

A detailed black and white illustration of a guillotine execution scene. The guillotine is a tall wooden structure with a large blade at the top. A man in a dark coat and hat is bent over the guillotine, preparing the body. A crowd of people, mostly men in hats, are gathered around the guillotine, watching the execution. The background shows bare trees and a building.

Between THE Guillotine & Liberty

Two Centuries
of the Crime Problem
in France

by Gordon
Wright

Between the Guillotine and Liberty

*Two Centuries of the
Crime Problem in France*

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Preface

Science in general . . . does not consist in collecting what we already know and arranging it in this or that kind of pattern. It consists in fastening upon some thing we do not know, and trying to discover it. . . . All science begins from the knowledge of our own ignorance: not our ignorance of everything, but our ignorance of some definite thing. . . . Science is finding things out: and in that sense history is a science.

R. G. COLLINGWOOD

HISTORICAL STUDIES, like fashions in food and dress, evolve in response to changing tastes or altered social concerns. Indeed, the changes in historians' interests, and why they occur, constitute a valid subject of historical inquiry; for the topics they choose and the methods they use reflect the interests and the techniques of the society in which they live and work.

Until the last decade, crime and punishment attracted few historians in any country; monographs on the subject were rare, general works gave such matters no more than passing notice. The field was left to jurists and criminologists, whose concern with the record of the past was usually subordinated to their interest in practical problems of the present. Changes over time in attitudes toward crime and criminals, conflicting views about the purpose and techniques of punishment or treatment seemed to lie on the margins of the historian's interests, or even outside his proper realm. Just as criminals were seen as social deviants, historians drawn to such subjects were regarded in a way as professional deviants.

Things have changed of late; in fact, the study of deviants of

all sorts begins to resemble a major industry. The surge of interest in social history and in *mentalités*, inspired in part by the work of the *Annales* school in France, has brought both social misfits and ordinary inarticulate people into the mainstream. History from below, concerned with the masses rather than the elites, exerts the powerful attraction of a new frontier. And while there may be a touch of faddishness in all this, the appeal of such subject matter can also be traced to genuine curiosity and valid social concerns.

Curiosity born of ignorance brought me to investigate French attitudes toward crime and punishment during the past two centuries. A dozen years ago, conversations with my son (then a legal aid lawyer involved in efforts at prison reform in California) started me thinking about the nature of prisons and the activities of prison reformers in France. The Attica riot of 1971 made me wonder whether such outbreaks had occurred in France. A brief incursion into the University library turned up few answers. General histories or studies of periods in French history ignored or barely mentioned the subject; monographs were rare and inadequate. My efforts to interest doctoral candidates in the topic fell on sterile ground, so I found myself drawn gradually into the quicksand. During a first round of investigating the subject in Paris (in 1974), I quickly learned that the topic was both rich and complex, and that a long line of French jurists, legal scholars, and criminologists had worked the field during the past century. I learned also that a whole cluster of historians, both French and Anglo-Saxon, had just descended on the crime problem, like flies attracted to carrion. No doubt good sense should have dictated abandoning the enterprise at that point, to await the fruit of others' labors. Yet I kept returning to it, driven, I suppose, by a feeling that when one's curiosity has been aroused by questions that seem interesting or important, one is somehow obligated to pursue them to the end.

Winston Churchill in his youthful days as social reformer is often quoted in support of the subject's significance: "The mood and temper of the public in regard to the treatment of crime and criminals," he declared in 1910, "is one of the most unfailing tests of the civilization of any country."¹ Churchill was certainly not aware that a French politician had said almost the same thing a century earlier (1831): "It is by the criminal legislation of a people that one can judge the level of its civilization, and the moral ten-

dency of its government."² Nor would he necessarily have agreed with the French prison inspector Louis Moreau-Christophe, who asserted in 1837 (with some hyperbole) that "Crimes are the endemic malady of every social body. . . . It is into the prisons that the historian must go, if he is to make a sane judgment of a people's moral state."³ Surely a society's crime rate and the kind of people who populate its prisons do not suffice to measure its "moral state"; nor are a society's attitudes toward crime and criminals an adequate test of its mores and values. The treatment of other marginal, deviant, or underprivileged groups is equally revealing, along with attitudes toward its more central values—work, wealth, individual rights and obligations, and so on. Still, criminality remains one of the most persistent and recalcitrant problems of any society—a problem that somehow resists every effort at control or "cure," that leads each generation to engage in the same cycle of analyses and remedies and failures, until one develops a jaded feeling of *déjà entendu*. It is not surprising that Emile Durkheim concluded at the end of the nineteenth century that crime is a normal and inescapable aspect of any society, to be accepted without shock or surprise and even (within limits) as a socially useful phenomenon. Nor is one astonished when, after two hundred years of unbroken discussion of the problems of crime and punishment, a British political leader can still say flatly: "We . . . need much more research into the causes of criminality, of which we know next to nothing."⁴

The historian's quest, of course, does not necessarily lead him toward new hypotheses about the causes of criminality, or about the proper definition and boundaries of crime, or about the best techniques of punishment or rehabilitation. His purpose, rather, is to discover and explain how a society has grappled with the problem over time, and to understand how and why attitudes toward crime and punishment have evolved, reflecting changes in values and *mentalités*. Grass-roots opinion is of course difficult and sometimes impossible to gauge; the inarticulate masses leave little formal record of their feelings and beliefs, though such beliefs can sometimes be inferred. But it is naturally easier, and not necessarily unimportant or elitist, to get at the views of the articulate minority that was able to get its opinions recorded, and that provided the leaders and activists in virtually all social reform movements over the past two centuries. Many of these activists, whose names were household

vanished into historical oblivion. Some of them deserve to be rescued from that oblivion, both to show why Frenchmen of their sort became involved in efforts at penal or procedural reform, and to weigh their successes against their failures.

The book's title may seem more evocative than descriptive. It is borrowed from the title of a mid-nineteenth century drawing by an obscure French artist, whose purpose was to make an ironic comment about those reformers who exalted imprisonment as the "golden mean" of punishment techniques (see reproduction, page 74). My original title—*Criminals, Honest Folk, and Others*—grew more directly out of the subject matter, for one cannot read the record of the past two centuries without being struck by the constant repetition of the two terms "criminals" and "honest folk." At times one gets the impression of a civil war between two totally distinct and hostile races; indeed, the idea of a separate "criminal class" was long accepted, and even today recurs now and again. Only occasionally did Frenchmen suggest that there might be a gray zone rather than an impassable barrier between the world of criminals and that of *les honnêtes gens*. Such an exception was the criminologist Henri Joly, who wrote in a candid moment (1892): "There is a terrible truth that persists in the minds of prison inmates: that at bottom men do not differ much from one another, and that one can find self-styled honest folk who are no better than *galériens*."⁵ Joly's purpose was not to deny the difference between guilt and innocence, but to recall the Christian view that all men are sinners, and to argue that it is safer to have offenders learn this from a chaplain than from direct observation. He neglected to add that honest folk might also do well to reflect on his "terrible truth."

My principal obligations, in the material realm, are to the John Simon Guggenheim Foundation and to Stanford University. A quarter free of teaching duties at Stanford enabled me to carry out the first stage of my research in Paris; a Guggenheim Fellowship in 1980–81 allowed me to return for the final phase and to do much of the writing. I hereby express my deep gratitude to both agencies. The manuscript was efficiently word-processed by Barbara Wawrzynski, and edited with style and forbearance by Leona Capeless of the Oxford University Press. The task of preparing the index was made easy and pleasant thanks to the help and computer expertise of Margaret H. Wright. I am greatly indebted to the eminent magistrate Henri Gaillac for permission to use two illustrations from his

book *Les maisons de correction*. Nancy Lane, Editor at the Oxford University Press, provided welcome encouragement and guided the publication process throughout.

Personal obligations are more difficult to measure, but no less important. I owe a particular debt to my son Eric W. Wright, who first aroused my interest in this subject and who kept that interest alive by raising provocative questions. My wife, Louise Aiken Wright, provided the companionship and moral support that contribute so much to the completion of a long-drawn-out project. If the subject-matter were less grim, this book would be dedicated to her.

G. W.

Stanford, California
January 1983

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Between the Guillotine
and Liberty

I

The Challenge to Tradition

Take a moment to descend into those dark cells where the light of day never penetrates and contemplate the distorted features of your fellow men, weighed down by their chains, half naked in their tombs, barely nourished by some coarse substances sparingly doled out, constantly distracted by the groans of their unhappy companions and the threats of the pitiless guards; not so much fearful of the torture to come as tormented by having to wait for it; and throughout this long martyrdom, anticipating a death that will be kinder than their miserable lives.

JOSEPH SERVAN (1766)

WHEN THE YOUTHFUL magistrate Joseph Servan jolted his fellow judges in 1766 by his harrowing description of French prison conditions, and urged them to use Christian compassion toward law-breakers and to push for drastic reforms in the system of criminal justice, he was voicing the sentiments of a new wave of moralists on the chronic problem of crime and punishment. For some years before Servan's passionate plea at the opening of the court's annual session, a small but influential cluster of thinkers and writers had been denouncing the excesses and inequities of the traditional system; and their cause was powerfully reinforced when a French edition of Cesare Beccaria's *Essay on Crimes and Punishments* appeared in Paris in 1765. The fact that a rising young magistrate like Servan dared to risk his career by speaking out for reform showed

that something was changing in the temper of the French elite, if not in the outlook of Frenchmen *en masse*.

France's system of criminal justice had not been altered very much since the end of the Middle Ages. Most Frenchmen (like most other Europeans) accepted as natural a system of repressive justice designed to enforce law and order. "Find the guilty person, punish him, react strongly to any aggression against society"—such was the standard attitude toward offenders.¹ Such ideas as analyzing the causes of crime or trying to rehabilitate offenders scarcely existed, even in embryo. A primitive form of due process did exist, however; it was embodied in royal ordinances of 1539 and 1670, whose provisions were interwoven with doctrines drawn from Roman and canon law and were further elaborated by commentaries by the king's jurists. But if due process was respected, it was harshly conceived and enforced. The ordinance of 1670 permitted suspects to languish in prison for months or even years before trial; it allowed the magistrate to hear the testimony of accusers or witnesses without informing the suspect of either charges or evidence; it denied the accused person the right of counsel, and authorized the examining magistrate—in precisely specified conditions—to order varying degrees of torture designed to elicit a confession. Even after such a confession, the prisoner might have to undergo a second round of torture (oddly labelled *la question préalable*) to make him reveal the identity of his accomplices. The trial itself (like the investigation, conducted in secret) thus became in most cases a mere formality; the principal variable was the nature of the sentence, for judges were allowed broad discretion in fixing punishment. The ordinance of 1670 listed a series of penalties, but left it to the magistrates to apply these penalties in specific cases.

This judicial discretion was bound to produce a good deal of inconsistency; judges were restricted by no standard code, and could indulge their individual instincts. They rarely tilted in the direction of mercy, however, nor did they explicitly take into account the culprit's character or intentions, or what later generations would call extenuating circumstances. Transgressors were not viewed as tragic victims of an overpowering fate (as the ancients had once believed), or of a crime-breeding social milieu, or of some uncontrollable biological or psychological drive; they were evildoers, dangerous types who had chosen to violate society's norms and who

were threats to property or life. Harsh punishment, therefore, seemed only natural, since its purpose was retribution and deterrence. If many lawbreakers escaped punishment, it was not through the mildness of the system or the generosity of those who operated it, but through the ineffectiveness of the police and through rural society's tolerance of certain infractions committed by local residents: smuggling, for example, and bloody brawls between the young men of neighboring villages. As for policing outside the large cities, the *maréchaussée*—even after it was placed under national control in 1720—was too thinly spread to function except in spasmodic fashion. The system rested on the principle of occasional arrests plus harsh punishment of those who were caught; the unlucky ones were presumed to serve as examples to deter others.

If the police and the courts of the old regime functioned sporadically and sluggishly, the punishment of those convicted was swift and sure. The ordinance of 1670 specified that sentences be carried out on the day they were pronounced—a rule that left little time for royal clemency when the penalty was death. Capital punishment might be imposed for a wide variety of offences, including such minor ones as household theft by a domestic servant. The sentence might call for hanging, burning, or breaking on the wheel, sometimes preceded by protracted torture or the lopping off of a hand or tongue. Executions were public and attracted enormous crowds. When the attempted regicide Damiens was put to death before the Paris Hôtel de Ville in 1757, the square and adjacent streets were jammed with thousands of curious Parisians; windows overlooking the scene were rented out at high rates to fashionable gentlemen and ladies who feasted and drank while watching the victim endure several hours of the most excruciating tortures, climaxed by the process known as quartering.² The Damiens example was not typical; most executions in eighteenth-century France were less gruesome. But at best they were brutal rituals that pandered to the most savage instincts of the crowd. It was assumed that since deterrence and social vengeance were the purposes of punishment, executions would be most effective if they were both public and horrifying.

Although death sentences were common in the eighteenth century, they amounted to less than 10 per cent of all sentences pronounced. Much more common were penal servitude in the galleys,

or banishment from the region or the country. France's Mediterranean fleet in early modern times was made up in part of ships propelled by oarsmen, and manpower for this service was hard to find. From the time of Louis XIV, therefore, the government turned to the courts for *galériens*; for the most part they were petty offenders—thieves, vagabonds, smugglers, army deserters. Chained to their benches, exposed to the vagaries of wind and weather, poorly nourished, *galériens* rarely survived for more than a few years. Those hardy enough to last were often kept on well beyond the terms of their sentences; few of them returned to freedom unless they managed to escape. When the galleys were decommissioned in 1748, they were replaced by what eventually came to be known as *bagnes*: shore-based prisons (sometimes using moored vessels for nighttime confinement) in various seaports, where the navy utilized the prisoners for hard labor to maintain port facilities and arsenals. In the nineteenth century the term *galérien* gradually gave way to *bagnard* (though the two words were long used interchangeably); but whatever the label, these prisoners remained legendary figures, objects of fascinated horror among the general population. When the semiannual shipment of *bagnards* departed from Bicêtre prison near Paris for the long journey (on foot or, later, on open carts) to Toulon or Brest, crowds gathered to watch as iron collars were riveted around their necks; and in every village en route, the locals came out to hoot or stare.³ Escaped *bagnards*, bearing the telltale brand on the shoulder and often betraying their condition by a characteristic limping gait (the effect of years weighted down by ball and chain), were sources of terror in the countryside, rivaling the werewolf in the disciplining of unruly children. The *bagnes* held about 4000 prisoners in 1748; there were 5400 by 1789, and 16,000 by the end of Napoleon's rule. When the English reformer John Howard visited the Toulon *bagne* in 1785–86, he was told that some inmates had been there for forty, fifty, even sixty years. One of them, aged fifty-six, had been there since the age of fourteen, when he was given a life sentence for stealing.⁴

For lesser offenses, banishment from the area of the court's jurisdiction was the commonest penalty; it might be for a term of years or for life. Since other countries also resorted to this easy solution, the effect was a kind of multilateral trade in malefactors. Alternative punishments (sometimes in combination) included

whipping, branding, public exposure in the pillory, and, less often, prison terms or monetary fines. Prisons, however, were rarely used for punishment, but were places of detention for arrested or indicted persons awaiting trial; the ordinance of 1670 did not even mention a prison term (except for penal servitude in the galleys) in its list of penalties. Prison as punishment was reserved mainly for women and juveniles whose offenses would, if committed by men, have led to galley service. There were also two special categories of prisoners: debtors incarcerated on the demand of a creditor,⁵ and persons detained by a royal order (*lettre de cachet*). These latter unfortunates—victims of court vendettas or family disputes—were locked up without trial or sentence, usually in an old fortress or abbey such as the Bastille, Vincennes, or Mont-Saint-Michel.

Such prisons as existed during the old regime were invariably grim places: "sewers of infection," said Voltaire; "inhuman and indecent," as described in one of the cahiers submitted to the Estates-General in 1789. A Parisian magistrate complained in 1789 that prisoners brought before his court "resembled spectres or cadavers rather than living men"⁶; another in 1783 reported thus on the condition of one inmate who had finally come to trial:

The prisoner remained recumbent night and day, possessing neither trousers nor stockings nor shoes, deprived of heat for two winters, lacking fresh air, wine, and adequate nourishment, tightly confined by iron bars and locks, exposed to the most intense cold, and for three years, whether healthy or ill, denied the right to present himself for confession.⁷

Over the years, some officials had made sporadic efforts to correct the worst abuses. The drafters of the ordinance of 1670 had discussed prison conditions, but without result. The *parlement* of Paris tried again in 1717, ordering that the sexes be separated, that prisoners be provided with bread and water and with clean straw for beds, and that jailkeepers be forbidden to charge inmates for special amenities. In fact, nothing of consequence changed. When the Petit Châtelet prison in the heart of Paris was demolished in 1783, Parisians had their first chance to observe how suspects had been housed for centuries: the dank subterranean cells, below the water level of the nearby Seine, resembled tombs rather than living quarters for human beings.⁸ And in 1788 they could read the newly

translated work of the English reformer John Howard, who set forth in sober detail the record of his visits to dozens of prisons throughout France.

Some Frenchmen justified the dreadful state of the prisons on the ground that living conditions for a great many free citizens were not much better. (This latter argument was to be echoed frequently throughout the nineteenth and into the twentieth century.) But there were other grave flaws in the traditional system of criminal justice, flaws less easy to explain away. They included the class character of justice, which ensured special treatment for privileged offenders; the slow and costly nature of the judicial process; the often arbitrary and capricious nature of judgments, especially in the lower courts; the persistence of jurisdictional conflicts in a system that lacked an ordered hierarchy of courts; and the want of a clear and uniform legal code. Indeed, Voltaire was led to remark ironically that a traveler in France changed his law code more often than his horses.⁹

Yet until the eighteenth century, there was no serious or generalized protest against the system of criminal justice. Law and order was, after all, a condition to be valued by those Frenchmen who had property or privilege to protect; and it was valued also by those who possessed little but who feared for their personal safety. In Paris before the eighteenth century, police protection was still rudimentary, and the streets were dangerous after dark. The countryside was even less effectively policed, and many regions were infested (especially in periods of famine) by roving bands of vagrants and beggars who preyed on isolated farmsteads and extorted food and shelter from the peasants. Brigandage was endemic in certain mountainous or forested areas, so that travel involved risk to both property and life. In a society where, despite the splendors of the court and the brilliant culture of the capital, the manners of the common folk were rude and the struggle for survival a desperate reality, it is easy to understand why violent crime was common and why its severe repression was demanded by all those who called themselves *les honnêtes gens*. True, this attitude was counterbalanced by a strain of popular sympathy for the local poor and for wanderers down on their luck. A kind of informal system of charity operated in much of rural France; peasants shared what little they had with vagrants and gave them shelter in a corner of