Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)
15(3):320-340, setembro-dezembro 2023
Unisinos - doi: 10.4013/rechtd.2023.153.01

Democratic punishment: Alexis de Tocqueville's writings on the prison system *

Punição democrática: os escritos de Alexis de Tocqueville sobre o sistema carcerário

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Abstract

The essay deals with Alexis de Tocqueville's writings on the prison system, paying special attention to *Le système pénitentiaire aux Etats-Unis et son application en France.* These writings have been overlooked for a long time and are still disregarded by many readers of Tocqueville. I instead argue that they should be taken into consideration, since they offer a significant point of view on Tocqueville's political thought, revealing how, paradoxically, the "democratic prison" has been organized as the reverse of democracy.

Keywords: Toqueville, prision, democracy.

Resumo

O ensaio trata dos escritos de Alexis de Tocqueville sobre o sistema prisional, dando atenção especial a *Le système pénitentiaire aux Etats-Unis et son application en France*. Esses escritos foram negligenciados por muito tempo e ainda são desconsiderados por muitos leitores de Tocqueville. Em vez disso, defendo que eles devem ser levados em consideração, pois oferecem um ponto de vista significativo sobre o pensamento político de Tocqueville, revelando como, paradoxalmente, a "prisão democrática" foi organizada como o reverso da democracia.

Palavras-chave: Toqueville, prisão, democracia.

* This essay is an English translation of Lucia Re. 2023. “Tocqueville e il sistema penitenziario”. *Suite française*, vol. 2023, pp. 177-202. The author is grateful to the editors of the journal for authorizing it.

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A neglected "brother" of *La démocratie en Amérique*: *Le système pénitentiaire aux Etats-Unis et son application en France*

De la démocratie en Amérique[2] is not the only work Tocqueville wrote upon his return from his trip to the United States. In fact, the French Ministry of the Interior had commissioned him, along with Gustave de Beaumont, to make a sojourn in North America to carry out a survey of the country's prisons. When, in 1835, he published the first volume of *La démocratie*, Tocqueville was thus already known as the co-author of *Le système pénitentiaire aux Etats-Unis et son application en France*[3] , a work translated into several languages[4]. Yet, this inquiry has long been forgotten by most scholars and, even today, is ignored or underestimated by many, despite the intense activity of interpretation that Tocqueville's work has undergone over nearly two centuries.

In comparison to the vast secondary literature on Tocquevillian political thought, there are in fact few studies that have dealt specifically with the *Système pénitentiare* and, more generally, with Tocqueville's philosophy of punishment. The majority of these, moreover, are recent. In the Italian academia, only Francesco Gallino (2020) has devoted a monograph to this topic[5]. In the English-language literature, of note is a study entitled *Tocqueville's Moderate Penal Reform* by Emily Katherine Ferkaluk (2018), an author who also translated the *Système pénitentiaire* into English in an edition published in the same series (Beaumont and Tocqueville, 2018). While offering an analytical reconstruction of the *Système pénitentiaire* and its various editions, the book does not, however, go so far as to place Tocqueville's penitentiary philosophy in relation to his major works[6].

Attention to writings on the prison system has been paid by a number of authors who have dealt with Tocqueville's social thought[7]. Among the few articles specifically devoted to the topic in English are Roger Boesche's *The Prison: Tocqueville's Model of Despotism* (1980); Joel Schwartz's *The Penitentiary and Perfectibility in Tocqueville* (1985) and, more recently, Richard Avramenko and Robert Gingerich's *Democratic Dystopia: Tocqueville and the American Penitentiary System* (2014), which, however, largely echoes Boesche's arguments[8].

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[2] As is well known, the first volume of *De la démocratie en Amérique*, devoted to U.S. institutions, was published in 1835, while the second, dealing with the culture and customs of Americans, was published in 1840. In this essay both will be referred to as *La démocratie*.

[3] Later cited as *Système pénitentiare* (cf. Tocqueville, 1951-1998, t. IV; for a recent English edition cf. Beaumont and Tocqueville, 2018).

[4] The 1833 edition was translated into English and published in both England and the United States. There was also a German edition. A Portuguese edition, on the other hand, is announced in the notice placed by the publisher before the third French edition, but no trace of it has been found. The *Système pénitentiare* finally had a Belgian edition in 1837. For English language quotations in this text I will refer to translation made by Francis Lieber in 1833 (Beaumont and Tocqueville, 1833).

[5] Among the essays on the subject in Italian, in addition to Re, 2002, which the present essay takes up and develops, one may recall Noto, 2011.

[6] Beginning with Tocqueville's expressed hostility toward penal colonies, the author rather attempts a comparison with his positions on the colonization of Algeria, showing, however, a less accurate knowledge of both his writings and his political action on the subject.

[7] In addition to Drescher, 1968, see Drolet, 2003, which takes up and develops Drescher's analysis. See also Swedberg, 2009.

[8] References to the Beaumont and Tocqueville Report are also found in Cary, 1958 and in Dumm, 1987. A brief review is Barnes,1966.

In French, in addition to the short article by Alain Peyrefitte, *Tocqueville et les illusions pénitentiaires* (1985-1986), which places Tocqueville among the theorists of a "realist" punishment, contrary to reformist and abolitionist illusions, with a clear reference to the political debate of the Eighties, one can mention the essays by Antoine Leca, *Criminologie et politique: l'exemple de Tocqueville* (1989), which focuses on Tocqueville's idea of punishment as an instrument of retribution and incapacitation of the offender, and Éric Keslassy, *Tocqueville et l'"économie pénitentiaire*" (2010). The latter retraces some passages from the *Système pénitentiaire* and other penitentiary writings, paying particular attention to the economic arguments employed by Tocqueville to support the reform of the French prison system. Finally, Jean-Louis Benoît devoted a chapter of his study on *Tocqueville moraliste* (2004, ch. 4) to the penitentiary.

Among the many biographies to have paid attention to Tocqueville's reflection on the prison are the one published by Umberto Coldagelli in 2005 and the more recent one by Olivier Zunz (2022), which traces, in chronological order, based on his writings and correspondence, Tocqueville's activities as an expert on the prison[9].

These are texts, of different nature and quality, which I will take into account in the remainder of this analysis, while proposing a different reading of Tocqueville's penitentiary thought and its relationship to his political thought. I believe, however, that first it is worth questioning, as Michelle Perrot has done in her *Introduction* to tome IV of the *Oeuvres Complètes*, why the *Système pénitentiaire* and, more generally, Tocqueville's writings on the prison (1951-1998)[10], have been the subject of a long oblivion[11] and are still ignored or undervalued by many scholars today.

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[9] Also of note is Sheldon Wolin's reflection (2001, especially ch. XX).

[10] The first volume of tome IV reproduces:
1) the *Note sur le système pénitentiaire et sur la mission confiée par M. le Ministre de l'intérieur à MM. Gustave de Beaumont et Alexis de Tocqueville*, a rewrite of the *Mémoire* that Beaumont and Tocqueville addressed to the Minister of the Interior requesting to be allowed to conduct the inquiry in U.S. prisons;
2) the third edition of *Du système pénitentiaire aux Etats-Unis et de son application en France*, which also included the *Rapport fait par M. de Tocqueville au nom de la commission chargée d'examiner le projet de loi sur les prisons (séance du 5 juillet 1843)*;
3) the introduction to the second edition;
4) the *Quelques notes du traducteur allemand, le docteur Julius*, which had been published along with the second edition of the *Système pénitentiaire*;
5) the *Passages extraits textuellement des revues et journaux français qui ont examiné l'ouvrage des MM. G. de Beaumont et A. de Tocqueville*, also appended to the second edition of 1836;
6) the account of his visit to the Maison centrale de Poissy on September 26, 1830: Tocqueville's first entry into a prison;
7) the letter sent by M. Charles Lucas to Tocqueville and Beaumont in March 1831, just before they left for the United States;
8) the account of Tocqueville's visit to the Roquette prison on August 7, 1832, which he made while writing the *Système pénitentiaire*;
9) the account of the conversation with the Minister of the Interior in Paris, dated between November 24 and 26, 1835;
10) the articles written by Beaumont in 1843, in controversy with the newspaper *Le Siècle*;
11) Beaumont's speeches at the Brussels Prison Congress in 1847.
The second volume of tome IV is composed as follows:
1) *Lettres d'Amérique sur le système pénitentiaire*: drafts of letters on the penitentiary system that Tocqueville would write from the United States to Le Peletier d'Aunay and the Minister of the Interior;
2) *Voyages pénitentiaires de 1832*: accounts of Tocqueville's missions to a number of penal institutions, both in France and Switzerland, during 1832;
3) *Ecrits pénitentiaires de 1836 à 1842:* letters written by Tocqueville to other prison experts, as well as the *Rapport de M. de Tocqueville à l'Académie des Sciences morales et politiques sur le livre de M.R. Allier, intitulé Etudes sur le système pénitentiaire et les sociétés de patronage*;
4) *Tocqueville parlamentaire et les prisons*: memoirs, remarks and speeches, which Tocqueville made as a parliamentarian and which have as their subject the reform of the French prison system.

Admittedly, the *Système pénitentiaire* is the fruit of administrative inquiry, not a political science essay designed to become a "classic". In spite of this - or perhaps because of it - it offers a novel key to the reflections that Tocqueville develops in his major work: it provides an outline of the American journey, of which it allows us to grasp some salient moments; it allows us to know *in nuce* the genesis of some of the arguments developed in *La démocratie*, "following" Tocqueville in the experiences that helped generate them[12]; it can be considered as a laboratory on the level of the "proto-sociological" method employed by Tocqueville in many of his works, including *La démocratie.* Indeed, in these pages, as well as in his other writings on the penitentiary system, one finds traces of the use of statistics, of economic considerations, but above all of his field observations and interviews he made with a number of privileged witnesses, the considerations of which are later found transposed and meditated upon in *La démocratie*[13]. In particular, it seems clear that Tocquevillian reflections on fundamental notions, such as those of equality and despotism, were also nourished by the prison inquiry that allowed our author to experience them firsthand in the prisons of the United States, where inmates were placed under conditions of radical equality and, at the same time, subject to the despotic power of the prison administration[14].

As Michael Drolet (2003, p. 116) has argued:

> [...] the study of prisons became an important facet to a wider examination of democracy. It encompassed considerations on political economy, statistics, and investigations into poverty, education and religion. It lent itself readily to the analytical method, contributing to an enhanced knowledge of the basic facts that made up the general fact of society. It illuminated the relation between external social elements, such as laws or the economy, to internal elements, including ideas on correction or sentiments on retribution. It was tied to the development of civilization, to the rise of democracy itself.

Therefore, it can be argued that the *Système pénitentiaire* "[...] became part of the foundation of Tocqueville's great works: *Democracy in America* and *The Ancien Régime and the Revolution*" (Drolet, p. 116).

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[11] Perrot (2001) spoke of "oubli" referring more generally to the history of prisons. Perrot (1951-1998, t. IV, p. 7-44; republished in Perrot, 2001, p. 109-158), argued that that of the prison writings is a "Tocqueville méconnu". In 1980 Boesche wrote that "[...] this corner of Tocqueville's thought remains the most consistently dark and ignored" and, referring to Pierson (1938) and Drescher (1968), added that "Only two of his commentators cast more than an obligatory glance toward Tocqueville's concern with prisons, and even these two merely report Tocqueville's thought, displaying no inclination to analyze its significance" (Boesche, 1980, p. 550).

[12] Drolet believes that the investigation of prisons influenced the very selection of topics covered by Tocqueville in the first volume of *La démocratie* and, in particular, the chapters on the judiciary, the legal professions, Americans' compliance with the law, the effects of demographics on public morality, and the effects of private morality on public mores (see Drolet, 2003, p. 29). Considerations concerning Americans' endurance of loneliness (ch. 2 of the first part of *La démocratie*) and the analysis of the tyranny of the majority (see Drolet, 2003, p. 129) can also be traced back to the research experience in American prisons.

[13] On the transposition of these considerations in *La démocratie* see Pierson, 1938 and Tocqueville, 1997. In terms of method, the information Tocqueville and Beaumont gathered on U.S. prisons comes from numerous and diverse sources: theoretical works, administrative reports, statistical data, etc. Interviews, some of which were conducted by Tocqueville alone, play an important role. In addition to members of the prison administration and philanthropists, he interviewed - an unprecedented fact at the time - prisoners, bringing out their "experience" as an important element of the investigation. There is also evidence in his writings on the prison of his questioning of the goals pursued by the interviewees and the relationship he had established with them at the time of the interview. Particular attention to their language also emerges.

[14] Both Boesche (1980) and Avramenko and Gingerich (2014) note this. The topic is also discussed by Wolin, 2001. I will return to this point later.

Finally, it should not be overlooked that the *Système pénitentiaire* had multiple editions. Tocqueville continued to work on it from 1833 to 1845, correcting it, expanding it, and annexing new writings related to other penitentiary missions carried out in Europe. This text can thus be considered as a kind of *work in progress*, thanks to which it is possible to follow the evolution of Tocqueville's thought on the prison. Moreover, it is a work that accompanied him in writing not only the first but also the second tome of *La démocratie*, published in 1840.

One can point to five reasons behind first the "forgetting" and then the underestimation of the prison writings and, in particular, the *Système pénitentiaire*:

1. there has been and still is little consideration of the prison theme in scholarly debate on political institutions and democratic systems in particular. Despite the masterful work of "unveiling", carried out in *Surveiller et punir* by Michel Foucault (1975) - among the few contemporary philosophers to have paid attention to Tocqueville's pages on the prison - the very close nexus that links regimes of power and systems of punishment has continued to be largely overlooked. The penitentiary system continues - wrongly - to be considered a specialized topic, interesting only to scholars of criminal and prison law or criminologists, moreover - it should be noted - in contrast to what many important modern authors thought, from Montesquieu, to Voltaire, to Beccaria, to Bentham, to name the best known, not forgetting Tocqueville himself;

2. Interpreters of Tocqueville have long overlooked his political activity, of which the American Prison Inquiry is the starting point. In fact, it was also thanks to this early writing, in which he showed that he had acquired administrative expertise and a reforming vision on an issue considered relevant and new, as well as thanks to the success of *La démocratie*, that Tocqueville was able to pursue a political career. Prison then became one of the elected themes of his parliamentary activity. He entered the Chamber of Deputies in 1839 and devoted nearly ten years to the prison, just as he became interested in school reform, the abolition of slavery in the French colonies, and the French colonization of Algeria. In the eyes of many twentieth-century interpreters these are "technical" issues that he would have dealt with in order to maintain a certain independence vis-à-vis the various political currents of the time in which, as a son of the aristocracy, he did not recognize himself[15]. And yet, prison reform, school reform, abolition of slavery, colonization, rather than "specialized matters" seem key issues for the creation of a new society and state, that is, for the goal pursued by Tocqueville in many of his works and, in particular, in *La démocratie;*

3. As mentioned, the *Système pénitentiaire*, which is the most important of Tocqueville's penitentiary writings, was published together with Beaumont. Some, devaluing its significance, have attributed it essentially to the latter, considering that for both of them the prison inquiry was nothing more than an invented excuse, in order to travel to the United

[15] This is particularly the interpretation of Jardin, 1984. On the technical nature of the interest in the penitentiary see also Coldagelli, 2005. Concerning the relationship between aristocracy and penitentiary philanthropy, it is worth mentioning that Alexis's father, Hervé de Tocqueville, had been president of the prestigious Société royale des prisons, founded by Elie Decazes in 1819 to improve the living conditions of prisoners, and he worked hard, as prefect of Seine-et-Oise, to humanize the regime of French prisons.

States[16], getting their careers as magistrates temporarily suspended, partly because they were not comfortable with exercising that role in the newly formed July Monarchy. Tocqueville had indeed asked the Minister of the Interior to entrust him and Beaumont with the task of carrying out the penitentiary inquiry, benefiting from a leave of absence.

Tocqueville and Beaumont were linked by a strong friendship, born in their university years, and family relations[17]. They worked together at all stages of the U.S. inquiry, from the preparation of the trip to the different editions of the *Système pénitentiaire*. Tocqueville himself later tried to attribute the authorship of the Report to Beaumont alone in order to favor his appointment to the Académie des sciences morales et politiques, although in the letter drafted for this purpose he calls him the sole "rédacteur", a word that seems to allude to the material drafting of the text[18]. This is corroborated by Beaumont himself, who expunged the writings on the penitentiary system, with the exception of the note devoted to penal colonies published as an Appendix to the *Système pénitentiaire*, from the edition of Tocqueville's *Oeuvres Complètes* he edited after his friend's death. The reason for this choice is made explicit in the Preface to that same edition where, while claiming that these are the best parts of the work, Beaumont declares that Tocqueville had left the editing of the text to him and had limited himself to writing the notes and the appendix (cf. Noto, 2011, p. 57 and Drescher, 1968, p.130-131).

The parts indicated by Beaumont correspond to about a third of the work. However, Jardin believes that the idea of the American mission, justified by a full-bodied *Mémoire* signed by both of them, was Tocqueville's and attributes the conceptually and scientifically most important parts of the inquiry to the latter[19], while for Perrot it is not possible to distinguish with certainty the parts of the book that are to be attributed to Tocqueville and those that were conceived by Beaumont[20].

As mentioned above, Tocqueville carried out relevant survey work in the United States, documented in his penitentiary writings and travel notes. On his return he then undertook a series of missions through France and Europe in order to gather the documentation necessary to complete the American study, with a comparative section on the systems of punishment adopted in Europe. Finally, in *La démocratie*, although there are very few references to the

[16] This is how Pierson (1938) defines it. The idea that the mission to America was a "pretext" also comes from Tocqueville's correspondence where he uses this expression (see Tocqueville, 1951-1998, t. XIII, 1, p. 374). Coldagelli (2005) emphasizes the "randomness" of the choice to travel to the United States and the improvised character of the trip.

[17] On the friendship and collaboration between the two, see Tesini, 2011.

[18] See, for example, Zunz, 2022, footnote 40 at p. 109, where Tocqueville's letter to Droz dated June 26, 1841 is cited (Tocqueville, 1951-1998, t. XVII, 2, p. 131) and it is recalled how Perrot instead considers Mignet the addressee of the missive (Tocqueville, 1951-1998, t. IV, 1, p. 23).

[19] He considers the chapter on the moral reform of prisoners and the one on the French criminal enforcement system to have been written by Tocqueville and believes that the densest passages in the book, both in form and content, can be attributed to him (Jardin, 1984, p. 181).

[20] Cf. Perrot, 1951-1998. Many of the authors I have so far mentioned, since they have dealt with the subject, address the question of the authorship of the Report, stating that Tocqueville played an important role (see, for example, Boesche, 1980 and Schwartz, 1985; for a summary of the different interpretations in the English-language literature see Ferkaluk, 2018, ch. 1).

prison[21], there are, as mentioned, significant traces of the experiences related to the prison inquiry[22].

Beaumont, like Tocqueville, also did not just participate in the drafting of the *Système pénitentiaire*: in fact, his social novel, *Marie, ou de l'esclavage aux Etats-Unis*, which describes American customs, addressing the issues of racial discrimination and slavery, was born out of his trip to the United States. The book was conceived together with *La démocratie* as part of a joint project. Tocqueville consulted, after all, Beaumont at every stage of the drafting of his best-known work (cf. Jardin, 1984)[23].

Collaboration between the two friends on prison issues continued during the years when they both sat in the Parliament. While it is therefore difficult, as Seymour Drescher (1968) has argued, to distinguish Tocqueville's thinking on social policies-including those relating to punishment-from Beaumont's, it can nevertheless be assumed that the analyses made in the *Système pénitentiaire* were shared and that later decisions on prison policy were discussed between them. If anything, it emerges from the correspondence between the two that it was Tocqueville who later took a position on a central issue, such as the choice of the penitentiary model to be followed in France, without consulting his friend beforehand, generating a disagreement (cf. Noto, 2011, p. 63), which was nevertheless later healed. This shows how he certainly did not feel himself to be a second-rate "pénitencier". One can therefore analyze Tocqueville's penitentiary writings-including the *Système pénitentiaire*-by relating them to his political thought.

4. Tocqueville's writings on prison, like many of his texts related to political activity, are diverse in nature. The *Système pénitentiaire* is the only systematic work and it is in fact on this that much of the recent literature focuses. The others are parliamentary reports, bills, writings addressed to prison administrations, and letters. In many cases they were not intended for publication. It is therefore not easy to find one's way through these pages, to look for a common thread, to follow the evolution of Tocqueville's thought on the subject, not least because his activity as an expert on penitentiary issues went through at least three distinct phases.

In an early period, from 1830 to 1838, he visited American and European prisons and became one of the leading French experts on the prison system. He conducted a great deal of field research that enabled him to come into direct contact with the prison world. We could say that the first phase of his penitentiary work was the most "sociological".

In a second phase, in the years 1838-1840, he was very active in the *querelle pénitentiaire* that divided those who, like him, proposed that prisoners be isolated in individual cells, following the American model, from the opponents of solitary confinement, led by Charles Lucas[24].

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[21] See, for example, ch. 2 of the first volume of *La démocratie* where the laws of civil and criminal procedure are analyzed.
[22] In addition to what has already been mentioned, for an analysis of some of the expressions employed in *La démocratie* and attributable to penitentiary inquiry see, for example, Schwartz, 1985.
[23] On Beaumont's novel, see Guellec, 2011.
[24] Charles Jean Marie Lucas (1803-1889) was Tocqueville's main opponent in the penitentiary dispute. Lucas was a major player in the 19th-century French penitentiary debate. His essay on U.S. and European prisons has a title very similar to that of Tocqueville and Beaumont's inquiry, *Du système pénitentiaire en Europe et aux Etats-Unis.* Lucas wrote it between 1828 and 1830,

In the last phase, Tocqueville was involved in the passage of prison reform in Parliament. Elected in 1839, he was chosen as speaker of the bill the following year. From 1840 to 1847 he then fought for the adoption of a French prison reform law marked by the principles he had made known in Europe. The reform adoption process was not easy. The bill, amended several times, was not adopted by Parliament until 1847, shortly thereafter the Orleanist Monarchy was swept away and, with it, the reform that remained a dead letter. Under the Second Republic Tocqueville was finally appointed chairman of the commission charged with dealing with the reintroduction of labor in French prisons, but by then his "penitentiary career" was drawing to a close.

At a superficial glance, this lengthy activity devoted to prisons may appear as incoherent, for in part Tocqueville changed his position, first being in favor of the system of solitary confinement in cells at night and day labor to be done communally but silently-adopted in Auburn Penitentiary in New York State-and later espousing the Quaker model followed in Cherry Hill Penitentiary in Philadelphia, where inmates were always isolated in cells and did only individual work[25]. Despite their differences, both systems were based on the isolation-material or communicative-of inmates, and Tocqueville thus always remained a supporter of the American system, which philanthropists like Lucas opposed for being too harsh.

Tocqueville was interested in the reform of French prisons and also tried to make the mediations that are always necessary in politics. This "realist" approach also marked other areas of his parliamentary activity, particularly his advocacy of French colonization of Algeria. In fact, even then he made ambivalent judgments, changing his opinion, for example, on the relationship between native populations and colonists, the military government of the colony, and the actions of Marshal Bugeaud[26]. Realism, moreover, is regarded by many as a defining feature of Tocquevillian political science and as the foundation of his own option in favor of democracy, whose advent he considered inevitable. As is well known, Tocqueville was not an ideologue of democracy, but a disenchanted observer who, noting the emergence of the "égalité des conditions"[27], aimed to guide the new social and political system to "the nearest port"[28].

Schwartz (1985) even went so far as to consider Tocqueville's attention in the *Système pénitentiaire* to the actual effects of prison reform-attention that, as mentioned, was

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thus before Tocqueville and Beaumont published the *Système pénitentiaire*, so much so that they cite it in the *Mémoire* with which they justify the need for the penitentiary mission in the United States. However, Tocqueville always claimed credit for having visited the prisons he wrote about, unlike Lucas, who had only set out his own theories. Lucas' main work is *De la réforme des prisons ou de la théorie de l'emprisonnement, de ses principes, de ses moyens et de ses conditions pratiques* (Paris, Legrand, 1836-1838). It is divided into three volumes and summarizes all the projects for reforming the French penitentiary system drawn up by Lucas. The latter held numerous positions in the French penitentiary administration. In 1830, in particular, he was appointed "Inspecteur général des prisons", and in this capacity he judged the mission of Tocqueville and Beaumont to the United States to be inappropriate, starting from the consideration that the United States could not represent a model to be imitated. Indeed, he opposed any form of solitary confinement of prisoners, as he regarded communication as an important factor in moral reform and considered partial reform of the old French system preferable to its complete replacement. On Lucas' positions in relation to Beaumont and Tocqueville, see Gallino, 2020, p. 82-102.

[25] Briefly reconstructs these different stances Keslassy, 2010.

[26] On this topic I refer to Re, 2012; see also Letterio, 2011.

[27] The expression recurs in *La démocratie*.

[28] The metaphor is found in the letter written by Tocqueville to his cousin Camille d'Orglandes, Nov. 29, 1834, in which, with reference to his attitude toward democracy, he declares, "embarked on a vessel that I did not build, I try at least to make use of it to reach the nearest port" (Tocqueville, 2003, p. 311; translated by the author).

confirmed by subsequent political activity devoted to prisons-as an important key to understanding Tocquevillian political thought. The U.S. Prisons Report would make it possible to unravel certain dilemmas whose solution has occupied for decades - and continues to occupy today - Tocqueville scholars, such as that concerning the relationship between freedom and determinism in his thought[29]. Indeed, it can be read as "a general study of democratic reformism in America" (Schwartz, 1985, p. 11), in which the authors argue in favor of a moderate reformism, aware of its limitations, opposing both utopians and fatalists. This moderate position would prefigure that taken by Tocqueville in his major works, beginning with *La démocratie* with regard to human perfectibility and the relationship between freedom and determinism. Not only that, but the analysis conducted by Beaumont and Tocqueville in the *Système pénitentiaire* would show Tocqueville's aptitude for constantly comparing theory with practice, a theme that for Schwartz is at the heart of *La démocratie* and, even more so, of *L'Ancien Régime et la Révolution*.

For Sheldon Wolin, the *Système pénitentiaire* would arise instead from a genuine "anti-theoretical project", from the need to place facts at the center of analysis, as opposed to the abstraction of the Enlightenment philosophies that had led to the Revolution. Linking the aversion to prison philanthropy that Tocqueville expresses recurrently in his writings on the prison to his judgment of the Revolution, Wolin (2001, p. 389) goes so far as to argue that for him, "the nineteenth-century philanthropist was cut from the same cloth as the eighteenth-century philosophe". This is an interpretation not without forcing, which makes Tocqueville an author dominated by concern for the Revolution-a concern certainly very present in his work-while unduly overshadowing precisely that trait of moderation highlighted by Schwartz[30]. It seems to me that such moderation and attention to "facts", rather than with an aversion against theory *tout court*, are combined, as mentioned, with a properly realist posture, which also includes revising one's positions if they do not allow reforms to advance or if criticalities emerge in their application[31].

In addition to being inconsistent at times, the activity of the "pénitencier" then appears, again at a surface glance, as unsuccessful, since the reform to which he had worked so hard remained unimplemented. This is probably for some of Tocqueville's readers an additional reason to disregard his writings on the prison. However, his theories had forged the terms of a debate that is still open today, placing the U.S. prison model at the center of discussions about punishment in Europe as well.

5. *Last but not least*, the oblivion to which Tocqueville's prison writings have been subjected has probably been motivated by the inconsistencies that his ideas about the prison system and his assessments of the methods employed in U.S. prisons present in relation to the image of Tocqueville as a theorist of liberal democracy. In particular, in many passages of *Système pénitentiaire*, as well as other writings devoted to the prison, Tocqueville justifies

[29] See, for example, the strongly deterministic interpretation of Tocquevillian philosophy recently offered by Volpi, 2021 (for a discussion of it, see Re, 2023).
[30] The theme was taken up by Ferkaluk (2018), who makes it the pivot of her analysis.
[31] Coldagelli (2005, p. 170), regarding the positions that Tocqueville expressed in the field of penitentiary and, in particular, his critique of philanthropy spoke of a realist *parti pris* that is even disconcerting. I refer here to the tradition of political realism to which I believe Tocqueville's political thought can be traced (see in this regard Portinaro, 1999).

authoritarian methods, violent treatment of prisoners and the disavowal of any of their rights. It is a contradiction, in my opinion only apparent, which is also found in other writings related to Tocqueville's political activity, such as, once again, those on colonization, and which some interpreters explain by hypothesizing a sort of split personality: the democratic theorist Dr. Jekyll would turn into Mr. Hyde, when he switches from the philosopher's or historian's robes to the politician's[32]. Others - this is the case, for example, with Boesche (1980) and with Avramenko and Gingerich (2014) - consider that the contradiction is not there, since, on the contrary, the prisons visited in the United States would represent a warning for Tocqueville: they would show how democracy can degenerate where equality is not combined with freedom. They would thus be an image of the despotism that Tocqueville warns readers of *La démocratie* against, or even a kind of dystopia. However, it remains to be explained then why he chose to suggest the adoption of such a penitentiary system in France as well.

In my opinion, precisely the apparent contradictions of the political Tocqueville-which, moreover, must always be placed in the historical context in which he operated and wrote-allow, on the contrary, to gain a more complete picture of his democratic theory and the kind of liberalism of which he was an advocate. The prison system is not only the distorted mirror of liberal democracy. It is the punishment system of liberal democracy.

Prisons and democracy

All readers of *La démocratie* agree that, especially in the first volume published in 1835, Tocqueville's intent is to show the French how to put an end to revolutionary violence while preventing it from escalating into tyranny. To this end, he intends to persuade the legitimists-many important exponents of whom were members of his own family-to accept the inevitable establishment of "égalité des conditions". The goal is to guide this process so that democracy acquires a moderate character, respectful of freedom and private property. Looking at institutional engineering is not enough. It is also necessary to shape a democratic "état social"[33]. Indeed, democracy corresponds to a new social order, which may, however, take on different characteristics depending on the countries in which it is established and which, in France, has yet to stabilize. Tocqueville thus points to a model in U.S. democracy: there the powers are in balance with each other; administrative centralization is averted thanks both to federalism and to the autonomy enjoyed by local communities; freedoms of thought and of the press are assured; associationism and Christian religious worship help to maintain the social bond that the competition produced by the drive toward equality tends to dissolve.

The purpose that Tocqueville and Beaumont pursue, more or less explicitly, in writing the *Système pénitentiaire* is similar: it is to study how criminal enforcement is organized in what

[32] Such an analysis was carried out by Melvin Richter (1963) regarding his writings on the colonization of Algeria. I discussed the argument in Re, 2012.

[33] The notion is Tocqueville's (see, for example, Tocqueville, 2012, vol. 1, p. 74, where he writes: "In my view, the social state is the material and intellectual condition in which a people finds itself in a given period. The social state is ordinarily the result of a fact, sometimes of laws, most often of these two causes together. But once it exists, it can itself be considered the first cause of most of the laws, customs and ideas that regulate the conduct of nations; what it does not produce, it modifies").

at the time was the only "great republic"[34]. The great laboratory of democracy was in fact, at the same time, a great penitentiary laboratory. Tocqueville did not seek in the United States the ideal penitentiary, but the penitentiary of a democratic country. On this basis he then set up his battle for the adoption of this system in France. For him, the American penitentiary was in fact the criminal enforcement system proper to democracy, while the confusion of systems typical of the French system corresponded to the post-revolutionary transition. Finally, the remnants of the old punitive systems, such as the "bagnes" visited by Tocqueville in France, corresponded to the *Ancien Régime*. Each system analyzed in Tocqueville's penitentiary writings is thus linked to a particular political regime. From this perspective, the penitentiary system in particular could become an instrument of control of that part of the population that had been caught up in the Revolution and subsequent turmoil and now needed to be brought back to order[35].

In the *Système pénitentiaire* Tocqueville and Beaumont do not explicitly situate the prison alongside the democratic institutions of the United States, nor, as noted, do we find a systematic treatment of the penitentiary in *La démocratie*. Yet, the institutional nature of the penitentiary was the very premise of the inquiry into U.S. prisons. It also emerges clearly in Tocqueville and Beaumont's analysis of prison administration and the organization of prison labor. As Wolin (2001, p. 386-387) has pointed out, the prison reform movement was, after all, one of the avenues by which liberalism recovered the importance of the state and the institutionalization of social problems and took up, while innovating, the paternalism proper to the *Ancien Régime*.

In the *Système pénitentiaire* Tocqueville and Beaumont look at American prisons from two different but complementary points of view: from the inside, when they look at the power relations established in prisons; from the outside, when they analyze the relationships that exist between the prison, other institutions and civil society.

From the "inside perspective", the prison system would seem to have little that is democratic: the prison is a despotic place in which a well-organized and armed minority (the guards) controls a submissive majority (the inmates). Tocqueville is not surprised by the use of violence by the guards and agrees with the use of corporal punishment. He thinks, however, that the techniques employed in the United States allow for limited use of these methods: guards should resort to them only when compliance with discipline cannot be obtained from inmates by other means and, above all, any form of "private" subjection of the prisoner to his jailer should be avoided. In prison, the offender must be subject to the state, whose laws he has violated, and to society, whose laws he has offended.

In his penitentiary writings, Tocqueville fuses together different conceptions of punishment: retribution (punishment is the vengeance for the offense caused to society); deterrence (punishment aims at generating fear in citizens about the consequences they may face if they break the law); rehabilitation (punishment aims to reform the offender's behavior

[34] The expression is used by Tocqueville in his famous letter to Charles Stoffels dated August 26, 1830 (Yale Tocqueville Archive, AVII), in which he outlines his plans to travel to the United States. The idea that the United States is distinguished by being a "great republic" returns several times in *La démocratie*.

[35] Wolin (2001) particularly insists on the "counter-revolutionary" character of the prison system for Tocqueville.

in order to prevent recidivism). Prison also fulfills a purely incapacitating function that Tocqueville deems fundamental.

In contrast, from the perspective of relations with the outside world, the democratic character of the prison system appears more evident. In particular, Tocqueville gives a prominent role to civil society. As in *La démocratie,* so in the *Système pénitentiaire* and other penitentiary writings, he opposes, on the one hand, the idea that private individuals can be entrusted with the task of performing important public functions and, on the other, the public monopoly understood as being reserved for state officials alone. Public functions must remain as such, but they always imply the involvement of civil society. Indeed, honest citizens are called upon to take an interest in the functioning of the prison system, to monitor the work of the administration, and to meet with prisoners to be an example to them and, where possible, a support. Beaumont and Tocqueville (1833, p. 30) opposed prisons understood as "[…] a sort of administrative sanctuaries, into which no profane person can penetrate". They also opposed prisons run by private individuals who aim to make a profit and the excessive involvement of a philanthropy whose only goal is to spread its ideological beliefs. This is why the United States is a model for Tocqueville: the ways in which civil society controls the prison administration, as described in the *Système pénitentiaire*, comply with the general functioning of American democracy, and citizens do not hesitate even in this field to form associations whose aim is to contribute to the goals that the prison system is called upon to pursue.

Control over the prison is carried out, either directly by citizens who are authorized to visit it, or through the appointment of prison inspectors chosen among the most influential citizens of the locality in which the prison is located. These perform their duties free of charge and personally guarantee, through their authority, the proper application of discipline and the supervision of the institution management. Such a system makes it possible both to bind the penitentiary closely to the local community, achieving a balance between the needs of centralization and decentralization[36], and to make the inspectors personally responsible for the proper administration of the prison. Prison staff are thus in the United States part of an administration that is not devoid of prestige, contrary to what Tocqueville himself observed in France, where wardens often felt close in culture and social status to the inmates and did not hesitate to collude with them in order to make a profit from organizing small businesses inside the prison or to run the jails or "bagnes" more easily[37]. In France wardens were poorly paid and despised by the public. In contrast, civil society in the United States recognizes the significance of the task entrusted to prison administrators and guardians and directly monitors their actions, thanks to the prison administration's duties to inform the public.

Thus, in the penitentiary system we find some typical features of the U.S. democratic model: the presence of associations, the federal structure of the administration, the importance of local autonomy, the prominent role accorded to respected citizens, chosen for

[36] The point is particularly highlighted by Ferkaluk, 2018, especially p. 82-88.

[37] Benoît (2004, p. 172) effectively underscores the point: retracing Tocqueville's account of the Toulon Bagne (a prison colony in Toulon), he speaks of "a form of class solidarity, at least a form of contiguity" between prisoners and wardens and asserts that the latter "are as immoral as their prisoners". The situation was similar in prisons, where between guards and prisoners there was "complicity, not to say collusion" (Benoît, 2004, p. 173; translated by the author).

their virtue, and the power of the majority finding expression in public opinion. Beaumont and Tocqueville (1833, p. 30) write:

> We have seen how the superintendents, however elevated their character and position may be, are subject to the control of a superior authority-the inspectors of the penitentiary. But above both, there is an authority stronger than all others, not written in the laws, but all-powerful in a free country; that of public opinion.

The need for public control over the penitentiary and the similarities between penitentiary and democracy are also apparent in Tocqueville and Beaumont's analysis of the organization of labor in American prisons. At issue are the similarities and differences that must exist between prison workshops and factories: on the one hand, it is necessary for prison labor to be productive; on the other hand, the prison must not turn into a factory[38].

At Auburn and Philadelphia, unlike in most European prisons, work was productive. Tocqueville and Beaumont consider this a central element of discipline, allowing the prisoner to feel useful and to develop an interest in earning a living. However, the pay should be less than that given to free workers and should not allow prisoners to change their conditions of imprisonment by purchasing food or other comforts. Instead, it is appropriate for inmates to receive it when leaving prison so that they can seek employment, without returning to crime.

American penitentiaries were organized on the basis of work. In almost all the prisons visited by Tocqueville and Beaumont this was interrupted only for meals and contracted out to a private contractor. Tocqueville and Beaumont admit that this is necessary for the management of prison labor, but they are highly critical of the subordination of prisons to the needs of industry. Indeed, discipline must be managed by public officials. In this regard, Perrot (1951-1998, p. 42) spoke of an "anticapitalisme carcéral" of Tocqueville. Admittedly, the latter sees prison labor as a means of discipline and is opposed to penitentiaries competing with business. However, he praises a system in which, for both economic and disciplinary reasons, work occupies the entire life of prisoners, takes place in absolute silence, does not stop except to permit the exercise of vital functions, and is extremely strenuous. We read in the *Système pénitentiaire*:

> It is essential for the convict as for the order of the prison, that he should labour without interruption; for him, because idleness is fatal to him; for the prison, because according to the observation of Judge Powers, fifty individuals who work, are more easily watched than ten convicts doing nothing (Beaumont and Tocqueville, 1833, p. 32).

Moreover, the food given to prisoners in U.S. penitentiaries was barely enough to sustain their strength so that they could work, but it gave them no pleasure. This discipline appears to the French observers to be "moral and just" (Beaumont and Tocqueville, 1833, p. 33), because

[38] The relationship between prison and factory has been the subject of important studies, from the "classic" Melossi and Pavarini, 1977 to the more recent Caputo, 2020, who also examines Tocqueville's views on prison labor.

it reconciles the need to make the penitentiary economically sustainable with the need to impose a strict regime.

The coincidence between the needs of capitalist production, state savings and prison discipline is not accidental. The prison described in the *Système pénitentiaire* is the punishment system of a capitalist society. Thus, if one can speak of Tocqueville's "prison anti-capitalism" in terms of the priority he accords to discipline over productivity, the final design of the prison system complies with the capitalist organization of labor and society. At the center of prison discipline Tocqueville places labor, exhausting, repetitive and productive. Despite these characteristics, prisoners must be induced to regard it as a relief from the misery of their condition and must understand that the work ethic is the linchpin of social life. They must therefore not love it for its intrinsic value. Work is not a way for them to express their personalities and put their skills on the line. It is a relief from the torment of the monotony of prison life.

Tocqueville is not so much interested in the moral reform or religious conversion of prisoners, which, according to his Jansenist orientation, is not the state's task to pursue and is difficult to assess. Although, especially in the later stage of his "prison career", he insists on the importance of the presence of religious people in prison and of a basic level of education for inmates[39], the reform he looks to as the primary task of the prison system appears to be understood in a very narrow sense: it is about "discipline" (Foucault, 1975, part 3). The main role of religion in prison, after all, is not spiritual, but is to make inmates tamer, to give them hope that alleviates the mental suffering caused by imprisonment, and to encourage, where possible, imitation of the good example set by the priest.

Tocqueville thus abandons the attitude that had animated his father's generation and still guided French and European philanthropy inspired by religious beliefs. It is not up to the state to deal with the conversion of offenders. It is above all indolence that the prison must remedy.

One might at least expect that, as an advocate of learning rights through their exercise, as evident in his well-known analysis of the role of the jury in the United States (cf. Tocqueville, 2012, vol. 1, p. 442-450), he would point to the development and enforcement of prison regulations as a necessary element in the education of inmates in legality. In this regard, the *Système pénitentiaire* merely notes the absence of regulations in most prisons in the United States. In the prisons inspired by the Auburn model, there were no regulations at all. One was content to point out the principles that formed the basis of discipline: solitary confinement at night and communal work during the day, respect for silence. Otherwise, life in these prisons was regulated by directives issued by inspectors to prison staff. The prison warden enjoyed a very wide discretionary power. Where regulations existed, they were often ignored by the inmates. Tocqueville makes no criticism of this system, which seems to him the only effective one for maintaining order in a prison.

Particularly revealing of Tocqueville and Beaumont's position on this issue is the third part of the *Système pénitentiaire*, devoted to the houses of refuge, institutions that they describe as

[39] These considerations emerge especially in relation to the 1844 prison reform project. Tocqueville's positions on education are very nuanced and it is not possible to go over them here. However, it is worth noting that Tocqueville and Beaumont see both the merits and possible risks of education on crime and recidivism.

a hybrid of prison and school, where both young people who had committed crimes and abandoned minors or minors from disadvantaged families who were intended to be removed from crime were hosted. Tocqueville and Beaumont describe the meticulous regulations of the House of Refuge in Boston, where an attempt was made to teach inmates the value of democratic citizenship. The lives of the guests were regulated in every detail by written regulations that were communicated upon entering the institution. The boys had to swear that they would abide by the regulations and enforce them on their fellow inmates. They were thus aware of their rights and duties to other juveniles and to the institution. Great value was also placed on their word, honor and honesty. Juveniles were encouraged to self-evaluate their own behavior, to self-censor and to consider respect for the law as part of self-respect. Finally, they enjoyed active and passive electoral rights, being called upon to elect one of their representatives to direct some of the activities of the House of Refuge. This system is judged by Tocqueville and Beaumont to be unnecessarily complex. They prefer the simpler methods employed in the Houses of Refuge in Philadelphia and New York, although these were far more severe and contemplated the use of corporal punishment.

Although the two French observers claim that young offenders are the only part of the criminal population that is recoverable, they entrust their moral reform not to civic education but, once again, to work. The young inmates in the U.S. houses of refuge - the majority of whom, it is worth recalling, were under the age of sixteen if male and fourteen if female - worked eight hours a day (five and a half hours in Boston, where two hours for recreation per day were allowed), while only four hours were devoted to education, at the elementary level. Once out of the House of Refuge, minors were automatically assigned to the most menial jobs. Girls, then, were not taught any trades. They were assigned exclusively to domestic work.

In his interpretation of Tocqueville's penitentiary philosophy, Gallino (2020, p. 174-175) has argued that the pages of the *Système pénitentiaire* devoted to houses of refuge for minors form "a veritable optical prism. Passing through it, Tocquevillian philosophy separates into its two spectral components, which can then be analyzed separately: the technology of domination and democratic theory"[40]. The former is that to which adult prisoners are subjected; the latter, on the other hand, is nourished by a pedagogy that we can see at work as much in houses of refuge as in other democratic institutions. For Gallino (2020, ch. 3), Tocqueville sees adult criminals as people who have gone through an ontological "fall" that has deprived them of self-esteem, while young people could be (re)educated in democratic citizenship.

In the pages of the *Système pénitentiaire* devoted to the House of Refuge in Boston, however, Tocqueville and Beaumont make it clear early on that they do not take these children citizens seriously and, as mentioned, speak out in favor of the simpler models of New York and Philadelphia where the minors worked for the majority of the time and were initiated into manual trades. In fact, Boston's success in limiting the recidivism of juveniles coming out of the house of refuge is attributed by Beaumont and Tocqueville (1833, p. 121), rather than to the system employed, to the charisma of the "distinguished man who puts it

[40] Translated by the author.

into practice". The method adopted in Boston also has the "great defect" of not isolating young people at night. They write:

> [...] the system, moreover, which is established there, rests upon an elevated theory, which could not be always perfectly understood; and its being put into practice would cause great difficulties, if the superintendent should not find immense resources in his own mind to triumph over them.
> In New York and Philadelphia, on the contrary, the theory is simple. The isolation during night, the classification during day, the labour, the instruction-everything, in such an order of things, is easily understood. It neither requires a profound genius to invent such a system, nor a continual effort to maintain it.

That is, it is a disciplinary system akin to the penitentiary system, which functions automatically. The goal of houses of refuge according to our authors is, after all, as with the penitentiary, to have inmates acquire "habits of order" (Beaumont and Tocqueville, 1833, p. 122). And it is precisely the development of these habits that superintendents must evaluate in order to determine when juveniles can be released. The length of detention, in fact, is not defined by a magistrate, but is decided entirely at the discretion of the superintendent.

Gallino is therefore right when he points out that adult prisoners have for Tocqueville gone through a "fall" that makes their moral reform all but impossible, while in minors one can still excite "all the generous passions of youth" (Beaumont and Tocqueville, 1833, p. 123). However, it should not be forgotten that for both categories moral reform is not the goal that Tocqueville believes it is important to pursue. In fact, the method favored by our author is properly disciplinary and aims to train obedient workers in the first place. In the *Système pénitentiaire,* immediately after describing the U.S. houses of refuge, Beaumont and Tocqueville (1833, p. 123) hasten to declare that the reform of young delinquents is "almost impossible" in the case of boys, "who have contracted habits of theft and intemperance", and "girls who have contracted bad morals". For the latter, reformation "is a chimera which it is useless to pursue". It is worth mentioning that to these categories belonged a large part of the hosted minors. Not only that, but Beaumont and Tocqueville (1833, p. 123-124) adhere to the widespread opinion in the United States that: “[...] it is necessary to avoid receiving, in the house of refuge, boys above sixteen, and girls over fourteen years; after this age, their reformation is rarely obtained by the discipline of these establishments, which is less fit for them than the austere discipline of the prisons.”

And again, in the chapter devoted to the possible introduction of houses of refuge into the French system, Beaumont and Tocqueville (1833, p. 127) recommend the systems of New York and Philadelphia and point out that, even in the case of the deviant juvenile, "it is not only for the purpose of correction, that it is imprisoned: it is particularly for the interest of society and the sake of example that the punishment is inflicted". Finally, they conclude with a reminder of *less eligibility*, a cardinal principle of the prison systems formed in the nineteenth century and, we might say, of those of today as well[41]. Speaking of the houses of refuge Beaumont and Tocqueville (1833, p. 130) specify:

[41] Very clear on the point Caputo, 2020.

> It ought, therefore, to be kept in mind, that these establishments, to fulfil their true object, must preserve, though differing from a prison, part of its severity, and that the comfort as well as the moral instruction which the children are sure to find in the house of refuge, ought not to be such as to make their fate enviable by children whose life is irreproachable. We may, on this occasion, remind our readers of a truth which cannot be neglected without danger, viz., that the abuse of philanthropic institutions is as fatal to society as the evil itself which they are intended to cure.

The tone of these pages suggests that even the later choice not to commit to a reform of French juvenile prisons is a sign that between deviant adults and deviant minors Tocqueville did not see much of a difference, at least from a pragmatic point of view. Not only that, but the houses of refuge, in his eyes, were to serve what is now called "net widening", i.e. the widening of the net of control even beyond the strictly penal sphere. Indeed, as mentioned, both juveniles who had committed crimes and juveniles who had not committed crimes were imprisoned there. Beaumont and Tocqueville (1833, p. 126-127) hope that in France, too, if the houses of correction would undergo a reform, "the magistrates would send there without repugnance a number of young delinquents, vagrants, beggars, &c., who abound in all our cities, and whom an idle life leads infallibly to crime". The houses of refuge were thus an instrument of empowering the control of the dangerous classes to be routed to work from an early age.

In the *Système pénitentiaire,* as in *La démocratie*, Tocqueville is concerned about some of the harmful effects that the capitalist system can produce-especially in relation to the emergence of a wealth-based oligarchy that does not take into account the general interest and can take over the state. He also criticizes some elements of the capitalist anthropological model, based on competition that annihilates social ties and encourages the narcissistic retreat of individuals into the "circle of small domestic interests and duties" (Tocqueville, 2012, vol. 2, p. 1049), but does not radically question the mode of production, let alone the subalternity of the working classes and the most marginal strata of society. His vision of democracy and society remains essentially conservative.

Violence and arbitrariness in democracy

Beaumont and Tocqueville (1833, p. 47) write: “Whilst society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism. The citizens subject to the law are protected by it; they only cease to be free when they become wicked.”

At first glance this might appear to be a criticism. On closer reading, however, one realizes that it is rather a justification. Indeed, the evil character of the prisoners justifies the arbitrariness and violence that are exercised against them. They have voluntarily placed themselves outside the protection that the law provides for citizens. The "isonomy" that characterizes democratic regimes does not apply to those who break its laws. The more the rights and freedoms of citizens are protected by the state, the more the citizen is required to

abide by the law. Indeed, he is the "sovereign" of democracy; he has been allowed to participate in the formulation of laws; he is part of a social contract among free and equal individuals. He is no longer the subject who can enter into a struggle with the unjust ruler, breaking a law that the latter alone has established. In "becoming wicked", he effectively renounces his sovereign *status*, showing that he is unable to remain within the protective circle of democratic citizenship, reserved for those who are able to govern themselves. Democratic "paideia" has in prison its reverse.

If the absolute ruler can condemn to death or pardon the criminal, democratic rulers must show themselves inflexible. This underlying thought animates not only the pages of the *Système pénitentiaire*, but Tocqueville's entire battle against French philanthropy inspired by charitable sentiments. Charity seems to be an aristocratic sentiment. It can be exercised by the upper classes in a society in which each individual has a place assigned at birth in the social order. In democratic, mobile, plural, agitated societies, "zero tolerance" of lawbreakers is necessary. Interestingly, this approach was at least in part suggested to Tocqueville by Elam Lynds, former warden of Auburn Penitentiary, who was known to have directed the building of Sing Sing prison by the inmates themselves, to whom he applied inflexible discipline based on the extensive use of corporal punishment.

Lynds is a privileged witness to the penitentiary inquiry of Tocqueville and Beaumont[42]. The conversation with whom is called "the father of the present prison system" (Tocqueville, 1951-1998, t. V, 1, p. 67) is published as an appendix to the *Système pénitentiaire*. Lynds argues there that the more severe a prison is, the softer the criminal laws can be. Better short sentences, then, but served in a harsh prison, than long prison sentences served in a prison softened by principles of humanity. For Lynds, as well as harsh, prison discipline must be arbitrary. The warden must have absolute power over both inmates and staff.

Lynds' position corresponds to the upheaval of the eighteenth-century penal reform, which, with Beccaria, had pointed to long but mild punishments as the most effective means of combating criminality and safeguarding the dignity of the offender, and had envisioned a punitive "sémio-technique" (Foucault, 1975, part 2, ch.1) that would make clear in the eyes of citizens the link between deviant behavior and the punishment adopted. To Enlightenment transparency, Lynds contrasts a despotic prison model.

Tocqueville, far from criticizing Lynds, bases his defense of the Auburn system on the thought of the "tyrant of Sing Sing". Beaumont and Tocqueville (1833, p. 44) write:

> We believe that society has the right to do everything necessary for its conservation, and for the order established within it; and we understand perfectly well, that an assemblage of criminals, all of whom have infringed the laws of the land, and all of whose inclinations are corrupted, and appetites vicious, cannot be governed in prison according to the same principles, and with the same means, as free persons, whose desires are correct, and whose actions are conformable to the laws.

[42] On the importance of the encounter with Lynds for Tocqueville and Beaumont's prison philosophy Gallino (2020, p. 126-145) appropriately insists.

A manuscript fragment preserved in the Tocqueville Archives and cited by Perrot in her notes to *Ecrits sur le système pénitentiaire en France et à l'étranger*, confirms the impression that Tocqueville rigidly separates the prison from the world of *honnêtes gens:*

> Society and prison are by no means composed of the same elements. It can be said in general that all the inclinations of free men make them inclined to good, while all the passions of convicted criminals push them violently toward evil. It is very well understood that the means that are sufficient to govern the former are ineffective in taming the latter.[43]

Democratic citizens must be "governed", while prisoners must be "tamed"-this is the difference between the democratic political system and the prison system. Prison is outside the law. The penitentiary is the prison of democracies; it is not a democratic prison.

These are probably the positions that have embarrassed some interpreters of Tocqueville who have approached prison writings. Here Mr. Hyde would come out. Indeed, the pattern of *La démocratie* appears reversed. If there Tocqueville pointed to freedom of expression of thought and freedom of association as the main guarantees against the tyrannical power of the majority, in the prison it is desirable for a tyrannical minority to prevent prisoners from communicating and, even more, from associating, and to do so by resorting even to corporal punishment. Prison discipline thus seems, at first glance, at odds with that "art of being free" that Tocqueville (2012, vol. 1, p. 393) outlines in *La démocratie*. The contrast is only apparent, however, since for Tocqueville there are two distinct classes of subjects, free citizens and prisoners. As to the common man, so to the convict, the saying quoted by Tocqueville (2012, vol. 1, p. 392) in *La démocratie* applies: "Homo puer robustus". In democracies, rational love for the general interest arises from education and:

> develops with the help of laws; it grows with the exercise of rights; and it ends up merging, in a way, with personal interest. A man understands the influence that the well-being of the country has on his own; he knows that the law allows him to contribute to bringing this well-being into being, and he interests himself in the prosperity of his country, first as something useful to him and then as his work (Tocqueville, 2012, vol. 1, p. 385-386).

The prisoner, too, is a "puer robustus", who must learn how to make use of freedom, but while the upright citizen succeeds on his own in becoming an adult, in controlling his own selfish instincts, the dishonest one behaves like the child who "inflicts death when he is unaware of the value of life" and "takes property from others before knowing that someone can rob him of his" (Tocqueville, 2012, vol. 1, p. 392). In the penitentiary, the educational mechanism that in democracy is the result of the combined action of various institutions becomes discipline enforced by institutions specifically created to respond to the need to "reform" those who have violated the social compact. If the citizen learns to make use of freedom through the responsible exercise of his rights, the inmate unconsciously acquires "habits of order".

[43] Yale Tocqueville Archives, Blf 2/5, in Perrot, 1951-1999, footnote 6 at p. 43. The word "tame" is underlined in Tocqueville's manuscript. Translated by the author.

Between the project of *La démocratie* and the penitentiary writings, therefore, there is no contradiction. Rather, there is continuity. In *La démocratie* Tocqueville points out the paths that a society must take for democracy to be established and flourish. In his writings on the prison system, the prison is conceived as a kind of limbo to which are destined those who fail to properly exercise the rights and fulfill the duties of citizenship. These can hardly be redeemed from their marginal condition. They can at best be trained to work and learn to submit to the social order. The prison system is thus the other side of democracy and is--for Tocqueville as for us today--a device for controlling that stock of the population which one chooses not to include fully, to avoid the economic and social costs of integration. In the "society of individuals", where *status* is no longer defined at birth, prison allows the new "democratic hierarchies" to be produced and consolidated.

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Submetido: 12/04/2024
Aceito: 25/04/2024