The Hangman's Knot

Lynching, Legal Execution, and America's Struggle with the Death Penalty

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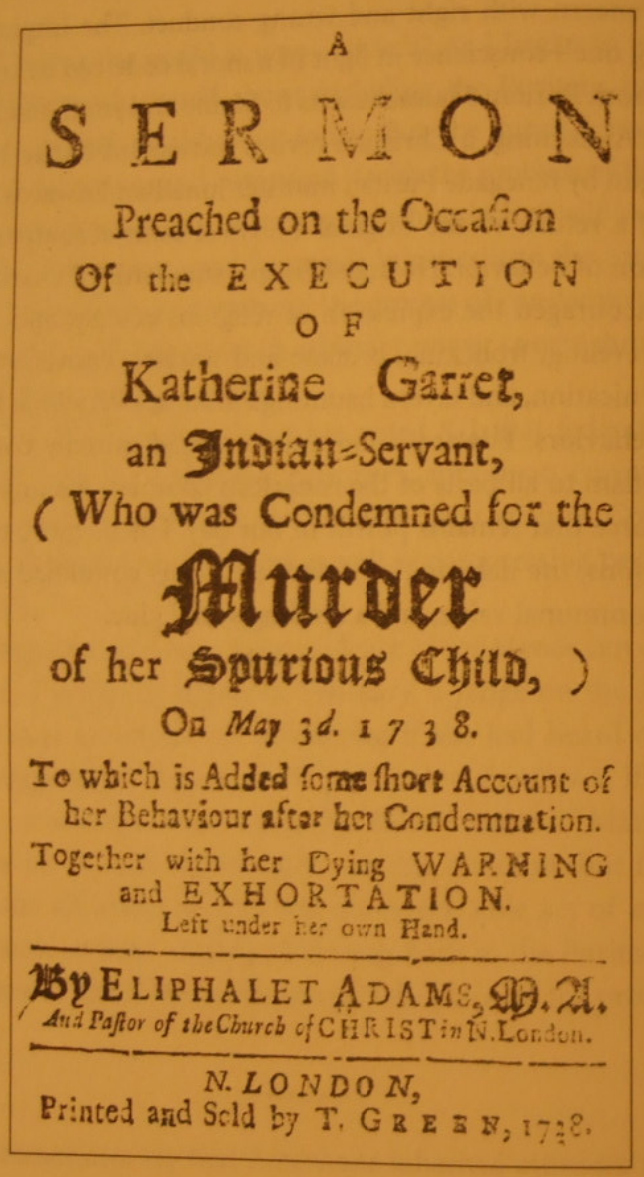


A
SERMON
Preached on the Occaſion
Of the EXECUTION
OF
Katherine Garret,
an Indian-Servant,
(Who was Condemned for the
Murder
of her Spurious Child,)
On *May* 3*d.* 1738.
To which is Added ſome ſhort Account of
her Behaviour after her Condemnation.
Together with her Dying WARNING
and EXHORTATION.
Left under her own Hand.
By ELIPHALET ADAMS, M. A.
And Paſtor of the Church of CHRIST *in* N. London.
N. LONDON,
Printed and Sold by T. GREEN, 1738.

Katherine Garret heard this sermon, later printed, before she was hanged.

"A Vast Circle of People"
Authority, Public Execution, and Crowd Control

Whoever Cotton Mather was as an individual, he was also the last of a breed—the Puritan divines who could govern New England from a pulpit, marshaling the fears and beliefs of entire communities at occasions such as a hanging.

Cotton Mather secured his place in the Puritan power structure through his expertise in moral judgment. In early Puritan days, ministers were the masters of law, of innocence and guilt.

When the state took a human life, the presence of ministers lent legitimacy to an act that was otherwise too nakedly appalling to contemplate. In return, ministers who succeeded were accorded as high a status as anyone in the land. Mather in particular was the learned authority on heaven and hell. There could be no more climactic moment than when the condemned was about to be sent for all eternity to one realm or the other. Mather took a special interest in the crime of fornication or "uncleanness" and, during his career, saw two young women to the hangman for murdering their illegitimate infants. Many ministers in Mather's place might have felt real compassion, but all saw themselves as comforters whose primary responsibility was to the soul, not the body or the emotions of those who were to be hanged. Mather feared that the condemned women could not be spiritually saved. He performed all parts of his duty scrupulously, but his diary entry makes clear that contact with the prisoners was tedious. They weren't on his social or intellectual level and were probably awed to silence when he visited them in prison. "Many and many a weary Hour, did I spend in

the Prison, to serve the Souls of those miserable Creatures," he wrote in a diary entry after the execution on June 8, 1693.

Ministers who upheld state religion and the executions it sponsored don't seem to have acknowledged, probably not even to themselves, the professional benefit they received. But Mather's diary reveals a real root of his zeal for attending the condemned. After his sermon for the execution of the two condemned women on the same day, he told his diary with pride that "one of the greatest Assemblies, ever known in these parts of the World, was come together" to hear him preach. He also recorded the later satisfaction of seeing his sermon "immediately printed, greedily bought up, and afterwards reprinted at London."

But, you'll say, all this has changed. No one in our society derives the kind of authority or status from the death penalty that Cotton Mather attained. A secular bureaucracy has taken the place of ministers both in law courts and at the place of execution. To see the connection between support for capital punishment and the aggrandizement of authority figures today—you'll protest—we have to go to Islamic nations where religious texts are still the law of the land.

All right—I'll indulge you in this argument before we return to the end of Cotton Mather's time and the beginning of ours. Let's take the case of Nigerian felon Amina Lawal.

In March, 2002, a Nigerian religious court convicted Lawal of adultery. The man she named as the father of her child swore on the Qur'an that he was not the father, therefore the court found him innocent. He was released. Amina Lawal, the mother, was reprieved until the religious authorities judge that her infant is old enough to be weaned. Then she will meet a death perhaps more cruel than that of Giles Corey, who had stones piled on top of him until he suffocated. In Lawal's case, the stones will be thrown at her head until she is broken, blind, and faceless, then more stones will be piled over her. In the darkness she'll be left to die of shock, blood loss, or brain swelling while still buried in the ground up to her shoulders.

Even if Amina Lawal weren't unlettered, poor, and without influence, she is similar to early Puritan defendants in having few rights

under the law. Lawal's conviction was supported by the chapter and verse of Islamic religious law, the Sharia. The sanctity of the Qur'an is so central to northern Nigerian society that Lawal's lover was declared innocent simply for swearing on the holy book. Any other verdict would place the authenticity of the Qur'an in question. So judges turned a blind eye to the lover's obvious self-interest—avoiding being executed. Lawal's stoning, it's clear, will also serve to stress the authority of Nigeria's religious leadership in their power struggle with secular politicians. To carry out an execution is to assert that one holds the highest authority in the land.

But, you'll protest, authoritarian government in the United States ended with the American Revolution.

Oh, did it? If power struggles using the death penalty as a symbol have ended in the American nation, how did they end, and what came afterward?

In the 1700s, colonists' growing diversity of income and origin all over the British colonies of America fostered moral and religious diversity. It became difficult to prosecute unorthodox beliefs and moral offenses under law. Early Puritans had several times punished Quakerism with death during the 1600s. Later, in a live-and-let-live atmosphere, accepted Protestant sects ranged from Anglicanism and Quakerism to a kind of early Unitarianism and to the conservative, evangelical Christian belief that Jonathan Edwards preached. By 1750 when Edwards, as Puritan pastor of Northampton, chastised his congregation for drifting away from original Puritan beliefs, church members simply removed him from his job.

With the move away from morals prosecutions, the focus on women as capital offenders disappeared. Adultery was last punished with legal execution in the 1640s, and no one was executed for witchcraft after 1692. After the 1730s, the law seldom singled out murdering a newborn as morally distinct from other kinds of killing. Thirty-six of the 135 recorded executions in the Plymouth, Maine, and Massachusetts Bay colonies during the 1600s—about one-quarter of all executions—were of women. Twenty-five of these women were executed as witches in

Connecticut and Massachusetts. During the 1700s, the total fell to only fifteen of 179, fewer than ten percent of the female population. Ultimately, women (except for the poorest) would be sequestered at home as the keepers of lost human innocence—those whom prosecutors and juries professed to believe were almost incapable of a crime deserving the death penalty. We are now fewer than two percent of all those on death row in the United States.

Slaves, both men and women, were executed historically at a higher rate compared to their total population than unenslaved persons. But after about 1800, unenslaved men, especially young immigrant men, became a preferred target of punishment along with slaves. African-American men were to become the most targeted group of all. This change began around 1800 when the newly prosperous American society grew more concerned about keeping order and protecting property than inquiring into their neighbors' beliefs and conduct. Most executions since we became a nation have been for murder, robbery, theft, or arson.

Today, to shed light on the fate of Amina Lawal, we have to read about executions of women in the 1700s. The American holy men who walked these two women to the gallows told almost nothing about the women who died, but left a full record of what they were thinking. During the 1730s, their insecurities about their own authority began to show.

Rebekah Chamblit was convicted of murdering her illegitimate infant shortly after his birth. To escape hanging, Chamblit would have had to prove that the child was born dead. However, Chamblit gave birth alone and buried the child without telling anyone. Chamblit's burying her baby could have been reported by anyone whom she inconvenienced—a spiteful neighbor, a member of her family, or the baby's father. In a "confession" dated the day before her execution in Boston, on September 27, 1733, Chamblit maintained that when the child was born she wasn't sure whether it was alive or not.

Chamblit may have made this halfway admission in hopes she would be spared. But she became an example of the fate that awaited

the morally tainted—what one of Cotton Mather's execution sermons called a warning from the dead. The horror of Chamblit's death was supposed to deter other young women from fornication, the crime of unwed sex. Whether or not this effect was achieved, the death sentence, the execution sermon, and the appearance of ministers on the scaffold underscored the worldly power of Puritan divines in a very pertinent way: they were able to cause lives to be taken. But the lesson, whatever it really was, had to be public. Terror was part of the punishment, and so was dying for the edification of a crowd. In his professional capacity, the attending minister at an execution was bound to hope the crowd was a large one.

What really happened to the baby and what Chamblit felt as she wrote her confession—whether she even wrote it without help amounting to dictation—will never be known. Almost everything that remains of Chamblit's twenty-seven years of life is contained in an execution sermon of the kind that Puritan ministers commonly made up into pamphlets or books. The sermon as published typically included the lecture given the Sunday before the execution, the confession of the doomed prisoner, and a description of the last hours of life. But the writing of these documents is so tightly scripted, so stuffed with piety and hellfire, that it's hard to imagine the real scene.

Chamblit, her prison fetters having been struck off and the hanging rope placed around her neck, walked to the gallows behind her own coffin. The Reverend Mr. Byles went with her. Even if she hadn't been terrified, I wonder if she could have heard his words over the noises made by the crowd. Chamblit couldn't expect much sympathy. Many bystanders were doubtless active supporters of her punishment; others were just looking for entertainment, or feeling the delicious pleasure of not being in Chamblit's shoes. Many would have been used to witnessing and experiencing suffering in their own lives.

As Byles walked with Chamblit in procession to the gallows, he carried out his moral duty by describing her evil nature in much the same terms that proponents of the death penalty make use of today. About one man condemned by a Houston jury in 1992, a sheriff said

in a typical comment, "he is absolutely the most vicious and savage individual I know." In theory, Pastor Byles, unlike this modern-day sheriff, was speaking directly to Chamblit, but both Byles and the sheriff knew their comments would be recorded and widely read.

"You are now walking to a dismal execution!" Byles tells us he began.

Perhaps most of what's in his record is for the benefit of us, the readers. And maybe young women like Chamblit were so used to hearing this kind of talk from their pastors that it seemed normal. On their way to the place of execution, Byles tells us he found time to touch on Chamblit's "raging corruptions," "vicious habits," and "the obstinacy of her wicked heart."

Byles's comments were lengthy; as for Chamblit, "Her answers indeed were but short." As they reached the place of execution, which was a tree growing on Boston Common, Chamblit "grew disordered and faint, and not capable of attending further to continu'd discourse." It may be that Chamblit, like most of the condemned, was able to keep herself from believing what was going to happen. But dignity came to an end at the hanging tree. Byles's flat summary probably meant that, when Chamblit saw the executioner and the sheriff's men, the burst of body heat and the cold sweat and piss and shit of mortal fear took her over. The human system is made to retain consciousness as long as resources of body and mind remain, but Chamblit may have had to be physically supported in her appointed position, standing on a wagon. She had to be rendered helpless and immobile before she could be killed, and so her hands were tied, and perhaps ropes tied around her arms and her legs. A handkerchief or cloth bag was placed over her head and the rope, already around her neck, was thrown over a tree limb and secured while Byles continued to pray aloud.

Then the sheriff's men whipped up the horse and drove the wagon away.

Hanging always worked, unless the rope wasn't prepared correctly or just broke and the whole operation had to be repeated, but it could kill in different ways. Chamblit probably swung off the wagon and dangled from the rope, instead of being dropped so that her neck was

caught abruptly and fractured by the noose. Modern medical evidence suggests that hanging victims like Chamblit didn't usually die either from spinal cord injury or from having their air cut off but because the noose compressed major veins, arteries, or nerves in the neck. The condemned might die in five minutes to an hour following the destruction of brain cells or disruption of the heart's rhythm. We don't know how long it took to become unconscious.

Chamblit's execution was an ordinary one—like several hundred others we can learn about through execution sermons. Nothing the commentators said suggested that they, or the crowd, objected to the proceedings. But an execution sermon five years after Rebekah Chamblit's came to terms, possibly for the first time, with both opponents of execution and the darker motives of bystanders.

Katherine Garret was an American Indian and, like Rebekah Chamblit, was a servant convicted of the death of her illegitimate infant. Before Garret was hanged in New London, Connecticut, on May 3, 1738, Eliphalet Adams, pastor of the Puritan or Congregational church, chose somewhat strangely to preach on the text from Proverbs 27:17, "A man that doth Violence to the blood of any person, shall flee to the Pit, Let no man stay him." In his sermon, Adams inveighed against lesser punishments than death and applied some of the same reasoning death penalty supporters use today.

Adams said that the "Pit" he referred to was a Bible term for the grave. He spent fully thirty-one pages of his thirty-seven-page sermon outlining the reasons that no one should prevent the formal killing of one who killed. There may have been some feeling in New London against Garret's execution, even some fear of retaliation by the Indian community. Adams spoke the Pequot language and had opened Indian schools in Lyme, Connecticut. He may have been considered an acceptable figure of authority to uphold Puritan law. But his note of defensiveness had rarely been heard on previous occasions.

Adams was even at pains to spell out that a killer's becoming a fugitive and exile like Cain was no longer sufficient punishment. After Cain murdered Abel, said Adams, God expressed His wrath by means of the

Biblical flood, and afterward He said to Noah (Genesis 9:6): "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." Adams also recognized that pity was natural, and some in his audience would want to help a condemned individual escape execution. The sermon spelled out forbidden stages of resistance to the law—forcibly preventing arrest, suppressing testimony at the trial, aiding a prison escape.

Adams went on to give some of the same reasons that death penalty supporters still use to avoid granting mercy to the condemned. Commutation of sentence, Adams said, made the merciful one an accessory to the guilty one's crime. It invited God's judgment on the whole community. It allowed the freed felon (if he or she was ever freed) to commit another crime. As if even these reasons were not enough, Adams then justified the penalty of death for murder on grounds that (1) it was God's law and (2) it was practiced by, as he claimed, the whole world.

Adams couldn't help boasting about the size of the crowd—"more Numerous, perhaps, than Ever was gathered together before, On any Occasion, in this Colony"—but he admonished spectators who attended for the wrong reasons. If many in the crowd jeered, got drunk, and picked each others' pockets, it was nothing new. But Adams, because of his official capacity and his religious belief, was adamant for the execution as a religious occasion and a moral lesson. Spectators were there to witness God's will being done and should behave accordingly.

To make matters difficult for the Reverend Mr. Adams, however, a greater population and better communications within the colonies were making execution crowds larger. At the same time, ideas were changing fast, throwing the authority of both church and state into doubt.

During the second half of the 1700s, both evangelical Protestantism and Enlightenment philosophy affected debate. The cult of reason prompted each citizen to think independently; democratic evangelical fervor called for direct communication with a God who cherished each individual. Unexpectedly, reason and religion worked together to

undermine the severity of colonial law. A milestone of public discussion was Cesare Beccaria's anti-execution *Essay on Crimes and Punishments*, first published in 1764. Beccaria's work was reprinted and discussed by reformers almost as quickly in the United States as in France or England. By the end of the century, some new American states were at pains to distinguish their application of justice from the bloodthirsty behavior of the British, as when Quaker reformers William Bradford and Benjamin Rush, a physician and member of the Continental Congress, used Beccaria's arguments to rewrite the colonial-era Pennsylvania criminal code. The Pennsylvania laws of the 1790s established two degrees of murder and instituted imprisonment, rather than corporal punishment, as the norm for offenses less than first-degree murder. Other newly formed states followed more or less slowly in revising their legal codes.

But the crowd roared louder and louder. Executions after Independence, held at county seats, took on the atmosphere of a combined market day and festival. The crowd at a 1784 execution in Reading, Pennsylvania, was estimated at 15,000 to 20,000. As late as 1806, the minister at an execution in Haverhill, New Hampshire, it is said, preached a two-hour sermon and led the crowd of 10,000 in singing and prayers. But, if it even happened that way, the pastor was there by invitation of the community, not as a representative of state religion. As crowds grew more raucous, ministers may have been invited less often to address them. Or the ministers may have withdrawn voluntarily, unable to insist on the edifying example of a hanging, eventually attending only when the condemned individual asked them to. By 1820, accounts of many executions state that the pastor's participation was limited to a brief prayer.

After attending the execution of a man named Bennet as part of an enormous crowd at the hanging in July of 1820, the Quaker and prominent Philadelphia merchant Thomas Cope asked himself, "Can this be the best mode of managing such cases?" Cope wrote in his diary, "Is this the way to reform him, or even to deter others from the commission of crime?"

The way that Cope spoke of the condemned man was new: as an individual rather than a stick figure manipulated to make a point. The young Bennet, Cope wrote sadly, was "in the prime & vigour of manhood." Convicted of murder, however, Bennet seemed "a most hardened, abandoned culprit, evincing nothing like contrition or repentance even under the jibbet. Till the hour of his execution he has been visited by any person who chose it & his time since condemnation appears to have been spent in obscene conversation, in drinking & abuse of courts, juries &c." A criminal like Bennet could now feature in popular imagination, and spur the cottage industry of tradespeople and printers as the published broadside detailing the culprit's crime replaced the execution sermon. In this new format, every detail of the crime, then of the culprit's manner and bearing in prison and on the scaffold, was detailed. As the preacher's role faded into obscurity, the condemned criminal became a celebrity.

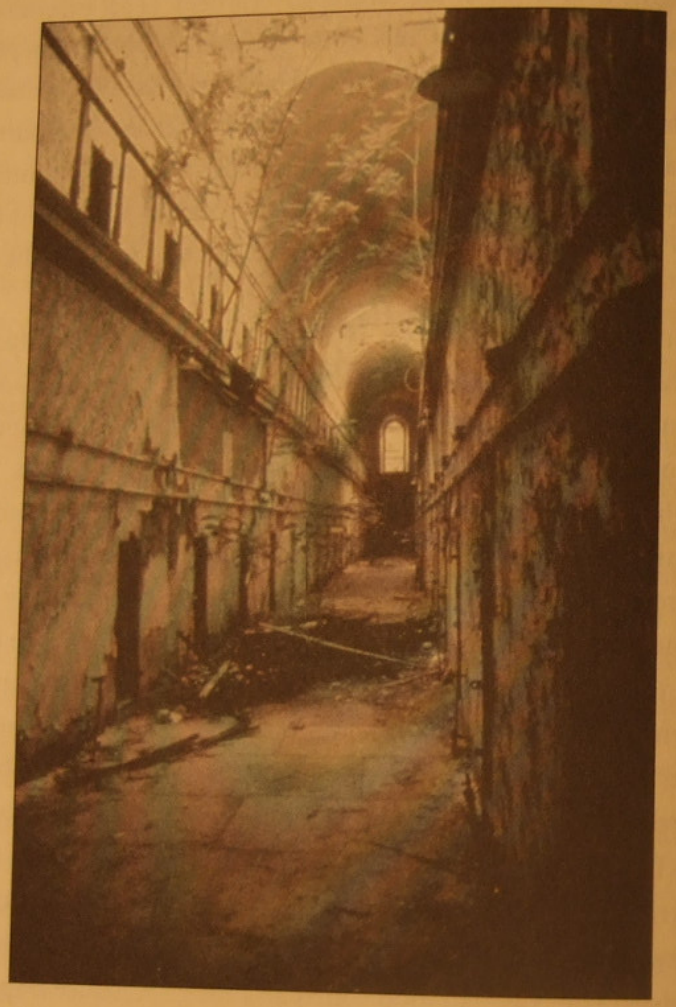
"If society will persist in the infliction of death for crime, why thus suffer the criminal to be exposed to idle, vicious company? Why not, rather, by seclusion from the world, afford him the opportunity of reflection & repentance?" Thomas Cope continued. People like Cope believed in the importance of individual atonement. But they also saw to it that public executions ceased in state after state because they believed that the disadvantage of public disorder had won out. Public execution had become the opposite of a demonstration of governmental authority.

Does the fact that we no longer execute publicly mean that executions are no longer a power play on the part of government? A recent headline says it all: "Under Ashcroft, Judicial Power Flows Back to Washington." U. S. attorney general John Ashcroft, morally self-assured supporter of capital punishment, recently overruled twenty-eight recommendations from local federal prosecutors who had decided *not* to seek the death penalty. Ashcroft's actions aggrandized the power of federal government by exerting the ultimate governmental decision of death over life. Ashcroft is less able to impose his position directly on

state governments, but he has already attempted to do so by trying to overrule Oregon's law allowing physician-assisted suicide.

Ashcroft's aggressive positioning of the federal government, as it takes a new ideological tack, opposes the historical American fight for states' rights over those of the central government. Legal execution has been one of the tokens in this chess game since the death-penalty debates of the 1790s. The American federal system has always made use of the death penalty for a maximum number of offenses—more than most states have authorized. But, traditionally, as a sign of autonomy from centrally determined policies, some American states held tightly to their right to execute while others vigorously rejected the death penalty.

I doubt that John Ashcroft is an especially cruel individual—no more than Cotton Mather, John Byles, Nigerian religious leaders, or the men of Amina Lawal's community who'll throw the stones. The father of Lawal's child may be among the stone-throwers just as Chamblit's and Garret's lovers were likely to be in the crowd when their child's mother was hanged. You could say decision-makers like these are callous, indifferent. But that attitude is the one they need. I think they've weighed the value of a condemned prisoner's life to them against the value to them of their public standing and their careers. Is it surprising if, however unconsciously, they've decided in favor of self-interest? Lawal and others waiting on death row are like rabbits who wandered into the hunter's gunsights just when the hunter needed a rabbit. Those who judge are those least likely ever to have to play the role of rabbit. And those who witness execution or help inflict it may feel they're buying themselves insurance against meeting such an end themselves. The Nigerian local courts and the U. S. Justice Department are playing to different audiences, perhaps. American power mongers, unlike Nigerian ones, have learned that they can act effectively without risking the fully informed debate, much less the riot potential, of a live-audience public execution.



Cell block seven, Eastern State Penitentiary, Philadelphia (1829).

4

"Darkness, Threatening, Ruins, Terror"
The Penitentiary and Capital Punishment

Executions today are the tip of America's punishment iceberg. Capital punishment in the United States was once considered the opposite of imprisonment—each execution seen by reform-spirited citizens like Thomas Cope as society's failure.

At the end of October 2002, 3,697 prisoners were on death row in 37 states and 2 federal jurisdictions, civil and military. Sound like a lot? These condemned men and women were about *three-tenths of one percent* of the total 1,406,031 prisoners in state and federal prisons nationwide. Another 702,044 were awaiting trial or serving sentences in county and city jails, or on probation or parole. According to a World Prison Population List maintained by the British government, more than half the world's prisoners are in the United States.

Trying to compare the rate of punishment to the crime rate is tricky, I find. For instance, the number of persons in American prisons rose dramatically each year for twenty years—from 1980 to 2000. Crime rates have risen, fallen, risen, and fallen again in those years and are now comparable to 1970s rates. A University of Texas study group estimated that only twenty-five percent of our drop in crime can be accounted for by putting more people in prison for longer sentences. These researchers credited most of the decrease to our recently strong economy, improved policing, and a drop in sales of crack cocaine. When crime and imprisonment rates are compared state by state, there's even less relationship between crime and punishment than the national rates suggest.

The history of crime legislation is more telling than the history of crime rates. In 1968, during an era of anti-war protests and urban riots, Richard Nixon was elected on a platform that emphasized crime as a problem. In the same year, Congress approved major funding for local law enforcement and mandated that federal government become more involved in local enforcement. In an uneasy nation, Nixon's "war on drugs" was every bit as popular as Cotton Mather's wars on witchcraft and adultery. Popular response hasn't diminished under presidents since Nixon. His initiative was taken up by the states when Nelson Rockefeller as governor of New York encouraged mandatory prison sentences of benchmark severity for drug-related crimes. Rockefeller's move was imitated nationwide.

But both liberal and conservative experts—for example, criminologist Franklin Zimring of the University of California, Berkeley, and U.S. Supreme Court Justice William Rehnquist—have described mandatory sentencing as punishment by political decision.

If political candidates are making hay out of our fear of crime, it's nothing new. The creation of penitentiaries was an important step in politicizing punishment, and the United States was a leader in developing the penitentiary—*a place of repentance in captivity*. Stimulated by reformers, lawmakers intended this type of prison to replace corporal punishment and most capital punishment. The first American penitentiary was the Walnut Street Jail in Philadelphia, built in 1773 and made into a penitentiary in 1790. Today, at last estimate, the United States has 1,196 "confinement facilities," or twenty-four per state if they were distributed evenly. Add to this total at least one county jail in each of our more than 3,000 counties.

It's hard to believe that our only places of imprisonment in colonial times were town jails—few, small, and insecure. A typical example was built in a Maryland town in 1693, an iron cage fifteen feet square placed on the courthouse grounds. In some frontier locales, prisoners were boarded in a locked room in the jailer's house, or held in caves or mines. These jails didn't have cells, just a common space, and mostly held arrestees waiting for trial. If the prisoners survived the cold, heat,

bad water, scanty food, and vermin-borne illnesses of confinement and were convicted, the wealthier and more influential citizens might be allowed to pay a fine and perhaps make public confession or monetary restitution. Some who were convicted of murder were pardoned with only a brand on the thumb—for one murder only—if they could show they were able to read. For the rest found guilty of an offense, the luckier ones would only be placed in the stocks or pillory so that the public could mock them and throw refuse, animal and human excrement, and sometimes rocks. The less lucky men and women were whipped until their backs and breasts were scarred for life, branded on the face, had their ears cropped or their noses slit. All of these punishments served as public entertainment. Afterward, some convicted felons may have remained in the community. But many left voluntarily or were driven away.

When Pennsylvania's new legislators first mandated the penitentiary, they were rebelling against the harsh, Puritan-style criminal code that the British crown had imposed on them. American Quakers of the 1700s, led by the social thought of William Penn, believed unshakably in both reform and the deterrent value of public example. They felt penitentiaries would supply these two goods. They were also responding to a fact of postcolonial life that Pennsylvania felt with special intensity—the growth of population. At some point, the beatings, the pillorying, the branding and cropping, and the hangings would be continuous. As with execution crowds, spectators at other public punishments created a consuming exercise in keeping order. From the point of view of an elected state government, it wasn't feasible anymore to put every offender out of town. Sooner and sooner, the next town would be complaining of their arrival.

"To reclaim rather than to destroy"—Pennsylvania's legislators started at the top when they stated their goal for criminal justice in 1786. These words are dusty now, vague and hard to grasp, an epitaph for a theory of a system. Reading them in the half-dark stacks of a uni-

versity law library in the twenty-first century, I marvel at the optimism and self-confidence of the reforming lawmakers who wrote them. The same whirlwind of social change and intellectual energy that brought about the American and French revolutions led reformers to the idea of the penitentiary—to the idea of reform itself. It certainly *sounds* as if Pennsylvania's lawmakers intended, or at least hoped, to return their straying citizens to a productive place in the community. Distinguished Europeans such as Tocqueville and Dickens who visited our first penitentiaries couldn't have guessed that over the next half-century these elaborately designed "houses of reclamation" would be remodeled again and again, first to house more prisoners, then to contain a death chamber.

The prison theory that created the penitentiary came partly from sixteenth-century European experiences with workhouses, where the poor were trained to work. Governments later began to detain vagrants, disobedient servants, and even unruly children at labor in houses of correction. These institutions introduced the idea of the prison as residence—of very tightly regulated work as the road to redemption. Workhouses may always have had a profit motive, but reformers tried to adapt them as a humane alternative to corporal punishment and public humiliation. To do so, they needed to overcome the standard conditions of jail detention: enforced idleness, indiscriminate mixing of genders, ages, and kinds of offense, and extortion of prisoners by jailers and other prisoners. Reformers sought, it seems, to model good social relations through an exemplary life under lock and key. Both English and American houses of correction took off from the idea that criminals were created by a disorderly social environment in which they never learned the virtues of industry and a "regular" life.

This idea hasn't been disproved. But in well over 200 years we've made relatively few offenders into productive citizens by any system of imprisonment. The first penitentiary regimes were the Pennsylvania and Auburn systems. Both called for only one prisoner per cell and the inmates' complete silence at all times. Under the Pennsylvania system,

prisoners worked alone in their cells, but the Auburn system called for work in groups. The Pennsylvania system was sponsored by the Philadelphia Society for Alleviating the Miseries of Public Prisons, organized in 1787 by Benjamin Franklin, Benjamin Rush, and other leading Philadelphians. Drawing on Quakers' belief in solitary meditation, the Pennsylvania system prescribed isolation. Prisoners weren't even allowed to get a glimpse of one another or of their jailers. Work such as shoemaking or weaving, which was optional, was performed alone in one's cell. The only reading was the Bible. There were no letters, no visits except from official prison visitors.

Officials first introduced Pennsylvania's "unremitting solitude to hard labor" at the Walnut Street Jail in 1790-1792 simply by adding a block of isolation cells in the jail yard. The Pennsylvania government had a very difficult time getting taxpayers to go even this far into spending money on reform. Within a decade, reformers were deploring overcrowding in the Walnut Street Jail. Meanwhile, from about 1797 to 1817, other states from New York to Georgia constructed Pennsylvania-system prisons that provided individual isolation cells.

Then the competing Auburn system made its debut in New York state with a macabre experiment. To prove the Auburn system's superiority to that of Pennsylvania, Auburn's prison officials chose a comparison group of eighty offenders to be placed in solitary confinement, with no work, for two years from Christmas 1821 to Christmas 1823. An unknown number of these prisoners died or went insane. Nonetheless, back in Pennsylvania, legislators persuaded themselves that a new prison especially for solitary confinement should be built near Philadelphia. The $780,000 prison, begun in 1829, was one of the most expensive buildings in the United States.

"Darkness, threatening, ruins, terror," Francesco Milizia wrote in his *Principles of Public Architecture* in 1785. A prison should look like a house of horror. To visit Eastern State Penitentiary, which has stood empty since 1971, is—almost—to understand and be converted by the concept of architectural deterrence. Architect John Haviland designed a

fortress-like Gothic Revival exterior in rough stone with battlements, an intimidating, overscaled entry, and nearly a half-mile of high stone wall with guard towers at each of four corners. Inside the walls, cellblocks were arranged like spokes, converging on a central guard station. The purpose of the Boston Prison Discipline Society in hiring Haviland, they wrote, was to create "architecture adapted to morals." This principle made the interiors of prisons much more frightening than the exteriors. Haviland explained in his prospectus that each cell wall, adjacent to the central corridor, would contain "a feeding-drawer and peephole." The wall itself was eighteen inches thick, and the drawer was made so that food and clothing were passed to the prisoner without his or her being able to see the keeper. This arrangement, Haviland went on, was considerably cheaper than a door for the same purpose.

Not mentioned on elegant occasions such as the presentation of architectural plans was another purpose of solitary cells: the sheer need to control a rapidly increasing population of prisoners. Reporting on New Jersey's original, congregate penitentiary (built 1797 with additions in 1820), a legislative investigating committee found in 1830 that the guard room "[commanded] a view of neither the yard, the shops, the wings, or the walls of the prison." The prisoners, the committee reported, "might rise upon the under keepers, in the shops; the prisoners, in the cells of either the north or south wing, might make their escape; the sentinel, on the wall, might sleep at his post, and the principal keeper and his deputy, in the guard room, be so far removed from hearing, and cut off from sight, as to know nothing of it.

"In a prison, thus constructed," the New Jersey committee concluded, "there can be no discipline." In a penitentiary on the Pennsylvania plan, by contrast, where prisoners were "in their places," silent, and constantly under surveillance, "there would be comparatively little need of severe punishment, because rebellion and villainy would be prevented in the very beginning." But, at the Eastern State Penitentiary, it took thirteen years to build the first 250 cells. By then, authorities realized that the prison was too small, and the rest of the building's history was a scramble to fit more and more cellblocks into the radial

design. Crowding obliterated design features that were meant to enforce silence, such as the high, vaulted ceilings that magnified sound and the separate exercise space for each prisoner.

Jails as short-term holding areas needed to be convenient to the courthouse and police station or sheriff's office, but long-term confinement after sentencing could be carried out elsewhere. After the economic advantage of prisons in creating community employment became apparent, politicians in many states vied to locate these facilities within their district. Penitentiaries were also sited for large, cheap land parcels and some kind of resource suitable to convict labor. Sing Sing, for example, was built at the village of Ossining near a river and a quarry, and convicts from the Auburn penitentiary mined the construction rock. Sing Sing's first cell house was 482 feet long, containing about 800 cells, seven by three and one-half feet in size, in five tiers. "Solitary" systems proved unsuccessful at reform, a fact that was quickly discovered by impartial observers though only slowly and reluctantly acknowledged by officials. Superintendents and wardens took over from charitable prison boards, and the prison bureaucracy was born. Prison labor, touted as self-sustaining or profitable in response to taxpayer and voter concerns, seldom paid the state (though it was sometimes profitable for individual contractors) but found its importance as a means of occupying the inmates' time and attention. Corporal punishment was not abolished with the construction of cellular prisons. It flourished for another one hundred years and more within penitentiary walls, and one of the most dreaded disciplinary measures was solitary confinement.

As American states developed other kinds of reform institution, penitentiaries became a warehouse for unemployable trouble makers, ranging from career criminals to brawling immigrants. As early as 1850, Massachusetts prison records show that a third of all those incarcerated in the state were foreign born—over twice their percentage in the general population. The Irish formed 11.4 percent of the states'

population and 17.6 percent of its prisoners. African-Americans, 0.9 percent of the population, made up 8.6 percent of prisoners.

From what we know of wrongful conviction and unequal punishment in more recent times, it's safe to say that judge and jury prejudices and no money for a good attorney contributed to these statistics. In these years, even right-minded reformers like Samuel Gridley Howe could use the expression "the criminal or dangerous class." If this class of irredeemables existed, they made an unstated argument for the permanent need of capital punishment. The circle of such reasoning was completed by placing the execution within the penitentiary.

Before this ironic conclusion was reached, the spirit of human reclamation that drove prison reform also raised the possibility that capital punishment could be replaced by imprisonment.

Politically conservative thinkers had justified capital and corporal punishment for centuries as retribution, a deterrent, and a tool for maintaining civil order. In the new nation, conditions and opinions were changing. Crowd behavior at executions accorded less and less with the idea of order. Juries were often unwilling to convict if a verdict of guilty automatically meant the death penalty. It's hard to know so long after the fact how broad public support might have been for abolishing capital punishment, but during the 1820s to 1840s nearly every state had an anti-death penalty movement. Leaders relied on several arguments, for example that a government by consent of the governed had no right to take a citizen's life. They also pointed to or drew on the psychological thought of John Locke. Contrary to Calvinist belief in sinful human nature, Locke—and some reform-minded Christians as well—proposed that a human life began as a blank slate and was written on by experience. If this were so, society shared responsibility for the individual's actions. Moreover, the individual could be changed by a different quality of experience.

By 1809, the governor of Pennsylvania began asking the legislature to abolish the death penalty. The anti-capital-punishment movement was in full swing by the 1820s. It drew on, and added to, the high energy of other causes such as prison reform and abolition of slavery.

Liberal thinkers and writers such as Lydia Maria Child and John Greenleaf Whittier, celebrities of their time, supplied a link between legislative arguments and the public. Boston Universalist minister Charles Spear publicized the arguments of jurists such as Edward Livingston and Robert Rantoul, and also united with John Greenleaf Whittier and others to form a Massachusetts society to abolish the death penalty. The abolitionist leadership generated petitions to end capital punishment that were frequently presented to state legislatures in New York and Pennsylvania, among other states, during the 1840s.

Another influential abolition campaigner was Edward Livingston, an attorney, former mayor of New York and later member of Congress and U. S. Secretary of State. After moving to New Orleans, Livingston drafted a liberalized legal code for Louisiana. It was not adopted but was studied by several other state legislatures. Livingston spoke against capital punishment in many venues, citing England's high crime rate to show that the death penalty didn't deter even petty thieves. Unfortunately, he based his case most strongly on one debatable point—that executions brutalized the populace who witnessed them. This argument appealed to individuals like Thomas Cope who were members of a rising middle class and held the liberal religious views of Quakerism or Unitarianism. More and more, prosperous Americans supported public order and the dignity of the individual. They frowned on the raucous street life and street politics that the previous generation had considered appropriate during the Revolutionary War.

Edward Livingston didn't foresee how easily his opponents could adapt his argument to a politically much simpler solution: hold the execution in private. In 1833 Rhode Island became the first state to hold private executions, followed by fourteen other states between 1834 and 1849. But counties, not states, held the execution in their prisons. The central location at a county seat, and the frequent lack of truly secluded indoor gallows, made it possible for the public, with or without official connivance, to outwit most counties' halfhearted privacy measures. When Samuel Mills, a 26-year-old miner, was executed in New Hampshire on May 6, 1868, the hanging was watched by

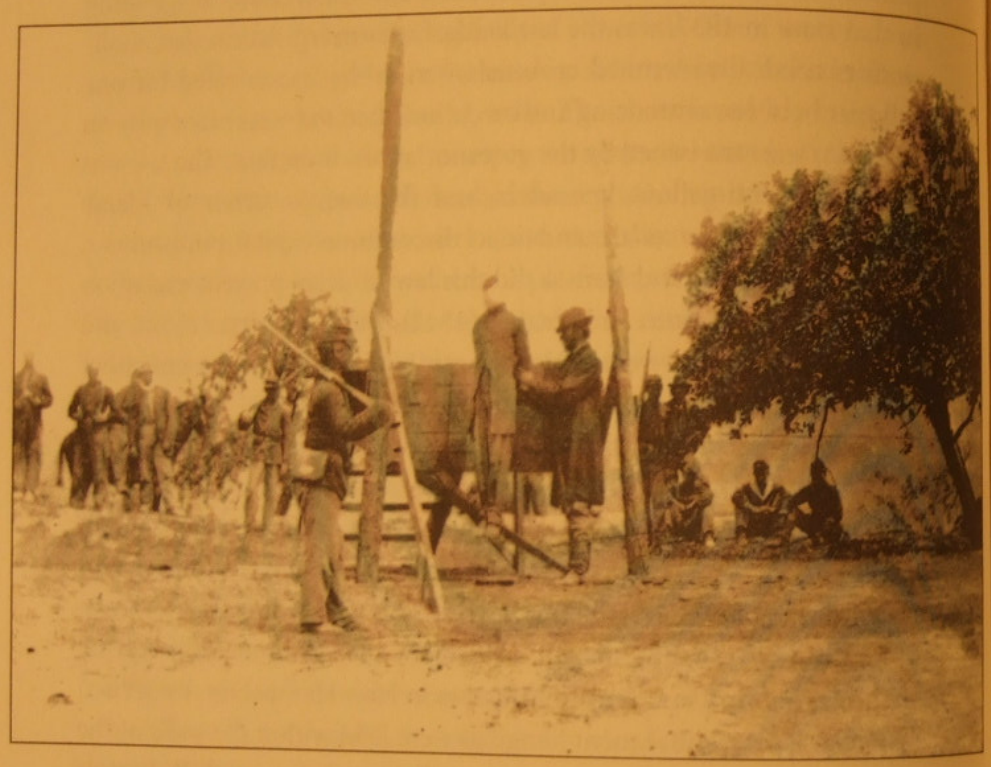
approximately 3,000 persons. Bystanders criticized the sheriff for holding the hanging earlier than the announced hour, an eyewitness later said. The train from Littleton hadn't yet arrived, and "some folks didn't think it fair that the trainload should be cheated out of the sight of the hanging."

The hanging took place in the jail yard and was not officially public. The gallows, "a rough hemlock joist projecting five or six feet from the window of [Mills's] cell on the second floor of the jail," could be seen from the street and surrounding fields of Haverhill. There was no death walk—Mills just stepped over the window sill to an improvised gallows platform built onto the jail yard walls. The sheriff and his assistants, Mills's attorneys, and several newspaper reporters waited on the platform. When the condemned climbed through the window, he bumped his head. As if the occasion were quite an ordinary one, he cried out loudly, "Hel -*lo!*" After he reached the platform and stood himself over the trapdoor, below which the earth had been excavated to a depth of nine feet to provide a drop, "the death warrant was read, and a prayer was offered." Mills, who had robbed and murdered an elderly neighbor in Franconia, wasn't admonished about his sinful nature or his slim chances in the next world. Rather, Mills, like the condemned man Thomas Cope described in his diary, was supported by those around him in keeping up his bravado. "Tell the people that Samuel Mills died like a man," Mills requested. He called out a goodbye to friends he saw in the crowd, and they simply replied, "Goodby, Samuely."

"There was a fence, about as high as my piazza, built around it, so when the body dropped, it couldn't be seen," the eyewitness said. Elmore Whipple was twelve years old at the time and had sneaked away to Haverhill from Franconia with a friend. They heard Mills speak his last words and saw the hood placed over his head. "The man was instantly dangling at the end of the rope," said Whipple. After Mills was cut down, he was placed in a coffin to be viewed. Many in the crowd had already lined up; but "the funny part of it all," as Whipple expressed it, was that some found themselves unable to watch. Whipple and a friend named Harry had urged their other friends to attend, but "when we got to Haverhill and the hanging commenced, Harry had to leave; he was sick as a dog." As for himself, the eyewitness turned his head away. "I couldn't eat any lunch and I wanted to go home."

In spite of the squeamishness of Whipple and his friend, New Hampshire was one of the few states at that time where a majority of voters was known to support capital punishment. They upheld death penalty laws in an 1844 referendum and defeated the attempt at compromise of a "Maine law" five years later. The "Maine law," originating in that state in 1837, was the last kind of reform legislation that abolitionists tried. Condemned criminals were to be incarcerated for one full year between sentencing and execution, then to be executed only on a written warrant issued by the governor at his discretion. The law was written by anti-gallows crusaders, and the then-governor of Maine interpreted the law as a mandate to discontinue capital punishment. But only in Maine and Kansas did this law of delay prevent execution for any length of time. In Vermont (1842), Massachusetts (1852), and New York (1860) as well as New Hampshire, similar laws were either short-lived or didn't have the intended effect.

In these years legislators began to realize that executions held under county authority wouldn't ever really be removed from public view. The Haverhill jail yard where Samuel Mills died was in the heart of town, and like most jails it had no room with a ceiling high enough for an indoor execution. Penitentiary execution was the chosen solution, first put in place by the state of Vermont in 1864. Samuel Mills was the last to be hanged by county authorities in New Hampshire. By revised state legislation, subsequent hangings were held within the walls of the 1812 penitentiary at Concord on a scaffold built by Isaiah Wilson of Portsmouth, having a crossbeam, we are told, 17 feet high. On November 9, 1869, Josiah L. Pike was the first to be hanged from Mr. Wilson's gallows. It was the first of America's "invisible executions"—now, the only kind that we conduct—under the control of a state prison bureaucracy and completely limited to invited witnesses. The "reform" of moving executions to the penitentiary proved much more popular than that of abolishing the death penalty altogether.



The U.S. military executed this Union soldier for attempted rape (1864).

5

The Will of the People

Early Reactions Against Capital Punishment

In Wisconsin, during a public execution in 1851, the crowd had more than enough time to witness the experience of death by hanging. The condemned man, James McCaffry, was quite obviously conscious as he struggled and strangled for five full minutes at the end of the rope. Only then did he become unconscious and slowly suffocate.

Imagine you are one of the spectators and try timing a period of five minutes.

After this hanging was widely reported, a Milwaukee jury refused to convict a defendant generally believed to be guilty, because their finding of guilt was an automatic death sentence.

Abolition of Wisconsin's death penalty took place in 1853 and has never been repealed. How did it happen that activism in Wisconsin and Michigan led to abolishing the death penalty while the efforts of abolitionists in New York, Massachusetts, Ohio, and Pennsylvania came to nothing during these years?

Wisconsin is one of three states, with Michigan (1846) and Rhode Island (1852), to abolish the death penalty in the years before the Civil War. Michiganians, it is said, were made nervous shortly before repealing capital punishment by the execution of someone who was wrongly convicted. When it was too late, the real murderer confessed and the hanged man was revealed to be innocent.

The story of abolition and recall in many states goes the same way: A gruesome or unjust execution is carried out; legislators vote to end the death penalty. Then a gruesome murder occurs; legislators vote to bring the death penalty back. Or else, the death penalty is repealed

because too many juries refused to reach a guilty verdict in capital cases. Then the death penalty is reinstated because the number of homicides—sometimes of lynchings—seems to be rising.

At other times citizens and their legislators have remained unmoved. The rope has broken or the electric current has failed even to make the condemned unconscious. But the execution was resumed, and followed by many more, without a change in the law. In such states, even the deaths of persons later shown to be innocent may not bring about abolition.

Back and forth we go with our hopeful "becauses," trying to get to the bottom of differences between one American state and another. Some states have gone full circle, even more than once. At any single point in time, the decision to repeal or restore the death penalty seems almost accidental.

But the cases of Michigan, Rhode Island, and Wisconsin are a little different. These three states haven't authorized an execution in over 150 years—a record in the United States or, for that matter, in the English-speaking world. Something was happening in these states, and a few others at a later date, that goes beyond a legislature's whim, a governor's intervention or non-intervention, or the momentary changes of heart of a state's voters.

Michiganians debated capital punishment from the beginning, when they wrote their state constitution in 1835. But the constitutional convention chose to write in the death penalty. This outcome was the same as in other states during the 1830s, when legislative committees in Massachusetts, New York, Ohio, and even Louisiana presented reports that did not, finally, result in abolition legislation. But in Michigan the debate came back. The state's legal code was due to be revised, so between 1843 and 1846 the legislature conducted a full debate of the code and the proposed changes.

Senator Stanford M. Green presented the revisions. Green favored the compromise of the Maine law, with executions to be carried out after a year's delay on the governor's instructions. As Green rewrote the Michigan code, capital punishment wouldn't be abolished.

Surprisingly, the legislature soon lined up pro and con in two camps of about equal strength. After considerable vote-switching and bargaining, legislators made Michigan the first state to end capital punishment.

The first version of the new law simply substituted "imprisonment in the state prison for life," but the words were immediately reamended to "solitary confinement at hard labor in the state prison for life." The Senate did not agree to this version, and proposed omitting "at hard labor." However, after a joint committee was convened, both House and Senate passed the version prescribing both solitary confinement and hard labor in place of the death penalty. The death penalty was retained for treason, a crime that has never been prosecuted at the state level.

Michigan eliminated capital punishment only after legislators came up with a substitute penalty terrifying enough to appease execution supporters. In practice, perpetual solitary confinement, which was capable of driving prisoners insane and also made hard labor impracticable, was tried for only four years in Michigan. But abolition of the death penalty endured in Michigan law, and it wasn't until 1929 that reinstatement really came close. When both legislative houses passed a reinstatement bill, it would have become law if not vetoed by Governor Fred W. Green. Two years later, the return of capital punishment seemed even more certain when a bill was passed and, this time, actually signed by Governor Wilber M. Brucker. But Brucker had signed only with the provision that a referendum be held, and Michigan voters defeated reinstatement by 352,000 to 269,000, or 56.7 to 43.3 percent of the vote.

What we know about the public's views on capital punishment in past times is very spotty. But I'm pretty sure that Michigan's result was exceptional. It's also hard to explain.

Liberals didn't dominate Michigan politics around 1930, or both houses of the legislature wouldn't have tried repeatedly to bring back the death penalty. The most liberal legislative segment was a minority coalition based partly on labor leaders. What seems to have happened is that eight Upper Peninsula counties very strongly opposed restora-