

## Chapter 8

# Moderating Punishment

Seen in a long historical view, punishments have—with some fluctuation—become more moderate. Durkheim argued that as societies became more complex and interdependent, they would naturally scale back punishments.<sup>1</sup> Like all general explanations, this one is unable to account for why harshness has fluctuated historically or why it has varied among cultures that were otherwise seemingly similar. In China, castration, the last remaining mutilating punishment, was ended around 220 CE.<sup>2</sup> The Western state's embrace of moderation began only after an initial turn first to greater violence under absolutism. When punishing was a communal activity, vengeance often ran amok. Here, the state exerted a calming influence, suppressing feuds and eventually outlawing them. As the state began to take over punishment, however, it needed to prove its mettle and show that it could administer justice. The punitive ferocity of the early modern period was unleashed as the state asserted its authority and ability to enforce. Capital punishment expanded in the eighteenth century to even trivial transgressions—thefts of trifles and the like. In 1688, some fifty crimes were capital in England, and by 1820 more than two hundred were.<sup>3</sup>

Public punishments reached their violent extreme in Europe sometime in the 1700s.<sup>4</sup> Moderation had begun earlier, perhaps already in the fifteenth century, but with the absolutist regimes of the early modern era they at first grew more severe again.<sup>5</sup> The Enlightenment philosophes were eager reformers. In 1762, Voltaire

exposed the gross injustice done to the Protestant Jean Calas, falsely accused, tortured, and executed for having killed his son, a convert to Catholicism. Cesare Beccaria's book on punishment became a runaway global bestseller, advocating moderate, regular, and predictable punishment as more effective deterrence than occasional public dismemberment. The state now had more and more effective tools, so why rely on horrendous public sanctions?<sup>6</sup> Mercy sprang less from a change of heart than from the state's developing prowess.

In the Middle Ages, *mens rea*, the doctrine that an intent to offend was a prerequisite for punishing the act, created new offenses of planning and conspiracy. Yet it also moderated sanctions that had earlier been levied on the act alone, even if it had been accidental or unintentional. Equity law, with its roots in Roman and canon law, softened the often harsh consequences of applying the common law literally. Confessions were no longer required for conviction or torture for their extraction. Offenders could be tried on evidence that would earlier not have passed muster and sentenced to lesser punishments.<sup>7</sup> Spectacular public deaths were gradually considered more deleterious than deterrent. The US Constitution specifically forbade cruel and unusual punishments in 1787. Torture was eventually outlawed in all nations, at least on paper. Disgusted with the Inquisition's excesses and the Reformation's pursuit of its own heretics, the Enlightenment philosophes saw torture as barbaric. Prussia led the way, abolishing it in 1754. By the late eighteenth century, it had been forbidden in most European nations—at least if we ignore the torture of serfs in eastern Europe and of slaves in the colonies.

The right granted clergy to be punished only in ecclesiastical courts, which could not impose death, was extended in fourteenth-century England to all men who could read (using generous and often ritualized literacy tests) and thus claim, even if implausibly, to be of the cloth.<sup>8</sup> In 1487, this right—benefit of clergy—was extended to all men, and in 1623 to women. Nonclergy could invoke it once,

and to prevent repeat claims they were branded on the thumb with an M for “murder” or a T for “theft.” In the sixteenth century, about 20 percent of all felons sidestepped execution through benefit of clergy. In the early eighteenth century, capital punishment was extended by removing benefit for various crimes (petty thefts and shoplifting, attacking deer, cutting down trees, etc.). Yet at the same time the literacy requirement for benefit was removed, thus extending it to everyone, literate or not.<sup>9</sup> Though on paper the law may have been harsh, the number of executions declined after the mid-seventeenth century.<sup>10</sup> Awash in capital crimes, England undercut their effect through benefit of clergy and other mitigations. In seventeenth-century Sussex, 80 percent of those found guilty could have been hanged, but at least two-thirds were thus spared.<sup>11</sup>

During the seventeenth and eighteenth centuries, death was less invoked for property and other minor offenses and reserved instead for homicide and other serious crimes.<sup>12</sup> In the American colonies, William Penn’s Great Act in 1682 limited death to murder alone at a time when the British homeland had more than 200 capital crimes. Those 200 were then reduced to 8 by 1841.<sup>13</sup> The Prussian penal code restricted capital punishments in 1743 and executed only murderers after 1794.<sup>14</sup> Most northern US states confined the death penalty to murder starting in the 1780s.<sup>15</sup> With the new French penal code of 1791, the panoply of capital crimes (from sodomy and murder to minor theft and the cutting down of trees) was pruned, leaving just various forms of murder and theft.<sup>16</sup> In China, from 800 in the Qing dynasty (1644–1911), the number of capital crimes fell to 130 in the penal code of 1908 and to 10 in the 1950s—part of the twentieth-century reforms intended to follow Western models of moderation.<sup>17</sup> Today, some 70 are on the books. The US has 46 capital crimes, mostly variations on homicide.<sup>18</sup> Nations that retained death sentences cut back dramatically on executions—from 72 per million in colonial America to 1.8 in the 1990s. The Chinese remain enthusiastic executioners, killing thousands annually. But even

they have recently narrowed the range of capital offenses under the slogan “Kill Fewer, Kill Cautiously.”<sup>19</sup> Even for major transgressions, such as treason, death became less common throughout the world. Most nations eventually no longer applied it at all.<sup>20</sup>

The technology of death was also refined.<sup>21</sup> Capital punishments came in a wide variety over the centuries: poisoning, strangling, drowning, stoning, asphyxiating, boiling, precipitating, impaling, hanging, crucifying, and burying. Beheading was among the earliest techniques, reserved in Roman law for nobles and the reason why such punishments are called “capital.”<sup>22</sup> The Chinese, in contrast, regarded strangulation, leaving the body intact, as superior.<sup>23</sup> With its semiautomated decapitation, the guillotine brought the nobility’s privilege to the masses. Commoners, too, escaped the vagaries and humiliation of the noose or the mishaps of unskilled or inattentive ax-wielding executioners.<sup>24</sup> In the twentieth century, Americans accepted gas, the electric chair, and then lethal injections as neither cruel nor unusual.<sup>25</sup> Earlier, as the use of execution declined, intermediary punishments developed, more severe than fines and less than death. The Byzantine Empire mutilated instead of killing. Emperor Wen in ancient China whipped rather than mutilated. The Reichslandfriede of 1103 prescribed the loss of hand or eye for large thefts.<sup>26</sup> After 1600, thieves in France were sometimes branded rather than mutilated. Less visible parts of the body than the face were gradually chosen for scarring or mutilation.<sup>27</sup> To preserve their economic value, slaves in nineteenth-century America were whipped rather than imprisoned or executed. Gallies, workhouses, and transportation joined death and mutilation. Transportation was introduced on a large scale in late seventeenth-century England thanks to dissatisfaction with death.<sup>28</sup>

Banishment and transportation were in turn eventually judged excessive, too, their use declining by the mid-nineteenth century. Indeed, transportation at times hardly deterred. The actual passage, though not easy, became less harrowing by the mid-1700s. The

prospect of jobs and a future was often better than the offender's situation at home. By the 1870s, deportation to the South Pacific island of New Caledonia was considered so desirable that French inmates assaulted and murdered guards or fellow prisoners in hopes of being banished to paradise.<sup>29</sup> Flogging, balls and chains, solitary confinement, and other physical chastisements were gradually abandoned, too.<sup>30</sup> Punitive excesses were tempered early in England, though well into the eighteenth century more convicts were executed there than in other European nations. The breaking, drawing, quartering, and mutilation still common in France ended, leaving only hanging. Pressing with weights was abolished in 1772, branding in 1779. In Prussia, strangling and burning were not abolished until forty years later, and in the 1830s most executed bodies were still also broken on the wheel or decapitated.<sup>31</sup> Yet where punishments remained public, sentiment was turning. Reformers feared that the spectacle of death fed the crowd's bloodlust more than it edified.<sup>32</sup> In Germany, physically chastising the convict before execution was thought to arouse the crowd's sympathy, and so it was eliminated in the late 1700s.<sup>33</sup> By the nineteenth century, executions had been moved from the public square to the comparative seclusion of the prison.

Instead of death and other savageries, prison became the favored sanction. In late eighteenth-century England, public whippings declined as prison sentences became routine for theft.<sup>34</sup> Yet prison could nevertheless be retributive, even barbarous. Perhaps the Victorian era's (and our own) overcrowded, undermanned, chaotic, and violent prisons were shortcomings of the original intent. Even so, certain aspects of incarceration squarely aimed to inflict pain. Some prisons were deliberately more unpleasant than others. Into the nineteenth century, German prisons flogged inmates on entry and exit (*Willkomm und Abschied*) as well as on the anniversary of their offense. The practice of *schwerer Kerker* in Austria put inmates in chains, permitting almost no communication.<sup>35</sup> British Victorian

jail diets were so meager as to constitute scientific starvation. Pointless treadmill labor made sentences even nastier experiences.<sup>36</sup> The Philadelphia system's solitary confinement would now be considered psychologically so harsh as to be retributive. Today's US supermax institutions take this tradition to its extreme, but now with no ambition beyond controlling prisoners and inflicting psychological pain.<sup>37</sup>

Prison itself eventually came to be considered harsh and ineffectual. By the end of the nineteenth century, more than half of British offenders, especially first timers and the young, were fined rather than incarcerated.<sup>38</sup> As prison was thought to breed further criminality, the number of those jailed was reduced. Parole, probation, and other halfway solutions instead kept the convicted within the carceral loop without actual lockup.<sup>39</sup> The prison's foundational idea, that isolating the inmate from society would serve to rehabilitate, was here reversed. The responsibility for social molding and control was instead returned to society.<sup>40</sup> Already in the late nineteenth century, Belgium and France began suspending first timers' sentences, releasing them on good behavior. In France, inmate numbers were thus halved between 1887 and 1956. Alternatives to prison were developed in the late twentieth century using house arrest, conditions of residence, halfway houses, periodic imprisonment, treatment programs for addiction, electronic controls on movement, community service, and boot camp. Prisons themselves were differentiated by adding more loosely structured and policed arrangements for inmates unlikely to abscond as well as specialized institutions for juveniles.<sup>41</sup>

Punishments were moderated for several reasons. As authority was exerted on its subjects' behalf, law became less of an outside imposition on civil society and more the expression of its own will, thus giving less cause to contravene it. Such moderation began already in the sixteenth and seventeenth centuries, long before democracy, so we cannot see an immediate cause in a specific political system.<sup>42</sup>

Yet it did coincide broadly with the rise of more representative government. It seems also to have been part of the civilizing effect that historians have identified as a general ameliorating influence on violence starting in the early modern period. As measured in homicide rates but also in many other respects, levels of violence in European society began declining in the sixteenth century. The absolutist state's monopolizing of the tools of violence, the repression of vengeance and private adjudication and their replacement by courts, the decline of honor culture with its insistence on a personal righting of the moral balance upended by an offense, which in turn was connected to a growing liberation of individuals from the demands of their immediate kin groups—all such factors led to the broad and dramatic decline of homicide rates over the past five hundred years.<sup>43</sup>

Nor could the penal code diverge too far from common sentiments of right and wrong without provoking resistance and becoming hard to enforce. To preserve order, the state had reason to keep those it was policing on its side. On the whole, maintaining order was a popular cause. Laws have often favored the powerful: harsh measures against poaching or against lost rights over commons or against smuggling, for example. But ensuring that criminals who preyed on fellow subjects got their due was a welcomed state function. Popular sentiment was therefore likely to have influenced punishment even before politics were formally democratized. Law enforcement is invariably a *pas de deux* between state and civil society, each relying on the other. The more a legal system appears to its subjects as legitimate and justified, the more they follow its precepts voluntarily rather than out of fear of the consequences of disobeying.<sup>44</sup>

Conversely, as the state became more powerful and confident, it needed less to exert its force overtly. Durkheim advanced an axiom that punishments were harshest where society was primitive and government absolute.<sup>45</sup> The interplay between society and state

in determining punishment is, of course, one of the leitmotifs of this book. But Durkheim's idea that absolute government was also omnipotent misses the mark. The thrust of modern governance has been precisely the increase in its effective power over society, even as it has discarded the trappings of absolute dominance. The modern state's ability to persuade, jostle, inculcate, and arm-twist its subjects—who grew more literate, rational, and self-aware as education spread—into obedience proved more effective than drawing and quartering in the town square. At its most savage, the state's law enforcement in fact undermined its own ambitions to effective control. Violence begat resistance. We have noted how harsh punishments spawned further crime as offenders sought to avoid execution by eliminating witnesses. The henchmen of Truman Capote's true-crime novel *In Cold Blood* (1966) became killers so as to leave no witnesses. Even those who committed mere property offenses in China during the 1980s often murdered their victims to avoid the testimony that might subject them to the ever-harsher punishments threatened for such offenses.<sup>46</sup>

Harsh punishments also made it hard to convict. The law of accomplices was first developed to spare secondary participants from what seemed like an unjust death.<sup>47</sup> When lay moral intuitions rejected disproportionate sanctions, the prosecution's ambitions were hindered. In nations with jury systems, where decisions fell to the accused's peers, drastic punishments at odds with popular sentiments of justice were often not enforced.<sup>48</sup> In medieval England, the great majority of defendants tried for homicide were acquitted.<sup>49</sup> For crimes where conviction meant death, few defendants pled guilty. In eighteenth-century England, they were actively discouraged from doing so in capital cases. With so many capital crimes, many offenders were tried but few convicted—in part thanks to inevitable difficulties of evidence and proof but also in part because juries deliberately nullified outcomes they considered needlessly bloody.<sup>50</sup> Although members of early juries were jailed for



not returning the verdicts demanded by judges, jury nullification eventually became an accepted mechanism to rein in overly harsh prosecutions. Juries either found defendants guilty of lesser crimes or innocent altogether.<sup>51</sup> When punishment for defendants pleading benefit of clergy was changed in 1699 from branding on the thumb to branding on the cheek near the nose, courts often balked. So long as rape was a capital crime, no one pled guilty, and few were convicted. When the punishment for grand larceny increased to transportation to America in 1718, defendants were less willing to plead guilty.<sup>52</sup> Forgers and counterfeiters were hard to prosecute in the early nineteenth century when death was their reward. The Bank of England therefore proposed lesser sentences to maintain its conviction rates and thus plausible deterrence.<sup>53</sup> Early nineteenth-century French laws punished quarantine avoiders so harshly that they were rarely applied (whereas the moderate English system of fines for the same offense was consistently enforced).<sup>54</sup> Even under the Nazi regime, Germans were reluctant to report looting to the authorities once it became punishable by death.<sup>55</sup> An overly vindictive state, bereft of sympathy, undercut its own purpose.



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# Command and Persuade

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