

# THE SPECTACLE OF SUFFERING

PIETER C. SPIERENBURG

---

Pieter C. Spierenburg reveals the origins of the criminal justice system through an investigation of the beginnings of state-enforced punishment. The feudal system in Western Europe provides the backdrop for what ultimately represents a shift away from personal vengeance as the primary impetus for punishment. Criminal behavior came to be viewed as a sin against the state, rather than a sin against another individual. As such, it became the state's responsibility to regulate the processing of offenders. Secondary to the rise of the nation-state as a precursor of state-enforced punishment is urbanization. Although urbanization may have provided an initial opportunity for greater public display of punishment that was rooted in general deterrence, it was ultimately the revulsion of the public that led to what Spierenburg calls the privatization of repression. Above all else, Spierenburg highlights the importance of considering the greater social context when analyzing major changes in a society's punishing mechanisms.

---

## THE EMERGENCE OF CRIMINAL JUSTICE

From the way in which I have defined repression, it is obvious that its evolution should be intimately connected with the development of the state. The practice of criminal justice was one of the means by which authorities, with or without success, attempted to keep the population in line. As the position of these authorities changed, the character of criminal justice changed. However, before we can speak of criminal justice in any society, at least a rudimentary state organization has to be present. A system of repression presupposes a minimal level of state formation. Differentiation of this system, moreover, also presupposes the rise of towns. This...is an attempt to trace the origins of preindustrial repression....It focuses on repression as a system of control, the emergence of which was a function of the rise of territorial principalities and of urbanization.

At the height of the feudal age in Western Europe the state hardly existed at all. Violent entrepreneurs were in constant competition; from his castle a baron would dominate the immediate surroundings and de facto recognize no higher authority. His domain may be called a unit of attack and defense but not a state. Essentially it comprised a network of ties of affiliation and bondage. But in the violent competition between the numerous chiefs of such networks the mechanism was imminent which would eventually lead to the emergence of states. The first units with the character of a state were the territorial principalities which appeared from the twelfth century onwards.

As it happens, the emergence of criminal justice also dates from the twelfth century. Several legal historians have studied the "birth of punishment" or "emergence of public penal law." The most detailed work is by P. W. A. Immink. This author also comes closest to a sociological-historical view

of the subject. He placed the origins of punishment in the context of changing relationships of freedom and dependence in feudal society. Thus he avoided presenting an analysis of legal texts alone, which can be very misleading especially for the period in question. From a sociological-historical perspective, the essence of criminal justice is a relationship of subordination. This was noted by Immink: "In common parlance the term 'punishment' is never used unless the person upon whom the penalty is inflicted is clearly subordinate to the one imposing the penal act." This is the crucial point. This element distinguishes punishment from vengeance and the feud, where the parties are equal. If there is no subordination, there is no punishment.

The earliest subordinates in Europe were slaves. In that agrarian society, from Germanic times up into the feudal period, freemen were not subject to a penal system, but unfree persons were. The lord of a manor exercised an almost absolute authority over his serfs. When the latter were beaten or put to death "or maybe even fined" for some illegal act, this can certainly be called punishment. The manorial penal system of those early ages belonged to the realm of custom and usually did not form part of written law. Therefore we do not know much about it. The Barbarian Codes (*Leges Barbarorum*) were meant for freemen. They only referred to unfree persons in cases where their actions could lead to a conflict between freemen.

Free persons, on the other hand, settled their conflicts personally. There were a few exceptions to this, even in Germanic times. In certain cases, if a member was held to have acted against the vital interests of the tribe, he could be expelled from the tribal community (branded a "wolf") or even killed. But on the whole, as there was no arbiter strong enough to impose his will, private individuals settled their own conflicts. A settlement could be reached through revenge or reconciliation. Vengeance and the feud were accepted forms of private retaliation, but they did not necessarily follow every injury. In a situation where violence is not

monopolized, private violence is potentially omnipresent but does not always manifest itself in practice. Notably, it can be bought off. Reconciliation through payment to the injured party was already known in Tacitus' time.

To the earliest powerful rulers who represented an embryonic public authority, encouragement of this custom was the obvious road to be taken if they wished to reduce private violence. This is in fact what the Barbarian Codes are all about. In every instance they fix the amount which can buy off vengeance. These sums are not fines in the modern sense, but indemnities. They were either meant as compensation when a person had been killed, wounded or assaulted (*wergeld*) or as a form of restitution when property had been stolen, destroyed or damaged. Among freemen this remained the dominant system well into the twelfth century.

Criminal justice, however, slowly developed alongside this system. Its evolution during the feudal period was construed by Immink as one argument against the thesis put forward by Viktor Achter. The latter had argued that punishment suddenly emerged in Languedoc in the middle of the twelfth century, from where it spread to the rest of Europe. Although Immink placed the definite breakthrough around the same time, he believed the evolution of punishment was inextricably linked with feudalism. The feudalization of Western Europe had brought about a fundamental change in the notion of freedom. This change eventually led to the emergence of criminal justice.

Before the feudal age the notion of freedom was closely connected to the allod. An allod should not be considered as a piece of property in the modern sense, but rather as an estate which is free from outside interference. Its occupant is completely his own master. His freedom implies a total independence from any worldly power and is similar to what later came to be called sovereignty. Hence the relationship of a freeman with the unfree persons subject to him, and over whom he exercises a right of punishment, is not one of

owner-owned but one of ruler-ruled. The development of the institution of vassalage slowly put an end to the notion of freedom based on the allod. The Frankish kings and their successors attached freemen to themselves in a relationship of lord and *fideles*. Hence the latter were no longer entirely independent. By the time the whole network of feudal ties had finally been established, the notion of freedom had been transformed. Freedom meant being bound directly to the king, or to be more precise, there were degrees of freedom depending on how direct the allegiance was.

The feudal transformation of the notion of freedom formed the basis of the emergence of a penal system applied to freemen. The king remained the only free person in the ancient allodial sense, the only sovereign. His reaction to a breach of faith by his vassal (*infidelitas*, felony), usually the imposition of death, can truly be called punishment. The king himself never had a *wergeld*, because no one was his equal. His application of punishment for *infidelitas* resembled the exercise of justice by a master over his serfs. When more and more illegal acts were defined as felonies, the emergence of a penal system with corporal and capital punishments applied to freemen became steadily more apparent.

The implication of Immink's analysis for the study of state formation processes is evident. Absence of a central authority is reflected in the prevalence of private vengeance, the feud or voluntary reconciliation. The development of criminal justice runs parallel to the emergence of slightly stronger rulers. Originally it is only practiced within the confines of a manor; later it is applied by the rulers of kingdoms and territories. But we do not have to accept every part of Immink's story. For one thing, in his description the evolution of criminal justice and the parallel decline of the feud appeared too much as an unilinear process. This follows partly from his criticism of Achter. The latter, for instance, saw the legal reforms of the Carolingian period as a precocious spurt in the direction of a breakthrough of a modern notion of punishment. This

would be in line with the fact that this period also witnessed a precocious sort of monopoly of authority. Achter considered the spurt as an isolated episode followed by centuries of silence. This may be too crude. Immink, however, with his conception of an ultimate continuity, seems to go too far in the other direction, playing down the unsettled character of the ninth and tenth centuries. These were certainly times when the vendetta was prevalent, despite whatever intentions legislators might have harbored. On the other hand, we should not overestimate the degree of monopolization of authority around AD 800. The Carolingian Empire and its successor kingdoms were no more than temporary sets of allegiances over a wide geographic area, held together by the personal prestige of an individual king or by a military threat from outside. From Roman times until the twelfth century Europe witnessed nothing approaching a state, but there were certainly spurts in that direction.

In the middle of the twelfth century the first territorial principalities made their appearance and a penal system applied to freemen was established. The symbiosis is evident. Criminal justice emerged because the territorial princes were the first rulers powerful enough to combat private vengeance to a certain degree. The church had already attempted to do so, but largely in vain. I leave aside the question of whether its representatives were motivated by ideological reasons or by the desire to protect ecclesiastical goods. In any case they needed the strong arm of secular powers in order to succeed. The *treuga Dei* only acquired some measure of effectiveness when it became the "country's peace." Two of the earliest regions to witness this development were Angevin England "which can also be seen as a territorial principality" and the duchy of Aquitaine.

Incidentally, the South of France is also the region where, according to Achter, the concept of punishment originated. It is interesting that he reached this conclusion even though he used quite different sources and from a different perspective. Achter considered the element of moral disapproval

as the essence of punishment. This notion was largely absent from Germanic law, which did not differentiate between accidents and intentional acts. If a felled tree accidentally killed a man the full *wergeld* still had to be paid. Immink criticized this view and it may be another point where his rejection is too radical. He indicated, in fact, how Achter's view can be integrated into an approach focusing on state-formation processes. For the private avenger redressing a personal wrong, the wickedness of the other party is so self-evident that it need not be stated. As long as the law merely attempts to encourage reconciliation, it is likewise indifferent to a moral appreciation of the acts which started the conflict. When territorial lords begin to administer punishments to persons who have not wronged them personally, their attitudes to the law change as well. Theorizing about the law increases. The beginnings of a distinction between civil and criminal cases become apparent. The latter are *iniquitates*, acts that are to be disapproved of morally and which put their author at the *misericordia* of his lord.

Thus it is understandable that a new emphasis on the moral reprehensibility of illegal acts also dates from the middle of the twelfth century. Indeed this period witnessed an early wave of moralization-individualization, connected to what medievalists have long been accustomed to call the Renaissance of the twelfth century. And yet we should not overestimate this spurt towards individualization, certainly not with regard to penal practice. Before the twelfth century there may have been even less concern for the motives and intentions of the perpetrators of illegal acts, but... the practice of criminal justice continued to focus on crimes and their impact on the community rather than on the criminal's personality and the intricacies of his guilt. Up into the nineteenth century repression was not primarily individualized.

There is another aspect of the transformation under discussion which merits attention. When a malefactor finds himself at the mercy (*misericordia*)

of a prince, the implication is that a religious notion has entered criminal justice. Mercy was an attribute of God, the ultimate judge. The relationship of all people with God had always been viewed as one of subordination. Hence God was indeed able to punish. Any wrong suffered, such as the loss of a combat, could be seen as a divine punishment, of which another man was merely the agent. Heavenly justice was never an automatic response. The Lord could be severe or show mercy. By analogy this line of thought was also applied to human justice practiced by a territorial lord.

Several authors discussed the "sacred quality" of preindustrial punishment and even considered it an explanatory factor for its character. According to this view, executions, especially capital ones, were a sort of sacrifice, an act of expiation. They reconciled the deity offended by the crime and restored the order of society sanctioned by heaven. This notion may have been part of the experience of executions, although there is little direct evidence for it. But it would certainly be incorrect to attribute an explanatory value to it as being in some way the essence of public punishment. For one thing, during and after the Middle Ages *every* social event also had a religious element. In the absence of a division between the sacred and the profane, religion pervaded life entirely. To note the sacred quality of executions in this context is actually redundant. If a religious view of the world has to "explain" public punishment in any way, it should do so in a more specific sense. But the evolution which gave rise to criminal justice hardly lends support to this view. Criminal justice arose out of changing relationships of freedom and dependence in the secular world. It was extended by powerful princes at the expense of vengeance and the feud. Ecclesiastics had indeed already advocated harsh corporal penalties in the tenth century. But they too favored these merely as alternatives to the vendetta. Their wishes were realized by the territorial princes of the twelfth century. Only then, when powerful lords applied a new

form of justice, did notions of mercy, guilt and moral reprehensibility enter the picture; rather as a consequence than as a cause of the transformation. That clergymen should figure in the drama on the scaffold during the next centuries is only natural. As will be argued in this study, the role of the church remained largely instrumental in a spectacle which primarily served the purposes of the secular authorities.

The transformation during the twelfth century was only a small beginning. First, private vengeance had been pushed back to a certain degree, but continued to be practiced throughout the later Middle Ages. Second, generally the various courts were not in a very powerful position. Often they acted merely as mediators facilitating the reconciliation of the parties involved. A resolute practice of criminal justice depended as before on a certain measure of state power and levels of state power continued to fluctuate. But state formation is not the only process to which the further development of criminal justice was linked. A new factor entered the stage: urbanization. During the later Middle Ages the peculiar conditions prevailing in towns increasingly made their mark on the practice of justice. This situation was not equally marked everywhere. In a country such as France alterations in criminal procedure largely ran parallel with the growth of royal power. In the Netherlands, on the other hand, the towns were the major agents of change.

During the early stages of urban development the social context actually formed a counter-influence to the establishment of criminal justice. Originally, relationships of subordination did not prevail in cities. The charters of most towns recognized the inhabitants as free citizens. It has long been commonplace in historiography to note that the urban presence was encapsulated into feudal society. The body of citizens became the vassal, as it were, of the lord of the territory. The town was often a relatively independent corporation, a *coniuratio*. *Vis-à-vis* each other the citizens were equal. The councils ruling these cities were not very powerful.

There were hardly any authorities in a real sense, who could impose their will and control events.

This situation left plenty of room for private violence. As the degree of pacification around the towns was still relatively low, so was the degree of internal pacification. To be sure, the vendetta might be officially forbidden. In the Northern Netherlands the prohibition was legitimized by the notion of a quasi-lineage: the citizens were held to be mutual relatives and a feud cannot arise among relatives. But the fiction of lineage could never prevent actual feuds from bursting out, as the prohibitions, reiterated well into the fifteenth century, suggest. Similarly, proclamations ordering a truce between parties were frequent until the middle of the sixteenth century. An early seventeenth-century commentator gives a good impression of the situation. Speaking of the 1390s, he denounces the lawlessness of the age:

The people were still rough and wild in this time because of their newly won freedom and practically everyone acted as he pleased. And for that reason the court had neither the esteem nor the power which it ought to have in a well-founded commonwealth. This appears from the homicides, fights and wanton acts which occurred daily and also from the old sentences, in which one sees with what kind of timidity the Gentlemen judged in such cases: for they bargained first and took an oath from the criminals that they would not do *schout*, *schepenen* and burgomasters harm because of whatever sentence they would pass against them. And the most severe, almost, which they imposed on someone, was a banishment or that the criminals would make a pilgrimage here or there before they came in [to town] again, or that they would give the city money for three or four thousand stones. They also often licensed one or the other, if he was under attack from his party, that he might defend himself with impunity, even if he killed the other in doing so. These are things which have no place in cities where the law is in its proper position of power.

Apart from the fact that this situation was considered abnormal in the seventeenth century, we

note an acceptance of forms of private violence and the predominance of a reconciliatory stand instead of serious punishment. Towards the end of the fifteenth century, however, this began to change. The ruling elites finally became real authorities. Patriciates emerged everywhere, constituting a socially superior group. The towns became increasingly stratified. The patrician courts could act as superiors notably towards the lower and lower-middle class citizens. In the towns of the Netherlands this development is clearly reflected in their ways of dealing with criminal cases. For a long time the main business of the courts had been to mediate and register private reconciliations. Around 1500 "corrections" gradually outnumbered reconciliations. The former were measures expressing a justice from above and often consisted of corporal punishment.

Another development in criminal law which took place during the same period, was even more crucial. A new procedure in criminal trials, the inquisitorial, gradually superseded the older, accusatory procedure. This change occurred throughout Continental Europe, but not in England. The accusatory trial, when nothing else existed, was geared to a system of marginal justice. Where the inquisitorial trial prevailed, a justice from above had been established more firmly.

The contrast between the two procedures is a familiar item in legal history. Here it suffices to review briefly the relevant characteristics. The inquisitorial procedure had been developed in ecclesiastical law, and was perfected by the institution which took its name from it. From the middle of the thirteenth century onwards it entered into secular law. Generally speaking, the rules of the accusatory trial favored the accused, while the rules of the inquisitorial one favored those bent on condemning him. The former procedure was much concerned with the preservation of equality between the parties. Thus if the accused was imprisoned during the trial "which was not usually the case" the accuser was often imprisoned as well.

Moreover, if the latter could not prove his case, he might be subjected to the *talion*: the same penalty which the former would have received if he had been convicted. While the proceedings in the older trial were carried out in the open, the newer one was conducted in secrecy. Publicity was only sought after the verdict had been reached.

The most important element of the inquisitorial procedure, however, was the possibility of prosecution *ex officio*. The adage of the older procedure, "no plaintiff, no judge," lost its validity. If it wished to, the court could take the initiative and start an investigation (*inquisitio*). Its officials would collect denunciations and then arrest a suspect, if they could lay hands on him. The court's prosecutor acted as plaintiff. Thus an active prosecution policy was possible for the first time. In the trial the authorities and the accused faced each other and the power distribution between the two was unequal, favoring the former. Under the accusatory procedure the authorities had hardly been more than bystanders. Consequently the rise of the newer form of trial meant a further spread of a system of justice from above.

This is also implicit in the final element to be noted. The inquisitorial procedure brought the introduction of torture. An accused who persisted in denial, yet was heavily suspect, could be subjected to a "sharper examination." It is evident that the principle of equality between parties under the accusatory procedure would have been incompatible with the practice of torture. Torture was not unknown in Europe before the thirteenth century. It had long been a common feature of the administration of justice by a lord over his serfs. Under the inquisitorial procedure torture could for the first time also be applied to free persons. The parallel with the transformation discussed above is obvious.

The retreat of the accusatory before the inquisitorial procedure did not occur at the same pace everywhere. That the older one was originally more common is reflected in the names of "ordinary" and "extraordinary" procedure which the two forms



acquired and often retained throughout the *ancien regime*. The gradual establishment of the primacy of the latter took place between the middle of the thirteenth and the beginning of the sixteenth century. Its use in France by Philip the Fair against the Templars paved the way for its further spread. Prosecution *ex officio* increased in importance from the fourteenth to the sixteenth centuries. The growth of royal power was the main force behind it. In the Netherlands, North and South, the cities formed the most important theater. The formation of patrician elites facilitated the shift. But here too the central authorities confirmed it. In 1570, when the Dutch Revolt was already in the process of breaking out, Philip II issued his criminal ordinances, which clearly favored the inquisitorial trial.

In the Dutch towns non-residents were the first to be tried according to the inquisitorial procedure. As outsiders they were more easily subjected to justice from above. Citizens occasionally put up resistance to it, in Malines, for example. In France it was the nobles of Burgundy, Champagne and Artois who protested. Louis X granted them privileges in 1315 which implied a suspension of inquisitorial proceedings. In the end they were unsuccessful. The forces of centralization and urbanization favored the development of a more rigorous penal system.

England forms a partial exception. Criminal procedure in that country remained largely accusatory throughout the preindustrial period. Nevertheless, essentially these developments can be observed there too, and in the end processes of pacification and centralization brought about a firmer establishment of criminal justice. Originally there had been plenty of room for private violence, just as on the Continent. An outlaw or "wolf," for instance, could be captured by any man and be slain if he resisted. This right was abrogated in 1329, but as late as 1397 a group of men who had arrested and beheaded an outlawed felon, were pardoned because they had thought it was lawful. Around 1400 it was not uncommon for justices to be threatened with violence by the parties in a lawsuit. The power of the

courts went up and down with the fluctuations in the power of a central authority. It was the Tudors, finally, who gradually established a monopoly of violence over most of England. Consequently, except in border areas, the feud definitely gave way to litigation. The available literature on crime and justice in early modern England suggests that a system of prosecution of serious crimes, physical punishment and exemplary repression prevailed there, which was basically similar to that on the Continent.

Thus, the emergence and stabilization of criminal justice, a process going on from the late twelfth until the early sixteenth centuries, meant the disappearance of private vengeance. Ultimately vengeance was transferred from the victims and their relatives to the state. Whereas formerly a man would kill his brother's murderer or beat up the thief he caught in his house, these people were now killed or flogged by the authorities. Legal texts from late medieval Germany sometimes explicitly refer to the punishments imposed by the authorities as "vengeance." Serious illegal acts, which up until then had been dealt with in the sphere of revenge and reconciliation, were redefined as being directed not only against the victims but also against the state. In this process the inquisitorial procedure was the main tool. Its increase in frequency in fourteenth-century Venice, for instance, went hand in hand with the conquest of the vendetta. Private violence by members of the community coming to the assistance of a victim was similarly pushed back. In the Netherlands a thief caught redhanded could be arrested by anyone. His captors were obliged to hand him over to the court, but they might seriously harass him and were often excused if they killed him. This "right" retreated too before the increase of prosecution *ex officio*.

It would be incorrect to assume that the state's arm was all-embracing during the early modern period. An active prosecution policy remained largely confined to the more serious crimes. Private vengeance had been conquered, but reconciliation

survived in cases of petty theft and minor violence. The mediators were no longer the courts but prestigious members of local communities. The infra-judicial resolution of conflicts prevailed beneath the surface of justice from above. Historians have only recently come to realize this and the phenomenon has only been studied in detail in France.

This "subterranean stream" was kept in motion from two sides. The authorities, though able to take the initiative, restricted their efforts to specific cases. Prosecution policy was often concentrated on vagrants and other notorious groups. The near-absence of a professional police force further limited the court's scope. Hence many petty offenders were left undisturbed. The attitude of local residents also contributed to this situation. Victims of thefts and acts of violence did not often take recourse to the judiciary. One reason was that a trial might be too costly for the potential plaintiff. Another reason was that numerous conflicts arising from violent exchanges or disputes over property were not viewed in terms of crime and the court was not considered the most appropriate place to settle them. Mediation was sought from non-judicial arbiters. This form of infra-judicial reconciliation survived until the end of the *ancien regime*. Thus preindustrial repression was never an automatic response to all sorts of illegal acts.

Relics of private vengeance can also be observed in the early modern period. This is attested by the public's reaction to property offenders in Republican Amsterdam. The archival sources regularly make mention of a phenomenon called *maling*. From it a picture emerges of communal solidarity against thieves. Events always followed a similar pattern. A person in the street might notice that his pocket was picked or he might be chasing after someone who had intruded into his house. Soon bystanders rushed to help him and the thief was surrounded by a hostile crowd. The people harassed and beat him and forced him to surrender the stolen goods. The thief was then usually thrown into a canal. Servants of justice were often said to have saved his life by

arresting him, which meant getting him out of the hands of the crowd or out of the water. Memories of the medieval treatment of thieves caught red-handed were apparently still alive. The authorities tolerated it but did not recognize a form of popular justice. In 1718 a man was condemned for throwing stones at servants of justice when they were busy saving a woman, who was in the *maling*, from her assailants. Comparable forms of self-help by the community against thieves existed in eighteenth-century Languedoc.

... [T]he emergence of criminal justice was not a function of changing sensibilities. These only started to play a role later. If corporal and capital penalties increased in frequency from the twelfth to the sixteenth centuries, this certainly cannot be taken as reflecting an increased taste for the sight of violence and suffering. It was primarily a consequence of the growth and stabilization of a system of criminal justice. Conversely, whatever resistance may have been expressed against the transformation... did not spring from an abhorrence of violent dealings as such. Physical punishment was simply introduced into a world which was accustomed to the infliction of physical injury and suffering. In that sense it was not an alien element. The authorities took over the practice of vengeance from private individuals. As private retaliation had often been violent, so was the penal system adopted by the authorities. Similarly, as the first had always been a public affair, so was the second. Attitudes to violence remained basically the same. Huizinga demonstrated the medieval acceptance of violence more than sixty years ago and recent research confirms his view. Thus "to mention only a few" Barbara Hanawalt gets the "impression of a society in which men were quick to give insult and to retaliate with physical attack." Norman Cohn recalls the violent zeal with which self-appointed hunters of heretics proceeded, such as the two who managed to reverse God's dictum at the destruction of Sodom and Gomorrah: "We would gladly burn a hundred, if just one among them were guilty."



It is understandable that in such a climate of acceptance of violence no particular sensitivity prevailed towards the sufferings of convicts. This arose only later. Urban and territorial rulers had to ensure that people accepted the establishment of criminal justice. But once they had accomplished that, they did not encounter psychological barriers against the full deployment of a penal system based on open physical treatment of delinquents. By the middle of the sixteenth century a more or less stable repression had been established in most of Western Europe. It did not exclusively consist of exemplary physical punishments. Banishment was important as well and confinement would soon appear on the scene. From that time on it was possible for changing sensibilities within society to affect the modes of repression. From that time too the development of states and the ensuing pacification produced domesticated elites and changed mentalities. These would eventually lead to a transformation of repression....

#### STATE FORMATION AND MODES OF REPRESSION

Modes of repression belong to the history of mentalities. They reflect the elites' willingness to deal in one way or another with persons exhibiting undesirable behavior. The sort of repression which is advocated or tolerated in a particular society is an indication of the psychic make-up of its members. Publicity and the infliction of physical suffering were the two main elements of the penal system of the *ancien regime*. They should be understood as part of the mental atmosphere prevailing in preindustrial Western Europe. Many events in social life, from childbirth to dying, had a more open character, while with regard to physical suffering in general, a greater lack of concern prevailed than is current today. This mentality was never static; it began to crumble from the seventeenth century onwards. Simultaneously, repression was changed too.

In this study the routine character of seventeenth- and eighteenth-century executions has been

demonstrated. From about 1600 the seeds of the later transformation of repression were manifest. The two elements, publicity and suffering, slowly retreated. The disappearance of most forms of mutilation of non-capital convicts constituted the clearest example. An equally important expression of the retreat was the spread of houses of correction; a theme which could not be discussed here. A slight uneasiness about executions among the elites in the second half of the seventeenth century has also been shown. These developments all anticipated the more fundamental change in sensibilities which set in after the middle of the eighteenth century: an acceleration which led to the privatization of repression. The acceleration after the middle of the eighteenth century had a parallel in other areas of the history of mentalities. Processes of privatization are notably reflected in the rise of the domesticated nuclear family.

I am explaining the evolution of modes of repression with reference to processes of state formation. The latter do not of course belong to the history of mentalities; we enter the field of human organization. State formation and such events as the rise and fall of social strata comprise a separate area of societal development.... Norbert Elias offered a model for the interdependence of developments in the two fields. I indicate the revisions to be made in the model: notably the shift in emphasis from single states to the rise of a European network of states. In early modern Europe this network extended its influence to areas, such as the Dutch Republic, which lagged behind in centralization. There too a relative pacification produced domesticated elites. On the other hand, the stability of the early modern states remained vulnerable, and this holds true for both patrician republics and absolute monarchies. Ultimately, however, the early modern state was transformed almost everywhere into the nation-state; in Britain, France and the Netherlands among others. These developments provide the key for understanding the evolution of repression in Europe.

This study has continually emphasized the functions which public executions had for the authorities....[L]ate medieval and early modern executions served especially to underline the power of the state. They were meant to be an exemplary manifestation of this power, precisely because it was not yet entirely taken for granted. This explains the two basic elements of the preindustrial penal system. Publicity was needed because the magistrates' power to punish had to be made concretely visible: hence the ceremony, the display of corpses and the refusal to refrain from executions in the tense situation after riots. That public penalties usually involved the infliction of physical suffering is in tune with their function as a manifestation of the power of the magistrates. Physical punishment achieved a very direct sort of exemplarity. The authorities held a monopoly of violence and showed this by actually using it. The spectators, who lived in a relatively pacified state but did not yet harbor a modern attitude towards the practice of violence, understood this. Public executions represented *par excellence* that function of punishment which later came to be called "general prevention."

So far the relationship has been demonstrated largely in a static context: It can be further clarified if we consider the dynamics....[T]he beginnings of criminal justice were intertwined with the beginnings of state formation and, to a lesser extent, with urbanization. Gradually urban and territorial authorities conquered the vendetta and limited private reconciliation. They started to protect their servant, the executioner, and attempted "though unsuccessfully" to raise his status. The magistrates became the agents who exercised justice.

Public executions first served to seal the transfer of vengeance from private persons to the state. The justice which the authorities displayed served to bolster up their precarious position. They were preoccupied with the maintenance of a highly unstable and geographically limited monopoly of violence well into the sixteenth century. When these monopolies became slightly more stable and crystallized

into dynastic states or oligarchic republics uniting a larger area, new considerations came to the fore. Control of the monopoly had to be defended against real or imagined incursions. Bandits and armed vagabonds were still omnipresent. Maintaining the dominance over lower strata and marginal groups was another pressing concern.

Thus, the display of physical punishment as a manifestation of authority was still considered indispensable in the early modern period, because the existing states were still relatively unstable in comparison to later times. In other words, the spectacle of suffering was to survive until a certain degree of stability had been reached. The spectacle was part of the *raison d'état*. I note this in connection with the penalty of sword over head for semi-homicide in the Netherlands. The peace of the community stood more centrally in dealing with crime than today. Hence the existence of a category such as "half guilty," which would be inconceivable in modern criminal law. Similar considerations applied to torture. In the second half of the eighteenth century, when opinions *pro* and *contra* were both expressed, this becomes eminently clear. The reformers, placing an individual person at the center of their considerations, argued that he could be either guilty or innocent. It made torture unnecessary since innocent persons should not be hurt and those found guilty should simply receive their punishment. The defenders of torture argued from a different point of view. They stuck to an intermediate category of serious suspicion. The heavily suspect were dangerous to the community, so that it was lawful to subject them to torture. This argument is based on the *raison d'état*, where the security of the community takes precedence.

The relative instability was not the sole characteristic of early modern states that explains the nature of repression. A second one, also inherited from the later Middle Ages, was equally important. It is the personal element in wielding authority.... In the later Middle Ages the preservation of authority was often directly dependent on the person of

the ruler. This was illustrated by urban ordinances which put a higher penalty on acts of violence if committed when the lord was in town. In the early modern period this personal element was not as outspoken as it had been before, but it continued to make its mark on the character of the state. A crime was a breach of the king's peace. Public executions constituted the revenge of the offended sovereign.

The personal element should not be viewed as referring exclusively to the king or sovereign. If that were the case, the fact that public executions in countries ruled by patrician elites "such as the Dutch Republic and eighteenth-century England" did not differ significantly from those in France and in German principalities, would be inexplicable. In France the state meant the king and his representatives; judges in the royal courts, for instance. In the Netherlands the state meant the gentlemen assembled in The Hague, the Prince of Orange or the burgomasters of Amsterdam. Foucault's image of physical punishment as the king's branding-mark is relatively well known. But the marks usually represented the jurisdiction. The symbol was equally forceful in a patrician republic. The reaction to the removal of a body from Amsterdam's gallows field... is revealing. The magistrates considered such a body as the property of the city and saw the removal as a theft. The inhabitants of urban and rural communities, also in dynastic states, must have associated authority—perhaps even in the first place—with local magistrates. The conspicuous presence of these magistrates at executions sealed the relationship.

These observations, finally, bring a solution to the problem of the disappearance of public executions. They suggest that a transformation of the state constitutes the explanatory factor. Indeed other transformations are less likely candidates. It would be futile, for instance, to relate the change to industrialization. In many countries the privatization of repression preceded the breakthrough of an industrial society. This chronology is evident in the case of the Netherlands. In England, on the other

hand, public executions were still a common spectacle when industrialism was already fully developed. The situation produced hybrid combinations of modern transport and traditional punishment, especially in the larger cities. For a hanging in Liverpool the railway company advertised special trains ("parties of pleasure"), departing from the manufacturing towns. The chronology of industrialization varied from country to country, while the retreat of public executions took place almost everywhere between about 1770 and about 1870. Similarly, the transition from the early modern to the nation-state also occurred in most Western European countries in this period.

Thus, the closing of the curtains can be explained with reference to state formation processes as well. We may schematically divide the inherent transformation of sensibilities into two phases. The first comprised the emergence of an aversion to the sight of physical punishment and a consequent criticism of the penal system among certain groups from the aristocracy and the bourgeoisie. This aversion became manifest in the late eighteenth century and was a result of processes of conscience formation. The relative pacification reached in the early modern states cleared the way for the appearance of domesticated elites. The psychic changes which they underwent first found an expression in a refinement of manners and restraints in social intercourse. But the slight sensitivity to public justice that was already manifest before 1700 prefigured later developments. Originally, psychic controls were largely confined to a context of one's own group. Emotions and aggressive impulses were hardly restrained with regard to inferior classes. This situation altered gradually. In the course of the early modern period mutual dependence between social groups increased. Consequently, the context of psychic controls widened. Once more I should note the importance of the identification aspect: an increase in mutual identification between social groups took place. This increase certainly had its setbacks.... [T]he Amsterdam magistrates became "within the

confines of the general standard of the period" slightly harsher towards delinquents between 1650 and 1750 due to their increasing social distance from the classes they ruled. This can also be understood as a temporary decrease in identification of rulers with the ruled. But in the long run this identification grew stronger. By the end of the eighteenth century an unknown number of individuals among the elites had reached a new stage and identified to a certain degree with convicts on the scaffold. These delicate persons disliked the sight of physical suffering: even that of the guilty. The first phase of the transformation of sensibilities had set in.

This first phase, so it appeared, resulted from developments that took place within the context of the early modern state. It did not immediately produce a major reform of the penal system. Two ancient features of repression disappeared though: torture and exposure of corpses. Abolition of the latter custom was often part of revolutionary measures. The gallows field symbolized a monopoly of justice particularly within an urban or regional context. The image of the individual city or county as a relatively independent entity had eroded during the seventeenth and eighteenth centuries. The final blow was long overdue. It came everywhere as a direct consequence of the downfall of the *ancien regime*.

The early modern state, however, did not disappear overnight in the Revolutionary period. The final establishment of the nation-state in Western Europe took most of the nineteenth century. The second phase of the transformation of sensibilities set in parallel to it. Repugnance to the sight of physical punishment spread and intensified. In the end the "political conclusion" was drawn and public executions were abolished. The privatization of repression had been completed. It could be completed because the nation-state lacked the two essential elements of which public executions had been a function. The nation-state, because of closer integration of geographic areas and wider participation of social groups, was much more stable than

the early modern state. And the liberal/bourgeois regimes, with their increasingly bureaucratized agencies, had a much more impersonal character. Hence the later nineteenth century witnessed more impersonal and less visible modes of repression. Public executions were not only felt to be distasteful; they were no longer necessary. In its internal affairs the nation-state could largely do without the *raison d'état*. Beccaria had anticipated the transformation a century earlier. His often-quoted saying that effective prevention of crime depends on the certainty of being caught rather than on the severity of punishment was actually a plea for a stronger state, and in particular for a police force. This was realized in the nation-state. Consequently the authorities could afford to show a milder and more liberal face.

Once more it should be emphasized that absolutes do not exist. Even the privatized repression which emerged in the course of the nineteenth century needed a minimum of exemplarity. We find it expressed, for instance, in the location of prisons on a conspicuous spot where a road or railway entered a town. In an indirect way punishment remained public. L. O. Pike, writing in 1876, reminded his readers that a secondhand impression of a whipping indoors was occasionally brought home to the public by the press. Indirect knowledge of the death penalty, executed within prison walls, remained alive.

National variations in the chronology of the disappearance of public executions must be related to national singularities. The relative importance of the two elements, stability and impersonal rule, may also have varied. In England, for instance, the first half of the nineteenth century was the period of the great public order panic. Thereafter only occasional outbursts of fear occurred and a relative orderliness prevailed. No doubt this situation made the completion of the privatization of repression easier. The kingdom of the Netherlands, on the other hand, was relatively peaceful. The old patrician elites, however, largely dominated the scene until the middle of the nineteenth

century. Shortly thereafter the abolition of public executions was a fact. Around the same time the system of public order maintenance was also depersonalized and acquired a more bureaucratic character. These remarks about the specifics of the transformation are of a hypothetical nature and call for detailed research. The continuation of public guillotining in France until 1939 likewise needs a separate explanation.

The fact that the completion of the privatization of repression took about two-thirds of the nineteenth century in most Western European countries adds up to a critique of Foucault's views. He pictures early nineteenth-century imprisonment as suddenly and almost totally replacing a penal system directed at the display of the human body. The new penal system, and especially solitary confinement, was also directed at the mind. It is true that a widespread enthusiasm for "moral treatment" prevailed in the first half of the nineteenth century. But the penitentiary cannot be considered as the successor to public executions. The observations of the present study make the conclusion inescapable: classical nineteenth-century imprisonment represented an experimental phase contemporary to the last days of public executions. Several authors emphasize that the middle of the nineteenth century was the heyday of the penitentiary and solitary confinement, after which the enthusiasm declined. Of course executions were less frequent at the time, but this is not relevant to the argument. From a quantitative viewpoint they had always been in the minority, though they were the pearl in the crown of repression. In the course of the nineteenth century public physical punishment was increasingly questioned. This coincided with experiments in new penal methods such as solitary confinement. The experiments were discontinued and public executions disappeared.

Routine imprisonment succeeded "with capital punishment indoors for a few heinous offenses" to the top of the penal system.

Modern imprisonment would need another story. The penal system of today, however, bears the mark of the developments that gave rise to it. On the one hand, it has retained its ancient characteristics to a certain degree. Everyone still has to realize that punishment exists, and this is the essence of the notion of general prevention. And a penalty still involves, in one way or another, the infliction of injury. Feelings of sensitivity, on the other hand, did not vanish after their appearance in the late eighteenth century. Time and again those concerned with the condemned have looked inside prisons and told the public the painful story. The result is a permanent tension. Every modern Western society witnesses the conflict between a perceived necessity of punishment and an uneasiness at its practice. Perhaps this remains inevitable, unless we find a way to do without repression entirely.

#### STUDY QUESTIONS

1. How did relations among the governing and the governed change between the Germanic and the feudal periods?
2. During this time period, how did inquisitorial procedures change power relations among individuals and between individuals and the state?
3. What purpose did repression, especially caused by the spectacle of public physical suffering, serve in the early modern states?
4. Exactly how did the transition from an early modern to a nation-state transform sensibilities and make the spectacle of suffering unnecessary?