

## Punishment in Liberal Regimes

“To prove fiction, indeed,” said I, “there is need of fiction; but it is characteristic of truth to need no proof but truth.”

—Jeremy Bentham, *A Fragment on Government*

In a virtually manic departure from the foundations of early American democracy explored in the last chapter, today the United States incarcerates a much higher proportion of its population than any other advanced democracy. In 2003 Bruce Western measured a penal population of 2.1 million inmates, indicating a scale of incarceration that “exceeds the historic average by a factor of nearly five” in the history of the United States.<sup>1</sup> Analysts have measured and examined crime rates, public insecurity, shifts in (or manipulations of, depending on one’s perspective) perceptions of crime, sentencing practices, institutional trajectories, and economic and racial elements to explain the punitiveness that characterizes the United States today.<sup>2</sup> No doubt all of these factors need to be considered. But what I offer here is another element that does not usually appear in discussions about contemporary penal practices in the United States: classical liberal political philosophy. In this chapter, I demonstrate the unique reliance upon punishment in liberal contract theory, relating it back to the role that punishment plays in the presentation and legitimation of political order. One of the most striking aspects of the current incarceration boom is how it appears to completely defy logic or utility. At great human and capital costs, we cycle an increasing percentage of the American citizenry through jails and prisons, producing little reform and a questionable impact on the crime rate. Clearly, we are pursuing this policy for reasons that are not immediately apparent. Understanding the unique reliance of liberal social contract theory on punishment to establish its terms and principles helps to explain the function of penal practices in the political order of the United States in different terms.

On the face of it, the incarceration boom in the United States seems to

contradict the classical liberal tenets that venerate individual rights as much as limits upon state power. Should we see punishment and penal policy as the exception to this rule? On the contrary, when we examine the philosophies of John Locke, we find that punishment plays an integral role in defining and developing—and importantly, presenting—both individual rights and limited state power. While I do not offer liberal thought as a primary reason for contemporary carceral policies, understanding the centrality of punishment in classical liberalism helps us to understand in part how a punitiveness that seemingly contradicts all other governmental trends is not generally viewed as problematic.

Let me conclude this introduction by clarifying what I am not arguing. It is relatively clear to argue that modern forms of penalty have been instrumental in molding the kinds of behaviors desired by capitalistic, liberal regimes. The calibration between systems of punishment and the ideal political subject was explored to great effect by Foucault in *Discipline and Punish* and Thomas Dumm in *Democracy and Punishment*. I am not out to contest these arguments but rather to point out the relatively exceptional reliance upon punishment in the formation of John Locke's liberal political philosophies. He relied upon punishment to signify and represent the most basic definitions and conditions of liberal social contract theory, such as responsibility, personhood, and limited executive power.

It is simple to say that punishment is necessary to enforce the terms of the liberal social contract. Yet this would not distinguish social contract theory from any other form of government. I argue that where liberalism comes to rely uniquely upon punishment is in establishing its comparative strengths: a veneration for individual rights and circumscribed state power. How can the exercise of state power be visibly and convincingly registered as limited? How are such abstract notions as "individualism" and "responsibility" to gain meaning? In both cases, theorists turn to punishment as a way to put together the necessary elements of the liberal regime. Social contract theory claims that it is derived directly from natural rights, but a close examination of Locke demonstrates that he used punishment as the midwife in the birth of the social contract. Punishment is not an exception to the rules of liberalism, but an integral element in the classical liberal paradigm.

### *Punishment and the Contract*

Proponents of the social contract point to the great strengths of using the metaphor of contract to structure government such as the necessary

reciprocity between citizen and state, the consent that makes it possible to reconcile order to freedom, the explicit rights for individuals and limitations upon the government, and the ability to agree upon what conditions will render the contract null and void. Critics point to the contract as a scrim, a facade of consent that serves as a cover for coercion, and argue that the mechanism of the contract renders a society composed of agents and objects, exchange, rationality and calculation, as opposed to community, emotion, and love. Contract as a metaphor for organization also occludes power dynamics. Both critics and proponents take the intangibility of the contract as a given and see that its neat character stands in contrast to the messiness of social dynamics. Depending on one's point of view, this distinction can mean that contract is normative in modeling interactions and seeking to regulate them. Conversely, it can be argued that contract serves as a blinder to actual people, ambiguities, and coercion. In both views, contract is something that stands outside of the world, and hence orders it—to good or ill.

Contract may be the most powerful tool of political order to emerge since deism precisely because of its abstract existence. Empirical methods of political organization and regulation are relatively vulnerable. Institutions can be corrupt and recognized as such. Rulers can die, go mad, or produce idiotic offspring, and laws can be critiqued as written or applied. Even actual contracts contain loopholes and weaknesses that make them less than ironclad. Since no one has ever seen a social contract, much less signed one, it is difficult to point out exactly how it fails to manifest itself. Critics say as an abstraction it is a poor representation of the much messier world. Proponents point out that its remove from the everyday struggles and prejudices of life make it able to mediate fairly. How exactly does such an abstraction come to order society and state? Even God had his miracles, revelations, and spokespersons. While faith was considered all the stronger because it eschewed the need for evidence, belief in contract relies upon a similar type of devotion without the support of institutionalized faith. Contract, improbably, becomes the abstraction upon which a positivistic political order is based.

It is an indication of the power of the contract metaphor that we live in a properly contractual society today. A contract gave birth to the government that protects against abuse of contracts between individuals. A marker of our freedom as individuals is our ability to make contracts, yet the contracts themselves are what help define us as individ-

uals. We became citizens through entering into the social contract, and contract creates our protections as citizens. There is a truly remarkable convergence in our conceptions of agency, freedom, government, and economy around the idea of contract. But this makes it virtually impossible to understand what the contract is, how it functions, where it came from, and what its effects are.

Most literature surrounding social contract theory and practices of punishment tries to justify or challenge the state's right to punish, which can and often does take away the inalienable rights upon which the social contract is based. This is a genuine problem: how can a state founded upon the sanctity of individual rights be allowed to take them away? Some have argued that crime tips the natural balance between the rights of individuals in the favor of the offender; the state must punish in order to restore the equilibrium.<sup>3</sup> Others have argued that membership in the social contract is predicated upon the understanding that the state will enforce laws, thereby one has already consented to one's own punishment in the case of an infraction. The consent implied in membership reconciles this curtailing of rights with individual freedom.<sup>4</sup> Others embrace utilitarianism, proposing that the state must punish in order to protect the rights of others in the future and that punishment should be viewed for what it produces, as opposed to how or why it achieves this goal. Others have argued that as soon as one breaks the law, that person falls out of the social contract into a state of war and thereby loses all claims to individual rights.<sup>5</sup>

These positions take the social contract form of government as a given and recognize the problem that punishment poses for it theoretically.<sup>6</sup> I think that the more interesting question is why punishment plays such a central role in the foundations of social contract theory. Since punishment places a strain upon the conception of individual rights and social contract, why does it play such a large role in their articulation?

I had long thought that the practices of liberal regimes and the theories of liberalism were incompatible—perhaps, even worse, that the ideals themselves might be complicit in the bloody practices done in their name, agreeing with others such as Pateman, Pitts, and Mehta.<sup>7</sup> This is why I find it particularly interesting to consider the appearance of punishment in John Locke and Jeremy Bentham—two classic variants of the liberal argument in which punishment plays a central role. I couldn't point to violence as a way to belie the claims of philosophical

liberalism, because I found a stream of blood running right through the core of the liberal canon.

### The Second Treatise of Government

On its most basic level, Locke's version of the social contract is an agreement between individuals or persons consenting to be bound by the rule of law. Fascinatingly, all elements of this configuration—personhood, law, rights, and contract—are defined in reference to punishment. Following Locke's own logic that individuals are the point of departure for social and legal organization, we should begin by examining personhood. While personhood is not extensively defined in *The Second Treatise of Government*, he does dwell upon the subject in *An Essay Concerning Human Understanding*. Locke asserts that personhood is a matter of consciousness. After all, I could define myself by saying I am a Philadelphian. Would I then cease to be me if I moved? I could say I am the person that occupies this body. But bodies change. Isn't the woman the same person—even though changed—as the girl who came before? What makes a person, according to Locke, is the consciousness that can connect experiences throughout time and space: "This personality extends itself beyond present existence to what is past, only by consciousness,—whereby it becomes concerned and accountable; owns and imputes to itself past actions, just upon the same ground and for the same reason as it does the present."<sup>8</sup> Notice that the term *accountable* rests at the center of this definition. Consciousness is what provides accountability: if I could not remember what I did yesterday or if I was reborn every day (a strangely common theme in films these days), human consciousness as is typically understood could not exist. We would have no sense of where we were, where we had been, that our actions and choices have effects, or that we are distinct from our environment.

Consciousness defines a person; it also makes every person accountable. "In this personal identity is founded all the right and justice of reward and punishment."<sup>9</sup> To elaborate upon this claim, he turns to punishment that, in this case, is not a system of laws and application but rather an external recognition of personhood and accountability, or the mitigation thereof. Punishment is one way our personhood is recognized by others, and the way society as a whole establishes who counts as a person and who does not. As accountability is the marker of

personality, the determination whether someone can be held accountable for his actions signals his personhood or lack thereof.

Locke's definition of personhood serves an instrumental role in his political system. If people cannot be held accountable, then they could not possibly consent in any sort of meaningful or binding fashion. It is interesting that he turns to punishment as a way of demonstrating that such recognition of accountability is already present in legal practices. Whether a small village or a state, it is true that some persons are recognized as having greater accountability for their actions, and this is made most clear through practices of punishment. As Locke points out, to punish someone for a crime of which she has no understanding or recollection is nothing but creating misery. The term *punishment*, as opposed to *cruelty*, implies comprehension that there is logic behind the pain. For a person to recognize pain as punishment they must have consciousness. But this is not entirely subjective because society also recognizes different gradations and elements of consciousness. Hence punishments are mitigated accordingly.

What Locke presents in *An Essay Concerning Human Understanding* is a definition of personhood that supports his later elaboration of consent and contractual political order. Yet he turns to extant practices of punishment as a demonstration of his definition. It seems to me this provides a corrective to Foucault's work that looks at modern penal practices as a reflection of Enlightenment notions of responsibility and individualism. Locke's notion of personhood is elaborated, even substantiated, in reference to legal practices, not the reverse: the practice gives rise to the theory.

Another crucial element of the contracting Lockean individual is established through his discussion of personhood and punishment. Locke contemplates why society punishes the actions of drunkards, but not madmen. The common answer is that drunkenness is a state that is voluntarily entered, while madness descends without volition. Locke agrees that part of accountability would include being conscious of the choice to lose consciousness. However, knowing the difference between the two scenarios—deliberate and involuntary unconsciousness—is difficult. "And all that lies upon human justice is, to distinguish carefully between what is real, and what is counterfeit in the case."<sup>10</sup> Therefore, the social contract is dependent upon this definition of a person as accountable, yet this principle creates all-new difficulties for the administration of justice. Locke turns to punishment to establish

an empirical point for his definition of personhood, but practices of punishment render that same person increasingly intangible. The problem that punishment poses for the voluntary, willing individual is especially apparent in the following passage in Locke's *Essay*.

It is past doubt the same man would at different times make different persons; which we see, is the sense of mankind in the solemnest declaration of their opinions, human laws not punishing the mad man for the sober man's actions, nor the sober man for what the mad man did, —thereby making them two persons: which is somewhat explained by our way of speaking in English when we say an one is 'not himself,' or is 'beside himself.'<sup>11</sup>

Our consciousness may make us a person, but our actions seem to splinter us into two individuals at times. The demands of justice are such that only the fully realized individual may be punished, however.

H. L. A. Hart's *Punishment and Responsibility* is a brilliant rendering of the difficulties of establishing individual accountability when administering punishment. Hart discusses the different mitigating conditions that excuse a criminal infraction as well as determine culpability. Think of all the legal categories that describe differing levels of responsibility for a death: First, Second and Third Degree Murder, Criminal Negligence, Attempted Murder, Manslaughter, Negligent Manslaughter, and Murder in Self-Defense, to name just a few. Hart argues that practices of punishment reveal the difficulty of trying to determine the level of responsibility of a person at the same time that these practices rely upon this idea of responsibility.

Hart proposes that punishment is not actually indicative of individual responsibility—official legal recognition of such intangible aspects of the human psyche such as volition, duress, insanity, compulsion, or self-defense is impossible. The difficulty between determining what is "real" and what is "counterfeit" is too great. Imagine that a man guns down a teenager who had been following him on a dark street for half an hour, convinced that the young man was about to kill him. "I thought he was going to kill me, I thought he had a gun, even though it turned out to be a cell phone." How can we decide if this statement describes self-defense, temporary insanity, murder, or manslaughter?

Instead of actually ascribing clear responsibility, Hart points out that punishment serves to change the relationship of individuals to their

world, in making it appear to be more calculable, if not actually become so. Practices of punishment make our environments more predictable by assuming accountability as a norm. We can recall that the first step in Locke's conception of personhood was consciousness defined as the ability to make connections between past and future. The next step he takes is that consciousness then makes people envision themselves in relationship to past, present, and future actions. But another manifestation of this ability to position oneself in a temporal continuum would be the desire and ability to plan and to make choices about present activities with future benefits in mind. Of course things may not always go as planned, and as tempting as it is to see causality in all events (as I explored in chapter 2), sometimes there simply is no link between past and present. Accountability is not ironclad, but assuming accountability is one step toward creating a more calculable world. Hart argues, "If with this in mind we turn back to criminal law and its excusing conditions, we can regard their function as a mechanism for similarly maximizing within the framework of coercive criminal law the efficacy of the individual's informed and considered choice in determining the future and also his power to predict that future."<sup>12</sup>

The relationship between punishment and personhood is ultimately circular. In defining personhood, Locke points to punishment as a reference point. But then practices of punishment bring this definition of personhood into question, precisely by taking Locke's challenge to distinguish between accountable and unaccountable persons. In the end, we cannot rely upon persons having accountability. Someone may have lost his mind that morning, someone may lose consciousness while driving and crash into your car, someone might under orders from a superior flip a switch that releases gas or electric shocks intended to kill. Every day, actions occur for which apparently no person is accountable. But the result of this system is that laws and rights gain accountability, providing a person who may or may not have accountability with an environment with some element of predictability.

Personhood is just one of the pillars of social contract theory; descriptions of the state of nature and natural rights also serve as the foundation for the liberal political order. Locke's account of the natural laws and natural rights that provide the basis for the social contract also rely heavily upon punishment. Locke adopted his ideas of the natural right of punishment from the work of Hugo Grotius, who made the connection between punishment and contract explicitly. In *De Jure Belli*

*ac Pacis* he quoted Michael of Ephesus's *On Aristotle's Nicomachean Ethics*, which observes that in punishment there is "a kind of giving and receiving, which constitutes the essence of contracts."<sup>13</sup> This sounds remarkably like Nietzsche's account of political and social order in book 2 of *On the Genealogy of Morals*. While Nietzsche wants to emphasize the interconnection based upon extraction at the heart of all social orders, I would argue Locke is searching for empirical referents to help sustain his imaginary state of nature.

Locke defines law according to punishment. "For, since it would be utterly in vain to suppose a rule set to the free actions of men, without annexing to it some enforcement of good and evil to determine his will, we must, wherever we suppose a law, suppose also some reward or punishment annexed to that law."<sup>14</sup> *An Essay Concerning Human Understanding* points out three kinds of law: divine, civil, and philosophical law (which he calls opinion or reputation). God punishes or rewards in the afterlife, and upon occasion through divine intervention on earth. Civil law is enforced by magistrates, while social laws, such as etiquette, are enforced through derision and exclusion. Curiously absent from *An Essay Concerning Human Understanding* is natural law, which, as he points out in *The Second Treatise*, implies an ability to punish: "For the Law of Nature would, as all other Laws that concern Men in the World, be in vain, if there were no body that in the State of Nature, has a Power to Execute that Law, and thereby preserve the innocent and restrain offenders."<sup>15</sup> The assertion of natural law was not enough, you needed the evidence that such a thing as natural law did indeed exist. This may be the reason that Locke articulates a natural right to punish: to establish the existence of natural law. After all, even he admits that this position is "a strange doctrine."

Let us consider all of the different useful aspects in his assertion that "every Man hath a Right to punish the Offender, and be Executioner of the Law of Nature."<sup>16</sup> According to his own logic, this demonstrates the existence of natural law, for it would be inconceivable to have law that did not imply punishment. We have the same tautology between accountability and personhood replicated in his idea of natural law and natural right.

The presence of law provokes the necessity to punish. Or is it that the ability to punish marks the presence of law? This is not an idle question. We are more likely to think of punishment following law in order to enforce it. But this leaves unresolved the foundations of political

order. Social contract theory delivers the image of men exercising their reason and overcoming chaos to create a more calculable world for themselves. However, all three elements of this scenario—rights, natural law, and personhood—are defined in reference to punishment. Nietzsche’s “anti-enlightenment” reading of the social contract is little different from the sources of liberal political philosophers. It may seem that the image of self-regulating rational beings is destroyed by reliance upon punishment to establish the components of the social contract, but for both Grotius and Locke, the ability to punish guaranteed the presence of consent as opposed to coercion.

Grotius presented a more extended consideration of principles and rights of punishment in *De Jure Belli ac Pacis*, but Locke seems to adopt the shorter discussion from *De Jure Praedae Commentarius* almost verbatim. Looking at Grotius’s account makes Locke’s use of punishment somewhat clearer. The story that most people associate with Locke is present: Grotius accounts for the natural right to punish, quoting from ancient philosophers and the Bible, arguing that the right to punish derives from the right of self-preservation. When we enter a civil society, this right is passed to a political entity. Leaving aside the question of why we would enter such a society for just a moment, consider Grotius’s proof for the natural right to punish.

In the light of the foregoing discussion it is clear that the causes for the infliction of punishment are natural, and derived from that precept which we have called the First Law. Even so, is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals. . . . therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.<sup>17</sup>

In other words, as all political power derives from individuals consenting to it, the political power to punish must originate in those same individuals. The existence of the political power to punish therefore proves the natural right to punish. This is similar to Locke’s assertion that any law needed punishment, and that the existence of natural law proves the natural right to punish. Both arguments are tautological. In grounding civil law in natural law, they turn to punishment as a

method of proving the existence of natural law and right, and in asserting its particular relationship to civil society.

Grotius and Locke both invoke the ability of a government to punish aliens as further proof of the natural right to punish. If punishment were purely a political right, then those who had not consented to the government would be unable to be punished. While Grotius seems primarily concerned with using this fact as evidence for natural right, Locke's account betrays an even more pragmatic use of this argument.

To those who have the Supream Power of making Laws in England, France, or Holland, are to an Indian, but like the rest of the World, Men without Authority; And therefore if by the Law of Nature, every Man hath not a Power to punish Offenses against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can punish an Alien of another Country.<sup>18</sup>

In other words, a refusal of the natural right to punish would diminish the authority of colonizing powers—there are pragmatic reasons for embracing the strange doctrine.

The natural right to punish also provides the impetus to join the social contract. As both Grotius and Locke point out, when punishing crimes that have occurred against oneself, we are more prone to anger and lose our natural state of reason. Grotius is particularly interested in pointing out the dangers of exercising our natural right to punish offenders. He spends four pages citing poetry and observations about the weakness of character that emerges in vengefulness. He concludes by offering his most damning account from a poem by Juvenal: "A mind, small, weak, and mean, will ever pleasure take in vengeance. Mark this at once, that in revenge A Woman does rejoice above all others."<sup>19</sup> Nature and reason provide us the ability to punish; the *practice* of punishment, however, can endanger that same reason and nature. One of the primary mechanisms that propel free persons out of their state of nature is the recognition that uninhibited exercise of natural rights creates more discord. Locke argues that in the state of nature, reason reigns supreme. In committing a crime, "the Offender declares himself to live by another Rule, than that of reason and common equity."<sup>20</sup> Others can respond to their infraction and take revenge, but then they too will cease to live by the laws of reason. The same seed spawns crime and vengeance.

The exercise of our natural right to punish endangers our reason. Further, an inability to exercise our natural right to punish endangers our preservation. While Locke emphasizes the danger in exercising this right, think of the frustration and fear that might provoke anxiety in the face of one's natural right to punish. There is a crucial gap between the natural right to punish those who infringe upon your body, rights, or possessions and the ability to do so. Those of poor social stature, no resources, or weak disposition would not have been able to procure justice.

Locke's ideas about punishment make two important additions to Grotius's. Locke defines criminality as irrational, a point that contradicts Hobbes, who at least acknowledges that it can be in one's interest to commit crimes. But in punishing, we do not thereby transfer the offender back into the realm of reason. In his "Second Letter Concerning Toleration," Locke blasts critics of his first letter who argued that religious dissenters should be punished in order to bring them to the correct mode of reasoning. He insists that though crime is a state of war, reason and following the law are not absolutely commensurate. "Will punishment make men know what is reason and sound judgment? If it will not, it is impossible it should make them act according to it. Reason and sound judgment are the elixir itself, the universal remedy; and you may as reasonably punish men to bring them to have the philosopher's stone, as to bring them to act according to reason and sound judgment."<sup>21</sup> Locke points out the futility of using pain to try to inspire reason—that it is far more likely to engender resistance to the power that administers it. Lack of reason will incur punishment, but punishment will not inspire reason.

There is one more aspect of Locke's theory of punishment that has been explored by Nozick that bears mention here.<sup>22</sup> Both Grotius and Locke assert that the natural right to punish demonstrates the natural executive right—it is evidence of our individual power that precedes natural law. While Locke makes the case only obliquely, Grotius is far more forthcoming about the political ramifications of this proof. "Moreover, whatever existed before the establishment of courts, will also exist when the courts have been set aside under any circumstances whatsoever, whether of place or of time. In my opinion, this very argument has served as the basis for the belief that it is right for private persons to slay a tyrant, or in other words, a destroyer of law and the courts."<sup>23</sup> This is a crucial result of the natural right to punish. It means

that anyone who opposes the law deserves punishment, including a king. If the king uses the law for vengeance, and the interests of the ruler replace the rule of law, then the people have the right to punish the tyrant. Grotius argues that anyone who refuses to follow the law places himself in a state of war with society; the same logic holds whether it is a murderer or king. The natural right to punish is the capability that proves the natural executive right. The right of revolution is guaranteed by the natural right to punish, which makes it perhaps the most indispensable element in social contract theory since consent is immaterial if it may not be withdrawn. Within Lockean theory, punishment becomes a measure of the rule of law, and the final protection of individual rights.

*Punishment and the Perception of a Distinctly Liberal Power*

Locke relies heavily upon already existing practices of punishment to establish the normative principles of his social contract as empirical precedent. Without punishment, he could not prove the a priori existence of personhood, natural law, or executive powers. He also relies upon instances of punishment to help distinguish the bounds and establish the unique character of his political authorities. It is well known that Locke was uneasy with the creation of the all-powerful authority in Hobbes. But he does not, as is often assumed by many in the United States, enthusiastically encourage rebellion against authority. "May the commands then of a prince be opposed? May he be resisted as often as any one shall find himself aggrieved, and but imagine he has not right done him? This will unhinge and overturn all polities, and, instead of government and order, leave nothing but anarchy and confusion."<sup>24</sup>

Locke's attempt to balance the need for order with individual freedom is best surmised through his articulation of tyranny: here he spells out the privileges and limitations upon liberal power. Like Hobbes's, Locke's sovereign exists in a special relationship to the law. As in Hobbes, the sovereign has the power to punish. But here the spirit in which punishment is delivered becomes, for Locke, the key to perceiving whether the use of executive privilege is within or exceeds the bounds of acceptable power. In the *Second Treatise*, how a sovereign punishes is one principal way to judge whether he is a ruler, who deserves obedience, or a tyrant, who can rightfully be deposed.

In a liberal system, it is understood that the law stands above the ruler; after all, Locke clearly states the difference between a legitimate sovereign and a tyrant: "one makes the laws the bounds of his power, and the good of the public, the end of his government; the other makes all give way to his own will and appetite."<sup>25</sup> The fact that Locke talks about legitimation of sovereignty as its disembodiment reveals his basic understanding of the necessary transcendental qualities of sovereignty. As in *Leviathan*, Lockean sovereignty is based upon transcendental principles, only in this case, it is not semidivine status; instead it is the disembodiment provided by reason that serves as the basis of authority.

This characteristic of Locke's ruler is established through his distinction between the natural right to punish held by all individuals, as opposed to the civil right of punishment awarded to political rulers. In the state of nature, all people have the right to revenge injuries wrought upon them; as a party to the social contract, we relinquish this right. In so doing, Locke points out, we eliminate the state of war from society. Because political rulers are not the victims of crime, they can punish disinterestedly, without cruelty and vengeance. Therefore, the state of war ends with state punishment, rather than being fed as in a cycle of private revenge.

Because this is one of the primary benefits of being in a civil society, a ruler who punishes with revenge in his heart fails to deliver one of the most basic requirements of the social contract. A sovereign who punishes according to emotion, not reason, is by Locke's own definition a tyrant. Therefore, the liberal political order isn't merely dependent upon the exclusive right of punishment and the ability to enforce laws as all regimes are. Instead, the ruler must accomplish order and enforce law, but do so in a very particular manner. This may be the most effective device used to limit state power ever invented: to insist upon reason and calculation even when administering pain to offenders. However, there can be no doubt that this is one of the most difficult principles to maintain in practice, and many commentators have observed that liberal regimes routinely indulge in the pleasures of revenge.<sup>26</sup>

Lest his audience be alarmed that any liberal regimes shall be continually upset by intransigent populations, Locke astutely points out that once the habits of obedience to a ruler are established, they are overturned only with great difficulty. For a ruler to be considered a

tyrant, “a long train of Abuses, Prevarications, and Artifices, all tending the same way” must be evident.<sup>27</sup> Locke argues that the substitution of “Will” and “Appetite” for reason and the greater good must be “visible to the People” in order to justify the dissolution of government. This is why in practice, liberal regimes may repeatedly indulge in revenge and cruelty, but leaders not be called to account for the betrayal of principles. The boundaries upon liberal power are entirely dependent upon public perception, not clear regulation. If punishment, no matter how senseless, is perceived as within the boundaries of law, it will be acceptable. Yet because the principle of impartial punishment is elaborated, whenever punishment is perceived as systemically cruel and vindictive, the legitimacy of liberal regimes is called into question.

The fact that Locke uses an explanation of a particular form of punishment to elaborate his vision of sovereign power suggests two different things. First, the disembodiment of the sovereign in the practice of punishment is his way of signaling that this power will be bound, and completely so, by reason. Only the mind will be allowed to rule, and reason is a far less cruel master than the heart. The second element of this description of liberal punishment is more difficult to explain. That Locke is seeking to demonstrate the limited power of the sovereign through the power of punishment is a truly paradoxical task. After all, punishment is a demonstration of power, but in Locke’s writing, it is a demonstration of bounded power. The belief that the act of state punishment can demonstrate the limits of state power is a remarkable claim on Locke’s part. The fact that the exercise of sovereignty can be taken as an expression of its limits reveals that the “limits” of state power may be far more a matter of perception than empirical measurement. After all, what is considered a pattern of abuses on the part of the sovereign? By what measure can we determine if a ruler is governing with appetite or reason? These judgments are a matter of perception.

### *Perception, Punishment, and the Social Contract*

Jeremy Bentham’s work on the social contract proves to be instrumental in helping to understand how perception and punishment serve a uniquely instrumental role in social contract theory. Bentham was made notorious by Foucault’s studies of the panopticon, yet it is not his theories of penal practice that interest me here. I believe his ideas about rights and legislation and, even more important, his “Fragment on

Ontology" prove of the greatest interest in relationship to Locke's social contract. Appalled by the overdependence of law and governmental authority upon the fictions of social contract, Bentham offered utilitarianism as a corrective. "The indestructible prerogatives of mankind have no need to be supported upon the sandy foundation of a fiction."<sup>28</sup> Instead, the relationships between state and individual and between private individuals could be grounded in rational and empirical calculation based upon maximization of pleasure and minimization of pain. As Locke adopted the Grotian framework with a new emphasis upon reason, Bentham assumed Locke's interest in reason and abandoned the Grotian framework of natural rights and law altogether.

Though Bentham is often characterized as a coolly calculating utilitarian, he was driven by an adamant desire to reconstruct law and politics upon firm, clearly self-evident grounds. His impulse toward reform was such a primary drive that others observed that "he was the sort of person who could not even play badminton without wanting to stop and design a better shuttlecock."<sup>29</sup> One of Bentham's primary objections to social contract theory and law in general was its foundation upon either a mythical past or an interpreted one. Bentham found reprehensible the practice of viewing the past as the only authoritative source; instead his framework looks to create future good. In *A Fragment on Government*, Bentham fumes against the scaffolding of natural right and original contract that are intended to support sovereignty and obedience to law.

Conversing with Lawyers, I found them full of the Virtues of their Original Contract, as a recipe of sovereign efficacy for reconciling the accidental necessity of resistance with the general duty of submission. This drug of theirs they administered to me to calm my scruples. But my unpracticed stomach revolted against their opiate. I bid them to open to me that page of history in which the solemnization of this important contract was recorded. They shrunk from this challenge; nor could they, when thus pressed, do otherwise than our author has done, confess the whole to be a fiction.<sup>30</sup>

Ridding himself of fiction, Bentham proposes a different basis for right: punishment. "I say *punished*: for without the notion of punishment (that is of *pain* annexed to an act, and accruing on a certain *account*, and from

a certain *source*) no notion can we have of either *right* or *duty*.”<sup>31</sup> To understand why this is the case, a cursory examination of Bentham’s utilitarianism is needed. He saw maximization of pleasure and avoidance of pain as the clear empirical bases for human action. We may assert rationality as our God, but reason alone cannot overcome these primary impulses. Reason may tell me that I should not take a vacation if I do not have the funds, but it is the threat of creditors that keeps me home. Without any clear consequences for our actions, we would always choose to avoid pain and seek pleasure.

“Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne.”<sup>32</sup> To achieve good behavior, morality needs to be attached to pain and pleasure: we will suffer when we are bad, be rewarded when we are good.

Reason helps us understand the causal relationship between pain and nonperformance of duty. It is up to the state to ensure that punishment is sure to follow infractions, rewards to follow acquiescence. The fundamental shift between Locke and Bentham is that Bentham believes that punishment can influence reason. Not that it creates rationality through pain, only that the assurance of pain administered by the state will change the calculations of every citizen. It may be painful to work, but the pain involved in hanging or incarceration that would result from robbing a bank is far greater than the discomforts of working. In this way, punishment allows the state to manipulate the terms of reason. Any organization of society that attempts to have people do what is right even though they will suffer for it is sure to fail. Reason can be utilized in social order; it cannot serve as the sole basis of it.

This is why though we may be able to understand such a concept as right and duty, this insight will not affect our actions unless we can see a clear manifestation of these abstract concepts in our own lives. Hart and Schofield have commented that Bentham’s ontology provides the key to his radical critique of law and politics.<sup>33</sup> Examining his “Fragment on Ontology” reveals that his utilitarianism is actually grounded in the belief that much of reality is founded in perception. He divides the world into categories: those entities that are corporeal and those that are inferential and fictional. Corporeal substances are ones that are tangible such as an animal, mineral, or plant. He has a fascinating test

for how one can tell whether the substance in question is corporeal: "Suppose the non-existence of corporeal substances, of any hard corporeal substance that stands opposite to you, make this supposition, and as soon as you have made it, act upon it, pain, the perception of pain, will at once bear witness against you; and that by your punishment, your condign punishment."<sup>34</sup> Take, for example, deciding that the cars driving by in the highway do not exist. You step into the traffic, only to have the existence of the cars affirmed when you find yourself in an ambulance on the way to the hospital.

The situation with inferential substances is quite different. "Suppose the non-existence of any inferential incorporeal substance, of any of them, and the supposition made, act upon it accordingly,—be the supposition conformable or not conformable to the truth of the case, at any rate no such immediate counter-evidence, no such immediate punishment will follow."<sup>35</sup> I could wake up and bleakly assert that love does not exist. Whether or not there is love in my life, there is no immediate counter to my sad assertion. Someone could do something that demonstrated love to me that day which might make me change my mind, but love itself, free of all agents, could not demonstrate that my bleak denunciation was wrong.

It is tempting to conclude that punishment serves as the basis for empiricism, but this would be incorrect. Instead, punishment serves to create the perception of reality, or not. Love may exist, but it needs an agent to make it appear, while the cars need no such messenger. These passages assert a kinship with Hobbes's theories of nonrepresentational perception and his theory of sovereignty. Therefore, while Bentham's critique of social contract theory as a fiction seems particularly damning, it becomes clear that all abstract categories such as sovereignty, rights, and law would fall into the same category.

Necessity, impossibility, certainty, uncertainty, probability, improbability, actuality, potentiality;—whatsoever there is of reality correspondent to any of these names, is nothing more or less than a disposition, a persuasion of the mind, on the part of him by whom these words are employed, in relation to the state of things, or the event or events to which these qualities are ascribed.<sup>36</sup>

The problem of politics then, is how to make these abstract entities appear to be real, to have people perceive them as real. Punishment is

the way that abstractions such as morals, rights, duties, and sovereignty gain an empirical existence. The enforcement of laws and duties through punishments is what makes us perceive them as real. Contract, as another noncorporeal entity, cannot serve as the translation of rights and duties. This would be, in Bentham's terms, using fiction to prove another fiction. Bentham insists that rights and duties only become real when they cause pain or reward.

The fact that Locke's formulation of law, rights, personhood, and contract keeps returning to the practices and notions of punishment to serve as an empirical referent suggests that perhaps the essential views of Locke and Bentham are not as far apart as they initially appear. Take away Locke's story of the contract, and all you have left is punishment to serve as the foundation. However, to say that right and personhood is based in punishment requires unflinching pragmatism.

Bentham's ontological theory also suggests why political institutions play such a central role in the formation of consciousness and perception of the world. He argues that the state is the "strongest and surest" mechanism in its operation—the entity that will most reliably administer punishments and rewards to meet our perceptions and actions based upon those perceptions. Other entities, such as schools, friends, and parents, can also provide punishments and rewards, but they do not have the "sufficient force" to give these other suppositions "any practical value."<sup>37</sup> Therefore, the power of the state to punish in a way that no other entity in our world can, by administering death or incarceration, is what gives the noncorporeal entities it enforces a stronger existence than most inferred substances—friendship, love, community, to name a few. While we may experience these entities, and they may give us pleasure, they are not enforced with the same vigor as the law. Hence, according to Bentham it would be impossible to arrange a society based upon the sure cause-and-effect relationship between the rewards or loss of friendship. The power of the state to punish, along with the will to do so vigorously, literally structures our reality; it makes political principles more central than all others.

This assertion immediately provokes the question of what happens when the state fails or refuses to punish offenders. Does this mean that we lose the most central points of orientation in our grasp of abstract reality? Do other principles arise and become more central than the law and sovereignty? Do we struggle to maintain a sense of right and duty, ultimately failing in our ability to believe these fictions "that deal in

sounds instead of sense"?<sup>38</sup> If we are to take Bentham's assertion seriously, then punishment would be the primary duty of a state: in punishing it creates the reality of sovereignty, it makes the laws empirical, and it orders the conceptual universe of its citizens. This is an unyieldingly difficult view of the possibilities of human organization and justice, which is why the metaphor of contract is more generally acceptable, even if they amount to the same thing.

### *Liberal State Power and U.S. Penal Practices*

Therefore, we can see that social contract theory is dependent upon practices of punishment in an entirely unique sense. Because liberalism is based upon abstractions such as the social contract, natural rights, and even personhood that have no empirical referent, it has from the very start relied upon practices of punishment to make these terms operable. If practices of punishment are needed for theoretical explanation, making the power of the liberal state evident is certainly more difficult. Yet this is a difficult matter, for if just making state power evident were enough, liberalism would be no different from other forms of government. However, punishment in liberal regimes is intended to make government evident, but as a limited, not absolute power. Punishment establishes the two core elements of a liberal regime: its emphasis upon the rights of individuals and the bounds upon state power.

Critical reflection on contemporary U.S. penal practices reveals that they do shadow the arguments I have outlined in this chapter. First of all, the government has largely relinquished the aim of producing or changing reason through punishment; therefore there is currently no justification for penal practices based upon reformation. The U.S. government recognizes the rights of prisoners without seeking to bolster the capacities that presumably create those rights. The ambiguous tautology between practices of punishment, rights, and personhood present in the foundational texts of liberalism continues today. The state punishes to emphasize personal responsibility but through punishment often denies that same sense of self and culpability. We do not punish to bolster individual rights and personhood as much as to assert that these things exist already.

Some people argue that corrections has become a gruesome industrial complex, an economic engine in its own right. While certainly

some people materially benefit from incarceration, I believe these industries grew because the opportunity was there, and now these organizations and towns defend their territory, unnaturally prolonging the impulse toward severity. However, private corrections firms and rural local governments cannot be understood as the root cause of mass incarceration today. Instead, we can see how current incarceration creates, as Hart observed in 1968, the expectation of accountability and personhood, rather than the actual product. I will explore this theme in relation to neoliberal economic policies in the following chapter. Choice, labor, and citizenship are reinforced as basic freedoms in an era of deindustrialization through the deployment of mandatory labor in penal institutions.

While the terms of liberalism are clearly at play in contemporary penal practices, the struggle over the limits and scope of state power is also evident. David Garland has made a powerful argument that the new severity in the United States and Britain is a reflection of changing definitions of state power. Both regimes have aggressively rolled back the entitlements of citizenship in the past thirty years. This decline in welfare and other social entitlements reflects a larger shift in the relationship between the state and its citizens. Political freedom has been redefined to highlight individual freedom, exercised through the market and the capacity for personal choice, instead of an emphasis upon political freedom that is guaranteed by social and economic stability. The decline of the welfare state and the growth in incarceration both emphasize individual choice and the private freedoms of the market. But they are complementary in another sense: the economic disparities resulting from neoliberalism produce more fiscal insecurity and instability. Polarization of income levels creates fear of crime, while the loss of the safety net combined with deindustrialization creates more economic anxiety. Both of these fears can be visibly, and dramatically, met by the state as it steps up to vigorously control crime. People feel more secure in an unequal world when the government adopts more rigorous policing methods. The state may be providing a different kind of security than it used to, but has proven its continued indispensability.<sup>39</sup>

While I agree with Garland's argument, I continue to be mystified why such vigorous policing and the incarceration of so many citizens has been considered acceptable in a historical era marked by distrust of government and a desire to have less regulation. Crime is certainly one of the great exceptions to this overall social trend in both the United

States and Great Britain. Though Garland persuasively shows us how punishment and social control meet the new insecurities caused by a reduction in state entitlements, how can a social movement so greatly at odds with the prevailing philosophy of government flourish? What can account for the exceptional status that is awarded to state power in the area of punishment in liberal regimes?

Part of the answer to this question is provided by Locke. In his theory, liberal state punishment actually represents bounded and limited state power: punishment is a method of representing the limitations of the state rather than its coercive capacities. In many ways this is entirely counter to any logic—after all, the state is exercising domination over bodies in a fashion that is considered completely unacceptable under any other circumstance. The fact that these activities are perceived as an expression of measured authority can help account for the lack of alarm on the part of the general public.

Whether or not the governments of Britain and the United States are pursuing rational and just penal practices, the populations of these two countries perceive them to be acceptable. Thus it becomes more important to understand why particular groups support punitive punishment and why others do not see it as an issue that is central to larger questions of justice and right in their own lives. Marie Gottschalk has recently completed a study of interest group politics and institutional trajectories that explains the unexpected sources of support for new severity in the United States. Reaching back into the 1920s, Gottschalk examines the deep institutional roots that help provide legitimacy for punitiveness. More recently, she looks at identity interest groups and also advocates of prisoners' rights from the 1970s that unwittingly contributed to the mass incarceration of the 1990s into the twenty-first century.<sup>40</sup> Clearly the racialized nature of mass incarceration plays a central role in the lack of identification with those languishing in prisons in the United States.

However, religious tensions and different ethnic identification did not prevent average Americans from feeling absolute horror at the abuse of prisoners in Abu Ghraib. Though Garland and Gottschalk help to explain the lack of popular outcry over the carceral explosion of the last twenty years, we cannot assume that public apathy will continue in the future. When a train of abuses becomes "visible," and when the standard of reason is applied, rather than assumed, with respect to

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methods of punishment, there may yet be a day of reckoning and reform. Locke established the highest standards for the norms of liberal governance; however, enforcement of these standards falls to the perseverance of the people. The real question is whether the habits of obedience will continue to trump the intangible ideals at play, and whether these ideals can truly be wielded to redistribute power.