The Road to Eastern State: Liberalism, the Public Sphere, and the Origins of the American Penitentiary


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In 1833, Alexis de Tocqueville and Gustave de Beaumont published the results of their inquiry into the workings of the prisons they had visited during their nine-month ramble through America. On the Penitentiary System in the United States, as the book was called in English, shared little in common with the most famous account of this journey published a few years later, Tocqueville’s Democracy in America. While the latter is leavened with aphorisms that continue to engage historians, pundits, and political theorists, the prison report is decidedly heavy fare. It begins with a grim description of contemporary France, besieged by “two millions of paupers, and forty thousand liberated convicts,” and proceeds to offer a detailed comparison of the penal institutions founded in the northern United States in the early decades of the nineteenth century. But buried in the discussion of operating costs and recidivism rates is an epigram that still gives pause. The two young Frenchmen remarked that “while society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism.”

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4. See id. at 37-102.
5. Id. at 79. On the authors’ division of responsibilities in preparing the report, see André
As the legitimacy of penal incarceration faded in the 1960s, historians began to wrestle with the puzzle first posed by Tocqueville and Beaumont. A decade later, a remarkable literature attempted to explain how it was possible that the penitentiary, with its uniformed prisoners and heavily surveilled cells, first emerged in societies undergoing the protracted transition to democratic politics, free labor, and the market economy. These studies, with varying emphases, concluded that the invention of the penitentiary in the late eighteenth and early nineteenth centuries was no paradox but was instead inextricably intertwined with the emergence of liberal society. According to David Rothman, reformers in Jacksonian America turned to the penitentiary in the nostalgic hope that it could instill self-discipline in criminals who were products of the disordered families and communities of an overly mobile society.

Michael Ignatieff argued that the factory-like rules and routines of the English penitentiary defined "the moral boundaries of social authority in a society undergoing capitalist transformation." Most influential of all, Michel Foucault’s *Discipline and Punish* proposed that the control of time, space, and bodies epitomized by penal incarceration was a distinctly modern technology of power that constituted the "dark side" of bourgeois liberalism.

Michael Meranze’s elegantly written and incisively argued *Laboratories of Virtue* reexamines the fusion of liberty and compulsion that attended the birth of the penitentiary. In the decades after the American Revolution, the members of Philadelphia’s

8. See ROTHMAN, supra note 6, at 79.
10. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 222 (Alan Sheridan trans., Pantheon Books 1977) (1975). In a complex work that deals only tangentially with the relationship between the prison and liberalism, Foucault wrote that "the general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by... tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines." Id. at 222.
humanitarian coteries became convinced that only imprisonment could rehabilitate criminals and secure public order. Their efforts to create a perfectly regulated prison culminated in 1823 with the founding of the Eastern State Penitentiary, a massive institution on the edge of the city where inmates labored in solitary confinement, insulated from the moral contagion of both their fellow prisoners and the outside world. Meranze argues that liberal ideology pervaded the discourse of criminality and the modes of rehabilitation embraced by Philadelphia reformers. Liberalism posited a distinction between the self-possessed individual and society, leading penal crusaders to locate the roots of vice in the character of the offender rather than in the social conditions of their city. Moreover, the penal reformers’ commitment to the liberal vision of a society with minimal constraints on individual action blinded them to the intensely corporal nature of their carceral strategies. Insisting that their target was the soul of the criminal, humanitarians often ignored the violence undergirding penal authority and claimed that physical punishments were reserved only for those who resisted their ministrations.\textsuperscript{12}

Meranze’s work deserves the widest readership. Recent scholarship on the birth of the penitentiary has downplayed the explanatory significance of class relations and instead has stressed reformative incarceration’s centuries-long pedigree.\textsuperscript{13} In contrast, \textit{Laboratories of Virtue} squarely situates the origins of Eastern State in the efforts of elite Philadelphians to comprehend, and then contain, the breakdown of traditional hierarchies in the years after the Revolution. Yet in revisiting the topics that gave urgency to the penal histories of the 1970s, Meranze has recast them in fresh and compelling ways. While he echoes a longstanding theme in labor and criminal justice history by arguing that the penitentiary buttressed the emerging capitalist economy,\textsuperscript{14} he stresses that the understandings of criminality and

\textsuperscript{12} See id. at 12-16.

\textsuperscript{13} See, e.g., ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA (1992) (locating the ideological origins of the penitentiary in the early modern workhouse and arguing that penal reformers in postrevolutionary Massachusetts were motivated not by class interest but instead by humanitarian ideals and the desire to control an uprising in crime). For a discussion of related trends in English criminal justice history, see PETER LINEBAUGH, THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY at xvii-xxv (1992).

\textsuperscript{14} See, e.g., LINEBAUGH, supra note 13, at xix-xxv (describing the links between capitalist transformation, the activities of the laboring poor, and the definition of crime and property in 18th-century London); DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 59-71 (1993) (describing how American police forces and magistrates suppressed “popular behavior that disrupted the mastery of society by capitalist markets”); GEORGE RUSCHE & OTTO KIRCHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 132-33 (1939) (arguing that early 19th-century European penal practices were intended to discipline the industrial workforce through intimidation); Robert J. Steinfeld, \textit{The Philadelphia Cordwainers’
character that guided penal crusaders were also a response to the struggles of ordinary Philadelphians to define the public sphere in their new republican polity. The triumph of the penitentiary, he concludes, helped usher in a social and political order in which propertied humanitarians presumed that ordinary citizens lacked the requisite sensibility to engage in the pursuit of the common good. Helpfully informed by the theoretical perspectives of Foucault and Jürgen Habermas, Laboratories of Virtue is a landmark book. It opens new avenues of research in criminal justice history and eloquently reveals how the tenor of civic life in America has been shaped by our two-hundred-year experiment with penal incarceration.

I. THE POLITICS OF PENAL REFORM IN POSTREVOLUTIONARY PHILADELPHIA

Meranze’s account of the road to Eastern State begins with the rites that attended hangings in early Philadelphia. Studies of capital punishment in Europe and America have shown that public executions were theatrical events that violently and episodically displayed the authority of the state in an era before it became an everyday presence, embodied by the professional policeman on his beat.\(^{15}\) Philadelphia ministers, magistrates, and condemned persons derived their roles in this drama from a script that would have resonated with audiences almost anywhere in the eighteenth-century Anglo-American world. The rituals of justice began in the courtroom. In grand jury charges and fearsome sentencing speeches, judges affirmed that the protection of life and property was a cornerstone of civil government that brought man’s institutions into accordance with God’s precepts. On execution day, the condemned person typically made a confession revealing the easy descent into sin while also illustrating the transformative power of prayer and repentance.\(^{16}\)

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\(^{15}\) See Meranze, supra note 10, at 21-29, 37-48.
The success of public punishment, like any piece of theater, depended on the response of the audience. In England, the plebeian crowds that gathered before the gallows occasionally erupted into riots. Such scenes were rare in Philadelphia, in part because the city’s artisan population supported the punishments meted out to lawbreakers. Reiterating the conclusions of a number of works on criminal justice in eighteenth-century England, Meranze argues that middling Philadelphians’ enthusiasm for law enforcement was neither an indicator of ruling-class hegemony nor a sign of consensual social relations. While they distrusted the aristocratic pretensions of the city’s elite, Philadelphia artisans endorsed the defense of private property and sensed that public punishment reinforced the authority of all husbands, fathers, and masters. When Philadelphians believed that the death sentence was unwarranted in a particular case, they campaigned for a reprieve. Pardons, Meranze shows, actually legitimated the punitive regime by confirming that its enforcers could balance the claims of justice and mercy.

The fall of corporal punishment in Philadelphia began with the rise of the city’s middling men to political power in 1776. When the Pennsylvania Assembly hesitated on the question of independence from Britain, radicals with close ties to Philadelphia’s artisan community forged an alliance with rural sympathizers, secured the support of the Continental Congress, and displaced the colonial government. This coalition framed the most democratic constitution of the revolutionary era, a document that enfranchised all tax-paying adult males and aimed to ensure close ties between citizens and their representatives by vesting most political power in an annually elected legislature. The new leadership also sought to transform Pennsyl-

17. On petty proprietors and criminal justice in England, see John Brewer, The Wilkites and the Law: A Study of Radical Notions of Governance, in AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 128 (John Brewer & John Styles eds., 1980) (discussing the Wilkites’ support for property rights, criminal law reform, and trial by jury); Peter King, Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800, 27 HIST. J. 29 (1984) (drawing on late-18th-century Essex Quarter Sessions records to demonstrate that prosecutors in property crime cases were drawn from almost all social strata, including the laboring poor); and John H. Langbein, Albion’s Fatal Flaws, PAST & PRESENT, Feb. 1983, at 96, 101-05 (drawing on 18th-century Old Bailey sources to argue that, in property cases, the criminal justice system attempted to serve the needs of victims, the majority of whom were shopkeepers, artisans, and other small property-holders). Cf. Douglas Hay, Property, Authority, and the Criminal Law, in ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 37-59 (Douglas Hay et al. eds., 1975) (arguing that the 18th-century prosecutorial process was dominated by gentlemen).

18. See MERANZE, supra note 11, at 29-37, 41-43.

vania’s criminal laws. The Constitution instructed the state legislature to create a less sanguinary penal code and ordered the creation of facilities where noncapital offenders could be confined at hard labor.20 In 1786, after an alarming rise in crime rates, the legislature eliminated capital punishment for all but a handful of offenses and declared that convicts, identifiable by their shaven heads and “habits of coarse materials,” would be required to labor in public for the benefit of the community.21 Within a year, rows of “wheelbarrow men,” as they came to be known, could be seen on the streets of Philadelphia.22

Pennsylvania was not alone in restricting the use of corporal punishment after the Revolution. Laboratories of Virtue endorses the conclusions found in earlier studies of these reforms by proposing that they combined Enlightenment arguments in favor of moderate but certain penalties with the widespread American sentiment that physical punishments, reeking of monarchical power, were not suitable for a republic.23 However, the Philadelphia convict labor scheme was unique, and Meranze deftly shows how it expressed the experiences and sensibilities of the city’s highly politicized artisan community. The labor provision of the new law expressed middling Philadelphians’ beliefs in the redemptive qualities of hard work and the dangerous links between idleness and vice. Its emphasis on display reflected assumptions about the capacity of public spectacles to inculcate virtue dating back to the colonial experience with corporal punishment, which had been reinforced by the festivals and parades of the revolutionary era.24 Most importantly, the scheme grew out of a set of contentions about ordinary citizens’ capacities to engage in the pursuit of the common good that suffused the 1776 Pennsylvania Constitution. Just as the framers of the constitution had believed that all taxpaying adult males had the requisite virtue to participate in political affairs, the authors of the penal labor law imagined that Pennsylvanians shared common conceptions of justice that would yield uniform understandings when they saw the wheelbarrow men. The

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20. See MERANZE, supra note 11, at 61-62.
21. Id. at 79-80.
22. See id. at 89-90. Although the law did not distinguish between the sexes, nascent conceptions of domesticity infused the implementation of the scheme in Philadelphia. Female convicts sewed clothes in the city workhouse while males labored in public. See id. at 90-91.
sight of silent and obedient convicts, legislators predicted, would instill respect for the law in the citizen-spectators who encountered them in public.25

The public labor plan was subverted from the outset. Not only did ordinary Philadelphians ply the wheelbarrow men with drink, but the convicts also refused to play their assigned parts in the didactic street theater devised by the state legislature. They fought with guards, conspired to escape, and committed more crimes when their plots were successful.26 The state admitted failure in 1790 and began to confine prisoners to the old city jail on Walnut Street, where they hoped that offenders would learn self-discipline through religious exhortation, labor, and habituation to the rules of the institution.27

Behind the urban prison's walls, authorities fitfully implemented the modes of regulation and classification that Michel Foucault called "the disciplines" in their pursuit of a perfectly ordered penal regime.28 They segregated the penitentiary's inmates by sex and permitted them to have contact only with their attorneys, ministers, and the occasional, carefully selected visitor.29 As Walnut Street filled with a heterogeneous population of offenders, its rehabilitative program became increasingly individuated. Prison authorities scrutinized court records and interviewed recent arrivals for information about their formative experiences, present character, and prospects for rehabilitation. Beginning in 1797, male inmates were divided into four classes based on an impressionistic calculus that took into account each prisoner's age, criminal history, and general demeanor.30

In the pivotal chapters of the book, Meranze proposes that the turn to incarceration was neither an effort to recreate the social lineaments of the colonial era nor a retreat from the politics of the street. Instead, it was one expression of an ambitious campaign on the part of propertied and politically powerful Philadelphians to reconstitute social relations in the city through the application of disciplinary techniques. If the wheelbarrow law had embodied radically egalitarian assumptions about public communication by asserting that all persons possessed the capacity to grasp the meaning of punishments, the new disciplinary strategies signified the emergence of the contrasting view that ordinary citizens are characterized by disordered perceptions and easily corruptible characters. Defending the Pennsylvania Constitution in a 1778 essay, Thomas Paine had confidently declared that "it is the

25. See MERANZE, supra note 11, at 72-78.
26. See id. at 91-96.
27. See id. at 167-69.
28. See FOUCAULT, supra note 10, at 135-41.
29. See MERANZE, supra note 11, at 183-86.
30. See id. at 199-204.
practice of the new world . . . to make men as wise as possible, so that their knowledge being complete, they may be *rationally* governed."

In the aftermath of the wheelbarrow debacle, elite Philadelphians asserted that, rather than making the people wise, exposure to certain forms of knowledge might actually undermine their virtue. Doubts about the "universalistic and rationalistic presumptions of republican culture" were most vigorously expressed by the merchants and professionals who gathered in such charitable and philosophical organizations as the Society for Political Inquiries (SPI) and the Philadelphia Society for Alleviating the Miseries of Public Prisons (PSAMPP). Not coincidentally, many members of these associations were opponents of the 1776 Constitution, and Meranze insightfully shows how their fears about the public's inability to resist examples of vice, which he terms "mimetic corruption," led them to champion the penitentiary ideal. These attitudes were most forcefully revealed in the writings of Benjamin Rush, the Presbyterian physician who explored the dangers of trusting in ordinary persons' abilities to comprehend the meaning of punishments in a 1787 essay, *An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society*. Rush argued that public punishments, such as floggings, failed to rehabilitate offenders and kindled in them a "spirit of revenge against the whole community." Even worse, public punishments dangerously corrupted spectators. Some viewers instinctively sympathized with the suffering criminal and thereby lost respect for the law; others were incited to commit criminal acts after watching the state's infliction of violence on the lawbreaker. Rush proposed that these dangerous misperceptions could be avoided by reploting the drama of punishment. If criminals were confined to penitentiaries, the state could remake their characters through a regimen of "bodily pain, labour, watchfulness, solitude, and silence." Moreover, the penitentiary would reorder popular perceptions of punishment by removing the rehabilitative project from public view. Because citizens would be forced to imagine the sufferings of inmates, they would dread the fate that befell

32. Meranze, supra note 11, at 96.
33. See id. at 137-50.
34. Id. at 8-9.
37. See id. at 121-25.
38. Id. at 134 (quoting Rush, supra note 35, at 13) (emphasis omitted).
lawbreakers without being infected by misplaced sympathy that could be stimulated by the actual sight of pain.\textsuperscript{39}

Rush's interlocutors in the SPI and PSAMPP endorsed the Walnut Street Penitentiary and began to view its disciplinary strategies as the cure for an ever-expanding array of social ills. In the decades after 1790, they and other propertied Philadelphians attempted to combat prostitution, poverty, and juvenile crime by creating new institutions that relied upon the techniques and assumptions most elaborately expressed in the penitentiary's routines: the classification of individuals and the insistence that the characters of deviants and delinquents could be remade through labor, prayer, and removal from the corrupting influences of society.\textsuperscript{40} These efforts, Meranze shows, were bolstered by a campaign to transform the sites of disordered public communication where vice seemed to be transmitted to dangerously impressionable city dwellers. Philadelphia reformers busied themselves in regulating theatrical productions and plebeian uses of the streets.\textsuperscript{41} Embarking on a decades-long campaign to centralize the city's court system, they branded neighborhood-based and fee-dependent magistrates "improper and unfit persons" who undermined popular respect for the law by making "a meer trade and commerce of justice."\textsuperscript{42}

Meranze's account of these movements builds on the vast literature that has examined bourgeois responses to crime and poverty in early nineteenth-century cities.\textsuperscript{43} He makes an important contribution to this scholarship by examining how regulatory campaigns were partly shaped by the Philadelphia reformers' claims that their exertions embodied humanity and reason. Whether they have searched for the

\begin{itemize}
\item \textsuperscript{39} See id. at 132-33.
\item \textsuperscript{40} See id. at 150-57, 253-92.
\item \textsuperscript{41} See id. at 160-67, 233-35.
\end{itemize}
origins of penal reform or the roots of antislavery sentiment, historians have frequently stressed that previously acquired experiences and beliefs, such as religious convictions or involvement in the marketplace, led individuals to participate in the work of benevolence. Meranze, by contrast, downplays the occupational, religious, and political identities of the Philadelphia humanitarians and emphasizes instead the importance of the process by which they joined together in the campaigns to reorder the city. Invoking Jürgen Habermas’s conception of the public sphere, he focuses attention on the forms of elite self-identification that grew from engagement in urban and penal reform.

In *The Structural Transformation of the Public Sphere*, Habermas traced the development in seventeenth- and eighteenth-century Europe of institutions and modes of communication, separate from the absolutist state, through which private individuals came together to debate questions of public concern. While he explored the settings where critical-rational discussion took place, such as cafes, philosophical societies, and literary salons, Habermas stressed that the public sphere was, in large part, shaped by the claims about the universality and openness of these debates that were made by the members of the educated bourgeoisie who dominated them. Because the participants in the public sphere had set aside (at least in principle) any regard for social rank and claimed to be governed only by a spirit of open inquiry, they defined their pronouncements as the embodiment of generality, abstraction, and rationality. And when the participants in the public sphere turned their attention to political affairs, this “public of property owners” donned the mantle of public opinion and claimed to represent and speak for “human beings pure and simple.”

The SPI and PSAMPP were American outposts of the republic of letters described by Habermas. As they united in these and other associations, Philadelphia’s merchants, ministers, lawyers, and physicians began to identify themselves as the locus of refined sensibilities and informed public debate in the city. Meranze argues

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44. For thought-provoking examples of this approach see *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (Thomas Bender ed., 1992) (essays by John Ashworth, Thomas L. Haskell, and David Brion Davis); and Elizabeth B. Clark, “The Sacred Rights of the Weak”: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 J. AM. HIST. 463 (1995).

45. See Meranze, supra note 11, at 144-46.


47. *See id.* at 31-51.

48. *Id.* at 56.
that there was a close relationship between these claims to authority and the modes of discipline so enthusiastically endorsed by the societies as their members’ concerns about the dangers of republican political culture grew in the 1780s and 1790s. From the perspective of the Philadelphia reformers, the individuals who subverted the wheelbarrow scheme, patronized corrupt magistrates, and committed crimes were harbingers of a citizenry incapable of exercising the self-governance upon which the republic depended for survival. By demonstrating that they could not participate in the rational pursuit of the common good, such individuals had rendered themselves suitable objects of discipline and regulation.  

Meranze concludes that the prison and its allied institutions derived legitimacy partly from the fact that they sought to contain those “who remained outside the bourgeois public sphere—and who thereby embodied its limits.”

The new disciplinary strategies also captured the imaginations of Philadelphia humanitarians because they harnessed liberal understandings of the relationship between the individual and the community to the republican goal of creating a virtuous society. When the reformers surveyed the violence, poverty, and disorder besetting their city, they dogedly located the roots of social problems and conflicts in the character defects of individuals. Without abandoning their belief in the collective good, elite Philadelphians argued that it could only be achieved through the isolation and regulation of persons who corrupted their fellow citizens.  

Meranze’s examination of the ways in which the disciplinary campaigns fused liberal and republican assumptions qualifies the interpretation of regulation in nineteenth-century America recently advanced by William J. Novak. In The People’s Welfare, Novak has documented the vigorously enforced body of regulatory legislation created by state and local governments in the decades between the Revolution and the Civil War. Its existence, he has argued, demonstrates the central role played by notions of the common good in American legal theory and governmental practice, thereby challenging two tenacious fictions about American public life in this period: “the myth of American statelessness” and “the myth of liberal individualism.”

Meranze, however, shrewdly shows that liberal assumptions thoroughly structured the pursuit of communal ends in early-nineteenth-century Philadelphia. Rather than addressing the systemic causes of poverty

49. See Meranze, supra note 11, at 143-46.
50. Id. at 12
51. See id. at 169-71.
and crime in the city, regulatory ordinances and reformative institutions sought to discipline the individuals who had been branded enemies of the well-ordered society.53

The final chapters of Laboratories of Virtue describe how the Philadelphia reformers' continually frustrated efforts to regulate public communication and redeem the characters of offenders drove them to an ever greater commitment to the disciplinary techniques first essayed in the late eighteenth century. The overcrowded, violent, and disease-ridden Walnut Street Penitentiary erupted into a riot in 1820.54 Rather than questioning the premises of carceral rehabilitation, Philadelphia reformers responded to the riot by urging the creation of a new prison where "a pure solitary system" would separate inmates from one another, drive them to the brink of despair, and thereby make them amenable to rehabilitation.55

Within a decade, these proposals were realized in the Eastern State Penitentiary (see Figure 1).56 Behind its brooding, crenelated walls, inmates labored in total isolation, but even the segregation of each refractory soul proved incapable of securing the disciplinary ideal. Eastern State was engulfed in scandal soon after it opened. An inmate died after being placed in an iron gag, and subsequent inquiries by a concerned state legislator revealed that the warden had embezzled, given his mistress the run of the prison, and enforced his authority with a range of corporal punishments that included outdoor shower baths in winter.57 These revelations, however, never led to fundamental reforms. Philadelphia physicians declared that the corporal punishments were safe, and the legislative committee charged with investigating the abuses absolved the prison administrators of any wrongdoing. Eastern State, founded by gentlemen-reformers who had aimed to produce virtuous citizens capable of engaging in the affairs of the commonwealth, had been effectively shielded from a public debate over the means and ends of punishment.58

Why did public authorities cling to the penitentiary when its failings were apparent from the outset? And why did earnest humanitarians continue to support institutions undergirded by the corporal punishments they had repudiated? Historians who have traced the origins of the American penitentiary have found it difficult to explain its persistence. Adam Hirsch has argued that prisons simply became "embed-
ded in the American grain” when disillusioned advocates and administrators abandoned their initial ideals.\(^{59}\) In David J. Rothman’s formulation, reformers found it almost impossible to imagine rehabilitation without incarceration once they had concluded that the roots of deviancy lay in corrupting social influences. Moreover, wardens claimed that violent disciplinary measures were necessary for the maintenance of institutional order, an excuse that went unchallenged by a public with little interest in the sufferings of a disproportionately African-American and foreign-born inmate population.\(^{60}\)

Meranze proposes that the reformers’ stubborn support for penal incarceration was ultimately an act of defensive self-delusion. The penitentiary paradoxically aimed to produce independent citizens by subjecting them to the most thoroughgoing subordination. It claimed the soul as its object but directed its force against the body. Yet to acknowledge these contradictions, Meranze concludes, “would have meant acknowledging the structure of submission that underlay liberal society.”\(^{61}\) Thus was born not only the penitentiary, with its physical miseries and never-realized rehabilitative aims, but also a seemingly unending policy debate in which scandal and failure have all too often been met with minor adjustments to the basic carceral strategies first proposed over two centuries ago.\(^{62}\)

II. PUNISHMENT, LEGAL CULTURE, AND THE PUBLIC SPHERE IN NINETEENTH-CENTURY AMERICA

One of Meranze’s most noteworthy achievements in *Laboratories of Virtue* is his thought-provoking engagement with the theoretical perspectives of Foucault and Habermas. Although he stresses, along with Foucault, that surveillance, classification, and the control of time and space constituted a new form of governance, Meranze diverges from Foucault by emphasizing the subjective intentions of the disciplinary institutions’ creators.\(^{63}\) And while *Discipline and Punish*

\(^{59}\) HIRSCH, supra note 13, at 117.

\(^{60}\) See ROTHMAN, supra note 6, at 237-57. On penal reform in the late 19th and early 20th centuries, see DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 17-81 (1980).

\(^{61}\) MERANZE, supra note 11, at 327.

\(^{62}\) Foucault contended that “for a century and a half the prison had always been offered as its own remedy: the reactivation of the penitentiary techniques as the only means of overcoming their perpetual failure; the realization of the corrective project as the only method of overcoming the impossibility of implementing it.” FOUCAULT, supra note 10, at 268. The return of mandatory sentencing in the United States, along with the investment of hundreds of millions of dollars in new penal facilities in the past decade, aptly illustrates his argument. For an examination of the late-19th-century prison reform movement, which resulted in institutions that were just as plagued by violence and brutality as their predecessors, see generally ALEXANDER W. PISCOTTA, BENEVOLENT REPRESSION: SOCIAL CONTROL AND THE AMERICAN REFORMATORY-PRISON MOVEMENT (1994).

\(^{63}\) As Meranze observes, “[t]here were numberless actors and speakers in *Discipline and
concludes with the triumph of the new forms of power and knowledge epitomized by penal strategies, Meranze reveals that the disciplinary project was, in important respects, thoroughly subverted by the actions of the individuals who were its intended objects. *Laboratories of Virtue* thus situates the rise of the penitentiary and its allied institutions in the context of elite Philadelphians' fears, values, and intellectual inheritances without ever mistaking their aspirations for reality. By the end of the book, Meranze shows how the Philadelphia version of the "carceral city"—Foucault's term for the nineteenth-century web of almshouses, prisons, hospitals, and insane asylums—was a rather shabby and ineffectual affair, presided over by humanitarians and administrators whose failure to redeem the characters of deviants and the poor seemed only to deepen their belief in the efficacy of disciplinary institutions.

Meranze similarly employs both Habermas's work and the critical literature it has inspired. Habermas acknowledged that the bourgeois public sphere was dominated by propertied, educated men, but in recent years a number of scholars have elaborated on this theme. French historians, for example, have argued that the postrevolutionary marginalization of women in public life was prefigured in the 1780s by writers who linked feminine power with despotism. The bourgeois public sphere and the politics it engendered, this literature has concluded, cannot be understood apart from their exclusions. Never losing sight of the heuristic power of Habermas's basic model, Meranze has fruitfully drawn on the new historical scholarship to suggest that Philadelphia's public sphere and the disciplinary institutions it produced were premised upon highly restrictive

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Punish. But they were, in a sense, marginal to Foucault's interpretive objectives. Foucault sought to displace attention from subjective intention to repetitious action, from reformers' beliefs to those social conditions that made such beliefs possible and rational." Meranze, supra note 11, at 7.

64. See Foucault, supra note 10, at 293-308.
65. Id. at 307.
66. See Habermas, supra note 46, at 55-56; see also Jürgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 428-29 (Craig Calhoun ed., 1992) (reiterating that women were denied equal participation in the public sphere but noting that its "universalistic discourses" provided the vocabulary for women's protest against their exclusion from public affairs).

assumptions about the perceptual powers of ordinary citizens who took no part in its debates over crime, vice, and punishment. "For those who met the discursive standards of the public sphere," Meranze concludes, "open debate could continue. For those who did not, silence or discipline was the answer."

Meranze’s exploration of elite Philadelphians’ sensibilities and self-deceptions is at once the great strength and most significant limitation of his book. As Laboratories of Virtue traces the events that impelled propertied humanitarians to endorse the penitentiary, their voices increasingly dominate, yielding a narrative that seems to be keyed to the rise and fall of the exuberant vision of inclusive public life expressed in the writings of Thomas Paine and in the 1776 Pennsylvania Constitution penned by his associates. The opening chapters chart a multivocal history of punishment, revealing how Philadelphia artisans and petty proprietors, no less than judges and ministers, shaped the administration of criminal justice in the city both before and after the Revolution. Meranze proceeds to describe the political and intellectual ascendency of the merchants and professionals who opposed the 1776 Constitution and who translated their distrust of ordinary citizens into support for carceral discipline, but he does not follow the paths taken by the city’s workers and artisans as they responded to the new institutions that emerged after 1790.

This is not to say that common city-dwellers, especially the very poor who most pointedly inspired the rehabilitative fantasies of the reformers, disappear from the text. Informed by the rich literature on working-class culture in Philadelphia and other northern cities, Meranze uses newspapers and the records of the humanitarian associations to offer sympathetic portraits of the men and women whose activities alarmed Philadelphia’s elite: the prostitutes who resisted the ministrations of the Magdalen Society; the young boys who disrupted public spectacles and incurred the wrath of the press; and the curiosity-seekers who gathered around the wheelbarrow

68. MERANZE, supra note 11, at 145.
69. Anticonstitutionalist forces triumphed in 1790. The new constitution they created included a bicameral legislature and a governor. See SANFORD W. HIGGINbotham, THE KEYSTONE IN THE DEMOCRATIC ARCH: PENNSYLVANIA POLITICS, 1800-1816, at 6-8 (1952); Herrington, supra note 19, at 604-09.
men. But though the book offers a few tantalizing examples of popular views on the roots of criminality and the efficacy of punishment, ordinary Philadelphians’ bodies, rather than their views on criminal justice, are what figure most prominently in Meranze’s account of the rise of disciplinary institutions. Meranze takes pains to show that the claims about character and public order voiced by legislators, newspaper correspondents, and reformers were rooted in their troubling encounters with urban popular culture, but he implicitly argues that the views emanating from the bourgeois public sphere constituted the only discussion of these questions in early-nineteenth-century Philadelphia.

Debate over punishment, however, was never limited to the rarefied deliberations of urban elites. From the beginning of their efforts to combat crime and disorder, American reformers were challenged not only by the refractory men and women who resisted disciplinary regulation, but also by ordinary individuals who forged, and acted upon, their own perspectives on the origins of vice and the efficacy of the penitentiary. The remainder of this Book Review offers an alternative interpretation of the relationship between punishment and the public sphere in the cities of early-nineteenth-century America. It argues that the emergence of the penitentiary must be situated in the broader history of criminal justice practices and institutions, a context that brings to the fore a surprising cacophony of voices and sites of contention. This discussion, in turn, complicates our conception of the “public,” a category we must consider in any account of the ways in which changing modes of punishment shaped the civic life of the early republic.

Habermas’s description of the public sphere, as well as the critiques it has provoked, can shed light on popular engagement in the problems of crime and punishment, just as it has enriched Meranze’s exploration of the penal crusaders’ consciousness. While one response to The Structural Transformation of the Public Sphere has been to emphasize that bourgeois publicity was shaped by its gender and class exclusions, an intertwined strand of scholarship has argued that the bourgeois public sphere must be understood as merely one among many sites of overlapping and conflicting critical-rational debate.

71. See Meranze, supra note 11, at 91, 103-07, 230-31, 272-79.
72. See id. at 111-13.
73. See, e.g., Landes, supra note 67, at 7 (arguing that “the bourgeois public is essentially, not just contingently, masculinist”); Oskar Negt & Alexander Kluge, Public Sphere and Experience: Toward an Analysis of the Bourgeois and Proletarian Public Sphere 11-12, 54-57 (Peter Labanyi et al. trans., University of Minn. Press 1993) (1972) (stressing the disjunction between bourgeois and proletarian public spheres).
74. See, e.g., Geoff Eley, Nations, Publics, and Political Cultures, in Habermas and the Public Sphere, supra note 66, at 289 (describing the European public sphere as an arena of
Structural Transformation acknowledged the existence of a “plebeian public sphere,” but Habermas relegated it to secondary historical importance because it achieved few lasting successes (it “was suppressed in the historical process”) and derived its structure and aspirations from the bourgeois sphere. However, this account of the plebeian public sphere, as Habermas’s critics have hastened to show, was mistaken in two important respects. In the first place, a generation of labor historians beginning with E. P. Thompson has demonstrated the significance of the ideologies developed in the workingmen’s newspapers, unions, and political societies of France, England, and America. Equally important, Habermas’s treatment of the plebeian public sphere prevented him from gauging the relationship between the bourgeois sphere and the welter of social and political movements that pressured it from below. “The hegemony of bourgeois publicity,” Craig Calhoun has argued, “was always incomplete and exercised within a field constituted partly by its relation to other insurgent discourses.”

The conception of a multiplex public sphere that emerges from these critiques of Habermas aptly describes the cultural and political ferment in which Philadelphia reformers labored to make their claims about the unstable characters and vicious propensities of their fellow citizens. In the decades between the Revolution and the Civil War, the conflict in which bourgeois male dominance was challenged by women, peasants, the working class, and subordinated nationalities; Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE, supra note 66, at 109 (arguing that discussions of the public sphere should recognize the existence of both “strong” and “weak” publics and must theorize their relations); Mary P. Ryan, *Gender and Public Access: Women’s Politics in Nineteenth-Century America*, in HABERMAS AND THE PUBLIC SPHERE, supra note 66, at 259, 271 (describing the relative weakness of the classical bourgeois public sphere in 19th-century America and arguing that the “democratic expression of publicness . . . created space in which women could politically organize in their own behalf”). For efforts to recover the “counter-publics” of late 18th- and early-19th-century England, see Kevin Gilmartin, *Popular Radicalism and the Public Sphere*, 33 STUD. ROMANTICISM 549 (1994); and Anne K. Mellor, *Joanna Baillie and the Counter-Public Sphere*, 33 STUD. ROMANTICISM 559 (1994).

75. HABERMAS, supra note 46, at xviii-xix.


78. It should be noted that Habermas certainly recognized the rise of the mass media as well as the importance of the social-political demands unleashed by industrialization and the expansion of the franchise. However, he argued that these developments undermined the classical bourgeois public sphere of the late 18th century; they were, in fact, important aspects of the 19th-century “structural transformation” of the public sphere. See HABERMAS, supra note 46, at 141-235.
debate over questions of public concern was never confined to the city's elite charitable and philosophical associations. At the beginning of the nineteenth century, for example, Philadelphia artisans discussed radical political ideas in the ward meetings of the Democratic-Republican Party and patronized a fractious Jeffersonian press presided over by William Duane, editor of the *Aurora*, and John Binns, editor of the *Democratic Press*. In the 1830s, the city's General Trades' Union sponsored rallies, debating clubs, reading rooms, and a Society for the Diffusion of Useful Knowledge. The discussions initiated in such settings were not confined to the union's circumscribed membership, for even workers who did not participate in these formal activities heard union members read from newspapers and conduct impromptu shopfloor seminars. By the 1840s, the city's popular culture had been transformed by sensational journalism and subversive literature such as George Lippard's *The Quaker City*, the novel whose scabrous exposé of Philadelphia's wealthy made it the most popular fictional work in America before the publication of *Uncle Tom's Cabin*. And throughout the first half of the nineteenth century, ordinary Philadelphians expressed themselves in parades and demonstrations that, as Mary Ryan and others have shown, must figure in any account of the public sphere in America.

How can the efforts of historians to recover the history of the plebeian public sphere shed light on popular American responses to the penitentiary? Did ordinary Philadelphians, echoing the penal crusaders who entertained Beaumont and Tocqueville on their American tour, debate the relative merits of Pennsylvania's solitary penal system and the congregate labor scheme employed in New


80. On the labor movement and the diffusion of ideas in working-class Philadelphia, see Laurie, supra note 70, at 100-02.


York? Perhaps not. Although disciplinary practices could spark heated debates when closely observed by popular audiences, such opportunities were rare. In 1822, for example, the New York Common Council authorized the construction of four treadmills at the city jail and invited spectators to watch the inmates as they took their turns on the devices. The treadmill had been invented in England, where enthusiasts called it "the most tiresome, distressing, exemplary Punishment that has ever been contrived by Human Ingenuity" and credited it with curbing the vices of vagrants and petty offenders.

When introduced in New York, however, treadmills excited such controversy that the supervisor of the devices, a reformed drunkard named James Hardie, found himself answering questions about their safety and propriety. He eventually composed a pamphlet that argued that, contrary to public rumor, the treadmill was not a "dreadful contrivance of cruelty and oppression, and one which ought not to exist in a Christian country." Hardie's protestations reveal that ordinary New Yorkers had discovered the perverse physicality of the treadmills, and it is not surprising that they were never widely used in American cities. More conventional forms of penal discipline shielded guards and administrators, no less than the inmates themselves, from public view. It is quite possible that the voices of wardens and reformers will largely prevail in any history of the prison because their tactical retreat from the public gaze was so successful.

Viewed narrowly, the penitentiary evolved within the confines of a strikingly self-contained debate among humanitarians, administrators, and their legislative supporters that quickly became resistant to outside intervention. However, if we consider the penitentiary as the endpoint of a criminal justice process that also encompassed the trials of suspects, a rather different portrait of punishment and the public sphere emerges. In the era before plea bargaining circumscribed the role of juries in ordinary cases, it was in the courtroom that the justice system opened itself to public scrutiny and was tangibly shaped by the perspectives on criminality and punishment voiced by trial judges, jurors, and witnesses. The conduct of such individuals in ordinary cases was generally more resistant to the public gaze. However, as Meranze observes, exposés of abuses attracted public interest but never translated into sustained demands for the reform of penal practices. See MERANZE, supra note 11, at 322. Ignatieff, supra note 9, at 177 (quoting Report Respecting Shepton Mallett House of Correction, in Appendix to the Minutes of Evidence Taken Before the Select Committee of the House of Lords Appointed to Inquire into the Present State of the Several Gaols and Houses of Correction in England and Wales, Part III, reprinted in 12 Sessional Papers 282 (1835)).

87. See MERANZE, supra note 11, at 293-328.
88. On the origins of plea bargaining, which became common in the second half of the 19th century, see generally Albert W. Alschuler, Plea Bargaining and Its History, 13 L. & SOC'Y REV.
criminal trials reveals that they greeted the penitentiary’s disciplinary project with a dose of skepticism that was consciously fostered by the defense lawyers who influenced the disposition of even routine cases. In the terms Habermas has recently employed to describe the forms of communication found in complex industrial societies, the criminal trials of the early nineteenth century brought together an “occasional public” in which issues of public concern were discussed in a carefully orchestrated setting.

Consider the activities of judges, lawyers, and jurors in the New York Court of General Sessions of the Peace, which tried felonies and misdemeanors at monthly terms presided over by the mayor or city recorder and two aldermen. The caseload in a typical month ranged from the most trivial thefts and assaults to such serious crimes as assault with intent to rape, grand larceny, and counterfeiting. The court handled its varied caseload in a manner that betrayed its ambivalent relationship with the perspectives on criminality and punishment voiced by advocates of the penitentiary. Although thousands of individuals were unhesitatingly dispatched to prison by Sessions Court juries in the early decades of the nineteenth century, almost every term witnessed cases in which the jury recommended accused persons to mercy, found them guilty of lesser offenses, or refused to convict at all. Judges also exercised a surprising degree of discretion, frequently sentencing sympathetic defendants to brief terms in the city jail rather than the penitentiary.

As Meranze observes, penal reformers certainly recognized that flexibility had to be built into a criminal justice system that posed rehabilitation as one of its goals, and the state penal codes of the late eighteenth and early nineteenth centuries granted sentencing


89. Habermas’s recent work has described the contemporary public sphere as:

a highly complex network that branches out into a multitude of overlapping international, national, regional, local, and subcultural arenas . . . [T]he public sphere is differentiated into levels according to the density of communications, organizational complexity, and range—from the episodic publics found in taverns, coffee houses, or on the streets; through the occasional or “arranged” publics . . . , such as theater performances, rock concerts, party assemblies, or church congresses; up to the abstract public sphere of isolated readers, listeners, and viewers . . . brought together only through the mass media.


discretion to judges and refrained from reining in executive clemency powers.\textsuperscript{91} New York judges and jurors, however, frequently structured trial decisions around a set of convictions about their duties in criminal cases that was sharply at odds with reformist pronouncements on law and punishment. Early-nineteenth-century American reformers, like their predecessors in eighteenth-century England, complained that jurors' ambivalence toward harsh corporal punishments encouraged them to show leniency to lawbreakers. One of the reformers' fondest hopes was that the creation of penitentiaries would render the criminal trial an impartial inquiry that, insulated from the passions and consciences of jurors, would funnel wrongdoers into carceral rehabilitation.\textsuperscript{92} But old practices died slowly, and as the examples given below will illustrate, Sessions Courts jurors and trial judges continued to insist that mercy had a central role to play in the disposition of criminal cases decades after the penal reforms of the postrevolutionary era.

This vision of the trial as a rite mingling justice with mercy, which would have resonated with the participants in the eighteenth-century English assizes described by Douglas Hay, was fostered by the defense lawyers who eeked out a living in New York's criminal courts.\textsuperscript{93} By the early years of the nineteenth century, defense work in the city had concentrated in the hands of a small cadre of attorneys, liminal figures who stood between respectable jurors and the brawlers, thieves, receivers of stolen goods, and counterfeiters who could pay for legal representation.\textsuperscript{94} The notoriety of these lawyers was heightened by their self-conscious embrace of a romantic oratorical style dismissed by more genteel practitioners as "Irish eloquence," a reference to the florid speech of the Irish barristers who represented defendants in treason and sedition cases.\textsuperscript{95} Then as now, theatrical oratory allowed the defense lawyer to turn ambiguous facts into a narrative suggesting the innocence of the accused. Even in the

\textsuperscript{91} See Meranze, supra note 11, at 81-83.
\textsuperscript{93} See Hay, supra note 17, at 40-49.
\textsuperscript{94} See Millender, supra note 90, at 133-45.
\textsuperscript{95} For an attack by a legal educator on "Irish eloquence," see David Hoffman, A Course of Legal Study 304-05 (Baltimore, Coale & Maxwell 1817), noted in Maxwell Bloomfield, American Lawyers in a Changing Society, 1776-1876, at 72 (1976). For a typical mid-19th-century celebration of the style, see Robert Emmet, Irish Eloquence: The Speeches of the Celebrated Irish Orators, Philips, Curran and Grattan (Philadelphia, DeSilver, Thomas & Co. 1836).
most clear-cut cases of guilt, however, New York trial practitioners skillfully used pathos-ridden oratory to encourage judges and jurors to feel the sufferings of defendants and to spur them to exercise their powers in mercy.96

The ways in which the practices of defense lawyers, jurors, and trial judges collectively subverted reformist conceptions of trial and punishment are neatly illustrated by the case of Jacob Edsall, a young man charged with stealing expensive lace from a Maiden Lane dry goods store in 1825.97 At his trial for grand larceny in the New York Sessions Court, Edsall’s attorney made a direct appeal to the jury based on his client’s youth and finely wrought feelings. He called the prisoner’s father to testify, whereupon the young man “burst into tears, which he occasionally used though the whole trial.”98 In his summation, the lawyer encouraged the jury to convict his client of a lesser offense, reminding them that English juries had often taken this course “when any circumstances existed in the case of the prisoner calculated to excite mercy.”99 The prosecutor rejoined that such displays of lenity might be common in England where grand larceny was a capital offense, but in America, “the law . . . exercised the attributes of mercy and not courts or juries.”100 The jury found Edsall guilty of grand larceny, but his dealings with the Sessions Court were far from finished. By the time he was sentenced a few days later, Edsall’s lawyer had successfully refashioned his client as a victim of personal folly and female machinations. As a reporter for the National Advocate explained, it then appeared that Edsall had stolen the lace because he “had become the dupe of artful women, and had rendered himself amenable to the laws of his country . . . for the purpose of decorating the persons of these abandoned females.”101 In the opinion of the presiding judge, Edsall’s tears at the trial had demonstrated that “the feelings of virtue were by no means extinct in his bosom.”102 He was sentenced to a term of imprisonment in the


97. See A Case of Grand Larceny, NAT'L ADVOC. (N.Y.), Jan. 12, 1825, at 2.
98. Id.
99. Id.
100. Id.
102. Id.
city House of Refuge rather than the penitentiary, with the promise that if he behaved well, the court and jury would recommend him for a pardon. 103

The jury had convicted Edsall of a serious offense, but the presence of an attorney had shaped the outcome of the case by transforming the defendant into a worthy recipient of judicial mercy. Even in the absence of a lawyer’s urgings, jurors frequently took it upon themselves to determine whether guilty defendants deserved punishment. In 1817, the New-York City-Hall Recorder, a monthly publication that related the activities of the city’s criminal courts to a lay and professional audience, juxtaposed the cases of two female thieves. Eliza Miller had left a house in borrowed clothes after she was abandoned by the man who had lured her from Philadelphia to New York. The jury concluded that Miller was “rather unfortunate than criminal” and acquitted her. 104 She was returned to her mother in Philadelphia at public expense. Jane Bibbin stole spoons from a shop and was acquitted when it seemed that she too was a pitiable young woman. Within a month, however, Bibbin was brought back to court for stealing, and this time she was sent to the penitentiary for a year. 105 Commenting on the pair of cases, the Recorder’s editor noted that the court’s mercy was copious but could easily be abused: “Youth and beauty excite pity towards a female in an unfortunate situation; but jurors may be often mistaken in the object of their compassion.” 106

Whether they responded to a lawyer’s exertions or spontaneously drew their own conclusions about the pitifulness of the defendant, the judges and jurors in these cases refused to acquiesce in penal reformers’ claims that mercy had no place in the courtroom, instead choosing to spare even guilty offenders from the rigors of carceral discipline. The gendered imagery that pervaded the trials of Edsall, Bibbin, and Miller drew the attention of the press, but the outcomes of these cases were not atypical. One historian found that only fifty percent of trials in the New York Sessions Court resulted in guilty verdicts during a representative period in 1811. 107 In his pioneering study of nineteenth-century Philadelphia courts, Allen Steinberg similarly found that conviction rates in larceny and minor assault cases rarely topped fifty percent and actually declined during the 1830s and 1840s. 108 Moreover, crime victims, out of apathy or misgivings about the forces they had unleashed by filing charges against a suspect,

103. See id.
104. Eliza Miller & Jane Bibbin’s Cases, 2 N.-Y. City-Hall Recorder 58, 58 (1817).
105. See id. at 59.
106. Id. at 58.
108. See STEINBERG, supra note 42, at 61, 72.
frequently failed to pursue their cases once a magistrate had referred matters to a court of record. Steinberg concluded that the practices of Philadelphia jurors and private prosecutors reflected "a criminal justice process easily negotiated by the public and dependent upon community-based definitions of crime."¹⁰⁹

Penal reformers were eventually provoked to respond to the alternative perspectives on criminal justice that circulated alongside their pronouncements on the origins of vice and the promise of penal rehabilitation. In the 1840s and 1850s, the PSAMPP's Journal of Prison Discipline interspersed discussions of cell design and management strategies with articles aimed at combating practices that seemed to be subverting the penitentiary. The journal criticized individuals who signed pardon petitions out of "kindly feelings toward the friends and family of the offender" or from fear of "being regarded as harsh should they refuse."¹¹⁰ It lambasted the businessman who chose to dismiss rather than prosecute a fraudulent clerk because he had "not much faith in imprisonment as a means of reformation or discipline,"¹¹¹ and it decried the witnesses who refused to cooperate in the prosecution of offenders.¹¹² Such accounts of the "weak nerves or morbid sensibilities"¹¹³ of the individuals who pitied lawbreakers echoed the PSAMPP's longstanding views on the dangerously disordered perceptions of ordinary citizens.¹¹⁴ Yet these denunciations of witnesses, crime victims, and signers of pardon petitions also betrayed the Society's awareness that, even if members of the public rarely gave formal expression to their views on punishment, they were nevertheless acting upon their conclusions about the ineffectiveness of the penal enterprise.

III. CONCLUSION

This sketch of law, punishment, and the public sphere suggests that Laboratories of Virtue has captured one part of the complex process by which a range of Americans—reformers and wardens, judges and lawyers, and the individuals who encountered the justice system as jurors, victims, and witnesses—negotiated the transformations wrought by the reform of criminal law in the decades after the Revolution.

¹⁰⁹. Id. at 71-72.
¹¹⁰. Pardons, 1 J. PRISON DISCIPLINE & PHILANTHROPY 395, 396 (1845).
¹¹². See The Impolicy and Danger of Winking at Crimes, 13 J. PRISON DISCIPLINE & PHILANTHROPY 26 (1858); Our Unimprisoned Criminal Population, 10 J. PRISON DISCIPLINE & PHILANTHROPY 1 (1855); The Pardoning Power, 12 J. PRISON DISCIPLINE & PHILANTHROPY 14 (1857); Undetected Crime, 6 J. PRISON DISCIPLINE & PHILANTHROPY 99 (1851).
¹¹³. Pardons, 8 J. PRISON DISCIPLINE & PHILANTHROPY 198, 200 (1853).
¹¹⁴. See MERANZE, supra note 11, at 144.
Benjamin Rush’s dream of a criminal justice regime in which ordinary citizens would be prevented from contemplating punishment at close range was largely realized, but penal reformers never successfully contained the alternative perspectives on criminality that were most forcibly articulated in the courtroom.\(^\text{115}\) By the middle of the nineteenth century, these two developments resulted in the peculiar cultural-political configuration that arguably continues to characterize American criminal justice. As debates over crime and punishment were rehearsed in the opaque language of penological expertise, major trials became ever more open to public scrutiny and popular control. Jury mitigation and outright nullification shaped outcomes in sensational trials, and even routine felony cases were followed by the public in the press and in the pamphlet-sized trial reports published by the thousands throughout the century.\(^\text{116}\)

While English historians have collectively created a complex portrait of jury behavior, prosecution patterns, and the origins of the adversarial criminal trial,\(^\text{117}\) these topics are among the most understudied aspects of nineteenth-century American criminal justice history. A growing body of literature is beginning to fill the gap, yielding insightful examinations of the sentimental cultural tropes employed in well-publicized cases, the ambiguous experiences of African-American litigants in the postbellum South, and the operation of the lower criminal courts.\(^\text{118}\) At first glance, Laboratories of Virtue

\(^{115}\) See MERANZE, supra note 11, at 132-36.


has little in common with the efforts of historians to explore the sensational trials and everyday courtroom practices that jointly defined ordinary Americans' encounters with the justice system. Meranze has described the transition from punishments based on an inclusionary vision of active citizenship to modes of discipline aimed at subduing the body politic. These historians, on the other hand, have emphasized the ways in which legal processes were at least partially shaped by the actions and perspectives of ordinary individuals who experienced them as spectators, jurors, or complainants.

Yet Meranze's meditations on the cultural and political assumptions shaping public communication in postrevolutionary America hold cautionary lessons for anyone who would view criminal proceedings as the site for the deliberations of an "alternative public." The penal ethos, Meranze argues, derived legitimacy from a conception of public life in which the imagined absence of civic sensibility defined individuals as worthy objects of discipline. In the raucous courtroom culture of the nineteenth century, attorneys attempted to cultivate the sympathies of judges and jurors with emotionally charged oratory, a strategy that rewarded some defendants while consigning individuals who seemed removed from the bonds of shared feeling to carceral discipline. Perhaps more profoundly than penal reformers themselves understood, the courtroom and the penitentiary rested on complementary foundations.

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119. Jay Fliegelman has similarly argued that in the "cultural code" of revolutionary America, the possession of sensibility was seen as a prerequisite for the exercise of republican leadership and citizenship, with the implication that "possession of that sensibility was the very test definition of being an American." JAY FLIEGELMAN, DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE 191 (1993). On the links between sensibility and public virtue, as well as the important consequences of this configuration for white women as well as African-American men and women, see id. at 189-95.