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THE RISE OF PRISONS AND THE ORIGINS OF THE REHABILITATIVE IDEAL

Carl E. Schneider*

THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC. By *David J. Rothman*. Boston: Little, Brown. 1971. Pp. xx, 376. \$12.50.

I. INTRODUCTION

In 1971, David Rothman published this appealing and provocative study of the rise of the large custodial institution—the penitentiary, the insane asylum, and the almshouse—in Jacksonian America. *The Discovery of the Asylum* has been influential¹ and remains the best general treatment of prisons in antebellum America.² It merits careful, though cautious, attention from the legal community. This essay attempts to give it that attention and to use the opportunity to begin to explore a significant but little-studied question: When did what Professor Allen has called the rehabilitative ideal³ first begin to be taken seriously in England and the United States? A review of Rothman's book invites that inquiry because an examination of the book's two main

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1. It has been reviewed in dozens of scholarly journals, often, though not invariably, respectfully, and in 1971 it won the American Historical Association's Albert J. Beveridge Award for the best English-language book on American history.

2. Since the publication of Rothman's book, two important works on European prisons have been written: M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1975); M. IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850* (1978). Foucault's study is an imaginative and sensitive investigation of the social and intellectual meanings of punishment in the eighteenth century. It relies primarily on the French experience. Ignatieff examines late eighteenth- and early nineteenth-century prison reform. His book was published after this Review was written, but while his analysis is quite different from mine, our factual accounts of English prisons do not conflict significantly.

These two books are very welcome, for, despite America's perpetual worrying about crime and its optimism about punishment, and despite modern social history's fascination with both deviance and reform, the literature (especially the original research) on prisons is startlingly sparse. A dismaying amount of the work on prisons is pedestrian, unanalytic Whig history: Each penologist is discussed only insofar as he foreshadows modern penology. Histories of prisons commonly dwell on the struggle of the prison administrators for institutional autonomy and funds but neglect questions about the purposes prisons served or were thought to serve. An honorable exception is W.D. LEWIS, *FROM NEWGATE TO DANNEMORA* (1975).

3. F. ALLEN, *Legal Values and the Rehabilitative Ideal*, in *THE BORDERLAND OF CRIMINAL JUSTICE* 25 (1964).

faults—its failure to look at the English experience with prisons and its over-reliance on a social control theory in explaining the motives of prison reformers—presents clues to the origins of the rehabilitative ideal.

Clio's seamless web, however, is not easily unraveled. Rehabilitation has probably always been one aim of any noncapital system of punishment, since the punisher presumably intends to persuade the punished not to err again. In the prototypical punishment of the child by the parent, punishment is part of parental efforts to educate, to bring up, the child. (None of which, of course, is to suggest that such punishment is not also inflicted to stiffen the deterrent effect of the parental penal system, to incapacitate the offender ["Go to your room!"], or to vent parental irritation.) And prison as a rehabilitative device goes back at least to Plato.⁴

The strands are tangled, then, by the close association the several purposes of punishment have with each other, and by the punisher's expectation that punishment will have multiple effects. That retribution remains an aspect of any punishment is suggested by the phrase "teach him a lesson," with its simultaneous intimations of reformation (he won't do it again, he'll learn something) and satisfaction of the victim's feelings (I've made him sorry). Deterrence broadly defined subsumes rehabilitation narrowly defined, since rehabilitation in that sense seeks only to deter a repetition of criminal conduct by the criminal. And rehabilitation and incapacitation, because they so often involve imprisonment, are linked in practice and theory; each is frequently regarded as a fortunate product of the other.

4. Plato says that where one man has acted unjustly to another, "all such cases as are curable we must cure, regarding them as diseases of the soul." 2 THE LAWS 229 (Book IX) (R. Bury trans. 1952). Plato envisioned three kinds of prisons:

one public prison near the market for most cases, to secure the persons of the average criminals; a second, situated near the assembly-room of the officials who hold nightly assemblies, and named the "reformatory"; and a third, situated in the middle of the country, in the wildest and loneliest spot possible, and named after "retribution"

Id. at 379 (Book X). Those convicted of certain crimes who suffer from folly, being devoid of evil disposition and character, shall be placed by the judge according to law in the reformatory for a period of not less than five years, during which time no other of the citizens shall hold intercourse with them, save only those who take part in the nocturnal assembly, and they shall company with them to minister to their souls' salvation by admonition; and when the period of their incarceration has expired, if any of them seems to be reformed, he shall dwell with those who are reformed, but if not, and if he be convicted again on a like charge, he shall be punished by death.

Nor is it easy to distinguish the humanitarian sentiments from the reformatory motives of penal reformers. For instance, I suspect that many of the humanitarian reformers were distressed to see idle, bored prisoners and advocated work as a way of helping prisoners pass the time and retain their sanity and self-respect. Reformers may have hoped the work would also have rehabilitative effects, but any such hope was sometimes secondary. Our basic question, then, is more properly, when did rehabilitation become so well established as a penal goal that it could not be ignored by anyone interested in penology? Or, to put the question from the perspective of individual reformers, when did rehabilitation begin to weigh significantly against other ends of punishment?

An investigation of the origins of the rehabilitative ideal must begin as an investigation of the origin of prisons. Whether or not rehabilitation is possible in another setting, prisons were the scene of the first essays in rehabilitation in any explicit, systematic way. An investigation of the origin of prisons also concludes a discussion of the origin of the rehabilitative notion, since by the time prisons were well established, so was the position of rehabilitation.

Rothman's Hypothesis

In order to establish the "revolutionary nature"⁵ of Jacksonian America's attitudes toward dependency and deviance, Rothman devotes the first two chapters of his book to the seventeenth and eighteenth centuries. During that period, he writes, Americans lived in small, cohesive, hierarchical communities. Those communities understood that man is basically depraved and that the poor and the criminal would be always with them; crime and poverty were not, therefore, thought of as symptomatic of any acute social problem.⁶ Of course, both crime and poverty had to be dealt with, but this could be done, society knew, without strain. Rothman emphasizes that they were dealt with noninstitutionally. They were controlled first by excluding from the community any stranger who could not present evidence of his capacity to support himself and of his social respectability. The colonial community helped its own poor, sick, disabled, or-

5. D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 3 (1971).

6. The well-off not only did not need to fear the poor, but "the presence of the poor was a God-given opportunity for men to do good." *Id.* at 7.

phaned, and widowed in the dependent's own family whenever possible. When that was impossible, he was boarded with someone else's family. Almshouses were rarely built and reluctantly used.⁷ These communities punished criminals with the whip, the pillory, the fine, and the scaffold, but not the jail.⁸ Colonial Americans did not conceive of a rehabilitative prison because of their belief in the natural depravity of man, the omnipresence and strength of the temptations to which he is subject, and the improbability that a household existence (which a prison would offer, since the family was the colonists' model for their institutions) would be either painful or corrective.⁹ "Even at the close of the colonial period," Rothman concludes, "there was no reason to think that the prison would soon become central to criminal punishment."¹⁰

After the American Revolution, however, the country's population grew quickly, urbanization increased, industrialization gradually began, and Enlightenment ideas won adherents. As Americans confronted these changes, they "perceived that the traditional mechanisms of social control were obsolete."¹¹ Further, "they had no vision of how to order society From where would the elements of cohesion come? More specifically, would the poor now corrupt society? Would criminals roam out of control? Would chaos be so acute as to drive Americans mad?"¹² Nevertheless, the new republic was also a confident one, and Americans soon decided they had "located the roots of deviancy not in the criminal, but in the legal system."¹³ In the Enlightenment beliefs that harsh punishments could cause, not prevent, crime and that certain but humane punishment would best reduce it, many states substituted imprisonment for the death penalty. But it was a "repulsion from the gallows rather than any faith in the penitentiary [which] spurred the late-eighteenth century construction [of prisons] To reformers, the advantages of the institutions were external, and they

7. *Id.* at 30-31.

8. "A sentence of imprisonment was uncommon, never used alone. Local jails held men caught up in the *process of judgment*, not those who had completed it The idea of serving time in a prison as a method of correction was the invention of a later generation." *Id.* at 48 (emphasis original).

9. *Id.* at 52.

10. *Id.* at 56.

11. *Id.* at 58.

12. *Id.*

13. *Id.* at 61.

hardly imagined that life inside the prison might rehabilitate the criminal."¹⁴

By the 1820s, though, Americans grasped that more rational and humane penal codes would not alone solve the problem of social control. Intensely optimistic yet deeply afraid, "Americans in the Jacksonian era *suddenly* [began] to construct and support institutions for deviant and dependent members of the community."¹⁵ This was a "revolution in social practice"¹⁶ which "invented" institutions which "were not the logical end of a development that began with the seventeenth-century house of correction, continued in the eighteenth-century workhouse, and improved in the post-Revolution prison."¹⁷ It was a time of unprecedented dangers, and the new institutions were "first and foremost a vigorous attempt to promote the stability of society at a moment when traditional ideas and practices appeared outmoded, constricted, and ineffective."¹⁸ Since Americans had learned that corruption in the community and the family (not sinful individuals) was the threat and caused deviance, rehabilitation would be possible if offenders were separated from society and placed in a well-ordered institution. Solitude was the primary rehabilitative device. (In New York, under the Auburn plan, convicts stayed in separate cells at night and worked together under a rule of silence by day; in Pennsylvania the prisoners were confined to a single cell perpetually.) Rothman describes the rehabilitative process this way:

Thrown upon his own innate sentiments, with no evil example to lead him astray, and with kindness and proper instruction at hand to bolster his resolutions, the criminal would start his rehabilitation. Then after a period of total isolation, without companions, books or tools, officials would allow the inmate to work in his cell. Introduced at this moment, labor would become not an oppressive task for punishment, but a welcome diversion . . . [O]ver the course of his sentence regularity and discipline would become habitual. He would return to the community cured of vice and idleness, to take his place as a responsible citizen.¹⁹

The penitentiary would not only rehabilitate the prisoner, it would rehabilitate society as well. It would be a "model and

14. *Id.* at 62.

15. *Id.* at xiii (emphasis added).

16. *Id.*

17. *Id.* at 94.

18. *Id.* at viii.

19. *Id.* at 85-86. This is actually a description of the Pennsylvania system, but Rothman stresses the essential identity of that system and the Auburn plan.

small-scale society [that] could solve the immediate problem [of social control] and point the way to broader reforms"²⁰ by "demonstrat[ing] the fundamentals of proper social organization. Rather than stand as places of last resort, hidden and ignored, these institutions became the pride of the nation."²¹

The penitentiary, Rothman leads us to believe, was a uniquely American reaction to an American problem. It was also a secular reaction: "the prescriptions of what was right action, the definition of the policy that men of goodwill were to enact, revealed more of a secular than a religious foundation."²²

I shall argue that Rothman understates the extent to which post-Revolutionary prisons were intended to rehabilitate, understates the European influence, understates the role of religion, and thus overstates the extent to which the American penitentiary was a "discovery" of the 1820s. While Americans may have been the first to establish rehabilitative prisons on a large scale, they were not the first to conceive of or advocate the possibility of doing so. This will become clear as we examine the rise of the prison as a punitive, and eventually rehabilitative, institution, first in Europe generally, then in England, and then in America.

II. EUROPE BEFORE THE EIGHTEENTH CENTURY

During the Middle Ages and through the early modern period, Justinian's precept was widely accepted: "Carcer enim ad continendos homines, non ad puniendos haberi debet." ("Prison ought to be used for detention only, not for punishment.")²³ Nations relied primarily on capital punishment, physical mutilation, and chastisement.²⁴ As Maitland said of death, it is a punishment "that can easily be inflicted by a state which has no apparatus of prisons and penitentiaries . . ."²⁵ Further, these

20. *Id.* at 71.

21. *Id.* at 79.

22. *Id.* at 75.

23. R. HINDE, *THE BRITISH PENAL SYSTEM, 1773-1950*, at 11 (1951); G. RUSCHE & O. KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* 62 (1939) [hereinafter cited as G. RUSCHE]. For a book-length treatment of pre-modern prisons, see R. PUGH, *IMPRISONMENT IN MEDIEVAL ENGLAND* (1968).

24. J. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 27 (1977).

25. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 452 (2d ed. 1899). As James Fitzjames Stephen explained,

[In] the days of Coke it would have been impossible practically to set up convict establishments like Dartmoor or Portland, and the expense of establishing either police or prisons adequate to the wants of the country would have been regarded

sanguinary punishments were vivid and must have seemed effective deterrents.

The Church

Nevertheless, prisons as punitive institutions were not unknown before the eighteenth century; in 1595 the Lord Treasurer said before the Star Chamber in *Gresham v. Markham*, "Prisons are ordained for two reasons, the one for safe custody, and the other for correction."²⁶ Penal imprisonment was first developed by the Church, which was driven to devise new forms of punishment because it could not use the death penalty.²⁷ "The church also had the elementary administrative capacity that imprisonment requires, to construct and maintain places of confinement and to care for those incarcerated," as Langbein explains.²⁸ As early as Boniface VIII (1294-1303) we find the Pope acknowledging Justinian's principle but making an exception to it for the Church:

Although it is evident that the use of prison is authorized for the prisoner's custody and not for punishment, we have no objection if you send members of the clergy who are under your discipline . . . to prison for the performance of penitence.²⁹

Not only was the Church administratively equipped to use prisons, but with its responsibility for saving souls and its experience with religious discipline in monasteries, it was the first institution able to think systematically about rehabilitation. For instance, Dom Jean Mabillon advocated solitary confinement and work as a means to serve the basic purpose of punishment—reformation of the prisoner.³⁰ In 1703, the Church founded the Hospice of San Michele in Rome, over the door of which was written, "Parum est

as exceedingly burdensome, besides which the subject of the management of prisons was not understood.

Quoted in G. RUSCHE, *supra* note 23, at 68.

26. Quoted in M. GRÜNHUT, *PENAL REFORM: A COMPARATIVE STUDY* 12 (1948).

27. J. LANGBEIN, *supra* note 24, at 29; G. RUSCHE, *supra* note 23, at 69-70.

28. J. LANGBEIN, *supra* note 24, at 29.

29. Quoted in M. GRÜNHUT, *supra* note 26, at 12.

30. J. MABILLON, *RÉFLEXIONS SUR LES PRISONS DES ORDRES RELIGIEUX*, in 2 *OUVRAGES POSTHUMES DE D. JEAN MABILLON ET DE THIERRI RUINARD, BÉNÉDICTINES DE LA CONGRÉGATION DE ST. MAUR* 321 (D. Thuillier ed. 1724). See also Sellin, *Dom Jean Mabillon—A Prison Reformer of the Seventeenth Century*, *J. CRIM. L. & CRIMINOLOGY* 581 (1927). Allen quotes Sir Francis Palgrave as saying that the Church's position was that punishment should not be "thundered in vengeance for the satisfaction of the state, but imposed for the good of the offender: in order to afford the means of amendment and to lead the transgressor to repentance and to mercy." F. ALLEN, *supra* note 3, at 27.

coercere improbes poena nisi probos efficias disciplina." ("It is of little value to restrain the bad by punishment, unless you render them good by discipline.") The Hospice was for boys convicted of crimes or found "inobedient to their parents," and it trained the offenders in trades, enforced a rule of silence, separated incorrigibles, and confined the boys to small separate cells at night,³¹ a reformatory program foreshadowing those of the late-eighteenth and early-nineteenth centuries.

Alternatives to the Blood Sanctions

Other forerunners of imprisonment were established with less beneficent intentions. The sentencing of convicts (often in commutation of death sentences) to the galleys was fiscally motivated, Langbein and Rusche and Kirchheimer agree: Countries with galleys could not persuade free labor to row; countries without galleys would rent prisoners to those countries with them.³² In the seasons when galleys could not be used the convicts worked ashore, and as the galley fleets declined, convicts were employed in construction work or in manufactories (*bagnes*).³³ Nevertheless, even as early as 1556 King Ferdinand of Austria announced that galley service gave the criminal a chance to atone through labor.³⁴

The galleys were primarily a southern European alternative to the traditional blood sanctions; the workhouse was a northern alternative. In the last half of the sixteenth century, poverty, vagrancy, and vagabondage had reached levels which horrified and frightened respectable folk in England and northern Europe. Among the English solutions was the chartering of "houses of correction," called Bridewells after the London houses founded in 1553. They were intended to reform as well as deter, and the founders hoped, as prison authorities were to hope for centuries, that they would pay for themselves out of the proceeds of the work the vagabonds and idle youths in them were made to do.³⁵ Labor

31. M. GRUNHUT, *supra* note 26, at 21-22.

32. G. RUSCHE, *supra* note 23, at 55; J. LANGBEIN, *supra* note 24, at 31.

33. J. LANGBEIN, *supra* note 24, at 33.

34. *Id.* at 31.

35. M. GRUNHUT, *supra* note 26, at 16. Thus Coke contrasted people committed to common gaols, who only emerged worse, with those confined in Bridewells, who "come out better." *Quoted id.* at 16. As a London order of 1579 read:

Such youth, and other as are able to labor and may have work and shall be found idle shall have some manner of correction by the parents, or otherwise as shall be thought good in the parish. And if they will not amend, they shall be sent to

as a sanction for vagabondage seems a punishment to fit the crime.³⁶ Grünhut, though, sees the houses of correction as something more, as an attempt to apply religious principles to a social and moral problem: "Let him that stole steal no more; but rather let him labour, working with his hands the thing which is good, that he may have to give him that needeth."³⁷ Thus, besides learning discipline and a trade, the inmate received moral instruction.³⁸ In the 1590s Amsterdam established similar institutions—they confined boys, beggars, and petty thieves and provided work and religious and moral instruction.³⁹ The purpose of the *tuchthuis* (house of correction), a contemporary said, was "not sore punishment, but the improvement [*beteringe*] and correction of those who do not realize its usefulness to them and would try to avoid it."⁴⁰ Gradually, from the middle of the seventeenth century, workhouses began to receive those convicted of more serious crimes but who had been reprieved because the state wished to soften the harshness of the law or to save the life of a useful citizen.⁴¹ Thus, as Langbein concludes, both the workhouse and the galley system "converged under the ancien régime to form the prison system that displaced the blood sanctions from European law."⁴²

It is natural that "idle youth" inspired the first secular rehabilitation programs, and that other early inmates of the houses of correction were not guilty of serious crimes. Misdemeanors could not be overlooked, yet the scaffold would not do, and it must have been easier to conceive of rehabilitating the young and possibly impressionable than the old and presumably hardened. The young are often safer and more sympathetic beneficiaries of a mitigation of a stern law, and throughout the history of prisons, the young, women, and the "better sort" (debtors, skilled work-

Bridewell to be reasonably corrected there.

Quoted in J. LANGBEIN, *supra* note 24, at 35.

36. Vagabondage was a very loosely defined crime, encompassing those who could work but would not (sturdy beggars) and professional petty criminals. Langbein suggests there was "a strong current of preventive criminal law in the regulation of vagabondage." J. LANGBEIN, *supra* note 24, at 34-35.

37. *Ephesians* 4:28. "The first Houses of Correction bear the marks of a new spiritual impulse, to organize worldly affairs in accordance with Divine commands." M. GRÜNHUT, *supra* note 26, at 20.

38. J. LANGBEIN, *supra* note 24, at 35.

39. T. SELLIN, *PIONEERING IN PENOLOGY* 9 (1944).

40. *Quoted id.* at 27.

41. J. LANGBEIN, *supra* note 24, at 38-39.

42. *Id.* at 30.

ers, and the upper classes) have been the opening wedge for concerned and reformatory treatment.⁴³

III. ENGLAND IN THE EIGHTEENTH CENTURY

The Influence of Religion

The eighteenth century in England was, of course, pre-eminently the time of a campaign to reform and rationalize the criminal law led by men like William Eden and Samuel Romilly and stimulated by the failure of sanguinary sanctions and the writing of Enlightenment figures like Montesquieu and Cesare Beccaria.⁴⁴ However, the student of the rehabilitative ideal needs to look first at religion's effect on expectations about incarceration and repentance, for religious sentiments provoked some of the most modern speculations about rehabilitation and motivated another group of reformers, those who were especially interested in prison reform. Today it is science which has convinced man he can reshape human behavior, but though the Enlightenment is a source of that confidence, much of the sublime self-assurance of the early adherents of the rehabilitative ideal came from what Christianity taught them of human nature and God's will.

Christians, of course, are admonished to behave charitably to all men, for "inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."⁴⁵ And more explicitly, "I was in prison, and ye came unto me."⁴⁶ Visits to prisons and reports on them were to become frequent, all published in the hope of ameliorating the wretched conditions which were usually discovered. The first English prison report was written in 1702 by an Anglican divine, Dr. Thomas Bray, for the Society for Promoting Christian Knowledge. Like many of the reports that were to follow, it deplored the squalor of the prisons, the incompetence and knavishness of the keepers, and the corruption of new prisoners by old. And like many subsequent reports,

43. "Incarceration in a . . . [workhouse] was often employed in order to spare [women and] members of the privileged classes the humiliation of corporal punishment or galley slavery." G. RUSCHE, *supra* note 23, at 66.

44. The reformers were especially influenced by C. BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* (1764). His biography is M. MAESTRO, *CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM* (1973). See also M. MAESTRO, *VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW* (1942). For information about the English reformers, see 1 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 259-396 (1968).

45. *Matthew* 25:40.

46. *Matthew* 25:36.

it urged that prisoners be kept in separate cells.⁴⁷

The Christian adjuration to repent, the assurance of redemption, and the dramatic example of the salvation of the thief at Calvary reminded the devout that improving conditions in prisons was not enough, that the moral and spiritual health of the prisoner could and must be restored. The tendency to confuse crime with sin made plausible the proposition that criminals as well as sinners could be reformed, and the Christian experience with redeeming sinners suggested a method of doing so. *An Exhortation to Prisoners*,⁴⁸ published in 1699, reveals the equation of crime and sin and sketches the psychological and spiritual process of rehabilitation. The exhortation reminds prisoners that "It is a great mercy of God, not to suffer men to ruin themselves both in this world, and in that which is to come. For this end, he is pleased to make use of several wonderful methods" Among these methods is the sending of afflictions:

By these he endeavours to put a stop to their sinful courses, by arresting their spirits a while that they may reflect upon their former *wicked lives*, and consider what will be *the consequence* of them, and so repent and amend them before it is too late.

The afflicted, it is true, are "apt to *murmur* and *repine* at God's punishments," but they should ask themselves

who they think is their greatest friend, one that encourages them to enjoy "the pleasures of sin for a season," which will betray them to *everlasting destruction* afterwards; or he that puts them to some trouble *now*, that they may *avoid* being *eternally* miserable hereafter?

The prisoner is encouraged to remember

that [since] you now are shut out from business and conversation in the world, you have a great deal of time in your hands, which under this restraint of your *body*, may be improved to the benefit of your soul. Let a considerable part of it therefore be spent in

47. T. BRAY, AN ESSAY TOWARD THE REFORMATION OF NEWGATE AND OTHER PRISONS IN AND ABOUT LONDON (1702), reprinted in H. DIXON, JOHN HOWARD AND THE PRISON WORLD OF EUROPE (1849), in the first edition only. W. LEWIS, *supra* note 2, at 23. M. GRÜNHUT, *supra* note 26, at 29.

48. The *Exhortation* was published in T. BOWEN, A COMPANION FOR THE PRISONER: BEING A SELECTION OF SERMONS, EXHORTATIONS: AND OTHER RELIGIOUS INSTRUCTIONS; COMPILED FOR THE USE OF IMPRISONED OFFENDERS. Bowen was the Chaplain of Bridewell and evidently made the compilation in 1798. A second edition was published in 1809 for the Society for Promoting Christian Knowledge. That volume contains, *inter alia*, sermons entitled: *The Nature of Sin, and the Punishment that certainly follows it; The Convict's Address to his unhappy Brethren; and Advice to habitual evil Livers*. It is worth reading as a very blunt description of the rehabilitative process as seen through a prison chaplain's eyes.

reflecting upon your *past* lives, in expressing your *hearty sorrow* for the *wickedness of your actions*

The themes of that exhortation were still current in prison sermons a century later, though the process of repentance and reformation was by then more precisely delineated. First, the offender has to be made aware of his offense. "Sharp calamity is an instrument which the grace of God uses to awaken sinners to a sense of their condition."⁴⁹ But the sharp calamity is to good purpose:

You are brought to this place, as the sick and wounded are sent to other places, to be cured . . . and the means here made use of, are such as, if it be not your own fault, will tend to make you *wiser*, and *better*, and *happier*, than you have ever yet been.⁵⁰

The method of "this place" is solitude:

It has been recommended, both by the practice and precept of holy men, in all ages, sometimes to retire from scenes of public course, for the purpose of communing with our own hearts, and meditating on heaven What can sooner bring us acquainted with our own hearts than the exclusion of the world?⁵¹

Once alone with his thoughts, the prisoner inevitably confronts his own nature:

You need not be told, on divine authority, that "the wicked are like the troubled sea, when it cannot rest;" and you need only have recourse to your own hearts to know, that "there is no peace to the wicked."⁵²

The inmate leaves prison reformed:

You will then take a *final* leave of this place, renewed in the spirit of your minds; established in diligent and virtuous habits; strongly impressed with a sense of your duty to God⁵³

Some scholars have intimated that solitude as a rehabilitative technique is an innovation of the American Quakers,⁵⁴ but as the preceding suggests, it was advocated by English Christians of several denominations throughout the eighteenth century. Solitude, of course, served two purposes. First, it prevented the corruption of the relatively innocent by the thoroughly guilty. The sight of men and women, felons and debtors, convicts and defendants, the old and the young, thrown together in one prison ap-

49. Thomas Bowen, *quoted in* A. BABINGTON, *THE ENGLISH BASTILLE* 161 (1972).

50. Glasse, *The Sinner Encouraged to Repentance*, in T. BOWEN, *supra* note 48, at 4.

51. Brewster, *Use of Solitude in Prisons*, in T. BOWEN, *supra* note 48, at 16-17.

52. Glasse, *supra* note 50, at 3.

53. *Id.* at 11.

54. *E.g.*, N. MORRIS, *THE FUTURE OF IMPRISONMENT* 4 (1974).

palled eighteenth-century visitors. Vice was repeatedly compared to an infectious disease, and, in fact, a highly contagious one. But this function of solitude only prevented degeneracy; as the sermons quoted above suggest, there was a common (if speculative and mystical) belief that solitude could cure it as well. I have already mentioned the example of monastic solitude, silence, and reflection.⁵⁵ In Protestant England, Dr. Bray's report in 1702 on prisons called for separate cells.⁵⁶ In 1740, Bishop Joseph Butler proposed that prisoners be placed "in solitude with labour and low diet" (a combination later favored by Bentham) "to make the experiment how far their natural strength of mind can support them under guilt or shame and poverty."⁵⁷ The Rev. William Dodd, from solitary confinement before his execution for forgery, endorsed the method:

Devotion's parent, Recollection's nurse,
Source of Repentance true; of the Mind's wounds

The deepest prober, but the safest cure!
Hail, sacred SOLITUDE! These are thy works,
True source of good supreme! Thy blest effects
Already on my Mind's delighted eye
Open beneficent.⁵⁸

Dodd's friend Jonas Hanway was perhaps the most fervent advocate of solitude; in 1776 he published *Solitude in imprisonment, with proper labour and spare diet, the most humane and effectual means of bringing malefactors to a right sense of their condition*,⁵⁹ in which he proposed completely isolating inmates to keep them alone with their thoughts, tracts, and God. Even the Rev. William Paley, who doubted the efficacy of attempts at rehabilitation, conceded that if rehabilitation were possible it would be through solitary imprisonment and the usual progression through calamity, reflection, and repentance.

An additional advantage of solitary confinement was that it could be defended against the sterner advocates of deterrence. In fact, the beauty of solitary confinement was that the more depraved the criminal, the more he would fear solitary confinement, since the more depraved he was, the more horrifying the thoughts he must confront in solitude would be. Thus Blackstone could find no other punishment

55. See note 30 *supra* and accompanying text. M. GRÜNHUT, *supra* note 26, at 29.

56. See text at note 47 *supra*.

57. Quoted *id.* at 31.

58. Quoted in W. LEWIS, *supra* note 2, at 25.

59. W. PALEY, *MORAL AND POLITICAL PHILOSOPHY* in *WORKS* 136 (1827).

in which terror, benevolence, and reformation are more happily blended together Solitude will awaken reflection, confinement will banish temptation, sobriety will restore vigour, and labour will beget a habit of industry.⁶⁰

One may facilely attribute inhumane motives to the men whose proposals led to the cruelty of solitary confinement. But they were men who took their own consciences and sins seriously, and who found consolation in the self-examination and denial they proposed for prisoners. John Howard, for instance, held to a "hard" diet, spent hours in prayer and meditation, and deliberately took risks that look (at least to the modern eye) like attempts at self-immolation. (The attempts succeeded.)⁶¹ Hanway, another philanthropic merchant and traveller, was a morbidly pious man who commissioned paintings of himself as an infant and as he would be on his deathbed. These he placed on his wardrobe over an inscription reading: "JONAS HANWAY, ESQ. . . . THE PERSUASIVE LAWS CONTAINED IN THE NEW TESTAMENT, AND THE CONSCIOUSNESS OF HIS OWN DEPRAVITY, SOFTENED HIS HEART TO A SENSE OF THE VARIOUS WANTS OF HIS FELLOW CREATURES THE LORD HAVE MERCY ON HIS SOUL AND THINE!"⁶²

Labor, like solitude, was integral to the houses of correction,⁶³ since idleness was one of the faults to be corrected in them. That irritating figure, the sturdy beggar, was a threat to society both because of what he was doing (taking advantage of private and public charity) and because of what he might at any moment do (steal, pimp, or assault). Idle hands were indeed the devil's playground, since a person not productively occupied was prey to the temptations to debauchery and corruption which were all about. So, as "aversion to labour is the cause from which half of the vices of low life deduce their origin and continuance, punishments ought to be contrived with a view to the conquering of this disposition." Solitary confinement with labor would make labor habitual, solitary confinement without it would make "idleness irksome and insupportable."⁶⁴ This perspective is not wholly attributable to the Weberian Protestant work ethic, since workhouses were introduced in Amsterdam before Calvinism. A final advan-

60. Quoted in M. GRÜNHUT, *supra* note 26, at 35.

61. D. HOWARD, *JOHN HOWARD passim* (1958).

62. J. HUTCHINS, *JONAS HANWAY*, 1712-1786, at 12 (1940).

63. See text at notes 35-43 *supra*.

64. W. PALEY, *supra* note 59, at 136.

tage of compelling inmates to work was that they would, it was hoped, thereby pay for their own rehabilitation.

The Criminal Law Reformers

By the eighteenth century over two hundred crimes carried the capital penalty, but the number of executions was, if anything, lower than it had been when fewer crimes could be punished with death.⁶⁵ The criminal law reformers argued that moderate penalties certainly and promptly inflicted would more effectively and humanely deter crime than a system so savage that citizens were reluctant to prosecute and juries reluctant to convict. Frequent, severe penalties, Eden wrote, "harden the sentiment of the people. *Une loi rigoureuse produit des crimes.*"⁶⁶ The rationalists, then, were absorbed with the problem of deterrence; especially during the early years of the movement rehabilitation was not foremost in their minds. Few reformers thought rehabilitation possible, joining for once with the supporters of the status quo, for whom Paley spoke when he said in 1785 that "from every species of punishment that has hitherto been devised, from imprisonment and exile, from pain and infamy, malefactors return more hardened in their crimes, and more instructed."⁶⁷ But whether the rationalists believed that men could not be reformed or simply that no available institution showed any prospect of doing so is not clear. By this time the houses of correction as well as the jails had become squalid, degrading, and devoid of any reformatory purpose; Henry Fielding was descending to clichés when he called them "schools of vice, Seminaries of idleness, common shores of nastiness and disease."⁶⁸ Eden, though he acknowledged the need for an intermediate punishment, opposed sending men to prison, which "has always a bad effect on [convicts'] morals,"⁶⁹ partly because "it must be confessed that gaolers are in general a merciless race of men."⁷⁰ Yet, the reformers also had to cope with the possibility and accusation that imprisonment was too pleasant to deter criminals.⁷¹

65. Hay, *Property, Authority and the Criminal Law*, in D. HAY, P. LINEBAUGH, J.G. RULE, E.P. THOMPSON, & C. WINSLOW, *ALBION'S FATAL TREE* 17 (1975).

66. W. EDEN, *PRINCIPLES OF PENAL LAW* 12 (1771).

67. W. PALEY, *supra* note 59, at 136.

68. *Quoted in* M. GRÜNHUT, *supra* note 26, at 30.

69. W. EDEN, *supra* note 66, at 44.

70. *Id.* at 47.

71. So we see Howard arguing: "[C]onfinement in a prison, though it may cease to be destructive to health and morals [after the reforms Howard calls for are accom-

Nevertheless, in their search for a satisfactory secondary punishment (a search made more pressing by the closing of the American colonies to penal transportation), the rationalists increasingly realized the advantages of rehabilitation. Thus, in the course of a disquisition on the impractical severity of the criminal law, Dr. Johnson remarked:

If those, whom the wisdom of our laws has condemned to die, had been detected in their rudiments of robbery, they might, by proper discipline and useful labour, have been disentangled from their habits . . . and passed their days in reparation and penitence; and detected they might all have been, had the prosecutors been certain that their lives would have been spared.⁷²

As usual, some of the early rehabilitative schemes were designed for the young, such as Berkeley's recommendation in 1737 citing the Amsterdam houses of correction.⁷³ Ignatieff reports that Henry Fielding, in searching for "an intermediate penalty, combining 'correction of the body' with 'correction of the mind,'" suggested

solitary confinement in new houses of correction built on a cellular plan: There can be no more effectual means of bringing the most abandoned Profligates to Reason and Order than those of Solitude and Fasting; which latter is often as useful to a diseased mind as to a distempered body.⁷⁴

Bentham published a plan in 1791 for "reforming the vicious," though it was also a plan for "punishing the incorrigible."⁷⁵ This was the Panopticon, a circular prison whose principal attraction, as the subtitle of Bentham's essay (*The Inspection-House*) implies, was that it allowed a few guards to keep close watch on many prisoners. Furthermore, its separate cells would prevent prisoners from corrupting each other. The Panopticon had high promise: "Morals reformed—health preserved—industry invigorated—instruction diffused—public burthens lightened . . . the

plished], will not fail to be sufficiently irksome and disagreeable, especially to the idle and profligate." J. HOWARD, *THE STATE OF PRISONS IN ENGLAND AND WALES* 43 (1792).

This is a charge reformers have had to deal with in all places at all times. A proposed French code, drafted after the Revolution, was convincingly defended against such a charge by Le Pelletier: "It is contended that capital punishment is the only one capable of deterring from crime; the penalty which we are now proposing [solitary confinement, bread and water, and ball and chain] would be worse than the most cruel death." *Quoted in* 1 L. RADZINOWICZ, *supra* note 44, at 298.

72. Johnson, *Rambler* No. 114, in 21 *THE BRITISH ESSAYISTS* 38 (1808).

73. 1 L. RADZINOWICZ, *supra* note 44, at 263.

74. M. IGNATIEFF, *supra* note 2, at 46.

75. J. BENTHAM, *PANOPTICON*, in 4 *WORKS* 37, at 40 (1841).

Gordian knot of the Poor-Laws not cut, but untied,—all by a simple idea in Architecture!”⁷⁶ In his discussion of imprisonment in the *Principles of Penal Law*, he described a theory of reformation much like that of the prison sermons. A prisoner subjected to solitude, darkness, and hard diet would “be forcibly solicited to pay attention to any ideas which, in that extreme vacancy of employment, are disposed to present themselves to his view.”⁷⁷ These ideas would naturally concern his past errors and his present unhappy balance of pain and pleasure. “Another advantage attendant on this situation is, that it is peculiarly fitted to dispose a man to listen with attention and humility to the admonitions and exhortations of religion.”⁷⁸

By and large, however, the criminal law reformers had not thought systematically about what prisons should be like. It was the union of the prison reformers with the criminal law reformers which produced the plan for a rehabilitative, decent punishment toward which both groups had been working.

John Howard

That such men as Blackstone,⁷⁹ Eden, and Bentham ultimately accepted imprisonment as a standard penal technique was chiefly due to the work of certain English reformers, most of them actuated by religious motives, who not only exposed miserable jail conditions but also tried to prove that a prison did not have to exemplify everything that was loathsome and terrible.⁸⁰

Pre-eminent among these reformers was “the celebrated Mr. Howard.” A philanthropic (though personally difficult) man of independent means,⁸¹ Howard discovered on being appointed sheriff of Bedford that there were men found innocent of crimes who were kept in jail until they paid fees to the jailer. The justices of the county told him they would substitute a salary for fees if Howard could find a precedent for charging the county. “I therefore,” Howard related, “rode into several neighbouring

76. *Id.* at 39.

77. 1 *id.* at 425.

78. *Id.* at 426. Bentham recognized that solitude could not be imposed indefinitely without injuring the prisoner.

79. Using the familiar medical metaphor, Blackstone wrote: “It is, it must be owned, much *easier* to extirpate than to amend mankind; yet that magistrate must be esteemed both a weak and cruel surgeon who cuts off every limb which, through ignorance or indolence, he will not attempt to cure.” 4 COMMENTARIES 17-18 (emphasis in original).

80. W. LEWIS, *supra* note 2, at 19.

81. D. HOWARD, *supra* note 61, is the most recent biography.

counties in search of one; but I soon learned that the same injustice was practiced in them; and looking into the prisons, I beheld scenes of calamity, which I grew daily more and more anxious to alleviate."⁸² This was the first of many trips in which Howard systematically visited the prisons, houses of corrections, hospitals, and insane asylums of England and Europe. Undeterred by squalor, danger, or hostile officials, Howard meticulously examined conditions and described them to other reformers and to Parliament. Writing at a time when jail fever (typhus) ravaged the prisons of Europe and when "rot in jail" was a literal expression, Howard was most concerned for the health and safety of the inmates, but he did not ignore their moral and spiritual welfare.

Howard admired Beccaria and partook of "the good Marquis's" rationalist, humane penology. Howard's own humanitarian sympathies had been sharpened by time spent as a prisoner of war.⁸³ But Howard was most importantly a devout Nonconformist and said of himself: "I could not enjoy my ease and leisure in the neglect of an opportunity offered me by Providence of attempting the relief of the miserable."⁸⁴

Howard's interest in the moral and psychological effects of prisons was aroused by the debilitating consequences of prison, which he, like other prison visitors, repeatedly encountered.

[I]f it were the wish and aim of magistrates to effect the destruction, present and future, of young delinquents, they could not devise a more effectual method, than to confine them so long in our prisons, these seats and seminaries . . . of idleness and every vice.⁸⁵

It was a short step from watching the moral destruction of the delinquent to urging his reconstruction; a seminary of vice could become a school for virtue. Like his predecessors, Howard made rehabilitation more palatable and plausible by emphasizing the "sympathetic offender": "In some gaols you see (and who can see

82. J. HOWARD, *supra* note 71, at 1.

83. "Debtors and felons, as well as hostile foreigners, are men, and by men they ought to be treated as men." J. HOWARD, *supra* note 71, at 12.

84. *Id.* at 1.

85. *Id.* at 11. As Tocqueville commented about the authors of the reformed American penal systems, "[I]t is natural that having preserved the prisoner from the corruption with which he was threatened, they aspire at reforming him." A. DE TOCQUEVILLE & G. DE BEAUMONT, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 81 (1st ed. 1833; reprinted 1969) [hereinafter cited as A. DE TOCQUEVILLE] Tocqueville and Beaumont were sent to America by the French government to study prison reform. It was during their visit that Tocqueville gathered the material for *Democracy in America*.

it without sorrow) boys of twelve or fourteen eagerly listening to the stories told by practiced and experienced criminals."⁸⁶ Howard's most explicit proposals for rehabilitation were for the houses of correction.⁸⁷ On that subject he was firm and clear:

To reform prisoners, or to make them better as to their morals, should always be the leading view in every house of correction, and their earnings should only be a second object. As rational and immortal beings we owe this to them.⁸⁸

Howard looked to solitary confinement at night and (for moderate periods) during the day as the way "to reclaim the most atrocious and daring criminal" and "to make a strong impression, in a short time, upon thoughtless and irregular young persons."⁸⁹ He was convinced of the reformatory power of religion, and he repeatedly reprimanded prisons without a chapel, a chaplain, Bibles, or religious services. Howard endorsed Fielding's expectation that

[r]eligion will . . . have a strong influence in correcting the morals of men, and I am no less persuaded, that it is religion alone which can effectually accomplish so great and so desirable a work.⁹⁰

Howard's books and proselytizing in favor of penal reform inspired the Penitentiary Act of 1779, which, drafted as it was by Eden (won over to prisons by Howard) and Blackstone, marks the union of the two lines of penal reform. It also marks formal, national recognition of rehabilitation as a partner of deterrence as a legitimate purpose of punishment. The Act authorized the construction of national penitentiaries in which not only were prisoners to be physically cared for, but in which

[s]olitary imprisonment, accompanied by well regulated labour and religious instruction, . . . might be the means, under Providence, not only of deterring others from the commission of the like crimes, but also of reforming the individuals and inuring them to habits of industry . . .⁹¹

The Act invoked the trinity which was everyone's prescription for reformation—solitude, work, and religious instruction—but the prescription was not taken until the next century, because Blackstone's death, Howard's intransigence, other political difficulties,

86. J. HOWARD, *supra* note 71, at 8.

87. Since debtors and persons awaiting trial or execution were held in the prisons, Howard could not regard the prisons as purely reformatory agencies.

88. J. HOWARD, *supra* note 71, at 41.

89. Quoted in M. GRÜNHUT, *supra* note 26, at 36. "Solitude and silence are favourable to reflection and may possibly lead to repentance." J. HOWARD, *supra* note 71, at 22.

90. J. HOWARD, *supra* note 71, at 41.

91. 19 Geo. III, c. 74.

and the beginning of penal transportation to Australia delayed the building of national prisons. Nevertheless, in the last quarter of the century, some counties enlarged or reformed jails along lines suggested by the Act, and "[a] dozen counties went further and actually built small penitentiaries adjacent to, or in place of, their jails and houses of correction."⁹²

By the end of the eighteenth century in England, then, those looking for a rational alternative to capital punishment, those incensed by injustice and cruelty in prisons, and those concerned for the moral and spiritual salvation of wrongdoers had come to agree on a rehabilitative prison as a solution to the problem of punishment. The primary technique of reformation—solitude—was also agreed on, though its proper extent and severity were not. And while criminal law reformers much influenced by the Enlightenment were important in securing legislation promoting rehabilitative prisons, a powerful motivating force behind the rehabilitative ideal was religious.

IV. THE REHABILITATIVE IDEAL IN AMERICA

Punishment in Colonial America

In his anxiety to demonstrate the novelty of rehabilitation in the Jacksonian period, Rothman adamantly denies that Puritans saw any hope of salvaging the depraved. But one student of criminal law in early Massachusetts writes:

[I]mplicit in the battery of punitive devices of admonition, referral to church discipline, public confession and humiliation is an attitude of hopefulness for the wayward which, despite the endless sermonizing on the depravity of man, was among the most vital forces in Puritanism. If the Puritan magistrate abhorred the criminal act, he respected the offender to whom, no less than to himself, God's promise of grace was freely proffered, and whose soul, however disordered in its faculties, could not be regarded as hopelessly lost.⁹³

While coercion was required for the obstinate (and while to our eyes the Puritans may have been painfully quick to spot obstinacy), correction was possible for the rational.⁹⁴

92. M. IGNATIEFF, *supra* note 2, at 96. For a description of these penitentiaries generally and of the influential Gloucestershire institutions in particular, see *id.* at 96-109.

93. G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 210-11 (1960).

94. *Id.* at 211.

Early Developments in Pennsylvania

The early Quakers had had in England the personal experience with jails which has always stimulated penal reform; William Penn was himself imprisoned three times. Further, they saw in every man an "inner light," a spark of the divine, which, properly tended, could redeem even a criminal.⁹⁵ Thus Pennsylvania's early penal code was a moderate one—only murder was a capital crime—and in 1682 Penn established a house of correction in which offenders were made to work in compensation for their crime.⁹⁶ A harsher penal code was imposed by the British in 1718, and after the Revolution an act was passed generally substituting "continued hard labor, publicly and disgracefully imposed" for capital punishment.⁹⁷ But the citizens of Philadelphia were perturbed by the sight of chain gangs in their streets and by the insalubrious state of their prisons, and in 1787 they founded the Philadelphia Society for Alleviating the Miseries of Public Prisons. The preamble of its constitution, after the usual citation to *Matthew 25:36*, stated:

[T]he obligations of benevolence, which are founded on the precepts and example of the Author of Christianity, are not canceled by the follies or crimes of our fellow creatures By the aids of humanity . . . such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness.⁹⁸

The first public recommendation of the Society was for "more private or even solitary labour" and separation of the depraved from the less depraved and of the men from the women.⁹⁹ The Society especially admired a prison in England which followed John Howard's recommendation of separate cells to be occupied by night and sometimes worked in by day. Announcing that "reformation hath become a principal object with the magistracy and rulers,"¹⁰⁰ the Society successfully urged the construction of separate cells in the Walnut Street jail for "more hardened and

95. W. LEWIS, *supra* note 2, at 21. For a biography of a Quaker merchant who toured British prisons trying to secure better treatment for incarcerated Friends and who probably advised Penn, see A. FRY, *JOHN BELLERS, 1654-1725* (1937).

96. B. MCKELVEY, *AMERICAN PRISONS* 3 (1977).

97. H. BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA* 81 (1968).

98. *Id.* at 82.

99. *Id.* at 86. The report also recommended the "prohibition of spirituous liquors among the criminals."

100. *Id.* at 92-93.

atrocious offenders."¹⁰¹

Among the Society's enthusiasts of solitary confinement was the extraordinary Dr. Benjamin Rush (1745?-1813), hero of the yellow-fever epidemic and irrepressible reformer.¹⁰² A devout man who had almost become a minister, he asked men to imitate their common Father by "converting those punishments to which [criminals'] folly or wickedness have exposed them, into the means of their reformation and happiness."¹⁰³ To Rush, the means were obvious: "To me there is no truth in mathematics or even morals more self-evident than that solitude and labor might be so applied for all crimes as to make the punishment of death and public disgrace forever altogether unnecessary."¹⁰⁴ His description of the psychology of solitary punishment closely resembles those of his English contemporaries:¹⁰⁵

Too much cannot be said in favor of SOLITUDE as a means of reformation, which should be the *only* end of *all* punishment. Men are wicked only from not *thinking* . . . For this reason, a bad man should be left for some time without anything to employ his hands in his confinement. Every *thought* should recoil wholly upon *himself*.¹⁰⁶

Early Developments in New York

The central figure in the prison-reform movement in late eighteenth-century New York was a Quaker merchant named Thomas Eddy. Eddy partook of the humane Quaker tradition, and his appreciation of the plight of prisoners had been enlivened by a term of imprisonment as a Tory in the Revolution. After the war he helped win passage of a law substituting long prison sentences for all but three capital crimes, and he served as the first warden of Newgate prison in New York City. He was a follower of Howard, but, to his later regret, he disregarded Howard's ad-

101. *Id.* at 93.

102. The editor of his letters reports:

Apart from clinical medicine, his letters deal with subjects as diverse as psychiatry and forestry, veterinary science and the ventilation of ships, penology and chemistry . . . [H]e was called upon for opinions on a vast variety of subjects: the proper mode of training children in the home, health measures for the Lewis and Clark expedition . . . , the curriculum at Princeton . . . and how a young woman should comport herself after marrying a widower with five children.

1 LETTERS OF BENJAMIN RUSH lxvii (L. Butterfield ed. 1951).

103. B. RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY 23 (1st ed.n.p. 1787) (reprinted 1954).

104. B. RUSH, *supra* note 102, at 527.

105. See notes 47-58 *supra* and accompanying text.

106. B. RUSH, *supra* note 102, at 512.

vice to build separate cells for the prisoners to be used at night.¹⁰⁷ Eddy believed that rehabilitation was the chief end of punishment, and he sought to "eradicate the evil passions and corrupt habits which are the sources of guilt"¹⁰⁸ through work, religion, and education.¹⁰⁹

The Pennsylvania and Auburn Systems

Neither Newgate nor the Walnut Street jail was successful; both were plagued by scarce funds, scarce space, and the vicissitudes of partisan politics. As it became clear toward the end of the nineteenth century's second decade that neither institution was rehabilitating its inmates and that those prisoners who were not escaping were undisciplined, a reaction set in. In 1821 Pennsylvania built a prison in which every inmate was kept in solitary confinement for the length of his sentence. New York experimented briefly and unsuccessfully with the Pennsylvania plan; it settled in 1825 for confining prisoners in cells at night and letting them work together under a rule of complete silence by day. Pennsylvania had, if anything, constructed a prison which (in the estimation of the day) was better suited to rehabilitation than what had gone before. In New York, as "the demand for severe and painful treatment of the felon gained strength, the deterrent theory of punishment was stressed at the expense of the reformatory idea."¹¹⁰ The reformatory idea, some argued, had been tested and had failed at Newgate.¹¹¹ Newgate's defenders retorted that Newgate had always been overcrowded and underfunded and that rehabilitation had therefore never been tried.¹¹² The whip-wielding warden of Auburn, Elam Lynds, a man known for the severity of his administration, did not believe

in a complete, [*sic*] reform, except with young delinquents

But my opinion is, that a great number of old convicts do not commit new crimes, and that they even become useful citizens,

107. W. LEWIS, *supra* note 2, at 1-4; S. KNAPP, *THE LIFE OF THOMAS EDDY* (1834).

108. *Quoted in* W. LEWIS, *supra* note 2, at 32.

109. *Id.*

110. *Id.* at 63.

111. The inspectors of the Auburn prison believed that the "great end and design of criminal law, is the prevention of crimes, through fear of punishment; the reformation of offenders being a minor consideration." *Quoted in* W. LEWIS, *supra* note 2, at 63.

112. See, for instance, the fervent defense of Newgate by the British reformer William Roscoe. *A BRIEF STATEMENT OF THE CAUSES WHICH HAVE LED TO THE ABANDONMENT OF THE CELEBRATED SYSTEM OF PENITENTIARY DISCIPLINE IN SOME OF THE UNITED STATES OF AMERICA* (1827).

having learned in prison a useful art, and contracted habits of constant labor.¹¹³

But by this time, even the "most thoroughgoing exposition" of the "doctrine of severity" had to pay "periodic lip service to the idea that penal treatment should be reformatory as well as preventive,"¹¹⁴ and Beaumont and Tocqueville found that "the idea was not given up, that the solitude, which causes the criminal to reflect, exercises a beneficial influence; and the problem was, to find the means by which the evil effect of total solitude could be avoided without giving up its advantages."¹¹⁵ Even after the failure of a rehabilitative system, then, the rehabilitative ideal could not by this time be ignored or discarded.

The Theory of the Penitentiary

The American understanding of the rehabilitative process differed little from that of the late-eighteenth-century British. This section will describe the American understanding and its similarities to English theories; the next section will look specifically at the evidence of actual borrowing.

In justifying rehabilitation as a goal of punishment, the Americans, like the British, first made the minimum argument:

[I]f it is obstinately insisted upon that government, as such, has no obligation to correct the morals of convicts, it is, at all events, its sacred duty not to lead them to certain ruin, and society takes upon itself an awful responsibility, by exposing a criminal to such moral contagion.¹¹⁶

It was clear, Tocqueville pointed out, that "if the [rehabilitative] efficiency of the prison is yet doubtful, its power of depraving [prisoners] still more is known, because experience proves it."¹¹⁷ In any event it is in society's interest to try to reclaim criminals.¹¹⁸ The advocates of rehabilitation then moved to a

113. Quoted in A. DE TOCQUEVILLE, *supra* note 85, at 163-64.

114. W. LEWIS, *supra* note 2, at 102-03.

115. A. DE TOCQUEVILLE, *supra* note 85, at 42.

116. Lieber, *Translator's Preface to A. DE TOCQUEVILLE*, *supra* note 85, at 3.

117. A. DE TOCQUEVILLE, *supra* note 85, at 81. The language and metaphor of the American reformers are in this area particularly close to those of the British:

Prisons have been called hospitals for patients laboring under moral diseases, but until recently, they have been . . . of a kind that they ought to be compared rather to the plague-houses in the East, in which every person afflicted with that moral disorder is sure to perish . . . [T]hese [are] moral lazarettos, intended for punishment and for the prevention of crime, but in reality, generating it and effecting the total ruin and corruption of their unhappy inmates.

Lieber, *supra* note 116, at 5.

118. *Id.* at 15.

“more dignified and nobler ground.” The legislatures “have provided prisons where the reformation and improvement of the criminal, and the protection of society, are the grand objectives.”¹¹⁹

“To correct a criminal radically, more is required than an excitement of feeling; his habits must be broken”¹²⁰ and the criminal must in some way be brought up sharp. The means of doing so is, of course, solitude.¹²¹ Tocqueville neatly summarized what he had learned in America of the rehabilitative process:

Can there be a combination more powerful for reformation than that of a prison which hands over the prisoner to all the trials of solitude, leads him through reflection to remorse, through religion to hope . . . and which, whilst it inflicts the torment of solitude, makes him find a charm in the converse of pious men, whom otherwise he would have seen with indifference, and heard without pleasure?¹²²

Americans also discerned a curative power in labor:

[E]ven if the criminal did not find in it a relief from his sufferings, it nevertheless would be necessary to force him to it. It is idleness which has led him to crime; with employment he will learn how to live honestly.¹²³

Not only was solitary confinement curative, it was a defensible deterrent, since criminals “shun, by a vague presentiment, perhaps, the being corrected and reformed in spite of themselves, and the contemplation of their unhappy life, spent and lost in evil deeds.”¹²⁴

An important difference between the nineteenth-century American and the eighteenth-century English proponents of rehabilitation is that the Americans encountered criticism of solitude as too harsh a treatment. Charles Dickens visited the Pennsylvania penitentiary during one of his visits to America and, like

119. Warden's Report to the Board of Inspectors, in *INSPECTORS OF THE EASTERN STATE PENITENTIARY OF PENNSYLVANIA, SECOND ANNUAL REPORT 13* (1831).

120. Lieber, *supra* note 116, at 16.

121. Solitude, of course, also prevents the spread of corruption from prisoner to prisoner. A. DE TOCQUEVILLE, *supra* note 85, at 55. The efficacy of solitude was subscribed to by adherents of the Auburn as well as the Pennsylvania system. Thus one of the first three resolutions of the Prison Discipline Society (which favored the Auburn method) announced “[t]hat solitary confinement, at least by night, with moral and religious instruction, are an obvious remedy for the principal evils existing in Prisons.” *FIRST ANNUAL REPORT 4* (1827).

122. A. DE TOCQUEVILLE, *supra* note 85, at 84.

123. *Id.* at 56. Like the British, the Americans hoped that convicts would pay for their own rehabilitation by working in prison. *Id.*

124. Lieber, *supra* note 116, at 14.

a number of Americans, was repelled by what he saw:

In its intention I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers. . . .¹²⁵

Tocqueville conceded that while the Pennsylvania system might have an "especially powerful [effect] over individuals endowed with some elevation of mind, and who had enjoyed a polite education,"¹²⁶ uninterrupted and absolute solitude "is beyond the strength of man . . . it does not reform, it kills."¹²⁷

Rothman notes another difference between the eighteenth-century British and the nineteenth-century Americans. Some Jacksonians demanded more of the penitentiary than rehabilitating the deviant; they asked it to serve as an experiment in and a model of societal organization, an orderly, disciplined, clean, wholesome, godly community.¹²⁸ Rothman attributes this optimism to an increasingly less primitive notion of the environmental origins of deviance and to the demise of the Calvinist explanation of crime as inherent in man's nature.¹²⁹ He quotes William H. Channing's remark in 1844 that the "study of the *causes* of the crime may lead us to its *cure*."¹³⁰ Schlossman cites a new willingness to use law, religion, and science to improve human conduct and society to explain the more aggressive use of institutions like penitentiaries and reform schools.¹³¹ The uniquely American ver-

125. C. DICKENS, *AMERICAN NOTES* 120 (1968 ed.). Dickens' comments were pointedly reprinted in 1843 in the Eighteenth Annual Report of the Prison Discipline Society, an organization which preferred the rival Auburn system. *EIGHTEENTH ANNUAL REPORT* 97.

126. A. DE TOCQUEVILLE, *supra* note 85, at 83. In a similar modern reaction, Norval Morris comments: "These three treatments—removal from corrupting peers, time for reflection and self-examination, the guidance of biblical precepts—would no doubt have been helpful to the reflective Quakers who devised the prison, but relatively few of them ever became prisoners." N. MORRIS, *supra* note 54, at 4.

127. A. DE TOCQUEVILLE, *supra* note 85, at 41.

128. D. ROTHMAN, *supra* note 5, at 71. Schlossman found similar aspirations for houses of refuge for children: "Casting the Refuge as an embodiment of Jacksonian egalitarian ideology, the managers described it as a miniature democratic community where character, merit, and a willingness to help others counted for recognition and reward." S. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT* 29 (1977).

129. D. ROTHMAN, *supra* note 5, at 70-71.

130. *Id.* at 74.

131. S. SCHLOSSMAN, *supra* note 128, at 25. For an analysis of the nineteenth-century use of law to shape social progress, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977).

sion of the nineteenth century's faith in man's steady progress toward an ideal society also helps account for the audacious American conception of the penitentiary as a utopian experiment. In 1828 the *Albany Argus* announced editorially, "The American Revolution is the greatest political event in history . . . '—every thing that belongs to it is consecrated.'"¹³² America, divinely guided, had taken the best the old world had to offer, and, unimpeded by the old world's feudal institutions, was now nurturing "the principles that are to renovate the earth."¹³³ True, corruption and crime threatened the experiment. True, Americans might be unworthy to bear the burden of the world's destiny. But those possibilities only made the rehabilitative activities of the penitentiary pressingly necessary.

The preceding narrative of the development of the American prison, and the accompanying description of its theory, demonstrate, I believe, that no sudden "Eureka!" announced the discovery of the penitentiary in America in the 1820s: The desire for and technique of rehabilitation can be traced to earlier reformers. Rothman properly argues that the extent of penitentiary construction suggests some change in thinking about society and rehabilitation. But Rothman obscures any such change by not specifying *whose* thinking altered—the public's? reformers'? legislators? And, to a degree, population growth necessitated the construction of more prisons, which had always been overcrowded. Rothman also underplays the extent to which decisions about prisons were reactions to the experiments and failures of the immediate past. The collapse of the programs at Walnut Street and Newgate made some legislative response imperative. The need to handle large numbers of prisoners and the longstanding faith in the curative powers of solitude made the construction of the penitentiaries logical, though of course not inevitable.

Our look at the development and theory of American prisons showed too the similarity between English and American penal reform proposals, a similarity which Rothman ignores almost studiously.¹³⁴ Reformers in both countries expected that solitude

132. Quoted in R. WELTER, *THE MIND OF AMERICA, 1820-1860*, at 3 (1975). My discussion of American optimism is drawn from pages 3-25.

133. The Reverend Josiah Bent, Jr., *quoted id.* at 6. Similarly, William Ellery Channing said in his 1830 *Remarks on a National Literature*: "We delight . . . that God in the fulness of time, has brought a new continent to light, in order that the human mind should move here with a new freedom, should frame new social institutions, should explore new paths, and reap new harvests." *Quoted id.* at 8.

134. For instance, neither Bentham nor Howard is mentioned in Rothman's index.

would make prisoners reflect on their own wretched moral state, would prevent the corruption of the first offender by the recidivist, and would permit the administration of a clean, safe, orderly prison. Reformers in both countries prescribed labor and religious and moral instruction. In both countries it had become difficult to ignore either prisons as a situs for punishment or the imperatives of the rehabilitative ideal.

Developments in England after the turn of the century and before the authorization of the construction of the Eastern State Penitentiary of Pennsylvania (1821)¹³⁵ and the Auburn prison (1825)¹³⁶ further substantiate the proposition that the Jacksonian penitentiary was neither a unique response to unique problems nor an exclusively American innovation. Owing especially to the impediments to reform created by the administrative balkanization of the English prison system, many jails were as dreadful in the early nineteenth century as when John Howard was made sheriff of Bedfordshire, and in the first two decades of the century men like James Nield and Fowell Buxton followed, literally and figuratively, in Howard's footsteps, visiting prisons and writing reports deploring them for the Sloughs of Despond that they were.¹³⁷ Their analysis of the purpose and process of punishment was possibly slightly more precise but no different in substance from that of their illustrious predecessor:

Punishments are inflicted, that crime may be prevented, and crime is prevented by the reformation of the criminal. This may be accomplished. The prisoner, being separated from his former associates, ceases to think as they think, he has time for recollection and repentance; and seclusion will humble the most haughty, and often reform the most abandoned.¹³⁸

135. H. BARNES, *supra* note 97, at 141.

136. W. LEWIS, *supra* note 2, at 52.

137. T.F. BUXTON, AN INQUIRY WHETHER CRIME AND MISERY ARE PRODUCED OR PREVENTED, BY OUR PRESENT SYSTEM OF PRISON DISCIPLINE (1818).

138. *Id.* at 12-13. Buxton presents the familiar litany of cause and cure in counterpoint:

As idleness is one great cause of sin, industry is one great means of reformation. . . .

The use of stimulating liquors is often the cause, and always the concomitant of crime. These, therefore, must be forbidden. The want of education is found to be a great source of crime; for this, therefore, a provision must be made. *The neglect of religious duties is the grand cause of crime.* Ministers of religion must, therefore, be induced to give their active and zealous labours to the prisoners daily . . .

Id. at 13 (emphasis added). Like Howard, Buxton worked for prison reform because "[s]urely it is in the power of all to do something in the service of [the] Master." *Quoted in* A. BABINGTON, *supra* note 49, at 172.

The House of Commons was still listening to Romilly's assaults on the death penalty and at his behest establishing a committee which reported

that many offenders may be reclaimed by a system of Penitentiary imprisonment by which [the Committee] mean a system of imprisonment not confined to the safe custody of the person, but extending to the reformation and improvement of the mind and operating by seclusion, employment and religious instruction.¹³⁹

In 1816, the Act of 1779¹⁴⁰ was in its essentials resurrected when the first part of Millbank Penitentiary opened.¹⁴¹ Prisoners in it served the first half of their term in complete solitude. In the second half, prisoners slept in separate cells at night and worked in congregate silence during the day.¹⁴²

Evidence of Borrowing

Although the primary-source material which might show precisely the extent of borrowing from England has not been fully studied, the secondary sources confirm the obvious inference from the similarity of opinion and practice on both sides of the Atlantic. Some knowledge of early European penal practices came to the New World with its settlers. Lewis believes, for instance, that the idea of the workhouse was brought to New York by the Dutch colonists.¹⁴³ Religious groups in America corresponded and visited with their counterparts in England to a striking extent, especially the evangelical and Nonconformist sects so active in prison reform.¹⁴⁴ And of course American children of the Enlightenment

139. Quoted in A. BABINGTON, *supra* note 49, at 167.

140. See text at note 91 *supra*. Romilly said of the Act that it "had been a dead letter on the statute book, although it was a monument of eternal praise to those who had framed it." Quoted in M. GRÜNHUT, *supra* note 26, at 55.

141. A. BABINGTON, *supra* note 49, at 171.

142. M. GRÜNHÜT, *supra* note 26, at 56; B. MCKELVEY, *supra* note 96, at 17.

143. W. LEWIS, *supra* note 2, at 11-12. By 1735 New York City had a workhouse for the punishment of disobedient slaves and servants. *Id.*

144. "An important connecting link in the Anglo-American world was the bond between religious groups on both sides of the ocean professing the same beliefs." M. KRAUS, *THE ATLANTIC CIVILIZATION* 310 (1961).

"Highmindedness, piety, and zeal united the Churches of America with the interlocking connection of Dissent and evangelicalism in Britain in the common object of spiritual regeneration and moral reform." Thistlethwaite, *The Anglo-American World of Humanitarian Endeavor*, in *ANTE-BELLUM REFORM* 70 (D. Davis ed. 1967).

Ties of religion, politics, and commercial interest linked English Nonconformists closely to the American colonies. To take but one example, Howard's friend John Fothergill had relatives among the Quakers in Philadelphia, visited there in the 1750s, and established close friendships with Benjamin Franklin and Benjamin

like Jefferson, Franklin, and Rush kept up an extensive correspondence with European intellectuals and social activists.

There is a good deal of evidence that John Howard profoundly influenced American prison reform. Kraus reports that Howard had his most enthusiastic disciples in America,¹⁴⁵ and the most important early American reformers, from Eddy¹⁴⁶ in New York to Rush¹⁴⁷ and Caleb Lownes (head of the Walnut Street Jail)¹⁴⁸ in Pennsylvania were certainly among them. Thus Rush, who wrote to Howard just before his death to invite him to inspect American prisons,¹⁴⁹ told one of Howard's associates that the Philadelphia Society for Alleviating the Miseries of Public Prisons had "grown out of [Howard's] excellent history of Prisons."¹⁵⁰ Eddy, Kraus says, corresponded generally with European philanthropists,¹⁵¹ and anyone who did not correspond personally could read the numerous articles on European penal conditions in American magazines.¹⁵² The man who in 1824 established the New York House of Refuge for juveniles sent the Quaker schoolmaster John Griscom to study European reform schools so that the New Yorkers could profit from the European example; in London he developed contacts with a number of the leading British prison reformers.¹⁵³ An American in Paris, Thomas Jefferson, "sent plans to Virginia for the construction of a prison on the solitary-cell plan which a French architect had suggested."¹⁵⁴ The solitary cells in the Walnut Street jail were inspired by the English model prison based on Howard's writing;¹⁵⁵ Newgate prison in New York was to some extent influenced by Howard's recommendations;¹⁵⁶ the Western Penitentiary of Pennsylvania was based on Bentham's Panopticon;¹⁵⁷ and the Eastern Penitentiary

Rush. When in London in the 1770s, the Americans joined Fothergill to discuss politics with other "Honest Whigs" at fortnightly meetings in the London Tavern.

M. IGNATIEFF, *supra* note 2, at 64.

145. M. KRAUS, *supra* note 144, at 130.

146. W. LEWIS, *supra* note 2, at 31.

147. B. RUSH, *supra* note 102, at 417.

148. M. KRAUS, *supra* note 144, at 130-31.

149. B. RUSH, *supra* note 102, at 528.

150. *Id.* at 517.

151. M. KRAUS, *supra* note 144, at 133.

152. *Id.* at 129.

153. B. MCKELVEY, *supra* note 96, at 22.

154. M. KRAUS, *supra* note 144, at 133.

155. H. BARNES, *supra* note 97, at 92-93.

156. W. LEWIS, *supra* note 2, at 31.

157. B. MCKELVEY, *supra* note 96, at 17.

of that state was modeled on an English prison.¹⁵⁸ The main evidence contrary to my thesis which I have located is Lewis's conclusion that Elam Lynds and his associates at Auburn, while presumably aware of the basic European developments, were not interested in them.¹⁵⁹

This coincidence of ideas and evidence of communication should provoke substantial doubts about Rothman's neglect of European precedents. In fact, two studies of other antebellum reform movements raise the intriguing possibility that, far from reacting to American social problems, the Americans may have been anticipating problems current in England but which, because America was less populous, urban, and industrial, had not yet been visited on this country.¹⁶⁰

The Religious Influence

Rothman acknowledges that "[t]wo of the most important figures in the New York and Boston [prison reform] organizations, [William H.] Channing and [Louis] Dwight, had first followed religious careers," but Rothman insists that they "echoed prevailing social anxieties; they did not make a uniquely religious perspective relevant."¹⁶¹ Just what this means is not clear, and Rothman evidently feels that no explanation is called for. He relegates the possibility that religious perspectives helped shape "prevailing social anxieties" to a dismissive footnote.¹⁶² He does not explain how in a society which thought of itself as Christian there could be a "uniquely religious perspective." In any event, it was thought at the time and I argue now that the prison activists were significantly motivated by religion, that the rationale for prisons (and especially for their rehabilitative function) was in important part religious, and that the standard rehabilitative method relied crucially on religious training and suasion. I

158. M. GRÜNHUT, *supra* note 26, at 46.

159. W. LEWIS, *supra* note 2, at 76-78.

160. A study of infant education in Boston suggests that reformers were anxious to forestall in Boston the kind of crime they saw in London. May & Vinovskis, *A Ray of Millennial Light: Early Education and Social Reform in the Infant School Movement in Massachusetts, 1826-1840*, in *FAMILY AND KIN IN URBAN COMMUNITIES, 1700-1930*, at 62 (T. Hareven ed. 1977). Thistlethwaite believes that the temperance movement in America can in part be attributed to the pervasiveness of Anglo-American evangelicalism, since the temperance movement "became manifest at about the same time in relation both to the urban masses of Britain and the largely rural population of the United States." Thistlethwaite, *supra* note 144, at 75.

161. D. ROTHMAN, *supra* note 5, at 75-76.

162. *Id.* at 327 n.29.

believe that Rothman's deprecation of religion and his sensitivity to the darker side of the rehabilitative ideal blind him to the humanitarian bases of prison reform.

"In America," said Tocqueville, "the progress of the reform of prisons has been of a character essentially religious. . . . [T]here is not one among all the officers of a prison who is destitute of religious principles."¹⁶³ And Lois Banner, a modern student of Jacksonian reform, confirms Tocqueville's perception: "[I]t is becoming increasingly apparent that a prime consideration in the motivation of many early American reformers was their religious background and training."¹⁶⁴

"To do good works," Banner tells us, "was a universal Christian sentiment. . . ."¹⁶⁵ The idea of benevolence (the belief "that certain persons, having received God's sanctifying grace, were obliged to extend to all men the means of obtaining that grace")¹⁶⁶ was inherited from eighteenth-century sources as diverse as the Quakers, the Anglican reformer George Whitefield, and the Methodist John Wesley.¹⁶⁷ Benevolence, however, was specially prominent in Protestant evangelicalism, which "stressed Christ's atonement, the mercy which God offered, and the grace which God would grant to those who repented and believed"¹⁶⁸ and which imposed on believers the duty "to make sinners realize their evil, to persuade them to repent, and thus to help God's saving work."¹⁶⁹ Evangelicalism expressed itself through the missionary, tract, Bible, and Sunday school societies, of course,¹⁷⁰ but evangelicals (often spurred by millennialism and a vision of a Christian republic) also labored to establish free schools for children of the poor, to lobby for better public education, to found libraries for young mechanics and apprentices, and to establish juvenile reformatories.¹⁷¹ Louis Dwight exemplified the evangeli-

163. A. DE TOCQUEVILLE, *supra* note 85, at 121-22.

164. Banner, *Religious Benevolence as Social Control: A Critique of an Interpretation*, 60 J. AM. HIST. 23, 33-34 (1973).

165. *Id.* at 28.

166. Griffin, *Religious Benevolence as Social Control, 1815-1860*, in ANTE-BELLUM REFORM, *supra* note 144, at 83.

167. Banner, *supra* note 164, at 25.

168. Griffin, *supra* note 166, at 83.

169. *Id.* at 83-84.

170. *Id.* at 82-83.

171. Banner, *supra* note 164, at 32-33.

For if Americans—and particularly the young, still impressionable and idealistic—were effectively taught right conduct in schools, in prisons, in reformatories, and through public lectures and lyceums, there was a chance they could transcend

cal prison reformer. Once an agent for the American Bible Society, he became the secretary of and dominant force in the Prison Discipline Society. In 1833 he summoned the devout Christian to labor in the vineyard of prison reform:

Convicts are creatures of the same glorious Creator with ourselves. . . . They have souls like our own They are capable of love; but generally, when committed to Prison, they are filled with malice. . . . The very aggravation of their guilt is the loud call for your pity and prayers, and efforts. And their case is not hopeless.¹⁷²

In 1839 the Prison Discipline Society sent wardens a questionnaire which asked them, among other things, what they thought of a prison without a chapel and Sabbath school instruction. One warden replied that the question transcended all others in importance, and another warden wrote that such a prison would be

not much unlike (in regard to wisdom) to a man who would build and adorn a beautiful ship, lade her with the richest cargo of goods, and send her to sea without rudder, compass, or chart.¹⁷³

The authors of the penitentiary system wished to reform the convict, and they believed that solitude was the first step in that reformation, since it separated a man from degrading influences and compelled him to look inward. God and conscience would speak. But the convict, ill-educated and hitherto unchurched, could not interpret the inner and divine voices unaided, and Tocqueville observed that, in respect to rehabilitation, "[m]oral and religious instruction forms . . . the whole basis of the system"¹⁷⁴ and that it is "its influence alone which produces complete regeneration."¹⁷⁵ The notion of the reformatory power of religious and moral instruction is one with which the reader is by now familiar, but insistence on its importance grew, it is my impression, throughout the early part of the century. One cannot examine the reports of the Prison Discipline Society (or even look

their natural selfishness and licentiousness and work together to achieve that millennial utopia which Protestant thought envisioned.

Id. at 38.

172. Quoted in W. Lewis, *supra* note 2, at 108. Similarly, Gershom Powers, a New York prison inspector, stated: "Though convicts, they are still accountable and immortal beings; and, deprived as they are, at such trying seasons, of the sympathies and kind offices of their parents, their wives, and their children, they need, in a peculiar manner, some benevolent and pious friend, to instruct and console them." *Id.* at 106.

173. PRISON DISCIPLINE SOCIETY, FOURTEENTH ANNUAL REPORT 87-88 (1839).

174. A. DE TOCQUEVILLE, *supra* note 85, at 82.

175. *Id.* at 121.

through their tables of contents) without being struck by the frequency of discussions of religious rehabilitative programs and successes.

There is a school of thought which accepts the suggestion that the evangelical Protestants were widely and seriously engaged in educational and other social-reform activities, but which interprets these "humanitarian" works as a fearful response to egalitarianism and as an attempt by reformers to regain what they believed was a lost social and moral authority.¹⁷⁶ *Hoi polloi*, licentious, irreligious, and lawless, had to be restrained if American society was to survive. "To many of those who could not accept the changing America," says one exponent of the social control theory, "evangelical Protestantism seemed an excellent means of keeping the nation under control."¹⁷⁷ He quotes the managers of the Home Missionary Society: "*The Gospel is the most economical police on earth.*"¹⁷⁸ At one level, the social control theory, especially in its application to prison reform, is unremarkable: of course prisons are an agency of social control. But problems with the theory abound.

Some of the difficulties are "empirical." Banner, for instance, doubts that the reformers perceived a threat to their status as moral arbiters. She also accuses the social-control school of seriously underestimating the number of denominations interested in benevolence.¹⁷⁹ But there are broader criticisms of the social-control theory, and many of them must be applied to Rothman. Rothman himself correctly says that the social-control

176. *E.g.*, J. BODO, *THE PROTESTANT CLERGY AND PUBLIC ISSUES, 1812-1848* (1954); C. FOSTER, *AN ERRAND OF MERCY* (1960); C. GRIFFIN, *THEIR BROTHERS' KEEPERS* (1960); Griffin, *supra* note 166.

This is, of course, a theory susceptible to many variations. Schlossman, for example, emphasizes the distress of urban commercial and religious elites at the decline of deference:

[T]hese men, all members of the city's pious uppercrust, were drawn together by a set of related fears and missionary drives centering on the changing nature of urban education. Recognizing with alarm many recent alterations in the city's physical structure and demography [especially in the influx of immigrants], they . . . chose schooling, in one form or another, to uplift, correct, and establish surveillance over the lower-class family.

S. SCHLOSSMAN, *supra* note 123, at 19-20.

The Marxist variant holds that the reform groups were simply interested in insuring a steady supply of trained, disciplined labor for the new capitalist economy. For such an interpretation applied to educational reformers like Horace Mann, see S. BOWLES & H. GINTIS, *SCHOOLING IN CAPITALIST AMERICA* 151-79 (1976).

177. Griffin, *supra* note 166, at 82.

178. *Id.* at 94.

179. Banner, *supra* note 164, *passim*.

theory is too narrow, that it makes every reformer liable for the result as well as the intent of his acts, and that it exaggerates the extent of economic and urban development.¹⁸⁰ But Rothman's interpretation of the penitentiary as a frightened society's response to perceived threats to social stability (if it differs significantly from the social-control school at all) differs primarily in locating the striving for control somewhat more generally throughout society rather than locating it specifically in a displaced group or a small elite.¹⁸¹ Rothman thus partakes of the faults I am about to describe of the social-control school.

Banner accurately identifies the essential flaw in the social-control hypothesis:

The not-surprising devotion of these men to Protestant morality, their attachment to the capitalist economy, and their fear of democracy comprised only one strand in a complex of attitudes toward politics and society. To abstract this one strand as their "real" motivation is to fall into the error which plagued the Progressive historians: the belief that reality is always mean, hidden, and sordid and that men normally act not out of generosity but from fear and from considerations of status and gain.¹⁸²

The social-control thesis simply neglects even to ask too many questions. If genuine humanitarianism did not animate the prison reformers, why did many of them also try to help even those among the unfortunate who did not threaten social stability? Why, for instance, did Samuel Gridley Howe work for the blind, the deaf, and the mute?¹⁸³ Why did some reformers assist groups which did threaten social stability? Why, for instance, did William H. Channing approve of the women's rights movement,¹⁸⁴ and why had many prison reformers since Rush been abolitionists?¹⁸⁵ If fear of social instability primarily motivated prison reformers, why were they obsessed with the physical cruelties inflicted on prisoners and by the dismal, dank, and deadly state of the prisons? Why, for instance, did the Prison Discipline Society repeatedly inquire after ventilation, light, cleanliness, and sickness, as well as security, solitary confine-

180. D. ROTHMAN, *supra* note 5, at xvi.

181. It is, though, one of the major disappointments of Rothman's book that he is extremely inexplicit about just who held the beliefs he describes and who did not.

182. Banner, *supra* note 164, at 24.

183. A. TYLER, *FREEDOM'S FERMENT* 297-98 (1944).

184. *Id.* at 451-52.

185. B. RUSH, *supra* note 102, at 417.

ment, and instruction?¹⁸⁶ Why does not Rothman produce biographical data to support his ascription of motives? Might not many of the prison activists have been propelled into their work by the kind of revelatory event which animated John Howard? Would not these incidents tell us a good deal about motivation? Why must the obvious interest of the evangelical prison reformers in winning converts be explained as fear of social instability? Has not an enthusiasm for converts characterized many religions in many times? How, finally was interest in rehabilitation maintained? Why did the insecurity Rothman attributes to penologists not impel more of them to favor harsh deterrent penalties only? Why was the opinion expressed by two New York prison inspectors in 1847 not more common?

Let prison cease to be a terror to the depraved, . . . let the principle that punishment is no part of our prison system, and moral suasion and reformation obtain the ascendancy over the calm judicious observance of an "enlightened policy"—a policy that would . . . prevent a continual drain upon the treasury for the support of those who [*sic*] the taxpayers are under no obligation and should not be compelled to support, and then the period will arrive when insurrection, incendiarism, robbery, and all the evils most fatal to society and detrimental to law and order, will reign supreme.¹⁸⁷

When people feel threatened, is not an angry, retributive response more common than a rehabilitative one? Is a person who writes that "every society, which, through insensibility, thoughtlessness, or overweening regard of expense, refuses to [a prison] the means necessary to moral discipline, and as far as practical to effect a reformation, must be, in the eye of reason and of heaven, itself deeply criminal . . ."¹⁸⁸ really thinking only of the usefulness of moral discipline in maintaining social order?

186. PRISON DISCIPLINE SOCIETY, FIRST ANNUAL REPORT 7 (1827), as well as any other annual report.

187. Quoted in W. LEWIS, *supra* note 2, at 249-50 (footnote omitted).

188. J. QUINCY, REMARKS ON SOME OF THE PROVISIONS OF THE LAWS OF MASSACHUSETTS, AFFECTING POVERTY, VICE, AND CRIME 26 (1822). Quincy, in arguing for reformatory institutions (especially for juveniles), insisted that states are morally responsible for the failure to do all within their power to prevent the corruption of their citizens. Individuals must interest themselves in the problems of the poor, the vicious, and the criminal not only because it is in the interest of the state, but because of "those higher sentiments of humanity and of gratitude to that Being, who prescribes and constitutes all the prosperity of a state, and all the differences existing among individuals." *Id.* at 26.

After the 1820s

This Review set out to discover when rehabilitation became "so well established as a penal goal that it could not be ignored by anyone interested in penology."¹⁸⁹ I believe that point was reached in America at least by the time the Auburn and Pennsylvania systems were established: when, after a perceived failure of the early rehabilitative institutions, ambitions for rehabilitation did not die. I do not suggest, of course, that Americans unanimously subscribed to the rehabilitative ideal—they did not then and they do not now. Nor can I say that penitentiaries were in fact rehabilitative, humane, or desirable. Nevertheless, the goal of rehabilitation (and humanitarianism) significantly motivated the people who built them.¹⁹⁰

The permanence of rehabilitation's place as a legitimate purpose of punishment is suggested by the developments after the 1820s and before the Civil War, when the traditional mechanism of rehabilitation—solitary confinement—began to seem somewhat less potent, but when rehabilitation itself still seemed worth seeking. Some of the changes advocated were attempts to improve the rehabilitative program. Thus in 1847 Samuel Gridley Howe called for "the adoption of some means by which the duration and severity of imprisonment may in all cases be modified by the conduct and character of the prisoners."¹⁹¹ Kindness and the extension of privileges as rehabilitative measures gained some favor even in Auburn,¹⁹² and a women's matron there named Eliza Farnham repealed the rule of silence and organized classes and choirs.¹⁹³ Dorothea Dix was an influential national advocate of humane prisons who interested herself in reforms such as the New York Prison Association's post-release program.¹⁹⁴ Theories of the environmental origins of crime buttressed justifications for rehabilitative programs; William H. Channing spoke of "the conviction, fast becoming general, that the community is itself, by its

189. Text preceding note 5 *supra*.

190. Thus I do not quarrel with Rothman's assertion that prisons increasingly became custodial institutions. The point is that a time had been reached when society found itself less able to justify them without reference to a rehabilitative purpose. As Dorothea Dix commented, "No candid or liberal mind will confound any system prescribed and adopted, with the *mode* in which such system is carried into daily operation." D. DIX, REMARKS ON PRISONS AND PRISON DISCIPLINE IN THE UNITED STATES 7 (1845).

191. Quoted in B. MCKELVEY, *supra* note 96, at 42.

192. W. LEWIS, *supra* note 2, at 201-02.

193. B. MCKELVEY, *supra* note 96, at 39.

194. D. DIX, *supra* note 190, at 11.

neglects and bad usages, *in part responsible* for the sins of its children; and that it owes to the criminal, therefore, aid to reform."¹⁹⁵ These changes, though, are easily exaggerated; it may be more significant that the pre-Civil War period also witnessed growing apathy toward prison affairs. Lewis speculates that the apathy was in part due to a diversion of reform activities into abolitionism and to public boredom with the endless internecine struggle between the advocates of the Auburn and Pennsylvania systems.

V. CONCLUSION

The rehabilitative ideal, the history of which is tightly intertwined with the history of the prison, first emerged from the medieval past in company with the Church's prisons, for the church had the administrative apparatus for running prisons and the duty to salvage the souls of the unrighteous. As humanitarian revulsion to the blood sanctions grew, as the social inutility of capital punishment became evident, and as beggars and vagabonds began to disturb men's perceptions of social stability, imprisonment, and (in a tentative way) rehabilitation were adopted by secular authorities, particularly for sympathetic offenders like the young. By the eighteenth century a Protestant theory of rehabilitation had developed based on an analogy to (and usually actually calling for) the conversion experience. Christianity also enjoined its followers to be humane, to tend to the physical as well as the spiritual needs of their brothers. This led some of the devout into the prisons in a crusade to make them healthier and less oppressive. And as that crusade progressed, it became impossible to ignore the hope that offenders could be weaned from criminal pursuits. These Christian activists then found they had an institution to present to the rationalist, humanitarian criminal-law reformers who were seeking a satisfactory alternative to the death penalty.

This English tradition was transplanted to America, where it flourished in a soil rich in Christian humanitarian sects like the Quakers. As the colonies became free to experiment with new institutions, they were able to begin to practice what the English reformers had preached. For the purposes of a study of the origins of the rehabilitative ideal, the significant fact about both the Auburn and Pennsylvania systems is that their proponents had

195. Quoted in W. LEWIS, *supra* note 2, at 232 (emphasis in original).

to come to terms with the demand for a rehabilitative rationale for their programs.

The origins of the rehabilitative ideal, then, are inextricably bound up with two other ideas—the religious ideal and the humanitarian ideal—and with considerations of social utility. Each factor reinforced the other. Religion fueled humanitarianism, which in turn posed questions of social utility in new ways. Men like the British reformers, who were attracted to the challenge of crime and punishment by their interest in calculations of social utility, were drawn to humanitarian causes. Yet each factor could be made to serve the darker side of the rehabilitative ideal: Religious zeal could give men the certitude to lock other men up alone in a cell until they succumbed to disease or madness; humanitarianism could be deployed to justify the deprivation of an offender's humanity "in his own best interests"; and no age has better known the possible abuses of the rationale of social utility than the twentieth century.

Rothman's disinclination to test his hypothesis cross-culturally, however, blinds him to the interactions, and possibly even to the presence, of these three ideals. Perhaps every historian need not compare the institutions he examines with similar institutions in a related society. But Rothman's failure to do so is more than usually serious. Rothman, after all, claims the penitentiary originated in America, a claim which can be convincing only when supported with evidence from other countries. But even considering only Rothman's interpretation of the penitentiary as a reflection of pressures within American society, cross-cultural comparison is still called for. If we can demonstrate (as this paper, I hope, begins to) that another society at a very different stage of social and economic development discovered the penitentiary, we surely must be skeptical about any time- or place-bound analysis. And cross-cultural evidence is likely to be particularly necessary where, as here, the country under investigation is a recent colony, still intellectually dependent on the mother country and still in communication with it.

One result of Rothman's failure to compare English and American penology is that he misses some of the complexity of the Americans' motivation. More seriously, though, his failure impedes the development of generalizations about why societies adopt the institutions they do, and about the closeness of the fit between the structure of society and the institutions it uses. Logically it is possible that the penitentiary may have matched the

special requirements of two quite different societies. But it is also possible that the penitentiary was adopted in America less because it seemed an appropriate response to America's special circumstances and more because it had been widely approved in England. That it was adopted in both countries may say something about the flexibility of social institutions, or about the elasticity of social needs, or about society's tolerance of badly fitting institutions. But until we examine these institutions cross-culturally, we are unlikely to know.