they have Stollen is but a Trifle," the governor noted, in suggesting

that clemency might be appropriate. The Council disagreed. Members urged the governor to inquire whether the two were guilty of "any other evil Practices" that might allow him, in good conscience, to let the execution proceed. "So many Burglarys are Dayly comitted in this Province," the Council concluded, "that it is absolutely necessary some publiq Example should be made to deterr others from the like Crimes for the future."[9]

Criminologists would likewise call it deterrence, but eighteenth-century Americans usually had blunter words for the primary purpose they ascribed to capital punishment. "There are but few who are made without fear," explained James Dana a few hours before Joseph Mountain's execution in Connecticut for rape. The punishment that awaited Mountain was "calculated and designed to put the lawless in fear." The Virginia Gazette observed that capital punishment was a way of "counterbalancing Temptation by Terror, and alarming the Vicious by the Prospect of Misery." An executed criminal was "an Example and Warning, to prevent others from those Courses that lead to so fatal and ignominious a Conclusion:—and thus those Men whose Lives are no longer of any Use in the World, are made of some Service to it by their *Deaths*." Fear, terror, warning—whatever one called it, the main purpose of the death penalty was conceived to be its deterrent effect, its power to prevent prospective criminals from committing crimes. "Suppose our ministers of justice, in their superabounding mercy, should spare the vilest criminals," the minister Aaron Hutchinson imagined. "Vice would be daring, and the wicked walk on all hands."[10]

To convey that message of terror to the greatest number required careful management of the process by which criminals were put to death. Most clearly, an execution had to be a public event, open to anyone wishing to attend. "A principal design of public executions is, that others may fear," argued Noah Hobart before an audience gathered in Fairfield, Connecticut, to see Isaac Frasier hanged for burglary. "One end of the law," the minister Nathaniel Fisher proclaimed at a similar occasion, "in ordering him to suffer, in this public and ignominious manner, is to alarm and deter others." By locating executions in open spaces affording views to large numbers of people, and by scheduling them in the daytime to maximize visibility and convenience for spectators, officials sought to broadcast terror as widely as possible. Death "should be publicly inflicted

on the wicked," Nathan Strong declared, so "that others may see and fear."[11]

The message was conveyed in several ways simultaneously. Americans in the seventeenth and eighteenth centuries knew in the abstract, even if they had not witnessed any actual executions, that death was the consequence of serious crime. Executions were reported in newspapers and discussed in sermons and were the talk of any county where one occurred, so the public would have been well informed about capital punishment even without the opportunity to see it put into practice. But there was something uniquely terrifying about seeing an execution. One could usefully meditate on the death of the burglar Philip Kennison, for instance, but it was only "the Sight of this unhappy Criminal" actually dying that could "give an Edge to these Meditations, and fix them with *lasting Impressions* on all our hearts." Those who saw Samuel Smith, another burglar, dropped from the scaffold would never forget that the "connexion between the crime and gibbet, is much nearer and more natural, than many suppose." Condemned criminals were well aware that their role at an execution was to be seen by as many as possible. Valentine Dukett was said to have pondered "the awful spectacle which this body of mine will in a short time exhibit." The burglar Levi Ames is supposed to have rhymed on the morning of his execution:

> Ah! what a Spectacle I soon shall be,
> A Corps suspended from yon shameful Tree.[12]

The death penalty was understood as something that had to be seen in order to have its maximum effect.

Not just seen, but seen properly. An execution needed to be "accompanied with circumstances of solemnity," because solemnity "would make a lasting impression on all ages, ranks, and characters—particularly on children and youth," who turned up in large numbers, and who could be expected to take the lesson of terror most to heart. The condemned person had to be transported from jail to the gallows, normally a long distance because a jail was in town but a gallows needed unobstructed space for spectators, and the trip offered the opportunity for a carefully orchestrated procession that could be seen by many, even those who did not attend the execution itself. People occasionally proposed modifying the ceremony to make it even more frightening—for instance, by staging the

ceremony at night. "Night naturally brings with it a kind of Dread that strongly operates upon the Heart of Man," urged one newspaper editor. "Night introduces a mental Horror, and throws a saddening Awe upon the World."[11] It was precisely this dread, this horror, this awe that an execution, when seen properly, was thought to provoke.

And not just seen properly, but seen properly by the kind of people considered most likely to commit crimes. Mark and Phillis, slaves in Charlestown, Massachusetts, were hanged in 1755 for poisoning their master. Mark's dead body was then placed on display. Those who could read might have seen the broadside printed for the occasion:

> Let servants all in their own Place,
> the Masters serve with Fear.
> Lest God should leave them to themselves
> As these poor Creatures were.

But one did not need to read to understand the message Mark conveyed, a message that endured in the consciousness of many far longer than the printed word. Three years later, when Dr. Caleb Rea was passing through Charlestown, he found Mark still hanging, a bit decomposed, but with his skin largely intact. In 1798, forty-three years after the execution, Mark was long gone, but locals still remembered him well. That year, when Paul Revere described his famous ride of 1775, he said: "After I had passed Charlestown Neck, and got nearly opposite where Mark was hung in chains, I saw two men on horseback under a tree."[12] If Paul Revere could assume in 1798 that people would know the place he was referring to by the mere mention of Mark's name, the display of Mark's body must have had a powerful effect on the area's slaves and servants in the late 1750s, when Mark was still there.

One common way of directing the terror of capital punishment to its appropriate targets was to stage an execution as close as possible to where the crime had been committed. John Whitney and Michael Kennedy, members of "a Gang of notorious Thieves" based in Fredericksburg, Virginia, were tried and sentenced in Williamsburg, but were taken back to Fredericksburg to be hanged, in the expectation that a local execution "would be attended with better Effects to the Community than if transacted at a Distance, and might probably deter their Accomplices"—many of whom in fact attended. Hangings in eighteenth-century Maryland were normally conducted "as near the publick Road as conveniently can

be where the fact was committed," for the same reason. Two Indians convicted of murder in New York in 1672 were ordered to be hanged "in som eminent Place near the Towne, soe to strike the greater terror in the rest of their Companoons." When two or more people were to be executed at the same time for the same crime, they could be profitably allocated to more than one location for maximum effect. Two servants were hanged as accomplices in piracy in Virginia in 1729, for example, "one at Rappahannock River, near the Place from whence they ran, and the other at York River, near the Place where they committed the Piracy."[13] The first location would drive the point home for other local servants, the second for any prospective pirates.

If capital punishment was expected to deter prospective criminals, it was certain to prevent existing criminals from repeating their crimes. The murderer Samuel Frost was told by his spiritual counselor immediately before his execution: "You have made yourself vile, and are become unworthy longer to be a member of the community. Your life and liberty are dangerous to the peace of society, dangerous to the lives and liberties of your fellow citizens." Chauncy Graham used a common metaphor to explain that the execution of a criminal was like "the cutting of a Wart or a Wen from the Body," an operation that "does not only free it from that troublesome and deforming Excrescence, which to the Loss of the whole, drew off so much Nutrition to maintain its useless and troublesome Bulk; but it may prevent the Growth of many more, that would in Proportion, rob the Body of proper Nourishment."[14] Today criminologists call this function "incapacitation," but in an age before the invention of the prison there was no way to incapacitate a criminal short of killing him. England and its colonies had *jails*, to hold suspects awaiting trial, but the *prison*, as a punishment for those convicted of crimes, was a development of the late eighteenth century. Before then, incapacitation and deterrence could not be separated. Both depended on the same show of force. The primary purpose of capital punishment was the emphatic display of power, a reminder of what the state could do to those who broke its laws.

Blood It Defileth the Land

Most colonial Americans assigned responsibility for crime to the criminal himself rather than to his environment. Among writers on the subject, humankind was often understood as intrinsically depraved, as having a natural tendency toward evil. "Why, is every natural man a murtherer?"

asked Increase Mather. "Truly he hath a *murderer's heart within him*, and he would quickly shed blood, he would actually commit murder, if God did not restrain him." If the spectators at an execution had not yet committed any crimes themselves, it was "no thanks to our own hearts, for we have the same nature that they [the condemned criminals] have." Anyone was liable to commit a crime at any moment.

> And shortly, reader, thou must follow me,
> And drop into a vast eternity!

So warned Robert Young, a rapist and maybe a poet as well.[7] While Young had raped an eleven-year-old girl and his readers had not, he saw no fundamental difference between them.

If humans were innately depraved, and if a criminal was someone who had failed to control a natural tendency that everyone shared, then the commission of a crime was an act for which blame properly attached to the criminal. The criminal had neglected to maintain the required degree of vigilance over his own conduct. He was responsible for his own crime. For those with a more benign view of human nature, the commission of a crime was still an exercise of free will that justified the assignment of responsibility to the criminal. Either way, the community took on a corresponding obligation to punish him, as a means of retribution that was not just legitimate but morally necessary.

The obligation was usually expressed in biblical terms. "Blood it defileth the land," God had instructed in the Old Testament, "and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." Capital punishment was understood as necessary to purge society, not just of a bad member, but of a guilt that would otherwise be shared by everyone. "You are now to Dy," Cotton Mather advised the murderer Joseph Hanno, because "the Land where you now Live, would be polluted, if you should be spared from Death." Josias and Joseph, Indians convicted of murder, were executed in 1709 because "the Land which we inhabit, ought to be cleansed from that defilement, which the Voluntary and Unjust taking away of the Lives of men doth bring upon it." Thomas Starr was hanged in Haddam, Connecticut, so "that God, the God of our salvation would deliver us, and our land from blood-guiltiness."[8] Guilt belonged to the land as well as the criminal. Execution was the only way to expiate that collective guilt.

This was a prominent theme of the poetry printed to be sold at hang-

ings in the eighteenth and early nineteenth centuries. Spectators at the 1734 execution of John Ormsby could read:

> No hope of Favour can he have,
> from any human Hand,
> The Blood which he has spilt must be
> purged from off the Land

And for John Harrington, in 1757:

> Go Murd'rous Wretch, deep-drench'd in Gore,
> With human Blood prophan'd,
> Thy Life we must admit no more,
> A Burthen to the Land.[9]

The execution of a criminal was thus not merely a forward-looking exercise in deterrence, a way of preventing crimes in the future; it was also a backward-looking effort at purging the community of guilt for crimes committed in the past.

Expiation was so widely accepted as a goal of capital punishment that it was felt even by criminals themselves, who were sometimes moved to plead guilty to capital offenses, a step that was close to suicide. Patience Boston was executed in 1735 for drowning an eight-year-old boy in a well. According to the minister who attended to her in her final days, she explained that she had pleaded guilty to a crime she knew to be capital, despite being advised to the contrary, because "I was so pressed in my Conscience to take the Guilt of Blood from the Land, on my self; that nothing could prevail with me to deny the Fact."[10]

The goals of deterrence and retribution were both furthered by the speed with which capital trials were conducted. On March 15, 1673, Virginia's General Court tried Richard Thomas and Mary Blades from start to finish, in two separate trials for unrelated murders, and then sentenced them to death, and that was only a small part of the day's business, which also included ruling on some land claims and a civil suit. On June 17, 1675, the Massachusetts Court of Assistants ran through four capital trials for piracy before turning to other cases. The length of time between the apprehension of a suspect and the trial was more variable, but only because the courts of the era sat intermittently. When a court session was scheduled soon after the criminal had been found, the trial would proceed without delay. William Linsey, executed in Worcester, Massachu-

setts, for burglary in 1770, stole a pillowcase full of items from a house while the occupants slept on the night of September 8. He was caught on September 9 and held for the next court sitting in Worcester, on September 22, when he was indicted by a grand jury, tried by a petit jury, convicted, and sentenced to death. "Thus have I been hurried on from one step to another," Linsey complained.[1]

Capital trials could be quick because they were not conceived of as adversarial proceedings, as they would come to be understood in the late eighteenth and early nineteenth centuries. Witnesses typically testified only on the government's behalf. The only lawyer normally involved in the case represented the government. Samuel Guile's 1675 rape trial in Massachusetts lasted only so long as was necessary to read "the Indictment & evidences" to the jury, which promptly convicted him. When a slave named Harry was tried in West New Jersey for "Buggering a Cow," the entire trial consisted of the testimony of two witnesses. Mary Myers related that she "saw him ride upon the Cow And that he was in Action as Buggering the Cow," and that "the Cow had the usuall Motions of Cows when they had taken the Bull." Her daughter said the same thing, whereupon Harry was convicted and sentenced to death. Only then was he asked whether he had anything to say.[2]

Speed served the twin purposes of retribution and deterrence. It meant that trials normally took place when the community's memory of the crime was still vivid and when the connection between the crime and the resulting legal proceedings was still perceived to be strong. It meant that trials focused on a single question, the guilt or innocence of the defendant, without any consideration of the multiple issues that crowd into a modern-day trial—the character of witnesses, the admissibility of evidence, the validity of searches and arrests, and so on. The link between cause and effect, between the commission of the crime and the imposition of the death sentence, was made as conspicuous as it could be.

It Concentrates His Mind

Capital punishment was also understood in the seventeenth and eighteenth centuries to facilitate the criminal's repentance. It was of paramount importance that one should die in the proper frame of mind, because on that mental state depended, in large part, one's eternal fate after death. One had to achieve a proper consciousness of God before it was too late. This was not an easy task for anyone, much less a criminal. Any

person facing the prospect of this internal struggle was likely to procrastinate, on the assumption that death remained far in the future. The living often "squander away precious time in hopes of long Life," one minister lamented, "that should be bestowed in laying up Treasure in Heaven for a future and an eternal Estate." Criminals, who had to start from a deficit in this sort of treasure, were even more prone to delay.[3]

In this respect a death sentence was of inestimable value. We may remember Samuel Johnson's comment—"when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully"—as satire, and when Johnson, one of the most prominent of the early English penal reformers, said it in 1777 it was taken that way, but in the seventeenth century and for most of the eighteenth it was no joke. Unlike other people, a condemned criminal knew well in advance the exact date of his death. He had a deadline, and the state was eager to help him meet it. "There is no Place in the World," marveled one minister, "where such Pains are taken with condemn'd Criminals to prepare them for their Death; that in *the Destruction of the Flesh, the Spirit may be saved in the Day of the Lord Jesus.*" The condemned person was normally allowed at least a week or two, and often several weeks, to get ready to die. If one took the long view, executed criminals were the lucky ones. Unlike ordinary people, "they were not snatched into eternity, from their wicked courses, in a moment, without time or opportunity to reflect on, and repent, of their misspent life, and the disregard they had paid to the commandments of God, or the laws of man."[4]

From the government's perspective, a delay of several weeks after sentencing had the added advantage of allowing time for publicizing the scheduled execution by word of mouth and in the newspapers, permitting interested spectators to make plans to attend. But the government also paid a price for the delay, a set of implicit costs high enough to suggest a consensus on the importance of the criminal's salvation. Delay between conviction and execution weakened the deterrent and retributive effects of capital punishment by attenuating the link between the crime and the punishment. Simply housing and feeding a condemned criminal in jail during the interim was a significant expense for units of colonial government that never took in much money. Risk of an even greater cost was posed by the likelihood that the condemned person would escape. Jails tended not to be very secure. Condemned criminals had very little to lose. Eighteenth-century records are full of inmates escaping after being

sentenced to death. In Georgia alone between 1790 and 1805, at least nine people escaped from jail after being condemned to death—two for murder, two for forgery, and five for horse-stealing. (In the same period at least six more escaped while awaiting trial for a capital offense.) The burglar John Brown, sentenced to death in Connecticut, escaped from the Litchfield county jail twice. Escapes like these forced the government to pay people to pursue the prisoners. The expenses of twice recapturing John Brown, for example, formed a major part of the bill submitted to the Connecticut Assembly by William Stanton, Litchfield's jailer.[5]

Yet governments continued to allow sufficient time for repentance, and even to lengthen that time for individual criminals. When "Bristol a Negro Boy," sentenced on October 11, 1763, to be hanged on November 17, petitioned the governor of Massachusetts that he was "desirous of further time being allowed him to prepare for death," his execution was put off another two weeks. Knowing the importance that those in authority placed on repentance, condemned prisoners desperately seeking to delay their executions were careful to include appropriate references to their efforts in that direction. Moses Paul, awaiting his death in New Haven, pleaded with the Connecticut General Assembly "at least to postpone the time, the dreadful time of his execution which now seems near at Hand; that he may have a longer space for repentance, that he may, if possible, (tho' he escape not punishment from men) escape the Punishment of God thro' the merits of Christ and Faith in his Blood." It worked. Paul's execution was put off from May until September.[6]

While in jail awaiting execution, the condemned person was not alone. A steady stream of ministers came to call, armed with advice on how to prepare for the death and the afterlife that awaited. "The compassionate Judges always allow a considerable Time (commonly a *Month* at least) after the Sentence is pronounc'd, before the Execution is proceeded in," one Boston writer noted in 1733. "All this while they are visited, it may be every Day, by some or other of the *Ministers* of the Town, to instruct them, direct them, and pray with them." Ministering to those condemned to death was so routine that in 1791 William Smith could publish a guidebook for ministers—*The Convict's Visitor: or, Penitential Offices, (in the ancient way of Liturgy) consisting of Prayers, Lessons, and Meditations: with suitable devotions before, and at the time of Execution*—made up largely of scripted dialogue between the minister and the condemned prisoner. The prison cell of a condemned person was in effect the minister's emergency room, the place where he believed his services to be needed most urgently. Between sentence and execution, "constant attention is given by some clergyman, or more, to the religious instruction of the convict . . . And scarce a murmur is ever heard, that too much is done for such an important object."[7]

As might be expected, the gist of the ministers' message was the need to repent before it was too late. "If you want pardon, look to a crucified Christ," Joshua Spalding pleaded with the murderer Isaac Coombs. "What thou doest, do quickly!" Ministers emphasized that while little remained of this life, there was still opportunity for forgiveness in the next. William Shaw "would die as a condemned criminal," his counselor told him, "yet being in Christ, you may be pardoned of God, and acquitted in the final judgment."[8]

These sessions were often successful, at least by the ministers' own accounts. When a condemned criminal could be brought to Christ, it was an occasion for singing and celebration. Christopher Flanagin reported that his last meeting with the murderer John Young was "more like a rational congratulatory visit to a bridegroom, or a man about to be put in possession of great earthly happiness, than a visit to one, who in a few hours was to suffer an ignominious death." When Francis Personel was sentenced to death, he recalled, "I saw myself out of Christ. I saw that I was under the curse of a broken law, that I was a child of hell, a bond slave to the Devil." But after a week of visits from ministers, "I saw that the blood of Christ was fully sufficient to cleanse from all sin and iniquity." Prisoners were often allowed to attend church on the day of worship preceding the execution, where they would find themselves the subject of the sermon. Sometimes the condemned person was allowed to choose the biblical text upon which the sermon was based. Jeremiah Fenwick, who chopped up his neighbor with an ax in 1717, asked for Matthew 10:28—"fear not them which kill the body, but are not able to kill the soul; but rather fear him which is able to destroy both soul and body in hell"—and Cotton Mather was happy to oblige him.[9]

The condemned prisoners could also turn these visits to their own short-term advantage. There were few things as useful in obtaining executive clemency as a conspicuous repentance, especially one achieved in the company of ministers who had the ear of the government. Once sentenced to death, a prisoner had little to lose by confessing his guilt and proclaiming his newfound faith. This incentive casts some doubt on the

sincerity of many of the execution-eve conversions so prized by the ministers. Every so often the strategy was revealed. John Morrison, condemned for robbery in Pennsylvania in 1751, "pretended to be a Quaker, and sent for some Preachers of that Profession to discourse with and pray by him, hoping by their Interest he might find Favour" with the colony's Provincial Council, which considered applications for clemency. The preachers "soon discover'd that he had never really been a Quaker, and that his present Pretensions and Desire of their Prayers, were with a View rather of being sav'd in this World than in the next." Morrison's application for clemency was denied.[10]

If ministers considered themselves indispensable advisors, that view was not unanimous, least of all among the condemned prisoners. After hearing a sermon about himself, Hugh Stone muttered "diverse things very Scandalous, and I could wish there had been more exactness in his Repentance." Cotton Mather admitted. "I do not think he is fit to preach," protested Rose Butler about one insistent clergyman, whose primary advice to Butler, a nineteen-year-old slave soon to be executed for the arson of her owner's house, was that she was sure to go to hell. Ministers were often perceived, one of their own number realized, as meddlers "who create all that contempt for religious pretentions . . . which their hypocrisy excites, & which weakens all regard to true religion."[11] Repentance required acknowledgment of one's crime, so ministers found it necessary to press the condemned prisoners to confess, but for those who believed themselves to be innocent, such persistence felt more like accusation than comfort.

Stuck in a jail cell, unable to stem the tide of clerical visitors, prisoners who did not share the ministers' opinions fought back as best they could by giving voice to their own views of death, sin, and the value of the clergy. "Don't you imagine that men of liberal education are more intriguing, and do more frequently deceive the world than illiterate farmers," Thomas Goss asked the ministers who tried to attend to him. "And will you not allow that there are as many bad clergymen, in proportion to their number, as of any other sect?—As this is my opinion, why should I request their advice or prayers, in preference to others?" When asked whether he wished to have a sermon preached at his execution, Samuel Frost replied "that he did not care any thing about it . . . and said he believed the Devils wore large black wigs—and many other such expres-

sions of folly and absurdity." The pirate William Fly flatly refused to attend church to hear the sermon preached about him. Sarah Smith, who killed an infant conceived long after her husband had been taken captive to French Canada, held firm in her view that there was nothing sinful about sex outside marriage, in the face of repeated prison lectures to the contrary.[12]

The ministers were flabbergasted when a condemned prisoner rejected their consolation. What thinking person, on the precipice of eternal suffering, would spurn the only path to salvation? "When we consider the great Advantages you have had, since your Trial and Condemnation," John Webb remonstrated with John Ormsby and Matthew Cushing, "in the unwearied pains which some of the faithful Ministers of Christ have taken with you . . . to lay before you the miserable State you are in," Webb could only conclude that "the Grace of God has been bestowed upon you in vain." "Since your Imprisonment, nay, since your Condemnation," complained Increase Mather to another uncooperative prisoner, "the Gospel has been offered to you . . . How shall you escape the forest Damnation, if you regard not this offer of mercy."[13]

Ministers were not the only visitors. Practically anyone wishing to enter the cell of a condemned prisoner was allowed to do so, and many prisoners had constant company in the days leading up to their deaths. The numbers of visitors often increased as the execution drew nearer. "No Place upon Earth does equal this Place for that Exercise of Charity," boasted Cotton Mather. "And this poor Creature"—Margaret Caulacher, soon to be executed for infanticide—"has had a very particular Share thereof. Not only have the Ministers of the Gospel done their Part, in Visiting of her, but also many Private Christians have done theirs." Mather bestowed particular praise on the many "Young Gentlewomen here in their Turns, [who] have Charitably gone to the Prison every Day for diverse Weeks together, and because of her not being able to Read, have spent the Afternoons in Reading Portions of the Scriptures, and other Books of Piety, to this Condemned Woman."[14]

As with the ministers, there could be a fine line between Christian fellowship and curiosity, between welcome sympathy and haughty moralizing. Twelve-year-old Hannah Occuish, sentenced to death for murder, had to endure a succession of "persons who made severe remarks upon her." So many tried to visit the New York prisoners Sinclair and Johnson,

"some through idle curiosity—others to commiserate and pray with them," that guests had to be admitted in shifts of twenty. Many visitors badgered the condemned person for a confession, not to facilitate the criminal's repentance but to provide gossip for themselves. Condemned prisoners were also visited by their friends, people presumably more welcomed by the prisoner if not by his ministers. "Too many persons coming to" the murderer Jeremiah Meacham, one minister regretted, "and some of them none of the best, nor upon the best designs, very much hindered the well improvement of his flying time." The burglar Matthew Cushing, another complained, was visited by "vain and inconsiderate people that resorted to the prison yard," who "were almost continually calling to and talking with him, . . . so that he was once or twice sadly overcome with strong drink."[8] A condemned person's final days could thus lack time for what they were intended to accomplish—reflection on a life of crime and proper preparation for death.

Today one virtually never hears anyone cite the facilitation of penitence as an object of capital punishment, or indeed of any kind of punishment. We still call our prisons "penitentiaries," but we no longer think of them as sites of penitence. Penitence can be valued only by those who view criminals as people not fundamentally different from themselves. If criminals are thought of as alien, as not fully members of the human community, we have little reason to worry about the state of their souls. Before the late eighteenth century Americans tended to understand criminals as people like themselves, human beings who had been overcome by the same tendency toward evil that afflicted everyone, so the criminals' penitence was an object of common concern. During the nineteenth century, as Americans became more likely to see themselves as inherently virtuous, and accordingly to view criminals as more alien, the interest in criminals' penitence correspondingly waned.[9] At the same time, religion was beginning to occupy a sphere apart from public, political life. States disestablished religions, Christianity was ceasing to be considered a foundation of the law, and faith was gradually being redefined as a private matter, separate from the state and the government. To the extent that Americans were still interested in facilitating the repentance of criminals, they were less likely to want the official criminal justice system to play a part in that process. Penitence became the province of private ministries, not public institutions.

Capital punishment could command widespread support in the seventeenth and eighteenth centuries as a punishment for all serious crimes because it served three important purposes. One was deterrence. American officials used a variety of corporal and financial punishments for lesser crimes, and they resorted to banishment for more serious offenses, but in an era before the invention of the prison, virtually everyone agreed that such punishments were insufficient to deter the gravest crimes. A second purpose was retribution. When the cause of crime was widely conceived as the criminal's failure to control a natural human tendency toward evil, capital punishment was accepted as a legitimate act of retribution directed at a person responsible for his own actions. A failure to punish the crime would spread the criminal's guilt to the entire community. The third purpose was penitence. Repentance before death was widely considered indispensable, and a death sentence was thought uniquely able to facilitate repentance. Given these three premises, capital punishment made a great deal of sense.

The death penalty circa 1700 was the equivalent of prison today—the standard punishment for a wide range of serious crimes. Today people criticize our prisons for not working as well as they should, and colonial Americans sometimes leveled the same kind of criticism at the death penalty. But for all the faults of prisons, no one seriously proposes that we do without them. The same was true of capital punishment before the late eighteenth century. It fulfilled the moral expectations of most colonial Americans most of the time, and that was enough to make it the standard penalty for all serious crimes. Hardly anyone suggested that it be used more sparingly, much less that it be abandoned.

2

HANGING DAY

UNTIL THE NINETEENTH CENTURY, hangings were conducted outdoors, often before thousands of spectators, as part of a larger ritual including a procession to the gallows, a sermon, and a speech by the condemned prisoner. Hangings were not macabre spectacles staged for a bloodthirsty crowd. A hanging was normally a somber event, like a church service. Hanging day was a dramatic portrayal, in which everyone could participate, of the community's desire to suppress wrongdoing. It was a powerful symbolic statement of the gravity of crime and its consequences. The person hanged had been condemned in court weeks earlier, but hanging day was a second, more collective condemnation—of the individual and of crime in general. We have no comparable ritual today.

The ceremony surrounding an execution could take several hours. It began in jail, where the condemned person, sometimes dressed in a special robe, began the procession to the gallows. The prisoner was accompanied by ministers, by the sheriff and his deputies, and sometimes by a military escort as well. The time and the route of the procession were public knowledge, so any condemned person could expect large crowds all the way from jail to the gallows, where an even larger crowd awaited. The sheriff read the death warrant aloud and sometimes added his own comments. At least one minister, and sometimes several, gave a sermon. The condemned prisoner typically delivered a speech of his own. The people on the scaffold might lead the audience in the singing of a hymn. Finally a cap was pulled over the prisoner's face, the rope was adjusted, and the prisoner dropped. The whole ceremony was public, outdoors, and as conspicuous as any event could possibly be.

An Odd Sort of Curiosity

Because a hanging was open to anyone who wished to attend, there was no reliable way to count the spectators, but that did not stop contemporaries from trying. Esther Rodgers was hanged for infanticide in Boston in 1761 before a crowd of at least four or five thousand, her minister estimated, at a time when Boston's population was only around seven thousand. Joshua Hempstead, a farmer and justice of the peace in New London, Connecticut, watched the execution of Sarah Bramble in 1755 and guessed the crowd to number ten thousand, more than three times the number of New London's inhabitants. Daniel Wilson, a Providence tailor, drew more than twelve thousand in 1774, nearly three times the population of Providence. These crowds would grow even larger in the early nineteenth century. Over thirty thousand spectators watched from the surrounding hills as Jesse Strang was hanged in Albany, New York, in 1827, and fifty thousand were said to have watched the murderer John Johnson hanged in New York City in 1824.

These were among the biggest crowds Americans had ever seen. The New London gallows that hanged Katherine Garret, an Indian convicted of infanticide in 1738, "was surrounded with a Vast Circle of people," marveled Eliphalet Adams, "more Numerous, perhaps, than Ever was gathered together before, on any Occasion, in this Colony." The only other reasons so many gathered in a single place were to wage war and to hear celebrated ministers. Well into the nineteenth century, execution crowds still outnumbered crowds gathered for any other purpose.

One reason crowds were so big was that in any given area an execution was a rare event. When Sarah Simpson and Penelope Kenny were hanged for infanticide in Portsmouth, New Hampshire, in the winter of 1739, the ceremony "drew together a vast Concourse of People, and probably the greater, because these were the first Executions that ever were seen in this Province." Much of York County, Maine, flocked to the hanging of Joseph Quisson in the summer of 1726, "there having been no such Example in the County for more than seventy Years." In rural areas, hanging day was a rare occasion for the gathering of large numbers of people. In more thickly settled areas, executions were more frequent, but the pool of people within traveling distance was also bigger, so the num-

bers of spectators could mount. The 1686 hanging of James Morgan in Boston was considered "a Piece of News," one witness reported, so much so that "some have come 50 miles to see it." Richard Doane, hanged in Hartford in 1797, was the first person executed there in seven years, long enough to draw "a large concourse of people collected from the neighbouring towns."[1] Nearly all Americans in the seventeenth and eighteenth centuries could have seen a hanging at some point in their lives, but outside the largest towns it would have been a rare experience, and even in the largest towns several years might pass between executions.

Execution crowds could be so large that many of their members had little hope of actually seeing the events on the scaffold. A broadside commemorating the 1734 hanging of John Ormsby and Matthew Cushing included a wry comment on the ceremony's logistics:

> Then they arrive at th' Gallows Tree,
> While Spectators lament and cry,
> Alas! how hard it is to see,
> Much more to feel their Destiny.

Hearing the speeches was even more difficult. The sheer distance between the scaffold and the farthest members of the crowd, coupled with the noise made by spectators themselves, meant that even many of those who could see were doubtless unable to hear. Olivia Robbins of Troy, New York, went to a hanging in 1811, but, as she told her sister, "I did not hear enough of the discourses to give you any statement of them."[2]

Closer to the front, however, spectators at an execution had a degree of contact with the condemned person that would be unimaginable today. Participation in the ceremony was not limited to those with an official role to play. Spectators who were close enough could ask questions of the prisoner and hope to get them answered, take their final leave if he was a friend, or join him in prayer. Sometimes they could even inspect his body after the hanging was over.

In the larger cities, crowd sizes posed a dilemma for the officials responsible for staging the ceremony. Hangings had to be in open spaces that could accommodate several thousand spectators, but they could not be so far from settled areas that mass attendance would be impractical. The Common Council of the City of New York wrestled with this problem for decades. In 1784, after execution crowds trampled their property, the residents of Chatham Street and Tryon Row pleaded with the Council to

move the city's gallows farther away from their houses. The Council complied, but in 1801 the issue arose again. At the city's first execution in five years, spectators had sat on and destroyed the fences and tree branches of one Elizabeth Glover, who demanded that the city reimburse her for the damage. The 1824 hanging of John Johnson, said to have attracted an audience of fifty thousand, prompted similar claims. New York had only recently stopped hanging burglars and robbers, men who did not have sufficient respect for the rights of private property, so it would hardly do for the hanging ceremony itself to commit the same offense. Officials began staging executions on uninhabited islands in the harbor, where spectators could watch from boats without trespassing on private property. (The federal government had already conducted at least one hanging on a ship moored in the East River, and would continue to use islands long after the state had moved its executions into the jail yard.) In Philadelphia, where hangings were often held on an island in the Delaware River, the crowds along the wharves could grow so large that the people living near the river would abandon their homes for the day.[3] Without sufficient open space, it was not easy to strike the appropriate balance between public instruction and private rights.

Public executions would be widely criticized in the nineteenth century, and much of the criticism would be directed at the crowd, who would be accused of drunkenness, irreverence, rowdiness, and similar sins. Respectable Americans of the nineteenth century would come to feel embarrassment at the idea of attending an execution, and a superiority to the sort of person who would attend. Those sentiments were rare in the eighteenth century. People occasionally complained about the crowd's behavior, as in this broadside poem written a few days before the 1773 hanging of Levi Ames:

> See round the Prison how the Throng
> From every Quarter pour,
> Some mourn with sympathising Tongue,
> The rader Rabble roar.

John Bryson recalled attending a hanging in Fredericksburg, Virginia, in the late eighteenth century at which one spectator was caught picking the pocket of another just as the cart drove off. This kind of anecdote would become commonplace in the nineteenth century. But so far as one can tell today, eighteenth-century American execution crowds were usually

not noisy or drunk or disrespectful. Indeed, when the earliest American opponents of capital punishment wished to argue that frequent public hangings instilled in spectators a lighthearted attitude toward violence, they had to cite examples of English execution crowds, for want of appropriate examples at home.[8]

An execution was "a most sad mellancholly scene," as one spectator put it. The diaries of upstanding citizens mention watching executions with the same matter-of-fact tone they use for describing the weather. "At Townhill to See Kate the Indian Woman Hanged for murdering her Bastard Infant at Saybrook last year & thn home," the Connecticut justice of the peace Joshua Hempstead noted in his diary in 1738. "By the way," the Baptist minister Isaac Backus wrote in his, "Mr. Reed at Abington told me that he was at Boston yesterday and See Willm. Wiser hanged for murdering one Chism last April." There was nothing unseemly about going to an execution.

Indeed, a hanging was considered an especially wholesome experience for children. The midwife Martha Ballard sent her daughter Dolly and her son Ephraim to see Edmund Fortis hanged in Maine, two years after she had helped Fortis's wife deliver their first child. "Only 13 boys were in school," the lawyer Henry Van Der Lyn's son reported the day George Denison was hanged in Chenango County, New York. "The rest had gone to see the execution." Ministers and condemned criminals often went out of their way to speak directly to "the Younger Sort, wh[o] usually appear on such an Occasion."[9]

The ministers emphasized the pedagogical value of attending an execution, but everyone knew that much of the motivation for attendance was simple curiosity. Death itself was a common enough sight—family members died in the home, not in hospitals—but not death in such a spectacular form. "From the vast Numbers of People who constantly attend at all publick Executions, and from thence return, either undolently indifferent, or extremely commiserating," said a pamphlet published in Boston, "'tis evident to common Observation, that there is an odd Sort of Curiosity, implanted in the Nature of some People, which prompts them to see, with a kind of Pleasure, the Sufferings of their Fellow Creatures."[10] A hanging was *fascinating*, in a way that aroused no embarrassment. Today we perceive no shame in attending films that use special effects to simulate death; in the eighteenth century people felt the same way about

attending hangings that caused real death. And the hanging was only a small part of the ceremony, which included a parade, a sermon or two, sometimes delivered by men who were celebrities in their own right, and a dramatic speech by the condemned person, who was on the verge of death and so worth hearing regardless of his or her level of eloquence. What could be more interesting?

What criticism of execution crowds existed in the eighteenth century tended to come from ministers, who were unhappy not with the crowd's deportment but with its state of mind. The clergy wanted to teach a moral lesson, not to entertain, but they were afraid they were doing more of the latter than the former. "Here is a vast number of people met together this day," Ephraim Clark observed at the hanging of the murderer Solomon Goodwin, "and God and your own consciences know best what ends you have in view in coming, whether to satisfy your curiosity, or that you might reap some good to yourselves from the heart-affecting scene." The ministers' enemy was not frivolity but curiosity. "Now, tho' Curiosity might move many Persons to come and behold those sad Objects," William Shurtleff conceded, "I would charitably hope that many came from a *better Principle*." The "numerous Audience of Christians" addressed by William Williams "are together, not out of Curiosity, we trust, but in a serious Frame, with their Hearts affected, to consider the sorrowful Effects of Sin."[11] Williams's tone suggested that he was not optimistic.

Curiosity was often accompanied by sympathy. The ceremony focused public attention on a fellow human being who would shortly die. Much of the ceremony was devoted to displaying the condemned person's penitence and readiness for the afterlife. As a result, a criminal who had been despised weeks earlier could find a very different reception at his hanging. Ebenezer Mason killed his brother-in-law W. P. Allen, but at the execution the mourning was not for Allen:

> Mason, alas! we mourn for you,
> Sentenc'd to die, as murderers do

Condemned prisoners had a forum in which to dramatize their humanity. Esther Rodgers murdered her baby, but several months later, before four or five thousand spectators, she demonstrated such "Composure of Spirit, Cheerfulness of Countenance, pleasantness of Speech, and a sort of Complaisantness in Carriage towards the Ministers" that memories of

the murder were superseded by very different feelings. Rodgers "melted the hearts of all that were within seeing or hearing, into Tears of affection, with greatest wonder and admiration."[11]

The broadside poetry sold at hangings was awash with this sort of sympathy. A typical verse was inspired by the hanging of the burglar Hugh Henderson in 1737:

> O Henderson! unhappy Man!
> How did'st thou feel, when in thy Ken,
> The best was Horror, like Despair,
> Amazing Doubt, or anxious Fear?
> What Pangs, what Extasys of Smart
> Convuls'd thy poor, thy bleeding Heart,
> When in that State, were brot to Mind
> Th' unnumber'd Crimes of Life behind?

Sympathy could only have been increased by the recognition that all concerned worshiped a God who, in his terrestrial form, had himself been publicly executed. The metaphor of the hanging tree allowed one poet to compare Christ with the burglar Levi Ames:

> He died the death of the accursed tree,
> That from the sting of death you might be free.

"Unhappy wretch!" began one sympathetic fictionalized account of a hanging, "This day thou must be launched into eternity!"[12]

The ceremony broadcast deterrence, but the message was one of sympathy as well. "Methinks there is none of you, but what must find your bowels yearning towards him," Thaddeus Maccarty observed.[13] The object of this yearning was a twenty-one-year-old black rapist named Arthur, not the sort of person likely to have attracted much sympathy in any other context. The execution ceremony, with all attention focused on the prisoner, facilitated the perception of the condemned person as a victim of sorts himself.

Public sympathy for condemned criminals did not, in the colonial period, translate into opposition to capital punishment. One could deplore the fate of an individual person without criticizing the general laws under which all were governed.

> To see her when she's just condemn'd
> does make my heart to ache,
> But God I know is just and true
> and this just law did make.

So concluded one spectator at the 1744 hanging of Elizabeth Shaw, with whom one could sympathize without casting any doubt on the justice of the death penalty for infanticide. And at the execution of the murderer Ebenezer Ball:

> But though we pity this poor Ball,
> Which we all do, I trust,
> Yet when we know for what he dy'd,
> We own his sentence just.[14]

This would begin to change in the late eighteenth century, as more and more spectators would translate their sympathy for the condemned prisoners into opposition to capital punishment generally.

In the seventeenth and eighteenth centuries hangings were genuinely popular. All kinds of people came to watch—old and young, rich and poor, white and black, male and female—in numbers that were enormous for the era. For the spectators there were at least three reasons to see an execution. First, violent entertainment has been popular in all cultures, and colonial America was no exception. Hangings were occasions for the vicarious experience of violence, a niche occupied today by television, movies, sports, video games, and the like. Why people enjoy watching violence is a difficult question, one that has only recently begun to receive much study. Violent entertainment does not appear to have a cathartic effect; that is, spectators tend to be more aggressive, not less, after watching violence. Spectators don't seem to feel a need to purge themselves of violent feelings; rather, they enjoy those feelings and seek low-risk opportunities for experiencing them, for reasons that are not well understood.[15] The ministers' repeated references in their execution sermons to the spectators' "curiosity" suggests that the appeal of violence was part of the attraction of a hanging.

Second, an execution was a dramatic portrayal of community at the moment when the fear of danger to the community was at its highest. Crime, then as now, prompted a terror of disorder. At a hanging, where

the criminal's repentance and God's forgiveness took center stage, the instigator of that terror could be symbolically reintegrated into society. Reintegration was only symbolic, of course—it took place just before the criminal was dropped from a height with a noose around his neck—and so it was of no terrestrial benefit to the condemned person himself, but the gain to the spectators was the demonstration that the rupture had been repaired and the community was back to normal. This was not just an intellectual experience for audience members. There could be no more viscerally powerful way to banish the terror of crime than to feel a genuine sympathy for the criminal, an emotion that was possible only because the staging of a hanging allowed sympathy to be experienced at a safe distance. No one sympathizes with a killer on the loose, but anyone can sympathize with a killer on the gallows.

Because sympathy for the individual did not translate into opposition to that individual's punishment, sympathy was not inconsistent with a third reason for spectators to attend executions. Watching a hanging allowed spectators to signify, in the strongest possible way, their disapproval of crime and the criminal. The ritual of hanging day put the words of the criminal law into practice, in the clearest and most dramatic way possible. By attending, a spectator could witness and participate in a depiction, literally in the flesh, of the community's most important norms, those proscribing grave crimes. For each person in the crowd, the ceremony reinforced the community's concern with crime. At the same time, each spectator by his simple presence in effect declared his membership in that same community and his adherence to those same norms. Despite their sympathy with the condemned prisoner as a person, spectators were not there to take his side against the state. If they had been asked to declare their allegiance, the vast majority would have sided with the government. Hangings were not the only public ceremonies with these symbolic effects. People watched the infliction of lesser kinds of public punishment, and they flocked to courts to watch the proceedings there. But hangings were bigger, rarer, and more exciting. There was no other occasion on which the community's interest in crime and its consequences was made so manifest.

A Very *Profitable* Spectacle

"There are certain miserable People to bee executed on the morrow," Cotton Mather noted in his diary in 1681. "A Man, for a Rape, and Two

Negroes, for Burning of Houses, and Persons in them. What use am I to make of this?"

Mather knew very well how he would use the hangings. They would provide an occasion for him to consider his own nature and the spiritual tasks that lay ahead. "Lett mee, with deep Humiliation reflect on the Vileness of my own Heart," his diary entry continued. "Alas, I have the Seed of all Corruption in mee." Such reflection would be of immeasurable benefit to Mather at the moment of his death, but Mather doubtless also had an eye on the more tangible gains to be had in the short term. An execution was an occasion for a sermon, and not just any sermon, but a sermon delivered before a crowd that could be hundreds of times larger than normal. The scaffold was the minister's stage, the gallows his spotlight. With a single sermon, heard by thousands and then perhaps published and read by thousands more, a minister could inject more good into the world than on any other occasion. Not incidentally, he could also make a career. Mather rejoiced when, "by a very strange Providence, without any Seeking of mine," an execution was rescheduled to permit him to speak. "I did then with the special Assistance of Heaven, make and preach, a Sermon," Mather recalled. "Whereat one of the greatest Assemblies, ever known in those parts of the World, was come together." "I may never have another opportunity of addressing so immense an assembly," another minister realized. For minister and spectators alike, an execution could be "a very *miserable*, but also a very *profitable* Spectacle."[6]

The profit to the spectators was understood by the ministers to reside in the uniquely clear view an execution provided of the consequences of sin. Execution sermons consistently urged spectators to seize the opportunity to reflect on their own sinfulness, and thereby to profit from the mistakes of others. "When you see this sad consequence of indulging vice," exhorted Andrew Eliot, "let it make you watchful against your own corruptions."[7]

Ministers frequently sermonized about the particular sins most likely to be practiced by members of the audience. Few spectators had committed murder, but many were drinkers, so at the hanging of a murderer there was more to be gained by addressing the evils of drink than those of murder. "And indeed, *Drunkenness* has bin a bloody sin," Increase Mather lectured; "it has bin the cause of many a Murder." Few had committed infanticide, as Abiel Converse had, but infanticide was the product of fornication, and fornication was a much more popular offense, so it was the

theme adopted by Aaron Bascom at Converse's hanging. "The practice of young people of both sexes keeping company together," said Bascom, "I think is a detestable practice. It is carried on in many instances no doubt, to gratify lust." Few were rapists, like the free Negro Anthony, but "the transition in the crime of lewdness, from little to great, is alike easy, and almost unavoidable."[8] The message was repeated in countless execution sermons: small sins lead inevitably to big ones, which carry grave penalties, so it was important to avoid even the small.

Sin was on stage, but so too was forgiveness. An execution was an unparalleled opportunity to display the power of salvation. The sermons routinely described the condemned prisoner's efforts at repentance, if there were any to describe, and assured the spectators that those efforts could not have been made in vain. If even condemned criminals, the worst sinners in the world, could find forgiveness in Christ, then members of the audience were reminded that they could do the same. The sermons carried both a negative and a positive message: avoid sin, and don't waste any opportunities to seek forgiveness.

With thousands listening, the ministers could hardly have been expected to stop there. Many used the occasion to buttress their own positions. A consistent message delivered in execution sermons was the importance of paying attention to ministers — not just at hangings, but every day. "Shall we begin, with the vacation of that, which is the usual Beginning of all Wickedness?" asked Cotton Mather. "That is to say, Sabbath-breaking. . . . Yes, By breaking the *Fourth Commandment* they come to the vilest Breaches of all the rest." In Dedham, Massachusetts, Thaddeus Harris cautioned his listeners against reading "idle and romantic books . . . written with a design to contradict the evidences and destroy the authority of religion." In New York Hezekiah Woodruff addressed "the friends of the prisoner, if any are present," to persuade them of "the importance of cultivating, more particularly, an acquaintance with Christian people" like himself.[9] An execution could be a splendid occasion for reinforcing religious authority.

And with the power of the state on display, an execution was perfect for underscoring secular authority as well. Spectators were urged to "reverence, then, in silence the majesty of the laws—and consider that the existence of your comforts, privileges and advantages depends on the execution of them." At the 1819 hanging of Rose Butler, a New York City slave

convicted of setting fire to her owner's house, the Baptist minister John Sandford directed his remarks to the black spectators. "The wings of the Constitution of America are extended to defend and foster the property, the liberties, and the lives of all its citizens, without exception," he began. "In this inestimable privilege, our fellow citizens of color enjoy a mutual share with us; and this unquestionably should dictate to them a correspondent spirit of gratitude and the practice of every social virtue. It is therefore deeply to be regretted that persons of color should either envy or attempt to destroy the safety and comfort to which we are justly entitled."[10] Hierarchies of all kinds could be explained and justified at hangings by ministers who worked such messages into their sermons.

Even apart from their substantive message, the sermons were a form of drama in their own right. "You deserve to suffer the eternal pains of hell, it is just in God to send you to the hopeless regions of the damned." Timothy Pitkin screeched at the murderer John Jacobs before an appreciative audience. Spectators did not need to agree with the theology to be entertained by the rhetoric. "The Horrors of bloody & cruel Murder have issued in public, infamous strangling & Death," ranted Ebenezer Parkman before Bathsheba Spooner's execution for killing her husband in 1768, "and such cruel, unnatural loathsome Murder has been preceded by detestable uncleanness, by repeated, if, I say, not *multiplied* acts of unfaithfulness to the conjugal Bonds, & defiling the Marriage Bed."[11] Speeches rarely got this racy in the eighteenth century, except at executions. That alone must have accounted for some of the popularity of execution sermons. A great deal of private life saw the light of day in these speeches, behavior to which the community had access on few other occasions. The ministers' persistent reminders to the crowd that a hanging involved more than just entertainment suggest that the ministers themselves had some doubts about how the spectators were profiting from the event.

The sermon remained a standard part of the execution ceremony as long as executions were held in public, through the first half of the nineteenth century in the North and well into the twentieth in parts of the South. After executions were moved into the jail yard and the sermon was abandoned, ministers would remain on hand to counsel the condemned prisoners and to lead those present in prayer. Even today, when executions are attended by only a few carefully chosen spectators and officials,

there is often a clergyman in the room, a vestige of a time when the clergy played an important role in political life, when the line between secular and religious power was not drawn as sharply as it is today.

The Hangman's Office

Ministers had the luxury of restricting themselves to the execution's spiritual aspects. They did not have to build the gallows, or adjust the rope, or pull the lever that would release the trap door. These physical tasks—the actual steps toward death—typically fell to the sheriff of the county in which the prisoner had been tried. A sheriff was "to make Execution, in Cases Civil and Criminal," instructed George Webb's 1736 manual for Virginia justices of the peace. For "Executing a Person condemn'd," Virginia sheriffs were to receive 250 pounds of tobacco.[2]

In England and elsewhere in Europe, death sentences were carried out by professional executioners, specialists loathed by the public. Massachusetts began with professionals. The "executioner Thomas Bell" appears in government records beginning in 1649, when by virtue of his office he was excused from taking his turn on the night watch. Maryland found it so difficult to appoint an executioner that the colony turned to a succession of criminals, each of whom was reprieved from a death sentence in exchange for agreeing to serve as hangman for a term of years or life. The first of these was apparently the murderer John Dandy, who became Maryland's executioner in 1647. Later hangmen included Pope Alvey, sentenced to death for stealing a cow; John Oliver, sentenced to death for the theft of seven shillings sixpence; and James Douglas, sentenced to death for stealing a horse bridle and saddle. But this system did not last long in Massachusetts or Maryland, and if it existed in other colonies it did not endure there either. By 1693 responsibility for Massachusetts executions rested with the county sheriff.[3] Other colonies were already conducting executions through their local sheriffs.

The duties of a sheriff encompassed the entire execution, from the erection of the gallows to the disposition of the corpse. (Because hangings were rare events in most places, few counties had a permanent gallows. Gallows were typically constructed for a hanging and dismantled afterward.) The sheriffs tended to delegate these responsibilities when they could. When Caleb Gardner was sentenced to death in Albany, New York, the sheriff promptly placed an advertisement in the local newspaper soliciting applications from persons willing to undertake the execution.[4]

The bills submitted by sheriffs for reimbursement often included entries for payments to several other people for actually carrying out the hanging. It was not easy to kill a fellow human being, even when the law required it.

Some of the surviving bills are soaked so thoroughly in liquor as to suggest that hangings were far from somber backstage. For the 1689 hanging of Angle Hendricks in New York, the sheriff, John Manning, disbursed one pound five shillings in "French wine to the Carpenters" and another eleven shillings in "Brandy to the Carpenters," for building the gallows; three pounds in money and eight shillings in brandy and wine to "the Executioner" for hanging Hendricks; two pounds in brandy and two pounds four shillings in wine "to the Cartmen & Porters" for carrying Hendricks and her coffin from jail to the gallows and from the gallows to her grave; as well as another pound spent on "more Wine and Beere." John Reynolds, in charge of Philadelphia's Walnut Street Jail, submitted a bill in 1780 that included "3 bowls of punch at putting up the gallows to Hang Dawson and Chamberlain." "3 bowls and a half of Toddy after the Execution." "3 bowls of Toddy at putting up the gallows on the island." and "Toddy for the Constables for hanging Sutton."[5] The managers of most hangings were not experts; they were local officials and contractors who typically had little opportunity to acquire any experience. The ever-present liquor must have been intended in part to strengthen the nerve of the participants in a difficult and gruesome task.

When a sheriff could find no one willing to carry out the work for money and drink, he might induce another condemned prisoner to do the job in exchange for a reprieve. Sheriffs did not have the authority to grant reprieves themselves, but the courts and governors that did possess that authority were willing to cooperate. Isaac Bradford, sentenced to death in Pennsylvania for robbery, was relieved of his own sentence in exchange for hanging two burglars. "A very *hard* choice," the newspaper called it. In Massachusetts John Battus was hanged by a fellow prisoner. A Maryland slave named Tony was sentenced to be the executioner of his four co-defendants, fellow slaves, who had been convicted of killing their owner.[6]

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self." But not all sheriffs were willing to conduct hangings themselves. In New York one 1762 double hanging had to be postponed when the sheriff could not find anyone to act as hangman. "The Sheriff informs me that he has taken all Possible Measures that the Time will allow to procure a Hangman for the two Persons that were to have been executed this morning & that he can procure None," Chief Justice Benjamin Pratt informed Governor Cadwallader Colden. "I think it would be hard to oblige the Sheriff to act the Hangman's Office in Person if it could be avoided." Before the hanging of Patience Boston in Maine there was considerable uncertainty as to who would do the work, so Boston made her own preferences known. She was "unwilling the common Whipper should Execute her, because he is an idle Man, and will misspend the Money he gets," she explained, and added that "Sambo a Negro should not do it, because it would be a dishonour to the Church of which he is a Member."[7] The sheriff himself was not even in the picture.

American officials of the seventeenth and eighteenth centuries were often not as severe as the penal codes they were charged with enforcing. With a few early exceptions they were not the experienced professional executioners of Europe, a caste traditionally shunned by others. They were ordinary citizens. They avoided the job of hangman when they could, and when they could not they dissolved their apprehensions in liquor. When the hanging was over, they were ordinary citizens once again. In the American colonies responsibility for conducting hangings was, for want of a better word, democratized. It was moved from a small set of specialists to a diffuse group of amateurs, where it would remain as long as executions were conducted by hanging. This diffusion of responsibility to nonprofessionals would contribute, in the late nineteenth and early twentieth centuries, to the United States assuming the lead in developing alternatives to hanging. In the seventeenth and eighteenth centuries the amateur hangmen reinforced the communal nature of capital punishment. Executions were often conducted by true representatives of the community, men without any specialized training, men who were known to the spectators as friends and neighbors. A professional executioner might be seen as an agent of the central government, but an American sheriff was a member of the local community. Acted out through the sheriff or his hired hand, the hanging ceremony embodied norms that were truly popular.

But if the death penalty was almost universally supported as just punishment, the difficulty of finding executioners suggests that it could prompt revulsion in specific instances. There was a tension between the general and the particular, between the approval of death as a punishment and a strong reluctance to carry out the distasteful steps necessary to put that punishment into practice. The tension would only intensify in later years. In the nineteenth and twentieth centuries it would result in the abolition both of public execution and of hanging itself.

A Very Sensible Trembling

And what did the ceremony mean to the condemned prisoners? The murderer Barnett Davenport was terrified. The burglar Levi Ames literally trembled with fear. "No Mortal, except the Sufferer, can form any adequate Conception of that Terror which seizes the Soul of a Person doomed to suffer such an exquisitely shocking and shameful Death," John Sheaman is supposed to have said, and if the precise wording is too flowery to credit, the sentiment was widely enough shared to be taken as accurate. At the sight of the gallows the counterfeiter David Reynolds "burst into Tears," and even hardened pirates "seemed much distressed, and continued crying to God." The Annapolis robber James Powell fainted away in his cart at the conclusion of the sermon, and had to be revived in order to be hanged.[8] The stars of the execution ceremony could look forward to pain and death under the close inspection of thousands. Many were understandably frightened.

Many others were angry. One Boston pirate "broke out into furious Expression" laden with profanities. A woman hanged in Maryland for eating her own child in the midst of famine "cried out to the people, in the presence of the governor, that . . . what she had done she did in the mere delirium of hunger, for which the governor alone should bear the guilt," because his military expeditions were the cause of the famine. John Young, who murdered a deputy sheriff who was trying to serve process on him, took advantage of his moment on the scaffold to decry New York's "oppression of the Unfortunate" in the form of laws facilitating the collection of debts.[9] Many of the condemned prisoners had spent months in jail, nursing grievances that exploded on hanging day.

The public display of emotion was limited in many cases by an ethic, inherited from England and widely shared, of "dying game"—of putting up a front of conspicuous unconcern as a way of defying the authorities. The Pennsylvania murderer John "McDonald died game, as it is called by

such wretches," recalled Charles Biddle. "A gentleman present when he was led pinioned and put in the cart for execution, observed he believed he had seen him before, wheeling oysters about the streets of Philadelphia. 'Yes,' says he, 'you may have seen me before, wheeling oysters, and if you will wait until Jack Ketch has done with me, I'll turn round, that you may see me behind and know me better at our next meeting.'" The condemned person, surrounded by force, could not offer any meaningful physical resistance, so this sort of psychological resistance was all he had. The pirate William Fly, hanged in Boston in 1726, "seem'd all along ambitious to have it said, *That he died a brave fellow!*" remembered a disbelieving Cotton Mather. Fly "pass'd along to the place of Execution, with a Nosegay in his hand, and making his *Compliments*, where he *thought he saw occasion*. Arriving there, he nimbly mounted the Stage, and would fain have put on a Smiling Aspect." Fly even "reproached the Hangman, for not understanding his Trade, and with his own Hands rectified matters."[8]

The condemned prisoner had to acknowledge that the state had won his body, but he could do his best to demonstrate that he had not lost his spirit. "I shall go to the gallows, just as free as any other person would take a pinch of snuff," John Banks asserted. An unnamed slave hanged in Annapolis "behav'd with as much resolution and unconcernedness as possibly could be. As he rode to the gallows he sung all the way with the executioner (who was one of his colour) a Negro Song . . . about war and fighting in their own country." Elizabeth Atwood, who was hanged for infanticide in Ipswich, Massachusetts, in 1725, believing that the executioner would be given her clothing, dressed her worst, and on the way to the gallows exclaimed, "I am laughing to think what a sorry suit the hangman will get from me."[9] Lurking beneath all the bravado, however, was an unmistakable terror, which sometimes showed through the mask. After William Fly's execution, it was Cotton Mather who could have the last laugh. "In the midst of all his affected *Bravery*," Mather noted, "a very sensible *Trembling* attended him. His hands and his Knees were plainly seen to *Tremble*."[10]

The condemned prisoners knew they were expected to address the crowd. "It is customary for Wretches under my unhappy Circumstances to say something at the Place of Execution, to satisfy the World," John Lewis recognized. The horse thief John Clarkewight acknowledged that "it may be expected that I will give some short account to the world." Few

passed up the opportunity. For some, it was the last chance to declare their innocence. "I solemnly declare I had no enmity against Capt. Drowne, nor do I know how it happened," proclaimed Elisha Thomas, convicted of Drowne's murder. "I never had any intention of taking the life of any fellow mortal, whatever." "I am *innocent of what is laid to my Charge*," pleaded John Ury, convicted as one of the conspirators in New York's 1741 "Negro Plot." The gallows speech provided an occasion for getting back at the witnesses whose testimony had sent the condemned person to his death. "As my Life is short I have one Thing to say that Isaac Miller, who swore against me was FALSE," argued John Smith just before he was hanged for counterfeiting. One could accomplish the same end more subtly with a sarcastic display of charity. "Four of the Men, who perjur'd themselves, and are the only Means of my Blood being innocently shed, I heartily forgive, and pray God to forgive them likewise," Joseph Lightly announced at his hanging for the murder of his female companion; "and as to the Woman who was my reputed Wife, she died with a Lie in her Mouth, but I freely forgive her."[11]

Genuine charity was not absent. George Burns and two other men were condemned for robbery in Charleston, South Carolina, but just before his hanging Burns exonerated the other two, who were later pardoned. The Virginia murderer John Sparks attested to the innocence of the man who had been sentenced to die with him, whose execution was then called off.[12] On the gallows a condemned criminal had nothing to lose by helping a colleague.

The hope of clemency was often present to the end. If they were to have any hope of avoiding death, the condemned prisoners could not say or do anything to detract from a conspicuous display of good character. As a result, the gallows speech was for the most part the most formulaic of genres, with near-obligatory recitals of a life's misdeeds and warnings to the audience to stay on the right path. The genre was a staple of English executions, at which the condemned prisoners faced the same set of incentives, and it became common in North America as well.[13] On the verge of death, condemned criminals felt the force of convention more strongly than ever.

The moral of the gallows speech, echoing that of the sermon, was that small malefactions would lead inevitably to grave ones. "I know not where to begin the black Catalogue of my Sins," Matthew Cushing declared, "except with my undutifulness to my Parents, which is enough to

lead on to all others." The condemned person was accordingly expected to provide a full criminal record, which served as evidence both of penitence and of credibility to deliver the warning that would follow. "I was guilty of many small Thefts while very Young," began the burglar Stephen Smith, who then traced the progression of his career to bigger burglaries and robberies. "When I was about ten Years old I betook myself to stealing small Things, such as Fruit, Knives and Spoons," admitted William Welch, to demonstrate how theft could lead to robbery and robbery to murder.[78]

The message of the inevitable progress of sin was reinforced by the poetry published in connection with executions, much of which was written in the voice of the condemned person (although most was not likely to have been written *by* the condemned person):

> The dreadful Deed for which I die,
> Arose from small Beginning;
> My idleness brought poverty
> And so I took to Stealing.

Such was the tale attributed to Levi Ames, hanged in 1773 for burglary. A generation later, readers could learn the same lesson:

> But those who deal in lesser sins,
> In great will soon offend;
> And petty thefts, not check'd betimes,
> In murder soon may end.

No matter how small, and whether or not he had been caught, every sin ever committed by the condemned prisoner was understood as a predictor of his eventual fate. Even activities that seemed harmless at the time could be recognized in retrospect as seeds of crime. Samuel Smith's road to burglary had begun, he now saw, when "I fell in company with a female of whom I was foolishly and extravagantly fond, but at length I found her heart was corrupt." The disappointment led to liquor, and the liquor led to capital crime.[79]

After completing his own history, the condemned person was expected to warn those spectators who might be starting down the same road. "Avoid bad company, excessive drinking, prophane cursing and swearing, shameful debaucheries, disobedience to parents, the profanation of the Lord's day, &c." advised three murderers. In that "&c.," probably inserted

by the publisher, was a recognition of how routine these warnings could be. "I am sensible that there are many Houses in this Town, that may be called Houses of Uncleanness," Rebekah Chamblit advised. "O shun them, for they lead down to the Chambers of Death and Eternal Misery."[80]

When the warnings were directed at particular groups of people, they tended like the sermons to reinforce the standard hierarchies of race and gender. "I would solemnly warn those of my own Colour, as they regard their own Souls, to avoid Desertion from their Masters," a slave named Arthur declared. Rachel Wall, one of the rare women executed for highway robbery, took special care to warn other women against a similar career. "Until we convince ourselves that we are by nature the children of wrath," the Mohegan Moses Paul was advised by a fellow Mohegan, "Hell must be our eternal home." At Paul's execution, the famous Indian minister Samson Occom is reported to have said, in substance if not in these exact words:

> My Kindred Indians pray attend and hear,
> With Great Attention and with Godly Fear,
> This Day I warn you of that cursed Sin,
> That poor despised Indians wallow in.
> 'Tis Drunkenness, this is the Sin you know,
> Has been and is poor Indians overthrow.

On the scaffold, Paul duly exhorted the many Indians in the crowd "to shun those Vices, to which they are so much addicted, viz. Drunkenness, Revenge, &c." Despite the fact that some of the condemned prisoners had flouted social convention most of their lives, the opportunity afforded by the gallows speech for critical social commentary was rarely taken.[81]

It was taken every so often. Cato, a New York slave, blamed his criminal career on the mistreatment he had received as a child from his master, "a man of very corrupt and immoral habits," and urged slaveowners to "learn the necessity of paying due attention to the instruction of their servants." The free black man Abraham Johnstone, hanged in New Jersey, spent his last days in jail placing his execution in the context of American race relations at the close of the eighteenth century. Johnstone was concerned that his case would "be made a handle of in order to throw a shade over or cast a general reflection on all those of our colour, and the keen shafts of prejudice be launched against us by the most active and virulent

malevolence." He pointed out that if one compared the numbers of blacks and whites executed with the racial composition of the population, "it will be found that as they claim a pre-eminence over us in every thing else, so we find they also have it in this particular, and that a vast majority of whites have died on the gallows." He concluded "that there are some whites (with all due deference to them) capable of being equally as depraved and more generally so than blacks or people of colour."[8] Johnstone followed with an argument for abolishing slavery. But social commentary was a rare commodity on the scaffold. With very few exceptions, if you had heard one gallows speech, you had heard them all.

After the speech, a hood was pulled over the face of the prisoner and the rope was adjusted around his neck. There might be a final prayer, inaudible to spectators except those right in front. And then came a riot of motion.

Turned Off

Hanging was the ancient and familiar English method of executing criminals. Not until the late nineteenth century would Americans begin to ponder whether other methods might be better, and even then hanging would continue to have its partisans, because it had some undoubted advantages over other conceivable ways of putting people to death. It required no equipment beyond a rope and a high structure sturdy enough to support the weight of a human body. It called for no expertise apart from the ability to tie a knot. In most cases it caused little damage to the exterior of the corpse. These were the benefits that had institutionalized hanging in England, and they did the same in the American colonies.

The earliest American criminals were hanged from tree branches. Within a short time after settlement, most communities switched to gallows specially constructed for the purpose. Boston, for example, built a gallows sometime before 1650, when the governor ordered "that the gallowes be taken downe from the place where it now stands, and forthwith removed into a convenient place of common." A gallows was often no more than a simple structure made of two vertical poles and a horizontal crossbar, around which the rope could be tied. The hanging tree lived on in common speech as a metaphor. Owen Sullavan, hanged in New York in 1756 for counterfeiting, declared on the gallows that he hoped his confederates would not "die on a Tree as I do." A broadside poem commemorating the 1732 execution of the Boston burglar Richard Wilson referred to the instrument of death as "the Gallows-Tree."[9]

A hanging required some method of dropping the condemned person from a height. In the seventeenth century the drop was commonly achieved by means of a ladder placed against the tree or the gallows. The prisoner, with a rope tied around his neck and his hands tied, would climb the ladder. When all was ready, the executioner would simply turn the ladder away, depriving the prisoner of support. A person hanged in this manner was said to be "turned off." Ladders remained in use for some time, despite some evident shortcomings. Dorothy Talbye, hanged in Boston in 1639 for murdering her daughter, swung away from the ladder and then swung back, enabling her to catch it with her legs. More often, the fall from the ladder was too gradual to be fatal, because the ladder, removed horizontally, allowed the prisoner let him- or herself down slowly. After one Massachusetts woman "was turned off and had hung a space, she spake, and asked what did they mean to do." Cotton Mather found a mysterious message in the execution of Mary Martin. "She acknowledged, her Twice Essaying to Kill her Child, before she could make an End of it; and now, through the Unskilfulness of the Executioner, she was turned off the Ladder Twice, before she Dyed."[10]

By the eighteenth century the drop tended to be accomplished by having the condemned person stand under the gallows in a horse-drawn cart, which could be pulled away at the designated moment. But even the cart was not foolproof, because it too had to be removed horizontally. Anthony Dittond, hanged by means of a cart near Williamsburg, Virginia, in 1738, was still alive three minutes later, causing the executioner to pull on his legs to create a downward force greater than that provided by gravity. The executioner's efforts broke the rope, and Dittond, not yet dead, tumbled to the ground.[11]

Dissatisfaction with the efficacy of ladders and carts prompted some communities to build the gallows on top of a scaffold, the floor of which contained a trap door. The condemned person would stand on the trap door until its supports were pulled away. Boston had such a device as early as 1694, when Samuel Sewall attended the hanging of seven pirates. "When the scaffold was let sink," he reported, "there was such a Screech of the Women that my wife heard it sitting in our Entry next to the Orchard, and . . . our house is a full mile from the place." Boston's scaffold

predated the use of scaffolds in England by several decades. A scaffold could be built up to a greater height than a cart, and the falling trap door made it impossible for the prisoner to let himself down gradually, so his fall was more likely to reach a velocity that would kill him. The scaffold's efficacy, along with, presumably, the difficulty of driving a horse and cart away from a gallows surrounded by spectators, made scaffolds common by the nineteenth century. With the routine use of a scaffold, the condemned prisoners were gradually no longer said to be "turned off." A new expression became commonplace, one referring to the speed of the process. "He was led to the *scaffold*," one account of a 1797 execution read, "the *supporting* line unfastened, and the *malefactor launched* into Eternity."[14]

But even with a scaffold, hanging might not kill on the first try. Ropes ripped apart with the sudden downward jerk. The drop might still be too short to kill. Thomas Lee, dropped from a scaffold in New York in 1765, hung by the chin for two minutes before saying "It does not choak me."[15] Occasional failures would remain associated with hanging throughout its existence, well into the twentieth century.

The technology of hanging was simple, so simple that nearly anyone could conduct a hanging, even of him- or herself. Hanging was a common method of suicide in the American colonies. The *Pennsylvania Gazette* reported at least ten suicides by hanging in the Philadelphia region in the 1730s alone, including three in Chester within a two-week period. Eight of the ten were slaves or indentured servants, most very young. One was a five-year-old boy, who hanged himself from a fence stake in Burlington, New Jersey, a few days after he had watched the execution of two local men. "It is said," the *Gazette* reported, "that he dreamt much of that Execution the Night before, and telling his Dream in the Morning, added, *and I shall die today*."[16] Of all the conceivable ways of killing, hanging was one of the easiest. Only in the military, where firearms were relatively plentiful and speed often essential, were significant numbers of seventeenth- and eighteenth-century executions conducted by means other than hanging.

Death by hanging could be fast or slow, apparently painless or obviously excruciating, depending on the actual cause of death. If the prisoner was lucky, the force of the drop would fracture the vertebrae of his neck and sever his spinal cord, typically between the second and third vertebrae. This is an injury often seen today—and still colloquially

known as "hangman's fracture"—usually after head-on automobile accidents in which the victim's body is thrown forward but his head is snapped back by the windshield. Death by this mechanism was nearly instantaneous and thus caused little or no pain. It was also unusual. A mass autopsy of English murderers executed between 1882 and 1945 and exhumed during prison construction found only six cervical fractures in thirty-four cases. An older study of sixty-five hangings conducted in the United States between 1869 and 1872 counted only six complete fractures and four partial fractures.[17]

Most people who were hanged died more slowly, as the rope encircling their necks either cut off the supply of blood to their brains or prevented them from breathing, or as the force of the drop wrenched the larynx away from the trachea, again preventing breathing. All these methods of dying took several minutes. The loss of blood to the brain was the least painful, producing unconsciousness within seconds. Asphyxiation, in contrast, left the conscious victim writhing and gasping through the last several minutes of his life. His mouth and nose would turn dark purple, and his eyes would bulge monstrously wide. Convulsions would gradually extend throughout his body, spreading from contortions of the eyes to violent kicking with the legs. He might urinate or defecate. His penis might become erect. Such displays accompanied a significant percentage of hangings. The study of sixty-five executions mentioned earlier catalogued their number and severity: "*Throes and Contortions*—*Severe and Continuous* 23. *Moderate* 14. *Feeble and Evanescent* 18. *Chest-heavings* (indicative of persistent sensation) 8."

Since at least the seventeenth century, Anglo-American lore had held that the crucial determinant of the means of death was the placement of the knot. A knot under the ear, it was thought, would exert sufficient leverage on the jawbone and temple to fracture the spinal column; a knot on the throat or the back of the neck would not. "Yes," said one prison superintendent, responding to a remark that the condemned man under his charge had died easily, "there is every thing in knowing how to fix the knot." Considering their personal interest in the issue, it is not surprising that some condemned prisoners were familiar with this lore, and were careful to instruct their executioners to put the knot in its proper place. "Let's see, where does the knot go, under the right ear?" asked the murderer Harry Hayward, in what would prove to be his last words. "Please pull it tight. That's good."[18]

The infrequency of cervical fractures is difficult to square with the apparently wide knowledge of knot lore unless that lore was wrong, as it may well have been. While there has understandably been little research on the point, the authors of a study of a 1993 hanging in the state of Washington (the first execution by hanging in the United States since 1965) suggest that knot placement probably made no difference at all. The English study found that the incidence of fracture was unassociated with hangman or hanging technique, a finding that suggests that the pain of being hanged was unlikely to have been mitigated by any skill possessed by one's executioner.* Whether a hanging was painless or painful seems to have been largely a matter of chance.

In the middle of the nineteenth century, when technological change would make it possible to minimize pain, more and more spectators would begin to find hanging too gruesome a method of execution. Until then, death by asphyxiation was understood to be unfortunate but inevitable. Accounts of evidently painful hangings written before the mid-nineteenth century tend to betray only resignation, not shock. Executions were not *supposed* to be painful. None of the reasons for favoring capital punishment made spectators or government officials want to inflict suffering along with death. There was just not yet any known way of eliminating the pain.

The Inquisitive Public

The crowd went home, the condemned person was cut down and usually buried, the gallows was dismantled, and everyday life picked up where it had left off, but the execution lived on in three genres of literature: the sermon, the last words, and the account of the prisoner's life of crime and public death. The dying speech and the criminal biography had already been popular literary forms in England, but the stand-alone execution sermon may have been an American invention. These genres overlapped. Last words and accounts of the criminal's life were often appended to published sermons in order to boost sales. Criminal biographies often culminated in the condemned criminal's last words. All three genres were published in greatest number in the North, especially in New England, which in the eighteenth and early nineteenth centuries accounted for the overwhelming majority of published material of all types. They found a ready market. The sermons, ostensibly published for didactic purposes, could enrich writer as well as reader. By Cotton Mather's own reckoning,

his sermon *The Valley of Hinnom*, delivered before the 1717 hanging of the murderer Jeremiah Fenwick, sold nearly a thousand copies in five days.* Criminal biographies were printed as inexpensive broadsides and sold to spectators at hangings. Accounts of last words and executions, often set to rhymed verse for public reading or singing, were advertised in newspapers. Published execution sermons remained popular in the North through the first quarter of the nineteenth century, after which changing attitudes toward the place of religion in public life and the move away from public executions caused the genre to disappear. Criminal biographies and accounts of last words held on longer; both were still being published in the second half of the nineteenth century.

The eagerness with which publishers pressed condemned prisoners to provide last words in advance of the execution is sure proof of the profits that could be had from selling them. The publisher of Matthew Cushing's "Declaration & Confession" tried his best to get a comparable statement from John Ormsby, who was executed alongside Cushing, but failed. Ormsby "appear'd very stupid at the time of his receiving Sentence," the publisher reported, "and remain'd very much so till the Day of his Execution; and we could get nothing from him worthy of any publick Notice." Lack of material was no deterrent to other publishers, who went ahead and wrote the last words themselves, then attributed them to the condemned person upon publication. One account of Whiting Sweeting's final days denounced "the spurious publication, by Mr. Barber," of a competing version, which "is supposed to have been in consequence of a merited denial of his application, hoping thereby to injure the sale of, and bring into disrepute, the true work." But how could a reader be sure that Barber's was not the true account, and the second one the pretender? The 1733 hanging of an Indian named Julian produced a battle of broadside "final warnings," each claiming to be the only authentic version. One broadside, bearing the oddly spelled title *Poor Jollevaun's Warnings to Children and Servants*, insisted that it was "Published at his Desire, in Presence of two Witnesses." That drew a sharp rebuke from the publisher of *Advice from the Dead to the Living*, who alleged that the other was "false and spurious, and disowned by the said Julian in the Presence of three Persons." The publisher of another version, *The Last Speech and Dying Advice of Poor Julian*, included a statement supposedly from Julian himself: "I do hereby utterly disown and disclaim all other Speeches, Papers or Declarations that may be printed in my Name."† The three

broadsides bore no resemblance to one another. Two were in verse, one in prose; one of the verses was supposedly in Julian's voice, the other in the third person. At least two were spurious, and perhaps all three were.

Knowing that they were addressing a public rightly skeptical of the authenticity of these accounts, publishers of condemned criminals' last words routinely included an attestation that the prisoner really did speak words close to those attributed to him. "After I had penned it from his own Mouth, I read the same over to him, because I had not related it just in the very same numerical words," wrote the publisher of the biography and last words of Thomas Hellier, an indentured servant executed in Virginia for murdering his master's family. "After he had heard the same read over, he acknowledged this to be the true sense of his own Intentions." "The reader will take notice that I do not attest to the truth of Pomp's dying speech," conceded Jonathan Plummer, who purported to have interviewed Pomp, a Massachusetts slave, in his jail cell, "but I affirm that he related to me as matters of fact the particulars recounted in this speech."[9] But of course such affirmations were as easy to falsify as the content of the speeches. Most readers had no way to know whether the condemned prisoners had actually said what they were reported to have said. Two centuries later, neither do we. Some of the accounts are written in a style probably too highflown to have been within the capacity of a person of average literacy, but of course some condemned prisoners, then as now, possessed literary skills far above the average. In other instances publishers may have embellished the style without altering the substance. Some publications were outright fraud. The published dying declaration unavoidably aroused doubts as to its authenticity.

From the condemned person's perspective, the opportunity to share in the profits of the enterprise, and thereby to provide some money for the family left behind, no doubt contributed to a willingness to cooperate. But money was not the only reason for publication. John Batter, hanged in Maryland for robbing a church, wrote out his confession in order to warn everyone about his accomplice "Dennis Hayes for he is the greatest Rogue in the World lest he bring them to the Gallows, as he brought me." Levi Ames pleaded with readers not to consider his execution any reflection on his mother or his brother, who already had troubles enough. A published declaration was also a final opportunity to declare one's innocence, even from the grave. "If the word of a dying man can be taken," said one New York counterfeiter who was probably already dead by the

time his words could be read, "I am innocent of the crime imputed to me."[10]

Unlike dying declarations, criminal biographies did not necessarily depend for their authenticity on the cooperation of the condemned prisoner. The facts of the crimes could be obtained from other sources. Like sermons and dying declarations, accounts of crime were often published ostensibly as a means of instruction. Many, however, contained little or no text explicitly devoted to that purpose. Crime was simply interesting to read about. As one broadside sold at Moses Paul's hanging admitted, "it is expected that the inquisitive Public will be desirous to know some Particulars" of Paul's life and crime.[11] Information about crime was valuable enough in its own right for readers to cover the cost of publication and more.

An execution thus possessed a literary existence long after everyone had gone home. By the time the last pamphlet was sold, several months might have passed since the criminal had been sentenced to death. He had been the object of hatred, then fascination, and then sympathy, and all the while in the eye of a public much larger than the crowd that attended his execution.

Why all the fuss? Convicted criminals could more easily have been killed without any ceremony at all. The procession, the sermon, the gallows speech—all of it must have served some purpose, or people would hardly have gone to the trouble. We may identify two reasons eighteenth-century officials would have found it useful to situate hangings within this kind of ceremony.

First, the ceremony provided a way to amplify the message of terror created by the hanging and to broadcast that message to the public. The infliction of death by itself might have drawn a crowd, but when death was placed at the end of a series of dramatic events that could have attracted spectators by themselves, the number of spectators was multiplied. Every additional member of the audience was one more person to be deterred from crime in the future. The hanging's message was intensified for each spectator by the context created by the procession, which could amount to a significant display of the armed power at the government's disposal, and by the speeches, which clarified why that power was being directed at a particular individual. If the primary goal of

capital punishment was to make people fear the consequences of committing crime, the ceremony served the twin goals of increasing the number of people and the level of fear.

The ceremony served a second purpose as well: that of reinforcing order. One common way to underscore the importance or unusualness of an event is to surround it with proceedings that set it apart from everyday life.[9] To demonstrate the importance of marriage, many people embed the brief moment of declaring the marriage within a much longer wedding ceremony. The rituals associated with judicial proceedings, in the seventeenth and eighteenth centuries as now, lent weight to those proceedings by dividing them from events before and after. The ceremony of hanging day did the same for hangings. By setting the actual hanging apart from daily life, the ceremony demonstrated the separation of the legitimate violence inflicted by the state on this occasion from the illegitimate violence inflicted by anyone else, often including the condemned prisoner. By embedding the hanging within the ceremony, the state symbolically declared that the hanging was something very different from what one might see elsewhere. The sort of violence that *establishes* order was clearly marked off from the sort of violence that *disrupts* order.

The ceremony thus permitted what might otherwise have been paradoxical: the ritual display of violence as a means of dramatizing the community's disapproval of violence. The staging worked. Not until the late eighteenth century would critics discern any paradox. Until then, hangings were understood by all as participatory enactments of a collective interest in punishing crime. Government officials, ministers, ordinary citizens—all came together to make an emphatic statement of condemnation.

3

DEGREES OF DEATH

ELIZABETH RAINER WAS TAKEN from jail to the gallows. Eleven months earlier, in the summer of 1676, she had conceived a child. That in itself had been a crime because Rainer was unmarried; as the indictment filed in a Special Court of Over and Terminer in Southampton, New York, put it, she had "played the whore, & become with childe by fornication." Fearing the disapproval of her neighbors, Rainer tried to conceal her pregnancy, and then when the baby was born in March 1677, in her father's house, she tried to hide that too. She took the child to a nearby cooper's woodshop, where, again in the words of the indictment, she "didst sinfully & wickedly leave it dead upon a pieli of Chipps . . . And more like a brute Beast than a mother did not acquaint any of the same, nor go in any way to save the life of it." Now, in May, she had been convicted. An audience gathered around the gallows to watch. No doubt many in the crowd knew her well. All knew of her crime and her sentence. Someone, probably the local sheriff, led her to the gallows and placed a halter around her neck. Elizabeth Rainer was ready for the execution of her sentence.

A half hour later that sentence had been executed. The crowd dispersed. The sheriff removed the halter from Rainer's neck. He did not need to carry her body away, because she was still alive. She was taken back to jail, where she would remain, probably frightened, probably embarrassed, pending further order of the court. Elizabeth Rainer had not been sentenced to death. Like many American criminals of the seventeenth and eighteenth centuries, she had been sentenced instead to "stand a full ½ houre on the gallowes with a halter about her neck." She had been sentenced to play a part in the ceremony of capital punishment, but not to capital punishment itself.

No one was surprised. Rainer knew she would live, and the crowd knew it too. This sentence would have been nonsensical—pointless play-acting—had her contemporaries not believed that it would have some salutary effect on Rainer and the crowd, at best that it would deter infanticide, or at the very least that it would make all concerned think twice before fornicating. From Elizabeth Rainer's sentence we can begin to get a sense of the centrality of capital punishment in early American criminal justice.

Capital punishment was more than just one penal technique among others. It was the base point from which other kinds of punishment deviated. When the state punished serious crime, most of the methods at its disposal were variations on execution. Officials imposed death sentences that were never carried out, they conducted mock hangings (as in Rainer's case), and they dramatically halted real execution ceremonies at the last moment. These were methods of inflicting a *symbolic* death, a penalty that mimicked some aspects of capital punishment without actually killing the defendant. Officials also wielded a set of tools capable of intensifying a death sentence—burning at the stake, public display of the corpse, dismemberment, and dissection—ways of producing a punishment worse than death. Taken together, these provided a wide range of possible punishments for serious crime, within a penal system that in principle included only one.

Mercy

A death sentence did not necessarily result in an execution. It merely shifted the case from the judiciary to the executive, from the question of guilt to the question of mercy. There was no expectation that all or even nearly all condemned criminals would be executed. In eighteenth-century New York, for instance, just over half received pardons. In a sample of death sentences from eighteenth-century Virginia, between one-quarter and one-third were never carried out.[2]

Unlike us today, when executive clemency is very rare, Americans of the seventeenth and eighteenth centuries assumed that the written law provided only an upper limit to the punishment a criminal might receive. While every death sentence was the same, the circumstances of every capital crime were different, and so were the life histories of the condemned criminals. The power of clemency was understood as a means by which the state could tailor the sentence to the individual case.

Clemency was governed by no rules. It was purely within the discretions of colonial and state governors, who could grant or deny a pardon for any reason or no reason.[3] In a world of unequals, connections mattered. Dennis Kilsbye, coachman to the governor of New Jersey, raped a fifteen-year-old girl but was pardoned. "Some Circumstances appeared to be in his Favour," was all the newspaper reported, and it was clear enough what those circumstances were. Where an application came from "Sundry Gentlemen," as in the cases of the Maryland burglars Samuel Nollar and "Mulatto Dick," or "the respectable inhabitants of Fredericksburg," as in the case of the horse thief Joshua Night, a pardon was almost a certainty. When the greater part of the Richmond bar petitioned in behalf of Angelica Barnett, a free black woman convicted of murdering a white man who had tried to whip her, Barnett was pardoned. Without friends in high places, in contrast, the chances of clemency were much smaller. The Connecticut murderer Richard Doane found himself "destitute of property & connections to support or intercede for him," and accordingly had to appeal to the legislature directly. (In Connecticut the legislature rather than the governor had the power to grant pardons.) "Others have their friends to speak for and redeem them from death," lamented Charles O'Donnel shortly before his execution. "But there is none to speak a word in favour of the guilty O'Donnel."[4]

Influence was most important where inequality was greatest. The owner of a slave convicted of a capital crime short of murder virtually possessed the power of life or death. Landon Carter's slave Manuel was "the best plowman and mower I ever saw" until drinking and whoring turned him to burglary. "For this I prosecuted him and got him pardoned," Carter reported. When another of Carter's slaves set fire to his meathouse, Carter simply sent a letter to the governor, and the slave was likewise pardoned. In New York a slave named Jack was sentenced to death for burglary but was not executed because his owner, the bricklayer Dyrck Vandenburgh, said that Jack had cost him £60 and was very helpful in his trade. The *Virginia Gazette* summed up the power of slaveowners in its account of some runaway slaves awaiting their executions: "It may be supposed if their masters would come and intercede for a pardon it might be granted."[5]

Most of those who were condemned lacked a powerful patron, but for each there was at least one man of influence who knew something about his case—the judge or judges who had sentenced him. "Your Honor hav-

ing presided at my Trial are better acquainted with all the Circumstances attending it than almost any other person," Lovon Handley pleaded with the Honorable Nicholas Thomas from his jail cell in Cambridge, Maryland. "Let me then entreat you to lay my Case, my long and painfull Confinement, my numerous and suffering Children, my ready and willing Services rendered my Country . . . before his Excellency the Governor, these I hope joined to your Honors powerfull Intercession." The trial judge was often the only person the condemned prisoner knew who was likely to have access to the governor. At the same time, because governors and their advisors normally lacked any firsthand knowledge of the case, the trial judge was often the only person the governor knew who possessed accurate information about the condemned prisoner and his crime. The recommendations of trial judges were thus pivotal in determining who would receive clemency. Although a New York jury had convicted James McBride of murder, Justice Daniel Horsmanden was persuaded that McBride had not intended to kill, and so McBride was not executed. Although a Maryland jury had convicted Elizabeth Horner of horse theft, the judge thought it possible that she might be innocent, so Horner was not executed either.[6]

To say that decisions were discretionary and influence important is not to say, however, that clemency was purely a matter of connections. Many people with no apparent influential friends were pardoned. When the powerful intervened after conviction they did not simply rely on their influence; they found it necessary to state *reasons* for clemency. Although no written law regulated the decision to grant a pardon, decisions were in practice governed by stable unwritten conventions which enabled all concerned to form a sense of the types of cases appropriate for clemency. These conventions allowed clemency to serve several purposes in the seventeenth and eighteenth centuries, functions all served by other legal institutions today.

First, clemency was the only means available to correct legal errors occurring at trial. Today appellate courts perform that role, but there were no criminal appeals in the seventeenth and eighteenth centuries. "I was this moment informed of the case of a negro man named Phil, belonging to one Tyree," Edmund Randolph anxiously wrote to the governor of Virginia. Phil had been sentenced to death as a burglar, for "going into a house, in the day time, *while the door was open*, and stealing a considerable sum of money." As every lawyer knew, however, "a *breaking* was absolutely necessary to justify" a conviction for burglary, and because Phil had walked right through an open door, no breaking had occurred. "The court, who sat on the trial, were very respectable and sensible men," Randolph assured the governor, "but seem to have mistaken the law." Phil received a pardon the following week because of the error.

Condemned prisoners and their lawyers, if they had lawyers, knew that a legal error at trial was likely to result in a pardon, and they accordingly proffered the sorts of arguments that today would be directed at an appellate court. The lawyers for a Connecticut slave named Cuff, condemned in 1749 for raping fourteen-year-old Diana Parish, argued (apparently without success) that the colony's statute establishing rape as a capital offense ought to be interpreted in the light of the Old Testament, which they asserted punished with death only the rape of a betrothed virgin, not that of an unbetrothed virgin like the victim. James Gibson, convicted of raping the elderly Mrs. Hubbard of Haddam, Connecticut, argued in his own behalf that his conviction had been procured unlawfully because the deliberating jury had been allowed to consult law books. Gibson's argument prevailed, although not without some cost; his sentence was commuted to castration.[7]

The most serious kind of trial error was, of course, the conviction of an innocent person. Governor Robert Hunter of New York arranged pardons for several of the slaves convicted of conspiring to revolt in 1712, "there being no manner of convincing evidence against them, and nothing but the blind fury of a people much provoked could have condemned them." Seventeen-year-old Margaretta Kirchin of Lancaster, Pennsylvania, was convicted by a jury of murdering her illegitimate infant in 1759, but when the judges at her trial reported that Kirchin's guilt was unclear, she was pardoned. In an era when all forms of scientific evidence still lay well in the future, it was not unusual for facts to come to light only after the trial was over. Clemency allowed such facts to make a difference. A slave named Bristo was convicted of raping young Hannah Beebe of Connecticut in 1756, upon Beebe's own testimony. As Bristo's execution date approached, Beebe admitted that she had falsely claimed to have been raped because she had been told that the claim would entitle her to obtain compensation from Bristo's owner. Bristo was immediately pardoned.[8]

Where the condemned person's guilt was clear and his trial conducted properly, youth or inexperience as a criminal might save him from being

hanged. This was a second function served by clemency, that of classifying offenders according to what was often called their "character," which tended to be synonymous with the perceived likelihood that they would commit more crimes in the future. Today this sorting function is incorporated into sentencing itself. Maryland's governor learned in 1754 that two condemned burglars "are both very Young and that this is the first offence that either of them to Our knowledge has been arraigned for." The burglars were pardoned. James Mansfield and Samuel Hall were condemned for counterfeiting North Carolina's bills of credit, but a petition signed by several of their neighbors demonstrated that "they are but young Men and of a former good character," whose crime was "more owing to the Unsteadiness of Youth and the Attacks of an old and hardened Offender, thoroughly hackneyed in the Ways of all Vice, than from any Settled Principles of Viciousness in Themselves." Mansfield and Hall were pardoned. Clemency served to separate such incidental criminals from those like John Webster, who had "committed many crimes of the most heinous nature," or James Duffy, whose single murder was "perpetrated in so unmanly and cruel a manner" as to leave no doubt as to his viciousness.[7] Some criminals were simply worse than others.

A third purpose served by clemency was that of encouraging criminals to inculpate their colleagues. John Smith was sentenced to death for being the ringleader of a group of men who murdered a ship captain in Maryland, for example, but because Smith provided the government with evidence against his confederates, he was pardoned. The condemned Philadelphia burglar John Crow was pardoned after informing on his accomplices. Today this sort of encouragement tends to be provided before trial, in the course of plea bargaining. Before there were police forces to investigate crimes, however, and before there was any significant amount of plea bargaining, clemency was used as a tool of law enforcement.[8]

The multiple purposes served by clemency put the condemned prisoner in a bind. A claim of innocence might make him a more appealing candidate for clemency, but if the claim was not believed it would be taken to demonstrate a lack of penitence indicative of a hardened criminal, and would thus make an execution more likely. To admit guilt and show remorse, in contrast, would make manifest one's good character but it would simultaneously reinforce the appropriateness of the conviction and the ensuing sentence. As one defendant was paradoxically told

"Unless he gave in a Petition wherein he Confest his Crime, he should have no Reprieve, but Execution would soon be put upon him."[9]

Caught in this dilemma, the prisoners made their choices. Some mounted displays of conspicuous repentance. His victim "was basely used by me," admitted the rapist Robert Young; "I humbly ask her forgiveness, and all others whom I have offended." The pirate Richard Barrick and the murderer Cassumo Garcelli, like many others, recited their prior records and conceded the justice of their sentences. John Ryer assumed a pose of prayer on the scaffold and remained motionless for three minutes, long enough to ensure that no spectator could miss the point.[10] Repentance may often have been genuine, but it was always useful.

Another way a condemned prisoner could demonstrate his good character was to show his appreciation for the services performed for him in the days leading up to his death. Three Boston pirates were careful to give thanks for "the humane and kind treatment they have met with ever since their Confinement, from every Person concerned with them, and from the many kind and charitable Citizens who have visited and comforted them." The burglar Dutch Gaunt thanked his jailer and the jailer's family "for their kind Attention to me while under Confinement." Bristol, a sixteen-year-old slave, "was very particular in thanking every Body that had taken Notice of him while in Prison."[11] Again, the gratitude may well have been authentic, but it was also prudent. There was good reason to show that one was not a hardened criminal.

Many took the opposite course, maintaining their innocence in the face of evidence to the contrary. Some of the strongest evidence against Moses Paul had been Paul's repeated threats to carry out the murder of which he was later convicted. Paul nevertheless insisted that although he "made use of some vile, threatening language, yet he begs leave to say that he had not any desire of murder in his Heart, and that his words and expressions at the time, whatever they might be, were but empty sounds without any meaning."[12] Innocence was probably as often genuinely felt as repentance, and it was always just as useful.

Other condemned people tried to avoid the paradox of clemency by finding ways to display innocence and repentance simultaneously. One might deny the crime but acknowledge that one deserved to die nevertheless, for leading a life of smaller sins like drunkenness and Sabbath-breaking. One might more plausibly protest atonement for the acts constituting the crime but deny having committed the crime itself, for want of one

of the elements making up its legal definition. "I have uniformly thought that the witnesses were mistaken in swearing to the commission of a Rape," Joseph Mountain was supposed to have said. "That I abused her in a most brutal and savage manner—that her tender years and pitiable shrieks were unavailing—and that no exertion was wanting to ruin her, I frankly confess." Mountain repented for his intent to commit rape, not for an actual rape. Sixty-eight-year-old John Jubeart "declared upon the word of a dying man, that it was more for the sake of trying an experiment than any fraudulent intention he had to impose upon the public" that he had melted down five Spanish dollars and mixed in an equal quantity of metal to coin ten new ones. Jubeart could use the law's requirement of intent to display penitence for coining fake money while simultaneously denying that he was a counterfeiter.[9] Legal argument allowed room for a condemned criminal to play both sides of an appeal for clemency.

Drink provided another middle path between the two sides of the clemency dilemma, because it allowed the condemned person to apologize for his conduct while disclaiming complete responsibility for it. "How I came to commit this Wickedness, I can give no Account," the murderer John Ormsby related, "unless it was the Effects of the Drink which had brought on my former Delirium." Ormsby could display repentance for an unintentional killing and for a life of drink, neither of which was a capital crime, without having to admit to murder in the technical sense. John Green, one of the few Americans ever sentenced to death for blasphemy, attributed his words to "an Excessive drinking of Rum the common strong drink of this land, which your Petitioner found by woful Experience operated upon him in an extraordinary & peculiar manner, causing him to be wild & frantick, noisy & turbulent little short of a madman." After fourteen years of abstinence, Green explained, "being not well your Petitioner thought he might prudently take a little strong drink thinking it would be for his health & comfort." But a nip of rum "alas whet & inraged your Petitioner's old appetite," and Green once again gave in to his addiction, "til frantick & wild with the fumes of large quantities of strong liquors your poor Petitioner, (as he is told for truly one half he cannot recollect) became more like a fiend than a human creature, hollering affronting words to God & man."[10] Green could portray himself as a weak man but not an evil man, and his blasphemy as fueled by drink rather than a godless character. The depiction probably worked,

because while there is no surviving record of the action taken on Green's petition, there is also no surviving evidence that Green was ever hanged.

As the date of execution approached, many condemned prisoners resorted to desperate means of seeking clemency. A few minutes before his scheduled hanging for counterfeiting, Benjamin Cooper confessed that he had also been part of a major unsolved robbery, and promised to name his accomplices if he could only live a bit longer. Cooper's execution was postponed, and he was eventually pardoned. The Philadelphia counterfeiter Herman Rosencrantz, in a last-minute effort to gain favor, named so many innocent people as his accomplices that the publisher of his confession felt compelled to clear their names in an appendix. Some prisoners pleaded for alternative sentences. The horse thief William Barker begged to be "Transported to some of her Majesties Colonies abroad" or to "spend the remainder of his Dayes in her Majesties service either by Sea or Land." The slave Cuff pleaded that his death sentence might "be changed into whipping branding transportation or castration any or all so as his life may be spared."[11] As time ran out, the tools available to condemned prisoners became weaker.

The ever-present possibility of clemency suggests why the last words of condemned persons tended to be so formulaic. Condemned prisoners all faced a similar set of incentives. They needed to project two inconsistent images, one of innocence and one of contrition for the crime. In the effort to obtain a pardon, one could choose one route or the other, or one could try to walk the narrow path between them. There were no other strategies available. To vent one's frustrations, or to take the opportunity to criticize the criminal justice system, was to make one's bad character manifest. It was a decision, in effect, to give up hope of living. One can readily understand why few pursued that course. The condemned person was far more likely to live another day if he met the expectations of his audience.

That audience was a broader group than it is today. Community sentiment still plays a role in criminal sentencing, especially in cases potentially capital, but that sentiment tends to be formally channeled through a small number of community representatives, most obviously through juries in capital cases, but also through elected prosecutors and judges, and through the victims and others who are permitted to testify at sentencing hearings. And we tend to be suspicious when the role of community

rule sentiment is low court—when the prosecutor or judge favors the death penalty shortly before an election, for example, or when sentencing juries seem to be influenced by public opinion. Neither the formal claiming of community sentiment nor the suspicion of it was present in the seventeenth and eighteenth centuries. Whether the condemned person lived or died was supposed to reflect the will of the community. Who, after all, knew the criminal's character better? Who had a better sense of whether he had made a single mistake or was truly evil?

Those who were locally powerful had a disproportionate say in which prisoners would be pardoned, but that was an attribute of the politics of the era generally, not a feature unique to clemency. As politics became more democratic in the nineteenth century, so too did clemency decisions, as governors found themselves increasingly forced to consider the electoral consequences of the grant or denial of a pardon. But regardless of who spoke for the community, the community was understood to play a proper role in deciding which condemned prisoners would die. Sentencing was not a specialized function reserved for either a technically trained elite (as noncapital sentencing often is today) or a jury presented with information in a formal, restricted setting (as capital sentencing is today). Through clemency, capital sentencing in the seventeenth and eighteenth centuries was seen as a community decision.

Symbolic Execution

The state also had at its disposal a variety of means, short of a pardon, to mitigate a death sentence. By invoking the ancient legal doctrine of benefit of clergy, by conducting simulated hangings, and by staging dramatic reprieves under the gallows, officials could reap much of the benefit of the death penalty without actually having to kill.

Benefit of clergy was a relic of English law. It began with the separation of temporal and ecclesiastical courts after the Norman Conquest. Criminal trials of members of the clergy fell within the jurisdiction of the ecclesiastical courts. A clergyman charged with a crime in a temporal court would accordingly plead his status—his "clergy," as it came to be called—as a bar to prosecution. Over time the English courts developed a shortcut for assessing the truth of the claim that a defendant was a clergyman. Rather than conducting a full-scale inquiry into the defendant's career, the courts simply ascertained whether he could read, on the assumption, realistic at the time, that few people other than members of the

clergy would know how to read. By the close of the fourteenth century, however, many of the people successfully claiming the benefit of clergy in English courts were in fact not clergymen at all but literate people pursuing secular occupations. One's status as a member of the clergy continued to be important only in successive prosecutions. Real clergymen could claim the benefit as many times as they needed, but literate laypeople were given only one opportunity. By the late fifteenth century laypeople pleading benefit of clergy were branded on the thumb to indicate that their immunity had already been used. Eventually the literacy test was abolished. A legal rule that had begun its life as an allocation of jurisdiction between different courts had been transmuted into a system of leniency for first offenders.[15]

Benefit of clergy was much more common in the southern colonies than in the northern because of the greater number of capital offenses in the South.[16] The doctrine was unavailable for the most serious crimes, and in the North these made up most or all of the capital offenses. Many of the criminals tried for the lesser capital crimes knew, if it was their first such trial, that the maximum penalty they could suffer was to be burned in the hand.

By tinkering with the scope of benefit of clergy, colonial governments could incrementally modify the severity of the criminal law in response to perceived patterns of crime. After the burning of the Kent County courthouse in 1720, the Maryland General Assembly was dismayed to realize that benefit of clergy was unavailable only for residential arson, and promptly withdrew the privilege for anyone thereafter convicted of setting fire to a courthouse. Nine years later, finding that "several Felons have feloniously broke and enter'd several Shops, Store-houses, or Warehouses, not contiguous to or used with any Mansion-house, and stolen from thence several Goods and Merchandizes," and discovering that only residential burglaries were exempt from benefit of clergy, the General Assembly likewise disallowed the privilege for burglars from commercial premises. In 1737, after a spate of burglaries from "Tobacco-houses, and other Out-houses"—structures neither residential nor commercial—the Assembly believed it necessary to prohibit these burglars as well from claiming the privilege. "Offenders have been encouraged to commit the said Crimes, by the Lenity of our Laws, and Expectation of having the Benefit of Clergy, when detected," the Assembly explained.[17]

The doctrine remained in place until the penal reforms of the late

eighteenth and early nineteenth centuries. Massachusetts abolished benefit of clergy in 1785, upon a legislative finding that "it was originally founded in superstition and injustice," and that as a means of mitigating the rigor of the penal law it "in most cases operates very inadequately and disproportionately." New York abolished the doctrine in 1788. The U.S. Congress, when enacting the first federal criminal statutes in 1790, explicitly refused to make the doctrine part of federal law. Pennsylvania abolished it in 1794, Virginia in 1796, Maryland in 1810. The southern states were generally slower to undertake penal reform, and this divergence between North and South extended to benefit of clergy. South Carolina did not abolish the doctrine until 1869.[7]

To prevent offenders from pleading the benefit more than once, governments needed a means of keeping track of their criminals. Any single community would have no trouble remembering who had been granted benefit of clergy in the past, either by keeping written records or simply by holding that knowledge in memory. A year after Pope Alvey received the benefit of clergy for murder, he was back in court again, convicted of stealing a cow. The court had little trouble turning him down when he tried to plead clergy a second time. But people seeking to escape their pasts could be highly mobile. They could change their names. Without an effective way of transmitting criminal records from one place to another, a criminal might plead the benefit of clergy again and again. Governments exchanged that data by placing it directly on the body of the criminal, in the form of a permanent burn mark on the thumb. Convicted criminals carried their histories around with them. The mark placed court officials on notice. The Boston *Weekly Post-Boy* joked that John Stevens, sentenced to death as a previous recipient of benefit of clergy for counterfeiting New York bills of credit, "complains much of a Hurt in his Right Thumb, and it is tho't he will have it cut off for fear of a general Mortification." The mark served the same function for the world at large: a person branded on the thumb was immediately identifiable as someone convicted of a nominally capital crime, and thus someone unlikely to make much way among respectable company. "After I received those marks of infamy," recalled the burglar John Brown, "I was held as an Enemy by the public and shunned as a pestilence by Common Society."[8] The doctrine of benefit of clergy thus provided a first step in a graded scale of punishments, within a penal law that in principle included only a single punishment for serious offenses.

A second form of symbolic hanging made its first appearance in American statute books in 1693, when Massachusetts adopted a new scheme of punishments for burglary and robbery. A third offense would be capital, as before. But second offenders would merely be required to sit upon the gallows for an hour with a rope around their necks. After the hour was up, they would be whipped.[9]

Simulated hanging must have been widely perceived as a successful punishment, because Massachusetts returned to it repeatedly over the next several decades. When the colony decapitalized adultery in 1695, the penalty substituted for death was an hour on the gallows with a rope around the neck, plus whipping, plus the wearing of the letter A forever. (This last punishment, of course, was the basis for Nathaniel Hawthorne's novel *The Scarlet Letter*.) Massachusetts did the same for incest the following year, with only the letter I to distinguish the incestuous from the adulterous. Blasphemy was decapitalized in 1697, and several possible sentences were substituted, one of which involved sitting on the gallows. Duellists received the same penalty in 1719, provided their opponents did not die. (When his opponent died as the result of a duel, the winner was to be executed and then buried without a coffin, with a stake driven through his body.) In 1737 the second offense of theft, if of over 40 shillings, received an hour on the gallows, plus whipping and triple restitution. The last of these statutes was enacted by Massachusetts in 1785, when it abolished benefit of clergy. Simply abolishing clergy, without simultaneously redrafting the rest of the state's penal code to provide lesser penalties for first offenders, would have suddenly rendered that code much more severe. Instead, the state substituted simulated hanging.[10]

The practice of simulated hanging was known throughout early modern Europe. It must have been familiar to many of the seventeenth-century colonists of North America, because in some early instances they conducted fake hangings without any statutory authorization. One case involved a slave referred to in the Massachusetts court records only as Anna Negro, who was accused of killing her illegitimate child in 1674. Although Anna was accused of murder, and was found to have committed the charged acts, the jury chose the wording of its verdict carefully: "They found the said Anna Negro Guilty of having a Bastard child & privately convey[ing] it away." Faced with a verdict that stopped short of a formal finding of murder, apparently because the jury was reluctant to condemn Anna to death, the court fashioned an appropriate sentence: an hour on

the gallows with a rope around her neck, to be followed by whipping and a month in jail.[8]

In the eighteenth century simulated hangings appear to have been most common in New England. New Hampshire adopted the punishment when it decapitalized blasphemy in 1718. Rhode Island did the same for adultery and bigamy in 1749. Pairs of adulterers were mock-hanged in Boston in 1731 and in Worcester in 1752. A pair of duellists, apprehended before they could fire a shot, suffered the same penalty in Charlestown in 1753. In 1754 Joseph Severance and Eunice Clesson of Springfield were convicted of incest, for which Severance sat on the gallows for an hour. Clesson did not, for what were expressed only as "special Reasons"—the court may have suspected that she had been an unwilling participant. Such had been the case in Connecticut in 1725, when the Assembly had relieved Sarah Pirkins of the same sentence, upon finding that "she was unnaturally forced . . . by her fathers authority." When both parties appeared to have consented to incest, as in the 1778 case of Dudley Drake and Abigail Holcomb, both spent an hour on the gallows.[9]

In Massachusetts and Connecticut simulated executions were also conducted as acts of leniency in cases where the statutory punishment was death. Arson was a capital offense in Massachusetts in 1753 when Sarah Peake was convicted of setting fire to her master's house, but she was sentenced only "to be whipp'd Twenty Stripes under the Gallows" after an hour with the rope about her neck. Connecticut's General Assembly sometimes commuted real executions to simulated ones. Vans Skelly Mulley, for instance, had been convicted of raping ten-year-old Amy Palmer of Greenwich, but the Assembly found several reasons to mitigate his guilt. He had only recently been brought to Connecticut as a captive from French Canada in the French and Indian War. Having been "born and brought up under the Dominions of the French King & in a great measure Ignorant of the Law of God & Man always prevented & forbid the knowledge of Reading or Writing," he claimed to be astonished to discover that in Connecticut rape was thought to be an offense "of so high & aggravated a kind & called for so great a punishment as Death." Further inquiry of one of Mulley's jailers revealed that Mulley may not in any event have been particularly skillful at his crime. "Damon Lock one of the men who searched the frenchman said that he and the other men did not think by what appeared to them that he ever entered her body," it was reported to the Assembly. They supposed instead that he "fumbled then

about till he satisfied himself by what appeared on his shirt." The men and women of the community, meanwhile, were watching Amy Palmer closely. In the immediate aftermath of the rape she was riding horses, carrying wood, playing with other children—in short, doing the same things she had always done. One man said that "he in particular took notis of the behaviour of the Girl and if he had not been told that was the girl he should not have thought any thing had ben the matter with her." One woman "wondered that Justus palmer [Amy's father] and his wife would let that girl go out in the wet if shee was so much hurt as they pretended." The Assembly accordingly commuted Mulley's sentence to a simulated hanging, followed by a whipping, "and then to have his right ear naild to a post & cut off," then a month in jail, then another whipping, and finally to be banished from the colony.[10]

With all this whipping and nailing, the hour on the gallows seems today to be scarcely a punishment at all. The scant surviving evidence of how these episodes were perceived at the time, however, suggests that they were intended and interpreted as serious punishment. The many statutes and newspaper accounts describing simulated executions always list them first, before the whipping or other punishment that would follow. This may be only an artifact of the order in which they were administered, but that order is itself indicative of the relative prominence of the punishments. A whipping or a term in prison could just as easily have come first, but it never did.

There is only one surviving visual representation of a simulated colonial hanging, on a broadside whose title deserves quotation in full as the best possible description of its contents: *Inhuman Cruelty: Or Villainy Detected. Being a true Relation of the most unheard-of, cruel and barbarous Intended Murder of a Bastard Child belonging to John and Ann Richardson, of Boston, who confined it in a small Room, with scarce any Victuals, or Cloathing to cover it from the cold or rain, which beat into it, for which Crime they were both of them Sentenc'd to set on the Gallows, with a rope around their Necks, &c.*[11] The title itself suggests the importance the author ascribed to the hour the Richardsons spent on the gallows. We know that similar cases were followed by corporal punishment, so we can assume that the Richardsons were sentenced to that as well, but the author relegated this part of the sentence to the "&c." at the end of the title, a choice that strongly implies that he considered the time on the gallows to be the primary part of the sentence. The broadside includes a

standard picture of a hanging scene, with a large audience. The picture was probably not intended to be a representation of the actual event but was rather a generic decorative element similar to those on many of the broadsides accompanying real executions. That a fake hanging would be thought a suitable occasion for publishing a stock picture of a real hanging suggests the perceived similarity of the two events. The text of the broadside suggests that the message a simulated hanging was intended to convey was exactly the one conveyed by a real hanging:

> Behold him, Sirs, with his inviting *Fair*,
> High on the gallows, see him seated there
> Behold how well the pliant halter suits
> These harden'd monsters, and unnatural brutes.
>
> . . .
>
> Behold, ye Swains, how great their guilt has been;
> Then stand in awe, and be afraid to sin.

A symbolic execution, with all the trappings of a real execution save the death of the criminal, was evidently understood to bear the same message of terror as a real one.

A third kind of symbolic execution was carried out in the case of two Philadelphia burglars, James Prouse and James Mitchel, who were scheduled to be hanged on January 24, 1731. Prouse was only nineteen, and Mitchel was widely thought to be innocent. A bell was tolled at one in the afternoon to signify that they would soon emerge from prison to begin the trip to the gallows. A crowd gathered to watch. Outside the prison walls, the condemned men's irons were removed and their arms were bound behind them. Prouse cried all the while. "Do not cry Jemmy," Mitchel said softly, in a futile effort to console him. "In an Hour or two it will be over with us, and we shall both be easy." Prouse and Mitchel were placed in a cart, next to their coffins, and led through the city to the gallows. Upon the scaffold, the sheriff told them they were expected to confess their crimes to the crowd, and to exhort listeners to avoid the paths they had taken. Prouse admitted that he had committed the burglary. Mitchel asked only "What would you have me to say? I am innocent of the Fact."

Their brief speeches concluded, Prouse and Mitchel were instructed to stand up. The ropes were prepared, one end affixed to the crossbeam, the other around their necks. The sheriff reached into his pocket, took out a piece of paper, and started to read. "And whereas the said James Prouse

and James Mitchel," the sheriff began. Prouse and Mitchel were barely listening to what they expected would be the routine reading of their death warrant. But then they began to hear some unexpected words: "have been recommended to me as proper Objects of Pity and Mercy." This was legal boilerplate too, the opening not of a death warrant but of a pardon. No one needed to hear the rest. Mitchel exclaimed "God bless the Governor" and immediately fainted. Prouse was overwhelmed with joy. Mitchel recovered consciousness in time to hear the crowd's acclamations for the governor's mercy. The sheriff had been carrying the pardon with him in his pocket all the way from the prison.[7]

Prouse and Mitchel's near-hanging was no doubt a "remarkable Transaction," as the *Philadelphia Gazette* put it, but it was by no means an unusual one. Government officials often withheld information about clemency until the last moment. By waiting until both the condemned prisoner and the audience were certain that an execution would take place, the government staged a drama of terror without having to take any life. Officials could simultaneously convey two opposing messages, the severity of the law and the kindness of the individuals administering it. Isaac Bradford was pardoned in 1737, "yet that his Crime may leave a more lasting Impression on him," Pennsylvania's Provincial Council ordered that Bradford's name nevertheless be included in an execution warrant, and that Bradford "be carried with the other Malefactors to the place of Execution, and there receive a Reprieve." The rapist Richard Shirtliffe was granted a pardon which the sheriff was "directed not to make known to him until he be taken under the gallows." John Coosman, condemned in Maryland for witchcraft, was ordered to be taken to the gallows, and, "the rope being about his neck, it be there made known to him how much he is beholding to the lower house of the assembly for mediating and interceding in his behalf."[8]

The practice persisted well into the nineteenth century. In 1820, when Ebenezer Dexter, the federal marshal in Providence, received a pardon for William Cornell, he promptly wrote back to Secretary of State John Quincy Adams with an urgent question: "Am I to understand that it is to be kept a secret until the day that he was to have been executed and every preparation to be made accordingly and to be made known under the gallows at the Hour appointed for his execution?"[9] Allocated judiciously, last-minute pardons provoked all the terror of full execution.

Allocated too often, on the other hand, the gallows reprieve would un-

determine the purposes served by the death penalty. If condemned criminals learned to expect that their executions would be called off at the last minute, they would neither experience the terror associated with the contemplation of death nor concentrate their minds on repentance. By the middle of the eighteenth century some condemned prisoners were approaching the gallows with this expectation. In Connecticut the burglar Isaac Frasier "behaved with a good deal of seeming unconcernedness, 'til a little before he was turned off," because "he had a secret hope of escaping his punishment." The burglar John Bly said, just before his execution, that watching others receive pardons "induced me to suppose, what many others vainly encouraged me in, that we should never be executed."[6] The practice of staging gallows reprieves began to come under criticism for raising the expectations of condemned criminals and thereby causing them to be too cavalier during their final days.

In benefit of clergy, simulated hangings, and gallows reprieves, the state had at its disposal a few forms of capital punishment that did not kill. Today we measure punishment in units of time in prison. Before prison became the standard method of punishment, the only available units of measurement for serious crime were degrees of deviation from an ordinary execution.

Worse Than Death

An ordinary death by hanging was not, however, the harshest penalty at the disposal of the seventeenth- and eighteenth-century state. Just as there were a few steps short of death, there were a few steps beyond it. "'Tis well known there are some kinds of Death more sharp and terrifying than others," one English writer noted. "An Execution that is attended with more lasting Torment, may strike a far greater Awe."[7] These more severe punishments were carefully handed out to apply terror where it was thought to be most needed.

Hanging, as we have seen, sometimes caused a quick and apparently painless death. When government officials wanted to ensure that death would be slow and painful, and thus all the more frightening to contemplate, they resorted to an alternative method—burning alive. Burning had a long history in English jurisprudence. In the late medieval period it had been a common method of execution for heresy and witchcraft.[8] By the time of the colonization of North America, however, burning was no

longer used as a punishment for religious offenses. Those convicted of witchcraft at Salem were hanged, not burned, as were the other colonists executed for witchcraft in the seventeenth and early eighteenth centuries. Burning was reserved for two classes of offenders whose crimes were considered unusually disruptive of the social order.

The first of these classes was slaves convicted either of murdering their owners or of plotting a revolt. In Virginia a "Negro Woman who lately kill'd her Mistress" confessed to the crime, "and is since burnt." "He stood the Fire with the greatest Intrepidity," it was reported of a New Jersey slave who killed his owner in 1753. Thirteen of the black participants in the New York "Negro Plot" were burned at the stake; nine of the whites was. The second and smaller class of offenders subject to being burned alive was women convicted of killing their husbands. Catherine Bevan was burned at the stake in Pennsylvania in 1731 for this offense. Her accomplice, Peter Murphy, was merely hanged. What these cases have in common is the reversal of the traditional hierarchy of the household, the revolt by slave against master or wife against husband. The legal name for such crimes, petit treason, suggests the strength of the analogy contemporaries drew between the household and the state. Treason denoted "not only offences against the king and government," explained William Blackstone, but also crimes "proceeding from the same principle of treachery in private life."[9]

Death by burning was always painful, and was for that reason alone a more fearful punishment than hanging, which was painful only sometimes. Burning also destroyed the body, unlike hanging, which usually left an intact corpse. Burning at the stake was thus a form of super-capital punishment, worse than death itself. Cotton Mather was at the 1681 burning of a slave the records call "Maria Negro," in the company of William Cheny, who was hanged for rape immediately afterward. Cheny had remained stoic through his trial and the period leading up his execution. He had protested his innocence, refused to listen to the sermon preached for him on his hanging day, and ignored the ministers who urged him to repentance. Only the sight of Maria being burned alive, Mather recalled, was enough to break Cheny down. "Never was a Cry, for Time! Time! *A World for a Little Time! the Inexpressible worth of Time!* Uttered, with a more unutterable Anguish."[10]

Burning was inflicted only rarely. Many slaves who killed their masters,

and many women who killed their husbands, were sentenced to be hanged instead. Sheriffs conducting burnings were sometimes so reluctant to proceed that, as an act of charity, they hanged the condemned person first to spare some of the pain. Catherine Bevan's executioner hanged her above the flames, hoping she would be dead before the burning began, but the fire spread too quickly to the rope around her neck and burned it off, dropping her, still alive, into the fire. Sentences sometimes specified that the defendant should be hanged first, and only then burned, as a way to intensify a death sentence without increasing the measure of pain involved.[7]

Another way to inflict a sentence worse than death was to display the corpse in a public place. The body, covered with tallow or pitch to delay decomposition, was encased in a *gibbet*, an iron cage sturdy enough to hold it high above the ground and with large enough spaces between the bars to permit easy viewing. A gibbeted criminal was commonly said to be "hung in chains" or "hung in irons." The practice was intended to magnify the deterrent effect of capital punishment, in two senses. By keeping the execution in public view much longer than the ceremony itself, gibbeting allowed the state to repeat its message of terror, day in and day out, to those who passed near the site in their daily routines. And by denying the customary burial, permitting the condemned person's body to decompose in full view, subject to weather, insects, and birds of prey, the state could intensify the message of terror by exploiting the popular concern with the integrity of the body after death.

Hanging in chains was a penalty applied in an ad hoc fashion. The gibbet would be in order whenever officials perceived the need for an extra dose of terror. Slaves were often hung in chains for crimes like rape and arson, in a show of force to other slaves in their community. Indians were gibbeted too, for the same reason. In Woburn, Massachusetts, William Bradstreet noted in his journal in 1671, "an Indian knockt an English maid on the head with his hatchet. He was taken & hanged and so hung upon a gibbett." When whites were hung in chains, their crimes tended to be those considered extraordinarily grave. Pirates often received the gibbet. Murderers might be hung in chains for particularly egregious crimes. In 1751 residents of Annapolis could watch the decaying body of

Jeremiah Swift, who had killed a group of children; in 1754 they could see John Wright and "Mulatto Toney" gibbeted near the harbor for the murder of a ship captain.[8]

The public display of the dead body of a famous criminal, by all accounts, created a sensation, attracting a steady stream of spectators. Benjamin Colman saw the Massachusetts pirate William Fly gibbeted; he called it "a Spectacle for warning to others." The notorious pirate Joseph Andrews was hung high in chains "on the most conspicuous Part of the Pest-Island in New-York Bay." Pest Island is now called Liberty Island, and if one considers the visibility of the Statue of Liberty one can get a sense of how well Andrews's rotting corpse could serve "as a Spectacle to deter all Persons from the like Felonies for the future." The gibbet was rare enough in any given place that it was an object of curiosity, a magnet that drew spectators from all social classes and age groups. Jeremiah Bumstead of Boston described a pleasant 1724 outing in his diary: "My wife & Jery & Bety, David Cunningham & his wife, & 6 more, went to the castle to Governors Island, & to see the pirate in Gibbons at Bird Island."[9] As mentioned earlier, the 1755 gibbeting of a slave named Mark was remembered distinctly by residents of Charlestown, Massachusetts, as late as 1798. One purpose of the gibbet was to reach the public, and the public appears to have taken notice.

The public-relations value officials perceived in the gibbet can be seen clearly in three unrelated episodes in late seventeenth-century New York, all involving the hanging in chains of people who were already dead when the decision was made to gibbet them. In 1682 an unnamed slave believed to have murdered three people, including two of his owner's children, was found dead in a river. His body was retrieved and gibbeted. In 1685 the body of a slave named Cuffy, executed for arson and then buried, was dug up and hung in chains. In 1697, when a murderer under sentence of death died of natural causes before his execution date, his body was ordered to be gibbeted.[10] In such cases, where officials manipulated the bodies of the dead as a warning to the living, the mere fact of death was evidently considered less important than the manner in which death would be publicly presented.

A poem published in Philadelphia in 1793 suggests that the fear inspired by the gibbet arose not so much from the prospect of having one's corpse seen as from that of having it turn to shreds:

He being hang'd, his body was conveyed
To hang in chains where he the murder did,
And the next day as for a truth 'tis well known,
His flesh the birds did pick from off the bone.

An experienced pirate, Joseph Andrews kept up an imperturbable front the night before his execution, except when his thoughts turned to the gibbet. "He was very desirous to know if his Body really was to be hung in Chains," one person present related. Andrews had been pressed to tell his life story for publication, and he grasped at that request, the only leverage he had, to bargain in vain with his jailers. If they would cancel the gibbeting, "he would give a particular account of the Transactions of his Life: but if, on the contrary, they persisted in their resolution to Hang him in Chains, the World should have little Satisfaction from him." English petitions suggest that the families of condemned criminals felt much greater disgrace from a gibbeting than from an ordinary hanging.[9] To have one's dead body exposed to the elements was to die dishonorably.

Hanging in chains was one way of intensifying the message of terror conveyed by an execution. The public display of a dismembered body was another. When tensions between colonists and Indians were running high, an Indian hanged for murdering a colonist might have his head "cutt off the next day and pitched upon a pole in markett place," as was the case with Nepaupuck, convicted of murder in 1639, shortly after the initial settlement of New Haven. In 1671, as war threatened, an unnamed Indian in Massachusetts "was hanged and his head sett upon a pole on the gallowes." When slaves threatened to rebel, their decapitated heads might be conscripted for the same public good. In 1763 a local court ordered that a slave named Tom from Augusta County, Virginia, who had been convicted of killing his owner, "be hanged by the neck until he be dead and . . . that then his head be Severed from his body and affixed on a pole on the Top of the Hill near the Road that lead from the Court House." Tom's head, high enough to be visible from a distance and close to a heavily traveled road, was no doubt seen by many, but probably not by as many as the body parts of another slave named Tom, also convicted of killing his owner, in Amelia County, Virginia, in 1755. This Tom was sentenced to have his head "severed from his body which is to be cut

up in four quarters and disposed of in the following manner: His head is to be stuck up at the cross road near Major Peter Jones', one quarter near William Wiley's, one quarter at Farley's, and the other at any other public place within this County the Sheriff shall think proper."[10]

In 1729 the Maryland legislature found that "several Petit Treasons, and cruel and horrid Murders, have been lately committed by Negroes, which Cruelties they were instigated to commit with the like Inhumanity, because they have no Sense of Shame, or Apprehension of future Rewards or Punishments." The ordinary manner of executing criminals, the legislature concluded, "is not sufficient to deter a People from committing the greatest Cruelties, who only consider the Rigour and Severity of Punishment." Maryland accordingly authorized its judges to sentence slaves in cases of murder or arson "to have the right Hand cut off, to be hang'd in the usual Manner, the Head severed from the Body, the Body divided into Four Quarters, and Head and Quarters set up in the most publick Places of the County where such Fact was committed."[11] Quartering, it hardly needs to be said, permitted four times as many people to see the criminal's dead body. While no early American theoretical discussion of the point has survived, we may surmise that further dismemberment, although allowing for a greater number of display sites, was thought to reduce the visual impact of each one. A severed head must have been considered a better deterrent than an ear, an arm better than a finger. The dead bodies of slaves were ripped into pieces, always four, on several occasions in the eighteenth century.

The harshest kind of dismemberment, preceded by disemboweling while still alive, was reserved for those believed to pose the greatest threat to public order—people found to have committed treason. Jacob Leisler and Jacob Milborne, convicted of treason in New York in 1691, were sentenced to be hanged "by the Neck and being Alive their bodys be Cutt downe to the Earth and their Bowells be taken out and they being Alive, burnt before their faces; that their heads shall be struck off and their Bodys Cutt in four parts." The sentence was carried out. The leader of the Regulators of North Carolina received the same sentence in 1771. So did a group of Maryland residents convicted of aiding the British in the Revolution. Disemboweling and quartering had been the common punishment for treason in England, and the practice was copied in the colonies.[12]

If many today would be horrified by such brutal punishments, so too

were many in the seventeenth and eighteenth centuries, or else the punishments could not have been believed to serve as such emphatic deterrents to crime. But if today's horror would cause people to find fault with the criminal justice system itself, the horror of the seventeenth and eighteenth centuries did not. Before the later eighteenth century there is no record of anyone in British North America claiming that public dismemberment was too severe a penalty for crime. To the extent that popular attitudes before then are recoverable today, they may be exemplified by an article in the *Boston Evening-Post* from 1765, describing an execution in Paris from two years before. According to the article, a midwife found to have killed several babies was executed by hanging her, over a fire, in a large iron cage also occupied by sixteen wild cats. The cats attacked her while she was still alive, pulling out her entrails in 35 minutes of what the account called "unspeakable torture," until she and the cats all died. Whether or not the story is true, the interesting aspect of it for our purposes is the short comment the paper's editor appended to it. "However cruel this execution may appear with regard to the poor animals," he lectured (speaking of Massachusetts as part of England, which it still was), "it certainly cannot be thought too severe a punishment for such a monster of iniquity, as could proceed in acquiring a fortune by the deliberate murder of such numbers of un-offending innocents. And if a method of executing murderers, in a manner somewhat similar to this was adopted in England, perhaps the horrid crime of murder might not so frequently disgrace the annals of the present times."[6] The conspicuous show of state power might be gruesome, but sometimes it was necessary. This, so far as one can tell today, was common thought for the seventeenth and most of the eighteenth century.

Burning, gibbering, and dismemberment all dwindled away toward the end of the eighteenth century, when they were replaced by a single method of intensifying a death sentence—dissection. The older forms of aggravated capital punishment were flamboyant public displays (sometimes literally so); dissection, by contrast, took place indoors, under the gaze of a small number of people. The abandonment of these most virulent forms of public punishment was the first step in the abandonment of public punishment generally, a process that took place throughout North

America and Europe between the late eighteenth and early twentieth centuries.

The practice of dissecting dead bodies, both for ascertaining causes of death and for instructing medical students, had a long history in England and the colonies. As instruction in anatomy came to be understood as an essential component of a medical education in the eighteenth century, the demand for cadavers began to exceed the supply. In the eighteenth and early nineteenth centuries the demand for cadavers was primarily satisfied unlawfully, by grave robbers who dug up the bodies of people recently buried.[7]

In this context the dissection of executed criminals killed two birds with one stone. By adding dissection to a death sentence the state could simultaneously furnish bodies to physicians and deter crime. The dissection of English criminals dates back at least to the sixteenth century, and there is evidence of the practice in the earliest American colonies. The 1641 Massachusetts Body of Liberties included a requirement that executed criminals be buried within twelve hours "unlesse it be in case of Anatomie," which suggests that some were being dissected. The earliest condemned North American criminal actually known to have been dissected was an Indian named Julian, who was hanged for murder in Boston in 1733. Five years later, in Williamsburg, Virginia, the murderer Anthony Dettond was "anatomiz'd by the Surgeons," according to a local newspaper account.[8] While the evidence is not entirely clear, these early dissections appear to have been authorized after the execution rather than being part of the sentence itself. They do not seem to have been undertaken in a conscious effort to deter crime by adding an extra element of terror to the punishment.

Dissection became a formal arm of penal policy in 1752, when Parliament passed an act "for better preventing the horrid crime of murder." In order "that some further terror and peculiar mark of infamy be added to the punishment of death," bodies of English murderers were required to be given to physicians to be anatomized. Colonial practice was never as severe. Dissection remained the exception rather than the rule for colonial murderers. After independence, many states authorized judges to include dissection in a capital murder sentence, but these statutes were nearly always phrased in discretionary terms, to allow judges to sentence a murderer to be dissected only where the judge believed the added pen-

ably appropriate. The first of the American dissection statutes, and appropriately the only one not allowing judges discretion in this respect, was a Massachusetts law of 1784 that made the increased penalty mandatory only for those convicted of winning a duel. (The judge was given discretion to order the loser to be dissected as well.) New York gave its judges the discretion to have murderers anatomized in 1789, after a riot in New York City the previous year directed at grave-robbing surgeons. In 1790, in the very first federal criminal statute, Congress provided the same discretion to federal judges. Other states and territories followed suit: New Jersey in 1796, the Louisiana Territory in 1808, Maine in 1821, Connecticut in 1824 (after an anti-dissection riot like the one in New York), Illinois in 1833, Iowa in 1838, and Nebraska in 1858. As late as 1904 a new statute in Massachusetts reaffirmed the power of a court to sentence a murderer to be dissected.[18]

Accounts of capital trials suggest that dissection was included in a very small percentage of nineteenth-century murder sentences. Like burning, gibbeting, or dismemberment, dissection was an enhancement to a murder sentence, not a standard part of one. Often it was imposed on defendants convicted of murder as part of a shipboard mutiny, or individuals considered more culpable than the accomplices with whom they had been convicted, as a way of signifying that some murderers deserved a greater punishment than others. "We ought to proportion the terror of punishment to the degree of offense," James Madison argued in dissection's favor in the first Congress. As United States Supreme Court Justice James Iredell explained to a Georgia grand jury in 1792, dissection was only for cases "of very aggravating circumstances."[19]

There were also, however, many cases in which no reason for dissection is apparent from the record, where it seems likely that the idiosyncrasies of the judge, or the lack of local relatives to claim the body, or the social standing of the defendant's family, or the earnestness of the local medical community played a role in filling the anatomy table. At a New York sentencing proceeding in 1818, the judge "took occasion to say, that he considered a weak man in the administration of justice, as dangerous to the community as a wicked or corrupt man," and then to prove his strength sentenced James Hamilton to be dissected. In Massachusetts Dominic Dales and James Halligan were dissected because two justices of the Supreme Judicial Court believed them to "possess dispositions

wicked, perverse, and incorrigible." The murderer Jesse Strang was spared dissection only because of the judge's "respect for the feelings of his aged and respectable parents."[20] Whether or not dissection would be part of a sentence was purely within the discretion of the trial court, and for that reason was often unpredictable.

In the debates on what would become the dissection provision in the first federal criminal statute, one representative cited "the very great and important improvements which had been made in Surgery from experiment" as an argument in its favor. But penal dissection failed miserably as a means of supplying surgeons with cadavers. The number of criminals executed was never anywhere close to the number of cadavers demanded for medical instruction. By the middle of the nineteenth century most states ensured a steady supply by donating to physicians the unclaimed bodies of the poor. Some of these unclaimed bodies belonged to executed criminals, so the connection between execution and dissection would never be totally severed. As a boy in 1886, John Motley Morehead attended the hanging of two black men and one black woman in Rockingham County, North Carolina. "There was no claimant for the body of one of the negro men," he recalled fifty years later, "and Dr. Wall of Madison bought it for $20.00. He embalmed it in some way and used it for dissecting and in the teaching of some students who intended to study medicine."[21] By the second half of the nineteenth century, however, if the bodies of hanged criminals were dissected, it was usually because when alive their possessors had been poor, not because they had been criminals.

But if dissection fell short of one of its objectives, it achieved the other. Dissection "was attended with salutary effects, as it certainly encreased the dread of punishment," one of its congressional proponents argued in 1790. The family and friends of Whiting Sweeting, hanged in Albany in 1791, pleaded in vain with the doctor who had been assigned the rights to Sweeting's corpse. Abram Antone, interviewed shortly before being hanged in Morrisville, New York, declared "that he is willing to die, and only complains of the manner. He is very anxious respecting his body, being fearful that it will be obtained for dissection."[22] Condemned prisoners were sometimes careful to instruct people they trusted to look out for their bodies, lest they be delivered to the surgeons. Michael Martin, executed in Boston in 1821, included such a clause in his will: "Feeling much

ally appropriate. The first of the American dissection statutes, and apparently the only one not allowing judges discretion in this respect, was a Massachusetts law of 1784 that made the increased penalty mandatory only for those convicted of winning a duel. (The judge was given discretion to order the loser to be dissected as well.) New York gave its judges the discretion to have murderers anatomized in 1789, after a riot in New York City the previous year directed at grave-robbing surgeons. In 1790, in the very first federal criminal statute, Congress provided the same discretion to federal judges. Other states and territories followed suit: New Jersey in 1796, the Louisiana Territory in 1808, Maine in 1821, Connecticut in 1824 (after an anti-dissection riot like the one in New York), Illinois in 1833, Iowa in 1838, and Nebraska in 1858. As late as 1904 a new statute in Massachusetts reaffirmed the power of a court to sentence a murderer to be dissected.[1]

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repugnance that my body should be given over for dissection, or fall into the hands of the surgeons, — therefore, I do hereby bequeath my body to Francis W. Waldo, of Boston, Esquire, trusting to his friendship for me, that he will see it decently interred, and preserve it as far as possible, from molestation." In 1878 John Ten Eyck of Pittsfield, Massachusetts, "worried lest his body should be dissected and his skeleton grace some museum, but his fears were set at rest" by his father-in-law, who volunteered to take custody of Ten Eyck's corpse. (The father-in-law did carefully remove Ten Eyck after the execution to another part of Pittsfield, where he began charging admission to see him. When the town government shut down the show, the father-in-law moved to a nearby town and netted fifteen dollars at ten cents a head. But Ten Eyck was never dissected.) Cases like these offered evidence in support of the view of one Boston judge that people had a "terror of dissection, greater even than the terror of death."[7]

Terror was not the only reaction to dissection. The conversion of a corpse into a commodity offered certain advantages to condemned prisoners, and some were quick to exploit them. Shortly before his death in 1772, the Massachusetts rapist Bryan Sheehen sold his body to a Dr. Kast of Salem, and in his last words he so instructed the hangman. In Somerset County, Maryland, a man named Rounds sold his body for dissection to a group of Philadelphia physicians. In New Hampshire Franklin Evans sold his white corpse to a Dr. Crosby of Dartmouth College for $50, but a few years later in Americus, Georgia, Charles Tommey could get only $3 for his black one. Amasa Walmsley found it necessary to dispel rumors that he had sold his body to the surgeons for rum. A New York artisonist named Will spent the proceeds of his own self-sale eating gourmet food in jail while waiting to be hanged. Jails of the eighteenth and early nineteenth centuries offered easy access to nearly anyone wishing to visit their inmates, so surgeons had ample opportunity to negotiate with the prisoners. Many condemned prisoners owned little or nothing apart from their own bodies. Many were leaving wives and children behind. In such circumstances the sale of one's cadaver to anatomists might be a prospect more attractive than any of the alternatives. But dissection was normally something to be feared, not welcomed. "To be dismembered by the Greedy Knife," as a late eighteenth-century poet put it, was to suffer a fate worse than the ordinary death.[8]

Burning, hanging in chains, dismemberment, dissection — these were four ways to make a death sentence more severe by destroying the physical body after death. Burning (if one was still alive) was also painful, but the other three were not. Their terror arose not from the prospect of pain but from the common concern for the integrity of the body, from the felt need for a proper burial.

Americans of the period knew that dead bodies decompose. They understood that they would all be reduced to skeletons within a short time after dying. Why then were they so afraid of having their dead bodies destroyed? It is easy to say that there was honor in a proper burial and dishonor in a mutilated corpse, but to call the phenomenon "honor" only gives it a name without explaining it. Why was honor equated with an intact corpse?

Part of the answer is not unique to colonial America. All over the world, in all eras of recorded history, people have cared deeply about the disposal of dead bodies. That concern persists in our own culture today. Many people, even those who consider themselves free of religious and mythical beliefs, place great importance in a proper burial, for reasons they may not be able to articulate. Punishments that mutilate the dead body or interfere with the undisturbed rest of the dead would be viewed as extraordinarily harsh today, just as they were in the seventeenth and eighteenth centuries. Scientific knowledge has barely dented our intuitive sense that an individual's personality is in some way connected with his or her physical body even after death, and that the improper treatment of a corpse is accordingly an insult to the person who inhabited it.

But these intensified forms of capital punishment could be effective in the seventeenth and eighteenth centuries — probably more so than they would be today — because colonial Americans had two additional reasons to be worried about the physical integrity of the dead body. First, most of the early Christian writers held that although the soul left the body at death, body and soul would be reunited at the last judgment. "If there be no resurrection of the dead, then is Christ not risen," Paul had told the Corinthians, and centuries of theologians interpreted that and similar passages to refer to the resurrection of the physical body. The precise de-

tails of how a decomposed corpse would be reassembled were a mystery, but the process was hardly beyond the competence of an omnipotent God, who had once created humans from nothing. "Our faith is not so fraile as to think that the ravenous beasts can deprive the body of any part to bee wanting in the resurrection," the Puritan John Weever affirmed, "where not a haire of the head shall be missing; a new restitution of our whole bodies being promised to all of us in a moment."[37]

Christian theology fused with older folk beliefs about the importance of undisturbed rest for the dead to create a powerful popular taboo against tampering with a dead body. All over early modern western Europe, it was widely believed that a corpse whose integrity had been violated would be denied resurrection at the final judgment. The confidence of the ecclesiastical writers on God's power of reassembly "did not succeed in convincing the people," Philippe Ariès concludes, "who had a very vivid sense of the unity and continuity of the individual and did not distinguish the soul from the body or the glorified body from the fleshly one." The dead body in early modern Europe was popularly understood as a sacred object, and the cemetery as a sacred place. This blend of elite and folk belief was carried by colonists to North America, where it persisted for some time (and indeed is still common today). It could be seen most clearly in the eighteenth and early nineteenth centuries in the widespread horror at dissection for anatomical instruction, a horror due in part to the methods by which cadavers were acquired, but largely due to the sense that something sacred was being defiled.[38]

Against this background of thought, a punishment that destroyed the body was especially terrifying. Even an executed criminal, if properly buried, might hope for bodily resurrection at the last judgment, but someone who had been intentionally burned beyond recognition, or whose body had been permitted to decompose in a gibbet, or who had been cut into quarters for display, or who had been carved up by surgeons, could never be resurrected. By merely hanging a criminal, the state could end this life, but it could not preclude the possibility of an eternal and perfect life sometime in the future. When the state killed and destroyed the body, however, the stakes were much higher. The Scottish merchant John Melish was on his way through Georgia in 1806 when his American companion "stopped to point out the spot where two negroes were executed for killing an overseer. The one was hanged, and the other was burnt to death." His friend explained to Melish "that this mode of punishment is

sometimes inflicted on negroes, when the crime is very flagrant, to deprive them of the mental consolation arising from a hope that they will after death return to their own country."[39] In exercising the power to deny the afterlife, the state exploited the most powerful weapon in its arsenal.

Popular religious belief thus provides one reason why these forms of punishment inspired a terror worse than death. There was also a very practical reason. Simply stated, one could never be absolutely sure that a seemingly dead person was irrevocably dead.

Colonial Americans inherited an extensive European folklore concerning the danger of premature burial. People heard buried corpses moaning about and making sounds like squealing pigs, phenomena attributed today to the emanation of gases in decomposition, but quite disturbing at the time. Fear of being inadvertently buried alive led to a variety of common precautions by the seventeenth century, most often a delay of several days between death and burial. These fears crossed the Atlantic to North America. The United States granted twenty-two patents for devices to be placed inside coffins to enable the erroneously buried to signal that they were still alive, typically by pulling a rope that ran up to the surface and rang a bell or raised a flag.[40]

The danger of being buried too soon was especially great when hanging was involved. Hanging often caused death very slowly, by strangulation. Death was often preceded by unconsciousness. If a hanged body was removed quickly enough and hastened to a physician, there was a possibility that the hanged person could be revived. Eighteenth-century American newspapers were full of such accounts. In 1736 the *Virginia Gazette* reported the miraculous story of Vernham and Harding, hanged in Bristol, England. "To the Surprize of every one," Virginians learned, "after hanging the usual Time, and being cut down, Vernham was perceived to have Life in him, when put into the Coffin; and some . . . who promis'd to save his Body from the Surgeons, carried him away in a House, and a Surgeon being sent for, immediately open'd a Vein, which so recovered his Senses, that he had the Use of Speech, sat up, rubb'd his Knees, shook Hands with divers Persons that he knew, and to all seeming Appearance, a perfect Recovery was expected." When the sheriffs heard the news, they retook Vernham to be hanged again, but Vernham died a few hours later, "in great Agony of Pain, his Bowels being very much convuls'd, as appeared by his rolling from one Side to the other, and often on his Belly."

That was worth reporting, but what made the event so remarkable was

that Harding revived too, "and is actually now in Bridewell, where great Numbers of People resort to see him, particularly Surgeons, curious of Observations. He lies in his Coffin, covered with a Rug, has a Pulsation breathes freely, and has a regular look with his Eyes." Harding had hung so long, with the rope's pressure preventing oxygen from reaching his brain, that he had apparently suffered brain damage. "He has not been heard to speak, only motions with his Hand where his Pain lies," it was reported. It was thought that Harding would not be exhanged, but would rather "be provided for in some convenient House of Charity, with Restraint, he being to all Appearance defective in his Intellects." Resurrection of the supposedly dead was common enough after hangings, but "two such resurrections happening at one Instant in the World, was never heard of in the Memory of Man."[39]

Stories like this one received wide circulation in eighteenth-century America. Several newspapers reprinted a 1767 account from Cork, Ireland, about the robber Patrick Redman or Redmond, who was cut down after hanging for twenty-eight minutes. Five or six hours later he was "actually brought to life by Glover the actor, who it seems is also a dexterous surgeon, and who made an incision in his wind pipe." Redman had been pardoned, and was still alive. The English newspapers published many more such accounts, enough to supply everyone with a stock of knowledge of the possibility of resurrection after execution.[40]

Americans also knew of equally thrilling episodes closer to home. The most famous may have been the story of Joseph Taylor, which was published in several editions between 1788 and 1790.[41] Soon before Taylor was hanged in Boston in 1788 for highway robbery, he was visited in jail by an unnamed doctor, who wished "to Bargain for My Body." Taylor recalled that the prospect of selling himself for dissection put him "in a cold sweat my Knees smote together and my Tongue seemed to cleave to the Roof of my mouth." Evidently feeling some sympathy for Taylor, the doctor offered to help "recover me to Life if my Body could be carried immediately after I was cut down to some Convenient Place, out of the Reach of the People."

The doctor hired a small boat, which would be ready to whisk Taylor to a larger boat moored at some distance from the wharf, upon which the doctor and his apprentice would be waiting. He supplied Taylor with instructions on how to minimize the physical damage wrought by hanging: "Taylor, everything depends on your presence of mind. Remember that

the Human Machine may be set in Time again if You preserve the Spinal Muscle from injury and do not dislocate the Vertebrae of the Neck . . . you must endeavour to Work the Knot behind your Neck and Press your Throat upon the Halter which will prevent the Necks breaking and likewise the Compression of the Jugular and preserve the Circulations in some degree." Taylor carefully followed these directions. While everyone else on the scaffold was praying, he "kept gently turning my head so as to bring the Knot on the Back of my Neck." When the trap fell, his "First Feeling after the Shock of Falling was a Violent strangling and oppression for want of Breath." That sensation "soon gave way to a Pain in my Eyes, which seemed to be burned by two Balls of Fire which appeared before them and which seemed to dart on and off like lightning." After one last flash of light, "I sunk away without Pain like one Falling to sleep."

Taylor was unconscious when his friends carried his body to the doctor. He did not know exactly what the doctor did to him, but an hour and twenty-two minutes after being taken on the boat, two hours and forty-three minutes after being dropped from the scaffold, Taylor began to move slightly. Twenty minutes later "I gave a violent deep groan." He felt pain greater than the pain of hanging itself. "I cannot Describe the Intolerable agony of that moment Ten Thousand Stranglings are trifling to it." But under the doctor's care Taylor soon recovered. He fled to Sweden.

A similar but less detailed account, *The Wonderful and Surprising Resurrection of William Jones*, was published in New Jersey three years later.[42] Jones was hanged for murder in Newark in 1791, but appeared a week later with a story much like Taylor's. He had arranged ahead of time with a physician learned in "certain processes in the medical art lately discovered in Europe." Jones followed the physician's directions on how to avoid having his vertebrae broken. "At the moment of my suspension," Jones recounted, "I could hear a buzzing noise in the crowd, which was instantly succeeded by a total darkness in my faculties, accompanied by seeming flashes of fire." Jones remembered nothing else until he awoke to see the physician's face staring down at him. Like Taylor, he experienced excruciating pain upon being restored to consciousness. For four days his feet were paralyzed, but then they began working again. He too planned to leave the country to avoid being hanged a second time.

Were stories like these true? Two centuries later it is probably impossible to know for sure, but at the very least they are not implausible. Unconscious people, apparently dead, are sometimes revived today even af-

ter they have stopped breathing. One study of suicides by hanging found that death by asphyxiation typically takes five to twenty minutes, but that it is possible to restore life even to a person who has been suspended for half an hour.[6] Eighteenth-century doctors knew less than doctors do today, but the same was true of the local sheriffs who served as eighteenth-century executioners, so it would not be surprising if on occasion they ended a hanging too soon. The physicians may not have been skilled in any secret art but may simply have taken good care of the body and watched closely for signs of life that might appear in a small percentage of prematurely terminated hangings. It is certainly possible that some of the stories were true—and, more important for our purposes, contemporaries thought they were. Ascertaining death was a tricky business even when death arrived quickly, and it was doubly difficult when the cause of death was slow strangulation. Contemporaries almost certainly believed that every so often an executed criminal was not irrevocably dead. This belief would play a role in the growing dissatisfaction with hanging as a method of execution in the later part of the nineteenth century, and around the turn of the twentieth century it would give rise to a scientific controversy over the efficacy of electrocution.

The possibility of revival provided the second reason punishments like burning, dismemberment, and dissection were so terrifying. By destroying the body the state could snuff out whatever remnants of life remained. The gibbet allowed birds, insects, and weather to do the same. Just as the disassembly of the dead body prevented eternal resurrection at the final judgment, it prevented terrestrial resurrection in the hours after execution.

Beginning in the late eighteenth century the adoption of prison as the standard method of punishment would allow fine gradations in sentencing, calibrated by years or even days. Penal reformers would consider the death penalty too blunt an instrument for the wide range of crimes to which it applied, and they were partly right. Compared with prison, it was. But the reformers' rhetoric has obscured the fact that capital punishment was not just a single penalty in the seventeenth and eighteenth centuries. It was a spectrum of penalties, providing government officials with gradations of severity above and below an ordinary execution. Judges and

governors had considerable discretion to tailor the punishment to fit the crime—not as much as they would have with the prison, but more than reformers would later acknowledge. Had that not been the case, the system of capital punishment in effect in the seventeenth and eighteenth centuries could not have been as durable as it was.

4

THE ORIGINS OF OPPOSITION

ASSIGNED IN 1793 TO WRITE an essay, Daniel Tompkins was having trouble settling on a topic. The Columbia College student spent hours searching for a fresh theme, but when the clock struck nine and he had not progressed past the first sentence, he gave up any hope of originality. "Want of time," he concluded, obliged him "to take refuge in some old thread bare subject as Capital punishment." He had nothing new to say about whether or not capital punishment ought to be abolished, he recognized, but "enough has been written by others to furnish us with materials for one side down and two or three lines at the top of the second page."[1]

Here lurked a revolution in public consciousness. Forty years earlier capital punishment had been uncontroversial. In the 1760s and 1770s that had begun to change, as many Americans started to question whether death was too great a punishment for property crimes like burglary and grand larceny. By the 1780s and 1790s the propriety of capital punishment for any crime, even murder, was a bitterly contested issue. Whether to abolish capital punishment completely was a subject taken up in debating societies and at college commencement ceremonies. Newspapers carried editorials and letters arguing for and against abolition. Some rising political figures, such as James Madison and the future governor of New York DeWitt Clinton, favored abandoning capital punishment altogether. Others, such as Thomas Jefferson and Benjamin Franklin, advocated eliminating the death penalty for all crimes other than murder. The Massachusetts minister Robert Nesbit reported that "sentiment was spreading in his parts" to do away with capital punishment, even for murder. "Humanity and reason are likely to prevail so far in our legislature that a law will probably pass in a few weeks to abolish capital punishments in *all* cases whatever," predicted the Philadelphia physician Benjamin Rush, the leading American opponent of the death penalty, in 1793.[2]

Rush was wrong, but not by much. No state ended the death penalty completely in the eighteenth century, but several did away with it for crimes short of murder. The partial abolition of the death penalty was just one component of a broader set of penal reforms that included the elimination of lesser public punishments like whipping and the pillory and the adoption of the prison as the standard tool for punishing criminals. This dramatic transformation in penal thought and practice was an international phenomenon. Opposition to capital punishment began to spread throughout Europe, and some European nations even abolished the death penalty completely. To understand why many Americans began to question capital punishment in the latter part of the eighteenth century, therefore, we must consider issues beyond the death penalty and places other than the United States.

A Very Novel Experiment

Opposition to capital punishment was not without some Anglo-American precedent. English radicals of the 1640s and 1650s argued unsuccessfully for an end to the death penalty for property crimes like robbery and burglary.[3] Some of the Quakers went even further and advocated abolishing the death penalty for all crimes. In the colonies of Pennsylvania and West New Jersey, where for a time they had the numbers to put their views into practice, the Quakers did eliminate capital punishment for crimes other than murder, but they never went so far as to abolish it altogether. This experiment ended in 1718, when Pennsylvania adopted a penal code like those of the other colonies, with the death penalty for crimes like robbery, burglary, and arson. There would be no similar legislative experiments for nearly seventy years.

The law on paper had to be enforced through the verdicts of juries, however, which gave the propertied white male public a point at which to register its opposition to capital punishment in specific cases. Juries in eighteenth-century America, as in England, sometimes tailored their verdicts to avoid imposing the death penalty for lesser felonies. Thomas Gray, charged in North Carolina in 1726 with the capital crime of grand larceny for stealing twenty shillings worth of assorted goods, was convicted by a jury that valued the goods at only ten pence, a figure low

enough to come within the definition of the noncapital offense of petit larceny. Another North Carolina jury exercised the same kind of leniency in the 1724 case of Mary Cotton, when it valued sixty shillings' worth of stolen goods at ten pence. Whether in the form of acquittals or in the form of convictions for lesser, noncapital offenses, such jury verdicts indicated an undercurrent of dissatisfaction with the formal criminal law.

> And tho' his Crime so great may'nt be,
> Yet by the Law 'tis Burglary.[4]

So read a poem commemorating the 1734 hanging of the Boston burglar Matthew Cushing, a faint glimmer of an argument that Cushing's sentence was disproportionate to his crime.

That glimmer grew into a blaze in the 1760s and 1770s, as more and more Americans began to question the appropriateness of capital punishment for property crime. "Who can avoid pitying poor young fellows, whose existence is cut off in the prime and vigour of life, for the paltry theft of a handkerchief, or of a watch, or for writing a few words on a slip of paper, with a fraudulent intention?" asked the *Georgia Gazette* in 1767. "Surely, means of intimidation cannot be wanting, even tho' every gallows were chopped down." The *New-York Journal* complained in 1773 of the "great disproportion between the value of goods stolen, and the life that is forfeited by the theft." The hanging of Levi Ames for burglary that year prompted a Boston poet to reflect on the incongruity that the government hanged burglars while pardoning a good many murderers.

> Must Thieves who take men's goods away
> Be put to death? While fierce blood hounds,
> Who do their fellow creatures slay,
> Are sav'd from death? This cruel sounds.

At other executions for burglary, ministers took note of the widespread doubts as to the propriety of the sentence and attempted in their sermons to justify it. But doubts continued to multiply. "If I am not myself so barbarous, so bloody-minded, and revengeful, as to kill a fellow creature for stealing from me fourteen shillings," Benjamin Franklin wondered along with a great many others, "how can I approve of a law that does it?"[5]

Opposition to capital punishment for property crime thus originated in a changing morality of retribution. Death, many believed, was simply too harsh a punishment for theft. This moral sentiment quickly acquired ur-

gent practical implications, because as belief in the disproportion of death for property crime grew, so did the difficulty of obtaining convictions. The propensity of juries to acquit defendants of property crimes rather than send them to their deaths began to be perceived as a serious problem in the 1760s. "Perhaps more villains escape punishment by the present rigour of the law than would otherwise if the penalty bore a greater proportion with the crime," reasoned one correspondent to the *Georgia Gazette* in 1767. Because "the law leaves no medium, but provides either death or no punishment at all" for theft, jurors with "a regard for the value of life, and above all for the value of souls," had no choice but to let thieves go free. The difficulty of obtaining convictions for the capital crime of horse-stealing caused New Jersey to substitute corporal punishment in 1769. The death penalty "has not answered the good Purposes thereby intended," the legislature explained, "but, on the contrary, from an Idea of its extreme Severity operating upon the Minds of the Inhabitants of this Province, has destroyed that Vigilance usually exerted by them in the apprehending of Criminals."[6] As dissatisfaction with the retributive aspect of capital punishment for property crime spread, concern about its deterrent aspect had to spread too, because a penalty from which juries were known to shrink could hardly deter prospective criminals.

In this climate of thought arrived one of the most influential books of the eighteenth century, the Italian philosopher Cesare Beccaria's *Essay on Crimes and Punishments*. Published in Italy in 1764, Beccaria's *Essay* was the first work to present a rigorous, sustained attack on the utility and the legitimacy of the death penalty. Within a few years of its appearance it was published in translation all over Europe. The first English translations appeared in London and Dublin in 1767. These circulated widely in the American colonies. Thomas Jefferson and George Washington bought copies, probably in 1769. Jefferson copied extensive passages into his commonplace book. John Adams quoted Beccaria in the opening sentence of his defense of the Boston Massacre soldiers in 1770. English editions were advertised in American newspapers as early as 1772. The first American edition was published in Charleston, South Carolina, in 1777, and two Philadelphia editions followed, one in 1778 and the other in 1793. The *Essay* was serialized in the *Worcester Gazette* in 1786. In the same year another serial version began in the *New Haven Gazette* and concluded in the *Connecticut Magazine*. Beccaria's ideas were mean-

while being repeated by English and American writers who were also widely read. For lawyers, the most important was William Blackstone, whose four-volume *Commentaries on the Laws of England* was the most popular jurisprudential work of the era. In his fourth volume, first published in 1769 (two years after Beccaria's initial publication in English), Blackstone called Beccaria "an ingenious writer" and summarized Beccaria's argument against capital punishment.[7]

Beccaria presented a two-part critique of the death penalty. He first questioned the state's authority to punish crime with death. "What right, I ask, have men to cut the throats of their fellow-creatures?" Relying on social contract theory, Beccaria reasoned that if the government possessed only those powers invested in it by the individuals who came together to form it, it could not claim any power over its members' lives, because in a pre-societal state of nature those individuals had not possessed power over their own lives capable of being delegated. "Did any one ever give to others the right of taking away his life?" Beccaria asked. "If it were so, how shall it be reconciled to the maxim which tells us, that a man has no right to kill himself, which he certainly must have, if he could give it away to another?" This argument was not original with Beccaria. Locke and Hobbes had raised and rejected it in the seventeenth century, on the ground that although one could not delegate a nonexistent right to commit suicide, a criminal forfeited his right to his own life, which could thus be legitimately taken by the community as a penalty. Rousseau did the same in 1762, only two years before Beccaria's *Essay*, in terms suggesting that the issue was already an old one.[8] But although the argument was not new, Beccaria's version of it would flourish in the newly independent American states.

The second and more original part of Beccaria's opposition to the death penalty rested on utilitarian reasoning. Death, he argued, was a less effective deterrent than imprisonment. "It is not the intenseness of the pain that has the greatest effect on the mind," he suggested, "but its continuance: for our sensibility is more easily and more powerfully affected by weak but repeated impressions, than by a violent but momentary impulse." The longer a punishment could endure, the more it would remind prospective criminals of the price they would pay for crime. Anglo-American governments had long experience with this principle in the form of the gibbet, which could make a single hanging echo for years. But Beccaria proposed something even better—a punishment that did

not diminish in intensity over time. "The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others than the continued example of a man deprived of his liberty." Even the most hardened criminals, "who can look upon death with intrepidity and firmness," would be frightened by the prospect of lengthy incarceration.

But what made forced labor such a remarkable improvement, Beccaria suggested, was that while it would be a greater deterrent than death, it was in truth a less cruel sentence. "If all the miserable moments in the life of a slave were collected into one point," he conceded, imprisonment "would be a more cruel punishment than any other; but these are scattered through his whole life, whilst the pain of death exerts all its force in a moment." As a result, imprisonment was perceived by the observer, who "considers the sum of all his wretched moments," as a punishment more severe than death, while the prisoner himself, who "by the misery of the present, is prevented from thinking of the future," would perceive his punishment to be less severe than death.

Another utilitarian concern led Beccaria to the same conclusion. "The punishment of death is pernicious to society," he argued, "from the example of barbarity it affords." The spectacle of executions only encouraged citizens to violence by acclimating them to its use. Laws, "which are intended to moderate the ferocity of mankind, should not increase it by examples of more barbarity." Spectators, like criminals, would be rendered less likely to commit crime by the abolition of capital punishment.[9]

Beccaria was hardly the only mid-eighteenth-century European writer with harsh words for the death penalty. Virtually all the writers of the Enlightenment had something to say in favor of milder punishments, including Montesquieu and Rousseau before Beccaria and Voltaire after. "The accumulation of sanguinary laws is the worst distemper of a State," insisted the English lawyer William Eden in 1771, effectively summarizing Enlightenment thought. "Let it not be supposed, that the extirpation of mankind is the chief object of legislation."[10] But Beccaria was the first to organize this pervasive discomfort with capital punishment into a coherent framework encompassing virtually all that could be said in opposition to it. From the late 1760s until nearly a century later, Beccaria was a name familiar to literate Americans, a name synonymous with opposition to capital punishment.

Beccaria's influence was felt quickly in the debate over whether death

was too harsh a penalty for property crime, but American reformers were not yet ready to follow him in advocating the abolition of capital punishment for all crimes. That tension is evident in an anguished essay published in the Connecticut *Courant* in 1768 on what the *Courant* called "a very *important* Question, viz. Whether any Community have a right to punish any species of theft with death?"[11] The *Courant* followed Beccaria in arguing that when individuals left the state of nature and formed a government they could invest that government with only those powers which they as individuals had possessed in a state of nature. The power to take one's own life was not one of them. "As a consequence," the *Courant* concluded, "we as individuals have no right to give up our lives to the community, to be taken from us, for any species of theft whatsoever."

Having gone this far, however, the *Courant* drew back from the obvious implication that capital punishment for murder, or indeed for any crime, was just as illegitimate. "I am sensible by this time the reader is impatient to ask, Whether a community has a right to punish murder with death, consistent with these principles?" the essay's anonymous author recognized. "I answer, they have, for there is an essential difference between murder and theft." The difference was that in a pre-societal state of nature a murderer had no right to live. "By the law of nature, he that had taken away the life of another wrongfully forfeited his own; not to any community, but to every individual man." It was thus right to kill a murderer that individuals had delegated to the government when they entered into the social contract. Admiring Beccaria's methods but fearing their logical conclusion, the *Courant* was forced to assume a natural law that matched the positive law it urged on Connecticut's legislature. Locke and Rousseau had earlier responded to the social contract argument with a natural law in which *all* criminals forfeited their right to life; in keeping with developing American attitudes toward lesser felonies, the *Courant*'s version of natural law limited that forfeiture to murderers.

Several of the state constitutions of the late 1770s and early 1780s included instructions to state legislatures to reduce the number of capital crimes. "The penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary," proclaimed Pennsylvania's constitution of 1776. Maryland and South Carolina followed soon after. The most explicit of

the early state constitutions was the New Hampshire bill of rights of 1784, which instructed:

> No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason, where the same undistinguishing severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.[12]

These constitutional provisions were aspirations, not actual changes in the law. The war years of the 1770s and 1780s understandably saw little move toward milder punishments.

But not everyone was too busy in the late 1770s to turn some attention to the subject. In November 1776 Virginia's House of Delegates appointed a committee, chaired by Thomas Jefferson, one of Beccaria's enthusiastic American readers, to revise the newly independent state's laws. The committee met in early 1777 to decide which aspects of English law needed revising. The very first item on the resulting list was a drastic reduction in the use of capital punishment: "Treason and Murder (and no other Crime) to be punished with Death." Most other crimes that had long been capital, including manslaughter, arson, robbery, and burglary, were to be punished by public labor.

Reform of capital punishment was only one of many projects undertaken by the committee, so it was not until late 1778 that Jefferson had drafted a "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital." The bill's lengthy preamble summarized much of what was crystallizing as progressive, Enlightenment thought. Governments have a duty "to arrange in a proper scale the crimes which it may be necessary for them to repress," Jefferson began, "and to adjust thereto a corresponding gradation of punishments." This was, in part, because "the reformation of offenders, tho' an object worthy of the attention of the laws, is not effected at all by capital punishments, which exterminate instead of reforming." Criminals kept alive might also "be rendered useful in various labors for the public," a particularly happy result in the new states of

North America, which were plagued by chronic labor shortages. Laboring criminals, meanwhile, "would be living and long continued spectacles to deter others from committing the like offenses." And by abandoning capital punishment for lesser felonies the state could boost conviction rates: "The experience of all ages and countries hath shewn that cruel and sanguinary laws defeat their own purpose by engaging the benevolence of mankind to withhold prosecutions, to smother testimony, or to listen to it with bias, when, if the punishment were only proportioned to the injury, men would feel it their inclination as well as their duty to see the laws observed."[7]

Here was a full catalogue of the emerging utilitarian arguments against capital punishment. The substitution of forced labor as the penalty for all but the gravest crimes would reduce crime rates in three different ways—by reforming criminals, by better deterring prospective criminals, and by encouraging the law-abiding to do their duty as witnesses and jurors—all while harnessing criminals' labor for public works. The public would win on all fronts simultaneously.

The bill was not introduced in the Virginia legislature until 1785, by which time Jefferson was in Paris as the American ambassador. In the interim the judges of the General Court had expressed their support for reform: "as men," they had informed the governor, "we cannot but lament that the laws relating to capital punishments, are in many cases too severe." The bill was nevertheless defeated in the House of Delegates by a single vote. James Madison, who presented the bill in Jefferson's absence, attributed its defeat to a widespread "rage against Horse stealers" which made the political climate a poor one for reducing criminal penalties.[8] Interest in penal reform subsided in Virginia for a time, but a decade later the state would once again be at the forefront of the movement against capital punishment.

While Virginia was rejecting Jefferson's bill, Pennsylvania became the first state to adopt something very close to it. With the end of the war, opposition to capital punishment for lesser crimes reentered public discourse in Philadelphia. "In some countries, the legislators, like Draco of old, seem to make sport of human life, and declare it forfeit on the most trivial occasions," declared the *Pennsylvania Evening Herald* in 1785. "We need go no farther than some of those European nations, which pride themselves on being patterns of refinement and civilization, for examples

of this." The *Freeman's Journal*, another Philadelphia newspaper, followed Beccaria in arguing that prison and forced labor would be more effective deterrents than the death penalty. A decade after the state's post-independence constitution had voiced the aspiration to reduce the use of the death penalty, the legislature finally followed through. Legislators recognized, as one of them put it, that "we are about to try a very novel experiment."[9]

Pennsylvania's 1786 penal reform, the first of many that would follow in the United States over the course of the next century, abolished capital punishment for robbery, burglary, sodomy, and buggery.[10] "It is the wish of every good government to reclaim rather than to destroy," trumpeted the statute's preamble, and the statute accordingly provided for sentences of up to ten years, in the state's new prison, for those convicted of any of these formerly capital offenses. But the goal of reclamation was plainly eclipsed by that of deterrence. Capital punishment for these four crimes, the legislature explained, had failed "to produce such strong impressions upon the minds of others, as to deter them from committing the like offences; which it is conceived may be better effected by continued hard labour, publickly and disgracefully imposed on persons convicted of them." Murderers and those committing manslaughter, rapists, arsonists, and counterfeiters—all would continue to be hanged as before. These were crimes for which Pennsylvania juries were still willing to impose the death penalty, the legislators believed. Where capital punishment could survive in practice, it would remain an effective deterrent.

In the years following, reformers were confident that rates of robbery and burglary had declined as a result of the reform. "Our streets now meet with no interruption from those characters that formerly rendered it dangerous to walk out of an evening," exulted Caleb Lownes. "Our houses, stores, and vessels so perpetually disturbed and robbed, no longer experience those alarming evils. We lay down in peace—we sleep in security." A French visitor to Philadelphia reported that two of the first robbers tried under the new statute pleaded to be tried under the old instead, preferring the chance of an acquittal or a pardon to the certainty of a long prison sentence.[11] The choice seemed to confirm the reformers' belief that milder sentences, consistently applied, would be more feared by criminals than an unpredictable death penalty.

Support for the abolition of capital punishment for lesser felonies con-

tinued to spread through the early 1790s. "What shall we say of the injustice and barbarity of our present institutions?" asked one writer. "How can an American tell an inhabitant of Turkey, or of Persia, that for stealing an horse, or for purloigning to the amount of five pounds, we punish the offender with *death*?" Another lamented that "so many of our laws, like those of Draco written in blood, stand in this liberal and enlightened age, as monuments of ancient barbarity." By 1794 New York Governor George Clinton could report to the state's legislature that "the sanguinary complexion of our criminal code has long been a subject of complaint," because "little attention has hitherto been paid to a due proportion between crimes and punishments."[28]

Calls for reform were more numerous in the North than in the South, but southern voices were heard as well. "Where is the man of humanity," asked one North Carolinian in 1796, "who could endure to see his fellow creature struck out of the present state of existence by the operation of our present sanguinary law, merely because he had stole his horse or other like property?" The Democratic Society of Lexington, Kentucky, adopted a resolution in 1793 complaining of "the multitude of inferior crimes which are capitally punished," and appointing a committee "to draft a memorial to the General Assembly, requesting that a radical change be made in our criminal code."[29]

Between 1794 and 1798 five states abolished the death penalty for all crimes other than murder, and three of the five even abolished it for certain kinds of murder. The first was Pennsylvania, which in 1794 provided prison sentences in place of death for treason, manslaughter, rape, arson, and counterfeiting. Murder remained the sole capital crime, and even murder, for the first time in any jurisdiction with a legal system based on that of England, was divided into degrees. First-degree murder, the only kind to be punished with death, included murder "perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated murder" and murder committed in the course of arson, rape, robbery, or burglary. All other murders would constitute the new crime of second-degree murder and would be punished with a prison sentence. Two years later Virginia enacted a similar statute. In 1798 so did Kentucky, in a statute whose preamble was lifted nearly word for word from that of Jefferson's failed Virginia bill of 1778–1785. New York and New Jersey enacted reforms nearly as dramatic in 1796. Both states restricted capital punishment to treason and murder, the latter crime not

divided into degrees.[30] As treason against a state government would be a rarity in the new United States, murder was in practice the only capital crime left in these two states.

Two of the five states that partially abolished capital punishment in the 1790s, Virginia and Kentucky, had large slave populations. In both the reforms were explicitly intended only for free people. Slaves, already in a prison-like environment, continued to be subject to a long list of capital offenses. Conceptions of appropriate punishment were changing, but in the South they changed only so far. The problem of managing large numbers of captives – in Virginia, nearly half the population – prevented any further reform.

Even in states that had not yet pruned their list of capital crimes, the small number of offenses carrying the death penalty relative to the English penal code became a point of pride for Americans of the late eighteenth century. "It doth honor to the wisdom as well as lenity of our legislators," said James Davis of Connecticut, that "not more than six crimes are capital by our law." "How few are the capital crimes, known to the laws of the United States," exulted James Wilson soon after his appointment as one of the initial Justices of the new United States Supreme Court, "compared with those, known to the laws of England!"[31] The gradual abolition of capital punishment for lesser crimes was increasingly understood as a mark of the new nation's progress.

As states partially abolished the death penalty, they resorted to prisons to fill the void. Several states, including Massachusetts, New York, and Pennsylvania, established their first prisons in the 1780s. When New Jersey, Virginia, and Kentucky partially abolished capital punishment in the 1790s, each state simultaneously appropriated funds for its first prison. These early prisons were a substitute for more than just the gallows. They replaced a host of lesser public punishments as well, including whipping, carting, and outdoor public labor. A variety of circumstances led to the birth of the prison, some of which had little to do with capital punishment. Increasing material wealth allowed governments to feed, clothe, and house prisoners for extended periods, a project that in an earlier era would have been prohibitively expensive. The development of the factory offered a model for imposing discipline on large numbers of people. But much of the motivation for the invention of the prison arose from the growing distaste for executing burglars, robbers, rapists, and the like.[32] Changing conceptions of the proper scope of retribution – the deepening

sense that death was too harsh a penalty for crimes other than murder—had resulted in a new calculus of deterrence. The new prisons, it was widely thought, would prevent crime more successfully than did capital punishment.

Virtue and Disease

In the late 1780s American opposition to capital punishment for lesser crimes blossomed into opposition to capital punishment for all crimes. The earliest American argument for complete abolition may have been an editorial published in the *Pennsylvania Evening Herald* in 1785.[2] Debates over complete abolition became common in the Philadelphia press in the late 1780s and then spread to other cities, especially New York, in the 1790s.

If there was one point on which the advocates of abolition were unanimous, it was that they were living in an era of great progress but that penal policy was lagging behind. "The world has certainly undergone a material change for the better within the last two hundred years," Benjamin Rush observed in 1789. Humankind was improving, but the civilized inhabitants of the late eighteenth century were still saddled with criminal laws written in a ruder, more barbaric time. "If we examine history in general," argued one New Yorker in 1794, "we shall readily perceive, that as mankind became more civilized, and advanced toward refinement, punishments became less severe." Capital punishment might be backed by the authority of the Bible, but, as Pennsylvania's attorney general, William Bradford, contended, humanity had made great progress since then. "How dangerous it is rashly to adopt the Mosaical institutions," he suggested. "Laws might have been proper for a tribe of ardent barbarians wandering through the sands of Arabia which are wholly unfit for an enlightened people of civilized and gentle manners." The New York reformer Thomas Eddy found it impossible to believe "that a people enamoured of freedom and a republic, should long acquiesce in a system of laws, many of them the product of barbarous usages, corrupt society, and monarchical principles." The scientist Samuel Mitchill grouped capital punishment with slavery, duelling, and imprisonment for debt as vestiges of a lesser age, relics "which doubtless will be done away when right reason shall gain the ascendency over the human mind."[3]

In an earlier stage of society, reformers argued, capital punishment might have been necessary. But people were better than that now. "I am

indeed surprised that capital punishment has not been totally abolished in this country," wrote the French penal reformer Brissot de Warville. "Morals here are so pure, material well-being is so general, and poverty is so rare! Is there any need of such terrible punishments to prevent crime?" When the Yale senior class debated the death penalty in 1784, the debate was not over its propriety in all places and at all times but over whether it was "too severe & rigorous in the United States for the present Stage of Society." New York, declared the physician Phineas Hedges, was a place where "the vindictive spirit of the laws, the implacable, intolerant disposition of the heart," in the form of capital punishment, "obscure the brilliancy of our revolution."[4] Hedges was speaking on the Fourth of July, but he was talking about a revolution deeper and more gradual than the one his listeners had gathered to commemorate. It was a revolution in human nature and in human understanding of the possibilities of further improvement.

The progress of society to a higher stage of civilization, the reformers believed, undermined each of the reasons for capital punishment. Now that Americans had built prisons, the death penalty was no longer necessary as a deterrent. "Every man of principle and honour would cheerfully sacrifice his life sooner than bend under the yoke of slavery," averred one writer. Capital punishment could only be justified on the ground that the criminal's death "is necessary to the future safety of society," posited one newspaper editor, but if "confinement will effectually answer this end, the question is decided *against all capital punishment*."[5] How was one clear way in which progress, reformers believed, had rendered capital punishment a relic of a less civilized past.

Progress was also more subtly at work, they contended, in the minds of the key decisionmakers within the criminal justice system: the victims, juries, and judges. Citizens had come to abhor harsh punishments, James Wilson told his Philadelphia law classes. As a result, where execution was known to follow upon conviction, "the criminal will probably be dismissed without prosecution, by those whom he has injured. If prosecuted and tried, the jury will probably find, or think they find, some decent ground on which they may be justified or, at least, excused in giving a verdict of acquittal." And even if convicted, the criminal would be in the hands of judges who would "with avidity, receive and support every, the slightest, exception to the proceedings against him: and if all other things should fail" would recommend him to executive clemency. "In this man-

ner." Wilson summed up, "the acerbity of punishment deadens the execution of the law." Death might be more severe than prison in the abstract, Bradford explained, but for criminals banking on the humanity of judges and jurors, a hanging was the last thing on their minds. "Experience proves that these hopes are wonderfully strong," he reported, "and they often give birth to the most fatal rashness."[7] For this reason as well, the advance of civilization was gradually removing the deterrent value from the death penalty.

Capital punishment had been understood to facilitate the criminal's repentance, but this advantage was likewise undermined by the existence of the prison. The prison itself could be "a house of repentance," as Rush put it, a place for the regular religious instruction that was lacking in the world outside.[8] The very word reformers used to describe the prison—a "penitentiary"—emphasized the spiritual transformation they hoped would take place during the period of incarceration. There was no longer any need for a hanging to concentrate the mind on penitence. The prison could reclaim the spirit just as well, without killing the body in the process.

Progress, in the form of the prison, had thus weakened the deterrent and penitential justifications for the death penalty. But the early opponents of capital punishment discerned a far more fundamental result of progress, one that removed the death penalty's retributive justification as well. Ever since the earliest colonial days, Americans had tended to attribute crime to innate human depravity. Everyone had a natural inclination to evil, it was thought, and so a life of virtue required a constant exercise of the will. The commission of a crime represented a failure of will, a decision to neglect the vigilance required of all members of society. Capital punishment, in this way of thinking, served a legitimate retributive purpose. The criminal's lapse from virtue was properly blamed on the criminal.

Many in the late eighteenth century began to reject this understanding of the cause of crime because they adhered to a new conception of human nature, one in which humans were not born evil. If people began life as blank slates, or if they were inherently virtuous, as many were coming to believe, then how could one explain the existence of crime? The criminal began to be conceived as somehow *different* from everyone else.[9] By some means the criminal had acquired an unnatural mode of thinking and acting. But how? The answer contemporaries developed to

this question—that crime was caused by malign influences beyond the criminal's control—began to undermine the retributive justification for capital punishment.

The concept was not entirely new. Youth and inexperience had long been common reasons to grant clemency, especially when the condemned person had been under the sway of an older, hardened offender, so the idea that a person might be induced to commit a crime by the influence of those around him was a familiar one. What was new in the late eighteenth century was the effort to attribute all evil to the criminal's environment. Some began to explain crime in terms of biological causation. When naturally healthy people became physically sick, it was because they had caught an infectious disease. Perhaps the same was true of the spiritual sickness that was crime. "Let every criminal, then, be considered as a person labouring under an infectious disorder," argued a resident of Maryland in 1790. "Mental disease is, indeed, the cause of all crimes: for to a sound mind, virtuous action is as natural and as necessary as breathing is to life." Speaking on the floor of the Virginia House of Delegates in support of the 1796 bill abolishing capital punishment for all crimes but murder, one legislator compared criminals to patients and the state to a physician. "What then shall we say of that system of law," he asked, which sends criminals "to the hands of the executioner, without a single effort for his cure?"[10]

If crime was a disease, the retributive justification for capital punishment, indeed for any punishment, virtually disappeared. How could society blame someone for catching a disease? A disease had to be treated, not punished. "To propose an hospital, for the reformation of criminals, is a new attempt, and may perhaps tend more to excite the ridicule, than the candid attention of those who estimate opinions by their antiquity," the Marylander recognized. But he nevertheless considered prison a hospital for crime, a hospital in which "fasting, hard labour, and bodily pain, may, in certain cases, be successfully applied in the reformation of criminals." Benjamin Rush, himself a physician, likewise drew an analogy between evil and disease, and spoke of prison routines as "remedies . . . for the cure of crimes."[11] To cure a disease one did not kill the patient.

If crime came not from within the criminal but from without, it followed that a naturally virtuous person repeatedly exposed to evil and violence might gradually become evil and violent himself. (A similar account is often given today of how crime is caused by exposure to

pornography or violence on television.) On this view, executions did not deter crime; they caused crime. Capital punishment "lessens the horror of taking away human life," Rush insisted, "and thereby tends to multiply murders." One only had to look at the number of crimes committed at hangings, another Pennsylvanian agreed.[6] If crime was understood as a product of the environment, caused not by universal human nature but by the specific circumstances in which individual humans found themselves, circumstances largely beyond their control, capital punishment ceased to serve any retributive purpose.

American abolitionists challenged the death penalty's retributive underpinnings by repeating the social contract argument popularized by Beccaria. "Life is a natural blessing, not a political one," declared a correspondent to the *New-York Evening Post*: the right to take life "appertains alone to the creator that bestowed it." Another writer concluded, following Beccaria, that "*no man can surrender or transfer it*, consistently with the mandates of Nature, consequently Society cannot receive it, nor does it exist in any assembly of men whatever." Despite its origins, the belief was not confined to intellectual circles but began to appear in clemency petitions written by people evidently without much education.[7]

This sort of abstract political theory was common by the end of the eighteenth century. Rush was the first to take the far more difficult step of attempting to reconcile opposition to capital punishment with the Bible. As everyone knew very well, the Bible was full of passages in which people were instructed to impose capital punishment in retribution for various offenses. "I expect to meet with an appeal from the letter and spirit of the gospel," Rush admitted, particularly "the law of Moses, which declares, that he that killeth a man shall surely be put to death.'" Rush had several responses. Most of the Old Testament's provisions for capital punishment, he noted, were the ones transmitted by Moses, which were "accommodated to the ignorance, wickedness, and 'hardness of heart' of the Jews." God had not purported to be laying down rules applicable to all societies at all times. Rush immediately conceded that this argument would not apply to the most frequently cited of God's instructions concerning the death penalty, the command to Noah in Genesis 9:6 that "whoso sheddeth man's blood, by man shall his blood be shed." This order, all agreed, had been intended not just for the ancient Jews but for humanity in general. But was it an order at all? Rush drew upon a recently published lecture of the English cleric William Turner to suggest that Genesis 9:6 was properly interpreted not as a command but as a prediction, along the lines of parallel Biblical passages like "He that taketh up the sword, shall perish by the sword" or "He that leadeth into captivity shall go into captivity." If these were all to be treated as commands, Turner had pointed out, then a magistrate had as much of a duty to sell slave traders into slavery as to sentence murderers to death.[8] Rush enthusiastically agreed.

Rush then returned to the more numerous provisions for capital punishment in Mosaic law. These did not include just the crimes punished with death in late eighteenth-century America, he noted, but also crimes like adultery and blasphemy, offenses for which virtually no one wished to impose capital punishment. One could not plausibly believe oneself bound by some of the laws given by Moses but not others. If advocates of capital punishment wished to rely on Old Testament passages other than Genesis 9:6, they would have to swallow some unpalatable laws as well.[9]

While Rush's utilitarian arguments against capital punishment had a great deal of support in the late eighteenth century, the same cannot be said of his biblical interpretation. "Some of his explanations of texts, we think, are forced," one reviewer sympathetic to Rush's cause concluded. Abolition of capital punishment might be more easily reconciled with scripture, the reviewer suggested, by recognizing that "whatever might be done under former dispensations, the discontinuance of the punishment of death is most consonant to the human spirit of the religion taught by him who 'came, not to destroy men's lives, but to save them.'" The message of Christ could be a potent tool for rebutting biblical justifications of capital punishment.[10] But the Bible would always be an obstacle to opponents of capital punishment. Their opposition followed from Enlightenment ideas about human virtue and human progress, ideas not easily reconciled with ancient texts and institutions. They were confident that they could solve problems their ancestors could not, using techniques of which their ancestors could never have dreamed. They were sure of the possibilities for improvement, for the reformation of the individual criminal, and for the remaking of a rational society.

Their adversaries—who outnumbered them in the late eighteenth century, judging by the persistence of capital punishment in every state—were far less optimistic about the direction in which the new nation was heading. "Liberty in the united states is verging fast toward licentiousness," declared the Philadelphia minister Robert Annan in a passionate

response to Rush's arguments for abolition. "Religion, the only sure basis of good government, is entirely set aside. . . . Humanity is become the popular cry!" The death penalty had been ordained by God, and it was presumptuous to announce that God's provisions were no longer needed. "If capital punishments be such a crying iniquity as our author pretends," asked another of Rush's critics, that "reflected very little credit on the justice and goodness of their God." Human nature could hardly change so fast, if indeed it could change at all, and even the reformers would become their old selves under pressure. Rush, Annan supposed, "has never had a brother, a wife, or a child murdered by the cruel hands of an ruffian. It is all theory with him." But if crime ever paid a visit to Rush's household, Annan predicted, "his fictitious humanity will evaporate before the strong and irresistible feelings of nature, and perceptions of justice and equity," and Rush's opposition to capital punishment "will vanish as chaff before the whirlwind."[7] Capital punishment's supporters doubted the possibility of improvement, whether of the individual or of the society as a whole.

The early reformers were motivated by Enlightenment visions of progress, but once having decided to oppose capital punishment, they drew upon other instrumental arguments. Abolition of the death penalty, Rush contended, would prevent those inclined to suicide from committing murder in order to be executed. No doubt this was not the reformers' strongest point, but neither was it so frivolous as it may seem today, when cultural and religious norms against suicide are much weaker than they once were. The Pennsylvania minister Henry Melchior Muhlenberg heard in 1765 of a New York man who cut the throat of his infant son because he lacked the courage to cut his own. A few months later Muhlenberg counseled a recent immigrant from Germany named Heinrich Albers who, Muhlenberg concluded, "had purposely cut the throat of a twelve-year-old German boy in order that he might thus lose his own life."[8] The prevention of suicide was not what drove reformers to oppose capital punishment, but it was a collateral benefit they could claim once the decision had been made.

The same was true of another anticipated benefit, the possibility of forcing criminals to work to compensate their victims. If a murderer was kept alive rather than executed, the proceeds of his labor could be "applied to the use of the widow or children of the person murdered." The point was not uncontroversial; Robert Annan, for instance, thought it

"one very shocking idea." Annan put a question directly to Rush: "Supposing a midnight robber were to murder him, while sleeping securely, as he vainly imagined, under the protection of the laws, how would his lady and children relish the food which, in this case, and on his plan, might be called the price of his blood?"[9] Again, this was more a side-benefit than an independent reason for opposing capital punishment, but it was one that appealed to the reformers' utilitarianism.

The debate over capital punishment broke out on many fronts in the late eighteenth century. The driving force behind all the biblical interpretation and the utilitarian calculus, however, was a new faith in humanity and in the possibility of progress. If people were virtuous at birth, if evil was an intruder arriving from outside rather than a part of human nature, one might design institutions to disinfect the criminal, to restore him to moral health. In this light the gallows seemed a product of ignorance and superstition.

Sympathy and Utility

The early United States was a particularly likely place for dissatisfaction with the death penalty to develop.[10] Many Americans adhered to a liberal theology emphasizing personal reformation and the possibility of universal salvation. Such beliefs created an intellectual climate congenial to the reformers' emphasis on innate human virtue and conducive to proposals for far-reaching changes in penal institutions. Especially after the Revolution, it was plausible to understand capital punishment as an outmoded institution, suitable only for monarchies or aristocracies, with no place in a more egalitarian republic. These strands of thought are detectable in the writings of some of the early American penal reformers, especially Benjamin Rush.[11]

But the emergence of opposition to capital punishment was not just an American phenomenon. It took place all over Europe too. The Grand Duke of Tuscany abolished capital punishment completely in 1786. Not long thereafter, so did the Austrian Emperor Joseph II. The Prussian General Law Code of 1794 limited the death penalty to murder and treason. Russia abolished capital punishment for all crimes but treason. France drastically reduced the number of crimes punished by death in 1791. There would be little legislative change in England until the nineteenth century, but the spirit of reform was very much in the air from the 1770s on.[12] The American reformers like Bradford and Rush considered

themselves part of an international movement. They were avid readers of the accounts of travelers in Tuscany, Russia, and other European states that had reduced the use of capital punishment, and they cited these European reforms as models for Americans to follow.

This international wave of opposition to capital punishment was part of a larger change in sensibility. As confidence in the possibility of progress increased, so did the belief that misery of all kinds was not part of the human condition but might be eliminated. It seems no accident that significant opposition to the death penalty emerged at exactly the same time as significant opposition to slavery, or that sympathy for the suffering of criminals grew side by side with sympathy for the suffering of animals.[6] The era saw the rapid growth of forms of evangelical Protestantism that placed a premium on sympathy with others. Sympathy was on the rise, and so was utilitarianism, which when applied to the question of crime yielded a sense that the proper punishment was rationally calculable by reference to the perceived costs and benefits of committing a particular offense, rather than by reference to the Bible or any other form of authority.

The sympathy came first. We have seen that the earliest American critics of capital punishment for property crime spoke not of its inefficacy but of their own emotional identification with the condemned prisoners. They reported "pitying poor young fellows" hanged for burglary. After the reforms of the 1790s they celebrated "the humanity of the modern code of this country." The residents of Alexandria (then part of the District of Columbia) pleaded with President Thomas Jefferson to pardon the condemned burglar Samuel Miller on the ground that capital punishment for burglary was "something shocking to the sense of moral justice."[7] Spectators at executions had long sympathized with individuals who were executed without translating that sympathy into a general opposition to capital punishment, but that changed in the second half of the eighteenth century. More and more people felt that their moral responses to individual executions justified them in expressing dissatisfaction with the criminal law.

Since the publication of Michel Foucault's influential *Discipline and Punish* in the 1970s it has not been fashionable to credit the penal reformers' professions of sympathy and humanity. Foucault rightly pointed out that much of the systematic penological writing of the period was grimly

utilitarian and betrayed very little concern for the actual people being punished. For many of the more philosophical reformers, the goal was, as Foucault memorably put it, "not to punish less, but to punish better."[8] But sympathy and utilitarianism are not mutually exclusive, and indeed here they went hand in hand. To "punish better" in the late eighteenth century required partially substituting prison for capital punishment only because capital punishment was widely thought to be causing too many people to sympathize with the criminals. A hundred years earlier, when there was less of this sympathy, there had been no reason to invent a new kind of punishment.

Sympathy came first, but utility was not far behind. Many of the early American opponents of capital punishment did, in fact, want to punish better, and often to punish more. The reformer Robert Turnbull favored prison over the death penalty because he thought capital punishment "evidently too mild for the crime of cool and deliberate murder." A life sentence lasted much longer than a hanging, so it could "be considered as the most painful." Rush proposed a prison in a remote location, one to which the road was "difficult and gloomy," where the clang of the iron gates would be "encreased by an echo from a neighbouring mountain, that shall extend and continue a sound that shall deeply pierce the soul." He envisioned a system in which the term of imprisonment would be unknown to all but government officials until the day the prisoner was released, in which visitors were strictly forbidden, and in which guards would never so much as smile at the prisoners. "I cannot conceive anything more calculated to diffuse terror," Rush explained. "Children will press upon the evening fire in listening to the tales that will be spread from this abode of misery. Superstition will add to its horrors."[9] Here was a truly Foucauldian punishment, one that would insinuate itself deeply into the psychology of offenders and the innocent alike, a penalty that operated as much on the imagination as on the body. Rush was no humanitarian; he was interested in punishing better, not less.

Utilitarianism pervaded the early opposition to capital punishment in another sense as well. One aspect of punishing better was punishing more uniformly by eliminating the wide disparity in actual penalties caused by a system of wholesale capital sentencing and frequent pardons. Before the late eighteenth century clemency was valued as a way of fitting the punishment to the offender by separating the reclaimable from the ir-

redeemably vicious. To the rationalists of the Enlightenment, however, this system looked hopelessly ad hoc. They agreed with Beccaria that the best deterrent was the certainty rather than the severity of punishment, that there would be less crime in a penal system that was inexorable and mild than in one that was harsh but unpredictable. "It is the universal opinion of the best writers on this subject, and many of them are among the most enlightened men of Europe," William Bradford argued, "that the imagination is soon accustomed to over-look or despise the degree of the penalty, and that the certainty of it is the only effectual restraint." For the same reason Rush declared that it "has long been a desideratum in government, that there should exist in it no pardoning power," and that the elimination of capital punishment was the only way to achieve uniformity in sentencing.[10] The substitution of prison for hanging was a way of punishing more effectively by punishing more systematically.

One precondition for the emergence of opposition to capital punishment was thus this broad change in sensibility. Americans, like Europeans, began to sympathize more with criminals, and began to believe that they could better shape the behavior of potential criminals by more subtly modifying the pattern of incentives potential criminals faced. But these intellectual changes might have had little practical effect had they not been accompanied by a crucial technological change—the invention of the prison. One could not credibly argue against the death penalty without proposing something else to take its place. In the late eighteenth century, for the first time, the idea of the prison provided American reformers with an alternative. The prison and the anti-death penalty movement went hand in hand: growing opposition to the death penalty caused growing interest in prison construction, while the existence of prisons strengthened the arguments of death penalty opponents.[11]

It was the emergence of the prison, combined with this Enlightenment conjunction of sympathy and utility, that gave rise to the first wave of significant opposition to capital punishment. The reformers understood utility and sympathy—"Reason and Humanity," as Bradford put it—to be twin facets of the progress they saw taking place all around them. "The voice of Reason and Humanity has not been raised in vain," Bradford proclaimed. "A spirit of reform has gone forth—the empire of prejudice and inhumanity is silently crumbling to pieces—and the progress of liberty,

by unfettering the human mind, will hasten its destruction."[12] Humanity was what allowed reformers to understand the causes of crime. Reason was what enabled them to calculate how best to prevent it. In a country where people increasingly believed they possessed both sympathy for others and the rationality to influence others' behavior, reformers were sure that capital punishment would not endure much longer.

5

NORTHERN REFORM, SOUTHERN RETENTION

"SO MUCH HAS BEEN WRITTEN and said on the subject of capital punishments," noted a Philadelphia newspaper in 1812, "that it looks almost like presumptive vanity to pursue the topic any farther." But Americans throughout the northern states did pursue it. Looking back in 1854, a New York lawyers' magazine concluded: "There is no legal question which has been so thoroughly and extensively discussed as that concerning the death penalty; no law which has been enacted, repealed, and re-enacted, as has that of Capital Punishment." Within the previous decade alone, three states had abolished the death penalty completely. Several others had come close. Throughout the North capital punishment had been removed from crime after crime, until none of the northern states used it for any offense other than murder. These legislative changes sat atop a mountain of public debate that had filled books, magazines, newspapers, and speeches since the turn of the nineteenth century. Yet after all this arguing the issue was no closer to being settled than it had been fifty years before. "The expediency or inexpediency of most legal enactments is determined by a comparatively short discussion, or, at the farthest, by a few years' experience," the magazine recognized. "But in the case of capital punishment, reason and experience seem alike in vain; each new statute leaves the question still open, and the discussion waxes louder and more earnest at each new step in legislation." After decades of confrontation, "neither party in the debate are able to see any reason on their opponent's side."[1]

In Louisiana, meanwhile, it was a capital crime to print or distribute material, or to make a speech or display a sign, or even to have a private conversation, that might spread discontent among the free black population or insubordination among slaves. Virginia provided the death penalty for slaves who committed any crime for which free people would serve a prison sentence of three years or more.[2] Throughout the South attempted rape was a capital crime, but only if the defendant was black and the victim white. The debate over capital punishment that engulfed the northern states in the first half of the nineteenth century was virtually absent from the South. The difference was a product of slavery.

The Northern Debate

Isaac Mickle, an apprentice to a Philadelphia lawyer, was part of an audience of nearly two thousand at an 1842 debate on what Mickle called "The Capital Punishment question which is now agitating the good people of the Commonwealth." Arguing for abolishing the death penalty was "the somewhat famous Charles C. Burleigh," who had become so for nothing but speaking and writing in favor of abolition. Burleigh's opponent was the minister William McCalla. After three consecutive evenings of debate, Mickle was won over to Burleigh's cause. The next year, when Mickle himself chaired another debate on the subject, he decided in favor of abolishing capital punishment.[3]

Similar scenes were repeated throughout the northern states. In Boston the Massachusetts Society for the Abolition of Capital Punishment put on all-star programs of speeches against the death penalty, with prominent reformers like Wendell Phillips and William Lloyd Garrison on the schedule. Debating societies in places as remote as rural Iowa considered whether government had any right to take human life. European visitors were astonished by what the English novelist and naval officer Frederick Marryat called "this aversion to capital punishment." "In no country is criminal justice administered with more mildness than in the United States," marveled Alexis de Tocqueville, who had been sent by the French government to report on the new American prisons. "The Americans have almost expunged capital punishment from their codes." The English tourist Harriet Martineau concluded that "in a short time capital punishments will be abolished throughout the northern States."[4] Reformers certainly thought so. They considered themselves on a crusade comparable to the simultaneous movement to abolish slavery.

The capital punishment debate in the North revolved around three issues familiar since the 1780s and 1790s. Was the death penalty necessary to deter crime, or would prison be a more effective deterrent? Was the death penalty a legitimate act of retribution, or did government—for rea-

seen rooted in the nature of crime, the characteristics of criminals, or the limited power of the state—lack the authority to punish crime with death? Was the death penalty a useful means of encouraging repentance, of reforming the criminal's soul, or would prison do the job better? All three were contested issues throughout the North in the first half of the nineteenth century. The debate quickly crystallized into stock arguments for and against abolishing the death penalty, arguments that drew standard responses. When the debate reached its peak, from the 1830s through the 1850s, there were no new moves available to participants on either side.

DETERRENCE

Its opponents were sure that capital punishment was unsuccessful as a deterrent to crime. "Does capital punishment tend to lessen the number of those crimes for which it was instituted?" asked one in 1810. "Certainly not." They were confident that prison would deter more effectively. Supporters of capital punishment were just as sure of the opposite. "Murder never has been, and never can be checked, by a slighter penalty than death!" exclaimed a popular magazine. This debate has persisted up to the present, but what is striking about its contours in the early nineteenth century is the virtual absence of any attempt by either side to back up its claims with numbers. The *National Era*, a black newspaper in Washington that favored abolishing the death penalty, complained with some justification that reformers "seem to rely more upon abstract reasoning, than appeals to facts," in contrast with their English counterparts, who "investigate with great care the statistics of crime, and dwell upon the comparative effects upon its prevention" of different penalties. American reformers did on occasion use statistical evidence. A lengthy article published in 1838 in the *American Jurist*, a leading legal periodical, surveyed recent rates of execution and crime in several states and foreign countries in an effort to prove that a decrease in the number of hangings had not been accompanied by an increase in crime. Robert Rantoul, the leader of the reformers in the Massachusetts legislature, used data from Belgium to infer that reducing the number of hangings would reduce the number of murders.[7] But statistical evidence was unusual, on either side of the debate, before the late nineteenth century.

The combatants instead relied on competing understandings of human nature. Abolitionists contended that prospective criminals feared

prison more than death. "Who would wish to live, if life offered no enjoyment?" one writer asked. A life in prison was worse than a thousand deaths, another averred. Retentionists believed the opposite: that most prospective criminals feared death above all else. A member of the New York Assembly noted that prisoners often asked to have death sentences commuted to prison terms, but never the opposite. "Do men request to escape from a milder to a more terrible punishment?" he asked. "Or is not this the spontaneous voice of the soul declaring which of these penalties is most dreadful, and hence most efficacious?" Abolitionists replied that the chance of acquittal or pardon was much smaller when death was not the sentence, and that a high chance of prison deterred more effectively than a low chance of death. In the absence of much information that could resolve the question one way or the other, the result was a standoff. "Whether the fear of capital punishments operates as a more powerful preventive of crime, than confinement for life to hard labor in the state prison, is rather a matter of conjecture or of argument, than of certainty," admitted one abolitionist. "There are not facts enough before the public to decide."[8]

In the debate over deterrence the incentives faced by jurors were no less important. It was a commonplace among abolitionists that jurors' reluctance to impose the death penalty caused conviction rates to be much lower in capital cases. "Jurors can no longer hold the scales of judgment with an even hand, when one man's blood is to be weighed against another's," concluded the *United States Magazine*, edited by the ardent New York abolitionist John O'Sullivan. "But if the punishment were of a nature less cruel, it would be more certain." In the twenty-nine murder trials conducted in Massachusetts between 1832 and 1843, one abolitionist observed, there had been only six convictions. In the sixteen capital arson trials there had been only four convictions. Charles Burleigh pointed to similar statistics in Philadelphia, where conviction rates were much higher in noncapital cases. The point was that a rarely enforced death penalty could scarcely serve as a deterrent.[9]

Retentionists had a ready response. That jurors were reluctant to convict in capital cases was undeniably true, they conceded, "but it is difficult to see how it can be regarded as an argument against the death penalty. If the law is a good one, and men are unwilling to execute it, there is greater reason why its friends should rally to its support." If capital convictions were becoming more difficult to obtain, they reasoned, that

was due to the active promotional efforts of the abolitionists, who, if not engaged in jury-tampering in a legal sense, were up to something much like it on a far broader scale.[8] The debate over deterrence could not be resolved with facts. Despite its empirical surface, it was a moral debate at its foundation.

RETRIBUTION

Very few people in the early nineteenth century were prepared to argue explicitly that retribution was not a legitimate purpose of punishment. The abolitionist *United States Magazine* found the distinction between impermissible private revenge and permissible public retribution "rather too fine for our optics," and for that reason denied retribution any role. But this was an unusual view before the Civil War. Most antebellum abolitionists were more comfortable arguing that the death penalty was not a legitimate *method* of exacting retribution. Capital punishment was "sanguinary"; it was "barbarism"; it was a form of "retaliation." Proper punishment required some attention to penitence and rehabilitation.[9]

Their opponents were equally confident of the opposite. "Beyond all question the murderer deserves to die," one proclaimed. "His crime is the greatest that man can commit against his fellow man." It was no coincidence that "for more than four thousand years, the laws of all civilized communities have affixed to the crime of murder the penalty of death." There was something in human nature that required a life for a life. If the state refused to fill that need, private groups would fill it instead. In 1843, when a divided committee of the Pennsylvania General Assembly recommended against eliminating the death penalty, the majority explained that capital punishment "is so clearly a law of nature" that it would be futile to try to amend it. "The mob finding the law impotent, would take its execution in their own hands. This cannot be looked upon as the feeling of revenge, but the voice of nature within us." When a convict was lynched in Janesville, Wisconsin, two years after Wisconsin abolished the death penalty, one Chicago newspaper took the incident as proof of the same natural principle: it found "the unwritten law of the human heart infinitely stronger than any mere theory."[10]

Retentionists' confidence in the death penalty's fitness for retribution was reinforced by the conviction that God was on their side. The Bible still played an important role in public life. Scriptural arguments in support of capital punishment received much wider circulation than they do

today, and they were taken much more seriously. If "we would not reject our Bibles we must not abolish the penalty of death for murder," admonished the Reverend Samuel Lee. "Opposition to capital punishment for wilful murder asserts that men may modify the law of God to suit themselves," the minister Nathaniel West cautioned. "This is opposition to the government of God. This is making a grave mistake." The primary piece of evidence that God favored capital punishment was Genesis 9:6, his statement to Noah that "whoso sheddeth man's blood, by man shall his blood be shed." The passage "is the citadel of our argument, commanding and sweeping the whole subject," declared the minister George Cheever, one of the most visible public spokesmen in support of the death penalty in the 1840s. "All else is mere guerilla warfare, if you cannot carry this entrenchment." Judges often quoted the passage when condemning criminals to the gallows. It was constantly being cited as "an imperative law," as "a divine enactment, which men are attempting to repeal at the hazard of offending God."

Abolitionists in the first half of the nineteenth century could not have persuaded many without denying that they sought to defy God's command. Some used the argument first popularized by Benjamin Rush in the late 1780s, that Genesis 9:6 was more accurately interpreted as a prediction than as a command. Some contended that the passage was meant to govern only Noah and his immediate family and cited as proof examples of uncapitally punished murders elsewhere in the Old Testament, most obviously the one committed by Cain. Perhaps most common was the argument that Genesis 9:6 stated a law God intended to enforce himself, not a law that was supposed to be enforced by human governments. Whatever the response, abolitionists were impatient with the claim that the passage outweighed all rational considerations. "It seems, on the face of it, to belong with other Theocratical hypotheses that have had their day," complained the editors of one Universalist magazine; "such as the divine right of kings, . . . the divine obligation of God's people, in all times, to exterminate obstinate heathens, the universal obligation to put witches to death, &c."[11]

Other aspects of the scriptural case for capital punishment were weaker, and abolitionists were quick to attack them. The death penalty pervaded the laws of Moses, but to a degree that discomforted even the most ardent retentionists. "If Moses is our lawgiver at this time," snarked John Edwards, "let us obey him; not in part only, but wholly, and put

tribute personal characteristics to the relative sizes of different parts of the brain. Today phrenology is classed with palmistry, astrology, and the like, but in the first half of the nineteenth century it was a respected discipline widely believed to offer scientific insight into human behavior. All over the country phrenologists studied the heads of condemned criminals and found ample confirmation of their theories. Some did their work while the subject was still alive, as in the case of the Connecticut murderer Caesar Reynolds, pronounced to be "a very remarkable negro" by the "distinguished phrenologist, who examined his head." Some waited until later. Sarah Reed was hanged in Illinois in 1845 after poisoning her husband with some arsenic in the buttermilk. Years later the jailer's daughter recalled that "as Phrenology was one of the leading Sciences of the Period they secured her head in toto for an examination by the Experts of Crawford Co[unty]. So they had her head on exhibition for many months."[9]

The lesson of phrenology, a lesson that would long outlive belief in phrenological doctrine itself, was that mentality had a physical basis. "All the manifestations of the mind, including the feelings and the passions, are dependent upon the conformation and state of health of its material instrument, the brain," declared M. B. Sampson, one of the many writers who sought to link brain structure with crime. If the decision to commit crime could be traced to a physical defect in the criminal's brain, crime began to look much more like disease than like sin. The appropriate response became treatment, not retribution. "The infliction of punishment for disorders of the brain is no more reconcileable to our ideas of justice than would be the infliction of punishment for disorders of any other organ of our physical frame," Sampson concluded.[10] If criminals were victims of brain defects that invisibly propelled them to commit crimes, they lacked the free will that all agreed was a moral prerequisite for the infliction of capital punishment.

Many phrenologists believed that the relative sizes of the parts of the brain were influenced by the individual's environment. Once crime was attributed to physiological causes, however, it was not a big leap to the conclusion that at least some criminals were *born* with defective brains. The reform minister Theodore Parker was one of the first to divide criminals into two classes, the "born-criminals, who have a bad nature," and the "made-criminals," who "become criminals not so much from strength of Evil in their Soul, or evil propensities in their organization, as from

strength of Evil in their circumstances." Theories of biological causation would gain influence in the latter part of the century, when they would be reinforced by the popular interest provoked by Darwin on heredity and evolution. But even in its embryonic form, so to speak, the concept of the born criminal had powerful implications for capital punishment. "I would not kill them more than madmen," Parker concluded. There was no point in executing a criminal who had been "born with a defective organization."[10]

The idea of free will, that evildoers had chosen to commit evil, thus came under increasing attack in the first half of the nineteenth century, and in corresponding measure so too did the retributive justification for capital punishment. Supporters of the death penalty fought back by insisting on the criminal's power to choose alternatives to crime. "The Committee talk as if law were against disease, against innocence and not against crime," one complained about an 1850 New York legislative report recommending abolition. "Why are we told nothing of the many cold-blooded murders where malice, with intent to kill, took the place of even other disease?" Another retentionist despaired at "the wide spread habit of referring sin and crime, not to the immediate actor of the sin and the perpetrator of the crime, but to temptation, as an efficient cause." The criminal "is a moral agent," one minister affirmed, "and having acted according to the freedom of his own will, he must fall by the righteous law of the state." Lawyers and judges feared that a justice system based on individual responsibility for criminal action would break down under a broader conception of the origins of crime. Supreme Court Justice Joseph Story refused to allow William Cornell's lawyer to introduce evidence of Cornell's poor education in mitigation of his murder. "If a bad or low education would in point of law justify or excuse crimes," Story lectured from the bench, "it would be the most facile mode of avoiding punishment that could be devised."[11] But evil was coming to be understood as produced by something other than free will, as the consequence of the criminal's brain or his circumstances. The new understanding weakened many Americans' faith in the death penalty.

Abolitionists were meanwhile formulating a new way of attacking the death penalty's retributive justification. They began to argue that innocent people were often executed by mistake. Individual condemned men and women had long claimed their own innocence, of course. What was new was the broader assertion that government ought to abandon capital

punishment in general because so many innocent people were going to their deaths on the gallows. The era saw the first nationally known American cases of apparently innocent people executed or condemned. Charles Boyington was hanged in Alabama in 1835, protesting his innocence all the while, for murdering a man in a tavern. A few months later the tavernkeeper confessed to the crime on his deathbed. Even more spectacularly, the Buoro brothers of Vermont were about to be executed in 1819 for murdering Russell Colvin, when Colvin himself (or someone who looked very much like him) turned up at the hanging. Abolitionists got a lot of mileage out of these and similar cases. Not everyone was convinced that executing innocent people undercut some of the death penalty's justification. "The innocent have sometimes been imprisoned," the minister Joseph Berg pointed out; "shall we, therefore, tear down our penitentiaries, and abolish imprisonment in every case?"[2] But to abolitionists the prospect that some of the hanged were innocent, and that nothing could be done to right that wrong, was further evidence that capital punishment failed to serve a retributive purpose.

In light of the emphasis late twentieth-century abolitionists would place on the inequality with which capital punishment was administered, it is worth noting that inequality played almost no role in the antebellum debate. To the extent that inequality was complained of at all, it was economic, not racial. "This is a d—d cold blooded selfish world," swore the murderer Amos Miner, awaiting his execution in Rhode Island in 1833. "If I but possessed some five hundred dollars I could find friends enough; but as it is, I suppose I must be abandoned!" After Wisconsin abolished capital punishment, a local prosecutor told a jury that the "death penalty hangs poor, penniless men, guilty or innocent, and it sets free and turns at large the wealthy and the influential, whether they be guilty or innocent; and every good citizen should abhor and deprecate a law that works so alarmingly unequal." But even this kind of commentary was unusual. The prevailing view may have been accurately summed up by an anonymous Massachusetts writer:

> To the honour of this state be it said, that most of the felons, who have here died on the scaffold, have been vagrant foreigners—fugitives from jails and gibbets—the refuse and dregs of society, thrown off in the effervescence of that morbid mass which lies at the bottom of old and dense communities, and cleaves like leprosy to decaying governments. Such wretches we yield to the executioner without much more regret, than when we witness the extermination of a beast of prey.[3]

In the first half of the century it appears to have been simply taken for granted, as an inescapable fact of life, that the poor were more likely to hang than the rich. Few—or rather few with the liberty to complain—commented on whether blacks were more likely to hang than whites.

REFORMATION

Capital punishment continued to be defended in the early nineteenth century as a means of facilitating the criminal's repentance. "May we not fairly reason from what we know of the nature of the mind, and the deceitfulness of sin," asked the New York minister John McLeod, "that the criminal will be more likely to give all the energies of his mind to the work of preparation for meeting his God, when he knows that his days are numbered, than when they appear to him to be lengthened out indefinitely?" Judges continued to advise condemned prisoners at sentencing to use their remaining time in "preparation for the great change that awaits you," as Massachusetts Chief Justice Lemuel Shaw put it. "The day is far spent," thundered a Maine judge at the just-convicted murderer Seth Elliot, "the night is at hand—the eleventh hour is come—a voice proclaims, *behold the bridegroom cometh*."[4] Many still viewed an impending execution as a uniquely powerful tool for concentrating the mind.

But this function came under increasing attack in the first half of the nineteenth century, from two different angles. Some critics began to question whether the weeks between conviction and execution were long enough. For a hardened criminal, true penitence could take years to attain, one reformer asserted; "that he should thus in a few months, nay, perhaps only weeks, attain to such a state of readiness is to me very extraordinary." As the *United States Magazine* suggested, reviewing some pro-capital punishment poetry recently published by William Wordsworth, "He who is unfit to live is far more unfit to die." Others began to question whether repentance was the proper goal in the first place. The new penitentiaries opening up throughout the nation promised instead to serve the goal of *reformation*, of saving the soul without killing the body. With proper instruction during a lengthy term of imprisonment, the

criminal could be converted into a law-abiding and industrious citizen. The point was a controversial one. Many retentionists were convinced that prison was even less likely to work reformation than the prospect of death, but would instead degrade criminals' characters even further.[26] But as more and more states constructed penitentiaries that offered the hope of turning bad people into good, the death penalty lost much of its attraction as a method of saving souls.

Characters and Feelings

If all the arguments for and against abolition were stock debating points with standard responses, what made people choose one side or the other? As early as 1827 one perceptive commentator suggested that opinions on capital punishment were produced not by the evaluation of empirical evidence but by the "characters and feelings" of the people on either side:

> In every society, there are multitudes, who defend capital punishments, just as they favour a severe mode of education, from violence of passion, from a propensity to harsh and expeditious measures, and from an impatience which cannot stop to employ the milder methods of persuasion and reformation. Their indignation is more operative than their compassion. When they think of a criminal, they think only of his crime, and forget that he is a man. They have too little humanity to inquire, whether his fate may not be mitigated; and regard the advocates of a milder system, as a set of visionaries, who would sacrifice the peace of society to a sickly and childish tenderness of heart.

But if the supporters of capital punishment could see only one side of the issue, the advocates of abolition were just as bad:

> There is another class, who are accustomed to feel rather than to reason; whose imagination, quickened by sensibility, represents to them, with vividness and power, the unhappy criminal, immured in his dark and lonely cell, his limbs fettered, his countenance fallen, his conscience harrowed with guilt, his mind abandoned to despair, his feverish sleep haunted by past crimes, and by horrid images of approaching death and judgment; and who forget, during this quick and tumultuous sympathy, the claims of the community, the necessity of restraining

> crime by terrour, and the difficulty of deciding, what modes and degrees of punishment are necessary to balance the temptations of the present state of society.[28]

In short, one's views on capital punishment were determined by what would much later be called one's "personality." On one side were those whose sympathy for the criminal precluded an ability to see the larger picture; on the other were those who saw the larger picture but not the human beings who made it up. One side was too forgiving, the other too severe. Abolitionists were too person-oriented, retentionists too rule-oriented. This was how the participants in the debate would understand one another over the next four decades.

The abolitionists of the early nineteenth century, like those of the late eighteenth, were optimists. They believed in progress. "This is an age of inquiry—of excitement growing out of the spirit of investigation," exulted one abolitionist reviewer of the debate. "The human mind has been throwing off shackle after shackle," and capital punishment would be just one more. The Universalist pastor Abel Thomas retold the old joke about "the traveller who thanked God for the evidence afforded him, by the appearance of a gallows, that he had reached the territory of a civilized, a Christian people!" His point was that the gallows was anything but a sign of civilization or Christianity. As one poet suggested in Rochester's black newspaper:

> Still in this Christian land of hope,
> of Bibles and of hallowed time,
> The gibbet and the hangman's rope
> Fit relics of a barb'rous clime.

The editors of a black newspaper in New York City were even more concise. *The Colored American*'s account of a bill pending in the Connecticut legislature to abolish capital punishment was headlined simply "PROGRESS."[29]

And as in the late eighteenth century, retentionists were people skeptical of the possibility of such dramatic progress. "We detest the new lights of the age—and they who stand in high places would do well to reflect before they advocate these new-fangled notions which tend to render our property and lives insecure," complained one Bostonian. "It needs no gift of prophecy to foresee that by abolishing capital punishments, every kind

of evil would environ us." In 1849, when a bill to abolish the death penalty was pending in the New York State Senate, one senator decried "this Spirit of the Age, of which we hear so much." Just a year earlier the same spirit of reform had moved the state legislature to adopt a simplified mode of court procedure and to allow married women to own property. The former had thrown the courts into chaos, in the senator's view, the latter threatened to rip apart the family. Now reformers wanted to get rid of capital punishment. "In view of these things," the senator asked, "whither is the Spirit of the Age leading us?"[8] Capital punishment had always been necessary for the prevention of crime. Human nature could hardly have changed so quickly.

The problem with the abolitionists, as retentionists saw it, was that they were so confident in the march of progress that they ignored the actual circumstances in which people lived. Christian benevolence was fine as a general principle, but, said one retentionist, "were society invariably to act on general principles, there would follow social ruin." People who interpreted the New Testament to disallow capital punishment "may be suitable legislators for a community of infants, or angels," William Dwight suggested, "but they are mere dreamers in a world of living men." When Joseph Story was asked to write an entry called "Punishment of Death" in the new *Encyclopedia Americana*, he took the opportunity to diagnose the cause of opposition. Some people doubted the right of the state to execute criminals, he conceded, but "the doubt is often the accompaniment of a highly cultivated mind, inclined to the indulgence of a romantic sensibility, and believing in human perfectibility."[9] The retentionists saw themselves as hard-headed realists, battling the abolitionists' reveries of progress.

Why would abolitionists let themselves be carried away with such a "shabby and deplorable looseness of feeling," as one newspaper put it? It was because they had lost their firmness in all aspects of life. "Those insane men . . . do not punish their children for filial disobedience, nor allow their schoolmasters to use the rod," a New Englander complained about the abolitionists. "Nothing can surpass the soft sentimentality" of some opponents of the death penalty, admitted one of their own number. An antebellum zoologist was sure that the fact that strong storks kill weak storks "will no doubt greatly horrify the sickly word-heroes of the anti-capital punishment" movement. To be soft and sickly in the early nineteenth century was to be feminine, so it is no surprise that one retentionist

referred to abolitionists as "mostly females of very tender feelings, and men of a similar spirit."[10] To favor capital punishment, by contrast, was to be hard, firm, disciplined—in short, to be masculine.

As evidence of the abolitionists' softness, retentionists had only to point to their constant professions of humanity, which often included implicit assertions of a superior capacity for sympathizing with the distressed. When Nathaniel Hawthorne's "new Adam and Eve," virtuous innocents set down in the fallen America of the 1840s, encountered their first gallows, they exhibited a reaction that Hawthorne and his fellow abolitionists would have proudly called their own:

> "Eve, Eve!" cries Adam, shuddering with a nameless horror. "What can this thing be?"
>
> "I know not," answers Eve, "but, Adam, my heart is sick! There seems to be no more sky!—no more sunshine!"[11]

This kind of sensibility, a pride in one's own sympathy for others and an implicit claim of superiority to those who did not share it, was becoming common in the early nineteenth century. It only exasperated the retentionists. "When the awful sentence of death is pronounced, then a sentiment of compassion begins to operate in favour of the unfortunate convict," complained the Connecticut judge Zephaniah Swift; "the sense of justice is drowned in the feelings of compassion; and false humanity begins to run riot." A New York execution broadside agreed that "the indulgence of false sympathy is the most dangerous feeling that can pervade a community." True humanity or true sympathy was an understanding of what was best for the community as a whole, which might well be the execution of a single member. Partisans of the condemned were losing the forest for a single tree. "The question becomes one of simple computation," explained one writer; "shall the interests of one individual, or those of the nation conflicting with his own, turn the scale?" The more the abolitionists professed their sympathy for criminals, the more they opened themselves to this kind of criticism. The New Yorker John Pintard scoffed in 1824, with reference to what he called the "mistaken philanthropy" of those who took up the cause of condemned prisoners, "It is a great distinction to be hung in this quarter."[12]

Reformers were criticized for false humanity in a second sense as well. Their vaunted humanity was insincere, their opponents charged, because they were less interested in the welfare of criminals than in smugly revel-

ing to their own sensitivity. "As for the humanitarian protests, they are a little shaky," the New York magazine *Vanity Fair* suggested when a bill to abolish the death penalty was pending in the state legislature. "The framers of this bill are not so celebrated for their gushing love of their species." The charge had some truth to it. During the Mexican War, as one critic pointed out, "these same tender-hearted people" who emphasize the sacredness of human life "advocate the doctrine that it is right to call out innocent men from their families, and butcher them by the thousands to vindicate the honor of our national flag."[5] Few of the abolitionists had any actual contact with the men whose lives they sought to save. Few exhibited much concern for the conditions of the penitentiaries in which these men would spend their lives if not executed, conditions that worsened almost from the moment the penitentiaries were built.

Retentionists savored a basic inconsistency in the abolitionist argument: reformers simultaneously asserted that the death penalty was too severe a sentence and that prison would be a superior deterrent. Abolitionists have "discovered a punishment which is far preferable to that of death," mocked the *Methodist Quarterly Review*, "first, because it is more severe, and, therefore, more efficacious; secondly, because it is less severe, and therefore more humane." The tension can be traced back to Beccaria, but that did not make it any easier to explain away. "Hanging is either more severe than imprisonment for life or less so," another opponent of reform argued. "If more severe, it deters more; if less so, what right have we to imprison? Have we a right to do a thing more cruel than hanging?" The only possible conclusion was that "opponents of a death penalty are at variance with themselves." If prison were to replace hanging, the abolitionists might come back to claim that *prison* was too severe. "The popular sympathy for the poor sufferers will fill thousands of streaming eyes with tears," one minister predicted, "and most probably, the doctrine will then prevail, that a state-prison punishment for life, is a thousand times more cruel than hanging, which might probably lead to the abolition of all laws against murder whatsoever."[6] Retentionists interpreted the inconsistency as evidence that abolitionists cared more for their own tender feelings than for the fate of condemned criminals.

Abolitionists, meanwhile, attributed support for capital punishment to the character of their opponents. Retentionists were people afraid of all change, the sort who had defended every evil practice from the slave trade to the divine right of kings, for no reason other than a terror of the

new. "The class of thinkers to which they belong," one abolitionist complained, "suppose it is only necessary to cry 'hug-a-bear' to terrify the whole of us out of our wits." Abolitionists were confident they could overcome this pathological fear of change, because after each step along the path of progress in the past, conservatives had learned to welcome the reform. "Most of those who have regarded with favor existing death penalties," noted Robert Rantoul, the leading abolitionist in the Massachusetts legislature, "have united in the chorus of condemnation of those which have been repealed; so that no sooner is any one item stricken from the bloody catalogue, than the voices of its former defenders are silenced."[7] On this view, the complete abandonment of capital punishment was just a matter of time.

No group of retentionists angered reformers more than the clergy. In speaking out in support of capital punishment, they contended, men who purported to be followers of Jesus were acting most un-Christlike. "My soul is filled with amazement, indignation and horror, utterly uncontrollable," reported a young New York poet who in 1845 still called himself Walter Whitman. He was shocked that "clergymen call for sanguinary punishments in the name of the Gospel . . . instead of Christian mildness and love, they demand that our laws shall be pervaded by vindictiveness and violence." With the exception of some members of some of the more liberal denominations, the clergy tended to favor the death penalty, a position reformers saw as the "obstinate dogmatism and resistance to progress . . . of a piece with the history of priestcraft throughout the world."[8]

The abolitionists' criticism of pro-death penalty ministers bristled with resentment at a group they believed ought to have been their allies and who they feared were pulling their congregations along with them. Such ministers were no better than "benighted and blood-thirsty pagans." They seemed "ambitious to assume the function of the very Body Guard of the Hangman." The clergy were "mad for the gallows." John Greenleaf Whittier's anti-capital punishment poem "The Human Sacrifice" reserved its greatest venom for the minister who attended the condemned prisoner:

> And near him, with the cold, calm look
> And tone of one whose formal part,
> Unwarmed, unsoftened of the heart,

Is measured out by rule and book,
With placid lip and tranquil blood;
The hangman's ghostly ally stood,
Blessing with solemn text and word
The gallows-drop and strangling cord;
Lending the sacred Gospel's awe
And sanction to the crime of Law

The abolitionists' disgust could hardly have been made any clearer. They occasionally tried to turn the ministers' views to their own public relations advantage. In 1843 the Massachusetts legislature received a petition praying for the abolition of capital punishment and, in case that request should not be granted, asking that pro–death penalty ministers be appointed as hangmen. "This has caused much fluttering among the clergy," chortled William Lloyd Garrison. "It certainly places them in a ludicrous dilemma; for it cannot be degrading to do what God requires."[7] The ministers embodied all that abolitionists hated about retentionists—their blind adherence to the status quo, and their quickness to cite scripture as a bar to change of any kind.

Participants in the battles over capital punishment that took place throughout the North thus understood themselves to be divided more according to character type than anything else. Opinions about the death penalty do not appear to have been related to political party or to economic interest. The only factor that correlates with the division was religious denomination, a characteristic that was itself closely related to one's views about progress and the possibilities of reform. In Rhode Island, for example, the most influential abolitionists tended to be Unitarians, Universalists, and Quakers, the most liberal denominations, whose theology emphasized salvation and reformation, while the vocal retentionists tended to be Calvinists, who emphasized retribution and innate depravity and were inclined to take the commands of the Old Testament more literally. A similar split can be found in Massachusetts, between the Unitarians and the Universalists on one side and the more orthodox Congregationalists on the other. The leading retentionists in New York were members of the Calvinist clergy. Outside the Northeast the denominational breakdown was not so clear. When the Michigan legislature voted in 1846 to abolish capital punishment, the vote did not track the religious affiliation of the legislators, most of whom were in any event not affiliated

with any denomination.[8] The debate over capital punishment was in part a sectarian struggle, but a struggle caused less by theological doctrine than by the divergences in the temperaments of the members of the various sects. The death penalty was a battleground in a larger war between two fundamentally different ways of understanding human nature and the world.

Northern Reform

The practical results of all this debate were minimal before the 1820s. After the wave of statutes enacted in the 1790s, there was little legislative activity for the next three decades. In 1801 Connecticut decapitalized arson, but only where no victim's life had been placed in danger. In 1805 Massachusetts removed the death penalty from arson and burglary except of dwellings during the night, and from robbery except on the highway. Indiana decapitalized robbery and armed burglary in 1807. In 1812 New Hampshire became the sixth state to limit capital punishment to murder and treason (after the five that had done so between 1794 and 1798). Ohio became the seventh two years later. But northern legislation proceeded in the opposite direction at the same time. Connecticut's new 1796 criminal code retained capital punishment for murder, rape, bestiality, sodomy, certain arsons, and various kinds of maiming. Indiana capitalized rape, arson, and horse-stealing in 1807, and then the following year capitalized receiving a stolen horse. New York, which had limited the death penalty to murder and treason in 1796, brought it back in 1868 for residential arson and in 1817, after a prison riot, for arson in a prison. In 1809 and 1810, when Governor Simon Snyder of Pennsylvania asked the state legislature to abolish the death penalty completely, the suggestion went nowhere.[9] The movement for reform had stalled after its initial successes in the 1780s and 1790s.

From the 1820s through the 1850s, however, legislation in the northern states was all in the direction of abolition. As opposition to capital punishment spread, state after state removed the death penalty from the lesser felonies like rape, robbery, burglary, and arson, while no state added to its list of capital crimes. Rape, for instance, ceased to be a capital crime in Maine in 1829, in Illinois in 1832, and in Massachusetts in 1852. By 1860 no northern state punished with death any offense other than murder and treason. Many of the northern states followed Pennsylvania in dividing murder into degrees, with capital punishment only for the first. The poet

of executions for each of the lesser felonies dwindled close to zero well before capital punishment was formally abolished for that crime. The last person executed for rape in the North appears to have been Horace Carter, a white man hanged in Massachusetts in 1825. The last northern arsonist executed may have been Horace Conklin, hanged in 1851 after burning down several buildings in Utica, New York. But Conklin's execution was an aberration, apparently the first for arson in any northern state since Simeon Crockett and Stephen Russell were hanged in Massachusetts in 1836,[9] and apparently the first in New York for any crime other than murder since the 1826 hanging of a black arsonist known only as Will. If one leaves out executions for the federal crime of mail robbery, the last robbers hanged in the North seem to have been Gilbert Close and Samuel Clesby, in Massachusetts in 1822. And no northern state appears to have hanged anyone for burglary in the nineteenth century. After the 1820s capital punishment in the North was in practice imposed almost exclusively for murder.

Northern legislatures meanwhile found themselves, beginning in the 1830s, devoting much of their attention to the issue of whether to eliminate capital punishment completely. A committee of the New York Assembly recommended abolition in 1832, but the Assembly as a whole did not agree. Legislative committees recommended against abolition in 1838 and 1839. In 1841 the issue was referred to a committee chaired by the young progressive lawyer John O'Sullivan, the editor of the *United States Magazine and Democratic Review* and a leader of the New York abolitionists. O'Sullivan produced a 165-page report that summed up all the arguments for abolition and that, after being printed and widely sold as a book, became one of the best-known statements of the abolitionist position. "I have never read a more convincing document," one reviewer concluded. The Assembly nevertheless rejected abolition by a close margin. O'Sullivan ended his political career at the age of twenty-nine by declining to seek reelection in 1842. But reformers did not give up. In 1844 they formed the American Society for the Collection and Diffusion of Information in Relation to the Punishment of Death, an organization based in New York City that soon changed its name to the more accurate New York State Society for the Abolition of Capital Punishment. The society circulated petitions, sponsored speeches and meetings, and briefly even published its own magazine.[10]

In and around Albany, James Richmond and other abolitionists also repeatedly petitioned the state legislature. As a result, the issue would not go away. Assembly committees recommended abolition in 1845, 1846, and 1847. None of these bills passed. In 1848, when yet another Assembly committee took up the issue, the arguments on both sides were so stale that the majority (which rejected abolition) simply reprinted the minority report from 1846, and the minority likewise reprinted the 1846 majority report. Assembly committees again recommended abolition in 1851, 1859, and 1860.[11] But these bills all failed too. In three decades of effort the abolitionists several times came tantalizingly close to persuading the New York legislature to abandon capital punishment, but they never succeeded.

Similar events took place in legislatures throughout the North. Massachusetts House committees chaired by Robert Rantoul recommended abolition in 1835, 1836, and 1837, to no avail. As one of Rantoul's critics put it, "I should say that he was as fit for the Insane Hospital in Charlestown, as he is for the legislative hall in Boston." Reformers pressed on, by organizing public meetings and circulating petitions. A House committee rejected abolition in 1848. Special joint committees of both houses voted in favor of abolition in 1851 and 1854, but no legislation passed. In Massachusetts, as in New York, the abolitionists never quite achieved their goal. Abolitionists were well organized in Pennsylvania too—in 1847 a committee of 30 women managed to get 11,777 women to sign a petition asking the state legislature to abolish the death penalty. Bills were before the legislature almost every year from the late 1820s through the early 1850s. All were rejected. The governor of Connecticut recommended abolition in 1842, and a joint committee of the state legislature agreed, but no bill passed. When another joint committee recommended abolition ten years later, again no bill passed.[12]

Abolitionists came close to success in several other northern states. A series of New Hampshire governors proposed abolition almost every year beginning in the mid-1830s, and in 1842 the state House of Representatives came within a few votes of it, but the measure lost 103–104. In 1844 the issue was given to the voters, in a referendum appearing on that year's presidential ballot. Prisoners awaiting execution were reprieved, to see what the voters would say. They rejected abolition by a margin of nearly two to one. In Vermont the state House of Representatives passed an abolition bill in 1838, but the Senate rejected it. A New Jersey assembly committee reported in favor of abolition in 1847, to no avail. The issue was be-

fore the Ohio legislature every year from 1836 to 1838 and 1844 to 1850, and was even considered at the 1850–51 Ohio Constitutional Convention, but no action was ever taken. The governors of Illinois and Indiana urged their legislatures to abolish capital punishment, but the legislatures refused.[11]

The abolitionists did register some accomplishments. In Maine, after a bill abolishing the death penalty completely was rejected, the legislature enacted a measure that would prove to have an identical effect. A statute of 1837 required a one-year waiting period between conviction and execution. At the expiration of the year, the governor would have to sign a warrant before the execution could go forward. The intent of the measure was to delay hangings until the passions aroused by the crime and the trial had subsided, and then to require the governor to take a very visible (and perhaps politically costly) step to set the process of execution in motion. It worked. Maine did not execute a single person between 1837 and 1865. In later years so-called Maine laws swept through the Northeast, enacted by Vermont, New Hampshire, Massachusetts, and New York.[12]

Finally, in 1846, Michigan became the first state to abolish the death penalty for murder.[13] The debate in Michigan was no different from that anywhere else. If the state had any relevant distinguishing features, they were a relatively small political and economic elite and a correspondingly egalitarian distribution of wealth and power, and a relatively small number of citizens who were members of the more conservative religious denominations, which may have created conditions conducive to reform of all kinds by virtue of the absence of powerful interests favoring the status quo. The state's small population allowed a determined minority pushing reform to have a greater impact.

Michigan was followed by Rhode Island in 1852 and Wisconsin in 1853. Like Michigan, these were relatively egalitarian states in which the conservative Protestant denominations were not very large, and states with populations small enough to permit focused abolitionist groups to have some influence.[14] Michigan, Rhode Island, and Wisconsin would be the only three states to abolish capital punishment before the Civil War.

The movement to abolish the death penalty tailed off in the late 1850s, as sectional controversy and slavery crowded out other issues, and then the movement virtually ceased during the Civil War. Abolitionists could look back on a mixed record. They had persuaded the legislatures of three small states to abolish the death penalty. Five other states had established a one-year waiting period between conviction and execution. The abolitionists' biggest success was in abolishing capital punishment for crimes other than murder. In 1800 capital punishment had been common throughout the North for rape, robbery, burglary, and arson; by 1860 it was gone. But along with these achievements had come a consistent string of failures. Year after year, in state after state, they had been unable to convince legislatures to repeal the death penalty completely.

Abolishing capital punishment for murder was probably never as popular as its proponents believed. They could see considerable opposition to the death penalty in individual cases, but opposition to the death penalty in the abstract was much less pervasive. The era was thick with reform movements, and like many of them, from the establishment of utopian communities to the adoption of strange new diets, abolition may have been a cause favored primarily by educated elites. In the one instance when abolition was put up to a popular vote, New Hampshire's 1844 referendum, it lost resoundingly. Legislators, who had to answer to a widening electorate, were almost certainly more closely attuned to public opinion on the subject than were the reformers. The abolitionists' limited successes were most likely due more to their own persistence, organization, and access to legislative agendas than to any groundswell of popular support for their cause. It was a movement heavy at the top, full of energetic leaders like John O'Sullivan and Robert Rantoul, but too light at the bottom.

The abolitionists hurt themselves by the breadth of their own interests. They needed to stay tightly focused on capital punishment to have any chance of prevailing, but many were too interested in other reform issues to devote more than a fraction of their time to the death penalty. In 1821, when Elisha Bates of Ohio founded an anti-capital punishment magazine called *The Moral Advocate*, the death penalty was only part of its charter, which encompassed "war, dueling, capital punishments, and prison discipline." That range of issues was compact compared with *The Daily and Weekly Chronotype*, founded in Boston, which advertised that it advocated

> equality of human rights, and the abolition of slavery, thorough land reform, cheap postage, abstinence from intoxicating drinks, exemption of temperance men from taxes to repair the damages of drinking, a reform in writing and spelling the Eng-

lish language, the abolition of capital punishment, universal and kindly toleration in religion, life and health insurance, water-cure, working men's protective unions, and all other practical forms of association for mutual aid—and generally, Progress."

When the death penalty was tucked into such a long list of proposed reforms, real legislative change was unlikely.

Such a scattering of interests weakened even the most successful of the antebellum anti-capital punishment periodicals, *The Hangman*, founded by Charles Spear in Boston in 1845. When it began, the weekly journal was devoted to nothing but showing "the entire inutility of the gallows." A year later, however, *The Hangman* changed its name to *The Prisoners' Friend*. As Spear explained, "We intend to enter on a still wider, though not a more important question, that of the Proper Treatment of the Criminal," and "to point out also the Causes, Effects and Prevention of Crime." By 1851, when Spear listed the sixteen "main topics" of his journal, abolition of the death penalty was number sixteen. It had been pushed aside by such issues as the "comparison of the advantages and disadvantages of the separate and congregate systems of prison government" and the "best means of securing a uniform method of reporting prison sentences." And in 1855, when Spear again listed the purposes of *The Prisoners' Friend*, their number had shrunk to fourteen and abolishing capital punishment was not one of them. A journal devoted to abolition had slowly transformed into one devoted to prison conditions. Spear's own handbills soliciting subscriptions suggest that a magazine about capital punishment could not make ends meet.[9] He had to broaden his subject to find a readership, a market made up largely of people interested in many other reforms that had little to do with the death penalty.

Opposition to the death penalty tended to go along with a cluster of reform positions on other issues. "It holds capital punishment cruel, barbarous and unnecessary, the diffusion of useful information a panacea for all social evils, and so forth," remarked the New York lawyer George Templeton Strong in 1848 about a book he was reading—"anybody can gulp its doctrines on all other subjects from these specimens." Nearly all the leading abolitionists had other issues they considered more important. Lydia Child proposed circulating anti-capital punishment petitions along with anti-slavery petitions, because she knew that the same people

would be willing to sign both. Arguments against capital punishment were sometimes made in temperance broadsides. Some of the movement's leaders were better known for other causes. An anti-death penalty meeting in Rochester, New York, was led by Susan B. Anthony and Frederick Douglass.[10] Many of the abolitionists simply had too many balls in the air to be effective lobbyists against capital punishment. With public opinion in most northern states still running in favor of death as a punishment for murder, part-time leadership was not enough.

Southern Retention

The institution of slavery caused events in the South to take a very different course for both whites and blacks. Much of the debate that took place in the North simply did not occur in the South because of the perceived need to discipline a captive workforce. By the Civil War there was a wide gulf between the northern and southern states in their use of capital punishment.

The South did move somewhat in the direction of the reforms that swept through the North. In South Carolina, one resident complained in 1800, "mercy is reserved for the murderer, and applause for the assassin." The South Carolina lawyer William Grayson recalled that in the early nineteenth century, when the ringleaders of an incipient slave conspiracy were convicted and decapitated and their heads placed on poles along the highway, the "sight was so disgusting that some of the younger people refused to bear it. They so far disregarded the majesty of the law as to take down the hideous butcher's work and bury it where it stood." An aggravated punishment for slaves that had been routine in the eighteenth century was becoming unbearable in the nineteenth. Grayson considered that new sensibility an improvement over "the barbarity of judicial proceedings in the good old time." Some southerners engaged in the same kind of utilitarian calculation as northerners concerning the efficacy of a punishment jurors were reluctant to impose. Matthew Brandon, a member of the North Carolina state legislature, complained of a deficiency "in our criminal laws, as far as they respect slaves, for if I am not much mistaken, there is not amongst us, one capital punishment, for ten crimes that are committed." The problem was the law's severity. Brandon accordingly proposed "to abolish capital punishments except it be for 3 or 4 crimes of the deepest dye, for crimes committed by slaves, and substitute in their room, some-thing more lenient, and consequently more cer-

tion."[9] From comments like these, one can infer the existence of at least some sentiment among southerners to reduce the use of capital punishment.

Petitions for clemency in the antebellum South often included arguments in favor of partial abolition. The impending execution of a slave named Jesse for attempted rape in 1837 caused one petitioner to explain to North Carolina Governor Edward Dudley that the state's law "is generally regarded, as one of terrible severity, if not of harsh cruelty." Even Robinson's death sentence for stealing fifty pounds of seed cotton, and those of Calvin Lyttle and James Adcock for minor burglaries, all drew complaints from North Carolinians that capital punishment was disproportionate to the offenses. Similar claims of disproportion came from residents of Baltimore and Alexandria on behalf of the pirate Israel Derry and the burglar Richard Hull, each sentenced to death for stealing a few dollars.[10] Again, such comments suggest a broad if often unarticulated belief that the southern states ought to punish fewer crimes with death.

The South did not have a visible corps of penal reformers as the North did, but it had a few prominent individuals who took an interest in abolishing capital punishment. The best known was Edward Livingston of Louisiana, who joined the state assembly in 1820 and was soon after appointed to draft the state's new criminal code. Livingston took the opportunity to press for the abolition of capital punishment in reports he submitted to the legislature in 1822 and 1824. Neither of his proposals was adopted, in part because Livingston was elected to the U.S. House of Representatives in 1822 and so was away from Louisiana for long periods. In Washington Livingston again took up the cause of abolition. He joined the Senate in 1828, and in 1831 he introduced legislation that would have abolished the death penalty for federal crimes. By the time the bill was before the Senate, however, Livingston had become Secretary of State and so once again his rising career prevented him from being an effective promoter of his own cause. None of his proposed measures on capital punishment was ever enacted.[11]

Livingston was not the only prominent southern advocate of abolition. In South Carolina Francis Lieber advised the governor to limit capital punishment to murder, and the Charleston lawyer and judge Thomas Grimké advocated complete abolition. Governor John Sevier of Tennessee asked his state legislature to abolish the death penalty in 1807. Legislators in Kentucky and Alabama urged their states to do the same. "Were I

supreme Legislator there should be no capital punishment," affirmed one correspondent to North Carolina Governor William Graham.[12] These lesser-known southern reformers had no more success than Livingston, if measured by the fact that no southern state abolished capital punishment completely.

If measured by partial abolition, however, reformers did accomplish something. All the southern states abolished the death penalty for certain crimes committed by whites. In 1809 Maryland decapitalized burglary, robbery, counterfeiting, and horse-stealing. Louisiana abolished the death penalty for arson in 1817 and for certain burglaries in 1818. In 1826 Florida decapitalized manslaughter, robbery, burglary, and slave-stealing. Delaware decapitalized manslaughter in 1829 and burglary and kidnapping in 1841, and then divided murder into degrees in 1852. As most of the southern states began building penitentiaries, some cut back drastically on their use of capital punishment for whites. Tennessee restricted capital punishment to first-degree murder when it revised its penal code and began building a penitentiary in 1829, and in 1838 it became the first state in the country to give juries discretion, in cases of first-degree murder, to sentence defendants to prison instead of death. When Alabama constructed its penitentiary in 1841, it limited capital punishment to treason, first-degree murder, and participation in slave rebellion. Even in South Carolina, which lacked a penitentiary and may have had the most severe criminal law of any southern state, the number of capital crimes in the penal code steadily decreased.[13] By the Civil War every southern state punished whites with something other than death for at least some crimes that had been capital in 1790.

The southern states moved nearly as far as the North in ceasing to execute whites for crimes other than murder. No white rapists are known to have been hanged in the antebellum South. Between 1800 and 1860 the southern states are known to have executed only seven white burglars (including four in North Carolina, the last in 1859), six white horse thieves (including three in South Carolina, the last in 1824), and four white robbers (two each in North and South Carolina, the last in 1835). By the Civil War capital punishment for whites was, with a few exceptions, in practice reserved for murder throughout the South nearly as much as in the North.

But most of the northern debate over eliminating capital punishment completely was absent from the South. No committee of any antebellum

southern state legislature recommended complete abolition. The issue was never part of any legislative agenda. Public debates on the subject were not held; societies devoted to abolishing the death penalty were not formed; the pages of magazines and newspapers were not filled with articles taking one side or the other. Many of the laws and practices abandoned by the northern states in the first half of the nineteenth century were retained in the South.

While few whites were actually executed for crimes other than murder in the antebellum South, many of the lesser felonies remained capital on the books. In 1860 rape was still a capital crime for whites in Arkansas, Delaware, Florida, Louisiana, Maryland, North Carolina, and South Carolina. Burglary was still capital in Delaware, Louisiana, and the Carolinas. Arson was capital in Florida, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, and Virginia. A few southern states, including Georgia and Texas, punished horse-stealing with death. Many retained capital punishment for the crime of "slave-stealing," or aiding runaway slaves. Many used it for conspiring in a slave revolt. Scattered other crimes remained capital in individual states—buggery and sodomy in Florida, forgery in Georgia and the Carolinas, and "wilfully and maliciously depriv[ing] any person of any one or more of the genital members" in Delaware. A man in Guilford, North Carolina, was even sentenced to death for bigamy, although the sentence was apparently never carried out.[8]

The even North-South distribution of power in Congress ensured that federal criminal law embodied a hybrid of northern and southern policies toward capital punishment. By the middle of the century the federal criminal code included more capital crimes than any northern state, but fewer than most southern states. Rape, arson, piracy, and aggravated mail robbery remained federal capital crimes, along with murder and treason. Throughout the North, the same act could be a noncapital crime if prosecuted by the state but a capital crime if prosecuted by the federal government. George Wilson was sentenced to death in federal court in Pennsylvania for robbing the mail, but as his mother argued in her successful plea for mercy to President Andrew Jackson (in a passage most likely written by a lawyer), "the state of public feeling" in Pennsylvania was against the death penalty for mere robbery.[9]

If the list of capital crimes for whites in the antebellum South was much longer than in the North, it was far shorter than the corresponding

list for southern blacks. In Texas slaves but not whites were subject to capital punishment for insurrection, arson, and—if the victim was white—attempted murder, rape, attempted rape, robbery, attempted robbery, and assault with a deadly weapon. Free blacks were subject to capital punishment for all these offenses plus that of kidnapping a white woman. In Virginia slaves were liable to be executed for any offense for which free people would get a prison term of three years or more. Free blacks, but not whites, could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault if the victim was white. Attempted rape of a white woman was a capital crime for blacks in these two states as well as Florida, Louisiana, Mississippi, South Carolina, and Tennessee. In his 1856 treatise summarizing the slave laws of the southern states, George Stroud counted sixty-six capital crimes for slaves in Virginia against only one (murder) for whites. In Mississippi he found thirty-eight crimes capital for slaves but not for whites. The ratios in the other southern states were less skewed but all had a similar imbalance.[10]

The black-white divergence in southern criminal codes was reflected in actual practice. Blacks were hanged in numbers far out of proportion to their percentage of the population. When the Reverend Preston Tarley was executed in Charleston, Virginia, in 1858, observers noted that while it was unusual to hang a minister, the real interest in the event arose "from the strange spectacle of the execution of a white man in this region. It was the first occurrence of the kind ever known to have taken place within the county."[11] Blacks were executed for many more crimes than whites were. All of the whites known to have been hanged in Virginia between 1800 and 1860 were hanged for murder. But of the hundreds of blacks hanged in Virginia in the same period, only about half were murderers. The other crimes for which blacks were commonly hanged included rape, slave revolt, attempted murder, burglary, and arson. In Louisiana nearly all the whites executed were murderers, but the blacks hanged for murder appear to have been outnumbered by those executed for planning slave revolts, and several others were hanged for arson and attempted murder. Kentucky hanged whites only for murder but hanged blacks for attempted murder, rape, attempted rape, arson, and slave revolt. The Carolinas were the states most likely to hang whites for crimes other than murder, but even they executed many more black noncriminals than white.

Even if it were possible to count the official antebellum executions, the

figure would underestimate the intensity with which capital punishment was used for black criminals in the South, for two reasons. First, it would not include the growing number of lynchings—that is, unofficial executions. These often had the approval, and sometimes the actual participation, of government authorities. Blacks were the primary victims. They were often lynched because they were believed to have committed crimes, so we can assume that many would have been executed officially had they lived a bit longer. Second, to the official count one would also have to add the many slaves who were spared execution only to be sold abroad. In Virginia (and perhaps in other southern states as well) condemned slaves were often sold to contractors who agreed to convey them out of the United States. Between 1801, when Virginia established the program, and 1858, when it was abandoned, nearly nine hundred condemned slaves were transported out of the country.[8] Because the state had to compensate the slaves' owners—a rule that prevailed in almost all the southern states, to ensure that owners would not attempt to protect their property from the criminal justice system—selling slaves rather than hanging them represented a substantial saving for the public treasury. If these slaves had been executed, the proportion of blacks hanged in the antebellum South would have been significantly higher.

The South's retention of capital punishment for blacks was surely a direct result of slavery. In the middle of the nineteenth century whites formed a minority of the population in South Carolina, Mississippi, and Louisiana. Blacks made up more than a third of the residents of Virginia, North Carolina, Georgia, Florida, and Alabama. From the perspective of slaveowners, harsh punishments were necessary to manage such large captive populations. The institution of slavery prevented southern states from developing alternatives to the death penalty for blacks. Incarceration or forced labor would not have been much worse than slavery itself, so these would not have been effective deterrents. Most white southerners had little interest in the reformation of black criminals—many would have dismissed the goal as impossible—so the ideal of prison as a penitentiary would not have held any appeal. With two million captives on their hands, southern state governments saw no solution other than capital punishment.

Slavery was also responsible, although less directly, for the South's retention of capital punishment for whites. In the North the most outspoken supporters of abolishing capital punishment were also in favor of

abolishing slavery and a host of other reforms. Northern reformers such as Robert Rantoul or John O'Sullivan operated within networks of like-minded people who had similar positions on a wide range of issues. The social and economic importance of slavery in the South prevented this culture of reform from emerging there.[9] The South had always been a more violent place than the North, and one may suppose that the continued employment of violent punishments for slaves acclimated white southerners to violent punishments generally, further reducing the opportunity for any significant anti-capital punishment movement to take hold. Hangings remained public in most southern states long after they had moved into the jail yard in most of the North, which also suggests that antebellum white southerners were simply more comfortable with public violence than white northerners. Finally, the idea that crime was caused by environmental or biological influences appears not to have been as widespread in the South as in the North, perhaps because such a belief would have entailed difficult moral questions about the propriety of punishing slaves. The loss of confidence in the criminal's blameworthiness had contributed to the North's movement away from capital punishment. The absence of comparable change in the South helped keep the death penalty relatively intact.

By the time of the Civil War the North had been through decades of debate over capital punishment. The South had not. Three northern states had abolished the death penalty completely, and the rest had confined it to murder and treason. In the South capital punishment still existed on paper for a wide range of crimes committed by whites and still existed in practice for an even wider range committed by blacks. Slavery had produced a wide cultural gap between the northern and southern states in attitudes toward capital punishment.

6

INTO THE JAIL YARD

David Mason was hanged for murder in Asheville, North Carolina, in 1852, before a crowd of approximately five thousand. Two spectators left very different accounts of the event.

Mary Gash, a farmer from Reems Creek in the western part of the state, described Mason's execution in a letter to her cousin Adda. The hanging was the first Gash had ever attended. "I don't think I ever in my life saw as many people congregated together at one time," she told Adda. "The streets were full, the Hotells were full, the Town and every other place was full." With the help of some male acquaintances, she pushed through the crowd to reach a spot from which she could watch Mason being taken out of the jail and placed in a cart. The crowd, including Gash and her party, then rushed to the gallows to stake out positions there. Gash was close enough to get a good view of Mason mounting the platform and to hear the minister's sermon. "After the sermon was over," she reported to Adda, "I pressed through the guard and sprung into the cart" just vacated by Mason, "where I could see and hear all that was going on." Mason called out to the witnesses who had testified against him, all of whom were present, and accused them of lying. Some of them shouted back to Mason. One of them even stepped up on the platform. Gash recalled, "and I think if the rope had not been around [Mason's] neck, he would have struck him." This witness and Mason kept up an argument at close quarters until the sheriff "told them the occasion was too solemn for any such altercation, the thing was then hushed, and the Sheriff proceeded to tie his arms, and legs, and then to knock the trap from under him, and left him suspended, between heaven and earth, by a rope." Gash held her watch, "to see how long till he be dead." Mason was left to hang for twenty-five minutes to ensure that he had died. Later Gash

reflected on what she had seen and realized that "it did not have that effect upon me that I expected it would." She had watched a man die, and that was that.[1]

Zebulon Vance was in the crowd too. Vance was a young Asheville lawyer planning a political career. Ten years later, during the Civil War, he would become the governor of North Carolina. After the war he would serve again as governor, and he would then spend the last fifteen years of his life as a U.S. senator. Vance's account of Mason's execution was part of a letter to Harriet Espy, the woman he was courting and would eventually marry, so it is fair to assume that he was trying to make a good impression. Unlike Gash's matter-of-fact description, Vance's dripped with disapproval from the start. "There was a vast concourse of people from all parts of the country here, estimated about 5,000. One third of which at least was women!" Any doubt that Vance considered a hanging an inappropriate sight for women was dispelled in his next sarcastic sentence. "I followed the crowd out to the place of execution, heard the religious exercises usual on such occasions, and then not being of such a tender heart as most of the women there, I left and came back to keep from seeing him hang." This was a barely implicit assertion of moral superiority to the women and the men in the crowd. A refined man, a civilized man, a man who truly had a tender heart, would stay for the sermon but not for the hanging itself. Hearing a sermon was a form of self-improvement; watching a hanging was a barbaric entertainment. "I suppose such details are not pleasant to you by any means," he added, "and I therefore forbear." By not saying more, Vance was according Espy the same superiority he had just claimed for himself. Ordinary people might enjoy a hanging, but someone as sensitive as Espy would be "filled with horror of the scene." The lesson of a public execution was normally that one ought not to commit crimes, but the horror experienced by Vance seems to have been less of violent death than of too much contact with the kind of people who turned up to watch executions. Vance concluded with an ambiguous prayer, to be "safe from the ebullitions of passion!" – ambiguous because the passion from which he sought protection might as easily have been that of the spectators as that of the criminal.[2]

Mary Gash was watching an execution; Zebulon Vance was watching himself watch an execution. Gash closely inspected the physical details of the hanging; Vance inspected his own response to it. Gash saw the crowd from the inside and considered its members as her equals; Vance

saw it from the outside and thought of himself as better than Gash and her companions. Gash found nothing shameful about watching Masters die; Vance considered the sight beneath him and professed shock that so many women like Gash did not feel the same way.

Such differences were not expressed in the eighteenth century, if they existed at all. Americans of all kinds—men, women, and children—watched executions and believed that the experience was a wholesome one. In the nineteenth century, however, the public representation of capital punishment became embroiled in issues of class and taste. For members of a self-conscious elite, particularly in the North, sights that had been thought educational in 1800 were too shocking for display in 1850. As elites stopped going to hangings, they came to view the crowd as a rabble out for a good time, too caught up in a carnival spirit to appreciate the moral lessons that were being imparted. Between 1830 and 1850 every northern state moved hangings from the public square into the jail yard, a much smaller space within the control of government officials. Some southern states did so as well, but most kept the ceremony open to the public until the later nineteenth and early twentieth centuries.

The change in location had significant implications for the justifications underlying capital punishment itself. Public hanging had been the paradigmatic deterrent, broadcasting a message of terror as widely as possible, but once executions moved into the jail yard their deterrent influence had to work at second hand. The sort of people most likely to need deterring were those least likely to be invited to an execution. The ceremony had once brought the community together, in an emphatic and participatory statement of retribution, but now that community was dispersed. One could sit at home and read about an execution in the newspaper, or sign a petition to the governor asking that a death sentence not be commuted, but the visceral sense of collective condemnation was gone. Changes in attitudes toward the dramaturgy of capital punishment thus subtly undermined part of its very purpose.

Gentility and Display

"Thousands of both sexes and of every age assemble at the appointed hour. It is then, while their hearts are throbbing wildly with dismay and anxiety, that a breathless multitude witness the awful spectacle." That was how one Pennsylvanian described public executions in 1809. But he was no critic. "Could any scene be imagined," he asked, "more extensively

and more permanently beneficial than this?" He was writing in *The Gleaner*, a Lancaster magazine that was in the midst of a series of three essays on the death penalty. The magazine's pseudonymous writers all took different points of view, but the one point on which they agreed was that a public hanging was the best possible opportunity to remind the public of the consequences of crime. "Where the whole is ceremoniously conducted and accompanied with decorous solemnity the effect must be in the highest degree awful and impressive," said a second writer, like the first using the word *awful* in its sense of awe-inspiring. "It is impossible but the stoutest resolution must shudder at such a sight," concluded the third. "Impressions are here made which time can never eradicate from the minds of the spectators." As the nineteenth century began, much of the death penalty's deterrent value was still understood to reside in the way it was presented to spectators. It was almost unthinkable to execute criminals anywhere but in the open, where everyone could watch and learn.

As in the eighteenth century, executions were normally not raucous affairs. Eyewitness accounts of public hangings in the first few decades of the nineteenth century include very few instances of unruly behavior. Twenty thousand people saw the Thayer brothers hanged in Buffalo in 1825, but "every individual performed the part assigned him, whether as actor, or a spectator, with a kind of melancholy calmness that precluded the possibility of disturbance." Peter Long was hanged in Connecticut in 1816, before a crowd that observed "the strictest discipline and decorum." The lawyer Allen Davidson attended a double hanging in Asheville, North Carolina, in 1835, along with several thousand others, many of whom had spent the previous night camping in the public square. Although Davidson saw some "toughs rushing about, drunken men," they were greatly outnumbered by the "thoughtful and sober people," including "women and children in their country finery." Four or five thousand spectators, the most people ever assembled in tiny Edgefield, South Carolina, gathered in 1850 to see Marian Posey hanged. "The only events to disturb the calmness and melancholy of the day," the local newspaper reported, "were a few drunken brawls in the afternoon, which ended in several fisticuffs, that produced no more serious results, we believe, than a few scratches and bloody noses."[4] Incidents of violence or undue hilarity were noteworthy, and were accordingly included in accounts of executions when they occurred, precisely because they were so rare. At most times

hangings the behavior of the crowd gave rise to nothing worth reporting. Spectators were usually orderly.

They were also inclined to sympathize with the condemned prisoner. It had long been noticed that the execution ceremony, by focusing attention on the qualities of the person being hanged, produced as much pity as condemnation. An 1829 broadside poem commemorating the execution of Moses Lyon emphasized the affinity spectators came to feel for the condemned prisoner, who was publicly presented as a sort of victim himself:

> See! yonder the gibbet doth stand,
> on which he must shortly expire:
> While thousands all over the land
> Stand gazing in mournful desire.

Lyon was a sixty-year-old drunkard who had beaten his wife to a pulp, but the dramaturgy of a public hanging had a way of evoking sympathy even for the most unattractive people. The last verse of the popular ballad "Amasa Fuller," about a man hanged in Indiana in 1820, went:

> The time at length arrived when Fuller was to die,
> He smiled and bade the audience adieu;
> Like an angel he did stand, for he was a handsome man.
> On his breast he wore a ribbon of blue.[4]

The staging of public hangings could turn criminals into heroes.

In the eighteenth century sympathy had been accepted as an unfortunate but unavoidable aspect of capital punishment, but in the early nineteenth century people began to complain about it and to suggest that it provided a reason for abolishing public executions. A hanging creates in spectators "emotions of pity, humanity and sympathy, which incline them to take the part of the sufferer, and to blame those who inflict those sufferings upon him," one Philadelphian argued in 1811. "These emotions are excited in the breasts of the best part of the spectators: and cause, even in them, a temporary disaffection to the government." Such complaints became more and more common as time went on. "What can more effectually defeat the ends of justice," a magazine wondered, "than to present malefactors before the public, in their prisons, or on the scaffold, as if they were martyrs, dying joyfully in Jesus, and ascending from the gallows to glory?" Such had been a goal of public execution a century earlier; now it was a consequence to be avoided. In John Neal's 1822 novel Logan, the character Oscar, whom Neal intended to be the voice of wisdom, argues against public hanging. "I have seen ten thousand people in tears because a handsome boy was to be executed," Oscar declares. "They have made up their minds to be sentimental."[5] By the 1820s the dramaturgy of hanging day was increasingly viewed as counterproductive because it made spectators side with the criminal against the state.

Meanwhile, an older critique of public executions—that by habituating spectators to violence they increased the incidence of violent crime—was gaining currency. The argument had been made by Cesare Beccaria in the 1760s and repeated by Benjamin Rush in the 1790s. Many more writers turned to it in the early nineteenth century. After the hanging of Jason Fairbanks in 1805, the Massachusetts minister Thomas Thacher concluded that "such exhibitions naturally harden the heart, and render it callous to those mild and delicate sensations which are the out guards of virtue." "The exhibition, of extreme punishment," an Ohioan argued, "seems to have a natural tendency to destroy the moral sensibility, and produce a shocking depravity of the human character." Stories began to circulate of crimes committed during and shortly after executions, by men presumably spurred on by what they had seen. One reform magazine gleefully recounted a murder recently committed in New Haven by Vinson Gunn, who not long before had been part of a team that constructed the town's gallows. Executing a criminal in public "is only exalting the profession of murder and making life cheap," concluded one midcentury observer.[6]

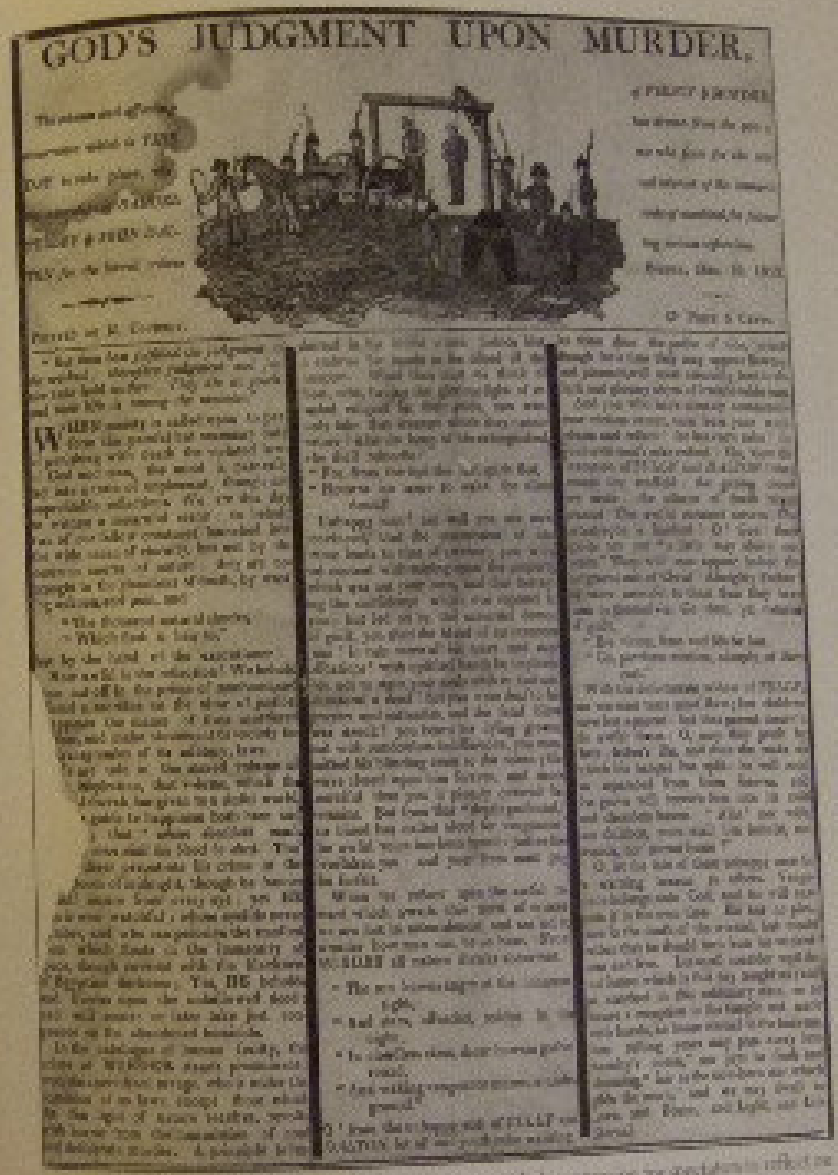
Critics never specified exactly how watching a hanging made a person more prone to violence. The argument had its skeptics, most memorably Ambrose Bierce, whose remarks remained as apt in the early twentieth century as they would have been in the early nineteenth: "Obviously, the thing is absurd; one might as reasonably say that contemplation of a pitted face will make a man go and catch smallpox, or the spectacle of an amputated limb on the scrap-heap of a hospital tempt him to cut off his arm."[7] But just as today's claims about violence on television and in films tend to attract supporters in the aftermath of a well-publicized murder, so too did arguments about public executions whenever it was discovered that a criminal had once been a member of the crowd.

The idea that public hanging promoted crime and the belief that it created undue sympathy for the criminal were already familiar in the eigh-

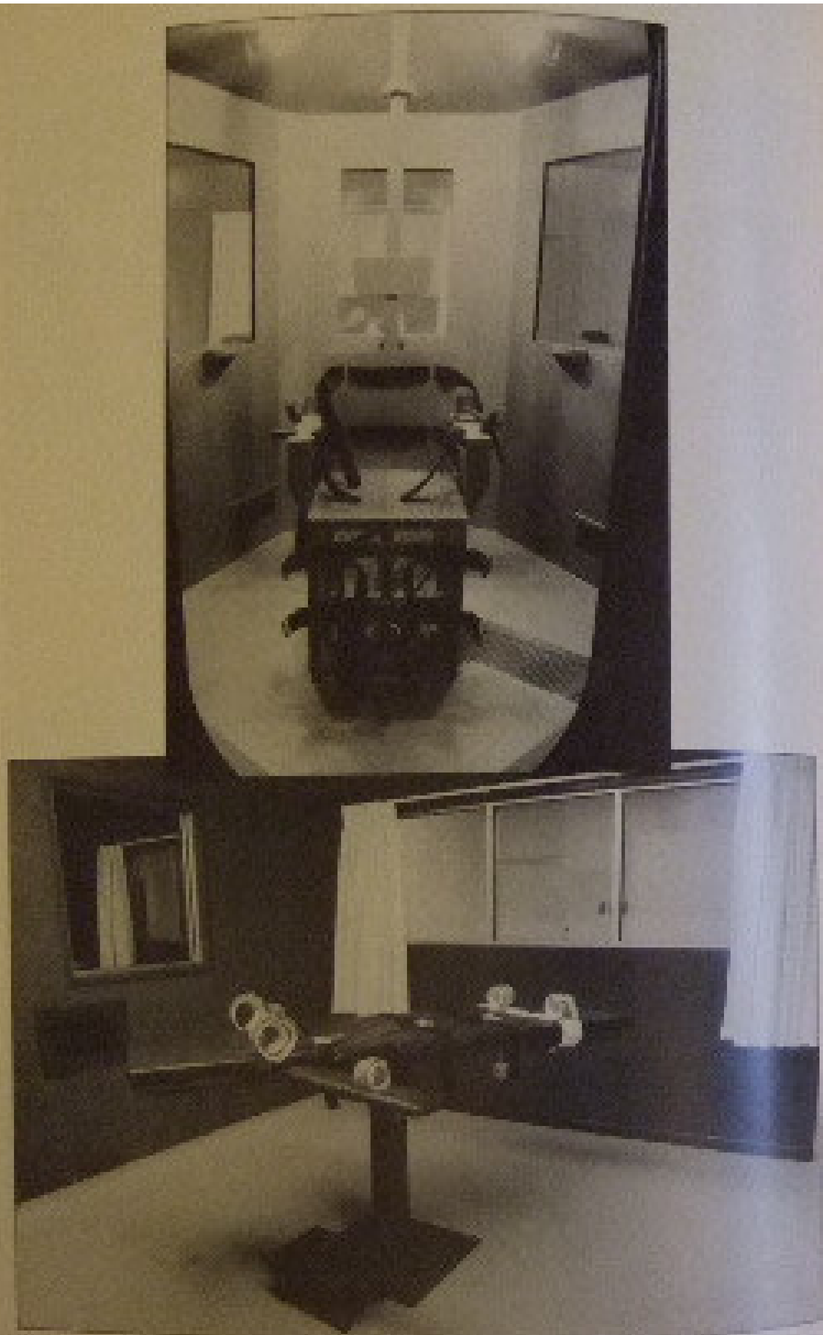
teenth century. They gained added currency in the early nineteenth century, however, because they were reinforced by a new conception of the crowd. Eighteenth-century Americans saw nothing unseemly about attending an execution. People from all walks of life watched hangings and described them without any hint of embarrassment about having been present. The experience was understood to be spiritually instructive, like attending a sermon, and for that reason parents took their children. In the first few decades of the nineteenth century, however, elite perceptions of mass gatherings shifted. The crowd came to be seen as an unruly, threatening mob. Spectators at an execution had once been perceived as a cross-section of the community, but now elites began to see the crowd as composed of the community's lesser members. Spectators showed up only to "witness the struggles of a dying man—to view the soldiery—to view the parade," and to consume "*food* and *spirituous liquors*," complained one early critic in 1811. By the 1820s and 1830s the spectators at hangings were widely understood to constitute an "ignorant mob" propelled toward the gallows by "the love of death like that which devils feel." They were "grossly vulgar" people who were there to enjoy "the scene of dissipation and confusion" around the scaffold.[9]

After one hanging in western Massachusetts in 1826, a local magazine published an account that is representative of this disdainful view of the crowd:

> The demoralizing effect of *public executions* was very fully exemplified in this county last week. Never, as we are informed, was there so great a debauch. Cattle shows, musters, sleigh-rides, all the public gatherings and drunken bouts put together, could not equal it.
>
> An hundred persons are made worse, where one is made better by a public execution. Rioting, drunkenness, and every species of disorderly conduct, prevail on such an occasion to an extent never witnessed from any other cause in this land of steady habits. There is on most occasions, that draw persons together in large bodies, some attention to decorum, some regard to character, some appearance of feeling, but all these are banished, for the time, by the thousands who flock together to witness a *public execution*.[10]



The theme of this 1835 broadside, that an execution provided an occasion for spectators to reflect on their own lives, was typical of the speeches given to onlookers and to the condemned prisoners themselves. In the drawing at the top, a horse pulls the cart away from the gallows, causing the prisoner to drop. Courtesy of the Library of Congress



Top: By 1955, when Maryland's gas chamber was installed, most states had abandoned hanging in favor of either the electric chair or the gas chamber. After the Supreme Court reinstated capital punishment in Gregg v. Georgia (1976), Maryland, like most states, switched to lethal injection [illegible] for its first post-Gregg execution in 1994. Courtesy of the Maryland State Archives, Special Collections (Death Chamber Photographs Collection), MSA SC 4407-12.

Bottom: Maryland conducts executions in this room—three between 1994 and 2000. While the condemned person lies strapped to the table, a series of three chemicals is injected into his arm. The [illegible] window at the right provides [illegible] Courtesy of the Maryland [illegible]

There had been an enormous change in opinion over the past two decades. Elites had become less comfortable in the presence of large numbers of those they perceived as their inferiors. Respectable people had once been proud to go to an execution. Now they were embarrassed and more than a little apprehensive.

Attitudes toward the public staging of violent death had already begun to change in the late eighteenth century, when the colonies/states replaced the public forms of aggravated capital punishment—burning, dismemberment, and the gibbet—with dissection, a punishment seen by a relatively small number of people. In the early nineteenth century that change in sensibility was brought to bear on ordinary hangings. The protest spread and intensified throughout the rest of the century.

Critics were quick to contrast the vulgarity of the execution crowd with the superior taste they found in themselves. "Persons of refined feeling and just sentiment are not disposed to be present" at hangings, asserted Thomas Upham, professor of mental and moral philosophy at Bowdoin College, in 1836; "it is a sight, however criminal the victim may be, which they find to be strongly repugnant to something within them." The reformer Lydia Child contrasted "the dense crowd . . . swelling with revenge, and eager for blood" with people like herself—"the innocent, the humane, and the wise-hearted"—who would never go to a hanging.[11]

In 1824, when a committee of the Pennsylvania House of Representatives became the first American legislative body to recommend abolishing public executions, this was the primary reason. "That the serious and well disposed on witnessing such a scene, should be deeply and solemnly impressed with a sense of the awful demerit of crime," was no doubt true, the committee observed. The problem was that "few, very few of such characters attend an execution from choice; and while they approve of the sentence of the law, they avoid being spectators of its execution." The drama was played to an audience "composed chiefly of those among whom moral feeling is extremely low." The crowd was made up of "the thoughtless; the profligate; the idle; the intemperate; the profane; and the abandoned," who were there not to profit from the moral lesson being presented but "to be amused; to enjoy a day and season of mirth and indulgence." These were people "in pursuit of pleasure, and the closing scenes of the day are evidently indicative of their success. They retire from the execution evidently delighted."[12] Pennsylvania kept its hangings

public for a few years longer, but it was already clear that a transformation in polite taste had driven a wedge between those who would attend an execution and those who would not.

Refinement in the early nineteenth century was intimately connected with gender. As men and women came to be understood to occupy separate spheres of life, as the hustle and bustle of public space became a male domain, people contemptuous of execution crowds were shocked above all at the number and the behavior of the women present. "When the drop fell, shrieks were heard from females, and it was said some fainted," a Worcester minister lectured from the pulpit the Sunday after the rapist Horace Carter was hanged. "It is a matter of surprise and regret, that female curiosity should so far get the better of female delicacy, as to induce their presence at such spectacles." In 1835, after William Enoch was executed on Long Island in one of the last public hangings in New York, *Niles' Weekly Register* remarked on the "great number of *females*" present, and used the developing convention of femininity to joke that "the dear creatures have but few occasions to shew their sensibility at hanging parties." An enormous crowd, estimated at between twenty and thirty-five thousand, gathered in St. Louis in 1841 for the hanging of four men convicted of a double murder. "We were surprised to see the number of women attending the execution," the local newspaper reported. "The place and occasion seemed to us to be one at which no female should have appeared. Nevertheless, judging from the equipages and dress which we saw, we supposed that some who rank high in fashion were present." That respectable women should watch an execution was too much to bear. "We, however, trust they really were not of that class." Despite the outward appearances of refinement, these must have been the kind of women with tastes low enough to enjoy a hanging.[13]

To what extent were these changing perceptions of the crowd based on real changes in the crowd's behavior? The vast majority of eyewitness accounts of executions from this period include no mention of any unforward activity on the part of spectators, and some explicitly compliment the crowd on its deportment. But the few incidents that did occur were widely known. When Joel Clough was hanged in New Jersey in 1833, for example, a committee of the Pennsylvania House of Representatives was so troubled by reports of drinking and gambling in the crowd that it once again recommended abolishing public executions.[14] These seem to have been unusual occurrences, but they provided critics with some empirical confirmation of their views of the crowd.

But the transformation in the polite understanding of the execution crowd was almost certainly due less to actual changes in the crowd than to changes in perception. In the early nineteenth-century United States, the people we would today call the middle class began to see great differences in the realm of taste and manners between themselves and those they considered to be less refined. Respectable people placed a new emphasis on etiquette and gentility, matters that had once been the province of the rich. The respectable took an intensified interest in proper behavior in public spaces. Public gatherings and entertainments had once appealed to a wide range of people, but now they were dividing along class lines into the highbrow and the lowbrow, with different codes of spectator conduct. One aspect of this developing genteel sensibility was an aversion to the sight of death. Disease and dying moved away from the home and into hospitals. Cemeteries moved away from urban areas to garden-like spots far from living people. The genteel no longer wished to see death, and they began to feel contemptuous of those who did. Once they had viewed the spectators at executions as fellow citizens, now the crowd became a vulgar mob. Reformers, drawn from the middle class, were humane and sensitive to the suffering of others, the crowd was callous to the sight of violence and enjoyed watching the infliction of pain. This change in perception was an international phenomenon that took place across Europe at the same time.[15]

There were intelligent, literate supporters of public hanging in the nineteenth century, who recognized that critics were less concerned with the fate of the condemned prisoners than with the delicacy of their own feelings. Whether or not to conduct hangings in public "is a purely sentimental consideration," argued *The Nation*. Life in prison was not a pretty sight either, and yet few seemed to be complaining about that because it was not on public display. George Cheever lashed out at the "revolting hypocrisy" of moralistic writers who deplored public hangings but showed up at each one, to compose "high-wrought pictures of public executions, detailed in all their minutiae," all the while criticizing their fellow spectators as vulgar thrill-seekers. (As if to confirm the view of Cheever and others that critics were more interested in publicizing their own sensitivity than in the welfare of criminals, the reformer Margaret

Fuller began her review of Cheever's book in the *New York Tribune* with the claim: "We have had this book before us for several weeks, but the task of reading it has been so repulsive that we have been obliged to get through it by short stages, with long intervals of rest and refreshment between."[8] The supporters of public hanging recognized that they were witnessing a change in polite taste rather than in actual behavior.

If the crowd was a mob oblivious to the moral lesson a hanging was supposed to impart, it followed that public executions had ceased to serve their original purposes of deterrence and retribution. "To the ignorant and unenlightened" who watched hangings, death was exciting, not frightening.[9] Worse, spectators like these were precisely the ones inclined to sympathize unduly with criminals and the ones most likely to commit crimes themselves after watching a public display of violence. Delivering a message of retribution required that the spectators at a hanging acknowledge the legitimacy of the state and the justice of the criminal law, but a rowdy crowd of drunkards appeared to respect neither. The new perception of the crowd reinforced older critiques of public punishment to create a wave of opposition to public hanging in the first half of the nineteenth century.

In some places, such as New York and St. Louis, local officials moved individual executions into the jail yard, apparently on their own initiative. But it became far more common for state legislatures to require *all* hangings to be conducted out of the public eye, either inside the jail itself or within the jail's high walls. The first state to abolish public executions was Connecticut, in 1830. By 1846 six other northeastern states had done the same—Rhode Island, Pennsylvania, New Jersey, New York, Massachusetts, and New Hampshire. In 1838 Iowa gave its judges discretion to order hangings in public or in jail. Soon after, Mississippi and Alabama became the first southern states to move hangings into the jail yard. By 1860 public hanging had been abolished throughout the North and in Delaware and Georgia. As the Georgia legislature explained, the practice "is believed by many to be demoralizing in its tendency and disgraceful to the character of our people for refinement and good taste." In later years, as the West gained population, the western states did the same.[10]

Public execution held on longer in parts of the South, where the mounting frequency of lynchings prevented whites from becoming too sensitive to the public display of violence. There it was still possible to argue, as one Virginian did in 1849, that "a criminal, dangling from the gal-

lows, is well calculated to excite a train of sober thought. He is a fresh promulgation of the law." The notion of hiding punishment from public view would have seemed vaguely tyrannical in the late eighteenth century, and as late as 1859 a member of the Georgia legislature could declare that he "wanted no Bastille in Georgia—he wanted the trials in public and so ought to be the executions." Many, and perhaps a large majority, of the public hangings in the late nineteenth-century South were of blacks, often before largely black crowds.[11] Genteel contempt for the crowd was most likely tempered by the feeling among whites that nothing short of a vivid display of force could deter such an audience, and that in any event little better could be expected from them.

But sensibilities were changing in the South as well. By the end of the nineteenth century public hangings had been abolished in Virginia, Kentucky, Maryland, Louisiana, Missouri, South Carolina, and Tennessee. In 1901, giving a clear signal that government officials had differing expectations for the two races, Arkansas abolished public hanging except for rape, a crime for which capital punishment was in practice largely limited to blacks. Arkansas moved even rapists' hangings out of the public eye five years later. Kentucky, which had abolished public hanging in 1880, brought it back for rape and attempted rape in 1920, at the discretion of local officials. Legislators explained that electrocution inside the state penitentiary, the execution method for other capital crimes, would not be adequate to deter rapists. Georgia and Mississippi each briefly reauthorized local officials to conduct public hangings around the turn of the century. Soon, however, the handful of states that still hanged criminals in public began switching to the electric chair, a method of punishment that for technical reasons had to be inflicted indoors. As the electric chair was adopted in North Carolina, Oklahoma, Florida, and Texas between 1909 and 1923, these states by necessity stopped executing their criminals in public.[12] The only state where public hanging remained was Kentucky.

The later public executions were attacked in the northern press, which saw them as evidence of southern backwardness. Northern reports emphasized the availability of food and liquor, sold by vendors on the grounds. "There were 50 fakirs doing business with exhibitions which bordered on the side-show variety," noted one Massachusetts newspaper about a 1901 hanging in Arkansas. In 1915, when the hanging of two men in Starkville, Mississippi, before a crowd of five thousand was accompa-

nied by picnic lunches, free lemonade, and political speeches from the candidates in the approaching primaries, the *New York Globe* called the affair a "carnival of brutality."[21] By that point there had been no public hanging in the Northeast for nearly a century. It seemed a throwback to a less civilized era.

The execution that drew the greatest attention, and the one that ended the practice of public hanging in the United States, was that of Rainey Bethea, hanged for rape in Owensboro, Kentucky, in the summer of 1936. Estimates of the crowd ran between ten and twenty thousand. The town's hotels were so full that thousands had to camp out overnight at the execution site. Hot dog and drink vendors set up near the gallows. Spectators jeered throughout, even while Bethea prayed. As soon as the trap was sprung, before Bethea had been pronounced dead, souvenir hunters tore off pieces of the hood that covered his face. The event gave rise to a whirlwind of criticism in the national press. The headline in the *Philadelphia Record* read "They Ate Hot Dogs While a Man Died on the Gallows." The *Boston Daily Record* decried the "callous, carnival spirit" exhibited by spectators. "The revolting spectacle at Owensboro was not the hanging of Rainey Bethea," cried the *Cincinnati Enquirer*. "It was the crowd which found in a hanging grand entertainment." Indignant editorials from all over the country were reprinted in the local newspapers. A few days later officials in Covington, Kentucky, who had an imminent execution of their own, announced that it would be conducted in jail, and that journalists would be barred from attending. Bethea's was the last public hanging in Kentucky. The state legislature abolished the practice in 1938.[22] There have been no public executions in the United States since then.

Some of the death penalty's later opponents looked back with mixed feelings at what they came to see as a bad bargain, in which supporters of capital punishment had bought off much of the opposition by agreeing to remove executions from public view. Many of the opponents of public hanging were indeed the very same people who argued against the death penalty generally. "When men begin to weary of capital punishment," the reformer Wendell Phillips concluded, "they banish the gallows inside the jail-yard, and let nobody see it without a special card of invitation from the sheriff."[23] But the timing of the move suggests this view is too cynical. The initial wave of statutes abolishing public hanging came in the early 1830s, but the movement to eliminate capital punishment generally did not peak until the 1840s and early 1850s. By 1846, when Michigan became the first state to abolish the death penalty, virtually all the northern states had long been conducting their hangings in jail. If the move into the jail yard had been a compromise with those who wished to do away with the death penalty outright, the move would have come earlier, not before, the peak of opposition to capital punishment itself.

Two Audiences

As hangings moved into the jail yard, local officials gained the power to control access to them. They tended to use that power, not to ban spectators altogether, but rather to divide the audience for executions into two groups. Inside the yard's walls, a few hundred well-connected observers packed into a small space for an intimate view of the execution. Outside, a much larger crowd milled about, hoping for a glimpse of the action. The division in polite taste that ended old-fashioned public hangings was reproduced in the physical division of the public. The genteel had taken the whole show for themselves.

A jail-yard hanging was open to a much smaller number of spectators than could attend a public hanging. In some states the number was set by statute. In others it was a function of how many people could fit in the jail yard or in the indoor space where the gallows had been set up. Attendance was by invitation. Many localities printed up formal invitations, with blanks for the sheriff to fill in the name of the invitee. Sheriffs were besieged with applications for invitations. Thousands pestered the New York sheriff to watch the hanging of Jeremiah O'Brien in 1867, including one well-dressed individual who, after his application was denied, showed up in the Police Court and asked to be committed to jail for ten days as a drunkard, in the hope that his cell would afford a view of the execution. Crowds often numbered in the hundreds. Three hundred fifty watched the hanging of George Pemberton in Boston. Over five hundred saw the execution in southern Illinois of the outlaw Charlie Birger. A thousand jammed into the Harrisburg jail for the execution of Weston Keiper and Henry Rowe.[24]

When there were more would-be spectators than could fit into the jail yard, political realities forced sheriffs to allocate the limited number of spaces to those with connections to power. In Brooklyn the hanging of Henry Rogers was witnessed by "over a hundred low beer-house politicians" and "between twenty and thirty lager-beer saloon-keepers" who

were friends of the sheriff's.[27] "Every man whose uncle was a second cousin to the Sheriff's step-brother by marriage was on hand" to see a multiple execution in Pennsylvania. It took some clout to get an invitation, so the crowd often included large contingents of politicians, lawyers and doctors. Spaces were normally reserved for journalists as well. In states where the number of spectators was limited by statute, sheriffs routinely gave the surplus temporary appointments as deputies. New York allowed only twelve spectators, but the sheriff of Utica appointed four hundred deputies for the hanging of William Henry Caldwell in 1859. In Manhattan the special deputies numbered approximately one hundred fifty for James Eager in 1845 and Matthew Wood in 1849 and nearly a hundred for Aaron Stookey in 1851. Minnesota law limited attendance to six spectators, but there were over four hundred special deputies at the 1898 hanging.[28] Admission tickets and commissions as deputies often sold in an active market outside the yard's walls.

Jail-yard hangings were thus still conducted before a crowd, but a smaller and more elite crowd than before. The crowd's behavior was often not particularly somber. Jacob Harden was hanged in New Jersey before hundreds of men, including reporters from all the New York, New Jersey, and Philadelphia newspapers. As they waited, the spectators compared the autographs many had obtained from Harden. Some examined the gallows, trying out the pulleys and playing with the spring. Everyone smoked, some whistled. An old man sold photographs of Harden. Another showed off his collection of obscene pictures. The well-connected audience at one 1878 hanging scrambled immediately afterward for pieces of the rope as souvenirs. A similar rush took place in Pottsville, Pennsylvania, in 1908, among hundreds of invited spectators who apparently shared a local belief that a piece of rope used in a hanging was a cure for rheumatism. Henry Wadsworth Longfellow summed up the atmosphere in the yard in 1854:

> Then within a prison yard,
> Faces fixed, and stern, and hard,
> Laughter and indecent mirth;
> Ah! it is the gallows-tree!

The most sober among the spectators may have been the prisoners, who could often see the events of the day from the windows of their cells.[29] But crowd behavior inside the jail yard never came in for the same kind of

criticism as comparable behavior on the part of the wider public. It mattered a great deal precisely whose conduct was at issue.

As room for spectators dwindled, the percentage of women in the crowd decreased. The trend was in part a matter of power—men were more likely than women to have access to the informal mechanisms for allocating tickets—and in part a continuation of the gender-based demarcation of space that began in the early nineteenth century. Women had once been as welcome at hangings as men, but no longer. By the early twentieth century it was national news when an actress dressed up in a man's overcoat and hat and managed to sneak into a Chicago hanging.[30] Capital punishment had become a male domain.

Because the event was still staged before a crowd, most of the rituals of hanging day survived the move into the jail yard. There was still a procession, though now much shorter, from the cell to the gallows. Ministers no longer gave sermons, but they still led prayers. The condemned person still had an opportunity to address the spectators. In New Jersey James Donnelly spent two hours asserting his innocence. In Ohio John Hughes rambled on so long, in a transparent attempt to prolong his life by filibustering, that the sheriff had to intervene. The audience was much smaller, but it was still large enough that many condemned prisoners tried their best to keep up appearances. John Ward of Vermont told the chaplain that he was reluctant to pray on the scaffold because "he desired to keep quiet, and to exclude all that would excite and unman him, and that he wanted a face of brass before the guard and others who might see him." James McMahon of Newark declared that he "was going to die like a soldier," William Delaney of Long Island that he would go to the gallows "like a man, and not like a nigger with his mouth open."[31] Had executions been conducted in jail from the start, the ceremony would doubtless have looked quite different, but much of the ritual retained vestiges of the old public hangings.

Another kind of vestige—the public itself—often waited just outside the gates. Hangings could draw thousands of people who had no expectation of being allowed inside. Fifteen thousand streamed into Fonda, New York, in 1878 to stand outside the jail during the execution of Samuel Steenburgh. The roads outside the Troy, New York, jail were impassable for three blocks around for the 1867 hanging of Hiram Coon. At the execution of Walter Goodwin in rural northern Pennsylvania, a large crowd formed outside, many screaming "hang 'im." Executions were sometimes

enough in any given place to attract huge crowds, even when there was nothing to see. In New York, the biggest city in the country, there were only thirty hangings between 1830 and 1880. In more sparsely populated areas a hanging could come once in a lifetime. The crowd outside the gates became the object of the same contempt among polite society that had once been turned on those watching the execution itself. These raucous spectators were "men and women, summoned by the smell of blood, attracted to the gallows by the instincts of their ferocious natures," people with "savage faces and hands uplifted in drunken frenzy," argued George Lippard in *The Empire City*, his midcentury novel of New York life.[8] When hangings moved out of public space, all that remained was the excitement of being part of a crowd near a big event—precisely the experience the genteel believed one was not supposed to savor.

At some hangings sympathetic sheriffs gave the public a chance to inspect the gallows before clearing the yard of the uninvited. At others the public was let inside after the hanging was over, to get a good look at the dangling corpse. Five thousand people from surrounding farms and villages, including many women with babies on their shoulders, rushed in to see the body of Harry Butler, hanged in Delaware in 1926. Sometimes there were less formal opportunities for inspection. The body of the Mississippi outlaw James Copeland was stolen and put on display in a drug store in Hattiesburg.[9]

At most hangings, however, the best chance to see anything was to find a spot on a nearby roof or in a tree. "The roofs of the neighboring houses and barns and the limbs of trees were black with people," reported a member of the crowd outside Jacob Harden's hanging in New Jersey. The roof of one barn collapsed. The limb of a cherry tree broke off, bringing a dozen people down with it. The commotion was so great that spectators inside the yard rushed onto the scaffold to get a view over the walls to see what had happened. At Charles Ecker's execution, someone constructed viewing stands outside the walls and charged two dollars per place, until the sheriff noticed and sent officers outside to kick everyone off. Homeowners around the jail in Pottsville, Pennsylvania, rented out their rooftops for the hanging of Joseph Brown. Sheriffs in New York and Buffalo fought back by constructing awnings above the scaffold to prevent people from watching from atop houses and trees. In Philadelphia the sheriff moved the gallows into a corridor inside the jail, where it could not be seen from the outside.[10] But efforts to exclude the crowd outside

were limited by the need to cater to the crowd inside, which normally required space and sight lines for a few hundred people.

Officials feared that tension over access to executions would erupt into violence, and sometimes it did. At the execution of Peter Robinson in New Jersey in 1841, when the mayor mounted the top of the wall to announce that the hanging was over, the crowd pushed through the gates and swarmed into the yard. Robinson's body had been removed, but the rope was still there, so it was cut into pieces and distributed. In 1878 a crowd of ten thousand awaiting the hanging of Edward Webb in Mansfield, Ohio, overran an armed guard and demolished the jail's fence. A nervous sheriff telegraphed the governor, who telegraphed back to go ahead with the execution in public. A similar incident occurred the following year in Nebraska.[11] The public's desire to attend hangings was so strong that people were still turning out, decades after they had been barred from the grounds.

The chance to watch a hanging clearly meant something to a great many people. They applied in large numbers for tickets, they traveled long distances to hangings they had no realistic hope of seeing, they risked their safety to sit in tree branches and on rooftops for hours at a time, and on occasion they overpowered local officials to gain a spot inside the walls. Why? One suspects that the motivation for attending an execution was the same as it had been for centuries. Part of it was the need to express retribution for crimes against the community. Part was the thrill of watching violent death. Part was the excitement of being in a big crowd. Part was the chance to see celebrities, especially famous criminals. Whatever the intent of the individual spectators, the effect of their collective presence in the days of public hanging had been the creation of a meaningful community ritual, in which they made manifest their condemnation of crime in the most visceral way possible, by being present at the law's execution. But not any longer.

A Different Kind of Public

The public lost direct access to executions between the 1830s and the 1930s, but other changes in the process of capital punishment were taking place at the same time, changes that redefined the nature of the "public" with respect to the death penalty. Three were particularly important: the growth of the press, an intensification of the attention paid to celebrated trials, and the widening of participation in clemency decisions. The pub-

lic was still closely involved in capital cases, but it was involved in a very different way. It was transformed from an actual crowd into a collection of readers and writers, a crowd that never physically assembled.

The first step in the decline of public hanging—the spate of statutes in the North and part of the South between the 1830s and the 1890s—coincided with the development of the newspaper as a mass medium. The new "penny press" included lavish descriptions of crimes and executions, which allowed readers a vicarious experience in place of the real one that was now being denied. Journalists were always allowed a place at jail-yard hangings. Front-page stories included descriptions of the same stock elements that had once transfixed spectators—the condemned person's behavior, his last words, and a vivid account of the physical details of death. Contemporaries recognized that the newspaper was serving as a substitute for public hanging. "Privacy, by means of the modern newspaper, no longer exists," claimed one midcentury observer: "a criminal to-day is hanged with even greater publicity than when swung off at Tyburn, to the delectation of a mob—for to every person in the land comes the elaborate description, the minute particularization of every incident." Newspaper accounts were "so far detailed as virtually to bring even the unimaginative reader into the death chamber and make him an eye-witness of what went on," one paper complained: "how much has really been gained against publicity over the old method of execution in the public square or on the hilltop?" But the same flood of information could be viewed more happily, as providing all the deterrence of a public hanging without the unseemly aspects of public spectacle. "The example lives and is multiplied by the newspaper," crowed *Harper's Weekly* in 1857, "jurists of all countries may well arrive at the conclusion, that the example pondered upon by millions of readers is more powerful than the one gloated over by a few curious thousands of spectators."[14]

The changing nature of the public was not missed by condemned prisoners themselves. When Holly Vann was hanged in a jail yard in Dallas in 1905, he could look out over the ticket-holders wedged into the small space beneath him, but he knew where his real audience could be found. "If anything comes out in the newspapers about me going to the scaffold and dying nervous," Vann instructed the sheriff while his cap was being adjusted, "please have it corrected for me."[15] Vann was dying game in the old tradition, but he was performing for a new public of readers.

Newspaper accounts of executions could be so sensational, and so contrary to polite sensibilities, that in the late nineteenth and early twentieth centuries several states banned the press from reporting the details of executions. New York enacted the first of these laws in 1888. The following year Colorado and Minnesota barred journalists from describing hangings. Similar laws were later enacted in Virginia, Washington, and Arkansas. These bans were widely flouted. In 1893, after a quadruple execution was lavishly recounted in the New York press, the city's district attorney obtained indictments against the editors of several papers, but the resulting criticism of the ban was so strong that the legislature repealed it soon after. Although newspaper editors in the affected states claimed to be confident that such censorship was inconsistent with freedom of the press, the newspapers lost their primary constitutional challenge when the Minnesota Supreme Court upheld the state's statute.[16] (At the turn of the twentieth century the First Amendment and its state constitutional analogues were very rarely invoked and were interpreted more narrowly than they are today.) The statutes nevertheless remained largely unenforced, and the press continued to report the details of executions.

The newspapers covered sensational trials too. By running daily accounts of the proceedings, often in copious detail, the press helped the trial replace the execution as the primary forum at which spectators could participate in the criminal justice system. People had always been attracted to the drama of litigation, but not on the scale that developed in the middle of the nineteenth century. Trials became national events. Famous defendants became celebrities to an unprecedented degree. "Where throughout the United States has not his criminal history been the subject of conversation?" asked one tourist about the Harvard professor John Webster, convicted of murder in 1850. "In Charleston and Savannah, as well as in Boston and New York, the public has universally given the closest attention to the trial."[17] The earliest of the celebrated trials took place at the same time states were moving their hangings into the jail yard. The infamous Lucretia Chapman was tried for murder in Philadelphia in 1832, the year before Pennsylvania abolished public hanging. The equally well-known Richard Robinson was tried for murder in New York in 1836, the year after New York began conducting its hangings in jail. By devoting so much space to trials like these, newspapers were responding to a preexisting demand among their readers, but they were simultaneously stimulating that demand by defining the criminal trial as an event deserving intense public attention.

Barred from executions, the public turned up at trials instead. Spectators packed into courtrooms so tightly that it could become difficult to move the defendant in and out. Women were now normally unable to watch hangings, but they could see trials, and they did in large numbers. During closing arguments at the Cincinnati trial of William Arnson in 1854, there were so many women present that they occupied the area normally reserved for the judge, including the judge's own seat.[5] The biggest criminal trials were often handled, even for the state, by private lawyers celebrated in their own right for eloquence, so closing arguments attracted big crowds. So did the announcement of the jury's verdict.

But the phase of the trial that seems to have been the most popular was sentencing, the part most similar to the old public hanging. Sentencing involved no suspense. The jury had already returned a verdict requiring a death sentence. As in a hanging, everyone knew how it would come out in the end. The drama resided in the emotion of the moment, in the words chosen by the judge and in the reaction of the condemned person. The sentencing of John Hanlon in Pennsylvania in 1870 was watched by a huge crowd including dignitaries and several professional actors studying the performances. At the 1881 sentencing of Albert and Charles Talbott in Missouri for killing their father, "the Judge broke down, covered his face with his hands, and quivered with emotion; strong men wept, women shrieked. The vast multitude present were shaken as if by a tempest."[6] Spectators at hangings had inspected the demeanor of the condemned prisoner, who, aware he was being scrutinized, had tried his best to remain stoic. Now the scrutiny came at the end of the trial, often accompanied by the same affected unconcern on the part of the defendant. A sentencing had many of the aspects of a hanging but none of the violence. Like a hanging, it was a moment of dramatic community condemnation, but it was an event the respectable could still feel good about attending.

Trials had to be conducted in courtrooms, however, and courtrooms were never large enough to accommodate crowds even a tenth of the size of those that had attended executions. The public that followed celebrated trials was primarily a reading public, not an actual assembly of people. As with jail-yard executions, a small number could be physically present, but a much larger number experienced trials at one remove.

The same wider public was meanwhile becoming more involved in the process of clemency. In the eighteenth century letters to governors concerning pardons and commutations had tended to come only from prominent individuals or from small groups of local leaders. But the country was becoming more democratic in general, and clemency was no exception. By the middle of the nineteenth century governors were frequently receiving petitions signed by hundreds or thousands of ordinary citizens. Petitions in favor of Washington Goode, who was ultimately hanged in Massachusetts in 1849, were said to have been signed by twenty-four thousand people. Hundreds of residents of Rock Island County, Illinois, petitioned Governor Thomas Ford to pardon William McKinney in 1845. Nearly a thousand asked Missouri Governor Silas Woodson to commute Joseph Hamilton's death sentence in 1874. Petitions were often printed and attached to blank pages, allowing as many people as possible to sign. Condemned prisoners and their supporters clearly believed that numbers mattered. "They have got the bigest number they can git," one victim's brother angrily reported to the governor of Illinois in 1854. By falsely claiming that the victim's family had forgiven him, the friends of the condemned Andrew Nash "got a grate many of there signers." In North Carolina one opponent of a pardon for John Medlin complained about "how very easy it is to get signers" for clemency petitions. Hundreds of people "usually sign such things as a matter of courtesy," admitted the lawyers filing a pardon application for Maria Eaddy in South Carolina in 1880.[7] A clemency campaign now normally required mobilizing a show of mass support.

Opponents of clemency fought back with mass petitions of their own. In Missouri nearly a hundred people threatened mob violence in the event of any clemency for John Skaggs. Hundreds of South Carolinians, observing that "the people are much exercised on this subject," asked "that Pompey Easterling . . . be not pardoned." Over a hundred of William Cole's Missouri neighbors pleaded with the governor in 1869 not to believe Cole's claims of insanity. They "never heard of such a thing until after he had Committed this horid murder," they argued, "not Even men that new him from a Boy." Clemency decisions turned into battles of petitions, between groups each claiming to represent the true wishes of the community, and each depicting the other as unrepresentative. The petitioners against commutation are "a small but noisy party of fanatics," their opponents assured the governor in one Illinois case.[8]

The point was to bring electoral pressure to bear on the governor by implicitly threatening that a wrong decision would alienate large numbers of voters. "Will the Governor dare to pardon him?" an anonymous New

York writer asked, referring to the recently convicted murderer John Colt. "We think not. The verdict seems to give general satisfaction." In 1858 a black employee named Friday Castles was convicted in South Carolina of murder after protecting his white employer's property by shooting and killing a thief, in a case that gave rise to considerable controversy over the justice of the sentence. "We would not for a moment, be understood, as bringing this to the attention of your Excellency, for whatever influence it may be thought to exercise on the State ticket, in the coming campaign," one group of petitioners assured the governor disingenuously. "Yet, we are free to say, that we believe a change of the death penalty to imprisonment in the Penitentiary for life in this case, would be acceptable to our people."[5]

So far as one can tell today, elected officials feared the consequences of a decision contrary to the popular mood. James Clements, sentenced to death in New York's federal court for murder on the high seas, was pardoned in 1851 by President Millard Fillmore because of doubts as to his guilt. Shortly before the pardon, Fillmore's treasury secretary received a note from A. Oakey Hall, the state district attorney in New York City, explaining that although the state's governor wished to advise granting a pardon, "he can do nothing publicly because of the example: having 3 respited scoundrels on our hands."[6] As participation in the clemency process broadened, whether to grant a pardon or commute a sentence could become a difficult political decision.

One must be careful not to overstate the degree to which clemency became a matter of public opinion. The views of the trial judge, the public official who knew most about the case, were still very important. The recommendations of the jurors, who also knew a great deal more than the average person, still meant a lot. As insanity became a common basis for clemency petitions, the expertise of medical professionals became correspondingly important.[7] Clemency was never just a matter of counting votes. But the public was more involved in clemency decisions in the nineteenth century than it had been in the eighteenth.

By the early twentieth century the death penalty's public had been redefined. People had once gone to hangings, but that privilege was now reserved for a select few. Instead they read about executions in newspapers, they watched or read about trials, and they signed petitions for clemency. The public had once been made up of spectators who came together and stared death in the face; now it was made up of individuals reading and writing about death in their own homes.

Consequences

"How do we have to get to be hung—sit or stand up?" asked Samuel Steenburgh in his cell a week before his 1858 execution.

"You will be pinioned at the ankles and at your knees, and your arms pinioned and stand up, and the sheriff will read his warrant; then you will be asked what you have to say, and will make your farewell speech," replied the reporter who had been taking down Steenburgh's confession. "Will you make a speech, Sam?"

"I am going to tell them something, yes; and if I could talk like that little murder, I would give them a good long speech," Steenburgh replied. Then he thought of another question. "Is hanging a hard death?"

"No, Sam, I think it is instantaneous, and all the punishment about it is the awful suspense before the execution." If the reporter knew what he was talking about, he was being kind. "Your heart ache is the punishment, and the hanging is only for a warning to others not to take a life."[8]

"Well," Steenburgh concluded, "I'll take it like a man."[9]

Steenburgh was forty-five years old when he was hanged, which meant he had been only two when New York abolished public hangings. Steenburgh had never seen an execution before his own. He lacked the education necessary to read about executions in the press. He had little idea of what his own would be like.

Capital punishment had long been justified as the most obvious way to deter crime. By vividly demonstrating the consequences of wrongdoing, the state was displaying a message that everyone could understand. But once executions moved into the jail yard, their deterrent value was increasingly called into question. Advocates of jail-yard hangings "give up the whole ground that Capital Punishments do good as an example," the abolitionist Charles Spear argued. "If such spectacles are calculated to strike the mind favorably, or to have a moral influence, why not have them in the squares of our crowded cities?" Soon after Alabama abolished public hangings in 1841, a southern magazine complained that "the lawmakers of Alabama, have abandoned . . . the last remaining ground in favor of capital punishments." What kind of deterrent was kept hidden? The people allowed inside the yard to watch executions were not the

ones likely to commit serious crimes. Officials were careful to exclude the very spectators for whom the sight of a hanging would be most beneficial. "We are accustomed to justify the death penalty as a deterrent example," observed the pardon attorney to the governor of Missouri, "but we take pains to render the example as inconspicuous as possible by dispatching the victim with the utmost privacy."[6]

By excluding the crowd, moreover, the move into the jail yard changed the character of capital punishment. Executions lost much of their symbolic meaning. The community no longer gathered to make its statement of condemnation. There was no more ritual to reinforce communal norms proscribing crime, no more ceremony at which to display one's participation in a collective moral order. Would-be spectators did not give up that ritual easily. They continued to gather outside the walls and to clamor for entry into the yard, and they developed alternative rituals—they eagerly read about hangings in the press, they flocked to trials, and they signed petitions and counter-petitions in the period between conviction and execution. But with executions conducted behind closed doors, before a small group of the well connected, out of the public eye, the people were no longer punishing the criminal. Now the government was doing the punishing, and the people were reading about it later.

Changing tastes in the nineteenth century about how death should be displayed thus began changing capital punishment itself. Form and substance were not easily separated. Without all the theater, the death penalty was not the same.

7

TECHNOLOGICAL CURES

A NEW WORD ENTERED the American vocabulary in 1889. Formed by combining electricity and execution, the word filled a need that had not been felt until the year before, when New York became the first state to abandon hanging for another method of putting criminals to death. Sticklers pointed out that electrocution made no linguistic sense—the second half derived from the Latin for "to carry out" or "to follow," so the compound referred literally to the following of electricity—but common usage quickly pushed aside early competitors like electrocide, even for accidental deaths by electricity.[1]

Between 1888 and 1913 fifteen states adopted the electric chair as their means of execution. By 1950 eleven more states plus the District of Columbia had followed. Another new device, the gas chamber, was first adopted by Nevada in 1921 and then by ten other states by 1955. Hanging had been the universal American method of execution in the late nineteenth century, but by the middle of the twentieth only a handful of states retained the gallows.

The cause of the transformation was an intensified public focus on the suffering of those who were executed. Aspects of hanging that had once been viewed as inevitable came to be perceived as barbaric and unnecessarily cruel. The result was the development of the new execution technologies, which were expected to be more humane on two fronts—painless to the condemned prisoner and less visually troubling to the spectators. But the search for a clean, clinical, undisturbing method of execution had some unexpected consequences. Hangings had once been public events, conducted by local sheriffs with little more expertise than the average spectator. By the middle of the twentieth century executions were being conducted not by ordinary representatives of the community