“Putting Cruelty First”: Liberal Penal Reform and the Rise of the Carceral State

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Why are so many people in prison today? What accounts for the fact that about 2.2 million Americans are behind bars, and approximately one in 35 adults are subjected to prison, jail, probation, parole, and other forms of surveillance? How do we make sense, more generally, of the fact that all the world’s liberal democracies rely on incarceration as an essential tool of punishment? Specifically, why do the discourses and practices surrounding punishment in today’s liberal democracies consider torture and other forms of physical abuse to be unacceptably cruel, while long-term incarceration is considered unproblematic?

To approach this problem, I consider the liberal reformism of Cesare Beccaria and Jeremy Bentham, which helped to pave the way for a transition from irregular, and usually corporal, punishment to the regular, systematic liberal justice system that eschews corporal punishment but relies heavily on incarceration.

In developing this argument, I engage with the literature that focuses on the role of cruelty within liberalism, in particular the work of Judith Shklar (her phrase, “putting cruelty first,” appears in the article title). Shklar argues, as does Richard Rorty (1998), that liberalism’s defining feature is its opposition to cruelty. In other words, before it is concerned with individual rights or limited government, liberalism is fundamentally against cruelty. This sensitivity is found in a number of early liberal thinkers, from Montaigne to Montesquieu (Shklar 1984). By drawing on Shklar’s distinction between physical cruelty (which liberals abhor) and moral-psychological cruelty (about which liberals are ambivalent), I am able to better illuminate how such humane reformists as Beccaria and Bentham could be opposed to corporal punishment while favoring incarceration as a satisfactory liberal solution to the issue of punishment that minimizes (physical) cruelty.

Most of this article focuses on Cesare Beccaria and Jeremy Bentham, two European thinkers whose work in the eighteenth and nineteenth centuries established...
their place as standard bearers of liberal penal reform. I argue that they attempt to justify the shift toward what we would recognize as a liberal justice system, which includes the prohibition of torture, the reduction or elimination of capital punishment, equal protection before fixed, public law, proportional (and generally mild) punishments, deterrence as the sole justification for punishment, and an attempt to render the justice system regular, systematic, and universal. In making these arguments, Beccaria and Bentham helped to establish the justifications for a penal system in which the authorities imposing the penalties are in principle as accountable to the law (and the public) as are the suspects being tried and potentially punished.

Both thinkers are motivated by a strong concern with cruelty and the desire to reduce or even eliminate its role in the penal system. However, their sensitivity to physical pain and torture does not translate into an equivalent sensitivity toward incarceration and the psychological harm it produces. Jeremy Bentham’s Panopticon, in particular, is an example of a system of carceral punishment that avoids physical abuse, but it would likely result in troubling psychological consequences for those detained within. These thinkers worked to discredit the physical, arbitrary sovereign forms of punishment diagnosed by Foucault while also defending, often explicitly, the shift to universal, regular, disciplinary punishment by way of incarceration, which should be just as problematic for a society defined by (or aspiring to) democratic self-government, the reduction of cruelty, and individual rights.

This is not to suggest that either Beccaria or Bentham intended, or could have envisioned, the creation of the carceral state in the United States, or its lesser siblings in England and Western Europe. They did, however, provide the rationale, by means of philosophical argument and public activism, for the shift from a system based on direct corporal punishment to one based on (often long-term) detention. Thus, they are central figures in the heritage that has produced the punishment imaginary of today, where physical torture, if discovered and reported, generates outrage, while sentences of 20, 30, or even 50 years in prison fail to merit much attention. In diagnosing this feature of the liberal justice system, I am arguing that Beccaria and Bentham, and reformers like them, helped to demolish a harsh, cruel, and unfair penal apparatus, but also helped to replace it with an entirely new regime of cruelty, one equally antithetical to a society that values strong democratic governance, the reduction of (all forms of) cruelty and pain, and the protection of the individual.

Liberalism’s blindness to moral-psychological forms of suffering renders it unable to fully understand and diagnose the cruelty and injustice in the US system of mass incarceration. This blindness, which is a profound moral failing on the part of liberalism, in turn makes it inadequate to the task of undoing mass incarceration. Indeed, some of the most effective recent challenges to prison expansion have come from conservatives concerned with cutting costs, not liberal reformers motivated by the prospect of human suffering. And neither conservative budgetary concerns nor liberal reformism seem likely to challenge the bases of the carceral state, which include, among other things, the War on Drugs.
At stake here are the institutions, practices, and discourses that together comprise the carceral state and the liberal justice system. Only through a better understanding of how we arrived at this moment, with the institutions and practices of the carceral state and its attendant discourses and philosophical justifications, can we hope to challenge it. My focus is not on specific policy choices, or on macroeconomic trends that may have driven these changes, but rather on examining the philosophical justifications and discourses that accompanied the transition to a liberal justice system (and with it, the rise of the carceral state). These are so entrenched that we struggle to go beyond them. To find creative solutions that are sensitive to physical and moral forms of cruelty and that may ignite and inspire future popular movements to challenge our reliance on mass incarceration, we must understand the philosophy of liberal reformism that justifies the carceral state.

The body of this article consists of three sections. The first discusses and assesses the reformist agenda of Cesare Beccaria and Jeremy Bentham, primarily by examining two key texts, Beccaria’s *On Crimes and Punishments* and Bentham’s *The Rationale of Punishment*. I show that Beccaria and Bentham argue for the main features of a liberal justice system. The second discusses in greater detail the role of cruelty in the reformism of Beccaria and Bentham, focusing on Judith Shklar’s definition of liberalism as a political philosophy that puts cruelty among its chief concerns. I then discuss some of the new moral and psychological cruelties associated with incarceration, and liberalism’s insensitivity to the possibility that imprisonment might constitute a new system of penal cruelty, one distinct from but filled with as many cruelties as the system it replaced. This is particularly evident in Bentham’s presentation of the Panopticon, a proposed institution of inspection built around solitary confinement and perpetual surveillance, which Bentham depicts as a model for prison life shorn of all cruelty. In the conclusion, I turn to Friedrich Nietzsche and Angela Davis to suggest possible lines of thought that move beyond the liberal philosophy that justifies the cruelties of the carceral state. Finally, I suggest some basic steps for going forward in terms of policy, activism, and political thought.

**The Liberal Reformism of Bentham and Beccaria**

I. Here I discuss the basic elements of liberal penal reform found in the work of Jeremy Bentham and Cesare Beccaria. In particular, I explore their opposition to torture and capital punishment, the insistence on the importance of public, impartial laws, the codification of punishments that are proportional to the severity of the crime, and a shift in the justification for punishment from retribution to social protection. After presenting the reformist agenda of each thinker, I turn to the question of cruelty in traditional corporal punishment and in its replacement, incarceration.

In 1764, Cesare Beccaria published his famous reformist text, *On Crimes and Punishments*. This work remains his most enduring text and is a classic statement of the principles of the liberal justice system. Beccaria presents, in embryonic form, many of the essential features of a liberal justice system that we recognize and
defend as desirable today. Beccaria stresses the importance of impartial, fixed law, which is publicly known and applied with equal intensity to all. “The greater the number of people who understand the law and who have it in their hands, the less frequent crimes will be,” for ignorance of the law is the enemy of lawful obedience (Beccaria 1764/1986, 9–10). Fixed, public laws serve the cause of obedience, while protecting the individual from the capricious whims of the sovereign. “Fixed and immutable laws” provide “personal security” for the individual because they leave “the judge no other task than to examine a citizen’s actions and to determine whether or not they conform to the written law” (ibid., 12). In this case, fixed, public laws serve the cause of obedience and social cohesion, but they also protect the individual from government abuse. The legal expectations of the citizen are as public and predictable as the government response. This, of course, is recognizable as an early articulation of the liberal justice principle of equality before the law, with the concomitant elimination of feudal privileges and titles.

The next crucial element in Beccaria’s approach concerns the need for proportionality in the distribution of punishments. The need to prevent crimes, or actions contrary to the public good, increases with the severity of the crime. In other words, mild crimes merit mild punishments, for they cause little harm and do not merit a harsh response. More serious crimes—those that do great harm to the public good—must be punished accordingly so as to prevent (or at least minimize) their occurrence in the future. As Beccaria puts it, “obstacles that restrain men from committing crimes should be stronger according to the degree that such misdeeds are contrary to the public good.” In establishing this standard, Beccaria provides for the use of harsher penalties, but also establishes a realm of protection for the individual. If the crimes are mild, they do not merit harsh penalties, regardless of how such crimes were previously handled.

One of the most interesting elements in Beccaria’s case for reform is his opposition to torture. As he notes, torture of the defendant during trial is “sanctioned by the usage of most nations,” generally for the purpose of extracting a confession (ibid., 29). The problem with this use of torture is that it does not respect the rights of the accused, who are innocent until proven guilty. Along with this, the evidence obtained through torture is of no value, for speaking “amid convulsions and torments is no more a free act than staving off the effects of fire and boiling water,” which leaves the victim “no liberty but to choose the shortest route to ending the pain” (ibid., 31). Torture is thus problematic on two levels: it treats the accused as one who is guilty and deserving of punishment, though this has not yet been established, and it extracts confessions of guilt that are not reliable. Moreover, a person convicted of a crime should face the publicly established, lawful penalty, not the arbitrary inclinations of a torturer. Here Beccaria justifies the basic liberal protections that are integral to the liberal justice system, including the presumption of innocence and the (at least formal) protection against bodily abuse. Similarly, Beccaria provides a series of arguments against the use of capital punishment, though space is lacking here to
deal with them adequately. Suffice it to say, he characterizes capital punishment as a “cruel example” offered to the citizenry, made all the worse because it “is carried out methodically and formally” (ibid., 48–51).

The next feature of Beccaria’s penal reform is a shift in the ends for which punishment is carried out. Beccaria, much like Bentham after him, seeks to eliminate the vengeful, retributive element in public punishment and to replace it with a milder, non-vindictive deterrent justification. The point of punishment is no longer to hurt the criminal but to deter the commission of future crimes. Prevention, not retribution, is the watchword of the liberal reform movement. In other words, the “purpose of punishments is not to torment and afflict a sentient being or to undo a crime which has already been committed”; indeed, the latter goal is not possible.

As a sort of necessary evil, punishment can and should “dissuade the criminal from doing fresh harm to his compatriots and to keep other people from doing the same” (ibid., 23). Physical cruelty is thus removed from the world of punishment. More generally, political systems should be built around eliminating the causes of punishment, rather than punishing crimes after the fact. As Beccaria himself says, “it is better to prevent crimes than to punish them. This is the chief purpose of every good system of legislation,” which is achieved through the creation and promulgation of clear, simple laws, easy to understand and obey (ibid., 70–71). With the focus on prevention of crime through smart legislation, the necessity and justification for harsh, physical punishments has largely eroded.

The final element of Beccaria’s liberal reform agenda concerns the need to render punishment as systematic and regular as possible. This includes the establishment of a justice system that provides for swift, public charge and trial as soon as possible after the crime has been committed. Preventive custody, in which the suspect is held before trial, must “last as short a time as possible and be as lenient as possible.” Similarly, the “trial itself must be completed in the shortest time possible,” so as to protect the individual from the caprice of a cruel judge and to ensure she receives her fair chance in the justice system (ibid., 36). Making punishment systematic and regular also includes the elimination of “every distinction, whether it be in honor or wealth,” that would privilege certain citizens and degrade others before the law (ibid., 39). Beyond abolishing feudal privileges of status and rank, punishment must be regular to the point of inescapability. If punishment is moderate, humane, and derived from simple public laws, there is no need for pardons or asylum. Says Beccaria, “let the laws, therefore, be inexorable … but let the lawgiver be gentle, indulgent, and humane.” In summary, the necessary penal reforms will render punishment “public, prompt, necessary, the minimum possible under the given circumstances, proportionate to the crimes, and established by law” (ibid., 80–81).

Beccaria’s remarkable work sets forth an agenda that is striking in its familiarity and resonance with our approach to punishment today, even though it was published before the American Revolution and two of the most radically transformative centuries in human history. Beccaria’s reform agenda sets up a powerful series
of protections for the individual, all designed to replace the arbitrary power of the
sovereign with a set of clear, fixed laws and penalties, which apply equally to all and are subject to public scrutiny. Most of these protections are still regarded as essential today, including the right to a speedy trial, humane treatment while in prison, and equal protection before the law. However, there are certain less appealing elements to this agenda. The liberal hope of minimizing and humanizing punishment blurs into the bureaucratic hope of making punishment everywhere, always, and strong.6 Similarly, despite Beccaria’s remarkable sensitivity to the brutal torture and capricious executions that often defined the punishment of his day, he displays little concern for the potential brutality of detention, other than to assure that prison conditions are not too harsh. We have here, in embryonic form, the main features of the modern liberal justice system.

II. Jeremy Bentham’s reformist agenda overlaps heavily with that of Beccaria, but the two are not indistinct. Apart from the reformist elements mentioned above, several elements of Bentham’s reformism are noteworthy. Bentham justifies his reformist agenda for punishment in more explicitly utilitarian terms than does Beccaria. His primary work in this area, The Rationale of Punishment, was written between 1774 and 1776, only a decade after Beccaria’s On Crimes and Punishments (Bentham 2009, 13). Bentham’s utilitarian approach seeks to minimize the amount of pain and maximize the amount of happiness experienced by the greatest majority in a given society. Given that Bentham’s utilitarian philosophy eschews all appeals to natural rights, it may seem unfair to place his work in the liberal tradition. This, however, would be a mistaken judgment. Although Bentham’s concern for “scientific legislation” includes a utilitarian emphasis on social engineering to produce the greatest outcome for the greatest number, he is ultimately concerned with liberation “in the direction of democratic individualism” (Fuller 1987, 717). Furthermore, Bentham’s reformist agenda with regard to punishment shares many remarkable similarities with that of Beccaria and has helped to provide the philosophical justifications for the liberal justice system.

Bentham’s utilitarianism, much like Beccaria’s, allows him to recognize that the infliction of punishment is an evil, since it directly produces harm to the individual being punished. Thus, punishment is a first-order evil, which consists of harming the offender, in the service of a second-order good, that of preventing future crime and protecting those in society. Along these lines, Bentham constructs an economy of punishment in which the penalty must be proportional to the severity of the crime, and the social impact of the punishment is ultimately of more importance than the actual harm inflicted on the offender. Since the infliction of suffering through punishment is harmful to the general utilitarian goal of maximizing happiness, punishments should be economically performed, where the “desired effect is produced by the employment of the least possible suffering” (Bentham 2009, 66). Since the primary utilitarian goal is to reduce and prevent crime, the social impact
of the punishment is more important than its personal impact on the criminal who
directly suffers the punishment. In other words, “the real punishment ought to be
as small, and the apparent punishment as great as possible” (ibid., 67). Bentham,
much like Beccaria, is sensitive to the unnecessary and harmful effects of overly
harsh punishment and seeks to establish a system in which these can be minimized.

Also strikingly similar to Beccaria is Bentham’s insistence that prevention is the
only possible purpose of punishment. Prevention comes in two varieties: “particular
prevention, which applies to the delinquent himself; and general prevention, which
is applicable to all the members of the community without exception” (ibid., 61).
This is justified in utilitarian terms, whereby punishment establishes a painful
consequence for criminal activity, thus making those inclined to criminal activity
less likely to do so. Particular prevention works in the sense that it removes the
offending criminal, who now cannot recommit his crime. Once released, this criminal
no longer desires to commit the crime for fear of experiencing that punishment
again. General prevention takes precedence, however, since the real purpose of
penal law is to teach through example those who have not committed a crime that
they will profit by continuing to be law-abiding and suffer undesired consequences
if they choose to violate the law. In the most general sense, then, punishment is
a necessary evil done for the sake of the social good, justified only as a deterrent
against future crime and not as an act of vengeance.

The Death and Rebirth of Cruelty

A key element in the liberal reformism of Bentham and Beccaria is the desire to
reduce cruelty. In this section, I consider the relation between cruelty and liberal
thought, the efforts by these two thinkers to reduce the amount of cruelty in the
penal system, and their inability to consider the alternative forms of cruelty that
emerge with long-term incarceration.

What is the role of cruelty in liberal political thought? Judith Shklar, in a
provocative set of essays, contends that the desire to put cruelty first is one of
the distinguishing characteristics of liberalism. She defines cruelty as “the willful
inflicting of physical pain on a weaker being in order to cause anguish and fear.”
The liberal focus on cruelty, and the desire to reduce its role in human affairs, puts
liberalism “at odds not only with religion but with normal politics as well.” This
is because, by focusing on a “vice that disfigures human character,” one is making
“a purely human verdict upon human conduct” and is reducing the concern for
violations of divine commands or normal human rules (Shklar 1984, 8–9). This
can be seen in certain early liberal thinkers, such as Montaigne, who are more
concerned with the horrors of cruelty than with the crimes of dishonesty or adultery,
which tend to be less cruel.

Beyond the liberal focus on physical cruelty, Shklar also introduces the concept
of moral cruelty, which is the infliction of “deliberate and persistent humiliation, so
that the victim can eventually trust neither himself nor anyone else” (ibid., 37). One
finds in Nietzsche a deep concern with moral cruelty, hypocrisy, and dishonesty, and thus an impassioned critique of Christianity due to “the self-torment of its internalized morality” (ibid.). Nietzsche is not, however, a traditional liberal thinker, a point I discuss later. As Shklar reminds us, when these early liberal thinkers turned their attention to cruelty, as did Montaigne, Montesquieu, and later Beccaria and Bentham, they primarily had physical cruelty in mind. Hypocrisy and betrayal, though objectionable, did not arouse the concern of these liberal thinkers in the same manner that physical cruelty did.

What role did cruelty (and the desire for its elimination) have in the work of Beccaria and Bentham? Beccaria was raised in a wealthy family in Milan and earned a doctor’s degree in law in 1758. He soon became active in literary clubs and published several works. In this context, his attention turned to penal reform. The most common methods for dealing with criminals then were capital punishment and “bodily mutilations.” Petty offenses were often punished by flogging or mutilations, such as “slitting or piercing the tongue, and cutting or burning off the hand” (Maestro 1973, 13). Without a doubt, the eighteenth century penal system in Italy and much of Europe was defined through its considerable physical cruelty. Aside from mutilations, capital punishment was common and torture was routinely practiced to elicit confessions. The desire to eliminate such brutal, unnecessary cruelties guided much of Beccaria’s writing and political activism.

A similar hatred of physical cruelty motivated Bentham’s reformism and was a key feature of his utilitarian philosophy, which sought to maximize the greatest happiness for the greatest number. As Judith Shklar (1984, 35) notes, “a moral theory that begins by identifying evil with pain will obviously take cruelty seriously; and indeed, Bentham did hate it.” With this hatred of cruelty in mind, we turn to Bentham’s model prison, the Panopticon.

Bentham first introduced the idea of the Panopticon in various letters written in 1787. He developed the idea further in a series of postscripts in the following years. Bentham’s letters introduce an ideal for any and all houses of inspection, including hospitals, schools, mental asylums, detention houses, and sites of long-term imprisonment. He focuses on how the ideal can be used with regard to crime and punishment. The central principle behind the Panopticon is that “the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose of the establishment have been attained” (Bentham 1995, 33–34). If maintaining constant inspection of those housed in the Panopticon is not feasible, they should at least believe themselves to be under constant inspection. The Panopticon is simply an inspection house, in this case a place of imprisonment, architecturally designed and guarded so that the inmates are under near-constant inspection from a central watchtower. They are thus forced to regulate their own behavior, even though (and precisely because) they cannot see the guards who watch over them.
The Panopticon perfectly illustrates Bentham’s liberal reformism. Inspection replaces cruelty and torture; reform of the individual replaces vengeance and harsh punishment. This happens through the “apparent omnipresence of the inspector ... combined with the extreme facility of his real presence” (Bentham 1995, 45). A similar regime of inspection will be established over the Panopticon guards as well, such that “servants and subordinates of every kind will be under the same irresistible controul with respect to the head keeper or inspector, as the prisoners or other persons to be governed are with respect to them” (ibid.). The architecture of the Panopticon facilitates the surveillance of the inmates and the “publicity of official actions,” affecting the behavior of inspector and inspected (Schofield 2006, 257). The Panopticon is a perfect reformist prison house in that it eliminates the need for physical cruelty. With “every motion of the limbs, and every muscle of the face exposed to view,” there is no room for misbehavior, since all such instances will be instantly spotted and stopped (ibid., 49). Furthermore, since each prisoner is isolated in his individual cell, and prevented from communicating with fellow inmates, the prospects for plotting, fighting, and other forms of misbehavior are eliminated. Through constant inspection, and absent the fear of violent torture, the Panopticon moves “the emphasis from punishment for doing wrong to enhancing incentives for doing right” (Fuller 1987, 717).

The system will further guard against abuse by the public nature of detention. The principle of inspection, which through the guards keeps the prisoners in line, and through the head inspector keeps the guards in line, will be extended to public citizens, who may visit the detention center at any time. Therefore, through publicity and constant inspection, the proper functioning of the institution is ensured, along with the proper treatment of the individuals housed within.

Thus, for Beccaria and Bentham (and Shklar as well), punishment can be done with as little cruelty as possible, through the elimination of corporal punishment and the shift toward humane detention. Shklar even suggests, much like Bentham, that since the criminal “did injure, terrify, and abuse a human being,” a liberal regime of punishment actually reduces social cruelty through its limited individual application in particular instances of punishment (Shklar 1989, 37). Beccaria felt similarly, for “society must protect itself … and this can involve cruelty, for the hatred and the fear of the crime are sufficient motives to apply cruel measures of prevention and/or correction,” provided they are done rationally and without unnecessary cruelty (Baruchello 2004, 307). The liberal approach to punishment thus demands that the infliction of physical cruelty be reduced to the bare minimum necessary for the social goal of deterrence.

The transition to the liberal justice system did not, however, eliminate unnecessary cruelty as its proponents wished. First, there is the telling insensitivity to moral cruelty, or cruelty that harms through psychological and emotional abuse. Bentham and Beccaria, as well as liberal thinkers today, are so focused on physical harm that they are blind to the different regime of cruelty that defines the modern carceral
system of punishment. To illustrate this, I turn to the account of an ordinary day in prison, written by an inmate held in a maximum-security facility in Illinois.

The first and defining feature of prison life is its unending boredom. “The dull sameness of prison life, its idleness and boredom,” grind prisoners down. “Everything is inconsequential other than when you will be free and how to make the time pass until then. But boredom, time-slowing boredom, interrupted by occasional bursts of fear and anger, is the governing reality of life in prison” (Morris and Rothman 1995, 228). The fear of gang violence is ever-present and life is characterized, in addition to boredom, by a sense of “impending danger.” Most maximum-security prisoners are illiterate, many have not even graduated from high school, and, cramped together in cells, fights are not uncommon. Even after offering this description, the author concedes that “it fails to capture the constant unhappiness of prison life and the constant sense of danger … the relentless, slow-moving routine … the tension mixed with occasional flashes of fear and rage; it misses the consuming stupidity of living this way” (ibid., 235–36).

Regarding solitary confinement, particularly in maximum-security and supermax prison facilities, prisoners have even stronger characterizations. Says one, “It’s pretty much like not living. You’re locked in a cell twenty-three hours a day…. That’s it … No outside air … you can’t see out the windows” (Rhodes 2004, 29). Another inmate described his first 30 days in solitary confinement with the following words:

Your lights are on all day … it really kind of dulls your senses…. It makes you numb. You get easily mad…. It’s terrible in here. It think they go out of their way to turn this into hell. (Ibid., 30)

These accounts present a compelling, if necessarily limited, picture of the moral cruelty that characterizes prison life. Obviously, conditions and security in minimum-security facilities are less harsh and less strict than those in medium-security facilities. The “persistent anguish” and humiliation that Shklar used to characterize moral cruelty fittingly describes the dread and monotony of prison life. Beccaria and Bentham did not anticipate or advocate such a system of punishment, but as liberals focused on reducing physical cruelty, they were unable to consider the new set of cruelties that could emerge in a system of incarceration.

Bentham’s Panopticon, as a model prison, is a horrifying example of moral cruelty run rampant. It is undoubtedly emblematic of “that modern sensibility which abhors the infliction of pain” and treats punishment as a necessary social evil, to be reduced and humanized as much as possible (Fuller 1987, 717). Yet neither solitary confinement nor long-term detention seem problematic to Bentham’s sensibility. For him, if the individuals being detained are held in isolation, this provides unique opportunities for reform. This serves the purpose of prevention, and if the stigma attached to the man who has served his time is not too great, it allows for effective integration back into society. Along with these advantages, imprisonment holds the dual advantages of simplicity and infinite divisibility, such that it can be modified
as needed to fit the nature of the crime. Though Bentham is attentive to some of the negative aspects of prison life, including the common “school of vice” charge, he is shockingly insensitive to the potential horrors of long-term solitary confinement, or even the possibility that such punishment might exceed any brutality inflicted through physical torture. For Bentham, such a thought is inconceivable.

In his Panopticon letters, Bentham addresses this concern and dismisses the possibility that solitary confinement might be harmful to the detainee. The fact that the Panopticon, through a feat of architectural design, changes the psychology of its detainees, forcing them to self-police and thus behave properly, does not strike Bentham as in any way cruel. This constant inspection would be expected to produce unending fear, terror, resentment, humiliation, and a twisted, totalitarian form of self-control among the inmates.  

The features that made liberal reformism such an effective tool in challenging the monarchical forms of corporal punishment render it unable to effectively engage with the new cruelties that emerge in a system of incarceration.

Given how deeply liberal reformers like Bentham and Beccaria abhorred physical cruelty, and how concerned contemporary liberals are with cruelty, why were they so oblivious to the new regime of cruelty that emerges in the system of incarceration? The primary reason is that liberalism is inadequately sensitive to what Shklar terms moral cruelty. The psychological cruelties associated with incarceration were invisible to these liberal reformers, even when, as in the case of Bentham, they had themselves designed an almost unimaginably cruel model prison. Similarly, Beccaria favored imprisonment because he saw in it a “civilized method” of punishment (Maestro 1973, 26). In this sense, Beccaria and Bentham’s reformism is a far cry from Nietzsche’s ideal of the strong society, which attains “such a consciousness of power that it could allow itself the noblest luxury possible to it—letting those who harm it go unpunished,” and in which physical and moral cruelty could be reduced or eliminated. Punishment, though transformed from a regime of physical cruelty to one of moral cruelty, is still essential for these two thinkers.

**Conclusion: Moving Beyond Incarceration**

This article has sought to better understand the shift to incarceration as the punishment of choice for liberal democracies in the nineteenth and twentieth centuries. Of particular concern is the growing carceral state in the United States, which with more than two million inmates is unprecedented in US (and human) history. Millions more are on probation, parole, or other forms of community surveillance, and former felons, “barred from public housing by law, discriminated against by private landlords, ineligible for food stamps … and denied licenses for a wide range of professions … find themselves locked out of the mainstream society and economy—permanently.” I approached this problem by considering the influential reformist works of Cesare Beccaria and Jeremy Bentham, which
provide a philosophical and polemical justification for the move toward a liberal justice system, along with the concomitant move toward incarceration as the primary mode of punishment.

In examining the works of these liberal reformers, we can see how the attempt to eliminate physical cruelty in punishment produced a new, troubling form of moral cruelty that characterizes incarceration and the liberal justice system more broadly. Both Beccaria and Bentham campaign for mild, proportional punishments, equality before the law, and the elimination of torture and capital punishment, motivated by a concern for the protection of individual rights and the elimination of (physical) cruelty. At the same time, their campaign includes a demand for a system of punishment that is regular, universal, inescapable, defined through surveillance, and is utterly insensitive to the cruelties of this new economy of punishment. These reformers thus helped to enact a system of punishment that is often quite cruel, albeit in a different manner than before. My hope is that by gaining a better understanding of how we got here, we will be better equipped to critique and challenge the carceral state, first by targeting its remarkable expansion in the past few decades, and then by rethinking the carceral approach to punishment more broadly.

In Peter Moskos’s provocative op-ed, “In Lieu of Prison, Bring Back the Lash,” he asks, “Is there a third way, something better than both flogging and prison?” I will conclude by exploring the possibility of a “third way,” such that we might begin to slowly unravel the practices, institutions, and discourses that comprise the carceral state. What concrete steps might we take? As Marie Gottschalk (2006, 255–257) argues, criminologists, lawyers, and other “experts” will not undo the carceral state themselves. “The public has to be mobilized and organized to undo the carceral state.” One way this can happen is for scholars, journalists, and activists to continue to make “prisons, jails, and the lives they mark more visible to the wider society.” Many of the works cited here are important interventions in rethinking the carceral state. In terms of specific policy mobilizations, undoing the criminalization of nonviolent drug activity and rethinking the harsh and costly “three strikes” laws are areas of intervention at the state and national levels. One concern for all reformist efforts is to avoid “striking compromises that leave the carceral state slightly leaner and less mean but more entrenched” (ibid., 257).

What philosophical basis is there for a new, post-carceral approach to punishment? An important resource is the work of Friedrich Nietzsche. Judith Shklar (1984, 37) articulated the distinction between moral and physical cruelty, and we can see in Nietzsche a lifelong attention to the “deliberate and persistent humiliation” found in moral cruelty. For Nietzsche, the Christian era produced feelings of pity and guilt on the part of the individual, which, when internalized, “transform physical cruelty into the moral tormenting of other people” (ibid., 41). Nietzsche found the impulse of moral judgment and condemnation to be terribly cruel, to the point that physical cruelty would even be preferable. It is not sensible to return to physical
cruelty, but Nietzsche provides helpful tools for exploring a turn to a post-carceral, less punitive approach to punishment.

Of course, we should retain the liberal reformist abhorrence of physical cruelty. This impulse was and remains a crucial tool in combating torture and physical abuse, whether de facto or de jure, within the penal system. We should also keep Bentham’s utilitarian impulse regarding punishment. Since punishment involves hurting the one who is punished, it ought to be eliminated or reduced to a minimum in all circumstances. As Bentham (2009, 52) notes, punishment is an evil inflicted out of “the direct intention of another.” Consistent with a large body of literature, I argue that the moral and psychological cruelty of incarceration is distinct from, but just as objectionable as, the physical cruelty of flogging and other forms of corporal punishment.

What can Nietzsche offer to inspire future research? He articulates the dangerous connections between moral condemnation and moral cruelty. As long as the project of punishment is harsh and built around the moral guilt of those being punished, it will involve insensitivity to the moral cruelties that necessarily come with locking a human in a cage. “Punishment is supposed to possess the value of awakening the feeling of guilt in the guilty one.” This, however, rarely works, for

... generally speaking, punishment makes men hard and cold; it concentrates, it sharpens the feeling of alienation; it strengthens the power of resistance. If punishment destroys the vital energy and brings about a miserable prostration and self-abasement, such a result is certainly even less pleasant than the usual effects of punishment. (Nietzsche 1968, 517)

Nietzsche is not simply speaking in generalities. Many inmates say very similar things. As one prisoner told Lorna Rhodes (2004, 35), “I’m walking around here like a caged animal—it makes you feel so inadequate, so inferior, so less than.” Most inmates convey a palpable sense of feeling trapped—cold, dull, and cut off from the outside world. Another prisoner described solitary confinement as “an environment where you can’t talk to anybody else, you can’t have any contact … unless you yell or scream.” Prison officers have admitted that “there’s probably few more negative places in this world” than the Panoptic supermax or control prison (ibid., 31).

Attentive to the moral cruelties of modern punishment, Nietzsche predicts the resistance they engender. His insight into Panoptic forms of punishment is that rather than reform and feelings of guilt, they provoke rage, alienation, and torment. This is because “the sight of the judicial and executive procedures prevents the criminal from considering his deed … reprehensible: for he sees exactly the same kind of actions practiced in the service of justice and … with a good conscience.” Nietzsche summarizes this as “the whole cunning and underhand art of police and prosecution, plus robbery, violence, defamation, imprisonment, torture, murder,” all of which are useful to the law and the administration of justice, but are prohibited
and punished when utilized by the criminal (Nietzsche 1968, 518). He overstates the case, but the important element of truth here is that the criminal may very well regret his act, particularly if it was a violent one. Yet he is very unlikely (and it is usually a “he”) to come to believe, after his time in prison, that it is a good institution, that it serves a social good to keep people in such a place for months and years on end. The prisoner is more likely to come to believe, with the officer, that there are probably few worse places on earth.

What about incarceration and practical alternatives to detention? Angela Davis suggests that the carceral state is so difficult to dislodge because it is composed of a “set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards’ unions, and legislative and court agendas.” To move in a post-carceral direction, we must get beyond “prisonlike substitutes for the prison,” such as house arrest (Davis 2003, 107; 2005). Instead, we need a strategy that works at multiple levels, reducing the need for incarceration and responding to crime in a different manner. This would include several positive steps, such as “demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance” (Davis 2003, 107). Responses to criminal behavior would include drug treatment programs, for the affluent and poor alike, and the decriminalization and de-policing of drug and other nonviolent activity that does not merit detention as a response. In addition, restorative justice and reparation have the potential to break the seemingly untouchable link between crime and harsh punishment.16

Challenging the carceral state has two key aspects. The first is reformist, policy focused, and defined through the need to undo the destructive effects of nearly a half-century of the “war on crime” and the “war on drugs.” These two “wars,” with their attendant policies and discourses, have largely defined the way we think and act regarding crime and punishment. In a material sense, the policies defining these two “wars” are largely responsible for the massive boom in incarceration since the 1970s and 1980s. Reversing these destructive policies is the first step in challenging the US carceral state. The second aspect is distinct from the activism and legislative campaigns called for in the first step. It entails a rethinking of the discourses that prop up and are interwoven with the carceral state. The goal, as Marie Gottschalk has noted, is not to construct a slightly nicer carceral state, with shorter sentences, but to fundamentally rethink and rebuild our sociopolitical approach to crime and punishment.

In my view, it would be a terrible mistake to entirely dispense with the liberal justice system. The reforms enacted by Beccaria, Bentham, and others played a critical role in challenging and ultimately overthrowing the penal systems of feudal monarchy. They remain an essential resource that reminds us of the horrors of a system of punishment that is unaccountable, brutal, arbitrary, defined by public spectacle and terror, and able to crush the individual without recourse. Liberal
reformers are correct when they reject the cruel and (always) unnecessary infliction of torture and capital punishment. They are right to insist on protections for the individual. The next move is to push toward a more participatory, democratic, and community-based system of dealing with crime and punishment, one that foregoes the cruelties of torture and mass incarceration, and that replaces these forms of punishment, whenever possible, with drug treatment, reparation, restoration, and rehabilitation, as Davis suggests. Such an approach offers two strengths: it allows us to retain the key insights of the liberal justice tradition (abolition of physical cruelty, protection of the individual from arbitrary state power) while transcending its more troubling features and insisting that the system of mass incarceration inscribes new cruelties into the penal system, which may be just as harmful to the individuals involved as the system of sovereign monarchical power they replaced. Going beyond detention and deterrence, we can move toward community solutions built on reconciliation between parties, reparation for the harmed, and rehabilitation for the criminals.

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NOTES

1. For official government figures, see the Bureau of Justice Statistics report, at www.bjs.gov/content/pub/pdf/cpus12.pdf. The year 2012 marked the fourth straight year in which the national prison population declined. It is nevertheless alarming that roughly 3.2 percent of US adults are either incarcerated or under other forms of surveillance, “a rate of state supervision that is unprecedented in U.S. History” (Gottschalk 2006, 1–2). Moreover, the corollary of the carceral state is that “once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits” (Alexander 2010, 92). Although I do not specifically address the racialized element of the US criminal justice system, it is central to understanding how it functions. A substantial and growing body of literature exists that demonstrates the particularly destructive effects of the carceral state on urban African Americans and other minorities. See also Tonry (1995). For general reference, see Currie (1998) and Wright (1973). Gerstle (2001) offers a thoughtful history of the role of racial thinking in the American civic identity.

2. For instance, the penal code of 1810 in France prescribed prison as the primary form of punishment, which was more severe than fines but less so than death. During most of the seventeenth and eighteenth centuries, however, “imprisonment—and on this point many countries were in the same situation as France—had only a limited and marginal position in the system of penalties” (Foucault 1995, 114–118, and, more generally, Part Two, Chapter 2).
3. Michael Ignatieff (1978) explores this question in *A Just Measure of Pain*, which focuses primarily on English prison reformers and the contestation over implementing the reformer’s strict vision of a disciplined, well-run prison built around solitary confinement and moral reform of the prisoner. The history and argument presented by Ignatieff relates to, but is distinct from, my argument.

4. For a broad perspective on the development of modern sensibilities, see Elias (1939/1994). For more on how our modern sensibility to cruelty and punishment evolved and affected institutions of punishment, see Spierenburg (1984).

5. See Benjamin Barber’s (1984, 151) rough definition of strong democracy, in which “active citizens govern themselves directly … not necessarily at every level and in every instance, but frequently enough and in particular when basic policies are being decided and when significant power is deployed.” For an argument that mass incarceration is inconsistent with core American values, see Albert W. Dzur (2012).

6. There are obvious resonances between this claim and Foucault’s ideas. In particular, his diagnosis of the rise of disciplinary power as a form of power that produces docile subjects through surveillance and their internalized self-policing is relevant to my focus on liberal penal reform. The emergence of disciplinary power in the late eighteenth and early nineteenth century coincides with the birth of the prison as a disciplinary institution. I cannot deal directly with Foucault in this article, but his spirit animates it throughout. See, for instance, Michel Foucault (1980, 1995, 1999). For a Foucauldian look at the history of the US penal system, see also Thomas Dumm’s excellent *Democracy and Punishment* (1987). For alternative perspectives, see Pieter Spierenburg (1984) and Georg Rusche and Otto Kirchheimer (2003).

7. Indeed, Shklar contends that if one “puts moral cruelty first … one can readily adopt every one of Machiavelli’s cruel maxims.” I explore the distinctions between physical and moral cruelty below, but cannot critique Shklar’s (1984, 42) unfair reading of Machiavelli. See also Rorty (1998).

8. Writing before the era of the modern prison, Bentham did not have a sense of the ingenuity that would emerge in the effort to communicate with fellow inmates.

9. For an account that describes in detail those brief moments of violence, rage, and abuse, both among prisoners and at the hands of prison guards, see Santos (2006).

10. It could be argued that the supermax prison, which involves solitary confinement for 23 hours a day and uninterrupted surveillance, is the modern incarnation of Bentham’s Panopticon. See Rhodes (2004). With regard to supermax incarceration, a corrections officer told Rhodes, “There’s probably very few more negative places in this world. If nothing happened it was a great day.” See, in particular, Chapter 1 for further connections between maximum-security prisons and Bentham’s Panopticon.

11. The moral cruelties of the prison system engender a wide range of practices of resistance on the part of inmates, from violence directed at guards to illicit drug trafficking. An innovative form of resistance involves the use of urine and feces as a projectile directed at corrections officers. See Rhodes, Chapter 1. Such resistance may intensify as prisons increasingly become spaces for housing dangerous populations and abandon any pretense of rehabilitation. See Feeley and Simon (1992).

12. Shklar (1984, 36) notes that Bentham’s separate project for the design of a poorhouse was “a model of moral cruelty,” in which physical abuse would be eliminated, but the life of the poor within would be “prescribe[d] in the most minute detail.”

13. One concern with Nietzsche, which Shklar recognizes, is that he is sensitive to moral cruelty to the point that he often dismisses concern for physical cruelty altogether. See Nietzsche (1968, 508). For additional thoughts on judgment, moral responsibility, and retribution, see several chapters in Connolly (1999).

14. See Alexander (2010, 92), who estimates that there are currently 5.1 million Americans on probation and parole.
15. Future work would do well to return to Montaigne. His sensitivity to different forms of cruelty and his willingness to see “barbarity” in our own domestic practices could help to provide a foundation for a post-carceral and post-corporal approach to punishment.

16. Davis (2003, 112) insists on recognizing that “punishment does not follow from crime in the neat and logical sequence offered by discourses that insist on the justice of punishment.” Indeed, there is no reason why we cannot respond to crime, even when violent, in a radically different manner. Thus, Davis insists upon prying apart the snug connection between crime and punishment advocated by Beccaria, Bentham, and later, Hegel.

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