ABSTRACT

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See No Evil: Britain's Abolition of Public Executions
(Under the Direction of Dr. Kirk Willis)

Great Britain's Capital Punishments within Prisons Bill, passed by Parliament in 1868, was a landmark piece of legislation. Compelled by a variety of reasons, from concern for the morality of the public to doubts regarding the deterrent effect of executions, legislators banned the practice of public hangings, moving executions out of the public sight. The right of a government to take the life of one of its citizens as punishment is frequently fodder for heated debate even in modern times. Often mentioned as a crucial step in Britain's abolition of the death penalty, the Capital Punishments within Prisons Bill has received little academic discussion of its own merits. This paper examines the intellectual and social environment that gave rise to this milestone legislation, the details of its passage, and the implications the law had for future developments of criminal law and executions.

INDEX WORDS: Capital punishment, Great Britain, History, 19th Century, Laws and legislation

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BRITAIN'S ABOLITION OF PUBLIC EXECUTIONS

by

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DEDICATION

I would like to dedicate this paper to my grandfather, the best writer I know.

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I would like to acknowledge and extend my sincere gratitude to Professor Willis for his guidance in researching and completing this paper, and to Professor Hashimoto for her assistance in evaluating and revising it. I especially thank my family and friends for their love and support, and my parents for their encouragement throughout my academic career.

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CHAPTER ONE
EXECUTIONS IN CONTEXT

Introduction

The mid-nineteenth century was a period of rapid change in Great Britain. Rising levels of industrialization created the need for a vast labor pool in cities, creating a distinct working class. The workers, chronically impoverished and undereducated, inspired strong reactions from the upper class. Elites were, at times, fearful of the working class. The lower class was perceived to be prone to immorality, and represented a threat to the entrenched interests of the well-to-do. On the other hand, the plight of the workers also inspired philanthropists and reformists to dedicate large amounts of resources toward improving their condition.

Embracing Enlightenment ideals, well-intentioned individuals embarked on campaigns for sweeping reforms to improve the state of society. Faith in progress and the problem-solving ethos of the Scientific Revolution led many to believe that people and their communities were capable of improvement. Reform movements ranged from the economic, such as remaking tariff laws, to the social, such as creating a poverty alleviation system.

In this environment of class division coupled with empathetic impulses for social improvement, the issue of criminal law reform rose in importance. Government officials sought new ways of making the penal system more effective in preventing crime, yet fairer to those convicted. There was a growing sense that Britain's criminal code was overly harsh and unbefitting a nation in an advanced state of development. At the same time, improved policing and far-reaching media sources contributed to an enhanced awareness of criminality, particularly

among the lower classes. The tension between the desire to ameliorate the most severe punishments and the fear of potential violence in a rapidly changing society is most clearly expressed in the mid-century conflict over the future of capital punishment.

This paper will address how capital punishment came to be a contentious issue in Victorian Britain, and how a debate about the death penalty morphed into a more specific battle over public executions. The movement supporting the private executions, it seems, had but a tangential relationship to the campaign for abolishing capital punishment entirely. While both were born of the broader reformist trend and were motivated by a concern for the moral improvement of society, advocates of private executions were particularly focused on the deleterious effect of the masses witnessing state-sanctioned violence. Although frequently intertwined, the issues of abolition and privacy in executions should be considered as separate concerns, undertaken with distinct intentions.

Crime and Punishment in Victorian Britain

It is a common misconception to think of the Middle Ages as the ultimate period of harsh, cruel punishments for a variety of offenses. While far from humane, the criminal system of the medieval period actually pales in comparison to that of the 1700s. Pre-Victorian Britain saw a vast expansion in prohibited actions, and punished many of these crimes by death. The march of history, in this instance, led to more stringent penalties. According to historian David Cooper, "In the reigns of the Tudors and Stuarts no more than fifty offenses carried the death penalty, but in the period from the Restoration to the death of George III in 1820, approximately

160 years, statutes defining crimes with capital punishments swelled to over two hundred."[1] The tangled network of criminal laws became known as the "Bloody Code" for their wide variety of capital crimes and gruesome methods of punishment. Citizens could be put to death for violations ranging "from the stealing of turnips to associating with gypsies, to damaging a fishpond, to writing threatening letters, to impersonating out-pensioners at Greenwich Hospital, to being found armed or disguised in a forest, park or rabbit warren, to cutting down a tree."[2] The breadth and complexity of capital crime law that developed in the eighteenth century led to the propagation of a system far more harsh than those of the states of continental Europe.

The laws of capital punishment in Great Britain at this time were intrinsically tied to broader contemporary theories of criminal law. By the Victorian period, class consciousness informed most social thought, including issues of criminality. The growth of industrialized urban centers led to highly concentrated, impoverished groups, whose destitution at times compelled law-breaking. Considered poorly educated in matters of morality and principle, the masses were looked upon by the elite as a threat to their elevated position.[3] Yet the issue was not perceived to be as simple as condemning all poor people as prone to crime. It commonly accepted "that most law-breaking was now confined to a criminal class, recruited from the urban

[1] David Cooper, *The Lesson of the Scaffold* (Athens, Ohio: Ohio University Press, 1974), 27.

[2] Arthur Koestler, *Reflections on Hanging* (New York: The MacMillan Company, 1957), 7.

[3] For a more thorough treatment of class issues and criminality in Victorian Britain, see Hay and Snyder's *Policing and Prosecution in Britain*.

poor, who were distinct from the law-abiding working-class majority."[4] Toward this distinct criminal class, then, attempts to lower rates of lawbreaking needed to be targeted.

The movement to reduce crime during the Victorian period took two main forms: moral development and deterrence. Certain groups, particularly evangelical Christians, wholeheartedly embraced the notion that humans were capable of improvement, that they could overcome environmental disadvantages—with assistance—to reach their full potential. To this end, many attempts were made to encourage "moral" behavior among the lower classes, through education, aid, and religious conversion. The belief that well-intentioned individuals could improve the virtue of the working class gained more popularity toward the end of the nineteenth century.

Before this idea took hold, however, the primary method of preventing crime was a system that worked through deterrence. Deterrent theory held that a potential criminal would weigh the benefits of committing a crime against the potential cost of punishment if he were caught and punished. The criminal, a rational being, would not choose an action that would do him more harm than good. Harsher penalties, according to this philosophy, would be more effective in preventing crime, because costs would more likely outweigh benefits in the potential criminal's balance. Indeed, maximizing the costs of conviction became the goal of the penal system, since there were many individuals in law enforcement who believed "hanging alone... would be sufficient to restrain the unbridled concupiscence and criminality of the lower orders."[5] Deterrent theory, probably the most frequently cited justification for the maintenance of the institution of capital punishment, had its roots in some of the most influential works of criminal

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[4] Douglas Hay and Francis Snyder (eds.), *Policing and Prosecution in Britain 1750 – 1850* (Oxford: Clarendon Press, 1989), 398.

[5] Harry Potter, *Hanging in Judgment: Religion and the Death Penalty in England* (New York: Continuum, 1993), 5.

law philosophy. Ironically, the same treatises that outlined the process of deterrence also argued that the punishment of death was not effective in preventing crime.

Intellectual Underpinnings

A full treatment of the philosophy underlining the death penalty debate in Victorian Britain is well beyond the scope of this paper. Instead, this section will briefly touch on a few examples of the most prominent and influential thought on the subject. The emphasis on philosophers who did not support capital punishment should not be taken as a suggestion that the opposite opinion did not exist; many philosophers, including Thomas Hobbes, John Locke, and Jean-Jacques Rousseau articulated support for executions. In nineteenth-century Britain, however, abolitionists were more likely to appeal to philosophical treatises to support their view, probably because they were not able to defer to experience, as their adversaries could. Interestingly, some of the most influential theorists of crime and punishment seemed to turn pro-execution arguments on their head, positing that deterrence would be better achieved through other means.

One of the most important philosophers in the field of crime and punishment was Cesare, the Marquis Beccaria, a Milanese politician. His most famous treatise, *Dei Delitti e delle Pene*, or *On Crimes and Punishments*, first published in 1764, represented a fundamental change in thought in the area of criminal policy. Beccaria was among the first advocates of penology, which supported rehabilitation along with punishment. His contribution to the field was immense—he has even been credited with establishing the "guiding principle of legal reform in

Europe during the age of Enlighenment."[6] Well ahead of its time, *On Crimes and Punishments* would often be referred to by reformists of the Victorian period.

In the work, Beccaria described a new and different theory of punishment. He was among the first modern Westerners to claim that punishment was not desirable in and of itself; rather, it was only tolerable to the extent that it protected society. Beccaria accepted the idea of deterrence, but thought that punishment should be minimized as much as possible while still protecting society. He wrote, "A punishment, to be just, should have only that degree of severity which is sufficient to deter others."[7] His conception of punishment focused greatly on man's psychological processes. He realized that the fear of consequences could be extremely useful, especially if punishment was not witnessed firsthand, because "all evils are increased by the imagination."[8] Yet while accepting the power of deterrence to check lawbreaking, Beccaria still found capital punishment unnecessary.

Philosophically, Beccaria believed that government did not have the right to deprive a citizen of his or her life. He declared that the government enjoyed this power in only one instance: "when, though deprived of his liberty, [the criminal] has such power and connections as may endanger the security of the nation; when his existence may produce a dangerous revolution in the established form of government."[9] Traitors or revolutionaries, he argued, represented a

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[6] Koestler, 36-37.

[7] Cesare Beccaria, *An Essay on Crimes and Punishments*, trans. M. de Voltaire (Albany: D.C. Little & Co., 1872), 101.

[8] Ibid, 102.

[9] Ibid, 98.

threat to the established order in a way that a common murderer did not. There was no need for a person to be destroyed when his or her continued existence did not represent a threat to society.

Beccaria's stance on this issue was largely informed by his religious beliefs. He felt that "since man was not his own creator, he did not have the right to destroy life."[10] An execution was only valid if it were absolutely necessary for law and order in the community to exist. The death penalty, Beccaria argued, cheapened life in the eyes of the masses. Men witnessing hangings feel "a sentiment which tells them that their lives are not lawfully in the power of any one but of that necessity only, which with its iron sceptre rules the universe."[11] The law should be charged with enhancing cultural beliefs like the value of individual life, rather than degrading life through practices such as public hangings.

In addition to his personal aversion to capital punishment, Beccaria argued that it was an ineffective punishment. He believed that executions, particularly those in public, actually worked against their expressed purpose of preventing potential crime. Beccaria declared that a hanging "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 condemned as a beast of burden to repair by his labour the injury he has done to society."[12] The shock of a hanging would soon wear off; the idea of a life of imprisonment and hard work, by contrast, kept the consequences of committing crimes omnipresent in the minds of other citizens. Beccaria believed "the experience of all ages [is] sufficient to prove that the punishment of death has

[10] Potter, 30.

[11] Beccaria, 105.

[12] Ibid, 100.

never prevented determined men from injuring society."[13] The harshness of the punishment, then, was not enough to stop crime from occurring.

An intrinsic problem with the death penalty, Beccaria argued, was that its very existence allowed criminals to walk free if a jury were hesitant to send them to their deaths. A calculating lawbreaker might feel his odds of escaping the consequences of the law fairly good in certain situations. This state of the law, he felt, was actually encouraging crime, rather than preventing it. In a new interpretation of deterrence theory, Beccaria posited that "crime was prevented not by the severity but by the certainty of punishment."[14] A lesser punishment could be even more effective in deterring crime if it were highly likely that lawbreakers would be penalized by the law. Criminals, he believed, would be more likely to be convicted and sentenced to life imprisonment if this were the maximum penalty. With the likelihood of evading the law greatly decreased, criminals would be discouraged from attempting violence. Beccaria's stance against the death penalty was thus grounded in the belief that secondary punishment[15] could actually be more effective than executions.

A few decades later, in 1789, Beccaria's views were echoed by a British philosopher, Jeremy Bentham. Bentham was a leading proponent of utilitarianism, a philosophy that held that an action's morality could be measured by the usefulness of its consequences. The act that provided the most good for the most people, then, was also the most moral. With utilitarianism's emphasis on the ends justifying the means, it may seem surprising that its leading advocate did

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[13] Beccaria, 99.

[14] Potter, 31.

[15] The term "secondary punishment" was frequently employed to describe alternatives to the punishment of death.

not believe that capital punishment was a legitimate state act. Bentham, however, believed that the harm done by executions outweighed any societal good, making it an unwarranted, excessive punishment.

Bentham acknowledged his indebtedness to the Italian thinker Beccaria, and the similarities between their philosophies of punishment are numerous. Foremost, Bentham agreed that punishment had a negative utility. He wrote, "all punishment is mischief: all punishment in itself is evil."[16] Like Beccaria, Bentham believed that punishment was only acceptable when it precluded a greater evil. The punishment, he argued, had to be in proportion to the crime in order to maximize the social good. He even went to the trouble of outlining numerous occasions when any punishment at all was unnecessary, such as when a perpetrator of a crime was intoxicated, or if punishing a criminal would lead to greater concerns, like problems in foreign relations. Bentham saw the need for great flexibility and responsiveness in punishment in order to make it as effective as possible.

Bentham, again, like Beccaria, believed that deterrence was an important consideration in determining the severity of punishments. He thought that people naturally weighed costs against benefits when choosing an action, writing, "all men calculate."[17] Indeed, this expectation of rationality is at the heart of utilitarian theory. Yet, because punishment was accepted as being an evil itself, it had to be minimized as much as possible. A specific punishment should be avoided when "putting an end to the practice may be attained as effectually at a cheaper rate"[18]—in other

[16] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1879): 170.

[17] Ibid, 188.

[18] Ibid, 177.

words, by a less severe penalty. Naturally, more potentially lucrative or beneficial crimes would merit harsher penalties, since a larger deterrent would be necessary. As Bentham described it, "the quantum of the punishment must rise with the profit of the offense."[19] At a certain point, however, a more severe punishment would not be any more effective in preventing the crime, and the harm of punishment would outweigh the positive gain.

In this category of overly harsh punishment Bentham included the death penalty. He grudgingly admitted that there might be some instances when capital punishment might be necessary. In a nod to Beccaria's analysis, Bentham admitted executions could be appropriate for "those cases in which the name of the offender, so long as he lives, may be sufficient to keep a whole nation in a flame."[20] Still, the cases when capital punishment were appropriate were extraordinary, rather than the rule. For a more typical crime, Bentham argued, "the purpose may be sufficiently answered by one or other of the various kinds of confinement and banishment: of which imprisonment is the most strict and efficacious."[21] At the least possible cost to society, imprisonment achieved the goal of removing the threat of dangerous criminals from the street, while concurrently deterring potential criminals through the example of what justice had wrought on the perpetrator. Bentham, avoiding the religious slant of Beccaria, argued that capital punishment was immoral because it had a cost that exceeding society's gain in executing the criminal.

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[19] Bentham, 180.

[20] Ibid, 197.

[21] Ibid.

While the theories of Bentham and Beccaria were slow to take root in British politics, certain intellectual leaders were more willing to adopt the implications of their theses. One leading Victorian advocate of Beccarian thinking was Vere Henry Hobart, Lord Hobart. Hobart, the son of the Earl of Buckinghamshire, was a governor of Madras and an active commentator on political issues in the mid-nineteenth century. His essay, "On Capital Punishment for Murder," published in a compilation of his work in 1885, was extremely influential among political elites, and is an excellent example of the intellectual mindset of mid-nineteenth century reformists.

Hobart draws upon many of the arguments expounded by Beccaria and Bentham. First, he expresses his belief that the "infliction of suffering upon criminals is in itself an evil," stating, if "it could be conceived possible to devise a method of deterring from crime which did not involve the infliction of suffering... the adoption of such a method, so far from being a subject of regret, would be a great and decided social improvement."[22] His argument is premised on the belief that executions are a punishment by their nature essentially different from any other. As he declared, "Moral instinct and religious precept alike proclaim that a man's life is his own in another, and more sacred, sense than anything else which he possesses. The very horror of murder which so largely contributes to the maintenance of capital punishment is an evidence that such an instinct exists."[23] Hobart believed that a growing appreciation for the worth of life, which naturally accompanied the development of society, would lead people to realize that executions were against their cultural values.

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[22] Vere Henry Hobart, *Essays and Miscellaneous Writings*, Vol. II, (London: MacMillan & Co., 1885), 80.

[23] Ibid, 90.

He went on to address a topic that was a contentious issue in Britain at the moment. Parliament was, at the time, discussing a suggestion to hold executions inside prisons instead of in the public square. Although Hobart decried the degrading effect of hangings on spectators, he declared, "It is not likely that in England executions will ever take place otherwise than in public."[24] He felt that a country with free and open institutions could never support a movement to transpose the end result of the justice process out of the public eye. Sounding almost like a supporter of executions, Hobart commented, "Men may jest jeer and blaspheme in the face of the gallows—appear when they are massed together to derive much amusement from the sight before them—but it is a sight nevertheless which they never forget."[25] Hobart's comments presaged the great debate over public executions that would soon follow.

By the middle of the nineteenth century, a substantial amount of philosophical literature had developed in support of the abolition of capital punishment. Many of the authors used justifications for the existence of the death penalty, especially the theory of deterrence, as an actual shortcoming of the institution of executions. With an increasingly literate population, and discussions of philosophical treatises on the capital punishment issue common in mass media, the public became increasingly aware of the intellectual arguments for abolition. At the very least, continued discussion among elites led the death penalty to became a common political issue.

[24] Hobart, 98.

[25] Ibid, 81.

The Unique British System of Law and Order

Popular opinion regarding capital punishment was also informed by Britain's unique policing and prosecuting system. Prosecution, for example, was not always a service provided by the government. Often, a victim of a crime would, of his or her own volition, retain a barrister to seek justice for the perpetrator. Victims retained a great deal of discretion in determining how and whether a person would ultimately be tried for their crime.[26] The somewhat haphazard system of prosecution gave rise to "a distinctive English institution of the eighteenth and nineteenth centuries—the association for the prosecution of felons."[27] These associations consisted of civic-minded citizens who would help find and retain attorneys to prosecute crimes committed against someone else, ensuring that more crimes were ultimately prosecuted in court. Proponents of prosecution associations believed that the increased likelihood of prosecution would help lower crime rates overall.

The result of this system of private prosecution was the sense that justice was ultimately the people's will. It was a civic exercise for citizens to band together and attempt to lower the incidence of crime in their towns. Private prosecution was also an assertion of the personal freedoms enjoyed by British citizens; for many, "public prosecution still, in the nineteenth century, had resonances of the connotations of oppression that the reviled police and courts of France had in the eighteenth."[28] Yet the system was not without its flaws. Although associations for the prosecution of felons helped increase the rate of prosecution for crimes, the expense and

[26] For a thorough analysis of victims' discretion in prosecution, see Ch. Two of Bailey's *Policing and Punishment in Nineteenth Century Britain*.

[27] Hay, 27.

[28] Ibid, 33.

trouble of bringing a case to court with a private barrister limited the frequency of trials. While public attorneys were not granted wide prosecutorial powers until much later, the expansion of the police instituted under Home Secretary Robert Peel in the 1820s helped fill the need for greater prosecution.[29] Policemen were granted powers to bring cases to court, and operated at a much lower cost than highly trained barristers.

The fledgling police system, however, created many problems of its own. The general public was wary of the concentration of power in the hands of professionalized law enforcement. Police were perceived to be "unmanly, unnecessary, unconstitutional, and unBritish."[30] It was a sharp break from the precedent of locally policed communities; citizens feared that the police would abuse their authority and act in an excessively heavy-handed manner.

Compelled by public opinion, the government curtailed police activity as much as possible. This led to a system in which police could not possibly address every crime—their manpower was simply too limited. Although every offender was not arrested, the police hoped that the threat of possible legal consequences would discourage crime regardless. The law and order system "worked on the principle that it did not catch and hang *all* offenders, provided that *some* people were caught and hanged to serve as a deterrent example to others."[31] The hit and miss nature of the criminal justice system seemed more palatable to the common people; it appeared that "working-class hostility [toward the police] was muted by the very patchy

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[29] Hay, 37.

[30] Victor Bailey, ed., *Policing and Punishment in Nineteenth Century Britain* (New Brunswick, New Jersey: Rutgers University Press, 1981), 47.

[31] Patrick O'Brien and Roland Quinault, eds., *The Industrial Revolution and British Society* (Cambridge: Cambridge University Press, 1993), 169.

interference of the police in their affairs."[32] Yet for a system based on the criminal's fear of possible consequences to function, it was absolutely crucial that criminals actually engaged in the rational weighing of costs against benefits that men like Jeremy Bentham envisioned.

Mounting evidence, however, suggested that this was not the case. The oft-publicized "unprecedentedly high rates of recorded crime"[33] fed widespread fears of moral decay. Of course, an increase in recorded crime did not necessarily (and probably did not) indicate higher levels of actual criminality; more likely, improved criminal systems simply *arrested* a higher proportion of offenders. There were, however, very real reasons to fear rising levels of lawbreaking. Increased levels of "extreme poverty with its concomitants of prostitution, child labour, drunkenness and lawlessness, coincided with an unprecedented accumulation of wealth as an additional incentive to crime."[34] Rising social inequality heightened tensions between the classes.

To middle and upper class contemporaries, the escalating crime rates suggested widespread degeneracy among the working class. The upper class felt threatened by this supposed surge of criminality from below, and their fears were exacerbated by politicians hoping to capitalize on public concern. Issues of crime and punishment, especially as they related to the working poor, frequently became the fodder for political debate. Beginning a trend that has continued through modern times, politicians, especially Robert Peel, were able "to shape and

[32] Bailey, 67.

[33] Hay, 397.

[34] Koestler, 18.

exploit a rich vein of anxiety about the decay of moral values to which increases in 'crime' supposedly testify."[35]

In the Victorian mind, issues of crime and personal morality were closely linked. A high emphasis on personal agency led to the perception that lawbreaking was almost entirely the result of personal choice. This view was not completely rigid, but "although want and mistreatment were acknowledged as contributing factors, crime was essentially seen as the expression of a fundamental character defect stemming from a refusal or an inability to deny wayward impulses or to make proper calculations of long-run self-interest."[36] In order to improve the justice system, it would be necessary to make the potential criminal's decision of whether to break the law more simple, so that even the most morally degenerate, poorly educated individual would be deterred from committing a crime. More effective methods of deterrence necessitated a sweeping reform of the penal system.

The criminal law reform undertaken by the various governments of the 1830s constituted a nearly complete overhaul of the criminal code. The breadth of the changes is stunning: "The scope of Peel's [Reform] Acts may be judged by the fact that they covered more than three-quarters of all offenses."[37] At this point, class tensions had eased somewhat, and the draconian deterrent measures previously considered necessary now seemed overly harsh. As an indication of "the graduation diminution of fear – fear of revolution, physical fear of the depraved, sullen

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[35] V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770 – 1868* (Oxford: Oxford University Press, 1994), 572.

[36] Martin J. Wiener, *Reconstructing the Criminal: Culture, law, and policy in England, 1830 – 1914*, (Cambridge: Cambridge University Press, 1990), 46.

[37] Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Volume 1: *The Movement for Reform* (London: Stevens & Sons Limited, 1948), 576-577.

masses, fear of incendiarism and destruction of property, fear of all kinds of lawlessness and violence" there began "a parallel diminution of laws needed to repress by severity and terror."[38] The technique of deterrence was gradually being encroached upon by those who supported the use of laws as a tool of moral development. Conceding somewhat to this philosophy, "punishment was reconstructed so that its discretionary, public, and violent character yielded to forms more calculated to promote the development of inner behavioral controls."[39] Perhaps the most clear example of this new approach to crime prevention was the amelioration of laws dealing with capital punishment.

Reformers attacked the capital code with gusto, attempting to bring it more in line with what they considered to be the sensibilities of the day. Parliament severely limited the number of crimes that could be punished by death: "in the five years between 1832 and 1837 the reformed Parliament abolished a number of anachronistic laws previously punishable by death: coining, horse-stealing, sheep-stealing... sacrilege and rick-burning."[40] Within a few decades, the only act punished by death in reality was the crime of murder. The reforms represent a dramatic shift in the conception of punishment in Britain. A noted historian of the subject even asserts, "There has been no greater nor more sudden revolution in English penal history than this retreat from hanging in the 1830s."[41] The change can be explained partly through changing social norms and increasing reluctance to resort to violence as an instrument of state control.

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[38] Cooper, 54.

[39] Wiener, 11.

[40] Cooper, 42.

[41] Gatrell, 10.

It was also the result, however, of a growing belief that frequent use of the death penalty was simply ineffective. Peel was not simply a soft-hearted liberal, as his admirers as well as enemies sometimes asserted—he and the other legal reformers of the early nineteenth century were seeking the best methods of reducing what they perceived to be the growing threat of crime. The changes instituted by the government "had less to do with repudiating the barbarism of past times than with his interest first in restoring the law's credibility against public attack, and secondly in making it more efficient, even more punitive."[42] Although the motivation behind the change varied, the result was striking. In the two decades between 1820 and 1840, "the Criminal Code changed from one in which death was the central punishment to one in which it became reserved only for the most serious offenses and was put into use infrequently."[43] Executions were increasingly seen as extreme measures, desirable only as the most effective method of deterring violence.

The reforms marked the beginning of a new era when the institution of capital punishment would more frequently come under attack. Legal reform represented the changing popular conceptions of justice and punishment. Specific concern with the death penalty was also related to broader social change and development.

Victorian Sensibilities

In the issue of crime and punishment, Victorian society was forced to reconcile conflicting popular impulses. On the one hand, the public craved the salacious and the sensational. This interest is evinced by the popular literature of the time; "Newgate novels," for

[42] Gatrell, 568.

[43] O'Brien, 170.

example, were melodramatic works that glamorized the life of crime. The popularity of books of this nature was extremely problematic for moral reformers, who decried how the novels "exhibited a fascination with unchained impulses and willfulness, suggesting anxiety about the very values of individual self-shaping... that were constantly upheld by contemporary moralists."[44] While reading about heinous crimes, however, the Victorian public made a show of increased delicacy and romanticism. This was an age "when women swooned on the slightest provocation, and bearded men shed happy tears in each other's arms."[45] The conflict between public decorum and private licentiousness translated into a difficult problem for the legal sphere. Desiring to aid man's higher self in triumphing over his base nature, reformists hoped to create laws that would decrease the opportunity for grossly "uncivilized" displays. Frequently, public hangings were the object of moralists' attacks.

One reason public executions were especially objectionable was their graphic display of disrespect to the human body. Although the macabre details of a typical hanging will be here omitted,[46] suffice it to say that the corpse's contortions ranged from grotesque to utterly revolting. If reformers sought to establish "a regime of self-discipline to restore the mind's control over a person's animal side,"[47] their goal, they believed, was surely undermined by the public display of these abominations. British society at this time placed a premium on bodily purity and modesty. The hanging was perceived to be "a pornographic invasion of the integrity

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[44] Wiener, 22.

[45] Koestler, 10.

[46] For a thoroughly disturbing account of the medical issues of hanging, see Koestler's Ch. One or Part One of Gatrell.

[47] Wiener, 44.

of the body, carried out by agents of the state."[48] Even worse, the violation of the physical self did not end on the gallows. Following the execution, "the murderer's body was to be given over to surgeons for dissection, and to make this innovation consistent with executing publicly, the dissections were often carried out in public."[49] The whole system seems bizarrely inconsistent in an era often associated with the popularity of chastity belts. Legal reformers assailed this disparity in moral sensibility, decrying a system that allowed "grotesque surgeons [to] leer over a disemboweled murderer's corpse exempted from the reverence otherwise accorded to the body."[50] Despite society's professed veneration for the human body, however, public displays of its degradation continued to draw large crowds, suggesting that somatic reverence was not as deeply ingrained as popular depictions of Victorian culture would hold.

In the nineteenth century, hangings of notorious criminals were well-attended. Although the crowds were generally believed to be predominantly lower-class, they were not exclusively the domain of workers. Motivated by curiosity, "bucks and swells and their lackies, aristocrats and gentlemen, writers and artists, continued in large numbers to test themselves from the hired windows overlooking Newgate [Gallows]."[51] The crowds regularly made an event of the hanging. It was a special occasion, and "the mob enjoyed public executions... Its mood could become ugly if the pleasure of viewing a hapless victim put to death were interfered with by the

[48] Wiener, 96.

[49] Cooper, 1.

[50] Gatrell, 256.

[51] Ibid, 65.

authorities."[52] Spectators demanded the most entertaining execution possible, and skilled hangmen were infamous and prized for their expertise.

Attending public hangings was so common that a set of social rituals developed surrounding the event. Physical souvenirs of the execution were highly sought-after. After the hanging, "mothers took their children up to the scaffold to have the hand of the corpse applied to them, for this was considered to have a curative effect; chips of the gibbet were carried off as a remedy for toothache."[53] Witnessing the death of another human being, it seems, inspired some sort of mysticism on the part of the crowds. Executions also became an opportunity to socialize; the working class had limited opportunities for leisure, so the group gathered around a gallows might offer a rare chance to see and be seen. Historians often posit that "the crowd was hungry for catharsis in or escape from routine-bound, deprived, or resentful lives, and that in such conditions there was a release in the very business of collecting together."[54] The chance to enjoy social interaction and collect superstitious tokens helped augment the gallows crowds.

Although other forms of physical punishment, such as whippings, had long been removed from public view, the institution of public hangings continued through the nineteenth century. In an age of dramatic sensitivity and modesty, executions provided an opportunity for outlet and entertainment among the working class. The upper class supported this arrangement, viewing it as an expression of a free and open system. Additionally, it was widely accepted that witnessing a criminal's hanging would have a powerful deterrent effect on potential transgressors. New

[52] Cooper, 3.

[53] Koestler, 11.

[54] Gatrell, 73.

social developments, however, led people to question the benefits of public hangings, and even capital punishment in general.

CHAPTER TWO
THE RISING TIDE OF CHANGE

The Contemporary Abolition Movement

It seems paradoxical that the very popularity of public executions helped stimulate opposition to them. Appalled by the crowds drawn by the dramatic death of a human being, elites in the fields of religion and law were among the first to press for change. Real action, however, began when broad swathes of the common folk began to accept the notion that public hangings were detrimental for society. The movement to abolish the death penalty, from which the desire to relocate hangings inside prisons developed, was one part of a larger reformist mentality embraced during the Victorian era.

At this time, it was widely accepted that human beings were improvable, and that institutions could assist people in reaching their full potential. Proponents of this belief saw laws not merely as a codification of existing moral values, but as an opportunity to shape citizens' character and encourage virtuous development. Moral reformists, for example, considered it barbaric that it was "common in London for... craftsmen who were engaged to complete orders within a given time, to remind their customers, 'That will be a hanging day, and the men will not be at work.'"[55] Undesirable habits, from laziness to drunkenness, could be limited or even proscribed through well-intentioned legislation. While the idea that laws helped advance morality was not new, the legal system "was expected more than ever to educate people in the

[55] Koestler, 8.

new standards of behavior."[56] Human history, viewed as an uneven march of progress, was entering a new era, when societies as a whole, not simply divided by classes, would be held accountable for the virtue of citizens.

Criminal law, in particular, had a special role to play in fulfilling this civilizing mission. The laws were seen to be fulfilling a higher mandate to improve the lives of people, and were expected "to serve not only the immediate practical aim of crime control, but even more importantly the ultimate goal of public character development."[57] Laws could function not just as negative discouragers of crime, but could also be positive reinforcers of more positive behaviors. In the discussion of capital punishments, this formative aspect of legal processes was often considered. Some abolitionists argued that executions taught the people to employ violence for revenge in their own lives. Emphasizing the need for healing and redemption, "they believed that social relationships might be healed by diffusing the same gift [for sympathy] among the common people rather than by resorting to coercive force."[58] Displaying violence in the form of hangings, went the argument, normalized violence in the lives of citizens, particularly the uneducated lower class. For those who saw it as their life's mission to improve the condition of the working masses, "public violence... was increasingly perceived to be working against the civilizing process, worsening popular character by legitimizing the open

[56] Wiener, 47.

[57] Ibid, 49.

[58] Gatrell, 227.

expression of dangerous passions."[59] If the public hanging were meant to serve as an example, it was perhaps an example of the wrong sort.

A great deal of the movement for the abolition of the death penalty was closely tied to religious developments. For decades, the Bible had been used as justification for capital punishment as well as against it. The rise of Evangelicalism in the last years of the eighteenth century, however, led to a more concentrated and organized voice of protest against the practice. Especially strident in their opposition to hangings were members of the Society of Friends, or Quakers. The first formal British organization dedicated to ending hangings, The Society for the Diffusion of Knowledge upon the Punishment of Death and the Improvement of Prison Discipline, was a Quaker group formed in 1808.[60] The Quakers were able to draw on an impressive legacy of moral legislative advocacy when working to oppose capital punishment. Many abolitionist leaders had also been vocal in ending the trade of human chattel, and had "honed their techniques in the anti-slavery agitations."[61] The Quakers were focused, methodical, and morally uncompromising when their religious convictions ran against the political grain.

Their steadfast opposition can be contrasted with the complacency toward or even support of capital punishment displayed by other religious sects. The Anglican Church, for example, as an instrument of the state was far more conservative and willing to support the government's consensus. In this instance, the established, state-sanctioned church was outflanked by what was essentially a fringe movement, which, despite its small size, was disproportionately influential when it appealed to popular opinion.

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[59] Wiener, 93.

[60] Potter, 33.

[61] Gatrell, 372.

Leaders of the abolition movement, however, were not solely motivated by religious convictions. Another important group that led the reformist movement were lawyers. In the early- to mid-1800s, the study of law was becoming more widespread and professionalized. Barristers and solicitors played an increasingly large role in the lives of ordinary citizens, and the prestige of their profession was enhanced. Attorneys, familiar with penal practice, were better prepared to work within the system to effect change. Their ability to change the practice of punishment was further increased by liberalized post-conviction appeals processes. Criminals convicted of capital offenses knew they had a better chance of escaping the noose if they retained an attorney, since "appeals with lawyers behind them were the most difficult for executive and judicial elites to shrug off."[62] With reformers working within the criminal law system as well as without, punishment practices came under pressure to change.

Leadership from legal and religious elites, however, could not be as effective without a truly popular movement for change. The great success of the reformist movement was their ability to convince the general public of the necessity for reconsideration of death penalty practices. Abolitionists formed large organizations with local chapters (that would be called "grassroots" in modern parlance) to organize opposition to capital punishment even in small townships. Coalitions such as the Society for the Abolition of Capital Punishment appealed both to public officials and to public opinion, using techniques such as town hall meetings, letters to the editor, and petitions to representatives.[63] Societies published and disseminated information in support of their cause. One influential tract was Edward Gibbon Wakefield's *Facts relating to*

[62] Gatrell, 430.

[63] Cooper, 56-57.

the Punishment of Death in the Metropolis, published in 1831, which used chilling crime statistics and harrowing analysis to convince the public that radical change was urgently necessary.[64] Organizations dedicated to eradicating the death penalty proved extremely effective in disseminating their views; their methods, in fact, would not be unusual for a special interest group in modern times.

The effectiveness of abolition groups also indicated the public's receptiveness to hear an alternative perspective on the issue. Although citizens attended hangings in droves, there is evidence to suggest that they were not simply passively absorbing lessons on justice and discipline handed down by royal authority. Rather, audiences were discriminating and even thoughtful in their responses to executions. The mob might madly decry a criminal convicted of betraying the motherland, yet "when humbler people hanged for humble crimes, they [the crowd] could act like a Greek chorus, mocking justice's pretensions."[65] The audience's raucous behavior, in fact, indicated a complex response to the compelling scene before them. Levity and merriment could betray a deep discomfort in the minds of the viewers. In this complex situation, then, "it was not... that the reformers 'invented' opinion or spoke into a vacuum. They tapped into anxieties about harsh law."[66] The common people actually present at hangings, after all, could be expected to have a very real sense of the injustices and severity of the system.

Public discontent was further reflected by increased jury acquittals when execution was deemed too harsh a punishment for the crime committed. In a representative system like that of

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[64] Radzinowicz, 596.

[65] Gatrell, 59.

[66] Ibid, 416.

Great Britain, when "social progress outpaces the Law, so that its penalties appear disproportionately severe to the public conscience, juries become reluctant to convict."[67] Although leaders often discussed "the mob" in patronizing or fearful tones, actions such as these demonstrate that the people were surprisingly astute observers of criminal enforcement, capable of passing judgment on situations they felt to be unfair or legal actions they believed to be unwarranted.

While much of the change in popular opinion regarding public executions can be described as a gradual shift in sensibilities, there was a single moment that perhaps altered the political landscape more than any other. This turning point occurred when Charles Dickens publicly opined that hangings should not be held in public. Dickens, one of the most famous citizens of his time, sent a letter to the editor of *The Times* on November 14, 1845, after witnessing an execution firsthand. Although his sentiments were not entirely original, their eloquent expression and the prominence of their author lent his analysis special weight.

Dickens, who would go on to write many novels dealing with criminals and the lower classes, was appalled by the scene he beheld before the gallows. He described the masses as "thousands upon thousands of upturned faces, so inexpressibly odious in their brutal mirth or callousness, that a man had cause to feel ashamed of the shape he wore, and to shrink from himself, as fashioned in the image of the Devil."[68] This approbation was earned by Dickens' perception of the nonchalance of the audience. He saw "no more emotion, no more pity, no more thought that two immortal souls had gone to judgment, no more restraint in any of the

[67] Koestler, 36.

[68] Charles Dickens, *Times*, Nov. 14, 1849, 4.

previous obscenities, than if the name of Christ had never been heard in this world."[69] Dickens believed that witnessing hanging contributed to and augmented the moral callousness of the witnesses. He declared, "I am solemnly convinced that nothing that ingenuity could devise to be done in this city... could work such ruin as one public execution."[70] His scathing criticism of the scene echoed the rhetoric employed by those who sought to abolish the death penalty.

Dickens was himself no abolitionist; this letter to the editor, in fact, represents his public split from the most radical reformist groups. Instead, he used his platform to advocate a different change: "that the Government might be induced to give its support to a measure making the infliction of capital punishment a private solemnity within the prison walls."[71] Dickens had accepted that capital punishment itself was effective in upholding law and order, but believed that its public nature actively worked against this end. *The Times* ran another column beside Dickens' letter arguing the opposite point. Their editorial board defended the position that it was "a matter of necessity that so tremendous an act as a national homicide should be publicly as well as solemnly done. Popular jealousy demands it."[72] For several days thereafter, the paper was filled with letters and editorials on either side of the issue. In a country primed by abolitionist organizations to take a side on the capital punishment issue, Dickens' letter had touched off a debate that came to captivate the public attention. It was several years before the members of Parliament had the political will to address seriously the issue of capital punishment

[69] Dickens, 4.

[70] Ibid.

[71] Ibid.

[72] *Times*, Nov. 14, 1849, 4.

laws and practices, but private executions had been introduced as an issue in the lexicon of criminal law reform.

Government Response

With the weight of public opinion favoring change in the capital punishment laws of the country, it was only a matter of time before Parliament responded with new legislation. The moment of great change was spurred into action on February 22, 1864. On this day, five pirates convicted of murder were hanged simultaneously at Newgate. The crowd present to witness the execution was particularly large because of the sensational nature of the crime and trial. Newspapers present to cover the hanging discovered, however, that the true story was the behavior of the witnesses.[73] The "Five Pirates Hanging" became synonymous with the unruly and immoral behavior of citizens who attended public executions. The situation prompted Charles Dickens to write another scathing letter to the *Times* that moved the issue of capital punishment to the forefront of popular consciousness.

In this context, the radical Liberal William Ewart moved to create a Committee for the purpose of investigating the necessity of maintaining the death penalty. Ewart was known as a crusader for radical reformist causes, and had won the passage of legislation on issues as varied as creating free public libraries and legalizing the use of the metric system. The session on May 3, 1864, was not the first time Ewart had introduced capital punishment into the debate in the House of Commons; he had already pressed through measures limiting the scope of capital

[73] "Punishment of Death—Select Committee Moved For," Parliamentary Debates (Commons), (3), 174 (3 May 1864): col 2079.

punishment, and had tried on several other occasions to move for complete abolition.[74] His proposal at this point was comparatively moderate—he believed an extended inquiry into the need for continued executions was justified by the current state of criminal law and social development.

Ewart attempted to frame his argument in terms that would seem acceptable to those of less radical opinions than he. He argued first that the specter of capital punishment reduced the amount of predictability in criminal proceedings. Ewart backed his claim with detailed statistics, observing, "The ten years ending with the year 1862, which I also offer for inspection, show that, while the chances of escaping the punishment awarded by the law was, for all offences, as 1 to 4, the chances of escaping it for the capital case of murder as 5½ to 1."[75] A figure like this could certainly be construed to support the notion, often argued by abolitionists appealing to the need for law and order, that reluctance to impose the death penalty led judges and juries to be excessively lenient. Buoyed by statistics, Ewart asked, "Are we not justified in saying that great inconsistency, great uncertainty, prevail under our present system of capital punishment?"[76] He sought to suggest that society would be better off and safer without the death penalty, because murderers would be more likely to receive the harsh punishment they deserved.

Ewart next took the tack of arguing that Parliament must take action to remain ahead of public opinion on issues of criminal law. Essentially, he argued that the public's use of the heckler's veto threatened to undermine the rule of law in the country. Using a recent case where

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[74] *Oxford Dictionary of National Biography*, s.v. "Ewart, William."

[75] "Punishment of Death—Select Committee Moved For," col 2057.

[76] Ibid, 2056.

a convict, Hall, escaped his hanging, Ewart noted:

> But why was Hall spared? Apparently, and avowedly on the part of the Secretary of the Home Department, on account of the strong expression of popular feeling in his favour. I admit the propriety of the concession. But on what dangerous grounds was it made, and how dangerous a precedent was given to the public in favour of popular agitation against the sentences of the law? I boldly say that, when such a reason for infringing the law is not only acted on but avowed, the law ought to be altered; for the law can no longer be maintained consistently with its own consistency and dignity.[77]

Allowing an unpopular law to be undermined by judges and officials exercising their own discretion devalued the authority of the law—and, by extension, laws in general. A much safer route would be to remedy the law itself.

Finally, Ewart discussed potential remedies for the public's distaste for current capital punishment laws. He noted that there was particular dissent regarding the execution of women, especially in the case of infanticide. Ewart argued, however, that men and women should be treated equally—at least in the case of murder. Another palliative he recognized was the transfer of executions from the public square to within the prison walls. He quickly dismissed this option as well, terming it a "concealment of the evil. It would be a confession that we are ashamed of what we are doing."[78] This argument was intended as a veil for Ewart's true beliefs. He, like many other opponents of hangings, feared that the instatement of private executions would undermine support for their total abolition. He thought that if he were unable to win immediate elimination, his best chance of gaining enough popular support to end the death penalty would be to keep such distasteful displays in the public's face.[79]

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[77] "Punishment of Death—Select Committee Moved For," col 2060.

[78] Ibid, 2062.

[79] Potter, 82.

George Denman, another radical Member of Parliament, rose to concur with Ewart's judgment as to the necessity of executions. He reasoned that the deterrent effect worked upon a potential criminal by causing him to calculate the possible cost of punishment if a crime were committed. If such rationality is assumed, however, the calculation might actually encourage crime. Denman noted that "in the year 1852... there were eighty-one persons committed for murder. In the case of eight of these, the grand jury ignored the Bill; five were acquitted on the ground of insanity at the time of committing the offence; six on the ground of insanity at the time of trial; sixteen were convicted, and no less than forty-six were acquitted."[80] The potential benefits of the crime, then, could easily outweigh the costs in terms of punishment. Denman further pointed out that the previous year had seen the highest number of executions for murder in twenty years, leading him "to argue that the carrying out capital punishment on a larger scale had had no tendency to diminish the number of murders."[81] His analysis of the statistics at hand aimed to show that the deterrent effect was not so effectual as hoped.

Naturally, not all the Members present saw the situation in the same way. Many believed that the threat of hanging served to prevent a great deal of crime, although it was difficult to quantify exactly how much. Lord Henry Lennox, speaking on behalf of those not as willing to make a radical departure from precedent, moved to amend the request to inquire into laws relating to capital punishment. He believed that there were many ways the law could be improved short of being abolished. In particular, he saw the need for a clarification of the legal definition of murder. As things stood, he felt it was not "a healthy state of the law, where two

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[80] "Punishment of Death—Select Committee Moved For," col 2066.

[81] Ibid, 2069.

crimes so dissimilar in their character received the same punishment."[82] Lennox served to remind his audience that lawmakers faced a complex and nuanced task: the criminal law reform that had been progressing for decades still left much to be perfected. It was his aim to take a broad and inclusive look at the capital laws, and he proposed the new language "with the view of widening the field of the inquiry."[83] Although he could not join in the opinion of his more radical colleagues, he did not preclude the possibility of moving toward their position if the appointed Committee found it necessary.

Taking a still more conservative view, Charles Neate suggested that the inquiry be conducted by a Commission rather than by a Committee. A Committee, comprised of Members of Parliament, lacked expertise and could be ideologically skewed. Commissions, on the other hand, would be composed of experts, could hear more witness testimony, and would be better able to focus on addressing the question at hand. Neate ventured that, with a Commission, "the country might have the advantage of the presence of one or two of the Judges as members of that body."[84]

Misinterpreting Neate's aim, the Radical stalwart John Bright snapped, "every amelioration of the criminal code of this country has been carried against the opinion of the majority of the Judges."[85] By the nature of their careers, and perhaps their dispositions, judges were likely to take a much more conservative view of changes to the penal code, and Bright

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[82] "Punishment of Death—Select Committee Moved For," col 2073.

[83] Ibid, 2077.

[84] Ibid, 2082.

[85] Ibid, 2092.

seemed to believe that Neate was attempting to block legal changes. In actuality, however, Neate was supportive of criminal law reform. He spoke of the existing system in scathing terms, declaring, "This country has always been the most barbarous of all civilized nations in its punishments; and at this moment is the most barbarous still."[86] Neate had trouble accepting that Britain would continue to employ punishments popular in "savage" lands, while the nations of Europe moved away from violent justice. In strident tones, he asked, "Is there any man with one particle of sense or the power of reason who believes that human life in this country is made more secure because ten or twelve men are publicly put to death every year?"[87] The argument that hangings lessened a threat to public safety, he believed, was ludicrous.

Instead of shaping behavior through fear, Neate promoted laws that would instill a higher moral sensibility. He believed "the security for human life depends upon the reverence for human life; and unless you can inculcate in the minds of your people a veneration for that which God only has given, you do little by the most severe and barbarous penalties to preserve the safety of your citizens."[88] He believed that more lenient laws would actually discourage criminal behavior. Neate possessed a deep faith in the malleability of human nature that many of his colleagues did not share.

For the most part, the Members shared a reluctance to put other human beings to death, but were also hesitant to make a change in the laws that could reduce the safety of the country's citizens. Francis Crossley perhaps put it best when he declared his belief that "nothing less than

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[86] "Punishment of Death—Select Committee Moved For," col 2094.

[87] Ibid, 2097.

[88] Ibid.

a plain command given to us by the Creator himself could justify us in depriving a fellow-creature of life."[89] Passing a death sentence was truly different from any other punishment, and should not be undertaken lightly. It followed that "if a mode could be devised whereby they could deter the murderer from committing crime without taking his life, they were bound to adopt that mode; and that for that purpose a most careful and anxious investigation ought to be pursued."[90] Clearly, a painstaking examination of the status quo and possible alternatives was necessary. As a body, the House of Commons agreed to move for a Royal Commission to inquire into the laws regarding capital punishment.

The Report of the Capital Punishment Commission

The report produced by the Capital Punishment Commission was two years in the making. The Commission included men of all political bents, in an attempt to represent various viewpoints fairly. Some of the representatives, such as John Bright and William Ewart, were interested in the issue of capital punishment as one part of a broader interest in reformist causes. Others, such as Charles Neate and John Hibbert, were known as specialists in the specific area of legal reform. Others, including Samuel Wilberforce, the Bishop of Oxford, and George Ward Hunt, were included for ideological balance despite little public record of their interest in the topic. Almost all of the Commissioners were legal professionals, and had at least some firsthand knowledge of the capital penal code.[91]

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[89] "Punishment of Death—Select Committee Moved For," col 2112.

[90] Ibid, 2112-2113.

[91] More detailed biographies of these men can be found in the *Oxford Dictionary of National Biography*.

The Commissioners, recognizing the far-reaching implications of their findings, took care to be as thorough and detailed as possible. Given a broad mandate to look into death penalty law and policy, they questioned expert witnesses on a variety of topics. Virtually every conceivable topic was addressed, from the deterrent effect to jury impact, from infanticide to insanity, that was even tangentially related to capital punishment practices. The Report, in the end, did not recommend the sweeping changes hoped for by some radicals, but nevertheless suggested alterations in death penalty law that were significant.

The majority of the Capital Punishment Commission agreed with those in Parliament who argued that capital laws were in need of alteration. The Commissioners recognized the need to refine the definition of murder, to split murder laws into degrees, and to limit the use of the death penalty to punish crimes**.** On the broader question of the legitimacy of continuing executions, they could not resolve their disagreement about the expediency of abolishing capital punishment altogether—their conflicting views were irreconcilable and ultimately based on ideology rather than evidence, so "the Commissioners forbear to enter into the abstract question of the expediency of abolishing or maintaining the Capital Punishment."[92] For the time being, since capital punishment was not conclusively proven counterproductive to the goals of the state, the Commissioners deferred to experience. Perhaps the most significant outcome of the Commission's Report was the decisive support it gave to the elimination of public executions. The Commissioners recommended that Parliament pass a law ending this practice, stating, "The witnesses whom we have examined are, with very few exceptions, in favour of the abolition of the present system of public executions and it seems impossible to resist such a weight of

[92] *Report of the Capital Punishment Commission* (London: George E. Eyre and William Spottswoode, 1866), xlvii.

authority."[93] Although opinions on capital punishment itself varied widely, the belief that the time had come to end public hangings was shared by almost all the expert witnesses called to testify before the Commission.

The first point emphasized in the testimonies delivered before the Commission was the low class and even lower morality of the people who regularly attended public executions. Lord Cranworth, Baron on the Court of Exchequer, lamented, "It is very desirable that there should be a mixture of all classes when great masses are assembled, but you can never have that at an execution; you have nothing but the lowest class of persons."[94] The hanging, then, was not exactly a general civic exercise, but rather an appeal to a specific segment of the population. Thomas Kittle, the Inspector of Police, described how the crowd actually created the opportunity for further crime. According to his observations, "it frequently occurs that pockets are picked, but as a rule persons do not go with any valuables about them to an execution."[95] The propagation of crime can be interpreted as a clear indicator that the lessons of the execution were not exactly absorbed by observers. They would even become unruly, as when Kittle described the time he "saw a man's legs above the heads of the crowd for a period, I should say, of three or four minutes. The man was crying out very much and there was a hubbub but his legs exalted above the heads of the crowd, and his head was down."[96] Respectable persons would be reluctant to be present at a scene of such disorder and even danger.

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[93] *Report,* l.

[94] Ibid, 13.

[95] Ibid, 110.

[96] Ibid, 116.

Although lawmakers hoped that the hanging would function to impress citizens with the power of justice, they were more inclined to see it as entertainment. Lieutenant-Colonel Henderson, who worked with convicts in Western Australia, believed that "they went there merely to see it like any other spectacle; that the appearance of the convict on the scaffold made him rather sick, but the actual execution was rather pleasant and satisfactory than otherwise, and that he went away satisfied—that it was rather a relief, but that it did not impress the spectators beyond that."[97] Hangings gave lower-class people the opportunity to socialize and be entertained by a macabre demonstration; they did not inspire the chilling fear and respect for the law that the system intended.

In fact, some witnesses believed that observing the hangings actually worked against the goal of preventing crime. Spencer Walpole, a Liberal Member of Parliament and former Secretary of State for the Home Department, argued that "it induces such a scene of demoralization that more injury is done to the public mind than if the community knew that the prisoner, as soon as the sentence was passed upon him, would be executed."[98] The atmosphere of public hangings, according to Walpole, was degrading to the consciences of the observers. Henderson had independently arrived at the same conclusion, arguing, "the very sight of the exhibition destroys the feeling which you want."[99] The great risk of public punishment was that the crowd could be moved to sympathize with the criminal, abrogating the goal of having the collective citizenry share in the punishment of a dangerous offender.

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[97] *Report,* 108.

[98] Ibid, 73.

[99] Ibid, 109.

Even if the spectacle of a hanging was not directly harmful, Hilary Nicholas Nissen, Sheriff of the City of London, argued that it was in no way helpful for the state's goals. As Nissen eloquently expressed, "men who had lived a constant life of wretchedness for many years with drunken wives or starving children, when at last they find some great result is to be attained by crime do not hesitate to take life, because the punishment of death has no terror for them."[100] Seeing death firsthand would not alter this desperate, callous state of mind. Sir George Grey, the Secretary of State for the Home Department, believed "it would be an undoubted gain if those scenes could be avoided and if at the same time the public could be quite satisfied that the sentence was properly carried into effect."[101] While public access and proof of justice would be necessary, an alternate arrangement could achieve these ends while also ending public displays of man's worst nature.

Witnesses also expressed concern for the wellbeing of the prisoner being executed. While perhaps not objecting to the need for his ultimate punishment, some individuals testified that the lack of gravity displayed at executions was unjust and immoral. Henry Avory, a criminal law expert through his work as a clerk of arraigns at Central Criminal Court and a deputy on Home Circuit, expressed his belief that "the destruction of a life is one of the most solemn acts in which the state can be engaged; it should be surrounded with as much solemnity as is possible without theatrical display."[102] His concerns were echoed by Sheriff Nissen, who said, "A public

[100] *Report*, 223.

[101] Ibid, 219.

[102] Ibid, 245.

execution in this country is... too prosaic a matter altogether."[103] This lack of solemnity could actually work against the deterrent effect of public executions; if the people present did not take the event seriously, they might not consider the implications of finding themselves in the prisoner's position. In addition to the negative impact on citizens, the jocular manner of the crowds was harmful for the person being executed. As Henry Cartwright, a barrister-at-law and governor of the Gloucester County Prison, asserted, "it is painful to think that a man who is going to end his life is to be taken suddenly out before the gaze of a great number of people; the whole of the influence which the chaplain has established in his mind is suddenly upset and his religious sentiments are diverted."[104] It was often unpopular to cite the hanging's effect on the criminal as evidence for abolition of public punishment, but Cartwright was not alone in believing that general morality was done a disservice by such an execution.

Many witnesses supported the belief that there could be other means of achieving a deterrent effect without public hangings. A private execution, indeed, would be more in keeping with general practice for punishments in Britain. Lord Cranworth, for instance, observed, "I do not see any principle which is to make a public capital execution necessary which would not make a public flogging necessary."[105] Even without seeing the hanging firsthand, the public, knowing the criminal to be put to death, would have heightened apprehensions about committing crimes themselves. The execution, even in private, would be widely discussed and acknowledged. Lord Wensleydale, a judge, saw no issues with having the "sentence, with the

[103] *Report*, 220.

[104] Ibid, 355.

[105] Ibid, 13.

names of the persons who witnessed the execution... published in conspicuous places in the town where the execution took place. I think that it would be very likely to produce a considerable deterring effect and probably more than the mere fact of the execution being seen by a crowd of people."[106] Further, the justice system could take advantage of the growth of literacy and media outlets to publicize executions. According to Lord Cranworth's analysis, "The newspapers are circulated all over the kingdom in 24 hours so that everybody may read them, and you may depend upon it that the criminal classes read them or hear them read, and I think that this would have same or nearly the same effect as a public execution."[107] The experts generally agreed that it was not necessary to witness a hanging in person to be dissuaded from crime. With moderate adjustments, the government could eliminate public executions without losing any deterrent effect that might result from capital punishment.

Removing executions from the public eye, however, would necessitate additional safeguards to ensure that justice was done. Those familiar with foreign practices insisted that this was eminently possible. Walpole, for instance, observed, "I am told that in some parts of America they have always a inquest upon the body after the execution."[108] It would be feasible, in other words, to emulate the practices of other countries that had successfully abolished capital punishment. Interestingly, in looking overseas for examples, the Commission focused almost exclusively on lands that had at one point been under British rule. Focusing on nations whose legal systems were based on English common law, "English insularity and the traditional feeling

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[106] *Report*, 54.

[107] Ibid, 14.

[108] Ibid, 74.

of the uniqueness and superiority of English institutions conditioned the authorities to overlook Europe for insights and ideas for reform; instead they turned to America and Australia."[109] In both America and Australia, states had created systems of private execution witnessed by government officials—a similar system could be expected to work in Britain. The chaplain of Newgate Prison, Reverend John Davis, acknowledged, "It will be very painful for the gentlemen who are called upon to witness. At present a new sheriff occasionally almost faints. I know that I was ill for three days after witnessing the first execution which I attended."[110] Notwithstanding official queasiness, foreign precedent suggested to the members of the Commission that a just system of private execution could be successfully created.

The opinion in favor of private executions, although held by a slim majority, was not unanimous.[111] There were those who felt that changing the current system might alleviate some problems, but would only enhance others. The Member of Parliament George Denman, for example, believed that a private hanging would only enhance the public's morbid fascination with the criminal's heinous crime. He declared, "My belief is that by secrecy and mystery, even supposing it be practicable, you would invest him with a new sort of interest, even to a greater extent than that which he has at present."[112] People sharing Denman's opinion believed that removing prisoners from sight would not remove them from mind, but would rather increase their infamy among the public, perhaps encouraging similar crimes.

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[109] Cooper, 133.

[110] *Report*, 149.

[111] Five men—Lushington, Ewart, Neate, Moncreif, and Bright—did not join the other seven members of the Commission in recommending the institution of private executions.

[112] *Report*, 98.

Other witnesses objected to the possible abuses of a private system. Thomas Beggs, for one, noted, "I think that, however compatible [private executions] may be with the institutions of other countries, they are scarcely compatible with ours; we have open courts of law, and open discussions in Parliament, and all our institutions arc open."[113] Beggs may have been misrepresenting himself; as the secretary of the Society for the Abolition of the Punishment of Death, he was doubtlessly attempting to persuade the Commission that full abolition of capital punishment was the only possible recourse. His expressed view, though, was shared by several other proponents of maintaining the current open system. Despite some misgivings, the Commission as a whole endorsed the view that abolishing public executions would be beneficial for the system of justice and for the morality of the public.

In order to gauge the effectiveness of the Commission Report, it is necessary to examine how its findings were received by the public. One example of such a perspective is provided by *Meliora*, a liberal periodical, which published a lengthy article reviewing the Commission's recommendations. The magazine noted that "the public generally have, and not without reason, a distrust of Parliamentary reports; such reports are sometimes one-sided and the examinations very often stifle as much information as they elicit."[114] In this particular instance, however, the magazine did not find this to be the case: "The Commission was chosen with fairness and the advocates of the abolition of death punishment were fully represented upon it. The inquiry was conducted with strict impartiality, and the evidence embodies all the arguments by which each

[113] *Report*, 320.

[114] "The Capital Punishment Commission," *Meliora: A Quarterly Review of Social Science* IX (1866): 125.

side of the question is sustained."[115] If *Meliora*, which tended toward the radical side of political issues, is a fair example of public opinion, the Commission conducted itself beyond reproach. It is doubly remarkable that the article praised the Commission even while disagreeing with its findings. It pointedly observes, "while the argument in favour of the deterrent influence of death punishment can only be speculative, every instance of a man suffering the punishment is an evidence of the failure of the penalty in affecting its purpose which is to deter."[116] Since its political leanings led it to the opposite conclusion of the Commission, while still praising the process by which the Report was produced, it is a fairly safe conjecture to believe that the Commission was likewise highly regarded by the rest of the general public.

Having produced a document so well-received and influential, the Commission's recommendations were laid out for government response. The Report seemed to signal a concrete course of action for officials who recognized the need for further penal reform, but who feared excessive change. The move to abolish public executions, rather than eliminating the death penalty as an institution, seemed to be a moderate third path. Not much time passed before the issue was taken up in Parliament.

[115] "The Capital Punishment Commission," 126.

[116] Ibid, 139.

CHAPTER THREE
PARLIAMENT DEBATES

Division in the House of Lords

Following the report presented by the Capital Punishment Commission, it was clear that the prevailing political sentiment held that change was necessary. Certainly there were those who felt the moment right for full abolition of the death penalty; others, however, hoped to preserve the existing system with minor adjustments.

On June 15, 1866, the Committee in the House of Lords sat to consider the draft of the bill. The debate quickly became contentious, splitting with Peelites and Liberals favoring ameliorative measures, while Conservatives stood adamant in their defense of public hangings.

Lord St. Leonards led off the discussion by objecting outright to private executions. In his opinion, preventing the public from seeing the hangings "would deprive capital punishments of their deterrent quality."[117] The knowledge that an execution took place was not an effective deterrent in itself; it required a first-person encounter with the gruesome act at which "the boldest man shuddered."[118] At the time of these debates, information could spread rapidly through newspapers and other written media, but far-off occurrences could easily take on the sensation of fiction to readers. Lord St. Leonards, hoping to circumvent the skepticism of the public, noted, "It was only by public executions that the great mass of the people could be

[117] "Law of Capital Punishment Amendment Bill," Parliamentary Debates (Lords), (3), 184 (15 June 1866): col 451.

[118] Ibid.

induced to believe that the law had taken effect in such cases."[119] Without seeing the punishment actually take place, in other words, he believed the people could easily dismiss the fact that justice had been done. This might lead to discontent with the purveyors of law and order, or, even worse, encourage would-be criminals to attempt to carry out more nefarious deeds. Lord St. Leonards further rejected the notion that viewing the hangings was morally corruptive for the viewers. He contended, "No wrong was done by public executions… there could be little doubt that to witness so solemn a spectacle must make a deep impression on the minds of those who beheld it."[120] Having never witnessed an execution himself, but familiar with the proceedings through reading *Times* coverage of the events, Lord St. Leonards assumed that viewers could not help but be overcome by awe at the majesty of justice being meted out.

The Duke of Richmond, however, looked upon the effects of viewing public hangings with more skepticism. He noted that the crowd was a self-selected group, not a representative swath of the Queen's subjects. The people who attended such events were not, to say the least, of the highest moral caliber; instead, "the execution of a criminal for murder brought together only the very dregs of the population."[121] It would be difficult to ascertain what sort of moral lessons a notably immoral crowd might learn. Further, the Duke asserted, "executions had no deterrent effect on the lower classes, who looked upon them in the same way as prize fights… and that the behaviour of the crowd was exceedingly riotous and undecorous."[122] As was often noted by critics of public executions, the crowds viewed the events as free public entertainment.

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[119] "Law of Capital Punishment Amendment Bill," 452.

[120] Ibid.

[121] Ibid.

[122] Ibid, 453.

If the deterrent effect derived from the act of execution, however, the Duke observed that "all the publicity attending the proceedings… was not in the least interfered with."[123] If the thought that death could result from a crime truly stopped a person from committing that crime, surely the fact that the death was privately carried out would not hamper this deterrent effect.

The Lord Chancellor, Frederick Thesiger, who first came to office under the Peel ministry and was hostile to Benjamin Disraeli's leadership of the Conservatives,[124] augmented the Duke of Richmond's argument. He pointed out that "capital punishment was the only punishment that was carried out in public."[125] Old practices of public floggings had been dismissed as too barbaric for public tastes. Yet if a beating was exceedingly tasteless, how could a human death be any less so? The Lord Chancellor drew the Committee's attention to compare the practice of Britain to "some of the American States and… several of the States of Europe."[126] These peer nations, he observed, had successfully abrogated the practice of public hangings and yet managed to keep civil order. The Lord Chancellor, seeking to appeal to the morality of his audience, concluded that the bill was "in harmony with the more humane feelings of the present age."[127] To resist the development of a more tasteful and refined society would be to impede the progress of history.

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[123] "Law of Capital Punishment Amendment Bill," 452.

[124] *Oxford Dictionary of National Biography*, s.v. "Thesiger, Frederick, first Baron Chelmsford (1794-1878)." Thesiger, although ideologically conservative, bore a personal animosity to Disraeli because of his anti-Semitism.

[125] "Law of Capital Punishment Amendment Bill," 453.

[126] Ibid.

[127] Ibid.

It seemed that the legislators could not agree on the state of crowds who viewed a public execution. Lord Dunsany interjected that he "believed that if the executions were carried out in private they would be far more solemn and decorous than they were at present."[128] The Earl of Romney, disagreeing, vouched that he had personally attended executions, and while the crowd may "indulge in a species of jocularity, trying, if possible, to carry off their nervous feeling, it was quite obvious that they were deeply impressed with the awfulness of the scene they had witnessed."[129] Regardless of their interpretation of the crowd's reaction, it is clear that the legislators had a vested interest in how the execution manipulated the crowd. Even more than instilling awe or fear in their hearts, they worried that the crowd sufficiently appreciated the dignity of human life, which had the counterintuitive effect of impressing upon them the awfulness of life being taken away. It was critical to determine how the crowd reacted to executions because their efficacy as deterrents depended on the mindset of the viewers.

The Earl of Malmesbury, James Harris, the Conservative Leader in the House of Lords, argued that an attempt to understand the minds of spectators was futile. He declared, "they were, perhaps, the worst Court in the world for passing judgment as to the effect of public executions upon the lower classes."[130] It would be impossible for men such as themselves to understand the thoughts of common folk, since they were clearly educated differently, and, "possessing refined feelings and minds,"[131] had an entirely different perspective. The Earl based his argument on the Burkean premise that the existing law must have some sort of innate wisdom, because it had

[128] "Law of Capital Punishment Amendment Bill," 454.

[129] Ibid.

[130] Ibid, 455.

[131] Ibid.

always worked. Better to err on the side of caution, he argued, and "unless they were certain that such executions were worthless in respect to morality and useless as warnings, he thought it was better to leave the law as it stood."[132]

He also objected to his colleagues' concern with the crowd's reaction to the hanging. He asserted, "those people were obscene, not because of what was taking place, but because it was their habit to be obscene."[133] Not accepting the new paradigm that government could actually shape the morality of the people, the Earl theorized that concern for the masses' virtues was a waste of time. On the other hand, he did consider the sentiments of the person being hanged. He thought that the public aspect of the punishment increased the severity of the sentence, since "criminals in general were not so insensible as some supposed to a feeling of degradation."[134] To make the executions private, he argued, would be lessening the sentence passed on the most violent and ruthless offenders. He concluded by contending that he suspected this law was "the first step to the abolition of capital punishment,"[135] a move of which he did not approve.

The Bishop of Oxford, Samuel Wilberforce, vehemently countered the Earl's opinions. Rather than being unable to understand the common folk, he argued, "the result of their superior education was just the reverse"[136]—the Peers were actually the better judges of their nature. The Bishop sought to appeal to the expertise of the Commission's conclusions that had led to the introduction of the bill. He pointed out that the evidence gathered by Commission "was clearly

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[132] "Law of Capital Punishment Amendment Bill," 455.

[133] Ibid, 456.

[134] Ibid.

[135] Ibid, 457.

[136] Ibid.

against the notion that any good effect was produced on the criminal masses."[137] The Bishop also developed a more nuanced interpretation of the deterrent effect. The Commission's findings also showed "that the dread of the punishment became increased when the sight itself was withdrawn from the public gaze."[138] Private executions, then, were a better way to achieve the goals outlined by proponents of capital punishment.

Public viewings, he argued, may even have a galvanizing effect on those who witness the hangings. Noting that "those very men who had themselves been great criminals had been constant attendants at public executions,"[139] the Bishop suggested that the coarsening effect of viewing hangings might actually create higher levels of criminality. He believed, "the morbid feeling excited by such spectacles… had led to the greater frequency instead of to the diminution of murders."[140] The Bishop, in making this argument, ignored the problem of self-selection: did viewing executions make people murderous, or did naturally murderous people feel drawn to a violent event like a hanging? It seemed, however, that the vast majority of Peers accepted the Bishop's reasoning regarding the correlation between acting violently and witnessing hangings; the committee voted 75 Content to 25 Not-Content[141] regarding the clause moving executions within prison walls. Although this paramount issue was settled, there were several other details still to be approved.

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[137] "Law of Capital Punishment Amendment Bill," 458.

[138] Ibid.

[139] Ibid.

[140] Ibid, 459.

[141] Ibid.

Although holding executions within prisons certainly eliminated much of the public's exposure to the event, many legislators were concerned with the public oversight of such an action. Their doubts took the form of two major sticking points: the clause requiring a sheriff's presence, and the clause regarding the coroner's autopsy. Both clauses, although tangential to the main issue, were seen by the minority as possible ways to expand the notion of "private." The fact that the hanging took place within the prison walls did not necessarily preclude observers from entering. With the language of the bill somewhat vague, it remained to be delineated exactly who had a right to be present at the execution.

One concern was that the law gave the sheriff present the discretion to determine who was allowed to witness the hanging. Noting that the wording of the bill allowed outside observers, as long as the sheriff admitted them, John Spencer-Churchill, the Duke of Marlborough, entreated the committee to "preserve to some extent a public character."[142] He believed that the sheriff should be required to allow "as many persons within [the gaol's] precincts as could be conveniently accommodated."[143] The body as a whole, however, felt that this allowance effectually undermined the intent of the bill, which was to remove the hanging from the public *eye*, not simply from the public square.

The exclusion of the public from the scene of the execution caused some lawmakers to consider how the people could be assured that everything had transpired legally and in reality. Lord Teynham suggested that this could be accomplished by requiring the sheriff to admit "a

[142] "Law of Capital Punishment Amendment Bill," 460.

[143] Ibid.

reasonable number of the accredited representatives of the public press."[144] Considering the public's interest in the proceedings of law and order, he observed, "Seeing that executions hereafter were not to take place altogether in public, it was most important that the representatives of the press should be enabled to inform the public of what transpired on those occasions."[145] Newspaper coverage of executions could help convince the people that there had been no foul play involved. When this amendment was negatived, Earl Nelson presented the unorthodox idea of having the jury that convicted the prisoner attend the execution and identify the body. This procedure, he argued, "would carry back to their neighbourhood the certainty that the crime had been punished."[146] When the Lord Chancellor pointed out the great logistical difficulty this law would entail, Nelson withdrew his suggestion. With limited further discussion, the committee finally accepted the bill with little alteration.

The discussion of the bill in the House of Lords touched on many of the most contentious elements of the public execution debate. The bill arose out of concerns expressed by the Royal Commission on Capital Punishment, which, in keeping with the time's concern with moral advancement, suggested that public hangings might degrade viewers, or even increase the rates of crime. Defenders of the status quo pointed out that the system had always worked; they doubted that viewing executions had a morally corruptive effect, and argued instead that the powerful deterrent provided by witnessing capital punishment helped protect public safety. With a Liberal majority in favor of the bill, however, the issue was, in reality, all but decided. The truly heated debate arose when the bill was introduced in the House of Commons the next year.

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[144] "Law of Capital Punishment Amendment Bill," 460.

[145] Ibid, 461.

[146] Ibid, 462.

Echoes in the House of Commons

The bill was first presented before the House of Commons and read in February 1867,[147] but was later withdrawn in July of that year[148]. The delay was the result of a dispute over the legal definition of murder; Parliament had to ensure that a redefinition of capital crimes would not abrogate extradition treaties with other nations.[149] In November 1867, John Tomlinson Hibbert, a Liberal representative for Oldham,[150] inquired whether the bill would be reintroduced. Gathorne Gathorne-Hardy, a Conservative Member of Parliament for Oxford and a Commissioner who produced the Report on Capital Punishment, replied that it would indeed.[151] With the time lags of Parliamentary procedure, the bill did not come up for a Second Reading until March 5, 1868.

Gathorne Hardy, who presented the bill, was a rising star in the Conservative Party. After defeating William Gladstone for the constituency of Oxford University in 1865, Hardy quickly became associated with social welfare issues. The Conservatives regained control of Parliament under the Prime Ministership of the Earl of Derby in 1866, netting Hardy a position in the cabinet as President of the Poor Law Board. In 1867, with the ascension of Benjamin Disraeli as Prime Minister, Gathorne Hardy became Home Secretary, one of the Great Offices of

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[147] "Capital Punishments Within Prisons Bill," Parliamentary Debates (Commons), (3), 185 (14 Feb. 1867): col 370.

[148] "Minutes," Parliamentary Debates (Commons), (3), 189 (26 July 1867): col 168.

[149] "Capital Punishments Within Prisons Bill. Leave. First Reading," Parliamentary Debates (Commons), (3), 190, (20 Feb. 1868): col 995.

[150] *Oxford Dictionary of National Biography*, s.v. "Hibbert, John Tomlinson."

[151] "Capital Punishments Within Prisons Bill—Question." Parliamentary Debates (Commons), (3), 190 (26 Nov. 1867): col 176.

State, the four most important political offices in Great Britain. It was in his capacity as Home Secretary that Hardy introduced the Capital Punishment within Prisons Act, lending his authority and prestige to the cause.[152]

Gathorne Hardy, in keeping with his career's focus on humanitarian aims, argued that public hangings were ineffectual and corruptive. He began by framing his argument with the observation, "I assume that no one would wish that so ghastly a spectacle as a public execution should take place except as a deterrent."[153] He took as an assumption the fact that public hangings were essentially grotesque and only desirable to prevent the greater evil of increased crime. Based on the evidence presented in his Commission Report, however, he believed that the public element was unnecessary.

Hardy argued that, in fact, the deterrent effect of executions would be even stronger if the hanging took place within the prison. He asked his listeners to imagine "how impressive and how deterrent would be the scene when the criminal was removed from the Court on sentence of death being pronounced. His acquaintances would look on him and know that they saw him for the last time… wholly out of their sight to be dealt with by the law."[154] Removing the execution from public view, he explained, would make it even more intimidating and horrifying to the general population. In case concerns for the public were not convincing enough, Hardy also asked the audience to consider the criminal himself. The crowds and noise would necessarily

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[152] *Oxford Dictionary of National Biography*, s.v. "Hardy, Gathorne Gathorne-, first earl of Cranbrook." Gathorne Hardy was actually closer to a Liberal point of view on social issues, but allied with the Conservatives out of support for the established church.

[153] "Capital Punishments Within Prisons Bill – Second Reading," Parliamentary Debates (Commons), (3), 190 (5 Mar. 1868): col 1128.

[154] Ibid, 1130.

"distract his mind from the religious and devotional duties in which everyone should wish he should be at such a moment engaged."[155] Framing an argument around the best interests of the prisoner was a contentious move; there were many in the audience who considered the persons hanged to be unworthy of consideration.

Sarjeant Gaselee, a Liberal Member for Portsmouth, stood to rebut Hardy's argument along these lines. With biting sarcasm, he interjected that he "did not see why they should consider the criminal."[156] Their duty as representatives, he believed, was not to protect the interests of convicts but to guard the safety of the rest of the citizens. In his next breath, however, Gaselee contradicted himself. He pointed out that public hangings served the purpose of protecting convicts by allowing public oversight of their treatment. If "executions were private, his [the condemned man's] treatment might be still rougher, and criminals might be absolutely tortured."[157] Gaselee believed, then, that lawmakers had a duty to protect a convict's legal rights, but drew the line at considering his moral wellbeing.

Gaselee felt that there were additional benefits to executions being public, even beyond the typical defense of the deterrent effect. He noted that "the opinion was prevalent in some quarters that if a rich man were condemned to death, he would be able to procure a substitute as in China."[158] The charge to which he refers seems to be a type of "urban legend" born from the difficulty of identifying a person. To the lower classes, especially, it seemed likely that a person with money and connections could easily have a person punished in his stead. Finally, Gaselee

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[155] "Capital Punishments Within Prisons Bill – Second Reading," 1130.

[156] Ibid, 1131.

[157] Ibid, 1132.

[158] Ibid.

asked his audience to consider the implications of Parliament's actions as influencers of public opinion and behavior. He wondered if "in this age of assassination and revolvers, it was not desirable that the Government should set the example of private assassination."[159] It would seem almost hypocritical for Parliament to punish people for doing the very same thing it aimed to do: privately take away life. It was almost as if the public aspect of capital punishment leant it legitimacy because it was more apparently a collective act of the people, rather than a personal action.

Edward Knatchbull-Hugesson, a Liberal Member for Sandwich, argued that the bill's safeguards rendered public oversight unnecessary. The many protections for the prisoner's rights, he observed, created a situation where "there was... no such danger" of abuse.[160] In the vein of Hardy's argument that private executions were actually a more effective deterrent, Knatchbull-Hugesson also offered a new interpretation of the deterrent effect. He believed that the case was "not that murderers were deterred by public executions, but by the fear of the punishment of death at all."[161] It should not make a difference that executions were within prison walls rather than before a public crowd; in either case, the potential criminal would seek to protect his own life.

Knatchbull-Hugesson concluded his speech with the moralistic argument made by several other Members. He stated, "any person who read the newspapers could not doubt that the scenes which really did take place at public executions were a disgrace not only to civilization but to our

[159] "Capital Punishments Within Prisons Bill – Second Reading," 1131.

[160] Ibid, 1134.

[161] Ibid, 1135.

common humanity."[162] It is apparent that there was a growing consensus, although by no means a unanimous opinion, that Parliament had a responsibility to consider the moral repercussions of their laws. Members like Knatchbull-Hugesson saw the Capital Punishment within Prisons Bill as an opportunity not only to represent the will of their constituents, but also to help promote the moral progress of the people.

At this point, Charles Gilpin, a reform Member from Northampton, weighed in. Gilpin, a former Secretary to the Poor Law Board, was a devout Quaker with strongly reformist tendencies. He did not wish to engage in a debate about the fine details of the bill; rather, he rose to offer his opinion that capital punishment should be abolished entirely. Gilpin stated that there were "few counties of England in which he had not attended public meetings called to promote the abolition of the punishment of death."[163] He attempted to persuade the other Members that he was representing a widely held, popular opinion. Gilpin saw the move to hold executions indoors as an act that only put off the larger debate about the desirability of hangings in general. Acknowledging his extreme position, he stated, "Perhaps… he ought to hail this measure as one which went three-fourths of the way to the abolition of the gallows; but, on the whole, he thought it better that the country should decide on the main question of the abolition of capital punishment rather than on the minor one as to the expediency of conducting executions in comparative secrecy."[164] It is interesting that in this speech Gilpin declined to discuss the moral influences that led to his opposing the death penalty entirely. This discussion, for the time being, was postponed for a later date.

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[162] "Capital Punishments Within Prisons Bill – Second Reading," 1136.

[163] Ibid.

[164] Ibid, 1137.

Charles Newdegate, a Conservative member for Warwickshire, spoke next to support not only capital punishment, but especially its current public character. Basically ignoring Gilpin's tangent supporting full abolition, he moved to rebut several other arguments in favor of the bill. First, Newdegate addressed the unruly behavior of crowds at executions, often cited as proof that public hangings were morally degrading for the general populace. Turning this common argument on its head, "he was convinced that much of the disgusting levity exhibited was no proof of indifference, but was rather an effort of unregulated minds to efface from their recollection the solemn and impressive scene they had beheld."[165] Newdegate made almost a psychological argument about the crowd's behavior, suggesting that they were using a defense mechanism to protect themselves from the harsh reality of the execution. Their carefree behavior, then, served as confirmation of how seriously they actually took the event. This counterintuitive interpretation would be hard to rebut, since Newdegate was basically asserting that the crowd's collective unconscious was where the lessons of the executions were learned, and where the deterrent effect was ingrained.

Newdegate also expanded on the idea that the public carrying out of executions was essential for preserving the appearance of fairness. He noted, "It had been the wise practice of the country for centuries to make the people feel that the law was the expression of their own judgment and will."[166] This idea permeated the British tradition of the rule of law; it was seen in practices ranging from holding trials in public to allowing the press to attend and report on the actions of courts. When a hanging took place before a group of citizens, it reinforced the idea that the punishment was from the people collectively. To move executions inside, Newdegate

[165] "Capital Punishments Within Prisons Bill – Second Reading," 1138.

[166] Ibid.

believed, would be to "take another step towards making all uninformed persons believe that punishment was not the necessary effect of the law, but that it was an act of the executive itself."[167] Most of Newdegate's colleagues who supported the bill took pains to show that the bill's protections would prevent any abuses of authority. Newdegate was the first to recognize that the *appearance* of abuse could be just as harmful as actual misdeeds. Especially in an era of expanding literacy and wide newspaper circulations, rumors of exploitation could be devastating to the government's authority as an arbiter of justice.

To other Members, however, their obligation was more than protecting the government's good image. John Tomlinson Hibbert, the Liberal Member for Oldham who first inquired about the bill in the House of Commons, put the most emphasis on Parliament's ability to effect social development. Moving executions inside prisons, he believed, was "a measure in consonance with the humane legislation of the past thirty years."[168] He ascribed to the view that history was moving along a trajectory to a more complete realization of human potential. This progressive view indicated that actions like eliminating people's exposure to macabre events like hangings would help social development. He believed that the crowds looked to executions as entertainment, rather than seeing themselves as part of the system that helped mete out justice to criminals. Hibbert observed, "In one light such executions might be regarded as examples, and in the other—while the present publicity was retained—as spectacles."[169] Parliament was in the unique, powerful position of being able to shape society through acts such as moving hangings into prisons. He noted, "while we were doing so much to refine and elevate the poorer classes of

[167] "Capital Punishments Within Prisons Bill – Second Reading," 1138.

[168] Ibid, 1139.

[169] Ibid, 1140.

our fellow-countrymen, it was scarcely consistent in the House to allow these barbarous exhibitions to be continued."[170] As it became increasingly expected for Parliament to create laws intended to enhance morality, many lawmakers wished to consider the impact of public hangings on the values of the nation.

When the bill was debated in the House of Commons, many of the arguments presented in the House of Lords arose once more. The deterrent effect of hangings was largely accepted; the debated point was whether this effect was still present if crowds did not witness the execution personally. Many opponents of private executions based their arguments on the need for public oversight, while supporters held that witnessing executions had a morally degenerative effect. The debate did not divide the House neatly down party lines; Members seemed more motivated by personal beliefs than political ideals. It seemed that the bill would eventually pass, as it had in the House of Lords, over the objections of certain holdouts but with relatively little controversy. The next month, however, saw an unexpected development when the Committee was forced to debate a radical amendment to the bill.

A Radical Turn

When the Order for Committee was read on April 21, 1868, a drastic change was proposed. Rather than discuss modest amendments to the bill, the validity of capital punishment itself was challenged. For the first time, the notion that executions deter crime was directly challenged. Finally, the elephant in the room—the validity of the death penalty—was addressed and discussed by the House as a body.

[170] "Capital Punishments Within Prisons Bill – Second Reading," 1140.

Compelled by conscience, Charles Gilpin rose to propose an amendment that would change the bill to abolish capital punishment in Britain. Gilpin's first major argument was that eliminating hangings would actually make the people safer. He began by observing, "that the atrocious murders... were murders which were committed under the present law, and he believed would not be committed under the altered state of law which he desired to introduce."[171] Clearly, the fact that murders were occurring at the time of the debate meant that public hangings were an imperfect deterrent. Citing the lessons of the past few decades, when sentences had been made consistently more lenient, he noted, "almost in every instance in which capital punishment had ceased to be inflicted for certain crimes those crimes had lessened in frequency and enormity."[172] His reasoning on this point is somewhat questionable; it is doubtful, for example, that fewer people stole simply due to the fact that they would no longer be put to death for it. A more likely explanation was that a rising standard of living was decreasing crime in general, independent of changes in penal law.

Gilpin made a better point when he brought up the issue of juries acquitting murderers simply due to the threat of capital punishment. He raised this issue of the "numbers of criminals [that] had escaped from the punishment due to their crimes, because of the unwillingness of juries to incur the possibility of convicting the innocent."[173] If a person were convicted and put to death before being proven innocent, there was no remedial action that could be taken. This was a very real concern at the time. As Gilpin stated, "The frequency of cases of mistaken

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[171] "Capital Punishments With Prisons Bill – Committee," Parliamentary Debates (Commons), (3), 191 (21 Apr. 1868): col 1034.

[172] Ibid.

[173] Ibid, 1036.

identity were notorious."[174] In an era before DNA tests or even fingerprinting, positive identification was incredibly difficult. The uncertainty this lack of identification created in trials often led to juries' reluctance to convict a defendant. Gilpin recognized that this problem probably allowed many people who actually were murderers to walk free; if juries were not so hesitant to convict as a result of the death penalty, more criminals would be taken off the streets.

Finally, Gilpin appealed to religious sensibilities in making the argument against capital punishment. He began by observing, "The sentence of death was decreed upon all of us by a higher than mortal Judge. We but antedated the sentence, and by how much this was done no man could know."[175] Uncertainty about how long a person would have lived could actually make executions unfair: shortening one murderer's life by twenty years through execution was a much harsher penalty than hanging a man who was already terminally ill. In interfering with matters of life and death, Gilpin suggested, man cannot be aware of all extenuating circumstances.

Another religious problem with capital punishment was its apparent hypocrisy. Gilpin noted, "We told the criminal in one breath that his crime was too great for man to forgive—that he was not fit to live on earth, but we commended him to the mercy of the Highest."[176] The message given to condemned criminals was indeed inconsistent. Going a step further, Gilpin asserted, "If we believed that faith which we professed, then the greater the sin the greater the

[174] "Capital Punishments With Prisons Bill – Committee," 1038.

[175] Ibid, 1040.

[176] Ibid.

need for repentance."[177] It would be more religiously fitting to allow a murderer to live long enough to make his peace with God. By imposing an artificial end to his life, humans might be interfering with the sinner's ability to find reconciliation. Gilpin concluded with a poetic entreaty to his colleagues:

> If we believed there was need for peace-making, let us give the murderer the time which God would give him to make his peace with Him. If we wanted to teach mercy, let us set an example of that mercy, and at all events stop short of the shedding of human blood. And if we would teach reverence for human life, let us not attempt to teach it by showing how it may be speedily taken away.[178]

This faith-based argument was not likely to persuade many of the more mainstream Christians in Parliament, but is indicative of the strength of Gilpin's personal faith, as well as of the integral role of religion in the political discussion of the death penalty.

To some other members, Gilpin's arguments completely missed the mark. William Henry Gregory, a Conservative Member for County Galway, took a different perspective. He brusquely remarked, "The question before them was not… one of softening the heart or saving the soul of murderers, but of preventing the Queen's subjects from being murdered."[179] Gregory had little patience for Gilpin's moralizing; he was more interested in the utilitarian purpose of the law, which was, of course, preventing crime. He did not accept Gilpin's assertion that hangings were not an effective deterrent. Based on his own research of preventing crime, "He had already shown from the evidence of police officers that it was precisely the fear of the gallows and

[177] "Capital Punishments With Prisons Bill – Committee," 1040.

[178] Ibid, 1040-1041.

[179] Ibid, 1041.

nothing else, which had restrained these desperate men [potential criminals]."[180] Based on anecdotal accounts, Gregory concluded that the possibility of execution affected men's choice to commit serious crimes. Gregory had the more challenging side of the argument: it is difficult to research crimes that did not occur.

Although he defended the death penalty, Gregory was a supporter of abolishing public executions. He believed public hangings "were not in accordance with the spirit of the age. They were barbarous, and, he believed, demoralizing; and he felt convinced that equal, if not greater, awe might be impressed if they were conducted within the precincts of the gaol."[181] Gregory serves as an example of the sizable portion of lawmakers who defended the death penalty as an institution, but still sought to have it carried out within prisons.

Charles Neate, a Liberal Member for Oxford, represented the opposite view: he supported full abolition of capital punishment, but, barring this, questioned the wisdom of removing executions from the public sight. Neate reasoned, "those who were most impressed with the sight of the scaffold were those who thought least of it when it was removed from their eyes. The same sensual nature which yielded to the terror of present death was least able to realize it at a distance."[182] In other words, holding executions privately would eliminate the deterrent effect because of the nature of the people who would have been deterred. These people could not grasp a theoretical concept like death without being faced with it, and so would not be discouraged from committing crimes. However, Neate thought that the total abolition of the death penalty

[180] "Capital Punishments With Prisons Bill – Committee," 1042.

[181] Ibid, 1045.

[182] Ibid, 1046.

would be preferable to continuing the practice of public executions. He took a unique view of the situation, saying, "One great reason why he wished the abolition of this law of murder was that it would compel them to see what they could do, by education and legislation, for the better humanization and improvement of the people."[183] Although acknowledging that public hangings were effective for reducing crime, he still asserted that there were better ways to achieve this same goal. Instead of controlling the people through fear, he wished to see the government improve the people morally, preventing murders by reducing violent natures.

A noteworthy defender of public executions was John Stuart Mill, at the time a Member for City and Westminster. Making an unexpected argument, Mill stated, "I defend this penalty, when confined to atrocious cases, on the very ground on which it is commonly attacked—on that of humanity to the criminal; as beyond comparison the least cruel mode in which it is possible adequately to deter from the crime."[184] In his opinion, any punishment that was equally deterrent but did not end in death would be exceptionally cruel—basically, torture. In his argument, Mill actually played down the severity of death as a punishment. As he expressed it, "There is not, I should think, any human infliction which makes an impression on the imagination so entirely out of proportion to its real severity as the punishment of death."[185] He attempted to argue that death was actually not the worst punishment one man could mete out to another.

Mill then attempted to justify the need for capital punishment through appealing to utilitarianism, the philosophy that the correct action is the one that is the best for the most

[183] "Capital Punishments With Prisons Bill – Committee," 1047.

[184] Ibid, 1048.

[185] Ibid, 1049.

people. He maintained that the punishment of death was at "less cost of human suffering than any other."[186] Minimizing cost, in this case measured by suffering, was Mill's guiding principle. Any choice that did this would be judged morally correct. One issue in measuring cost, however, was that it would be difficult to say how many crimes it had prevented, since, obviously, they never occurred. Mill was aware of this problem, noting, "Who is there who knows whom it has deterred, or how many human beings it has saved?"[187] Mill thought it reasonable to assume that the answer, if an answer could be determined, would be enough lives to outweigh the ones taken through capital punishment. The public aspect of hangings, additionally, was essential to his argument, since viewing the execution caused the deterrent effect. Mill believed "the efficacy of a punishment which acts principally through the imagination, is chiefly to be measured by the impression it makes on those who are still innocent."[188] The innocent people who viewed executions were Mill's main concern, rather than the criminal being put to death, because they were the ones who would compose society in the long run.

Finally, Mill declared that the trend of reducing the severity of punishments would have a negative effect on the country. In a biting criticism, he said, "The mania which existed a short time ago for paring down all our punishments seems to have reached its limits, and not before it was time."[189] He believed that vigorous punishments were the only way to maintain law and

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[186] "Capital Punishments With Prisons Bill – Committee," 1050.

[187] Ibid.

[188] Ibid.

[189] Ibid, 1054.

order in the country. As Mill explained, "to deter by suffering from inflicting suffering is not only possible, but the very purpose of penal justice."[190] Rather than envisioning a system of correction and rehabilitation, Mill believed the criminal justice system to be an institution whose weapons were coercion and intimidation. The most forceful, yet still humane, punishment would have to be executions in this system. If the British shy away from administering capital punishment, "they will have achieved it by bringing about, if they will forgive me for saying so, an enervation, an effeminacy, in the general mind of the country."[191] Mill saw more lenient punishments as a sign of weakness, rather than mercy.

Many of the lawmakers discussing the bill saw it as the first step toward complete abolition of capital punishment. For some, this was a positive development; for others, it was a move to be avoided at all costs. Darby Griffith, the Member for Devizes, for example, predicted "if any changes took place from private executions, it would most certainly not be to public executions, but to the total abolition."[192] Most Members recognized that it was highly unlikely that, once outlawed, public punishment would ever come back into being. George Denman, the Member for Tiverton, believed that moving away from public executions would have the additional effect of convincing the public that executions were not necessary for protecting the peace. He argued, "private executions would... remove the difficulty [of lacking public support] by leading the public to the opinion that it was not necessary to put a person out of the world for

[190] "Capital Punishments With Prisons Bill – Committee," 1052.

[191] Ibid, 1051.

[192] Ibid, 1057.

the public safety."[193] People would come to understand that life in prison was equally effective for removing a threatening person from society. Interestingly, people both supportive and critical of capital punishment as an institution all found reason to pass the law that made executions private.

The bill was passed in the House of Commons on April 28, 1868, and a matching bill cleared the House of Lords two weeks later. Royal assent was granted on May 29, 1868, and public executions were officially abolished. The last public hanging in Britain was the execution of Michael Barrett, a Fenian rebel, on May 26, 1868. *The Times*' editorial on the occasion represented a changed opinion on the topic of public executions. The paper wrote, "We have only to think of the horror with which we all now instinctively regard the barbarous punishments inflicted late down in our history, and we may conceive what posterity will think of capital executions before a motley crowd of vulgar and often brutal spectators."[194] Britain had entered a new era of criminal punishment.

[193] "Capital Punishments With Prisons Bill – Committee," 1057.

[194] *Times*, 27 May 1868, 8.

CHAPTER FOUR
AN ONGOING CONTROVERSY

The abolition of public executions was in many ways a beginning, rather than an end. Foremost, it signaled the rise of a new era of penal justice, in which the prison became a place of punishment and rehabilitation, rather than simply a holding cell. In conformity with the new Capital Punishment Within Prisons Act, "punishment was to be removed from the overly exciting public stage. The prison was... well suited for this aim."[195] Criminals could repay their debts to society without having any detrimental effect like the degradation conveyed through public punishment. Jeremy Bentham's assertion that imprisonment would be more desirable and effective than capital punishment, it seems, was eventually accepted by lawmakers. The field of penology experienced a rapid ascendancy in the end of the nineteenth century, eventually evolving into the complex corrective arrangement employed by criminal justice officers in modern times.

Offering imprisonment as an alternative to execution should, theoretically, have reduced the number of convicts put to death. The diminishing rate of capital punishment, however, did not signify an end to the practice. Indeed, once held within prisons, hangings became even more grotesque. Freed from the constraint of public oversight, prison officials began to experiment with more effective methods of killing. Hangings, once "a painful, agonizing, demeaning, and slow death, in the full gaze of a deriding public, it was to become a highly formalized, technically exact, and wonderfully speedy extinction, attended only by a handful of

[195] Wiener, 109.

witnesses."[196] The trial and error involved in developing a better system, though, produced some stomach-turning results. One of the main goals of prison officials was to ascertain a standard ratio of the prisoner's body size to the appropriate length of rope for a quick death. Unfortunately, executioners used a measurement of the condemned person's height rather than weight in making this determination. This led to macabre accidents, such as "when... short ropes were replaced by long ones in an attempt to kill faster, [and] one wretch was decapitated."[197] Opponents of private executions who pointed out the potential for excessive cruelty would have found themselves vindicated, but execution mishaps were largely covered up, since the public could be excluded.

The establishment of private executions also proved another of critics' concerns correct: it effectively undermined the movement for full abolition of the death penalty. The effect was almost immediate. Once "the public character of the penalties was done away with, the movements against both corporal and capital punishment rapidly lost strength."[198] The public's attention to the issue proved fickle, and when the act of executions was removed from plain sight, interest similarly disappeared. The passage of the law was widely seen as a victory for the reformers, but actually worked against their ultimate goal. In fact, "the abolition of public hanging in 1868 all but silenced the abolitionist cause for near on a century, just as Ewart [and his contemporaries] feared it would."[199] The opposition to private executions expressed by abolitionists was proven extremely prescient. Unfortunately for them, the half measure of

[196] Potter, 86-87.

[197] Gatrell, 54.

[198] Wiener, 100.

[199] Gatrell, 23.

eliminating public executions was enough to satisfy the public's demands for capital punishment reform. It would be more than a century until the political will could be found to eliminate the death penalty entirely from British law.

The abolition of public executions in the mid-nineteenth century was one small element of a greater reformist impulse sweeping Great Britain at the time. Motivated by Evangelicalism and the belief in human potential, reformers hoped to use laws and policies to improve public character and guide its development. In the area of criminal law, opposition to ancient practices such as capital punishment became more strident. Hangings were decried as being barbaric and counterproductive in the aim of keeping the citizenry safe. The movement to make executions private was an offshoot of this protest, in some ways deriving from the same critiques, but also employing unique dialogues of effective deterrence and popular sentiment. The abolition of public hangings should not be understood as simply a step in the historical struggle to end the death penalty; rather, it was the product of a complex confluence of social and political developments, and was, to many of its supporters, an end in itself.

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