

BEAUMONT, TOCQUEVILLE, AND THE NATION OF INCARCERATION

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INTRODUCTION

The modern American penal system occupies a unique position in the nation's collective consciousness. In today's political climate, it is a true rarity to encounter a major policy issue that serves to unite rather than to divide. Perhaps the closest thing that one could propose fills this role is the notion of penal reform, and even that only unites on the basis of diagnosing that there is indeed a problem. While most would agree that there is a problem, the consensus falls apart as soon as specific solutions are brought forth. If one were to divide the population in a rudimentary and bilateral fashion, the two sides may be characterized based on the level of authoritarianism displayed by the those that are tasked with enforcing the law, or perhaps around the question of whether punishment or rehabilitation ought to be the focus of an American system of law and order. While the issue is not so black and white, it is clear that these questions drive the national dialogue as well as the legislative and judicial trends that shape the entire criminal justice system.

The United States is faced with these divisive challenges at every level of the penal system. From the time a suspect has his first encounter with a police officer, through his experience within the various courts, all the way until the final day of his

sentence, every step is under public scrutiny. Understandably, the most commonly debated facet is police action, depositing on the officer or force in question vehement criticism from one side and ardent defense from the other. Subsequently, the other aspects of the penal system have taken a backseat in the public mind, as well as in the tangible agenda of the nation's lawmakers and executive offices. Given the perceived priorities of the current administration, one must imagine that they will stay there for the time being. These additional facets of the criminal justice system include the courts and what is perhaps the system that has the greatest impact on the national character of crime and punishment: the network of jails, prisons, and other correctional facilities. The unfortunate end of this collective ignorance towards the prison system is that its many glaring faults go unchallenged and the disastrous results it produces go unchecked, perpetuating a cycle of mediocrity that only serves to endanger the citizenry and devastate countless communities. The execution of the prison system is not an area in which the United States can be described as any form of standard-bearer for prudence or practicality. Typically, experts point to Europe for an example of an effective prison system.¹ However, this dynamic was not always so.

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¹ Subramanian, Ram & Shames, Allison. "Sentencing Practices in Germany and the Netherlands." *Vera Institute of Justice*, October 2013. <https://www.vera.org/publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states>

As the New World was settled, what would become the United States became filled with prisons, or at least primitive forms of them. However, these public buildings were not so much intended for punishment, but rather for temporary lodging for those who would soon receive their sentencing, allowing for a more swift and severe punishment to be administered upon a guilty verdict. This concept more resembles the modern definition of a jail than a prison, with long-term imprisonment typically only suffered by debtors. For other types of offenses, there existed four other common punishments: fines, public shame, physical chastisement, and death. This was the reality in the colonies into the eighteenth century. However, societal progress, new developments in social theory, and a shifting global reality would see that the concepts of punishment and the role of the prison would see a dramatic evolution in America.

As the eighteenth century progressed, developments such as the early Industrial Revolution and a transforming global economy made crime more prevalent in industrialized nations, or at least made the various populations more aware of its existence. This trend prompted many nations to modify their penal codes to reflect an effort to become tougher on crime, which led to a vast increase of offenses being designated as capital crimes. England's new "Bloody Code" saw the number of capital offenses increase from around 50 to over 200 between the years of 1688 and 1815.² The prevalence of capital punishment was also the reality in America, which prompted some American theorists to reconsider the role of the prison as a counter to this harsh trend.

² Lynch, Jack. "Cruel and Unusual: Prisons and Prison Reform." *Colonial Williamsburg Journal* (Summer 2011): <http://www.history.org/Foundation/journal/Summer11/prison.cfm>

As early as the late seventeenth century, the Pennsylvania Quakers, who were strict pacifists, underwent campaigns against capital punishment. This led them to endorse prolonged incarceration as a more humane alternative. In the 1780s and 90s, the Philadelphia Society for Alleviating the Miseries of Public Prisons, a Quaker group, advocated for institutions that were reminiscent of the workhouses of Tudor England. The notion that prisons could be useful for something other than housing the accused in wait of trial continued to permeate into the American mind through the Revolutionary era and into the years thereafter. The function of punishment itself was reconsidered by American reformers on political, practical, theological, and philosophical grounds, spawning a wide array of arguments for incarceration taking the place of execution.

Pragmatically speaking, reformers looked to whether grave punishments such as the death penalty or physical mutilation even deterred crime, arguing that indiscriminate punishment encouraged indiscriminate violation of the law. These theories made their way into the public code, with more states reducing the number of capital offenses and assigning punishments proportionally to the severity of the crime committed. Others argued that the death penalty was inconsistent with the American political character, as it was a monarchical punishment that was contrary to the Republican ideals on which the country was founded.³ Therefore, for some the rejection of capital punishment was a rejection of British tyranny being replicated in their own legal system. Opposition on religious grounds came when Americans pushed aside Calvinist and Puritanical doctrine in favor of more liberal theology, painting the picture of a more forgiving God in favor of reformation over retribution. Lastly, Enlightenment thought brought forth the pervasiveness of a new

³ Ibid.

philosophical perception of human nature, one in which the character of an individual is formed largely by the social institutions that surround him. Rather than derelicts that are inherently morally corrupt, human beings began to be seen as rational beings that were capable of being reformed.

Thus, the newly proposed role of the American prison became clear. Informed by European reformers such as Jeremy Bentham, John Howard, and Cesare Beccaria, American thinkers envisioned a society in which criminals could be reformed rather than needlessly brutalized. They thought a reinvigorated system of prisons could accomplish this.

However, the death penalty still had its proponents; the number of capital hangings increasing dramatically during the debates over execution.⁴ A principal criticism of incarceration was that it was decidedly too lenient for lawbreakers. However, any examination of early American prisons would reveal that the opposite was in fact true, which, in reality, was the most substantial problem with this reform process: a stay in one of these prisons was often more cruel than the death and torture that they were slated to replace. Prior to the early 19th century, American prisons were rife with abuse, overpopulation, and abject living conditions. Moreover, the operation of these facilities was corrupt; often those unwilling to bribe their keepers often dying of neglect. The buildings themselves, many of them simply repurposed spaces that had years before fallen into dilapidation, posed a threat to prisoner safety. It was more likely to encounter fresh sewage than fresh food, and inmate hygiene could be accurately described as rat-like.⁵

If the reformed prison system was to operate as intended, the quality of these facilities would have to be improved and main-

tained. The Quakers, along with other reformers, championed the goal of more humane and decent treatment for law breakers in penal institutions, and these concerns were not lost on the American Founders themselves. The Eighth Amendment of the Bill of Rights is evidence of this, which codifies that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The idea that a better quality of treatment for inmates would lead to a more fruitful reformation process eventually led to the development of what would come to be known as the “penitentiary system.” The driving theory behind this new system was that a prison that further corrupts its inmates, as would occur in the violent and pestilent conditions aforementioned, is simply a bad system. Rather, penitentiaries sought, through discipline, education, and reflection, to make their inmates *better*, both spiritually and as civically. Penitentiary proponents would say that this was the true reformation for which an effective criminal justice system should strive.

The penitentiary system reforms were innovative and new, serving as a model for other nations to imitate which was a reversal of the contemporary global dynamic on prison quality. One such nation was France. King Louis-Phillipe I sent a pair of statesmen to observe the various American prisons utilizing the penitentiary method and to report back with their findings related to its possible application in France. The two men he sent were Alexis de Tocqueville and Gustave de Beaumont, lifelong friends. This nine month expedition to America led to the publishing of an analysis titled, *Du système pénitenciaire aux Etats-Unis, et de son application en France*, which translates to *On the Penitentiary System in the United States, and its Application in France*. While this publication made the trip worthwhile in its own right, it is better known as the

⁴ Ibid.

⁵ Ibid.

pretense by which Tocqueville produced a different work, a prescient analysis of the American experience as seen through the observation of the nation's citizens, communities, and institutions. He would title it *De La Démocratie en Amérique*, or *Democracy in America*.

In their publication on the penitentiary system, Tocqueville and Beaumont detail their visit to many of the prominent penitentiaries in the nation, recording how they operate in pursuit of prisoner reformation. In the process, they come across certain timeless principles in the realm of criminal justice that stand to inform the contemporary conversation on how prisons ought to be run if they are to fulfill their optimal purpose.

CHAPTER ONE

Francis Lieber, friend to Beaumont and Tocqueville and English translator of their penitentiary report, offered a preface and introduction to his translation in which he dictates the purpose of this work as he understands it. His expertise having been requested specifically by the Frenchmen themselves, Lieber acknowledges the sober responsibility that he bears in conveying the work of his two French contemporaries. Initially hesitant to take on the project, “the great importance of the subject, however, soon induced [Lieber] to undertake the task ...The authors themselves,” he says, “seem to have considered the facts and observations which they had to communicate, of an importance greatly superior to the manner of conveying them to the public.”⁶ Lieber,

⁶ Beaumont, Gustave de, Alexis de Tocqueville, and Francis Lieber. 1833. *On the penitentiary system in the United States and its application in France. [microform] : with an appendix on penal colonies, and also, statistical notes.* n.p.: Philadelphia : Carey, Lea & Blanchard, 1833., 1833. OhioLINK Library Catalog – LR, EBSCOhost (accessed April 13, 2018). Preface, pg. v.

while he feels he may not do the work justice, proceeds anyway, believing that the subject matter was one of great importance to the American public. The translator agrees with the authors that the Penitentiary system is one of great moral and practical importance, which carries implications that reach far beyond the mere correction of criminal offenders.

As the preface continues Lieber comments on the state of American prisons. Prisons were often likened to hospitals, and prisoners, in so far as they suffered from moral diseases, to patients; Prisons have not lived up to this intended and rightful purpose. A more appropriate comparison than a moral hospital, Lieber writes, are the “plague-houses in the East,” as those unfortunates that find themselves locked inside are sure to perish from that mortal disorder, and those who may have been sent there free from moral corruption are sure to be afflicted before long. This grim truth, according to Lieber, is reminiscent of the inscription above the gates to the fiery inferno of Hell as described by Dante:

Through me you pass into the city of
woe:
Through me you pass into the eternal
pain:
Through me among the people lost
for aye,
All hope abandon ye who enter here.⁷

These lines exhibit the hopelessness that characterizes much of the penal system, the very reason why the reforms examined within the penitentiary report and promoted by Beaumont and Tocqueville are warranted in the first place.

Throughout the history of mankind, Lieber writes, there has been a sluggish but steady progress from the use of physical

⁷ Alighieri, Dante. *The Divine Comedy: Inferno* cited in Tocqueville, Beaumont, pg. vii

force to the alternative of moral power for the purpose of governance.⁸ Among all of society's branches, none has been slower in this growth than that of the organization and discipline of prisons. This can be observed most starkly in prisoners returning to society. In *Beaumont and Tocqueville's* preface to their original work, they illuminate how this plague manifests itself in France. "There are in France," they say, "two millions of paupers, and forty thousand liberated convicts, who have gone forth from the bagnes or other prisons." The multitude of these freed criminals proved to be a bane on French society, as they continued to exhibit the very deviant behaviors, sometimes an amplified version of such, that demanded their incarceration in the first place.

At that time, the French people petitioned their government to assuage this vexation, and in response the government considered implementing the agricultural colonies that had seen success in Belgium and the Netherlands. Another solution, one that *Beaumont and Tocqueville* investigate and explain at length, is that of the penitentiary system, which was beginning to take root in the United States. This was the origin of the two French statesmen's travels to America. Charged with finding a solution to the issue of criminals being further corrupted in the very institutions which purport to heal them, *Beaumont and Tocqueville* turn their attention to a correctional system that utilizes personal industry and isolation as a means to transform the very core of human beings, a tall order that, if successful, would warrant emulation the world over.

In 1833, the year in which *Beaumont and Tocqueville* publish their report, the penitentiary system was still a novel concept. In order to understand its origins, the authors insist that one must look well back into the history of crime and punishment on

the American continent. The basic concept of "prison reform" in the Americas originated with the Quakers, a religious sect in Pennsylvania. Being staunch pacifists, the Quakers always detested violence, institutionalized or not. As a result, they deemed the criminal justice law that the colonies inherited from Mother Britain to be immoral. Building up a position of influence within the state of Pennsylvania, they successfully lobbied for the abolition of the punishments of death, mutilation, and the whip in nearly all cases in the years following 1786. As a result, incarceration became a more prominent means of correctional sentencing, including prolonged solitary confinement for capital offenders. Walnut Street Prison was established, derived from principles of Quaker justice. This institution, according to the authors, was innovative, yet primitive. While Walnut Street made strides in the right direction, the incomplete nature of its reform efforts may have proved more harmful than beneficial.

Walnut Street's policies dictate that prisoners be sorted by the nature of their crimes and housed accordingly. An inmate's daily experience could be characterized by constant solitude, with the only opportunity for enrichment coming in the form of Biblical reading and prayerful meditation. As the authors explain, solitary confinement without the additional ability to work has been "condemned by experience."⁹ Additionally, the judicial authority of the age permitted judges to sentence a greater number of offenders to Walnut Street who otherwise would have been sent to other prisons. As the population of criminals rapidly increased, Walnut Street became unable to offer an adequate number of cells or service of any quality. This early example illustrates the primary issue that surfaces as an impediment to meaningful penal reform: overpopulation.

⁸ *Tocqueville, Beaumont*, pg. viii

⁹ *Ibid.* pg. 2

The failures of Walnut Street, the nation's sole institution of its kind, lead the authors to claim "there did not yet exist a penitentiary system in the United States," a fact that would not change until more establishments emerged that were dedicated to reform.¹⁰

It was the initial belief of the authors, as well as of the public, that the penitentiary system was thus named due to the substitution of imprisonment in the place of the death penalty. It stands to reason that a "penitentiary" system would put people in prison rather than execute them. However, this explanation is inadequate. If the death penalty were totally abolished, the system that remained would not automatically become a penitentiary system. Rather, this novel way of doing things requires something greater if it is to earn the title. A penitentiary system is one that imprisons criminals in such a way that the discipline enacted upon them makes them morally better than they were before; as the name implies, it is literally a place where penance is paid. If a system fails to rehabilitate a criminal or, even worse, leads him to further corruption, then that system is simply a bad system of imprisonment.

Walnut Street prison in Pennsylvania serves to show that a sound awareness of the principles behind the penitentiary model is insufficient in producing its desired and promised results. While the minds behind the prison certainly intended to better the souls of the inmates through their system, their theories proved fruitless when put into practice as prisoners still managed to corrupt each other. Despite failing to serve as a model for the penitentiary system, and instead earning the rightful description of a bad system of imprisonment, Walnut Street accomplished one positive success that would have a lasting effect on future at-

tempts at prison reform: it turned the public eye toward a broken justice system.

The principle of solitude for prisoners was sound in theory, but experts did not find a suitable use that rendered it tenable in practice. In 1797, the state of New York adopted new penal laws and a brand new prison system, making it the first state to attempt to imitate Pennsylvania's example as set by Walnut Street. Just like its predecessor, New York allowed for solitary confinement for prisoners, but only when a court specifically mandated it. Less serious criminals could face solitary confinement, but only as a temporary disciplinary measure. Otherwise, they were housed indiscriminately. New York was not the only state to emulate the system conceived in Walnut Street, with Maryland, Massachusetts, Maine, New Jersey, and Virginia all adopting similar penal philosophies. Unsurprisingly, they all faced similar negative results. The successes that the penal reformers hoped for would not manifest; the new systems generally ravaged the states' public treasuries while returning no discernible positive effects on recidivism. Despite the various state legislatures annually pushing more and more public funds into the penitentiaries, their routine failure to produce the desired results was a blight on their efficiency that could not be ignored.

Reformers recognized the failures of their efforts but, rather than attribute their shortcomings to the theories by which they operated, they instead focused on execution. They placed the blame, in most instances, on the propensity of these new institutions to overcrowd their inmates due to a scarcity of cells in proportion to their total populations. As a result, plans were made and funds were allotted to add new buildings and wings to existing prisons in order to increase the total amount of cells and alleviate the most pressing issue faced by these institutions. This campaign was the origin of Auburn Prison, constructed in 1817 in New York. The site

¹⁰ Ibid.

at Auburn features as one of two principal institutions reported on by Beaumont and Tocqueville due to the progressive modifications it employed in formulating a new penitentiary system that would garner more favorable results than any of its spiritual predecessors.

In its initial years of operation, Auburn, like Walnut Street, utilized absolute solitary confinement. However, the administrators at Auburn Prison soon witnessed the condition in which this practice placed its inmates. After witnessing the detrimental effects on morals and physical health of the confined, Auburn ceased the use of unmodified isolation by the year 1823. This decision proved to be instrumental in setting Auburn as a new standard for effective penitentiaries that achieved their intended purpose. Auburn's plan was met with "extraordinary success," but it risked becoming over-crowded due to its small size.¹¹ This prompted the New York State Legislature to take preventative action by resolving to open a second prison that would operate under the same philosophy. Thus, Sing-Sing prison opened its doors in 1825.

Not to be outdone by its rival state of New York, Pennsylvania too erected two updated prison, Pittsburgh Penitentiary and, later, Cherry-Hill Penitentiary in Philadelphia. These facilities, seemingly unmoved by the failures of Walnut Street, doubled-down on the use of unmodified solitary confinement. They even took it a step further, doing away with the notion of inmate classification, instead electing to provide each and every inmate with a solitary cell that they would inhabit for the duration of their sentence. The notable successes displayed by Auburn and its similar institutions in New York did not deter Pennsylvania from continuing to utilize total isolation in its facilities. In Pittsburgh, for instance, in-

mates were locked up day and night, with no opportunity to participate in any form of labor. The prevailing justification was that prisoners who were unable to interact with one another would, in turn, be unable to corrupt one another, resulting in the moral betterment of all parties. The very construction of the prison, however, jeopardized this mission from the start. The cells were built and situated in such a way that inmates could easily communicate with their neighbors at any time of that day, which naturally became the bulk of each prisoner's daily routine. Their ability to communicate undermined the intended result, rendering Pittsburgh even more ineffective than Walnut Street.

Having examined the results of Pittsburgh, the state of Pennsylvania became worried that she had "pursued a dangerous course" with the insistence on perpetuating the use of total isolation.¹² As a result, the state undertook research in order to determine how the theory of correctional isolation could be put into practice without bringing about the negative effects that have plagued their previous reform efforts. The result of these studies pointed to the Auburn model for their solution. Rather than adopt the New York system outright, Pennsylvania elected to combine elements of both Auburn and Pittsburgh to create a brand new system of corrections that was introduced into Cherry-Hill prison in Philadelphia. Cherry-Hill retained 24-hour isolation, but introduced the labor principle from Auburn. The application of this new system serves as the second of the two correctional philosophies on which Beaumont and Tocqueville focused their report. In comparing the Auburn system with the Philadelphia system, the authors draw conclusions that they believe will result in meaningful reform in the French prison system if applied there as it is

¹¹ Ibid. pg. 7

¹² Ibid. pg. 9

in these cases. Furthermore, the principles behind the report's findings stand to serve as a timeless example of how the contemporary American prison system may be improved upon as to alleviate the injurious issues that face it today.

For every positive example, there is a negative counterexample. While the authors consider the prisons of New York and Pennsylvania, at least on their face, to be constructive exemplars of how to undergo prisoner rehabilitation, they also offer examples of states in which the criminal justice practices are less than exemplary. For instance, the authors cite the state of New Jersey as a state whose jails "present the example of everything which ought to be avoided...[retaining] all the vices of the ancient system." In addition, the state of Ohio, while possessing humane penal codes for the time, utilizes "barbarous" prisons. Prisoners in Cincinnati lay bound with iron chains in infected dungeons, while those in New Orleans share their space with the hogs. In facilities such as these, no mind is given to the reformation of the prisoners, only taming their malice. "Instead of being corrected, they are rendered brutal."¹³ The authors choose not to address the states of the South, where slavery remains codified, as "in every place where one half of the community is cruelly oppressed by the other, we must expect to find in the law of the oppressor, a weapon always ready to strike nature which revolts or humanity that complains." A slave can only hope to be punished by death or whippings, and such a rudimentary and barbaric system of justice cannot hope to reform the soul of the punished.

In Chapter II of their report, Beaumont and Tocqueville resolve to outline the fundamental principles of the penitentiary system and craft an informative comparison between the Auburn and Philadelphia syst-

ems, eventually placing one over the other on the scale of effectiveness. First, it is important to note that the discussed reforms have only been applied to prisons, rather than short-term jails. Additionally, it is important to consider the nature of imprisonment in the United States as opposed to that in other nations, namely the fact that American incarceration is uniform throughout all sentences, varying only in duration. By this, it can be said that different brands of criminals, thieves and drug dealers for instance, share the same facilities and undergo similar experiences, with the amount of time served being the only tangible difference. This fact allows the reforms brought forth by penitentiary proponents to be applicable across all degrees of punishment for varying levels of criminal deviance.

As previously stated, two distinct systems of reformatory penitentiaries surfaced in the United States. Auburn prison and Philadelphia prison arose as representatives of their own respective reform styles. Auburn prison of New York is not alone in the manner in which it seeks to rehabilitate prisoners; New York's Sing-Sing prison, Boston prison in Massachusetts, Wethersfield prison in Connecticut, and Baltimore prison in Maryland have since sought to emulate Auburn's model. On the other hand, Cherry-Hill prison in Philadelphia stands alone as the sole proponent of its own theory at the time the report was written.

While the two systems are opposed to one another on many vital points of contention, they share one underlying principle that is central to the operation of any prison in a penitentiary system: the isolation of the prisoner. The prevailing idea that justifies the use of isolation in penitentiaries is that communication and interaction between inmates "renders their moral reformation impossible, and becomes even for them the inevitable cause of an alarming corrup-

¹³ Ibid. pg. 13

tion.”¹⁴ Thrown into isolation, a prisoner has no choice but to reflect on his crimes and learn to hate them, opening the door for remorse to overtake him. While isolation is a severe punishment, the authors state, it is merited by the guilty. Yet, to mandate that a prisoner face indefinite *absolute* solitude is to effectively take away his life, as his existence fails to resemble a worthwhile one, when society only decreed to strip him of his liberty. Because of its cruelty, and following the disastrous results that were produced in its absence of labor, inmate work initiatives are introduced into the prisons. In addition to the benefits it provides for the prisoner, inmate labor mitigates the public cost of housing the offenders.

The Auburn system rests entirely on the dual utilization of isolation and labor. Isolation without labor, as discussed previously, was ineffective at rehabilitating prisoners and instead further debased them in many cases. On the other end of the spectrum, labor without isolation was attempted in Baltimore at the time of the report, a project in which the authors are less than confident. The principal object of punishment, the authors say, is to instill in the criminal the proper habits of society and to teach him to obey. By this principle, proponents of the Auburn model claim that they have the edge over the Philadelphia due to the exact manner in which the labor is carried out.

While prisoners in the Auburn system are totally isolated during the night hours, they work communally during the day, occupying the same space. But how, given the proximity of these offenders, is the risk of moral contamination avoided? In the case of Auburn, prisoners are isolated even when they are near one another: each prisoner, though they share a work space with others, is sworn to silence under the risk of

punishment. This practice is the unique trait which separates Auburn from Philadelphia. The realities faced daily by Auburn prisoners, that being working alongside others without the ability to communicate with them, is a decidedly painful task, as they are constantly tempted to break their silence. This harsh existence exposes to the inmate the realities of outside society, as they obey a guideline without the deluding presence of outright necessity. Proponents of the Philadelphia system argue that such a strict adherence to silence is downright impossible to enforce, rendering the Auburn model ineffective on its premise. The authors answer that while the silence policy is not always so strictly enforced, any subsequent corruptions are so minor and infrequent that they are not worth mentioning.

The Philadelphia model is even more severe than that of Auburn. Rather than allow any interaction between inmates, under this system they are isolated day and night, only being permitted to labor in their cells during their waking hours. This, proponents argue, is the only way truly to avoid contamination by other inmates. Given the sound structural layout of the facility, their efforts are not without results. Unlike in Pittsburgh, the isolated inmates of Philadelphia are completely and utterly incapable of communicating in any way, shape, or form with other inhabitants of the prison. Within their solitude, work is their only respite from total monotony and alienation. For this reason, the inmates of Philadelphia cherish the opportunity to work, which contrasts with the findings in Auburn. “By detesting idleness,” the authors write, “they accustom themselves to hate the primary cause of their misfortune; and labor, by comforting them, makes them love the only means, which when again free, will enable them to gain honestly their livelihood.”¹⁵

¹⁴ Ibid. pg. 21

¹⁵ Ibid. pg. 24

Therefore, unlike in the Auburn system, the Philadelphia administrators do not worry much about rule violations, as the idea of losing their labor haunts each inmate. Besides, how many rules can really be broken in total isolation?

After examining the functioning principles behind both the Auburn and the Philadelphia systems, Beaumont and Tocqueville must lean on the numbers in order to determine which schools of reform are more effective. While obtaining accurate crime statistics was a difficult task in the 1830s, partial data shows that states utilizing the new penitentiary system did not see increases in crime. When determining the effectiveness of such a system, the rates of recidivism must be taken into account, as they determine, in a concrete manner, whether or not the institutions succeed in their goal of reforming inmates to a point where they, due to their time in prison, do not return to a life of crime and instead function as lawful members of society. Again, it is difficult to measure this figure with pinpoint accuracy, and it takes a number of years for these retention changes to be truly appreciated. Therefore, the authors turn to older prisons in order to examine their results more accurately.

In certain older prisons outside of the penitentiary system, such as Newgate, Walnut Street, and Boston, recidivism rates ranged from 11% to 25%, high numbers that only serve to plague outside society with increased rates of crime. On the other hand, Auburn and Wethersfield, the oldest prisons that could be said to follow the penitentiary model, the numbers are much more favorable; Auburn sees around a 5% recidivism rate, while that of Wethersfield is slightly lower.¹⁶ While these numbers are not exact, they certainly show the new penitentiaries in a positive light. While the authors realize the difficulties of transferring this American

system to France, they never less hold that France would do well to establish a model penitentiary.

The American penitentiary system does not exist today, and if it does it is only in name. In a climate where so many still call for meaningful penal reform, and where many similar problems plague the contemporary system that reared their head in France at the time of the report, one must wonder what went wrong. The simple answer is this: a penitentiary system, that is to say a system that emphasizes individual reformation through the avoidance of communal corruption, is impossible to sustain when incarcerated populations are too high. In the years since this report was written, America's prison population has skyrocketed. If the United States would ever wish to return to penitentiary system and the positive effects it brought on retention, it must reduce its incarcerated population to a manageable level.

CHAPTER TWO

Despite making up roughly 5% of the global population, the United States is responsible for over 20% of the world's incarcerated population. Roughly one in every 107 American adults is behind bars. That is a rate that is nearly five times that of Great Britain, seven times that of France, and 24 times that of India. Additionally, the American prison population has more than tripled since 1980, with the number of incarcerated exploding from just around 500,000 to almost 1,500,000 in 2015.¹⁷ Given the nation's role as the world's most consistent and prolific jailer, it is not difficult to imagine that the ratio between inmates and prison professionals is inadequate for providing ample attention to each prisoner. This is the reason why the

¹⁶ Ibid. pg. 68-69

¹⁷ Bureau of Justice Statistics Prisoners Series

American penitentiary system, so promising in 1833, failed to subsist in the country's common practices. Whereas in the 1800s, the nation drew students from across the globe to witness its novel penal system, the United States has since drawn global criticism and domestic mire for its inability to operate a healthy criminal justice system that accomplishes its intended purpose: to prevent crime through retributive justice.

The fault for this decline lies not only on the prisons themselves, but also on policy decisions that, for decades upon decades, have served to fill the nation's prisons to the brim while failing to solve any purported societal ailments. In order to understand why there is no contemporary equivalent to the 19th century penitentiary system, one must examine the history leading up to today's debate surrounding penal reform, stopping to consider how specific legislative agendas as well as political resolutions have affected the manner in which the United States justice system approaches its responsibilities in the criminal sphere. Through this examination, I will discover that the very manner in which the criminal justice system operates, namely the relationship between prison facilities and the legislators whose efforts serve to fill them, actually renders the system itself to a state of adverseness when attempting to fulfill its role.

While many of the plagues from which the contemporary penal system suffers are rooted in the 20th century, it cannot be ignored that the Penitentiary System, the very order of things semi-promoted herein, saw a swift end shortly after its inception. In order to defend the principles of rehabilitation and industry championed by Tocqueville and Beaumont, the reasons behind the system's initial shortcomings must be addressed. However, the Penitentiary System, according to some critics, could not be aptly applied to the modern age. According to

Robert M. Senkewicz, the reformative societal assumptions made by the French reformers were incompatible with the time in which the Penitentiary System was utilized. The inconsistency on which the reformers rely, he says, is even more true of the modern age. "The aspects of that spirit that they outlined," he says, are so foreign to our current experience that the Frenchmen seem to be describing not only another century, but another planet."¹⁸

Senkewicz's fundamental criticism is based upon the notion that the society in which the French reformers operated was too rife with peculiarities for the Penitentiary system to garner any real effects today. In order to operate as intended, modern American society would have to be free of a variety of unfortunate realities that only serve to render the populace disillusioned with any meaningful prison reform. For example, Tocqueville and Beaumont stress general public tranquility, a focused and concise public opinion, widespread obedience to the laws, and a religiously based moral consensus that rendered legitimate the structure of the social order as absolutely indispensable social and moral context for the proper development of a penitentiary system. This was the "spirit of reform," and it had to be commonly shared in order for said reform to make any ground.

It would be hard to contrive a convincing argument that modern society adheres to any of the tenets of this "spirit of reform." The public, in general, is far from tranquil. Any notion of a uniform public opinion on nearly any given issue is totally non-existent. Obedience to the laws can accurately be described as lacking, with the code not only being broken by lowly citizen criminals, but also, on a large scale, by the makers of the law itself. Lastly, the moral

¹⁸ Senkewicz, Robert M. "Early American Innocence and the 'Modern' Prison." *America*, vol. 134, no. 16, 24 Apr. 1976, pg. 355.

legitimacy of the social order finds a great deal of dissent. Why would someone who sees a given law as oppressive or unfairly administered sincerely pay penance for breaking it?¹⁹

The answer that Senkewicz gives to this hopeful picture of any American social landscape bears with it an unfortunate degree of truth. In the 19th century, and even more so today, there exists a substantial portion of the population that is adverse to even the most modest proposal of prison reform, labeling the convict as beyond moral rehabilitation. Senator Daniel Webster was of this opinion, once telling Tocqueville that reforming criminals was a “useless” endeavor.²⁰ Furthermore, a plentitude of business owners, as is true today, refused to hire former inmates, with one Philadelphia convict in particular informing the Frenchman that he was terminated from his job as soon as his employer discovered his status.²¹ This level of public apathy in the face of change, according to the aforementioned “spirit of reform” is incompatible with the proper application of the Penitentiary System. The public is partly unwilling to support such reforms in the contemporary dynamic as well. Indeed, they often oppose it entirely.

In addition to general societal shortcomings, the Penitentiary System had inherent flaws of its own, both of a moral and practical nature. First, it is not far-fetched to say that those conductors, under whom the whole system churns, look down upon their imprisoned charges as if they were less than human. Emphasis on the appeal of a submissive or cattle-like prisoner population, who answer to the whip above all, only serves to support this claim. Furthermore, a certain racist system of classification came into being, with the superintendent of Sing-

Sing in New York, for instance, confiding to the Frenchmen that “Spaniards of South America were the most difficult race to curb,” as they had “more of the ferocious animal and the savage than of the civilized man” within them.²²

The penal reformers saw urban lifestyle as a negative influence on prisoner rehabilitation, prompting them to place reformatory institutions predominantly in the countryside as to mitigate the morally corrosive influence brought forth by the city, a trend that still continues today. As a result, urban centers can be described as a sort of “weakness” in the Penitentiary system. Unfortunately for the reformers, those are exactly the demographic areas that would see the greatest developments concurrent with their efforts. So too did the increasingly diverse demographics, in the wake of explosive non-white immigration since the 1830s, serve as a handicap to the Penitentiary System in an area in which the system was ill-equipped to handle. These diverse immigrant populations largely funneled into urban zones, reinforcing the public prejudice that the cities were festering holes of societal corruption, further causing the penal reformers to ignore the practical difficulties of improving a facet that would have been invaluable to the efficacy of the Penitentiary System: urban reintroduction.²³ Additionally, as one may expect, the presence of supposedly inferior races within the penitentiaries led much of the general populace, at least those that had not lacked empathy for the incarcerated in the first place, to lose interest in ensuring that the system worked for the benefit of the inmates, showing a backward sense of social justice that would continue into the modern day.

Senkewicz’s criticisms, in his eyes, render the Penitentiary System a mere relic of the 19th century, with those that still exist

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

“commemorating the dreams, sometimes naive, of a more homogenous and simple society.”²⁴ These “museums,” he says, are to be visited, but without hope of finding use among their ruins. It is certain that the Penitentiary System had major operational problems; its current non-existence is a testament to that fact. However, it is unwise to make the claim that the principles behind it are misguided or even incapable of being harnessed in a similar, but modernized system. Senkewicz highlights the societal shortcomings that disqualify Tocqueville’s spirit of reform from manifesting itself properly in America. Those shortcomings are real, probably timeless, and harmful to any effort to reform the prison system for the better. However, that is not to be said that those societal factors cannot be mitigated in the formation of a criminal justice system that works more smoothly and fairly. For this to happen, it is not enough to reform prisons alone. Rather, every level of criminal justice must be examined, from the officers that patrol the streets, to the letter of the law that fills the penal code, to those very institutions in which society houses those that violate its legislative mandate. In order to repair the problems that will arise from this investigation, it is important to determine from where and when they came to be.

The most glaring and consequential problem governing criminal justice today is the overwhelmingly large prison population, which has been fed by decades of imprudent policy on that front. However, the negative effects brought forth by mass incarceration are not solely due to shortsightedness or incompetence. Rather, the instrument that serves to disenfranchise such a large portion of the population, most prominently impoverished people of color, is used in a purposeful manner in the face of wretched

opportunity; it is an opportunity that those in power see as a chance to maximize profits or maintain their grasp on political power at the expense of racial minorities.

To understand the issue of mass incarceration, one must confront many difficult questions that do not shed positive light on the American regime. Why do some states spend more money on prisons than higher education? Why have six million citizens been denied their right to vote due to their criminal records? Why do police forces crack down on African-American and Hispanic communities while often turning a blind eye toward those affluent individuals who loot the economy and commit war crimes? Why are billions spent to bail out mega-corporations while the poor sit idly in jail, unable to pay their own \$500 bail?²⁵ These questions, among others, make up the root of the mass incarceration problem, and the prevailing philosophy behind it has led to an avalanche of harsh and draconian legislation that has sought to fill prisons to the brim and keep them that way. If prison reform is to be accomplished in a meaningful way, one that is in line with the Penitentiary aspirations of Tocqueville and Beaumont, this harmful legislative structure must be dismantled and replaced by an agenda focused on restoration and rehabilitation rather than authoritarian punishment or any politically or financially charged stratagem.

The explosive growth of the prison system can most easily be attributed to the 1980’s and beyond. From 1980 to 2013, the United States incarcerated population rose from just over 500,000 to over 2 million, reaching a peak of 2.9 million in 2009. More than just human beings are being bound in this contemporary system. Money, too, is

²⁴ Ibid.

²⁵ Kilgore, James William. *Understanding Mass Incarceration : A People's Guide to the Key Civil Rights Struggle of Our Time*. The New Press. New York, 2015. pg. 2

being “locked up,” with prison and jail expenditures leaping from \$7 billion in 1980, to \$57 billion in 2000, and each year since 2007 topping \$70 billion. Those numbers do not include downstream costs to society, or the things that the nation cannot undertake due to how much it spends on prisons and jails. Proportional to the growth of actual imprisoned populations, those who are under some kind of enhanced oversight, such as parole or house arrest, have also increased drastically within that time frame.²⁶

The rapid growth of the incarcerated population has affected certain demographics and neighborhoods significantly more than it has affected others. While African Americans make up approximately 13% of the U.S. population, in the year 2012, blacks constituted around 40% of the collective population of the incarcerated. As for Hispanics, they are 14% of the national population while 22% percent of those behind bars. While the overall prison population consisted of about 30% racial minorities, the number is now closer to 70%.²⁷ Are these groups simply more inherently predisposed to criminal activity than whites? The answer to that question is no. Instead, the true reason for this trend is a vicious combination of enforcement bias as well as perhaps the most important factor in determining whether someone will commit crime: financial status.

Regardless of race, those who struggle financially are significantly more likely to turn to and be convicted of criminal behavior. This is due not only to the increased presence of desperation and hopelessness, but also because the laws are both tailored against these populations as well as disproportionately enforced to their disadvantage. Those individuals that inhabit America’s many prisons are more likely to be un-

employed on the outside, have lower average incomes, and have a more deficient level of schooling than the average citizen. Their time behind bars, of course, does not help them in these areas, as their identity as convicts upon release severely hinders one’s ability seek meaningful employment as to improve the situation of the family unit they may have left behind, who, in the absence of whom was likely the principal bread-winner, have fallen even further into poverty. This cycle continues for poor Americans, all while the wealthy seemingly operate within a completely distinct system of justice in which ace attorneys and deep pockets seem to more often than not keep these rich offenders out of prison.

This unfair distinction between justice for the rich and poor is not without real-world evidence. Consider the case of Ethan Crouch, the white teenager from Texas who, under the influence of alcohol, killed four people when he caused an automobile collision. Rather than face any real justice, Crouch was diagnosed with “affluenza,” a supposed ailment that affects the young and wealthy due to a lack of parental control. Judge Jean Boyd, with affluenza in mind, sentenced Mr. Crouch to ten years’ probation, during which he would live in an upscale treatment facility at about a quarter of a million dollars per year, most of which was footed by the taxpayer.²⁸ One would be hard pressed to find a poor teenager, let alone one of color, who has gotten off so easily for a similar offense.

Now that the modern context of mass incarceration has been addressed, there must be an examination of the specific historical timeline on which the populations have grown so drastically. In its earliest stages, what is considered the modern trend of increasing incarceration was an answer to the legitimate problem of crime rates that were rising steadily. In the 1970s, violent

²⁶ Ibid. pg. 12

²⁷ Ibid. pg. 14

²⁸ Ibid.

crime especially was on the rise. As a result, the incarcerated population increased in turn. In the mid-1990s however, the peak of the crime rate had already passed, and the frequency and number of these offenses had begun to fall. Nonetheless, the imprisoned population continued to grow, with every year until 2009 seeing an increase.²⁹ This was because of a growing movement to expand imprisonment as a means to deter future crimes in addition to providing punishment for past ones. As Richard Nixon said in 1968, “Doubling the conviction rate in this country would do more to cure crime in America than quadrupling the funds for... the war on poverty.” Nixon, inspired by the views of one J. Edgar Hoover, would declare a “war on crime,” during his presidential years, attempting to shape the opinion of the public into one that was “tough on crime,” to a degree previously unseen in the modern age of the western world.

The legislative basis for Nixon’s war on crime was that higher incarceration would lower crime rates. In addition, he greatly increased law enforcement budgets across the nation. Despite his stark efforts to promote his law-and-order strategy, Nixon saw no tangible success on the criminal front, and public support wavered. Additionally, Nixon’s tumultuous time in office, including the fighting in Cambodia, the Kent State Shooting, and the Watergate Scandal, distracted from any real progress that he could have hoped to achieve with his strategy. The Carter years took criminal justice in a different, more liberal direction, supporting the decriminalization of marijuana and cutting back on the strict enforcement policies of the Nixon era. However, the abysmal state of the economy at the end of Carter’s one and only term led the public to blame his lenient policies for the national ailments. This opened the door for a revival

of the tough-on-crime philosophy, which found its home in the administration and agenda of President Ronald Reagan.³⁰

The Reagan era is the quintessential example in the trend of mass incarceration. Following the tradition of Nixon and Hoover, Reagan orchestrated a shift that made legislation far more punitive in nature as well as expanding prisons greatly. There were just over a half a million prison inhabitants in the United States when Ronald Reagan took office in 1980; when he left in 1988, that figure had more than doubled. The passage of the 1984 Sentencing Guidelines laid the groundwork for robust prosecutions and longer sentences, placing the prison system on a course of ensured growth. Reagan, despite generating heavy controversy among Congressional Democrats on many issues, managed to unite the political landscape in favor of a tough-on-crime philosophy. Likewise, the populace followed suit. This afforded Reagan the political capital to harshen the legal penalties for drug-related offenses, even expanding the use of the death penalty in these cases.³¹

The prison explosion did not confine itself to Republican administrations, with President Bill Clinton taking the trend to a new level during his term. The passage of the Omnibus Crime Bill of 1994 threw \$9.7 billion to the construction of new prisons as well as opening the door for further participation by private corporations. As a result of his policies, the Clinton administration saw the prison population increase by more than a half million. By the end of his second term, public corrections expenditures were more than eight times the level of 1980.³²

These aforementioned agendas, propagated by those in power, served to harness public opinion in order to proceed with the

²⁹ Ibid. pg. 18

³⁰ Ibid. 29-31

³¹ Ibid. pg. 31

³² Ibid. pg. 32

enactment of their will. The popular media became filled with stories of crime, fueled by the efforts of public figures to generate a radicalized picture of the law-breaker in the minds of voters. Whole classes of people, namely young black males, were deemed criminal by the public as they were bombarded with images of offenders that fit that bill. There arose a certain mythos surrounding the public fear of criminals, often linking blackness to crime through the use of fictional caricatures of criminals such as Reagan's "welfare queen" trope. Furthermore, the media began to craft a over-the-top negative view of those who already inhabit prisons. This era saw the popular trend of portraying inmates as violent homosexuals, bent on forcing anal sex on his fellow prisoners.³³ With the public on board, it was a forgone conclusion that the powers that be would be able to reshape the prison system into one that serves the interest of the lawmaker, the corporation, or just the stalwart proponent of harsh punishment rather than seeks to achieve any level of personal rehabilitation whatsoever.

Having become aware of the predominant motivations of those particular governors of society, it is important to define the specific legal provisions and penal strategies that they have utilized in order to maintain a hearty incarcerated population. One of the most egregious facets of this system is the birth of mandatory minimum sentencing requirements. In response to the 1971 Attica Prison rebellion in Western New York, Governor Nelson Rockefeller drove what became known as the Rockefeller Drug Laws through the state legislature, citing drug use as the cause for such lawlessness. These laws entered uncharted waters with their enactment of strict and inflexible penalties known as mandatory minimums. A judge had no choice but to administer these sentences upon a guilty

verdict, which often answered relatively minor drug offenses with terms of fifteen years to life imprisonment. Similar statutes appeared in other states, culminating in the aforementioned 1984 Sentencing Guidelines, which applied on a federal level. By 1994, there was mandatory minimum legislation affecting all fifty states.³⁴

These mandatory minimums have kept prison populations at elevated levels by not only putting more people in prison, but also keeping them there for longer periods of time. Furthermore, these laws have essentially taken away the power of judges to consider mitigating factors when passing down sentences. In the system's current state, the prosecutor's recommendation is far more likely to determine an offender's final sentence than anything that a judge could do from the bench. Faced with harsh sentences, defendants become much more likely to accept plea bargains than take the risks that trial presents.³⁵

The philosophy behind mandatory minimums has generated other changes in criminal sentencing, such as "truth in sentencing" and "three-strikes laws." The former removes certain conditions for early release, such as good behavior reductions, keeping offenders behind bars for longer. The latter seeks to apply the spirit of mandatory minimums to habitual offenders, offering individuals a series of "strikes" for offenses; the last of which, in some states, can extend to life imprisonment.³⁶

The conditions within the prisons themselves, much of which is accounted for in the legal framework governing these facilities, are a testament to the brutal and authoritarian "tough-on-crime" philosophy that conjured them up. These less than ideal conditions only serve to render the inmate incapable of properly governing himself in

³³ Ibid. pg. 34-36

³⁴ Ibid. pg. 40-41

³⁵ Ibid. pg. 41-42

³⁶ Ibid. pg. 43-45

the outside world, too often leading them to reoffend and be thrust right back into the system. This phenomenon is referred to as institutionalization, and it is among the major contributors to the nations atrocious recidivism rates. The heavy use of solitary confinement, a troublesome aspect of the Penitentiary reforms that likely ought to be reconsidered to some degree, confront prisoners with inhumane conditions that often do not count towards their sentence, keeping them under lock and key for a longer period, sometimes amounting to several years.

These are just some of the legal instruments by which the prison system of the United States has reached its inefficient and overcrowded status. At the heart of the issue, however, is another societal and governmental trend that has served to inflate these numbers, and is a perfect example of how strides in criminal justice can be politically motivated. This trend is the War on Drugs, and it may be the single-most damning indictment of the American penal tradition.

Drug use has been a contentious issue in the United States for over a century, with the legal response too often being fueled by racially charged sentiments. The first anti-opium legislation came about in response to the influx of Chinese immigrants, and similar laws were passed for cocaine (African Americans) and marijuana (Mexicans) in the early twentieth century. This American crusade against drug use found a new ally in President Nixon, who, continuing in his symbolically militaristic tradition, declared war on drugs. Despite the charged language he utilized in his efforts, Nixon's war consisted mostly of treatment spending rather than expenditure for enforcement. However, it was Ronald Reagan who again escalated Nixon's war.

Under the Reagan administration, drug use entered the spotlight as a major political issue. The First Lady led the charge

for the Gipper, with her "Just Say No" campaign. Multiple popular entertainers aided her efforts, from Michael Jackson to Fred Flintstone. "Winners don't do drugs" was emblazoned on the screen of every arcade machine across the nation. The DARE program invaded the American school system, even affording school children the opportunity to report to the authorities those they expected of buying and selling drugs.³⁷ At the hands of the administration, the anti-drug message was infinitely pervasive.

While Nancy was occupied with the children of America, President Reagan militarized the police to an unprecedented degree. Utilizing surplus military-grade equipment from the Department of Defense, Reagan equipped a new breed of police task forces that would undergo an endless amount of violent drug raids during his tenure, all the while essentially robbing the citizenry through civil forfeiture.³⁸

The War on Drugs was the primary impetus of mass incarceration during the 1980s, and it only continued through the Clinton and Bush years, extending to a global scale after the 9/11 attacks. Like most aspects of the criminal justice system, the War on Drugs has unfairly affected the black population. Despite blacks and whites generally using marijuana at the same rate, blacks are four to five times more likely to be arrested for possession, a dynamic that is roughly true of every state in the Union.³⁹ College campuses, which have developed into hotbeds of illicit drug use, are largely ignored by police in favor of lower class neighborhoods.

As a result of this war, communities have been left devastated, lives have been ruined, and prisons have been stuffed to the brim with non-violent offenders on the taxpayer's dime. The overcrowded nature of

³⁷ Ibid. pg. 61-62

³⁸ Ibid. pg. 63-64

³⁹ Ibid. pg. 69

these facilities, as well as the public spirit that has arisen as a result of the demonization of offenders everywhere, has rendered it nearly impossible to achieve the meaningful reform that the system so desperately needs if it is to fulfill a moral and logical purpose. In order to have a chance at any degree of success, including the general ideas championed by Tocqueville and Beaumont in 1833, drastic change must come.

CHAPTER THREE

Any efforts aimed at changing the American penal system for the purpose of fulfilling a general framework akin to that praised by Tocqueville and Beaumont would require a concerted attack against the engines of mass incarceration. Such an endeavor must cover all fronts, from the enactment of criminal and penal legislation, the enforcement of said code by the police forces that dot the nation, and the practices surrounding these laws within the system of courts, to the very nature of the American mind regarding how the accused are treated and how the national code of laws is prioritized.

As stated in Chapter Two, the ongoing American war on drugs is the single largest proliferator of prison overpopulation. According to the Federal Bureau of Prisons, over 46% of all incarcerated individuals in the United States are behind bars for drug-related offenses.⁴⁰ This number does not take into account those who may have already completed a prison sentence for a drug-related crime, but are back in custody due to a crime of a different nature. Despite the purported role of the prison system to prevent crime by means of deterring potential criminals, the war on drugs, which to

date has cost roughly a trillion dollars, has had no tangible effect on the supply or demand of drugs in the United States.⁴¹ Instead, the only apparent result of this lengthy “moral” conflict is the explosion of incarceration within the United States.

Drug use, of course, is a reality outside of the United States as well. Other countries, plagued by the worst effects of drug consumption, have already taken considerable political action in order to curtail them. Portugal, for example, became the first nation in the European Union to effectively “legalize all drugs” by sending users to administrative panels dedicated to health and social service rather than to prison facilities. The once-illicit substances included in this 2001 revision of the Portuguese penal code include what are considered “hard drugs,” such as heroin and cocaine, in addition to more pedestrian drugs like marijuana. To date, Portugal has seen relative success. By destigmatizing the use of heroin, for example, the nation has successfully managed to reduce the amount of overdoses from the drug as well as the rate that communicable diseases are spread through the sharing of needles.⁴² On the other hand, the expected result of a modest increase in drug use came to fruition.

The United States, as a result of a substantial demographic that still strictly opposes drug policy reform, is nowhere near ready for such an extreme initiative as seen in Portugal. However, recent election cycles have seen the ever-growing development of a more narrowly tailored issue that is much more palatable to the American public. This

⁴⁰ Federal Bureau of Prisons. *Statistics*. https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

⁴¹ “End the War on Drugs.” American Civil Liberties Union. <https://www.aclu.org/issues/mass-incarceration/war-drugs/end-war-drugs>

⁴² Ferreira, Susana. “Portugal’s Radical Drugs Policy is Working. Why Hasn’t the World Copied It?” *The Guardian*, December 5, 2017. <https://www.theguardian.com/news/2017/dec/05/portugals-radical-drugs-policy-is-working-why-hasnt-the-world-copied-it>

issue, in addition, would be a vital first step in decreasing the prison population and improving the effectiveness of the criminal justice system as a result. This issue is the legalization of marijuana, specifically that which is intended for recreational use. The criminalization of marijuana, as discussed in Chapter Two, was largely initiated as a calculated attack on minority communities in America. To this day, cannabis laws are disproportionately and unfairly enforced. In 2010, the *New York Times* reported that blacks were four times more likely than whites to be the perpetrator in a marijuana arrests despite a fairly equal level amount of consumption between the groups.⁴³

This unfair enforcement further manifests itself among the incarcerated. As it stands, black inmates make up 37.9% of the total prison population in America⁴⁴ (as of October 2017) despite making up only 13.3% of the population at large.⁴⁵ Decriminalizing marijuana will not only keep prison population down, but it will also serve to take away one of the major mechanisms by which minority Americans, specifically those of African descent, are denied equal treatment under the law.

Furthermore, marijuana prohibition has fueled illegal activity of another, far graver nature. By disallowing the substance to be lawfully distributed in commercial outlets in the nation's economy, anti-marijuana legislation has ensured that a vast and violent illegal market will thrive in its sale of the drug. This illegal marijuana is most

abundantly grown below the United States' southern-border, and it is smuggled into the country and sold by one of the multitude of deadly cartels or by an entity connected to them.⁴⁶ These cartels contribute to the overall lawlessness of the nation by propagating violence both in the border region and in the country's interior. On top of these organized bouts of drug-related violence, small-time dealers too often commit violent crimes as a direct result of their role in the illegal drug trade. Within each year between 1987-2007, the Unified Crime Reporting Program (UCR) cites that between 3.9-7.4% of all homicides were drug related.⁴⁷

By legalizing marijuana, the United States would severely cripple, if not outright eliminate, the very existence of the illegal cannabis trade. The cartels would lose a major foothold in the United States, rates of drug-related violence would drop, and the nation would enjoy the benefits of what would likely be a highly-taxed commodity to boot.⁴⁸ Opponents of legalized marijuana might argue that cartels would simply maintain their financial foothold by making up lost revenues through the increased sale of harder drugs. However, the demand within the markets for these substances is simply not as robust as that of marijuana, which was estimated in 2010 to be a \$40.6 billion industry, while the sale of illegal heroin, for

⁴³ Urbina, Ian. "Blacks are Singled Out for Marijuana Arrests, Federal Data Suggests." *New York Times*, June 3, 2013.

<http://www.nytimes.com/2013/06/04/us/marijuana-arrests-four-times-as-likely-for-blacks.html>

⁴⁴ Federal Bureau of Prisons. *Statistics-Inmate Race*. https://www.bop.gov/about/statistics/statistics_inmate_race.jsp

⁴⁵ United States Census Bureau. *Quick Facts*. <https://www.census.gov/quickfacts/fact/table/US/PST045216>

⁴⁶ Joffe-Block, Jude. "Where Does Pot Come From? Domestic Growers or Mexican Cartels?" *fronteras.org*, June 15, 2011.

<https://fronterasdesk.org/content/8319/where-does-pot-come-domestic-growers-or-mexican-cartels>

⁴⁷ Bureau of Justice Statistics. *Drug and Crime Facts*. Last revised April 13, 2018. *Drug and Crime Facts*. <https://www.bjs.gov/content/dcf/duc.cfm>

⁴⁸ Kilmer, Beau, Susan S. Sohler Everingham, Jonathan P. Caulkins, Greg Midgette, Rosalie Liccardo Pacula, Peter H. Reuter, Rachel M. Burns, Bing Han, and Russell Lundberg, *How Big Is the U.S. Market for Illegal Drugs?*. Santa Monica, CA: RAND Corporation, 2014. https://www.rand.org/pubs/research_briefs/RB9770.html.

instance, only generated \$27 billion. While the War on Drugs, specifically marijuana prohibition, is a major factor influencing prison overpopulation, it is not the only one. Certain foundational elements exist within the American legal system certain foundational and functional elements that only serve to pump as many offenders into correctional institutions as possible.

These structural facets of American crime and punishment are purposeful, and they ensure that each and every prison facility is filled to a point deemed favorable by the powers that be. In some cases, this overcrowding is also profitable for prison officials, lobbyists, and the politicians they court, as there exists within the overall system a number of privately owned prison facilities that turn a government profit for keeping inmates out of the public eye. Private prisons are a minority in the system at large, being responsible for incarcerating 7% of all state prisoners and 18% of federal prisoners as of 2015.⁴⁹ However, when one considers the massive number of incarcerated individuals that the United States imprisons as the world's largest jailer, these percentages translate to an enormous number of prisoners.

As previously mentioned, the stated intention of the U.S. criminal justice is to punish offenders and to prevent future crimes. However, the current system, partly due to the presence of these private facilities, has proven itself incapable of deterring crime, and it has also shown itself to be incapable of properly correcting, with the punishments utilized being too inhumane to create productive citizens. The specific issue at hand, the central fact that brings the network of private prisons into the realm of conscious objection, is the inherent conflict of interest that arises when private com-

panies are permitted to take charge of a prisoner's correction process. The relationship between governments, both state and federal, and private prisons revolves around contracts that the governments issue to these facilities for the purpose of housing criminals. Private prisons are expected to meet government-generated quotas, and ensure that private prisons see large profits when they keep their populations high. How then, would these private facilities at all be motivated to pursue the deterrence of crime when they financially benefit when their cells are full?

In addition to a complete perversion of the proper mission of a criminal justice entity, private prisons amount to a lawless nightmare when it comes to their largely self-imposed standards. Due to their private status, the amount of oversight into their day-to-day operations is far less than a similar government institution would be subjected to. Consequently, private prisons tend to overcrowd and understaff, all while allowing for unclean and unsafe living conditions that are incompatible with any reasonable attempt at rehabilitation.⁵⁰

Private prisons, after becoming especially prominent in the "tough on crime" 1990s, gradually began to fade from public use under the administration of President Barack Obama. However, the dawn of the Trump administration, particularly the influence of Attorney General Jeff Sessions, has breathed new life into for-profit facilities. What was once a slowly dying practice made a drastic turn towards more common utilization with the new president's broad efforts for privatization not only in criminal justice, but also in other American institutions such as schools. The prevailing belief behind this new trend of privatization is that

⁴⁹ "Private Prisons." American Civil Liberties Union. <https://www.aclu.org/issues/mass-incarceration/privatization-criminal-justice/private-prisons>

⁵⁰ Wessler, Seth Freed, interview by Dave Davies, *Fresh Air*, NPR.org, August 25, 2016. <https://www.npr.org/2016/08/25/491340335/investigation-into-private-prisons-reveals-crowding-under-staffing-and-inmate-de>

the private sector has a greater capacity for efficiency and cost-effectiveness. However, at least to the point of prison operation, the evidence shows that this is not true. There is no strong evidence that a heavy reliance on private prisons actually saves money, as tax payer dollars must still be directed towards the monitoring of these facilities, however ineffective it may be. Even if the administration's fondness for private prisons were economically favorable, the moral cost far outweighs what a healthy conscience will allow. Subjecting prisoners to "bottom-line considerations"⁵¹ effectively treats them as commodities rather than as human beings, with private institutions often falling short of proper mental health treatment, living conditions, and even adequate meals. This is coupled with private prisons' statistical tendency to keep inmates behind bars for longer by more frequently handing down "conduct violations,"⁵²

America's renewed taste for private prisons is the revival of a national blight. The very premise is entirely incompatible with any idea of a justice system that desires to reintroduce a prisoner into common society by way of improving him as a person, much like the Penitentiary System studied by Tocqueville and Beaumont. If the United States is to return to such a system through philosophy or practice, it must reverse this recent trend and abolish the private prison entirely.

In addition to facilities themselves, there exists in the system of courts sentencing practices that too often rely on imprisonment rather than alternative forms of punishment. If this was not enough, there is then a concrete framework in place that makes it much more likely that freed

inmates offend once more, returning right back to a facility akin to the one they only recently left. This trend drives the United State's glaringly deplorable recidivism rate, which is presently estimated to be 76.6% after five years as per a 2005 study by the Bureau of Justice Statistics.⁵³ This means that of the 404,638 prisoners in 30 states that were tracked, about three quarters of them were rearrested within five years of their release. Compare this to Norway's recidivism rate, which hovers around 20%. While these numbers are indicative of a much larger, partly psychological issue, sentencing procedures in many states certainly do not keep recidivism down. The opposite, in fact, is true, with certain statutes that are on the books making it much easier for an individual, especially a prior offender, to do time for committing a crime.

One such judicial practice is the institution of mandatory minimums. Mandatory minimum sentencing laws prescribe a specific prison term for a specific crime, the length of which is entirely pre-determined, which leaves little room for the judge to consider aggravating or mitigating circumstances or to tailor the punishment to the individual. These mandatory minimum sentences, often very long and most often handed down in drug cases, effectively transfer sentencing power from the judge to the prosecutor and contribute to skyrocketing prison populations. Federal mandatory minimum laws in drug cases are especially egregious, carrying sentences of anywhere between five years and life, depending on the drug and volume involved. Another product of Reagan's leg of the War on Drugs, these sentencing laws guarantee unnecessarily long sentences that are not only fis-

⁵¹ Surowiecki, James. "Trump Sets Private Prisons Free." *The New Yorker*, December 5, 2016. <https://www.newyorker.com/magazine/2016/12/05/trump-sets-private-prisons-free>

⁵² Ibid.

⁵³ Office of Justice Programs. *Recidivism*. <https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx>

cally wasteful, but do nothing of substance to reform criminals.⁵⁴

Mandatory minimum reform has been attempted and performed in a variety of states. For example, Ohio, in 2011, enacted legislation that repeals mandatory minimum sentences for certain drug offenders, requires first-time nonviolent offenders to be sent to community control, job training or treatment programs instead of prison, and allows for shorter sentences for low-level trafficking and possession offenses.⁵⁵ While this new trend away from the practice is gaining steam in many states, Attorney General Jeff Sessions again jeopardizes these efforts by not only being a proponent of mandatory minimum sentencing laws, but also by filling what little positions that have been filled in the Justice Department with those holding similar allegiances. If the United States is to enact meaningful prison reform that allows correctional institutions to allot any focus towards the individual betterment of its inmates, it must keep prison populations down. A significant step in this process is the repeal of mandatory minimum sentencing laws, and other statutes with similar effects such as the “three-strikes rule” that exists in many states across the country.

While judicial practices, enforcement procedures, and government agendas have all contributed greatly to America’s prison problem, there must be something more beneath the surface. Why do so many former criminals reoffend? Why do the punishment practices ingrained in the nation’s prisons fail to get through to so many minds? The answer may be supplied by the theory of

institutionalization. Institutionalization, or institutional syndrome, is a psychological phenomenon characterized by the appearance of anti-social behavior or deficits in life skills stemming from an individual spending an extended amount of time within the confines of a prison, mental institution, or other similar location.

American prisons, as evidenced by abysmal recidivism figures, have this problem to confront. The uncomfortable truth is that imprisonment itself is dehumanizing in nature, especially when designed to be so. When an individual is treated as a sub-human, stripped of his liberty, and confined to a strict schedule and set of lifestyle guidelines for such a lengthy period of time, society should not feign surprise when he finds himself incapable of leading a normal life once he returns to the outside world. Many former inmates, all too aware of the psychological difficulties that they face on a daily basis, think it less burdensome to turn once more to a life of crime. To them, this life, and especially the incarceration that accompanies it, represents stability and familiarity in a world that seems to move faster and more freely than anything they can be expected to handle. It is worth noting that this calculus may most often be performed on a subconscious level.

In order to combat the ill-effects of institutionalization, the United States would have to alter the state of likely every one of its prison facilities comprehensively. As they exist, they are characterized by strict order, in some cases sexual violence and gang conflict, and most universally monotony and outright boredom. This vicious cocktail of conditions ensures that the criminal who entered the facility will leave with his illicit tendencies still intact if not refined. The United States must come to terms with the fact that a vast majority of its prisoners will someday walk the streets once again, and that current system of prisons

⁵⁴ “Mandatory Minimums and Sentencing Reform.” *Criminal Justice Policy Foundation*.

<https://www.cjpf.org/mandatory-minimums/>

⁵⁵ “Recent State-Level Reforms to Mandatory Minimum Laws” *Families Against Mandatory Minimums*, June 30, 2013. <http://famm.org/wp-content/uploads/2013/08/FS-List-of-State-Reforms-6.30.pdf>

creates individuals who may not be the optimal neighbor.

What is the alternative? A very extreme example would be Bastøy Prison, which is located in Norway and was dubbed “the World’s Nicest Prison.”⁵⁶ If one were to see the property before knowing what it was, he would likely guess that it was a quaint vacation destination rather than a correctional facility. There, prisoners, even those convicted of violent crimes, hold the keys to their own rooms, they have access to a variety of leisurely activities such as sunbathing and horseback riding, and they even enjoy cuisine that is borderline gourmet. To a staunch proponent of American crime and punishment, such conditions would be unheard of for those convicted of such serious offenses. However, if the goal of a prison is to heal and reform rather than punish, the Norwegian formula makes perfect sense. While not all of Norway’s prisons are as lax-natured as Bastøy, they do follow a similar restorative philosophy and the nation has been rewarded for its efforts. Only around 20% of the individuals that go through the Norwegian criminal justice system are recommitted after two years, which as was discussed earlier in the chapter, is a statistic that shines brightly when compared to the United States’ rate that routinely tops 70%. Similar trends exist in much of northern Europe.

While the United States will likely never see a complete upheaval of its prisons in order to better emulate the Scandinavian model, any efforts to promote restorative justice over retribution will move the nation in the right direction towards mitigating the effects of institutionalization and lowering the total prison population so that tailored rehabilitation efforts can be more effectively

administered to those who actually committed crimes worthy of societal reprimand.

CONCLUSION

The particular Penitentiary system studied and promoted by Alexis de Tocqueville and Gustave de Beaumont was, in many ways, a product of its age. First, it used practices, such as prolonged or absolute solitude or enforced reverent silence, practices that would be considered barbaric or inhumane by today’s standards. Additionally, the America of the 1830s was a very different country than the contemporary nation. Namely, it was far less populated and less racially diverse than contemporary America, the implications of which cannot be overlooked. Furthermore, the modern legal framework of the United States, and the grand bureaucracy that accompanies it, is far more detailed and expansive than the two French diplomats could have imagined.

However, that is not to say that the Penitentiary system of the 1830’s does not carry with it important underlying principles that could be well served in the improvement of the American penal system of today, perhaps making it more greatly resemble the system of old in both overall philosophy of justice as well as in its favorable results. At that time, the American criminal justice system was admired abroad to a point of emulation. While societal evolution killed the Penitentiary system, it was a concerted effort by lawmakers, presidents, and special interests that killed the spirit of reform that drove it, or at least, brought it to the brink of extinction. The dawn of the War on Drugs, the proliferation of private prisons, the institution of mandatory minimums, and all of the racial tensions that accompany them have transformed the American penal system into a conglomeration of money-hungry entities driven by special interests, with little

⁵⁶ Sutter, John D. “Welcome to the World’s Nicest Prison.” *CNN.com*, May 24, 2012.
<http://www.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/index.html>

to no concern for reforming what they deem to be beyond repair. In other words, the system has foregone the pursuit of any practical effectiveness in serving society's safety or satisfaction. This is a far cry from the system that garnered Tocqueville and Beaumont's praise, a system that truly sought to achieve personal improvement for the individuals who entered its doors.

In order to reduce the prison population in the United States, it would be necessary to eliminate the aforementioned obstacles to meaningful criminal justice reform. A lower population would take a significant burden off of prison officials, and it would allow them to deliver the personal attention required to all inmates left in the system so that they may overcome the threat of institutionalization and become productive citizens upon their release.

It is not only practical to make these changes, it is right. How we treat prisoners, especially the most malicious and sadistic, offer us perhaps the most challenging opportunity to affirm our humanity. Too often, society forgets that even the worst among its ranks still share a perdurable connection with humanity. Invariably, a prisoner loses much, including his freedom, his assets, his family, his sanity, and years of his life. At the very least, he must be allowed to retain his humanity.

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