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From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts

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From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts

by Adam J. Hirsch*

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I. INTRODUCTION

Today, most Americans take incarceration for granted. It is the routine sanction for serious crime in our modern system of justice,

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seemingly as elemental and inevitable a part of that process as police arrest, state prosecution, and judgment by one's peers. Punishments by their nature are meted out in units of years and months (if not dollars and cents). To be a "convict" nowadays is to be a person "serving time" in a prison cell for the commission of a crime.

Yet the frozen landscape of the criminal justice system, when glimpsed in the light of legal history, melts quickly; conceptual continents drift, oceans of doctrine ebb and flow. The wholesale incarceration of criminals is in truth a comparatively recent episode in the history of Anglo-American jurisprudence. Before the nineteenth century, offenders faced a variety of sanctions, including the pillory, the lash, the gallows, and exile. Though not unknown, "the sentence of confinement" was a rarity.¹ Thieves in early Massachusetts served their victims, not time.² The term "convict" applied literally to all persons found guilty, not to persons under prison sentences.³

This is not to say, of course, that incarceration *per se* originated in modern times; prisons have always played a role in Anglo-American jurisprudence.⁴ But before the American Revolution, prisons served principally a congeries of nonsanctional functions — some of which remain familiar, others of which have fled the scene.⁵

While the transition from the old forms of criminal sanction to incarceration was perhaps not, as Jeremy Bentham claimed, "one of the most signal improvements that have ever yet been made in our criminal legislation,"⁶ one does not overstate to call it a signal *development* in the history of Anglo-American criminal justice — a development, one may add, that still wants adequate examination, much less explanation.⁷ This Article attempts to do both for one sample region: Massachusetts. Though the jurisprudential movement from pillory to penitentiary took place throughout the new American re-

1. G. BRADFORD, *STATE PRISONS AND THE PENITENTIARY SYSTEM VINDICATED* 11 (Charlestown 1821) (published anonymously); see notes 34-41, 227-49 *infra* and accompanying text.

2. See notes 243-48 *infra* and accompanying text.

3. J. HOWARD, *THE STATE OF THE PRISONS* 19, 296 (rev. ed. 1929) (first ed. Warrington 1777).

4. The Latin root of the word "jail" (or "gaol") is "gaviola," which means cage or hole. This probably indicates the earliest form of this familiar institution. 5 OXFORD ENGLISH DICTIONARY 546 (1961).

5. See notes 13-33 *infra* and accompanying text. Nor was the prerevolutionary function of imprisonment static. For an example of a prison function that had expired before the colonial emigration, see S. MILSON, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 359-60 (1969) (Imprisonment for refusal to plead).

6. J. BENTHAM, *A view of the Hard-Labour Bill*, in 4 *WORKS OF JEREMY BENTHAM* 31 (Edinburgh 1843) (1st ed. London 1778).

7. See notes 69-79 *infra* and accompanying text.

public, as well as much of western Europe, our limited focus presents a case study, and a jumping-off point for further research.⁸

The story of the rise of the penitentiary in Massachusetts has many facets, and this Article addresses each in turn. Part II sets the stage by contrasting the penitentiary with an institutional predecessor in the criminal justice system: the colonial gaol. While the gaol and the penitentiary both held inmates against their will, they shared few functional or administrative attributes. As Part II shows, the system of incarceration represented by the gaol differed dramatically from the system of incarceration represented by the penitentiary.

In order to explain the transition to the penitentiary, one must first explore its ideological origins, and this exploration is undertaken in Part III. Although the penitentiary arose in the midst of a revolution in the theory of punishment, Part III asserts that the ideological blueprint upon which the builders relied had actually been developed at a much earlier date. Intellectual innovation did not prompt the transition, for Massachusetts had merely dusted off a venerable ideological construct that might have been implemented at any time.

Why Massachusetts chose the late eighteenth century to do so is the problem explored in Part IV. Here, the analysis shifts from criminological theory to social reality, to an examination of the criminal sanctions originally adopted in colonial Massachusetts and of the social setting that made those sanctions effective. Part IV concludes that widespread demographic changes occurring over the course of the eighteenth century weakened the initial system of crime control, and created a fear that crime had reached crisis proportions. In desperation, lawmakers turned to incarceration as the most promising means of restoring the status quo. Part V shows that the process of assimilating the new punishment into the Massachusetts legal system was gradual, and marked by a continuing debate over the efficacy and aims of the penitentiary.

In the course of detailing these results, this Article also responds to some prior students of incarceration in America. Special attention is given throughout to David Rothman, whose pioneering scholarship on this problem invites admiration — but also skepticism.

II. INSTITUTIONAL TRANSITION

The penitentiary was not the first facility for physical restraint to play a part in the process of criminal justice. It was preceded by the

8. This Article is the first installment of a larger study contemplated by the author.

gaol, an institution shrouded in antiquity. Still, a comparison of these two institutions reveals sharp contrasts, and provides an overview of the transition that this Article explores.

A. *The Gaol in Early Massachusetts*

1. *Function*

The Puritan colonists who repaired to Massachusetts in the early seventeenth century set out to build a model society for the edification of mankind.⁹ Without forsaking their English heritage, the Puritans hoped to erase those features of English life which affronted their vision of a godly community. The gaol, an institution of long standing in England, apparently did not represent such an eyesore. Although a number of Puritans had languished in prison at the instigation of Bishop Laud,¹⁰ the colonial leaders quickly decided to build one of their own.¹¹ Opened in 1635, the Boston gaol served as Massachusetts' sole prison for eighteen years. But as settlers fanned out into the wilderness, organizing new townships as they went, local facilities for incarceration sprang up elsewhere. By 1776 Massachusetts was divided into fourteen counties, and each was required by law to maintain its own county gaol.¹²

Imprisonment played a variety of roles in the legal system of early Massachusetts, filling both criminal and civil functions. Among its civil roles, imprisonment for debt was the most notable. The judgment creditor of a debtor who would not pay had the legal right to order that debtor's incarceration in the gaol.¹³ Similarly, any

9. The Puritan migration and plantation in America has been the subject of exhaustive inquiry, *see generally*, E. MORGAN, *THE PURITAN DILEMMA* (1958). On the legal history of early Massachusetts, *see* G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* (1960); E. POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS, 1620-1692* (1966).

10. *See, e.g.*, R. LOCKYER, *TUDOR AND STUART BRITAIN, 1471-1741*, at 255-56 (1964). Personal experience with imprisonment has often been associated with movements for penal reform, *see, e.g.*, Schneider, Book Review, 77 MICH. L. REV. 707, 727 (1979) (reviewing D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1970)), but it does not appear to have had a noticeable impact in Massachusetts.

11. 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 74 [1630] (N. Shurtleff ed. Boston 1853-1854) (by implication) [hereinafter cited as COL. RECORDS].

12. 1 ACTS AND RESOLVES OF THE PROVINCE OF THE MASSACHUSETTS BAY 426 [1700] (1869-1922) [hereinafter cited as PROV. LAWS]. On the early history of prison construction in Massachusetts Bay, *see* E. POWERS, *supra* note 9, at 212-17. Hereinafter, references to "colonial" Massachusetts will indicate the period preceding the second charter, 1630-1691. In the latter year the "province" of Massachusetts was born, and it lived until the Revolution, when Massachusetts became a "Commonwealth."

13. Execution upon the debtor's body could only follow unsuccessful execution upon the debtor's estate, personal and real. *See* The Body of Liberties of 1641, *in* THE COLONIAL LAWS OF MASSACHUSETTS § 1, at 41 (W. Whitmore ed. 1890) (reprinted from the edition of 1672) [hereinafter cited as COL. LAWS]. Imprisonment for debt could also occur on mesne process,

colonist adjudged delinquent in his obligations to the realm — for taxes,¹⁴ fines,¹⁵ or costs of court¹⁶ — could incur the same treatment as “a Debtor to the Publick.”¹⁷ Imprisonment for debt may be sharply distinguished from latter-day notions of criminal punishment. It was, at bottom, an instrument of coercion rather than sanction, intended to pry open the purse rather than to deter or rehabilitate welchers. This fact is plain from the form of the sentence: Delinquent debtors were imprisoned indefinitely until their debts were fully paid. Insolvent debtors could avoid imprisonment altogether by attesting under oath that they had concealed no part of their estates.¹⁸

In the colonial tradition of institutional austerity, Massachusetts gaols also served some functions entirely beyond the scope of the legal system. It was standard procedure, for example, to house prisoners of war in the county gaols, which thereby doubled as military internment camps. In the seventeenth century, the principal victims of this policy were Indians,¹⁹ but, as the eighteenth century drew on,

see COL. LAWS, *supra*, § 2, at 7. For an example of imprisonment for failure to pay a civil damages award, see RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680, at 916 [1678] (Z. Chaffee ed. 1933) (published as v. 29 & v. 30 of the COLLECTIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS) [hereinafter cited as SUFFOLK COUNTY COURT]. The legal history of debtor-creditor relations in Massachusetts has yet to be written. To whet the appetite, see G. HASKINS, *supra* note 9, at 215-21.

14. See, e.g., A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON CONTAINING THE BOSTON TOWN RECORDS 1758 to 1769, at 302-03 (1876-1909) [hereinafter cited as BOSTON TOWN RECORDS]; 4 PLYMOUTH COURT RECORDS, 1686-1859, at 40, 42 [1786] (D. Konig ed. 1978) [hereinafter cited as PLYMOUTH COUNTY COURT]; A JOURNAL OF THE HONORABLE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS [1784-1785], at 246 [1785] (Boston 1784).

15. See, e.g., COL. LAWS, *supra* note 13, § 2, at 51 [1638]; RECORDS OF THE COURT OF GENERAL SESSIONS OF THE PEACE FOR THE COUNTY OF WORCESTER, MASSACHUSETTS, FROM 1731 to 1737, [1735], reprinted in COLLECTIONS OF THE WORCESTER SOCY. OF ANTIQUITY No. 18, at 137, 138, 141 (1882) [hereinafter cited as WORCESTER COUNTY COURT]; 29 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 58, 61 [1752] (Mass. Hist. Socy. ed. 1919-1980) [hereinafter cited as HOUSE JOURNAL]; 3 PLYMOUTH COUNTY COURT, *supra* note 14, at 308 [1771]; Resolve of June 23, 1779, ch. 159, 1779-1780 Mass. Acts 85; Resolve of June 22, 1780, ch. 97, 1779-1780 Mass. Acts 566.

16. See, e.g., HOUSE JOURNAL, *supra* note 15, at 58, 61 [1752]; Boston Gazette, Sept. 7, 1764 at 3; Petition of William Scott, Oct. 20, 1786, Mass. Senate Documents no. 586 (1786) (unpassed) (unpublished manuscript, Mass. Archives).

17. 12 PROV. LAWS, *supra* note 12, at 71 [1734].

18. Since creditors were required to levy execution first upon the debtor's estate, see note 13 *supra*, the only debtors subject to imprisonment were those who refused to take the oath and those who were denied the oath under suspicion of fraud. See COL. LAWS, *supra* note 13, § 2, at 6 [1641]; 1 PROV. LAWS, *supra* note 12, at 330 [1698]; 2 PROV. LAWS *supra* note 12, at 363 [1725], 461 [1727], 831 [1737]; B. Black, The Judicial Power and the General Court in Early Massachusetts, 1634-1686, at 240-51 (1975) (unpublished doctoral dissertation, Yale University).

19. See, e.g., Mason, *A Brief History of the Pequot War* [c. 1656] in HISTORY OF THE PEQUOT WAR 42 (C. Orr ed. 1897); 3 WINTHROP PAPERS 481 [1637] (Mass. Hist. Socy. ed. 1929-1947).

French and eventually British soldiers came to join them.²⁰ In addition, Massachusetts gaols occasionally held political prisoners, much like the Tower of London in Old England. Indian sachems, Quakers, Jesuits, and Loyalists all shared this plight at one time or another.²¹ Once again, however, it is critical to distinguish these gaol services from criminal sanctions. Here, the aim of incarceration was, at bottom, segregative: it prevented persons from causing physical or moral harm to the community, rather than punishing them for doing so.²²

By far the most pervasive use of the gaol in early Massachusetts, however, was for pretrial and presentence internment. When indicted on a criminal charge, the defendant who could not raise bail was routinely imprisoned until the moment of his trial and, if convicted, the execution of sentence. The court or a single magistrate submitted a *mittimus* to the sheriff, ordering him to hand the defendant over to the keeper, who in turn was responsible for holding him securely until further directed by due process of law.²³ Likewise, upon conviction for an offense, the court routinely directed that the defendant, now a convict, "stand committed till sentence be performed."²⁴ Even after the punishment had been meted out, courts frequently demanded monetary "sureties" for future "good behavior" as a condition for release. Until the convict scraped the funds

20. See, e.g., 22 HOUSE JOURNAL, *supra* note 15, at 18, 96 [1745]; 1742-1757 BOSTON TOWN RECORDS, *supra* note 14, at 104-05 [1746]; Resolve of Dec. 6, 1775, ch. 416, 1775-1776 Mass. Acts 164; Resolve of July 6, 1776, ch. 201, 1775-1776 Mass. Acts 513; Resolve of Sept. 24, 1777, ch. 329, 1777-1778 Mass. Acts 134.

21. See, e.g., 2 J. WINTHROP, WINTHROP'S JOURNAL "HISTORY OF NEW ENGLAND" 1630-1649, at 134-35 (J. Hosmer ed. 1908); 1 PROV. LAWS, *supra* note 12, at 423 [1700]; Resolve of June 21, 1776, ch. 72, 1775-1776, Mass. Acts. 457; Resolve of June 29, 1776, ch. 134, 1775-1776 Mass. Acts 485; Resolve of Oct. 18, 1777, ch. 453, 1777-1778 Mass. Acts 177; Resolve of Jan. 29, 1779, ch. 422, 1778-1779 Mass. Acts. 578; E. POWERS, *supra* note 9, at 214-15, 221-22.

22. See, e.g., an act "against Jesuits and Popish priests," which automatically accounted any such person "an incendiary and disturber of the publick peace and safety," subject to banishment or "perpetual imprisonment" if he refused to depart. 1 PROV. LAWS, *supra* note 12, at 423 [1700]. Likewise, the danger posed by prisoners of war called for "a total & instant Separation" through confinement. 1770-1777 BOSTON TOWN RECORDS, *supra* note 14, at 278-79 [1777]; 1742-1757 BOSTON TOWN RECORDS, *supra* note 14, at 104-05 [1746]. Cf. note 249 *infra* and accompanying text.

23. SUFFOLK COUNTY COURT, *supra* note 13, at 724, 753 [1676]; 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY, 1630-1692, at 90 [1677] (1901-1928) [hereinafter cited as COURT OF ASSISTANTS]; COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, 1639-1702: THE PYNCHON COURT RECORD 307 [1684] (J. Smith ed. 1961) (Diary of Judge Pynchon) [hereinafter cited as PYNCHON COURT RECORD]; 1 PROV. LAWS, *supra* note 12, at 424 [1700].

24. E.g., WORCESTER COUNTY COURT, *supra* note 15, at 42 [1732], 80 [1733], 143 [1735], 149 [1736], 159 [1736], 184 [1737].

together, he stayed put.²⁵

Although it was in theory a status *pro tempore*,²⁶ pretrial incarceration might in practice go on and on. Not untypical was the procedural history of *Commonwealth v. Frye*,²⁷ heard before the Superior Court shortly after independence. Cato Frye allegedly committed a theft in April of 1784, for which he was indicted at the June session of the Court. Frye pleaded not guilty, "and from thence said Indictment was Continued from Term to Term to this Term and now the said Cato . . . is Set to the Bar" — on November 1, 1785, some seventeen months later. Frye was convicted that same day. In 1765, a woman accused of murdering her bastard child lay in gaol for a full year before she was acquitted and freed.²⁸ Yet despite its potential harshness, pretrial incarceration bore no abstract resemblance to a criminal sanction. Cato Frye might have had difficulty distinguishing such niceties,²⁹ but his lawyer would not.³⁰ Pretrial incarceration served a custodial³¹ function: It merely ensured that the prisoner appeared for his trial and, if convicted, received his deserts. Under the circumstances, the state was perfectly willing to hold the accused financially, instead of physically, hostage. Requests for bail were rarely denied, and only the chronic inability of criminals to raise funds necessitated resort to a more extreme safeguard.

The routine application of incarceration to suspects rather than convicts colored contemporary perceptions of the gaol and spawned a kind of jurisprudential about-face not unfamiliar to historians. In

25. See, e.g., 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 267 [1703]; 4 *id.* at 131 [1795], 149 [1797], 202 [1802].

26. See COL. LAWS, *supra* note 13, § 2, at 38 [1641].

27. Sup. Jud. Ct., Nov. 1785, f. 323 (unpublished court records, Suffolk County Court House).

28. See Boston Gazette, Mar. 25, 1765, at 3, col. 2. See also, e.g., 2 PLYMOUTH COUNTY COURT, *supra* note 14, at 31 [1722].

29. The Sheriff of Suffolk County complained of "Cursing and Swearing" by the inmates confined in his gaol "who regard not the Laws already made in that Case, for they being Prisoners conclude they cannot be further punished, and so presume to commit that Sin very Frequently." 17 HOUSE JOURNAL, *supra* note 15, at 241 [1739].

30. See, e.g., J. BENTHAM, THE RATIONALE OF PUNISHMENT 101 (London 1830) (1st ed. Paris 1811, from a manuscript written in 1775). In 1799, a legislative committee urged that sentencing a convicted criminal to imprisonment in the county gaol would be "unequal, as a person charged with an offence would suffer before conviction as rigorously as he would after his guilt had been established by a trial." Report Respecting Convicts, appended to 1802 Resolves ch. 54 (passed) (unpublished manuscript, Mass. Archives).

31. One document used the verb "detain'd" in reference to such prisoners. A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE RECORDS OF THE BOSTON SELECTMEN, 1764 to 1768, at 2 [1764] (1884-1909) [hereinafter cited as BOSTON SELECTMEN RECORDS].

1902, Edward Jenks stunned constitutional lawyers with his "most embarrassing discovery" that the writ of Habeas Corpus was originally used "not to get people out of prison, but to put them in it."³² Similarly, modern law enforcement officers would surely grimace to discover their eighteenth-century counterparts petitioning courts to expedite the trials of criminals — not so that they could lock the criminals up, but, on the contrary, so that they could *free* the criminals from gaol.³³ Then as now, imprisonment was expensive, and in the eighteenth century prisoners stood to be released after trial whether convicted or no. Under those circumstances, it made perfect sense for sheriffs to do everything in their power to accelerate a criminal's liberation — holding criminals was not what the gaol was for.

Not often, at least. On occasion, however, gaols did perform a penal function in pre-Revolutionary Massachusetts, and the sanction of incarceration arose with increasing frequency in the criminal statutes of the provincial period.³⁴ Still, a large proportion of these prison sentences were handed down to reprimand various shades of contempt,³⁵ and once again appear more coercive than sanctional. Such sentences were always for indefinite terms, "during the Pleasure of the Court."³⁶ Release hinged upon a display of proper deference to the offended authority.³⁷

32. Jenks, *The Story of Habeas Corpus*, 18 LAW Q. REV. 64, 65 (1902). Jenks' thesis has recently been challenged by Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978).

33. See 25 HOUSE JOURNAL, *supra* note 15, at 156 [1748]; 38 HOUSE JOURNAL, *supra* note 15, at 141 [1761]; 44 Mass. Archives 487-89 [1761] (unpublished manuscript, Mass. Archives).

34. See note 283 *infra* and accompanying text. Incarceration as a sanction was sufficiently familiar to be included in the list of punishments expressly permitted by the Massachusetts Bay charter, 1 COL. RECORDS, *supra* note 11, at 17. See *id.*, at 171.

35. Contempt of court: see, e.g., COL. LAWS, *supra* note 13, § 2, at 36; 29 SUFFOLK COUNTY COURT, *supra* note 13, at 121 [1672], 146 [1672], 232 [1673]; 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 210 [1691], 233 [1699], 266 [1703]; 2 PLYMOUTH COUNTY COURT, *supra* note 14, at 98 [1729]. Contempt of the magistrate: see, e.g., PYNCHON COURT RECORD, *supra* note 23, at 307 [1684]. Contempt of the constable: see, e.g., SUFFOLK COUNTY COURT, *supra* note 13, at 867 [1677]; Commonwealth v. Allen, Sup. Jud. Ct., Feb. 1785, f. 67. "Contemptuous Carriages" or "Reproachful speeches" in public: see, e.g., 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 192 [1687], 267 [1703]; 7 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASSACHUSETTS, 1678-1680, at 406-08 [1680] (G. Dow ed. 1911-1921) [hereinafter cited as ESSEX COUNTY COURT]. More particularly, "indecent reflections cast on the proceedings of the Governor and Council and the House of Representatives," 13 PROV. LAWS, *supra* note 12, at 307 [1743].

36. See, e.g., 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 210 [1691].

37. See, e.g., 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 266 [1703]; 3 PLYMOUTH COUNTY COURT, *supra* note 14, at 308 [1771]; 2 COURT OF ASSISTANTS, *supra* note 23, at 62-63 [1636], 132 [1643]; E. POWERS, *supra* note 9, at 235. Occasionally, judges ordered imprisonment "till the next court," when the prisoner's attitude would presumably be reexamined, see, e.g., SUFFOLK COUNTY COURT, *supra* note 13, at 867 [1677].

Criminal incarceration imposed in a strictly penal sense, for a definite span of time, was plainly a second choice: It served either as a substitute for some conventional means of punishment that proved infeasible³⁸ or as a supplemental penalty, added to buttress the primary sanction.³⁹ In either event, gaol terms rarely exceeded three months, and often proved as fleeting as twenty-four hours.⁴⁰ Before 1750, those few criminal statutes that imposed long-term incarceration fairly shouted their eccentricity. Forgers convicted after 1692, for example, awaited the loss of an ear and "imprisonment by the space of one *whole year without* bail or main prise."⁴¹ Bail was allowed, of course, in instances of pretrial incarceration, not by coincidence the most familiar function of the gaol. Colonial judges apparently granted bail so reflexively that a bail-less form of incarceration required careful elaboration.

In the final decades of the provincial government, social pressures began to nudge criminal justice in Massachusetts toward a critical transition. As a practical matter, however, the function of the prison had changed little over the first 150 years of the colony's history. In 1646, the county gaol was a "fit place to which . . . malefactors may be committed until the next court."⁴² In 1765, the gaol was "not intended as a Punishment, it is only to keep Offenders for Trial, or after Trial till Sentence is fulfilled."⁴³

2. Institutional Design

Not only did the colonial gaol perform a set of functions different from the modern penitentiary, but it was itself a very different institution, both structurally and administratively. Most of the early gaols were singularly unimpressive buildings, holding up to thirty

38. See, e.g., 1 PROV. LAWS, *supra* note 12, at 12 [1693].

39. See, e.g., 1 COURT OF ASSISTANTS, *supra* note 23, at 285 [1685], where the Court readily dispensed with the imprisonment which accompanied a fine. Hardly any prosecutions resulted in incarceration alone, without additional public or monetary sanction. For a rare example, see 3 PLYMOUTH COUNTY COURT, *supra* note 14, at 187 [1764] (five days for house breaking without theft).

40. See, e.g., 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 267 [1703], WORCESTER COUNTY COURT, *supra* note 15, at 153, 154 [1736]. The longest term of incarceration mandated by statute for a criminal act prior to 1749 was one year. 1 PROV. LAWS, *supra* note 12, at 51, 54 [1692].

41. 1 PROV. LAWS, *supra* note 12, at 51, 54 [1692] (emphasis added). The caveat against bail or mainprize (a variation of bail, now obsolete) appears in various other statutes and court records as late as 1753. See, e.g., *King v. Cook*, Super. Ct., Jan. 1753, f. 218 (unpublished court records, Suffolk County Court House).

42. COL. LAWS, *supra* note 13, § 2 at 13 [1646].

43. J. QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 110, 112 (1865) (Grand Jury Charge by Hutchinson, C.J., Super. Ct., March Term 1765).

prisoners or so. Upkeep was haphazard at best, and the thin wooden planks that stood between the inmate and freedom often rotted through, permitting easy escape.⁴⁴

Indeed, the gaol in early Massachusetts was no place to be. If negligence characterized the gaol's upkeep, then its administration must be elevated to the plane of recklessness.⁴⁵ Not even casual measures were taken to guard the inmates' physical health, and a *mittimus* of incarceration became an invitation to an early grave.⁴⁶ Yet, the government was surely aware of the problem. Though few officials ever toured a colonial gaol (and invariably denounced the conditions as "shocking [and] loathsome" whenever they did)⁴⁷ each change of season brought the legislature a fresh stack of petitions from inmates all over the colony alternately begging for a supply of firewood or access to fresh air.⁴⁸ Even more copious, however, were requests for release, as opposed to relief, and it does seem plausible that the early gaol's notoriously high rate of escape owed as much to inmate desperation as to the laxness of security.⁴⁹

44. See E. POWERS, *supra* note 9, at 212-16. On the small size of prisons, see 2 PROV. LAWS, *supra* note 12, at 119 [1718]. On the high rate of escape, see, e.g., 7 HOUSE JOURNAL, *supra* note 15, at 108 [1726]. Special precautions were occasionally taken to prevent dangerous prisoners from escaping — and even these did not always suffice. See 9 PROV. LAWS, *supra* note 12, at 33 [1708]; 14 PROV. LAWS, *supra* note 12, at 318, 324, 317-18 [1748].

45. The description that follows appears to conform with the other gaols of this period. For a similar picture of imprisonment in New York, see D. GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776, at 124-27, 168 (1976). For the early English experience, see M. IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850, at 29-42 (1978); J. Howard, *supra* note 3, at 1-10, 16.

46. Gaol keepers' petitions for reimbursement of expenses not uncommonly included burial fees, see, e.g., 11 PROV. LAWS, *supra* note 12, at 33 [1726], 84 [1726]. Thomas Hutchinson made the observation directly, see J. QUINCY, *supra* note 43, at 11 (Grand Jury Charge by Hutchinson, C. J., Super. Ct., Mar. Term 1765); Letter from Thomas Hutchinson to Robert Treat Paine (Nov. 29, 1766), in 1766 Paine Papers (unpublished manuscript, Mass. Hist. Socy.) (Hutchinson's pardon of one inmate "that he might not be [imprisoned] another winter."). Disease was one obvious danger (in England, "gaol fever" was an occupational hazard of the legal profession, for the inmates brought their afflictions with them to court; at the so-called "Black Assize" of 1577 almost 400 persons perished; John Howard believed that gaol fever claimed more lives than the gallows). See J. COCKBURN, A HISTORY OF ENGLISH ASSIZES, 1558-1714, at 53 (1972); J. HOWARD, *supra* note 3, at 6, 258-59. Massachusetts gaols were also firetraps, see, e.g., 1754-1763 BOSTON SELECTMEN RECORDS, *supra* note 31, at 150 [1761]; 1769-1775 *id.* at 4 [1769].

47. J. QUINCY, *supra* note 43, at 111 (Grand Jury Charge by Hutchinson, C.J., Super. Ct., March Term 1765); see 3 PLYMOUTH COUNTY COURT, *supra* note 14, at 308 [1771].

48. See, e.g., 1 HOUSE JOURNAL, *supra* note 15, at 164 [1716]; 2 HOUSE JOURNAL, *supra* note 15, at 103 [1718]; 14 PROV. LAWS, *supra* note 12, at 71-72 [1747], 171 [1748]; 7 ESSEX COUNTY COURT, *supra* note 35, at 227 note [1679]; 8 ESSEX COUNTY COURT, *supra* note 35, at 335 [1682]; Resolve of Apr. 18, 1777, ch. 1064, 1775-1776 Mass. Acts 890 [1777]; Resolve of Mar. 16, 1780, ch. 811, 1779-1780 Mass. Acts 373 [1780].

49. John Howard, who examined English gaols, drew this conclusion. See J. HOWARD, *supra* note 3, at 40 n.1.

In large measure, the mistreatment of inmates may be traced to the constitution of prison government. David Rothman has described prison government in the eighteenth century as "familial."⁵⁰ In Massachusetts, at least, a better term would be "despotic." As in English practice, Massachusetts gaols were managed by a "gaol keeper," but in all the years preceding independence, no statute or regulation ever ventured beyond the most cursory guidelines to delineate the responsibilities of this office. One of the first acts, appearing in 1663 (in response to the keeper's own inquiry), directed keepers to record a "true List" of their inmates and to discharge them from custody only upon judicial warrant.⁵¹ These provisions were subsequently reaffirmed by the provincial government.⁵² Another line of statutes, originating in 1705, provided for the separation of debtors from the rest of the inmate population.⁵³ Though the fees recoverable for inmate "maintenance" were a matter of frequent provision,⁵⁴ no authority ever bothered to explain the degree of care to which inmates were entitled. Inmates could, of course, lodge protests against ill use with the legislature, and they did so often. But in practice, few strings were attached to the keeper's office: The realm that he ruled was a small one, but within its walls his word was law.

Given such a license, abuse was inevitable. Keepers alternately neglected and exploited their charges.⁵⁵ Illustrative of the problem — and of the legislature's indifference toward it — was the notorious career of Zechariah Trescott, keeper of the Suffolk County gaol in Boston from 1727 to 1737. Prisoners began issuing complaints against Trescott shortly after he was installed in his post. When the

50. See D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 53-56 (1971).

51. COL. LAWS, *supra* note 13, § 2, at 128 [1663]; *id.* § 2, at 6 [1662].

52. 1 PROV. LAWS, *supra* note 12, at 424 [1700].

53. 1 *id.* at 565 [1705]; 2 *id.* at 119 [1718] (reaffirmed in subsequent statutes). For other random provisions, see 1 *id.* at 95 [1692], 330 [1698], 381 [1699].

54. See, e.g., COL. LAWS, *supra* note 13, § 2, at 128 [1663]; 1 PROV. LAWS, *supra* note 12, at 88 [1692], 331 [1698], 699 [1712]; 5 *id.* at 1173 [1780]. As in England, inmates in early Massachusetts gaols were required to pay the charges of their own support (a system that has stirred renewed interest of late, see, e.g., N.Y. Times, Oct. 1, 1979, § 1, at 26, col. 1).

55. Keepers probably earned more from the sale of liquor to inmates than from their regular fees. See 2 PLYMOUTH COUNTY COURT, *supra* note 14, at 145 [1734]; Petition to Governor Bernard in 44 Mass. Archives 512-13 [c. 1765] (unpublished manuscript, Mass. Archives); 22 HOUSE JOURNAL, *supra* note 15, at 240, 245 [1746]; SUFFOLK COUNTY COURT, *supra* note 13, at 912 [1678]. At least one keeper made a habit of using his prisoners as personal servants, see ESSEX COUNTY COURT, *supra* note 35, at 84 [1672]. At the same time, the right to exercise was routinely withheld, see, e.g., 8 *id.* 335 [1682], and as late as 1833, a House committee visiting the Springfield gaol on a tour of inspection "found the keeper absent, and the Prison left in charge of his two sons, one aged 13 and the other 11." REPORT ON GAOLS AND HOUSES OF CORRECTION IN THE COMMONWEALTH OF MASSACHUSETTS MADE BY A COMMITTEE APPOINTED BY THE HOUSE OF REPRESENTATIVES 10 (Boston 1834).

House ordered an investigation in 1731 it too received a taste of the Keeper's audacity. Although the legislators amassed enough evidence to vote for Trescott's dismissal, the keeper responded with a humble prayer to "overlook . . . his Faults and Misdemeanors" and restore him to office. "[A]fter a considerable Debate" Trescott's prayer was denied. Yet the keeper managed somehow to worm his way back into office — as we know by the fresh batch of complaints of "many grievous hardships and abuses" at his hands which turn up in the House minutes of the following year.⁵⁶

Upon receipt of these new charges, the House ordered Trescott to explain himself in person. But when the appointed day arrived, the keeper was nowhere to be found. Aroused, the legislators ordered Trescott locked behind his own bars, "there to remain till further order." Once again, he begged the House's forgiveness, and once again — incomprehensibly — was restored to favor.⁵⁷

Although petitions continued to pour out of Suffolk gaol,⁵⁸ the ax did not fall until 1736. In that year, as the inmates were about to be transferred out of the old "Wooden Prison" into a new stone structure, they rebelled and took over the building. The House was forced to call up the militia to surround the gaol, "with their Musquets charged," until the prisoners submitted.⁵⁹ Here was an event too serious to ignore or treat with another tap on the wrist. In January of 1737, after a full investigation, a formal hearing was held in the House to inquire into the management of the Suffolk gaol. This time Trescott did appear to answer his accusers (his wife at his side, in the best tradition of investigative hearings) but to no avail. The House determined that the keeper had "extorted excessive Fees," "unreasonably prevented the Prisoners receiving Victuals and Drink when sent to them by their Friends," and "kept some of the Prisoners in close Confinement without Water, to their great Suffering."⁶⁰

When the hearing concluded, Trescott was stripped of his office for good.⁶¹ Still, the legislators' response to the keeper's excesses was shortsighted at best. By merely replacing the bureaucrat instead of taking steps to define and monitor his duties, the House was clipping a branch, rather than grubbing up the root of the problem. The predictable sequel: a renewed stream of petitions assailing Trescott's

56. 10 HOUSE JOURNAL, *supra* note 15, at 327, 348, 350, 356 [1731]; 11 *id.* at 142 [1732].

57. 11 *id.* at 142, 144, 147, 149, 153, 161 [1732].

58. 13 *id.* at 59 [1735].

59. 14 *id.* at 176-77 [1736].

60. 14 *id.* at 177 [1736], 238, 240-41, 243-44 [1737] (emphasis omitted).

61. 14 *id.* at 244 [1737].

successor.⁶²

B. *The Rise of the Penitentiary*

When we skip forward a few years to 1785, a new picture begins to emerge. The Commonwealth of Massachusetts has just appointed Castle Island, a fortress guarding Boston harbor, to be a repository for *convicted* criminals — and only convicted criminals — from all over the state.⁶³ Simultaneously, the criminal code has been revised to permit judges to impose long-term incarceration as an alternative to the old sanctions such as whipping and the pillory.⁶⁴ Fourteen years later, Castle Island has been sold to the federal government and lies abandoned as a prison.⁶⁵ But by 1805, the Commonwealth has opened a new prison in Charlestown that presents a sharp contrast with the local gaol. Simultaneously, the criminal code has been revised anew, not simply to make room for incarceration, but to supplant the old sanctions entirely.⁶⁶

Structurally, the State Prison leaves a strong impression. Designed by one of the foremost architects in the state, its massive stone frame and looming walls have consumed six years of labor and \$170,000 in costs. It holds not thirty but three hundred inmates, all criminal offenders sentenced to solitary confinement and hard labor. They begin their terms in a dark and solitary cell and then find themselves transferred to congregate quarters and workshops where from dawn to dusk they labor at manufacturing shoes and nails or hammering stone.⁶⁷

Equally striking are the changes in institutional administration, now elaborated as the science of "prison discipline." No longer do the inmates' basic needs go unattended. A hospital has been constructed on the premises, staffed by a full-time physician. A major

62. 17 *id.* at 235, 247 [1739]; 18 *id.* at 51, 98, 129, 146, [1740]; 19 *id.* at 40, 41, 80, 82, 83, 91, 201 [1741].

63. Act of Mar. 14, 1785, ch. 63, 1784-1785 Mass. Acts 163.

64. See notes 344-46 *infra* and accompanying text.

65. Act of June 25, 1798, ch. 13, 1798-1799 Mass. Acts 16; Resolve of June 26, 1798, ch. 47, 1798-1799 Mass. Acts 196; Governors' Message, Jan. 11, 1799, 1798-1799 Mass. Acts 636.

66. Act of June 15, 1805, ch. 23, 1804-1805 Mass. Acts 427; see note 355 *infra*.

67. On the legislative history of construction, see Resolve of Jan. 22, 1800, ch. 68, 1798-1799 Mass Acts 558; Resolve of Nov. 15, 1800, ch. 64, 1800-1801 Mass. Acts 176; Resolve of June 23, 1802, ch. 54, 1802-1803 Mass. Acts 380; Resolve of June 22, 1803, ch. 51, 1802-1803 Mass. Acts 861. Additional documents relevant to construction can be found appended to 1802 Resolves ch. 54 (passed) (unpublished manuscripts, Mass. Archives). For a structural description and a description of early prison industries, see G. BRADFORD, DESCRIPTION AND HISTORICAL SKETCH OF THE MASSACHUSETTS STATE PRISON (Charlestown 1816). On working hours, see LAWS OF THE COMMONWEALTH FOR THE GOVERNMENT OF THE STATE PRISON 28 (Boston 1839).

effort has been undertaken to ensure prison hygiene and a proper diet. And as for our friendly gaol keeper, his responsibilities have been parceled out to a network of officials, all of whom work under a detailed code of regulations. What is more, the government inspects the State Prison periodically. In combination, these efforts have dramatically reduced prison mortality.⁶⁸

In short, the modern penitentiary has come of age. But where did it come from? The roots of criminal incarceration surely cannot be found in the old penalties like whipping and the pillory — at least there appears to be no natural progression from the one to the other. But neither can its roots be found in the gaol, for beyond the most superficial coincidences the two institutions were as different as night and day. To discover the penitentiary's true beginnings, we must explore, first, the ideology that underlay criminal sanctions in early Massachusetts and, second, the social realities that governed their effectiveness.

III. THE IDEOLOGY OF CRIMINAL PUNISHMENT

A. *The Rothman Thesis*

Any investigation of the rise of criminal incarceration in America must begin with a tip of the hat to David Rothman. Rothman's justly acclaimed work, *The Discovery of the Asylum*,⁶⁹ framed the questions, if it did not supply all the answers, and his interpretation of events has since spread throughout the textual and jurisprudential literature on penology. It seems appropriate, therefore, to review Rothman's conclusions briefly here, as a backdrop to my own analysis.

Rothman traces the inauguration of criminal incarceration pre-eminently to a series of intellectual waves that swept across America in the wake of the war for independence. During the colonial era, Rothman asserts, the Calvinist doctrine of original sin forestalled efforts to reduce crime by reforming or even deterring the criminal. Before the Revolution, punishment remained in principle retributive and expiatory — purposes that simply did not call for incarceration on a large scale.⁷⁰

68. See notes 382 & 384 *infra*. For a brief administrative history of the State Prison, see M. HINDUS, PRISON AND PLANTATION 162-81 (1980).

69. D. ROTHMAN, *supra* note 50. This work won the Beveridge Award in 1971. For thoughtful criticisms of the work, see Schneider, *supra* note 10; Zuckerman, Book Review, 121 U. PA. L. REV. 398 (1972); Muraskin, *The Social-Control Theory in American History: A Critique*, 9 J. SOC. HIST. 559 (1976).

70. D. ROTHMAN, *supra* note 50, at 3, 14-15, 17-18, 45-46, 52-53.

Rothman asserts that independence brought a fresh ideology and new programs.⁷¹ The social optimism of European Enlightenment thought found a receptive audience in the new American republic, steeped as it was in revolutionary excitement and activism. Concepts of human perfectability overpowered the "grim determinism" of Calvinist thought and inspired in Americans a fresh resolve to eliminate crime. Criminal incarceration was born not of an effort to *maintain* crime control, but of an intellectually stimulated effort to *enhance* it.⁷²

The initial program to accomplish this feat was derived from the tract of a recently celebrated Italian theorist named Cesare Beccaria. Beccaria postulated that the proliferation of crime could be traced directly to the viciousness and thoughtlessness of criminal codes. If the statutes were carefully redesigned to deter criminals rather than to take revenge against them, Beccaria taught, then the galling offenses would not occur in the first place.⁷³ Rothman asserts that incarceration was first seized upon as a punishment because it constituted an eminently variable mechanism of deterrence.⁷⁴

By the 1820's, Americans had become disillusioned with the deterrent approach.⁷⁵ Beccaria's vaccine had failed to immunize American society against crime. At the same time, population growth, urbanization, and nascent industrialization had provoked a general fear for the stability of American society. Still, reformers had lost none of their determination to put an end to crime. The Jacksonians looked into the problem anew, fueled by both ambition and anxiety.⁷⁶

The solution that they lighted upon, Rothman contends, was both novel and of American origin.⁷⁷ Taking a hint from the pro-

71. Rothman is adamant in his appraisal of the Revolution as a watershed: "Even at the close of the colonial period, there was no reason to think that the prison would soon become central to criminal punishment." *Id.* at 56, 59-61. See note 75 *infra*.

72. D. ROTHMAN, *supra* note 50, at 57-62.

73. Beccarian ideology is discussed in greater detail at notes 83-92 *infra* and accompanying text.

74. D. ROTHMAN, *supra* note 50, at 59-62, 89. "To reformers, the advantages of the institutions were external, and they hardly imagined that life inside the prison might rehabilitate the criminal." *Id.* at 62.

75. *Id.* at 62, 68. For Rothman, the intellectual eras are quite distinct: "Almost no eighteenth-century assumption about the origins or nature of . . . deviancy survived intact into the Jacksonian era . . ." *Id.* at 3. Furthermore, Jacksonian reformers "now looked to the life of the criminal, not to the statutes, in attempting to grasp the origins of deviancy. They presented biographical sketches, not analyses of existing codes. . . . Such questions were for the 1790's, not the 1820's and '30's." *Id.* at 68.

76. *Id.* at 57-59, 62, 69-71, 78.

77. See *id.* at 89, 94, 108, 330 n.20.

pounders of human perfectability, the Jacksonians determined to *rehabilitate* the criminal, to treat him and then to return him to the community a new man. Distressed by social deterioration, they now identified the root cause of crime to be the social environment, rather than misconceived criminal codes. To cure the offender, he had to be pulled out of society and placed in an artificial, corruption-free environment. Under the Jacksonians, the prison embarked on a new career as an institutional forum for the rehabilitation of criminals, and more broadly as a prototype for the rehabilitation of society.⁷⁸

Fascinating as it is, Rothman's account of the rise of criminal incarceration requires significant revision. The analysis is flawed, perhaps, by a tendency toward idiosyncrasy, but more seriously compromised by a curious compass of research that sweeps in all of the United States, yet never strays beyond its bounds. By contrast, a close study of the evidence from Massachusetts, coupled with a survey of European sources, presents a very different picture. Specifically, (1) the core ideology on which Massachusetts relied when it introduced criminal incarceration derived neither from eighteenth-century Italy nor from nineteenth-century America, but from sixteenth-century England; (2) the ideology of incarceration did not go through two distinct stages, the first emphasizing deterrence and the second rehabilitation; and (3) social forces influenced the initial post-revolutionary development of criminal incarceration, which occurred well before the Jacksonian era. The process of demonstrating these points, undertaken below, will also reveal that Rothman's treatment telescopes the complexity of the social and intellectual landscape on which his thesis rests.⁷⁹

B. *Images of Deterrence*

"One of the most embarrassing circumstances attending the government of the [Massachusetts State] Prison," its Directors observed in 1823,

is the vacillating and contradictory opinions, which prevail with respect to it. The subject of punishment for crime is one, on which most people have thought something and very few profoundly. Each man

78. *Id.* at xviii-xix, 62-78, 84, 107-08. A recent study also traces rehabilitative ideology expressly in Massachusetts to the Jacksonian era, specifically, to the period following the prison reforms of 1829 (discussed at notes 409-418 *infra* and accompanying text). See M. HINDUS, *supra*, note 68, at 163.

79. One potential element in the rise of criminal incarceration, namely class conflict and exploitation, requires separate treatment, and will not be addressed in this Article. For Marxist interpretations of the rise of criminal incarceration in Europe, see M. FOUCAULT, *DISCIPLINE AND PUNISH* (1975); M. IGNATIEFF, *supra* note 45; G. RUSCHE & O. KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (1939).

has his own theory, and each successive Committee of the Legislature its own favorite plan. . . . Opposite and conflicting expectations are entertained by different individuals, and often by the same individual.⁸⁰

The observation was as cogent as it was timeless. Like most social problems that stir emotion and defy solution, the "Gordian Knot"⁸¹ of crime control was incessantly debated, but never untangled. It would take an essay longer than this to rehearse all of the strands of contemporary ideology connected to the problem.⁸² For our purposes, however, broad strokes will suffice.

1. *Beccarianism*

Rothman traces the first movement toward incarceration in America to the criminological theories of Cesare Beccaria. Beccaria's essay, "On Crimes and Punishments," created a sensation on its publication in 1764, spreading quickly across Europe and onward to the American colonies.⁸³ But this work was not penned in a vacuum. It belongs to a larger school of thought known as "rationalism" or "utilitarianism" — an ideology planted at the core of the European Enlightenment and expounded by such well-known philosophers as Montesquieu and Bentham.

The rational ideology rejected scripture in favor of human logic and reason as a guide to the construction of social institutions. The aim of secular government, the rationalists taught, was not to do God's bidding, but to maximize secular utility (in Beccaria's oft-repeated phrase, to provide "the greatest happiness shared by the greatest number").⁸⁴ Intellectually, at least, the shift was as drastic as any that can be imagined, and it obliged the rationalists to recon-

80. Austin, Phinney & Soley, *Remarks on the Massachusetts State Prison*, in RULES AND REGULATIONS FOR THE GOVERNMENT OF THE MASSACHUSETTS STATE PRISON 23, 27 (Boston, 1823) [hereinafter cited as *Remarks*]. For similar statements, see J. BENTHAM *Panopticon; or, The Inspection-House*, in 4 WORKS OF JEREMY BENTHAM 121-22 (Edinburgh 1843) (1st ed. Dublin 1791); J. HANWAY, *SOLITUDE IN IMPRISONMENT* 4 (London 1776); REPORT [ON THE STATE PRISON] 5, 7 (1822) (legislative document, Harvard Law Library) (also printed in 1817-1822 Mass. Legislative Documents no. 52, at 1 (1822) (State Library Annex)); Tudor, *Book Review*, N. AM. REV. 417 (1821) (reviewing G. BRADFORD, *supra* note 1).

81. This is Bentham's analogy. See BENTHAM, *supra* note 80, at 39.

82. The standard treatment of criminological theory in Hanoverian England is 1 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* (1948). For a useful survey and anthology, see J. HEATH, *EIGHTEENTH CENTURY PENAL THEORY* (1963).

83. C. BECCARIA, *ON CRIMES AND PUNISHMENT* (H. Paolucci ed. 1963) (1st ed. Leghorn 1764). On the work's notoriety, see *id.* at ix-xi; 1 L. RADZINOWICZ, *supra* note 82, at 277 n.38, 283 n.60; note 94 *infra* and accompanying text. For a biography of Beccaria, see M. MAESTRO, *CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM* (1973).

84. The phrase is often attributed incorrectly to Bentham. See C. BECCARIA, *supra* note 83, at 8 & n.10.

sider a vast constellation of the most venerable dogmas. They plunged into the task gleefully.

In the realm of criminal law, rational philosophers argued that what made an action a "crime" was the harm it did to other members of society. "Sins" that were not also socially harmful had to be answered for at a different tribunal.⁸⁵ Furthermore, once a crime was committed, the only rational purpose of punishment was the *prevention* of future harm; retribution had no place in a theory of secular utility, for "what is done can never be undone."⁸⁶ Viewed in the cold light of reason, punishment thus became "an evil to which the magistrate resorts only from its being necessary to prevention of a greater."⁸⁷ Any gratuitous severity, (or "prodigality") of punishment constituted "abuse and not justice."⁸⁸

Rational philosophers who grappled with the problem of how crime could be prevented devoted much attention to deterrence: that is, setting penalties such that a potential offender would be held in check by the fear of a painful sequel to his action.⁸⁹ Just what scheme of penalties would best accomplish this intimidation was, to put it mildly, a matter on which the criminologists differed. The ideology of rationalism was sufficiently flexible to bear both reformist and apologetical glosses.⁹⁰

For his part, Beccaria postulated that the *certainty* of punishment contributed more to deterrence than its *severity*. Were apprehension, conviction, and sentencing all rapid and infallible, the punishments established for crimes could be quite moderate, for it was pre-eminently that reed of optimism, "the hope of impunity," that sustained

85. *E.g.*, Montesquieu: "In things that prejudice the tranquillity or security of the state, secret actions are subject to human jurisdiction. But in those which offend the Deity, where there is no public action, there can be no criminal matter; the whole passes betwixt man and God, who knows the measure and time of his vengeance. . . . [W]e must honor the Deity, and leave him to avenge his own cause." C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 263-64 (2d ed. London 1752) (1st ed. Geneva 1748); see C. BECCARIA, *supra* note 83, at 20-21.

86. *See, e.g.*, W. EDEN, *PRINCIPLES OF PENAL LAW* 6-7 (2d ed. London 1771) (1st ed. London 1771). ("The prevention of crime should be the great object of the Lawgiver. . . . It is from an abuse of language, that we apply the word 'Punishment' to human institutions: Vengeance belongeth not to man.")

87. W. PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 527 (London 1785) (an edition was printed in Boston by S. Etheridge for J. White in 1795). *See* J. BENTHAM, *supra* note 30, at 20-21.

88. C. BECCARIA, *supra* note 83, at 13, 14, 45, 63.

89. *See, e.g.*, J. BENTHAM, *supra* note 30, at 19-20. The standard modern text on the concept of deterrence is F. ZIMRING & G. HAWKINS, *DETERRENCE* (1973).

90. For example, Paley and Madan, both defenders of the "bloody code" (Great Britain's accumulation of over 200 capital statutes during the eighteenth century), adhered to the basic premises of rationalism enunciated above, though their thoughts on the matter of capital punishment were the antithesis of Beccaria's. *See generally* 1 L. RADZINOWICZ, *supra* note 82, at 239-59, 277-86. On the bloody code, see *id.* at 3-227.

an offender in his moment of temptation. Beccaria in particular denounced capital punishment for its superfluous rigor and capricious enforcement.⁹¹ And on a structural plane, he insisted that judges should exercise no discretion over sanctions. The legislature should specifically prescribe the penalty for each crime, both as a matter of constitutional theory, and to inhibit expectations of lenient treatment.⁹² In mapping out its code, Beccaria added, the legislature should carefully proportion punishments to the magnitude of crimes. The more heinous the offense, the more severe the penalty needed to deter it; but uniformly severe penalties would necessarily entail "prodigality" and destroy moral distinctions among various offenses.

Here, then, was one program for the control of crime. But how significant was it to the coincident rise of criminal incarceration in Massachusetts?

2. *Massachusetts Legislation*

The extent to which Beccarian ideology influenced developments in Massachusetts is problematic. To be sure, this current of thought did flow vigorously through the province in the late eighteenth century. By 1765, public documents paraphrased rationalist tracts by styling prevention the "great end" of punishment,⁹³ and Beccaria's specific suggestions for law reform received widespread notoriety and praise. Nathan Dane, codrafter of Massachusetts' criminal code of 1805, offered passages from the Italian theorist's writings in his celebrated *Abridgments*.⁹⁴ Still, the broad principles that made up Beccarian ideology were older than Beccaria's essay, and its specific suggestions were largely disregarded when the time came to translate exhortations into enactments. Moreover, Beccaria's program, though compatible with criminal incarceration, issued no call for it.

91. See C. BECCARIA, *supra* note 83, at 13-17, 42-52, 55-59, 62-64. In England, only a fraction of the capital offenders were actually executed. See generally 1 L. RADZINOWICZ, *supra* note 82, at 83-164.

92. "Flexibility" of sentence and "certainty" of punishment were cognate concepts, in that flexibility approaches uncertainty as the range of discretion approaches a minimum of zero (no penalty, hence impunity).

93. 44 Mass. Archives 538-39 [1765] (unpublished manuscript, Mass. Archives); see, e.g., G. BRADFORD, *supra* note 1, at 6-7, 10-11; Answer of the House of Representatives [n.d.] in May, 1818 Mass. Resolves 594. Cf. C. BECCARIA, *supra* note 83, at 93 ("ultimate end"); W. EDEN, *supra* note 86, at 6 ("great object"); M. MADAN, THOUGHTS ON EXECUTIVE JUSTICE WITH RESPECT TO OUR CRIMINAL LAWS 11 (London 1785) ("great end").

94. See N. DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 625, 630-32 (Boston 1824). Another student of Beccaria was John Adams, who quoted the theorist's writings at the Boston Massacre trial and on other occasions. See 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 352, 353 n.2 (L. Butterfield ed. 1961); 2 *id.* at 440, 442.

Even if the rhetoric had been faithfully observed, the rise of the penitentiary would not thereby be explained.

On the surface, at least, the early Puritan settlers of Massachusetts held sacred everything that Beccaria disavowed. For the Puritans, crimes and sins were one and the same: They were affronts to God, and their punishment by secular authority constituted an expiatory obligation to His government.⁹⁵ But whatever the ministers might have thundered from their pulpits, no historian today will question the pragmatic nature of early Massachusetts law. For all their avowed Biblical literalism, the Puritans regularly interpreted scripture to accommodate secular utilities, and they made only selective use of the Pentateuch in drafting their criminal laws.⁹⁶ Such general rationalist objectives as deterrence and carefully tailored criminal statutes would not have struck Puritan law-makers as blinding flashes of insight.⁹⁷

Beccaria's stand against capital punishment won many adherents in post-Revolutionary Massachusetts.⁹⁸ Yet once again, the ideology merely tapped an ancient cultural vein. From the beginning, the Pu-

95. The Puritan theory of punishment derived from the theology of the national covenant: if the nation endeavored to minimize sin and punished all incidents of it as dictated by scripture, then God would bless the nation with prosperity; if, however, the nation allowed sin to flourish and go unpunished (thereby violating the covenant), God would make His displeasure felt by visiting the nation with disaster. Thus, an offender is admonished in 1681 "that he do no more So offend, and become an occasion of bringing down Gods Judgments upon the Land." PYNCHON COURT RECORD, *supra* note 23, at 122-23; *see generally* P. MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* 463-91 (1939).

96. *See* G. HASKINS, *supra* note 9, at 141-62. For one Puritan's efforts to justify theologically the dilution of biblical literalism, *see* Perkins, *EPIEKEIA, or a Treatise of Christian Equity and Moderation*, excerpted in PURITAN POLITICAL IDEAS, 1558-1794, at 60, 63, 69-70 (E. Morgan ed. 1965).

97. For early recognition of the importance of a thoughtful and detailed corpus of criminal law, *see, e.g.*, 2 COL. RECORDS, *supra* note 11, at 39 [1643], 96 [1644], 168-69 [1646]; G. HASKINS, *supra* note 9, at 119-35. Haskins has termed the "Laws and Liberties" of 1648 "one of the crowning achievements of the Bay colony." *Id.* at 136. Though Rothman asserts that interest in the structure of criminal codes flagged in the Jacksonian era, *see* note 75 *supra*, this never occurred in Massachusetts. In 1834, for example, the criminal code was subjected to a major overhaul into which "great . . . time, labor and money" were invested, culminating in a debate in a special session of the legislature, *see* Resolve of Feb. 24, 1832, ch. 30, 1832-1834 Mass. Resolves 103; Governor's Address, Jan. 8, 1833, 1832-1834 Mass. Resolves 272; Governor's Message, March 6, 1834, ch. 32, 1832-1834 Mass. Resolves 623-24; Resolve of Apr. 1, 1834, ch. 85, 1832-1834 Mass. Resolves 663-64; Lieutenant Governor's Address, Sept. 1835, 1835-1838 Mass. Resolves 207-08; Resolve of Nov. 3, 1835, ch. 117, 1835-1838 Mass. Resolves 232; Lieutenant Governor's Message, Nov. 4, 1835, ch. 118, *id.* at 240-41. Rationalism or no rationalism, concern over the statutory framework of criminal punishment is discernible in Massachusetts from the very beginning, and has continued unabated to the present day.

98. *See, e.g.*, Governor's message, Jan. 15, 1801, 1800-1801 Mass. Acts 584; *The Independent Chronicle*, Feb. 7, 1793, at 1, *continued, id.*, Feb. 14, 1793, at 1-2; *Mass Centinel*, Jan. 5, 1785, at 3; Answer of the Legislature, Feb. 15, 1793, 1792-1793 Mass. Acts 242; Report of Committee, Jan. 26, 1802, appended to 1802 Resolves, ch. 54 (passed) (unpublished manuscript, Mass. Archives).

ritan settlers demonstrated an extreme reluctance to execute offenders, and they restricted the capital list in the colony to the most serious crimes.⁹⁹ In 1805, when the State Prison was opened and a new code of laws inaugurated, the drafters decided "after an anxious revision" to reject Beccaria's extreme position and "retain the punishment of death" to a limited extent.¹⁰⁰ But even if Massachusetts had gone ahead and dismantled the gallows, only a handful of sentences would have been affected. Criminal incarceration on a large scale could not have resulted from such a move.¹⁰¹

Another pillar of Beccarian ideology, inflexible punishments, called for a more drastic change in Massachusetts tradition. This issue had in fact simmered in the colony from its earliest days, when the permitted ambit of sentencing discretion was at bottom less a matter of ideology than of parochial politics. The magistrates sat as judges in colonial Massachusetts, and they resisted repeated efforts by the deputies to curtail their powers in that capacity. The dispute over sentencing discretion constituted one front in this broader

99. Twenty-five capital statutes were passed between 1632 and 1692, but only nine of those were ever invoked to order sentences of death. Adultery was added to the capital list in 1650, for example, but until its repeal in 1694, juries invariably returned convictions for "libidinous Actions" or "acts leading to Adultery" or the like, never for adultery itself, *see* E. POWERS, *supra* note 9, at 252-303; G. HASKINS, *supra* note 9, at 211-12; COL. LAWS, *supra* note 13, § 2 at 15 [1650]; 1 PROV. LAWS, *supra* note 12, at 17 [1694]. In 1705, the provincial code contained only ten capital statutes: for murder (including the killing of bastard children and killing in a duel), sodomy (and bestiality), polygamy, rape, Jesuits at large, arson, piracy, treason, and third convictions for burglary and robbery, 1 PROV. LAWS, *supra* note 12, at 52, 55-56 [1692], 171 [1694], 423 [1700]; E. POWERS, *supra* note 9, at 152, 303-08.

100. The drafters suggested that if the State Prison were successful, additional modification of the capital list might be considered. N. Dane & S. Sewall, Report of the Comm[itt]ee] app[ointed] to revise penal laws and on the subject of the state prison, Feb. 16, 1805, Senate Document no. 3232 (1805) (unpassed) (unpublished manuscript, Mass. Archives) (also printed in 1798-1809 Mass. Legislative Documents no. 3, State Library Annex). Over the course of the eighteenth century, additional capital statutes had passed, ultimately for a first conviction for burglary (the definition of which was expanded), a first conviction for robbery, a second conviction for theft, and certain types of counterfeiting, but these proved as difficult to enforce as prior capital laws against less serious crimes, *see* notes 285-97 *infra* and accompanying text. In 1805, the death penalty was retained for five crimes: murder, first conviction for burglary, arson, rape, and treason. The two prior capital statutes against piracy and Jesuits disappeared because these categories of crimes were eliminated entirely from the code. Two other capital statutes against robbery and counterfeiting were downgraded to lesser penalties, but the capital statutes in these instances represented recent provincial upgradings (and the capital statute against robbery was in fact restored in 1819). Only two long-time capital offenses were downgraded in 1805: sodomy and polygamy, *see* note 355 *infra*; Act of Feb. 19, 1819, ch. 124, 1818-1822 Mass. Acts 201.

101. *See also* note 114 *infra* and accompanying text. Rothman's generalized examination of capital punishment in the colonies vastly overestimated its use in Massachusetts, *see* D. ROTHMAN, *supra* note 50, at 50-52. But anti-capital punishment ideology may have had a more important impact in England and on the European continent, where the gallows were more extensively utilized. *See* 1 L. RADZINOWICZ, *supra* note 82, at 3-227; *cf.* Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. LEGAL STUD. 35 (1976).

contest.¹⁰²

In response to the deputies' charge that the magistrates were "seeking to have the government arbitrary," John Winthrop and others in 1641 fashioned a defense of sentencing discretion heavily laden with Biblical exegesis. But Winthrop also identified the principal oversight, and upshot, of Beccaria's plan, over a century before the Italian theorist began to ponder the problem of crime: namely, the more inflexibly a punishment is mandated, the smaller the likelihood that its enforcement will be just. "Offenses [vary] so much in their merit by occasion of circumstances," Winthrop commented, that "it would be unjust to inflict the same punishment upon the least as upon the greatest It is against reason that some men [legislators] should better judge of the merit of a cause in the bare theory thereof, than others (as wise and godly) should be able to discern it *pro re nata*."¹⁰³ Under the criminal statutes of Massachusetts, judges continued to enjoy wide sentencing discretion throughout the colonial and provincial periods. Indeed, even where discretion was not provided for by statute, the judges presumed to arrogate it.¹⁰⁴

Against this background, the adoption of Beccaria's method of inflexible sentencing would have been a radical departure indeed. But in its initial burst of post-Revolutionary legislation, in 1785, the House fairly thumbed its nose at Beccaria, installing by far the most discretionary code in the state's history. Most of the noncapital statutes previously in force had mandated a maximum term to a single public punishment (often with an alternative fine); now the statutes were revised to permit a variety of alternative punishments (including incarceration), and they often failed to set any quantitative limitations whatsoever.¹⁰⁵ In a speech before a joint session of the

102. The term "magistrates" refers to the governor, deputy-governor, and assistants elected by the colony as a whole, who sat on the Court of Assistants and made up the "upper house" (so to speak) of the General Court; the deputies were elected to represent local districts in the "lower house" of the General Court. On the dispute over judicial discretion, see Lee, *Discretionary Justice in Early Massachusetts*, 112 ESSEX INST. HIST. COLLECTIONS 120 (1976). On the broader contest between the magistrates and deputies, see G. HASKINS, *supra* note 9, at 25-47.

103. 2 J. WINTHROP, *supra* note 21, at 50-51; see 4 WINTHROP PAPERS, *supra* note 19, at 468-88; 2 COL. RECORDS, *supra* note 11, at 93-94. Winthrop's thoughts on judicial discretion may have been influenced by the English Puritan theologian William Perkins, who also remarked the injustice of inflexible sentencing. Perkins, *supra* note 96, at 59-73.

104. E. POWERS, *supra* note 9, at 446-51. See *id.* at 273-86; Lee, *supra* note 102. For examples of judicial disregard of statutory prescription in the provincial period, see note 297 *infra*. Notice also the justification for magisterial violation of statutory prescription offered in Perkins, *supra* note 96, at 71-72.

105. See notes 344-46 *infra* and accompanying text. For a description of the public punishments, see text at notes 233-36, *infra*.

legislature in 1793, Governor Hancock called on the representatives to abandon this system and impose Beccaria's method,¹⁰⁶ but the House failed to comply. The redrafted code of 1805 did limit the number of alternative punishments, but most of the new noncapital statutes continued to set maximum penalties only.¹⁰⁷ A legislative committee that reviewed the code in 1814 declined to alter this policy.¹⁰⁸ Twelve years later, another committee reconsidered the question of judicial discretion and laid the matter to rest with words that might as easily have flowed from John Winthrop's pen:

crimes of the same denomination admit of such a variety of palliating and aggravating circumstances, that discretionary power in punishing them, should . . . exist somewhere; and when confided to the court, it is fair to presume, it will be discreetly exercised.¹⁰⁹

The timeless wisdom of John Winthrop foiled Beccarianism.¹¹⁰

A related matter was the role of the pardon in criminal law. In keeping with its policy of sentencing discretion, Massachusetts had long granted a power to pardon convicted offenders in the General Court.¹¹¹ The Beccarian principle of certainty, however, called the practice into question.¹¹² Yet once again, a prescription that grated on ancient tradition was simply ignored. The Massachusetts Consti-

106. "I recommend these ideas to your wise deliberations, that such punishments may be provided as, if administered with certainty and inflexibility, may be sufficient to check the progress of crime." Governor's Message, Jan. 31, 1793, 1792-1793 Mass. Acts 694; see Governor's Message, June 6, 1792, 1792-1793 Mass. Acts 682.

107. By failing to set minimum penalties in many instances, the code of 1805 violated both the principle of inflexibility and certainty. See note 355 *infra*.

108. "The result of their attention to the subject has been a decided opinion on their part, that the Statutes enacted . . . [have] left very little occasion for additions or improvements to be attempted at this time." Committee Report, Jan. 22, 1814, 1813-1816 Mass. Legislative Documents no. 10, at 1 (1814) (State Library Annex). (This conclusion may have been influenced by the fact that two of the three committee members were the original 1805 drafters.)

109. Resolve of Mar. 3, 1826, ch. 93, 1824-1828 Mass. Resolves 307; REPORT [ON THE STATE PRISON] 16 (1827) (legislative document, Harvard Law Library) (also printed in 1826-1827 Mass. Legislative Documents no. 23, at 67 (1827) (State Library Annex)); see Resolve of Nov. 17, 1786, ch. 134, 1786-1787 Mass. Acts. 413. Other European rationalists shared variations of these views, see BENTHAM, *supra* note 30, at 411-13; HEATH, *supra* note 82, at 14-15, 164, 200; Radzinowicz & Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288 (1979).

110. The issue, indeed, remains as timeless as the wisdom. For a recent contribution to the debate on judicial discretion, see Note, *Daring the Courts: Trial and Bargaining Consequences of Minimum Penalties*, 90 YALE L.J. 597 (1981).

111. COL. LAWS, *supra* note 13, § 2 at 34-35 [1641]; see, e.g., 2 J. WINTHROP, *supra* note 21, at 61.

112. "[I]f the power of pardon is frequently exercised, the utility of the Penitentiary ceases," one legislative committee warned, "for . . . those who have the benefit of pardon escape with impunity There appears to be great force in the sentiments of Beccaria, connected with this subject." Committee Report, n.d., 1817-1822 Mass. Legislative Documents no. 1, at 4-5 (1817) (State Library Annex); Committee Report, Jan. 20, 1818, *id.* no. 2, at 3 (1818).

tution of 1780 invested the Governor with the pardoning power, and courts soon claimed their own analogue in the guise of the suspended sentence.¹¹³

The story of Massachusetts' bout with Beccarian inflexibility and certainty is an interesting sidelight, but has little connection with the rise of criminal incarceration. Incarceration was, after all, no more intrinsically inflexible and certain than any other mild punishment; "uncertain" death penalties could have been repealed without resort to anything new.¹¹⁴

The final principle of statutory structure offered by Beccaria, "proportionality" between crimes and punishments, again struck an ancient chord and appears to be reflected in the systematic splintering of legal categories in 1805.¹¹⁵ Still, incarceration does not facilitate such splintering in a way that older, noncapital penalties could not. One could spend "so many years" in prison, or suffer "so many lashes" at the whipping post.¹¹⁶ No commentator in Massachusetts cited variability as a merit unique to incarceration. Indeed, the Boston Discipline Society drew the opposite conclusion: Because men reacted so differently to the experience of solitary confinement, a whipping (as punishment for breaches of prison regulations) "can be more easily proportioned to the offense."¹¹⁷

Overall, Beccarian ideology may have had a significant impact on perceptions of punishment and deterrence in Massachusetts.¹¹⁸

113. MASS. CONST. of 1780, pt. II, ch. 2, § 1, art. 8; Act of Mar. 6, 1804, ch. 117, 1802-1803 Mass. Acts 703; *Commonwealth v. Chase*, in REPORTS OF CRIMINAL CASES TRIED IN THE MUNICIPAL COURT OF THE CITY OF BOSTON BEFORE PETER OXENBRIDGE THACKER 267-68 [1831] (Boston 1845). On at least one occasion, the legislature also claimed this power, Resolve of Nov. 17, 1786, ch. 134, 1786-1787 Mass. Acts 413. Arguments in favor of the pardoning power mirrored Winthrop's reasoning. See Governor's Message, Jan. 13, 1804, 1802-1803 Mass. Acts 981.

114. Thus, in advocating a retreat from the gallows, rationalist William Eden urged that "corporal pains might certainly with good effect be substituted, in some cases, in the room of capital judgments." W. EDEN, *supra* note 86, at 63. On the "uncertainty" of capital punishment, see notes 91 & 99-100 *supra* and notes 294-98 *infra* and accompanying text.

115. Compare 1 PROV. LAWS, *supra* note 12, at 577-78 [1705], with Act of Mar. 16, 1805, ch. 131, 1804-1805 Mass. Acts 202; 2 PROV. LAWS, *supra* note 12, at 5 [1715], and Act of Mar. 13, 1806, ch. 101, 1804-1805 Mass. Acts 522. For an early reference to the importance of proportionality, see, e.g., 2 COL. RECORDS, *supra* note 11, at 93-94 [1644].

116. See, e.g., *id.*; J. BENTHAM, *supra* note 30, at 83, 113.

117. FIRST ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE PRISON DISCIPLINE SOCIETY 26 (Boston 1826) [hereinafter cited as PRISON DISCIPLINE SOCIETY]; see J. BENTHAM, *supra* note 30, at 111-13, 81-84.

118. One Jacksonian rationalist (mistakenly) remarked that the early Massachusetts criminal law "was deduced almost literally from the Books of Moses." This, he added, had "given rise to no little ridicule, and however creditable to their piety it may have seemed to some in former times, it has certainly not tended to give the world in general, at the present day, a very exalted idea of their legislative wisdom." F. GRAY, REMARKS ON THE EARLY LAWS OF MASSACHUSETTS BAY 3 (Boston 1843).

As a practical matter its contributions were less marked, but Beccarianism probably did help to bring about the differentiation of grades of crimes, as well as to hasten the retreat of "moral" offenses.¹¹⁹ But Beccarian concepts of deterrence did not drive Massachusetts to criminal incarceration. The Italian theorist was captivated by statutory structure more than substance, and his structural suggestions demanded no novel sanctions. His allusions to the staple punishments of whipping and the pillory accepted them as a given, and his chapter on "imprisonment" addressed the subject in its classical, custodial context.¹²⁰

We must look beyond ideological reformulations of deterrence to find the origins of criminal incarceration. And, as already noted, Cesare Beccaria did not write in a vacuum. His was but one strand in the tangle of eighteenth-century thought on crime.

C. *Images of Rehabilitation*

Beccaria and others sought to prevent crime via the *threat* of punishment. Rothman asserts, however, that the Jacksonians placed their hopes in a different and novel mechanism: rehabilitation. Jacksonian punishment sought not to awe criminals but to *change* them, to cure their tendency toward criminal behavior.

The first thing to notice about the concept of rehabilitation is its plasticity. Rehabilitation has meant different things to different men. To understand a given theory of rehabilitation, one must ask of its author (1) What *causes* persons to commit crime, and (2) What *particular treatment* will counteract that cause. These questions have been pondered at least since Plato.¹²¹ In English criminology, answers involving incarceration (which we shall call "carceral rehabilitation") stretch back to Elizabethan times.¹²²

119. See W. NELSON, AMERICANIZATION OF THE COMMON LAW 37-39, 110-11, 117-18 (1975).

120. See C. BECCARIA, *supra* note 83, at 19-20, 54-55, 68, 71, 74. In several places, Beccaria also refers to penal servitude. See *id.* at 47-50, 74-76.

121. M. MACKENZIE, PLATO ON PUNISHMENT 179-224 (1981).

122. While the ideal of rehabilitation does not *per se* require incarceration (we shall encounter several forms of noncarceral rehabilitation in Massachusetts, see notes 228-36, 243-48 *infra* and accompanying text), the one did suggest the other. The signal feature of incarceration is that it offers an unparalleled measure of *control* over the deviant, and rehabilitation has often been deemed a process which demands such physical control in order to succeed. Thus Jeremy Bentham, speaking from the standpoint of Lockian psychology (see notes 160-62 *infra* and accompanying text), described criminals as "a particular class of human beings, that, to keep them out of harm's way, require for a continued length of time that sort of sharp looking after, that sort of peculiarly close inspection, which all human beings, without exception, stand in need of, up to a certain age." Other sorts of punishment, less comprehensive than incarceration, were "radically incapable of administering that corrective aid which, in the case in question, is so perfectly indispensable." J. BENTHAM, *Panopticon versus New South Wales*, in 4

1. *The Workhouse*

In the sixteenth century, when criminology in England remained an avocation of magistrates and pamphleteers, the common wisdom attributed the realm's abundance of property crime to idleness. "[T]heir sinews . . . benumbed and stiff through idleness," some Englishmen had abandoned all thought of earning a living, and so "of necessity live[d] by spoil" while drifting aimlessly about the countryside.¹²³ Since the Statutes of Laborers in 1349 and 1351, English law had sought to discourage able-bodied idleness by making it a status crime. Persons convicted of leading a "Rogishe or Vagabonds Trade of Lyef" were subject to an array of criminal sanctions that by 1530 included whipping, mutilation, and even capital punishment for a subsequent "offense."¹²⁴

With vagrancy on the rise in the sixteenth century, the municipal government of London decided to hazard a new approach to the problem. In 1557, after four years of planning, the city opened an old royal palace at Bridewell as a repository for all vagrants convicted in the municipality. Incarcerated vagrants were to be "chastened and compelled to labour, to the overthrow of the vicious life of idleness" to which they had all ostensibly succumbed.¹²⁵ In the following decades, "houses of correction" or "workhouses," as the institutions came to be known,¹²⁶ sprouted up in other major towns, and

WORKS OF JEREMY BENTHAM 174-75 (London 1843) (letter to Lord Pelham, Dec. 17, 1802); see J. BENTHAM, *supra* note 6, at 7; E. LIVINGSTON, *Introductory Report to the Code of Reform and Prison Discipline*, in 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 550, 556 (1873).

123. Letter from Edward Hext to the Lord Treasurer (1596), reprinted in 4 J. STRYPE, *ANNALS OF THE REFORMATION AND ESTABLISHMENT OF RELIGION* 404-05 (rev. ed. Oxford 1824) (1st ed. London 1709) [hereinafter cited as "Hext to Lord Treasurer"]; Harman, *A Caveat or Warning for Common Cursitors, Vulgarly Called Vagabonds*, [1566] in THE ELIZABETHAN UNDERWORLD (A. Judges ed. 1930); CRIME IN ENGLAND, 1500-1800, at 62-64, 98-99, 135 (J. Cockburn ed. 1977); 3 J. STEPHEN, A HISTORY OF CRIMINAL LAW IN ENGLAND 267-72 (1833). The equation of vagrancy with crime probably had ancient roots. See, e.g., the 1383 statute 7 Rich. 2, c.5 ("to restrain the malice of diverse people . . . wandering from place to place").

124. On the development of early English vagrancy law, see 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-64 (rev. ed. 1923); 4 *id.* at 387-402; 3 J. STEPHEN, *supra* note 123, at 266-75.

125. Van der Slice, *Elizabethan Houses of Correction*, 27 J. AM. INST. CRIM. L. & CRIMINOLOGY 50 (1936). On the history of Bridewell, see A. COPELAND, BRIDEWELL ROYAL HOSPITAL (1888); E. O'DONAGHUE, BRIDEWELL HOSPITAL, PALACE, PRISON, SCHOOLS (vol. 1, 1923; vol. 2, 1929). Documents on the founding of Bridewell, emphasizing its rehabilitative aims, can be found in 19 PARL. PAPERS 393-645 (pt. 1) (1840). See E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 734 (London 1817).

126. The terms "workhouse," "bridewell," and "house of correction" had no generally accepted definitions; while some contemporaries used these phrases to refer to different institutions, many used them synonymously. (From the last we have perhaps derived the modern term "correctional facility.") Hereinafter, I shall generally use the term "workhouse," even

in 1576¹²⁷ every county in the realm was enjoined to build one. The workhouse remained a fixture in England throughout the seventeenth and eighteenth centuries, and Puritan settlers carried the idea with them to Massachusetts.¹²⁸

The inventors of the workhouse operated under the assumption that idleness was a vice or "habit" that could be broken only through a regimen of enforced abstinence. The challenge of rehabilitation lay in destroying a "habit of idleness" and replacing it with a "habit of industry" more conducive to an honest livelihood. The therapy, at once depriving the deviant of old habits and instilling the new, was hard labor. Every house of correction was to obtain stocks of raw materials and the tools of trade necessary to set its inmates to work on such practical crafts as weaving, nail-making and wheat grinding.¹²⁹

The workhouse embodied one paradigm of carceral rehabilitation, a paradigm that we shall call "rehabilitation." Rehabilitation was an inherently superficial form of rehabilitation: it addressed the inmate's outward routines and abilities rather than his inner moral standards. Once released, the rehabilitated inmate would no longer need to "live by spoil," but curing that compulsion marked the limit of the treatment. Rehabilitation was also inherently coercive, acting quite against the deviant's will. As Lord Coke noted, some of his contemporaries were "of opinion, that in particular townes a discrete and expert workman may set the young and idle people as *voluntaries* on work." But he concluded that the derelicts were so wedded to their vices "as they will be never brought to worke, unless they be thereunto *compelled*."¹³⁰ Incarceration served to facilitate this coercion.

when another name appears in the contemporary reference (though not when directly quoting) for the sake of consistency.

127. 18 Eliz. I, c. 3.

128. Van der Slice, *supra* note 125, at 52-57. In the seventeenth century, institutions similar to the workhouse also developed on the European continent, in the Netherlands, France, and Germany; the extent to which they were influenced by English practice remains a matter of some controversy. See T. SELLIN, *PIONEERING IN PENOLOGY* 9-22, 27, 102-10 (1944); Langbein, *supra* note 101, at 48-51. While historians have traditionally assumed that the English workhouse fell into decline in the eighteenth century, see, e.g., S. WEBB & B. WEBB, *ENGLISH PRISONS UNDER LOCAL GOVERNMENT* 14-17 (1922), research in progress by Joanne Innes at Cambridge University indicates that they continued to flourish. In any event, there is no question that the *theory* remained vital throughout this period, see M. IGNATIEFF, *supra* note 45, at 11-14. On the workhouse in Massachusetts, see notes 190-91, 240-42 *infra* and accompanying text.

129. M. GRUNHUT, *PENAL REFORM: A COMPARATIVE STUDY* 15-16 (1948); S. WEBB & B. WEBB, *supra* note 128, at 12-14; Van der Slice, *supra* note 125, at 50-52, 60-65.

130. E. COKE, *supra* note 125, at 734, 728 (emphasis added); see, e.g., J. HOWARD, *supra* note 3, at 42; J. BENTHAM, *supra* note 30, at 155.

As they developed a theory of carceral rehabilitation, the builders of the workhouse also wrestled with the host of problems that have forever surrounded its implementation. One perennial concern of prison advocates was to reconcile rehabilitation with deterrence. A rehabilitative regime with too small a deterrent component might fail to prevent crime in the first instance or, worse, encourage persons to commit offenses for the very purpose of gaining admission.¹³¹ By the same token, a rehabilitative regime with too large a deterrent component might occasion such "rankling enmity" against the authority inflicting it that any concurrent hope of rehabilitation would be dashed.¹³²

Advocates of the workhouse believed that they had avoided this Scylla and Charybdis by making hard labor the institution's hallmark. According to the prevailing doctrine, hard labor could rehabilitate idlers, but it could *also* deter them because idlers were supposedly scared to death of work, and "will rather hazard their lives" than submit to it.¹³³ Indeed, the beauty of hard labor was its capacity to serve simultaneously as threat and therapy. If it did not succeed as one, it might still as the other.¹³⁴

A second, more practical, stumbling block lay in designing a system of institutional administration suitable to the new facility. Local gaols in England (as in Massachusetts) had been left to rot, precisely because their function extended no further than to mere custody over inmates. But the moment those inmates were to receive special treatment within walls, conscientious management of the facility became essential. In order to ensure the integrity of the workhouse's rehabilitative routine, authorities provided codes of regulation for its

131. Some persons imagined that the poor might find carceral facilities "more comfortable places of residence than their own houses." J. HOWARD, *supra* note 3, at 44; J. HANWAY, *supra* note 80, at 30. This fear was later elaborated into the infamous doctrine of "less eligibility," which held that a prisoner's lot must be made worse than that of the lowest paid honest laborer. *See, e.g.*, J. BENTHAM, *supra* note 80, at 122-23. *Cf.* note 391 *infra* and accompanying text.

132. 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 26 (1826).

133. Hext to Lord Treasure, *supra* note 123, at 291. This assumption continued in England into the eighteenth century. *See, e.g.*, J. HOWARD, *supra* note 3, at 44. But it was left to later reformers to address the second half of the problem, that is, the possibility that hard labor would prove *so* hard that the element of deterrence swamped the element of reformation. In this vein, Bentham urged moderation of the convict labor routine: "a man [should] be taught to love labour, instead of being taught to loath it . . ." J. BENTHAM, *supra* note 80, at 144.

134. The point was later presented crisply: "The privation of personal liberty and social intercourse, and the subjection to strict discipline and to hard labor, form indeed a severe punishment. But they would be equally necessary, if the Prison were not designed in the slightest degree for punishment [*i.e.*, deterrence], but solely for the reformation and permanent good of the Convicts." REPORT [ON THE STATE PRISON] 9-10 (May 1830) (legislative document, Harvard Law Library) (Also printed in 1830-1831 Mass. Legislative Documents 67 (1830) (State Library Annex)).

orderly government, supervised by the local justice of the peace. And in order to ensure that the rehabilitative routine was not threatened by disease, authorities mandated the first rudimentary hygienic precautions against the afflictions endemic to prior carceral facilities.¹³⁵

Last, but far from least, there remained the problem of funding the new establishment. Institutional treatment has never come cheap, and the builders of the workhouse hoped that proceeds from the inmates' own labor would suffice to foot the bill.¹³⁶ Hard labor thus took on still another role: as threat, as therapy, and as a fountain of support for both.

2. *Solitary Confinement*

A second stream of thought on carceral rehabilitation can be traced to the eighteenth century and another group of English reformers. These were the "humanitarians,"¹³⁷ a mélange of clergymen and lay pietists of various denominations who sought to alleviate the harsher features of English criminal law — not so much for reasons of secular expediency as for the sake of Christian charity.¹³⁸ And of all the features of eighteenth-century criminal justice that cried out for amelioration, gaol conditions cried the loudest.¹³⁹

Humanitarian reformers initially focused on curing the destruc-

135. 19 PARL. PAPERS 398-407 (pt. 1) (1840); Van der Slice, *supra* note 125, at 60-65; S. WEBB & B. WEBB, *supra* note 128, at 12..

136. See S. WEBB & B. WEBB, *supra* note 128, at 14 n.3. John Howard knew better. See J. HOWARD, *supra* note 3, at 41-42.

137. Also referred to in the literature as the "philanthropists," or the "evangelicals."

138. As described by Gamaliel Bradford, "the heart of the benevolent man and philanthropist is full of compassion and sympathy for the suffering of his fellow being . . . [even] where interest is opposed to the feeling." G. BRADFORD, *supra* note 1, at 32. Among the most notable English humanitarian prison reformers were Thomas Bray, John Bellers, Jonas Hanway, and "the great Philanthropist" John Howard. Humanitarian concerns also spanned many fields outside the legal hemisphere, such as education and poor relief. For discussions of the movement as it related to prison reform, see M. GRUNHUT, *supra* note 129, at 23-42; W. LEWIS, FROM NEWGATE TO DANNEMORA 19-28 (1975); Schneider, *supra* note 10, at 716-26. The standard treatment of the movement as a whole is D. OWEN, ENGLISH PHILANTHROPY, 1660-1960, at 11-88 (1964). Cf. M. IGNATIEFF, *supra* note 45, at 44-65, 76, 143-53, 164-67, 211, who discerns a complex of motivations behind the English humanitarian movement, most significantly a desire to utilize philanthropy to legitimate and perpetuate control.

139. See note 45 *supra*. Humanitarian concern for prison conditions, characteristically, was not restricted to gaols for criminals; debtors' prisons were included. See D. OWEN, *supra* note 138, at 61-65. But the concern was not strictly benevolent: prison hygiene was a boon to everyone who participated in the criminal justice system. John Howard insisted that efforts to ameliorate prison morality must accompany hygienic reform for "it is obvious that if [morals] be neglected, besides the evil consequences that must result from such a source of wickedness, a suspicion will arise, that what has been already done has proceeded, chiefly, from the selfish motive of avoiding the danger to our own health, in attending courts of judicature." J. HOWARD, *supra* note 3, at 268; see note 46 *supra*.

tive aspects of pretrial incarceration, rather than on attempting to use the prison for rehabilitation. John Howard, the most famous and influential representative of humanitarianism, devoted his life to the study of prison conditions and wrote movingly about the inmates' torments. Most of the suggestions offered by humanitarians in the areas of hygiene and administration either borrowed from or built on prior workhouse practice.¹⁴⁰ But humanitarians cared about more than just the inmates' physical ordeal; they also stressed the moral degradation inherent in pretrial imprisonment. In this regard, humanitarians sought increased attention to inmates' spiritual needs and an end to the random commingling of prisoners that resulted in "Old criminals corrupting new comers."¹⁴¹

Once they had set out to *maintain* an inmate's condition during confinement, humanitarians slid easily toward proposals to *improve* that condition. By the mid-eighteenth century, some spoke of reforming gaol inmates awaiting trial.¹⁴² With the appearance of Jonas Hanway's *Solitude in Imprisonment* in 1776, humanitarian literature began to focus on post-conviction rehabilitation of criminals.¹⁴³

The humanitarians thus came upon carceral rehabilitation by way of institutional benevolence rather than sanctional effectiveness — both roads had led to the same destination. Or had they? The humanitarians urged carceral rehabilitation, to be sure, but theirs was a novel brand, quite distinct from the workhouse model.

Humanitarians viewed crime as an outgrowth of the offender's estrangement from God. Once such a break had occurred, no punishment inflicted by men could deter the offender from sinning.¹⁴⁴ The challenge of rehabilitation lay in restoring the criminal's faith

140. See, e.g., Bray, *An Essay Towards The Reformation of Newgate and Other Prisons in and About London* [1702], reprinted in H. DIXON, JOHN HOWARD AND THE PRISON-WORLD OF EUROPE 33-41 (1850) (in the first edition only); Bellers, *Essay*, reprinted in A. FRY, JOHN BELLERS, 1654-1722, 22, 77 (1937); J. HANWAY, *supra* note 80, at 29-36, 111-24. Howard derived many of his suggestions for reform from the practices of continental workhouses, see, e.g., J. HOWARD, *supra* note 3, at 30-31, with which Hanway was also familiar, see J. HANWAY, *supra* note 80, at 117.

141. See, e.g., J. HANWAY, *supra* note 80, at 13, 24, 104; J. HOWARD, *supra* note 3, at 6, 8, 10, 37-38; Bray, *supra* note 140, at 34, 38.

142. See J. BUTLER, *A Sermon Preached Before the Right Hon. the Lord May., the Court of Aldermen, the Sheriffs, and the Governors of the Several Hospitals of the City of London*, [1740], in FIFTEEN SERMONS 365-67, 345-71 (4th ed. London 1749).

143. Though Hanway focused on post-conviction rehabilitation, he did not in the process forget preconviction rehabilitation, which he noted might in particular cases negate the need for a formal sanction entirely. See J. HANWAY, *supra* note 80, at 110.

144. "When only the fear of temporal punishments makes an impression, the world can never be governed; the power cannot be wrested out of the hands of the great ruler and supreme Legislator of the world." *Id.* at 5, 26, 72-73, 105, 117.

in, and fear of, his Maker, and thereby "qualify [him] for happiness in both worlds."¹⁴⁵ One humanitarian went so far as to equate the function of a rehabilitative prison with that of a church.¹⁴⁶

Though they did not speak with one voice, many humanitarians endorsed a radical antidote to the criminal's affliction: "Solitude," Jonas Hanway proclaimed, "[is] the most humane and effectual means of bringing malefactors . . . to a right sense of their condition."¹⁴⁷ Since 1740, humanitarians had touted solitary confinement, not only to isolate prison inmates from moral contagion, but also to precipitate their spiritual recovery.¹⁴⁸ As John Brewster remarked, "It has been recommended, both by the practice and precept of holy men, in all ages, sometimes to retire from scenes of public concourse, for the purpose of communing with our own hearts, and meditating on heaven."¹⁴⁹ Cloistered from the buzz of social interaction, forced to converse only with his own guilty conscience, the solitary inmate would rediscover God, tearfully repent his sins, and pledge himself to an honest and godly life. A Bible and a minister's proselytizing could smooth the process, but the operative agent was not to be found in this world. As Hanway concluded, "Let us pursue a consistent plan, and leave the event to Heaven!"¹⁵⁰

The humanitarian paradigm of carceral rehabilitation, which we shall call "reclamation," envisioned a deeper change in the offender's psyche than that intended by rehabituation.¹⁵¹ Equipping the criminal for work was not enough; secular habits and abilities would make no difference unless the offender *wanted* to live rightly, unless his own spirit (under threat of *divine* sanction) demanded moral rectitude. Given this premise, reclamation, unlike rehabituation, was inherently noncoercive, for "to compel people to be virtu-

145. *Id.* at 4, 18, 72-73, 98-99, 109, and *passim*. See J. HOWARD, *supra* note 3, at 261; Bellers, *supra* note 140, at 77.

146. He added that under his program "the *repentance* and *amendment*, the *sorrow* for the past, and the *resolution* with regard to the future part of life, will be more sincere in the *prison*, than it usually is in the *church*," J. HANWAY, *supra* note 80, at 98-99 (emphasis in original).

147. *Id.* at 4; see W. DODD, *THOUGHTS IN PRISON* (1777).

148. See note 142 *supra*.

149. Brewster, *The Use of Solitude in Prisons*, in *A COMPANION FOR THE PRISONER* 16 (T. Bowen 5th ed. London 1828).

150. J. HANWAY, *supra* note 80, at 31.

151. Contemporaries who compared the two programs were perfectly aware of this difference. Hanway: "solitude will thus accomplish the work, not in a *vague, formal, and unmeaning* manner, but by creating a real change in the heart, to raise them that are fallen." *Id.* at 44 (emphasis in original). Bentham: "This kind of discipline [hard labor] does not indeed, like the other [solitary confinement], pluck up corruption by the roots: it tends however to check the growth of it, and render the propensity to it less powerful." J. BENTHAM, *supra* note 30, at 164; see note 418 *infra*.

ous, is a contradiction in terms."¹⁵² Incarceration served only to induce the criminal to listen to his conscience. In the end, reclaimed prisoners were expected to work "gladly," and the humanitarians also hoped, under the dubious assumption that too much of a bad thing would do some good, that the relentless *idleness* of solitary confinement would itself produce a craving for employment.¹⁵³

Humanitarians also addressed the timeless obstacles to carceral rehabilitation that the builders of the workhouse had already faced. In reconciling reclamation with deterrence, humanitarian reformers emphasized that the fate of solitary subjection to one's guilty conscience was a painful sanction indeed, and that the ascetic existence of a solitary cell would never tempt persons to seek *entrée*.¹⁵⁴ At the same time, humanitarians promised that solitary confinement would not be *so* unbearable as to harden the inmates' attitudes. In this regard, many advocates stressed the importance of convincing prisoners that the punishment meted out to them was just and for their own benefit, both as part of the process of instilling remorse and as a means of preventing any "seeds of malice or ill-will" from infecting the rehabilitative process.¹⁵⁵

The problem of financing solitary confinement left the humanitarians in a bind. Unlike advocates of hard labor, the humanitarian reformers could not blithely assign prison costs to the inmates themselves. They sought instead to finesse the problem by belittling it, reciting the Kingdom's ample resources for such a project, as well as underscoring its nobility and practical value.¹⁵⁶ The propaganda succeeded: Local facilities for the solitary confinement of criminals appeared in Gloucestershire, Sussex, and Berkshire by the 1790s.¹⁵⁷

3. *Rationalism*

At this point rational ideology, already considered in the context

152. J. HANWAY, *supra* note 80, at 37. Like "volunteering" in the army, however, submission to the Lord was assumed to be virtually unavoidable. Hanway noted by analogy: "The arts practiced to seduce women are often successful: in this case *gentle* treatment and *Tenderness* alone will prevail . . . it does not change its name, when employed in the cause of virtue." *Id.* at 37-38; see J. BENTHAM, *supra* note 122, at 176.

153. See J. HANWAY, *supra* note 80, at 34; W. PALEY, *supra* note 87, at 292.

154. See J. BENTHAM, *supra* note 30, at 118-20; J. HANWAY, *supra* note 80, at 30-31, 103; W. PALEY, *supra* note 87, at 291.

155. J. BENTHAM, *supra* note 30, at 119; J. BREWSTER, SERMONS FOR PRISONERS 15 (Stockton 1790); J. HANWAY, *supra* note 80, at 104-05.

156. J. HANWAY, *supra* note 80, at 25, 35-36, 71-72. It was this issue that prompted Bentham to reconsider, and ultimately abandon, his ideological commitment to the principle of solitary confinement, when he drew his blueprints for the Panopticon in 1791. See J. BENTHAM, *supra* note 80, at 71-76, 137-41 (esp. 138n).

157. See M. IGNATIEFF, *supra* note 45, at 96-109.

of deterrence,¹⁵⁸ reenters the stage. While Beccaria himself focused exclusively on deterrence, other rationalists did not share his fixation. Having declared war on crime, rationalists hoped to mount the assault from a variety of directions, and rehabilitation was often central to their strategies.¹⁵⁹

The rational theory of criminal motivation rested largely on the "sensational psychology" first propounded by John Locke late in the seventeenth century.¹⁶⁰ Locke maintained that human conduct was a product of social environment, not innate propensities or moral principles stamped upon the soul. The human mind began life as a *tabula rasa* and formed a code of behavior by reference to continual hedonistic calculation. Beccaria had argued that because all "sensible beings" steered their conduct toward maximum pleasure and minimum pain, a properly graded scheme of punishments could prevent criminal acts by draining them of utility. What Beccaria *qua* rationalist neglected to consider was that some persons would *not* react "sensibly" to the threat of sanction. While sensational psychology assumed that a properly socialized individual would always act in his own best interest, it also recognized that some environments could impair an individual's ability to make such calculations, and thereby lead him into "senseless" behavior, such as choosing the short-term gratification of crime without heed to the long-term misery of punishment.¹⁶¹

For the offender thus deranged, sensational psychology held out hope. If environmental influences had crippled him, then a different environment could cure him. For rationalists, the challenge of rehabilitation lay in restoring the offender's ability to appreciate the inex-

158. See notes 89-92 *supra* and accompanying text.

159. Bentham spelled it out lest there be misunderstanding: "It is an excellent quality in a punishment that it is calculated to conduce to the *reformation of the delinquent*. I do not mean merely through fear of undergoing punishment a second time, but by reason of a change in his character and habits." 2 J. BENTHAM, *THEORY OF LEGISLATION* [c. 1788] at 146-47 (1914) (emphasis in original). On the eclecticism of the Rationalists' approach to crime, see *id.* at 174-273; H. FIELDING, *AN ENQUIRY INTO THE LATE INCREASE OF ROBBERS, ETC. WITH SOME PROPOSALS FOR REMEDYING THIS GROWING EVIL* (London 1751); M. MADAN, *supra* note 93, at 78.

160. See J. LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (1690).

161. Actually, the rationalists' "environmental" outlook on crime (though now developed into a complex theory) was not far removed from the thought of earlier criminologists, who also often attributed idleness and vice, in turn, to improper upbringing and evil companionship. Humanitarian theorists also rang the changes on this theme. See, e.g., J. BREWSTER, *supra* note 155, at 66-90; *Remarks*, *supra* note 80, at 10n; note 141 *supra* and accompanying text. The theme, indeed, has biblical roots: "Be not deceived: evil Communications corrupts good Manners," 1 Cor. 15:33. For early Massachusetts, see notes 223-24 *infra* and accompanying text. Cf. D. ROTHMAN, *supra* note 50, at 82-83 (tracing environmentalism to the Jacksonians).

pedience of crime.¹⁶² As in workhouse ideology, the depth of the change envisioned by rationalism was shallow: While the first sought to remove the inmate's need to steal, the second sought to grant him the good sense not to. Incarceration was the key to rationalist rehabilitation because it provided a controlled environment directed to criminals' psychological renewal.

But what *sort* of controlled environment would accomplish the job? Given the novelty of the rationalist perspective on criminal behavior, it is rather surprising to find that the enlightened philosophers had few new programmatic suggestions to offer. Imagination had carried the rationalists far, but here it seems to have failed them. Instead of inventing their own therapeutic design, the rationalists simply pirated those produced by their predecessors. A few rational reformers, notably Jeremy Bentham, initially joined the call for solitary confinement, notwithstanding the spiritual imagery in which the humanitarians had steeped it.¹⁶³ Bentham simply translated the humanitarian program of solitary reclamation into a secular version, based on sensational psychology.¹⁶⁴ Most rationalists remained skeptical of the therapeutic value of solitary confinement, however, and instead took up the banner of congregate hard labor, in the mold of the workhouse.¹⁶⁵ The hope was that rehabilitation would itself restore the offender's sensibility by correcting his hedonistic response to work, and thus his response to crime.¹⁶⁶

162. M. IGNATIEFF, *supra* note 45, at 66-68.

163. This led to the curious spectacle of a rational reformer endorsing the humanitarians' platform, even as he heaped scorn upon its ideological foundation. J. BENTHAM, *supra* note 30, at 114-20 (Bentham, an agnostic, does speak of religion in this section, but in distinctly pragmatic terms); W. PALEY, *supra* note 87, at 291-92. Bentham later altered his views on this subject. See note 156 *supra*. Though his thoughts at this time were unoriginal, Bentham ultimately deserves credit for one of the few programmatic innovations in rational penal theory: the "inspection principle" that inspired Bentham's Panopticon plan. See J. BENTHAM, *supra* note 80, at 40, 44-46; J. BENTHAM, *supra* note 122, at 175.

164. For Bentham's animus against "your sentimental orators," see J. BENTHAM, *supra* note 30, at 73-75. Predictably, the humanitarians returned the favor, though they remained willing to participate in a wary marriage of convenience. Thus, in the pages of his journal *The Philanthropist*, Quaker William Allen praised Bentham's early writings after determining that they contained "nothing at variance with my religious feelings. . . ." Quoted in IGNATIEFF, *supra* note 45, at 146-47.

165. See Henriques, *The Rise and Decline of the Separate System of Prison Discipline*, 54 PAST & PRESENT 61 (1972); see, e.g., S. ROMILLY, OBSERVATIONS ON A LATE PUBLICATION, INTITLED THOUGHTS ON EXECUTIVE JUSTICE 54-61 (London 1786). A few humanitarians, notably John Howard, also favored hard labor, and he in turn collaborated with rationalists William Eden and Judge Blackstone to compose the "Hard Labor Bill" of 1779. See note 204 *infra*.

166. See M. IGNATIEFF, *supra* note 45, at 67.

4. *Massachusetts Legislation Revisited*

Though the legislative record is scant, evidence drawn from it and other sources indicates that the government of Massachusetts did have rehabilitation in mind when criminal incarceration was introduced in 1785. The rehabilitative ideology advanced in that year, moreover, was not a new one at all — it was the venerable English rehabilitative construct, known to the settlers of Massachusetts even before their arrival in the New World.¹⁶⁷

The ancient equation of idleness and crime certainly remained alive and well in eighteenth-century Massachusetts. Old Light minister Charles Chauncy could easily have traded scripts with an Elizabethan magistrate when in 1752 he queried: "Who are so much noted for the moral Disorder of *Lying* and *Stealing*, as those who have settled into the Habits of Laziness? Their Laziness," Chauncy predicted, "reduces them to Straits and Difficulties; and these, as the readiest and easiest Way to supply their wants put them upon . . . robbing [persons] of their Money, and their Goods."¹⁶⁸ The 1785 Act establishing the prison at Castle Island followed hard on the heels of a string of newspaper columns petitioning the legislature to impose hard labor on property criminals. One author, who signed himself "A Friend of Industry," favored collaboration with New Hampshire on building a "nailing house" for convicted thieves. "As theft generally proceeds from idleness, labor will be the severest and most effectual punishment," the Friend promised. "A house established on this plan would I believe turn out many an *industrious member with an occupation*, who was taken in, an *idle thief* without one." The change envisioned remained a superficial one: "To eradicate bad habits, and teach the vicious that 'HONESTY IS THE BEST POLICY' " — an aphorism that itself emphasized the sort of compliance to law that sprang from calculation rather than conscience.¹⁶⁹ Other commentators shared in these sentiments, and one even specified Castle Island as a suitable site.¹⁷⁰

While the Castle Island Act does not explicitly refer to the goal of rehabilitation, that goal is implicit throughout the document. Most telling is the statutory requirement that imprisoned convicts perform

167. See notes 240-42 *infra* and accompanying text.

168. C. CHAUNCY, *THE IDLE-POOR SECLUDED FROM THE BREADS OF CHARITY BY THE CHRISTIAN LAW* 13, 16 (Boston 1752). John Hancock agreed: "Laws [prohibiting idleness] are important in Government, because they prevent a disposition to those crimes which are dangerous to society . . ." Governor's Message, Jan. 31, 1793, 1792-1793 Mass. Acts 692-93; see 1758-1769 BOSTON TOWN RECORDS, *supra* note 14, at 274-75 [1769].

169. Mass. Centinel, Sept. 22, 1784, at 1 (emphasis in original).

170. See Mass. Centinel, Oct. 16, 1784, at 1; Mass. Centinel, Oct. 20, 1784, at 1.

"hard labour," the *sine qua non* of the rehabilitative program.¹⁷¹ That such treatment was distinguished from the pretrial carceral regime is further indicated by the statutory restriction of Castle Island to *convicted* offenders.¹⁷² Other statutes and a gust of speeches spelled out the rhetoric more concretely, indeed, monotonously. An act in 1785: "Whereas idleness is often the parent of fraud and cheating, . . . confinement to hard labour may be a means of reclaiming such offenders" ¹⁷³ Governor Hancock in 1793: "[C]rimes have generally idleness for their source, and where offences are not prevented by education, a sentence to hard labour will perhaps have a more salutary effect" ¹⁷⁴ Governor Strong in 1801: "A great proportion of crimes are the effects of idleness, and it seems peculiarly proper therefore to punish them by confinement to hard labour; that offenders . . . may be compelled to acquire new habits and contribute something to the good of society" ¹⁷⁵ Et cetera.¹⁷⁶

To bolster his contention that pre-Jacksonian prisons did not focus on rehabilitation, Rothman points to the continued crudity and disarray of their internal administrations. In this crucial respect, he argues, post-Revolutionary facilities resembled the colonial gaol more than the Jacksonian penitentiary.¹⁷⁷ Whether or not Rothman's finding is sustainable elsewhere,¹⁷⁸ the evidence does not sup-

171. The preamble to the statute alludes to the presumed idleness of offenders: "Whereas it has become necessary to the safety of the industrious inhabitants of the Commonwealth. . . ." Act of Mar. 14, 1785, ch. 63, 1784-1785 Mass. Acts 163.

172. Act of Mar. 14, 1785, ch. 63, 1784-1785 Mass. Acts 163.

173. Act of Nov. 1, 1785, ch. 21, 1784-1785 Mass. Acts 472.

174. Governor's Message, Jan. 30 1793, 1792-1793 Mass. Acts 694.

175. Governor's Message, Jan. 15, 1802, 1800-1801 Mass. Acts 583.

176. See also, e.g., Answer of the Legislature, Feb. 15, 1793, 1792-1793 Mass. Acts 242; Report Respecting Convicts, *supra* note 30; Governor's Message, Jan. 11, 1799, 1798-1799 Mass. Acts. 636; note 348 *infra* and accompanying text.

177. "In the 1790's reformers anticipating the benefits of statutory revisions had devoted little energy to internal prison arrangements. Since laws, and not blueprints, captured their attention, the prisons erected at the end of the eighteenth century usually made only minor or confused departures from colonial arrangements" D. ROTHMAN, *supra* note 50, at 62, 89-93.

178. A preliminary survey of criminological literature in other states indicates that Massachusetts writers were hardly alone in espousing rehabilitative treatment of criminals at this date. *New York*: see T. EDDY, AN ACCOUNT OF THE STATE PRISON OR PENITENTIARY HOUSE, IN THE CITY OF NEW YORK 20, 21-32, 35, 50, 53 (New York 1801); *Pennsylvania*: see Act of Sept. 15, 1786, ch. 1241, in 12 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 280 (J. Mitchell & H. Flanders eds. 1906); LETTERS OF BENJAMIN RUSH 443, 512, 526, 874-75 (L. Butterfield ed. 1951); Lownes, *An Account of the Alteration and Present State of the Penal Laws of Pennsylvania*, in W. BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 89, 100-01, 111 (London, 1795) (1st ed. Philadelphia 1793); *South Carolina*: see R. TURNBULL, A VISIT TO THE PHILADELPHIA PRISON, 7, 13, 14, 22, 32, 34, 35, 71, 86 (London, 1797) (first published in the Charlestown Gazette); *Virginia*: see 2 THE

port it in Massachusetts. Convicts confined to Castle Island served under the military discipline of the garrison "as if under voluntary enlistment," rather than under a keeper's whim.¹⁷⁹ The convicts' dietary and sanitary well-being were provided for, and a full-time physician and chaplain were appointed to the Castle Island staff — all unprecedented measures for a gaol.¹⁸⁰ Equally extraordinary were the measures taken to ensure the physical security of the facility.¹⁸¹ Finally, the legislature carefully monitored the affairs of Castle Island by dispatching committees to inspect it periodically.¹⁸²

To be sure, Castle Island failed to function *in practice* as a well-regulated facility. During its thirteen-year history, some forty-five inmates, or sixteen percent of the total prison population, managed to swim to freedom;¹⁸³ and in 1792, smallpox broke out on the Island.¹⁸⁴ Evidence of such failure appears to have led Rothman to his conclusions.¹⁸⁵ But what a person (or institution) is doing is quite a different matter from what he is *trying* to do. Elsewhere in his book, Rothman addresses the trying, not the doing; there is little evidence that the Jacksonians whom he champions ever *succeeded* in rehabilitating anyone. At Castle Island, there was no shortage of concern. What the reformers lacked was practical experience in large-scale prison administration, and that was something that they could only

PAPERS OF THOMAS JEFFERSON 493 (J. Boyd ed. 1950). Administrative precautions taken in the 1790's at the Walnut Street prison in Pennsylvania and at Newgate prison in New York were comparable to those essayed in Massachusetts, see Lownes, *supra*; EDDY, *supra*.

179. See note 171 *supra*; Resolve of Mar. 11, 1791, ch. 170, 1790-1791 Mass. Acts 244-45. Rothman dates military discipline in prison to the Jacksonian period. D. ROTHMAN, *supra* note 50, at 82-83, 106.

180. Resolve of Feb. 16, 1789, ch. 113, 1788-1789 Mass. Acts 357; Resolve of June 24, 1790, ch. 81, 1790-1791 Mass. Acts 136; Resolve of Mar. 11, 1791, ch. 170, *id.* at 244; Resolve of Mar. 22, 1786, ch. 166, 1784-1785 Mass. Acts 928; Senate Documents nos. 2219 & 2219.2 (1797) (unpassed) (unpublished manuscripts, Mass. Archives); note 171 *supra*.

181. One innovation was the introduction of convict uniforms "made half of cloth of one color, and the other half a cloth of a distinct different color" — a precursor of prison stripes — to aid detection of escapees. In the same vein, "lamps" were ordered installed around Castle Island — a precursor of the modern search light. See note 171 *supra*; Resolve of June 30, 1792, ch. 76, 1792-1793 Mass. Acts 183; see also Governor's Message, Nov. 5, 1785, ch. 39, 1784-1785 Mass. Acts 755-56; Resolve of Mar. 22, 1786, ch. 166, *id.* 927-29; Resolve of July 8, 1786, ch. 123, 1786-1787 Mass. Acts 338; Resolve of Nov. 17, 1786, ch. 126, *id.* 405-06; Resolve of Nov. 22, 1788, ch. 73, 1788-1789 Mass. Acts 270 (halting the practice of staffing the garrison-guard with invalids). See also note 422 *infra*.

182. See, e.g., Resolve of March 22, 1786, ch. 166, 1784-1785 Mass. Acts 927-29; Senate Documents nos. 2219 & 2219.2 (1797) (unpassed) (unpublished manuscripts, Mass. Archives). For a rare description of confinement on Castle Island, confirming the implementation of hard labor, military discipline, divine worship, and government inspection, but denying the presence of a resident physician, see S. BURROUGHS, MEMOIRS OF THE NOTORIOUS STEPHEN BURROUGHS OF NEW HAMPSHIRE 136-38, 151-53, 159, 167-68, 170-71 (1924) (1st ed. 1798).

183. E. POWERS, *supra* note 9, at 241-42.

184. Governor's Message, Nov. 9, 1792, 1792-1793 Mass. Acts 688-89.

185. See D. ROTHMAN, *supra* note 50, at 89-90.

acquire the hard way.¹⁸⁶

In short, the program applied to Castle Island parroted the program of the ancient workhouse. The one coincided with the other in therapeutic design, administrative precautions, and even institutional nomenclature.¹⁸⁷ One early legislative report actually referred to the proposed facility as "a Provincial [*i.e.*, province-wide] Workhouse or House of Correction."¹⁸⁸ Under the circumstances, contemporaries harbored few illusions about the intrinsic novelty of the program they had implemented.¹⁸⁹ Workhouses had dotted Massachusetts since the seventeenth century, having "been found very Beneficial in other countrys."¹⁹⁰ In the eighteenth century, one massive workhouse constructed in Boston almost rivaled later penitentiaries in scale.¹⁹¹

186. See note 401 *infra*.

187. See note 135 *supra* and note 242 *infra* and accompanying text. Provincial workhouses operated under detailed ameliorative regulations and regular inspection. See 1 PROV. LAWS, *supra* note 12, at 378-80 [1699], 674 [1711]; 3 *id.* at 108-11 [1743]; 1729-1742 BOSTON TOWN RECORDS, *supra* note 14, at 104, 230-31, 234-40, 251-52; 1742-1757 *id.* at 150-51. On the coincidence of terminology, notice the term "overseer" in 3 PROV. LAWS, *supra* note 12, at 108 [1743] and Act of Mar. 14, 1785, ch. 63, 1784-1785 Mass. Acts 165 (a term still current in the 1820s and 1830s, Rules and Orders of 1823, in *Remarks*, *supra* note 80, at 53-54; LAWS OF THE COMMONWEALTH FOR THE GOVERNMENT OF THE STATE PRISON 38-40 (Boston 1839)). Though often structurally connected, the workhouse and the gaol were under separate government. 1729-1742 BOSTON TOWN RECORDS, *supra* note 14, at 230-31; 1700-1728 *id.* at 93; 5 COL. RECORDS, *supra* note 11, at 237 [1679].

188. 44 Mass. Archives 526, 526a, 538-39 [1765] (unpublished manuscript, Mass. Archives); 41 HOUSE JOURNAL, *supra* note 15, at 186, 230 [1765]. The 1765 report called for criminal incarceration, but was independent of the subsequent move to open Castle Island. By statute in 1785, all crimes triable by the Supreme Judicial Court, and previously punishable by hard labor in a workhouse, see note 212, *infra*, were thenceforth punishable by "hard labour generally" in a workhouse or on Castle Island, at the justices' discretion. See note 173 *supra* (slightly ambiguous provision). On the workhouse analogy, see 2 A. BRADFORD, HISTORY OF MASSACHUSETTS 251-52 (Boston 1822-1829). The analogy was also made in England, where similar legislation was floated in the eighteenth century. See J. BENTHAM, *supra* note 6, at 7; J. HANWAY, *supra* note 80, at 117; J. HOWARD, *supra* note 3, at 262, 263, 265n; Berkeley, *Querist*, quoted in L. RADZINOWICZ, *supra* note 82, at 263 n.11.

189. See REPORT [ON THE STATE PRISON] 1-2 (1822) (legislative document, Harvard Law Library).

190. 1729-1742 BOSTON TOWN RECORDS, *supra* note 14, at 180 [1737].

191. The Boston workhouse completed in 1739 took fully two years to build; some 55 inmates were housed there by 1741; in a 19-month period between 1739 and 1741 the facility produced some £1,620 worth of merchandise for sale. *Id.* at 273, 251. By comparison, Castle Island held an average of about 50 and a maximum of 91 prisoners during its 14-year history, 1785-1798. Opinion or Notes . . . Relative to the Situation and Plan of the State Prison, appended to 1802 Resolves, ch. 54 (passed) (unpublished manuscript, Mass. Archives) (this portion of the document is crossed out). The State Prison opened in 1805 was larger, containing on average some 300 inmates. G. BRADFORD, *supra* note 67, at 6. Apart from administrative similarities to later penitentiaries, see note 187 *supra*, the Boston workhouse was also subject to the careful construction planning, cost overruns, and financial legerdemain that later became a penitentiary trademark. See 1729-1742 BOSTON TOWN RECORDS, *supra* note 14, at 104-05, 114, 116, 152, 156, 159-62, 165-67, 172, 175-76, 188, 230, 248; 1742-1757 *id.* at 198. Cf. note 67 *supra* and note 393 *infra* and accompanying text. Without question, the workhouse regime was *in toto* far superior to that of the common gaol. In 1764 we find one Mary Robinson, in gaol

Castle Island did differ from earlier workhouses in one respect: It applied the rehabilitative formula to convicted criminals instead of idle vagrants. Yet even this step was neither intellectually momentous nor institutionally unprecedented. In the ancient equation, idleness and criminality had always been closely linked.¹⁹² To extend rehabilitative therapy from idlers to active criminals was roughly analogous to prescribing curative surgery along with preventive medication.

The idea of widening the scope of hard labor had been in the air in England, almost from the day the workhouse was founded. As an administrative matter, such an extension presented no hurdle. Since the Statutes of Laborers, idleness had constituted a crime, so from the beginning a sentence to the workhouse was strictly speaking a criminal punishment.¹⁹³ Nor did the need for effective deterrence militate against the extension. When Edward Hext, an influential Somersetshire justice of the peace, submitted in 1596 that idle vagrants "will rather hazard their lives than work," he illustrated the point with a startling anecdote: "And this I know to be true: for at such time as our houses of correction were put up . . . I sent divers wandering suspicious persons to the house of correction; and all in general would beseech me with bitter tears to send them rather to the gaol. And denying it [to] them, some confessed felony unto me, by which they hazarded their lives, to the end that they should not be sent to the house of correction where they should be forced to work."¹⁹⁴ The moral of the story fairly leapt from the page: The workhouse, for "mere" idlers, was more terrifying unto *felons* than the traditional criminal law. Subsequent English criminologists were likewise quick to point out the potential deterrent value of hard labor for serious offenses.¹⁹⁵

Edward Hext was perhaps the first criminologist to formally recommend an expanded role for the workhouse. His critique in 1596

on suspicion of theft and near the term of her pregnancy, ordered removed to the workhouse until she had given birth, and when "in a fit condition to be removed back again to the said Gaol." 1764-1768 BOSTON SELECTMEN RECORDS, *supra* note 31, at 2 [1764].

192. Bentham considered the difference between "the inferior degrees of *dishonesty*" and "*idleness* as yet untainted with dishonesty" to be "microscopic." J. BENTHAM, *supra* note 80, at 59 (emphasis in original).

193. See note 124 *supra*.

194. Hext to Lord Treasurer, *supra* note 123, at 291.

195. See, e.g., Berkeley, *Querist*, quoted in L. RADZINOWICZ, *supra* note 82, at 263 n.11. The "fate worse than death" was a frequently cited theme in the writings of deterrent-minded criminologists. See, e.g., HANGING NOT PUNISHMENT ENOUGH (London 1701) (author unknown). The theme reappears later in Massachusetts to justify criminal incarceration. See Mass. Centinel, Oct. 16, 1784, at 1; REPORT [ON THE STATE PRISON] 9 (1822) (legislative document, Harvard Law Library).

urged that convicted petty offenders be sentenced to hard labor *in addition to* traditional punishments.¹⁹⁶ In the seventeenth century, English workhouses increasingly served as repositories for petty criminals. While many of these institutions had been founded on former hospital sites, emphasizing their role in the system of poor relief, they subsequently gravitated toward the local gaols, often forming an annex to those facilities.¹⁹⁷

From the far end of the criminal spectrum, other criminologists offered hard labor as an alternative to transportation and the death penalty. Following the English Civil War, a procession of Commonwealth law reformers sought such measures.¹⁹⁸ George Berkeley repeated the call in his *Querist* articles early in the eighteenth century.¹⁹⁹ In fact, from 1576 onward, judges had held statutory authority to commit clerried felons to the workhouse for up to one year, though they declined to exercise it.²⁰⁰ The eighteenth century witnessed further legislative initiatives in this area: Under a 1707 statute inspired by Sir Robert Clayton,²⁰¹ incarceration of clerried felons became a common practice; this program continued until 1717, when the new Whig government decided to reemphasize transportation.²⁰² In 1750, the Fielding Committee introduced legislation to impose hard labor in the royal dockyards as punishment for felony. It passed in the Commons but was rejected by the House of Lords. In 1776, an act of Parliament temporarily re-routed prospective transportees to the Thames river, where they were to be reformed as they dredged the riverbed in aid of navigation.²⁰³ Finally, the Hard Labor Act of 1779, drafted by Howard, Eden and Blackstone, provided once again for therapeutic incarceration in lieu of

196. Hext to Lord Treasurer, *supra* note 123, at 293; see Bray, *supra* note 140, at 39 (ambiguous).

197. S. WEBB & B. WEBB, *supra* note 128, at 14-17; Langbein, *supra* note 128, at 50 n.107.

198. D. VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM, 1640-1660*, at 128-36 (1970).

199. Berkeley, *Querist*, quoted in L. RADZINOWICZ, *supra* note 82, at 263 n.11.

200. 18 Eliz. c.7 (1576). Benefit of Clergy, when granted, permitted a convicted felon to escape the gallows. It was rarely allowed in provincial Massachusetts, however, and was formally abolished in 1785. E. POWERS, *supra* note 9, at 607 n.151. See generally 1 J. STEPHEN, *supra* note 123, at 457-73.

201. 5 Anne c.6 (1707). As a matter of law, the statute merely increased the permissible length of imprisonment in the workhouse to two years; it served in practice, however, as a stimulus to the program.

202. 4 Geo. 1 c.11 (1717). This episode is treated in a doctoral dissertation in progress by Joanne Innes at Cambridge University.

203. L. RADZINOWICZ, *supra* note 82, at 415-23. The infamous "prison hulks" which resulted from the Act of 1776 were intended as a temporary alternative to transportation to the American colonies, which had become impossible upon the onset of the American Revolution. 16 Geo. 3 c. 43 (1776); W. BRANCH-JOHNSON, *THE ENGLISH PRISON HULKS* (1957).

transportation. The act passed through both Houses, but due to a series of ill coincidences the prisons it mandated were never constructed.²⁰⁴

Hard labor as a criminal sanction took firmer root in other places. From the mid-seventeenth century, persons convicted of serious crimes in many of the German states had been subject to hard labor in work-gangs and a specialized institution called the *Zuchthaus*.²⁰⁵ These facilities operated into the eighteenth century and were known in both England and Massachusetts.²⁰⁶ The Massachusetts colonists were probably also aware of Pennsylvania's brief experiment with criminal incarceration. Promulgated in 1682, the Great Law of Pennsylvania prescribed hard labor in the workhouse as a penalty for most crimes. The penalty was effectively abolished in 1718, but was reimposed soon after independence.²⁰⁷

Finally, Massachusetts had itself imposed hard labor in a workhouse on the occasional criminal from the earliest days of the colony. The categories of activities punishable by commitment²⁰⁸ to the workhouse, first established by statute in 1656, already betrayed some blending of "status" crimes with the lower grades of active offenses. The list included idleness, drunkenness, pilfering, night walking, eloping from indentured service, and "uncleanness in speeches or action."²⁰⁹ The provincial legislature subsequently added begging, vagabondage, juggling, brawling, harassment of wo-

204. 19 Geo. 3 c.74 (1779) (also known as the Penitentiary Act); M. IGNATIEFF, *supra* note 45, at 93-96.

205. Convict labor in this context expressly served both exploitative and rehabilitative ends. See M. GRUNHUT, *supra* note 129, at 25-27; Langbein, *supra* note 101, at 51-53.

206. J. BENTHAM, *supra* note 30, at 158-59; Berkeley, *Querist*, quoted in L. RADZINOWICZ, *supra* note 82, at 263 n.11; Mass. Centinel, Jan. 5, 1785, at 3; *id.*, Oct. 16, 1784, at 1.

207. A call for the reimposition of criminal incarceration appears in the Pennsylvania Constitution of 1776, though the operative statute was not passed until a decade later. Act of Dec. 7, 1682, in CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA, 1682-1700 at 107 (J. Linne ed. 1879); PA. CONST. OF 1776 ch. 2, §§ 38 & 39; Act of Sept. 15, 1786, in 12 STATUTES AT LARGE, *supra* note 178, at 280; H. BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA 31-39 (1927).

208. Commitment was by a single justice, two justices *quorum unus*, or by the criminal court of general sessions. COL. LAWS *supra* note 13, § 2, at 127 [1672]; 1 PROV. LAWS, *supra* note 12, at 378-81 [1699]; see, e.g., 2 PLYMOUTH COUNTY COURT, *supra* note 14, at 13, 173; SUFFOLK COUNTY COURT, *supra* note 13, at 89, 125, 185, 231, 336, 411; 17 PROV. LAWS, *supra* note 12, at 584 [1765].

209. 4 pt.1 COL. RECORDS, *supra* note 11, at 257; COL. LAWS, *supra* note 13, § 2, at 127 [1672]; see 4 pt.2 COL. RECORDS, *supra* note 11, at 394-95; COL. LAWS, *supra* note 13, § 2, at 236 [1672]. Another statute refers to the list as encompassing "misdemeanors and evil practices." 4 pt. 1 COL. RECORDS, *supra* note 11, at 222; see COL. LAWS, *supra* note 13, § 2, at 208 [1672]; E. POWERS, *supra* note 9, at 225-27. The criminal orientation of the workhouse in Massachusetts, as in England, was often emphasized by its physical proximity or attachment to the gaol. See *id.* at 224-25; WORCESTER COUNTY COURT, *supra* note 15, at 58; 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 199; note 173 *supra*.

men, and fortune telling.²¹⁰ In the seventeenth century, a number of persons convicted of serious crimes were also sentenced to the workhouse on an *ad hoc* basis.²¹¹ In 1749 and 1750, statutory prescriptions to the workhouse were passed for extortion and counterfeiting.²¹² And as will be shown, *noncarceral* forms of rehabilitation were common punishments for major offenders throughout the colonial and provincial periods.²¹³

In sum, not only was the concept of rehabilitation well known to the builders of Castle Island in 1785, but the prospect of applying it to active criminals was equally familiar to them. No great conceptual leaps attended the facility's inauguration. An establishment like Castle Island might easily have been conceived at a much earlier date.

IV. SANCTIONAL TRANSITION

If we accept that the intellectual foundation of criminal incarceration in Massachusetts was ancient, then an important question immediately suggests itself: Why did the government of Massachusetts choose *this particular moment* to implement in depth a venerable ideological motif? While the ideology was a prerequisite to the transition, it is not alone sufficient to explain it. For some reason, criminal incarceration became in 1785 an idea whose time had come.

To understand more fully the rise of the penitentiary in Massachusetts, we must move beyond ideology to the reality of criminal sanction in that region. My conclusion is that social change in the eighteenth century caused the gradual breakdown of the criminal

210. 1 PROV. LAWS, *supra* note 12, at 67 [1692], 378-81 [1699].

211. 1 COL. RECORDS, *supra* note 11, at 177, 193; 2 COURT OF ASSISTANTS, *supra* note 23, at 118, 126.

212. 3 PROV. LAWS, *supra* note 12, at 479 [1749] (this statute's striking severity probably owed to the fact that the governor and his councilmen were the complaining victims. See 15 HOUSE JOURNAL, *supra* note 15, at 10, 18 [1737], 25 *id.* at 244 [1749], 26 *id.* at 8 [1749]); 3 PROV. LAWS, *supra* note 12, at 498-99 [1750]. These acts resulted in actual criminal sentences to hard labor. See 19 *id.* at 86; King v. How, Super. Ct., Jan. 1762, ff. 285-86 (unpublished court records, Suffolk County Court House); King v. Wheeler, Super. Ct., Sept. 1763, f. 172; Commonwealth v. Gubtail, Sup. Jud. Ct., June 1784, f. 197; Commonwealth v. Burroughs, Sup. Jud. Ct., Sept. 1785, ff. 180-81; Commonwealth v. Wheeler, Sup. Jud. Ct., Sept. 1785, f. 184; Commonwealth v. Burrell, Sup. Jud. Ct., Oct. 1785, ff. 253-54. A third act, combining 10-20 years hard labor in a workhouse with whipping, pillory, and mutilation for burglary was passed by the house but rejected by the council in 1762. A fourth act mandating whipping and seven years hard labor in a workhouse for assault with intent to commit robbery was approved by both the house and council in 1765, but Governor Bernard declined to sign it. 47 Mass. Archives 498-99, 503-04 (unpublished manuscripts, Mass. Archives.) Hindus erroneously traces the first "authorization" of criminal incarceration at hard labor to 1767, HINDUS, *supra* note 68, at 163.

213. See notes 244-48 *infra* and accompanying text.

justice system that had functioned adequately in the seventeenth century, thus driving the colonists to seek new ways of dealing with crime. Criminal incarceration was born of a struggle to restore crime control, not a resolution to enhance it.

A. *Punishment in Early Massachusetts*

1. *Puritanism*

Judicial authorities in early Massachusetts used a wide array of sanctions to punish crime. While the express purpose of such punishments was expiation in fulfillment of the terms of the national covenant, its literal, biblical terms often bowed before (or, more precisely, were construed to coincide with) secular political and social needs.²¹⁴ Before turning to those punishments and needs, we must dispose of one last assumption about the Puritan viewpoint. Rothman and others have inferred that the vision of John Calvin, as reflected in Puritanism, precluded both the deterrent and the rehabilitative approaches to criminality in colonial Massachusetts.²¹⁵ This conclusion is unequivocally false, and rests upon a *reductio ad absurdum* of the Puritan creed.

Calvin taught that every human person since Adam's fall suffered from a "natural depravity" of the soul and deserved damnation. This innate depravity inevitably led persons to sin, and "prepared [them] for the commission of atrocious and innumerable crimes."²¹⁶ The Puritans adhered to Calvin's vision; indeed, it was their determination to do so that led the Puritans to Massachusetts.²¹⁷ Still, on close inspection, one finds that while Puritan theologians professed faith in Calvinist principles, they nonetheless filtered out of those principles some of their more pessimistic and deterministic implications.

As ever brilliantly, Perry Miller identifies one screen to determinism in the Puritan theory of the social covenant.²¹⁸ Although the national covenant with God offered Puritans one perspective on sin, the social covenant provided an alternative framework, based on the

214. See note 96 *supra*.

215. See D. ROTHMAN, *supra* note 50, at 53 (conclusion generalized to all the colonies); K. ERIKSON, *WAYWARD PURITANS* 196-98 (1966).

216. 1 J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 263 (J. Allen trans. 6th Am. ed. 1932).

217. See note 9 *supra*.

218. The social covenant, in contrast to the national covenant discussed at note 95 *supra*, bound the people not to God, but to each other: once the people had agreed to obey the will of God, a further joint compact granted government the authority to enforce that will.

secular institution of government. From the latter vantage point, sin assumed the form of a secular compact broken, an affirmative act of will, rather than "a disease contained in the protoplasm" of mankind. The social covenant tended to "externalize" sin, Miller concludes, for "[b]y reducing original sin to legal imputations and by turning redemption into a rational transaction, the doctrine was bound to enhance the value of natural capacities . . . [and vitiate] literal application of the dogma of innate depravity."²¹⁹ What is more, even when Puritan theologians spoke of sin in its unadulterated Calvinist sense, they remained equally adamant in admonishing their listeners to *try* to overcome it — an encouragement whose hopeful phrases carried Puritanism time and again to the brink of Arminianism.²²⁰

In addition to softening the concept of innate and inevitable depravity, Puritan theologians concurrently developed a theory of rehabilitation designed to overcome it. Theologians posited that the soul of every human person, though corrupted by original sin, possessed a "natural conscience" that could in the ideal distinguish right from wrong. Original sin clouded the conscience, but theologians maintained that secular instruction, in combination with saving grace, could restore it to near perfect clarity. Once afforded a "True Sight of Sin," the offender would sin again only by overt act of will, "against his conscience."²²¹ Notions of rehabilitation, which were too shallow to reach the conscience, must have been even easier to reconcile with Calvinism.²²²

The end result was a practical approach to crime, stressing the reformability of offenders, but only up to a point. Criminal tendencies were frequently equated with an infectious and progressive disease. If discovered before the criminals had slid too far and become "harden[ed] . . . in their evil courses," there was hope for them. But if the infection could not be arrested, as demonstrated by repeated offenses, a criminal would be deemed "incorrigible" and

219. P. MILLER, *supra* note 95, at 400, 411. See generally *id.* at ch. 14.

220. G. HASKINS, *supra* note 9, at 210; E. MORGAN, *supra* note 9, at 136-37. The Arminian heresy held that salvation could be achieved by dint of human effort, contrary to the Calvinist dogma of divine omnipotence and human helplessness.

221. G. HASKINS, *supra* note 9, at 204-06.

222. In accordance with his presentation of Calvinist doctrine, Rothman describes "Enlightenment ideas" as a "challenge" to them, as if the two were mutually exclusive. See D. ROTHMAN, *supra* note 50, at 57. As a general matter, it is well known that Calvinist and Enlightenment principles merged readily in the minds of the American revolutionary thinkers. See, e.g., note 372 *infra*. In particular, Lockian psychology and natural depravity were both accepted and reconciled in the writings of American intellectuals such as Jonathan Edwards. See generally P. MILLER, JONATHAN EDWARDS (1949).

dealt with accordingly.²²³ Youths were singled out as both particularly vulnerable to, and particularly salvable from, the disorder.²²⁴

In sum, Puritan theology did not compel the people of Massachusetts to view punishment as an exercise in futility. They could, and did, try to use punishment to control crime. But theology was, in any event, merely one variable in the calculus of sanction; there were others of equal, if not greater, weight.

2. Communitarianism

From the time of its foundation until the grant of the Second Charter, Massachusetts remained a conglomerate of small, tightly knit communities. The first generation of Puritans had settled into a string of embryonic townships. After the initial migration, the exodus from England tapered off rapidly, and even within the colony, intermigration between settlements became uncommon. Massachusetts communities grew slowly but steadily over the course of the seventeenth century, but almost entirely as a result of natural increase. The demographic history of Dedham was typical. Following its initial settlement in 1636, Dedham grew to contain some 400 inhabitants in 1648; by 1700, the total had climbed to 750. Over these years, migration into and out of town stood at less than one percent per annum, and the total number of family names actually declined. Kenneth Lockridge has described Dedham as "a self-contained social unit, almost hermetically sealed off from the rest of the world." As late as 1690, no town in Massachusetts, save Boston and Salem, held more than 2,000 persons.²²⁵

Criminal justice in Massachusetts reflected the social intimacy of its communities. Since the communities experienced little turnover in population, most criminal offenders were life-long residents, well known to everyone, rather than transient "outsiders." The first impulse of all concerned was to heal the wounds as best they could. The preferred sanctions sought to draw the resident offender back

223. See, e.g., 2 Col. Records, *supra* note 11, at 241 (quote); COL. LAWS, *supra* note 13, § 2, at 13 [1642], 59-60 [1651]; 1 COURT OF ASSISTANTS, *supra* note 23, at 189 [1680]; 2 *id.* 60 [1635].

224. See, e.g., 4 pt. 1 COL. RECORDS, *supra* note 11, at 59-60; 4 pt. 2 *id.* at 449; 4 WINTHROP PAPERS, *supra* note 19, at 474; Resolve of Nov. 17, 1786, ch. 134, 1786-1787 Mass. Acts 413; E. MORGAN, THE PURITAN FAMILY 66-78, 87-108, 139, 148, 169-73 (rev. ed. 1966). For an English Puritan theologian's accordant view, see Perkins, *supra* note 96, at 63.

225. E. GREENE & V. HARRINGTON, AMERICAN POPULATION BEFORE THE FEDERAL CENSUS OF 1790, at 19-21 (1932); K. LOCKRIDGE, A NEW ENGLAND TOWN 63-66 (1970) (quote at 64); D. RUTMAN, WINTHROP'S BOSTON 178-80 (1965); Lockridge, *The Population of Dedham, Massachusetts, 1636-1736*, 2 ser. 19 ECON. HIST. REV. 318 (1966). The story of Andover, Mass. is similar. See P. GREVEN, FOUR GENERATIONS: POPULATION, LAND AND FAMILY IN COLONIAL ANDOVER, MASSACHUSETTS 22-28, 39-40, 268-71 (1970).

into the community, through rehabilitation, deterrence, and an expression of community forgiveness. Sanctions of the last resort, designed to expel the offender, were reserved for nonresidents or residents who had tried the community's patience once too often.²²⁶

Monetary sanctions, common throughout the seventeenth and eighteenth centuries, relied entirely on deterrence to keep potential offenders in line. One such sanction was the fine for petty offenses. Closely akin to the fine, though less familiar today, was the bond for good behavior. Under the latter scheme, offenders were required to post a sum of money with the authorities, which would be forfeited upon any future infraction. Absent such infraction, the sum would be returned after a space of time set by the court. Thus, in colonial days, an offender might pay his debt to society in the form of an outright forfeiture or a financial contingency, as the court saw fit.²²⁷

More serious crimes required more serious punishment. One form of rehabilitative sanction common in the seventeenth century was the admonition. Faced with a community member who had committed a serious offense, the magistrates or clergymen would lecture him privately to elicit his repentance and a resolution to reform. The offender would then be brought into open court for a formal admonition by the magistrate, a public confession of wrongdoing, and a pronouncement of sentence, wholly or partially suspended to symbolize the community's forgiveness.²²⁸

John Winthrop provides a rare glimpse of the process in action in his *Journal* narrative of a 1639 case.²²⁹ Nathaniel Eaton, the first president of Harvard College, was presented before the General Court for an assault on one of his students. Eaton was found guilty in open court, Winthrop reported, "yet [he] continued to justify himself." Thereupon proceedings were suspended till the morning, while in the interim, "for divers hours," the elder ministers "[took] pains with him, to convince him of his faults . . . [and] in the end,

226. See note 223 *supra*.

227. In another variation, many early 17th-century fines were remitted, subject to good behavior — a procedure functionally equivalent to the later bond, except that in the first instance the offender held the stake. See Zanger, *Crime and Punishment in Early Massachusetts*, 3 ser. 22 WM. & MARY Q. 472-73 (1965).

228. G. HASKINS, *supra* note 9, at 206-10. Zagari, Public Confession in Seventeenth Century Massachusetts (1978) (unpublished paper, Yale University, on file with the author). I have relied heavily on Zagari's scholarship for my analysis of public confession, here and throughout.

229. References in the court records are generally cryptic. See, e.g., 1 ESSEX COUNTY COURT, *supra* note 35, at 174; PYNCHON COURT RECORD, *supra* note 23, at 207; 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 189, 258; 2 COURT OF ASSISTANTS, *supra* note 23, at 65, 68, 91, 92, 94, 104, 109, 116, 117, 118, 131, 139. For legislative references, see COL. LAWS, *supra* note 13, § 2, at 13 [1652], 26 [1642], 59 [1646].

he was convinced, and had freely and fully acknowledged his sin, and that with tears; so as they did hope he had truly repented, and therefore desired of the court that he might be pardoned." The justices then heard Eaton's confession, were satisfied of its sincerity, and sentenced the defendant to pay a fine, which the court remitted in part.²³⁰

Though built upon different premises, the Puritans' noncarceral process of admonition displayed striking similarities to the subsequent humanitarians' carceral process of reclamation: Both sought to make a deep impression on the offender's sense of right and wrong; both were voluntary processes, seeking to elicit tears, shame, confession, and a promise of reform. The Puritans' version depended on their own peculiar belief that a conscience clouded by original sin could be clarified through *secular* persuasion.²³¹ But it also depended on the communitarian nature of society for its success. The Puritans considered it critical to judge the sincerity of a repentance, and this was feasible only if the offender was well known to his examiners.²³²

Kindred to the admonition was a whole family of humiliating punishments, performed "openly" or on lecture days before the assembled community.²³³ Sentences to the pillory, to the stocks, to lashes at the whipping-post, and to hours on the gallows with a rope around the neck were all variations on this theme. Like the admonition, humiliating punishments sought to elicit feelings of shame, though through manifest, collective disapproval rather than private instruction.²³⁴ Humiliatory punishments also sought to deter both offenders and onlookers by administering physical — and psychic — pain. The sting of the lash and the contortions of the stocks were

230. I J. WINTHROP, *supra* note 21, at 310-14.

231. *Cf.* note 150 *supra* and accompanying text.

232. Zagari, *supra* note 228, at 12-13; see D. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* 158-59 (1967). Cotton Mather also emphasized the role of neighbors in reinforcing the reformatory process (in the analogous context of Church discipline): "When a Person has thus received an *Admonition* for a Scandal, the *private Christians* who dwell near him, reckon it their Duty, by *Visiting* of him, and by discoursing with him, to prosecute the *good Effects* thereof upon him." C. MATHER, *RATIO DISCIPLINAE FRATRUM NOV-ANGLORUM. A FAITHFUL ACCOUNT OF THE DISCIPLINE PROFESSED AND PRACTICED IN THE CHURCHES OF NEW ENGLAND* 148 (1726).

233. See, e.g., COL. LAWS, *supra* note 13, at 54 [1646], 59 [1651], 91 [1645] (all second section).

234. Unfortunately, the early Puritans did not discourse at length upon (what must have been for them) the obvious effects and utility of public humiliation. See generally G. HASKINS, *supra* note 9, at 210; E. POWERS, *supra* note 9, at 518; D. ROTHMAN, *supra* note 50, at 49-50; Friedman, *The Devil Is Not Dead: Exploring the History of Criminal Justice*, 11 GA. L. REV. 260-62 (1977). For a later English appraisal, see W. EDEN, *supra* note 86, at 56-59. But cf. J. BENTHAM, *supra* note 30, at 84-85.

surely no balm, but even worse were the piercing stares of lifelong neighbors who witnessed the offender's disgrace, and with whom he would continue to live and work. Esteem has always meant much in intimate communities, and in the world-view of the visible saints it had spiritual as well as secular implications.²³⁵ Under the circumstances, the authorities often dispensed with the punishment's physical component entirely: Many humiliated offenders were required simply to stand in public with signs cataloguing their offenses, a punishment that relied solely on mental anguish for its rehabilitative and deterrent effect.²³⁶

Still another battery of punishments evoked the English rehabilitative equation, which was already close to a century old when the colonists left the mother country. The Puritans, of course, had their own reasons for frowning upon idleness. As a matter of theology, idleness clashed directly with the Calvinist work ethic, which enjoined every person to labor assiduously at his calling.²³⁷ As a matter of economics, the scarcity of labor in early Massachusetts made it all but essential that every settler do his share. And as a matter of social tradition, the easy availability of employment in early Massachusetts deprived able-bodied idlers of their customary defense, to wit, the inability to find a job. Those who neglected work in spite of its abundance could not expect an outpouring of sympathy.²³⁸ To be sure, idleness (except among troublesome monarchs) had never been a virtue in Old England either, but in New England its offensiveness stood significantly enhanced.²³⁹

In 1629, the Massachusetts Bay Company ordered the vanguard of the settlement, recently arrived at Salem, to erect a workhouse "for the better governing and ordering of our people, esppecially such as shalbe negligent and remiss in performance of their duties, or

235. Being disgraced might literally indicate a lack of saving grace.

236. See, e.g., 2 COURTS OF ASSISTANTS, *supra* note 23, at 62, 89, 90; E. POWERS, *supra* note 9, at 198-201. On the other hand, a public audience was essential to the effectiveness of humiliating punishment; whence this delightful entry: "To sit in the stocks one hour next lecture day, if the weather be moderate." 1 ESSEX COUNTY COURT, *supra* note 35, at 138 [1647].

237. See, e.g., COL. LAWS, *supra* note 13, § 2, at 236 [1675], which labels idleness "a Sin of Sodom." On the theory of the work ethic, and its centrality to Puritanism, see, e.g., M. WALZER, *THE REVOLUTION OF THE SAINTS*, 210-19 (1974).

238. English statutes often distinguished idlers from unemployed persons who sought work; no such distinction was necessary in Massachusetts. See, e.g., 4 W. HOLDSWORTH, *supra* note 124, at 392; Answer of the House, n. d., May 1818 Mass. Resolves 593.

239. For a discussion of Old English attitudes toward labor and labor practices, see E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 61-70 (1975).

otherwise exorbitant."²⁴⁰ In 1655, the General Court instructed each county in the colony to construct its own local workhouse and to gather a stock of raw materials to occupy its inmates at their "daily stint."²⁴¹ Once again, the ostensible purpose of the regime was to bring delinquents "to some meet order."²⁴²

Though the workhouse was generally reserved for status criminals and other petty offenders,²⁴³ a sentence to hard labor for serious crimes could also result, though in a more roundabout fashion. By statute, persons convicted of theft in Massachusetts were liable to pay treble damages to the aggrieved as restitution.²⁴⁴ Offenders unable to pay this sum could be pressed into service for a term of years (either to the aggrieved himself or to a third party) to work off the judgment. Persons unable to pay fines or prison fees might be treated in the same way.²⁴⁵ While the expedient of service was doubtless contrived in part to guarantee effective compensation,²⁴⁶ it also served as a means of rehabilitation, conducted under

240. 1 COL. RECORDS, *supra* note 11, at 401. A workhouse was ordered built in Boston once the main body of the settlers arrived. 1 *id.* at 100.

241. 3 *id.* at 399-400; 4 pt.1 *id.* at 222, 256-57, 305; COL. LAWS, *supra* note 13, § 2, at 127 [1646].

242. COL. LAWS, *supra* note 13, § 2, at 127 [1646]. Another statute refers to the institution as a "House for Correction and Reformation," *id.* § 2, at 66 [1668], and the Boston workhouse built in 1739 operated under the slogan: "*Labor improbus omnia vincit*" [hard labor conquers all], 1729-1742 BOSTON TOWN RECORDS, *supra* note 14, at 234. See note 187 *supra*. Persons could be committed to Massachusetts workhouses under indeterminate sentences, again emphasizing their rehabilitative function over their deterrent function: freedom would follow upon "reasonable caution or assurance to the satisfaction of the justice or court, that [the inmate] will reform." See COL. LAWS, *supra* note 13, § 2, at 127 [1646]; 1 COL. RECORDS, *supra* note 11, at 401; 1 PROV. LAWS, *supra* note 13, at 67 [1692], 538-39 [1703], 655 [1710]; 2 *id.* at 183 [1720], 580 [1730]; 2 PLYMOUTH COUNTY COURT, *supra* note 14, at 6; Act of Mar. 26, 1788, ch. 54, 1786-1787 Mass. Acts 625-26. Other records indicate attention to the revenue and separation elements of workhouse incarceration. See 4 pt.1 COL. RECORDS, *supra* note 11, at 257; 1 *id.* at 193.

243. See notes 208-11 *supra* and accompanying text.

244. The first statute of this kind, passed in 1646, applied only to thefts from a garden or orchard, though this restriction was often ignored in practice. After 1692, all thefts were liable to treble damages. COL. LAWS, *supra* note 13, § 2, at 13; 1 PROV. LAWS, *supra* note 13, at 52. See, e.g., 1 COURT OF ASSISTANTS, *supra* note 23, at 145, 189, 200, 284; 2 *id.* at 32, 66, 70, 79, 90, 94, 97, 99, 118, 131, 134; SUFFOLK COUNTY COURT, *supra* note 13, at 521.

245. COL. LAWS, *supra* note 13, § 2, at 51 [1638]; 3 PROV. LAWS, *supra* note 13, at 711-12 [1754]; SUFFOLK COUNTY COURT, *supra* note 13, at 916, 1063; 1 PLYMOUTH COUNTY COURT, *supra* note 14, at 194. See generally R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 345-54 (1946); Towner, *A Good Master Well Served: A Social History of Servitude in Massachusetts, 1620-1750*, at 118-27, 397-409 (1954) (unpublished doctoral dissertation, Northwestern University).

246. The treble damages award for theft had biblical, as well as English statutory, origins and was probably rationalized as liquidated damages. If the aggrieved recovered any portion of the goods stolen, the award was mitigated accordingly. See, e.g., *Commonwealth v. Lisk*, Sup. Jud. Ct., Feb. 1785, ff. 72-73 (two indictments) (Suffolk County Court House); Towner, *supra* note 245, at 397-409. On the roots of the restitution sentence, see G. HASKINS, *supra* note 9, at 153-54, 178.

the auspices of private masters rather than a carceral facility.²⁴⁷ That the two were considered functionally equivalent is indicated by the authorities' willingness to substitute a term of indenture for commitment to the workhouse, even where there was no judgment to pay.²⁴⁸

There remained one last set of punishments designed, not to reintegrate the offender into the community, but to cast him out of it once and for all. Banishment served as the ordinary mechanism whereby Massachusetts communities rid themselves of undesirables. Less common, but equally effective, were branding and mutilation, punishments that fixed upon the offender an indelible "mark of infamy," to warn community members to keep their distance. Recourse to the gallows also took the offender out of the community, though this most final of all punishments was applied only in extraordinary cases.²⁴⁹ While all of these exclusionary sanctions were aimed in part at general deterrence, their specific motive was to disable the offender from ever harming the community again.

B. *The Breakdown of Crime Control*

1. *Change*

The initial repertoire of punishments in Massachusetts proved adequate to contain crime in the seventeenth century — at least there is no surviving record of dissatisfaction with it. But during the eighteenth-century, Massachusetts was buffeted by demographic and social changes that distorted old patterns of criminal activity. Having previously sustained moderate but steady population growth, eighteenth century Massachusetts entered upon a period of rapid growth. By 1765, some thirty towns contained more than 2,000 residents apiece, and almost half of all towns within the province had swelled beyond the 1,000 person mark.²⁵⁰ What is more, the mobility of

247. Cf. W. NELSON, *supra* note 119, at 40; Towner, *supra* note 245, at 118-19.

248. 2 COURT OF ASSISTANTS, *supra* note 23, at 126; SUFFOLK COUNTY COURT, *supra* note 13, at 89, 125, 185. This policy persisted into the provincial period. See 3 PROV. LAWS, *supra* note 12, at 926-28 [1756]. Cf. Act of Mar. 16, 1784, ch. 53, 1782-1783 Mass. Acts 633. In England, Bentham noted the reformatory potential of enforced servitude to a "private master," but considered institutional hard labor superior, because then the reformatory objective would be "express." J. BENTHAM, *supra* note 6, at 7.

249. On the separatory conception of the death penalty in English legal theory, see W. EDEN, *supra* note 86, at 25; in Massachusetts, see, e.g., Resolve of Nov. 17, 1786, ch. 134, 1786-1787 Mass. Acts 413 ("necessary for the safety of the Community"). Banishment was often ordered "on pain of death" if the outcast were ever to return: the two punishments were closely linked. E.g., 2 COURT OF ASSISTANTS, *supra* note 23, at 35; 3 *id.* 68-69.

250. See E. GREENE & V. HARRINGTON, *supra* note 225, at 21-30. For figures from a typical community, see P. GREVEN *supra* note 225, at 103-24, 175-79. Modern estimates of the overall population of early Massachusetts have relied on literary evidence, not the statistical

Massachusetts' population increased significantly over the same period. More than half the sons born in eighteenth century Andover, for example, moved out of town at some point in their lives. After 1765, more than ten percent of the residents of Boston had lived in town for five years or less.²⁵¹

To some extent the flood of migration emanated from outside the province. A small but growing proportion of Boston's immigrants arrived from foreign ports. The remainder, Massachusetts-born, streamed out of agricultural communities whose limited supplies of arable land could no longer support the burgeoning population.²⁵² The result was not merely motion but perpetual motion, the emergence by mid-century of "a small, but significant, floating population of men and women at the bottom of society who moved from seaport to seaport and town to town in search of work." These luckless vagrants had not only broken the bonds with their native communities, but had failed to tie themselves to new ones.²⁵³

As these demographic changes gathered momentum, so did distortions in the configuration of crime. Both impressionistic evidence and statistical studies indicate that the rate of property crime — theft, robbery, and related offenses — climbed fairly steadily after 1700, and most dramatically after the 1750s.²⁵⁴ And along with this increase went a growing perception that responsibility for property

methodology that has been applied to individual townships, and are therefore extremely rough. The U.S. Census Bureau estimates that Massachusetts contained 56,000 inhabitants in 1700 and 188,000 inhabitants in 1750; according to the first federal census taken in 1790 the state then contained some 379,000 inhabitants. These figures indicate that the population of the province was doubling every 30-40 years. U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 29, 1153, 1168. Cf. E. GREENE & V. HARRINGTON, *supra* note 225, at 14-19.

251. E. GREEN & V. HARRINGTON, *supra* note 225, at 123, 211-14; K. LOCKRIDGE, *supra* note 225, at 139-40 & n.2, 146-47; Kulikoff, *The Progress of Inequality in Revolutionary Boston*, 3 ser. 28 WM. & MARY Q. 399 (1971).

252. See K. LOCKRIDGE, *supra* note 225, at 400-01; Cook, *Social Behavior and Changing Values in Dedham, Massachusetts, 1700-1775*, 3 ser. 27 WM. & MARY Q. 565-73 (1970); Jones, *The Strolling Poor: Transiency in Eighteenth Century Massachusetts*, 8 J. SOC. HIST. 39-41 (Spring 1975); Lockridge, *The Evolution of New England Society, 1630-1790*, 39 PAST & PRESENT 62-80 (1968).

253. Jones, *supra* note 252, at 28-54; Kulikoff, *supra* note 251, at 403 (quote); Lockridge, *supra* note 252, at 73. See generally Henretta, *Economic Development and Social Structure in Colonial Boston*, 3 ser. 22 WM. & MARY Q. 75-92 (1965); 1700-1728 BOSTON TOWN RECORDS, *supra* note 14, at 93, 97; 1716-1736 BOSTON SELECTMENT RECORDS, *supra* note 31, at 66, 108, 275; 4 PROV. LAWS, *supra* note 12, at 911 [1767].

254. For impressionistic statements of the growth of crime, see 1 PROV. LAWS, *supra* note 12, at 673-74 [1711]; 2 *id.* at 5 [1715], 838 [1736]; 4 *id.* at 488-89 [1761]; 5 *id.* at 43 [1770]; 47 Mass. Archives 555 [1773] (unpublished document, Mass. Archives); 46 HOUSE JOURNAL, *supra* note 15, at 108 [1770]; Grand Jury Charge by Hutchinson, C.J., Super. Ct., Mar., 1786, in J. QUINCY, *supra* note 43, at 260-61; notes 278, 340 *infra*. See generally E. POWERS, *supra* note 9, at 186-87. On crime in Boston, see C. BRIDENBAUGH, *CITIES IN THE WILDERNESS* 68-

crime rested in large measure on persons unattached to the communities they afflicted. Chief Justice Thomas Hutchinson believed that "bad People frequently come into this Province from other Governments . . . merely for the sake of committing [larceny] here." Justice Nathaniel Sargeant referred to the recipients of punishment as "vicious persons . . . roving about the country disturbing peoples rest and preying upon their property." Evolving patterns of crime were matched by an evolving composite of the average criminal.²⁵⁵

While the imputation of criminal acts to outsiders must have stemmed from the rising geographic mobility of Massachusetts society, the causes of the overall increase in property crime are more complex and difficult to trace. Growth in the absolute numbers of inhabitants surely contributed to the trend, and it seems likely that commercial wealth, urbanization, and employment patterns all

73 (1938); C. BRIDENBAUGH, *CITIES IN REVOLT* 110-12, 299-302 (1955) (notes available only in the Oxford Univ. Press ed. 1971).

Impressionistic statements of increasing crime do, however, have an eternal ring, and examples in earlier times could doubtless be found. But in one respect, the provincial protestations are more than just air — they are backed up by a palpable, long-term trend of legislative response. See notes 285-90 *infra* and accompanying text. Statistical evidence compiled by Linda Kealey, David Flaherty, and William E. Nelson tracks the growth of property crime prosecutions and convictions in the Superior Court, and thereby provides a rough barometer of change in the overall crime rate. (Notice, however, that prosecution and conviction rates are affected by many variables extraneous to the crime rate, e.g., popular sensitivity to property crime.) Kealey's conviction statistics for the years 1750-1794 appear below:

| | |
|---------------|----------------------------------------------|
| 1750-54 | 14 Super. Ct. convictions for property crime |
| 1755-59 | 15 |
| 1760-64 | 35 |
| 1765-69 | 38 |
| 1770-74 | 58 |
| 1775-79 | 16 [wartime] |
| 1780-84 | 84 |
| 1785-89 | 259 |
| 1790-94 | 217 |

Kealey, *The Punishment of Criminal Offenders in Eighteenth-Century Massachusetts* 329 (unpublished chapter of a dissertation in progress, University of Toronto, on file with the author). See Flaherty, *Crime and Social Control in Provincial Massachusetts*, 24 *HIST. J.* 357-60 (1981); Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 *N.Y.U. L. Rev.* 458-59 (1967). These data indicate dramatic *proportional* growth, but a low *absolute* number of prosecutions and convictions. In the face of literary protestations of daily offenses, the low absolute numbers suggest an additional circumstance, likely contributing to popular anxiety: ineffective law enforcement. See notes 279 & 310 *infra* and accompanying text.

255. 46 *HOUSE JOURNAL*, *supra* note 15, at 108 [1770]; Sargeant, "Court Minutes" [n.d.] (unpublished manuscript, Essex Institute), *quoted in* Kealey, *supra* note 254, at 306-07. See, e.g., Report Respecting Convicts, *supra* note 30; 1700-1728 *BOSTON TOWN RECORDS*, *supra* note 14, at 93, 97; 1701-1715 *BOSTON SELECTMEN RECORDS*, *supra* note 31, at 178; Governor's Message, June 1, 1819, May 1819 *Mass. Resolves* 29; Answer of the House, Jan. 19, 1802, 1800-1801 *Mass. Acts* 479-80 ("that miserable class of the people, who are principally the object of public punishment"). The accuracy of these literary perceptions still awaits comprehensive statistical testing. See Kealey, *supra* note 254, at 333; Kulikoff, *supra* note 251, at 403; Nelson, *supra* note 254, at 459 & nn.59 & 60.

raised the incentives to crime — at least, contemporaries thought that they did.²⁵⁶ But the evidence also points to a decline in the effectiveness of traditional sanctions. As emerging social forces strengthened propensities to crime, they also weakened the impediments to crime. As a result, crime soared.²⁵⁷

One traditional sanction that seems to have broken down was the sale into servitude. Throughout the provincial period, thieves unable to raise treble damages had routinely been bound out to a term of rehabilitative service; the proceeds passed to the aggrieved to compensate him for his loss.²⁵⁸ This practice depended on the availability of a willing buyer, however, and finding one may never have been a simple matter. As early as 1702, Massachusetts legislators were compelled to make provisions for unsalable convicts. "Inasmuch as it often happens, that persons convicted of theft, and sentenced to make restitution to the party injured . . . are held long in prison" for want of buyers, the legislators ordered the convicts' release if not disposed of within thirty days.²⁵⁹ By the late eighteenth century, the market appears to have folded up altogether. "If [thieves] are not able to pay damages, they must be sold for a term of time sufficient to discharge costs," wrote a commentator in 1784. "But where are the purchasers? It is as difficult to find such persons, as for a thief to become an honest man."²⁶⁰

Just what caused the ultimate collapse of the convict-servant market remains unclear; the employers do not tell us. Economic trends do not appear to have been pivotal, for demand did not revive in the 1790s, when the Commonwealth enjoyed booming prosperity.²⁶¹ One possible explanation is that the Massachusetts antislavery movement spilled over to this not very different form of enforced

256. Report Respecting Convicts, *supra* note 30; Governor's Message, Jan. 15, 1802, 1800-1801 Mass. Acts 583; Answer of the House, Jan. 19, 1802, *id.* at 479; Governor's Message, June 1, 1819, May 1819, Mass. Resolves 29; J. QUINCY, A MUNICIPAL HISTORY OF THE TOWN AND CITY OF BOSTON 102, 153 (Boston 1852). See C. BRIDENBAUGH, CITIES IN REVOLT, *supra* note 254, at 110; Nelson, *supra* note 254, at 458-59.

257. For a very different interpretation of the effectiveness of crime control in provincial Massachusetts, see Flaherty, *supra* note 254, at 339-60.

258. See notes 244-45 *supra*.

259. 1 PROV. LAWS, *supra* note 12, at 504. Similar provisions occasionally appear in court records dating back to the seventeenth century. See 1 COURT OF ASSISTANTS, *supra* note 23, at 189 [1680]. Cf. Nelson, *supra* note 254, at 460.

260. Mass. Centinel, Oct. 16, 1784, at 1. See 46 HOUSE JOURNAL, *supra* note 15, at 108 [1770] (Gov. Hutchinson's message to the House enumerating the larcenist's "Risque" as a fine or whipping, without mention of treble damages or service.)

261. See, e.g., Governor's Message, June 13, 1799, 1798-1799 Mass. Acts 639.

servitude.²⁶² But it is also likely that demand slackened over the years because the status of the convicts had changed. It was one thing for a community member to admit into his household a wayward individual whom he had known, or known of, since birth; it was quite another to take charge of a transient pauper whose sole connection to the town was born of misconduct.²⁶³ Lawrence Towner suggests that changes in the composition of the servant population rendered the family increasingly unfit to perform its traditional function "as a socializing agency" in eighteenth-century Massachusetts. One manifestation was a growing storm of disputation between master and servant,²⁶⁴ and another may have been reluctance to purchase bonded servants in the first place. With the decline of community intimacy, rehabilitation at the private level probably became impractical.

Another punishment that proved particularly vulnerable to social change was the admonition. The process of admonition had never been used when the offender was a newcomer or a stranger, for in such cases the sincerity of the offender's repentance could not be gauged. As crime became increasingly the province of strangers, the utility of the admonition diminished accordingly. In addition, there appears to have been a growing reluctance, even among longstanding community members, to bare the soul before admonishers and before the public in the subsequent confession. Increasingly anonymous town life spawned a commensurate appreciation of, and insistence on, personal privacy.²⁶⁵

Other humiliating punishments were similarly impeded by social change. A sentence to whipping or the pillory had worked primarily through the media of psychic pain and shame. Growing social anonymity diluted both elements of the punishment. Surely, the penalty of a session on the pillory must have appeared far less daunting when performed before persons with whom the offender was unacquainted, and with whom he need have no further contact whatsoever. "Could your Honours but be spectators of the ease, the negligence, and unconcernedness, with which these people are led to

262. On the antislavery movement in Massachusetts, see, e.g., A. ZILVERSMIT, *THE FIRST EMANCIPATION* (1967).

263. It is suggestive that the first expression of doubt about the salability of convicts in the records of the Court of Assistants involved a pair of "Incorrigible Theeves" who had allegedly threatened "if loose to burne the Towne." 1 COURT OF ASSISTANTS, *supra* note 23, at 189 [1680].

264. Towner, "A Fondness for Freedom": *Servant Protest in Puritan Society*, 3 ser. 19 WM. & MARY Q. 201-19 (1962).

265. Zaggarri, *supra* note 228, at 17-18. See note 232 *supra*.

the whipping post," a commentator lectured the legislators in 1784, "your blood would chill in your veins, at the depravity of human nature."²⁶⁶

As for the rehabilitative element of humiliating punishments, this appears not merely to have dwindled but to have positively backfired.²⁶⁷ Expressions of rebuke, whether individual or collective, will strike home only when delivered by a person whom the wrongdoer respects. The same rebuke, when delivered by a rival or a stranger, will more likely arouse resentment or hatred. By the late eighteenth century, humiliation before anonymous onlookers appears to have engendered in offenders not heightened regard for the community but heightened indignation against it. "[T]he punishment [whipping] they have received has *destroyed* the fear of shame, and produces a desire of revenge, which serves to *stimulate* their vicious inclination," another commentator noted in 1784. "They improve the next opportunity to repeat the crime, and by practice make themselves masters of the trade."²⁶⁸ The process was indeed a vicious circle, the first author agreed: "A man shall be tried, sentenced, whipped and set at liberty; his character, if tolerable before, is now ruined; nothing is to be done but for him to go to the old trade of stealing, when he is again taken and goes through the same process, which instead of answering the least good purpose, serves only to harden him the more; and so he goes on stealing and being whipped, until death rids the community of him."²⁶⁹ Such a description of public humiliation surely would have bewildered Puritan colonists of the first generation.

In his early essay "Some Thoughts Concerning Education," a prescient John Locke warned that "the shame of the whipping, and not the Pain, should be the greatest part of the Punishment The Smart of the Rod, if Shame accompanies it not, soon ceases, and is forgotten, and will quickly, by use, lose its Terrour."²⁷⁰ Locke's insight, furnished from the context of family government in England, proved all too cogent from the perspective of community government in provincial Massachusetts. As the aura of shame and psychic trauma surrounding the penalty evaporated, there was left

266. Mass. Centinel, Oct. 16, 1784, at 1. See Mass. Centinel, Sept. 22, 1784, at 1.

267. For another example of Massachusetts social change causing a reversal in the impact of law (in an historian's view), see W. NELSON, *supra* note 119, at 6.

268. Mass. Centinel, Sept. 22, 1784, at 1 (emphasis added).

269. Mass. Centinel, Oct. 16, 1784, at 1. See G. BRADFORD, *supra* note 1, at 11-12; 1817-1822 Mass. Legislative Documents no. 1, at 11 (1817) (State Library Annex); Governor's Message of Jan. 30, 1793, 1792-1793 Mass. Acts 694.

270. THE EDUCATIONAL WRITINGS OF JOHN LOCKE 152-54, 177 (J. Axtell ed. 1968).

behind only a small core of physical pain quite insufficient to prevent offenses. By the late eighteenth century, the lash had evolved into a "slight corporal Punishment."²⁷¹

Still other traditional penalties grew increasingly unworkable as the eighteenth century progressed. At a glance, the fine would seem to be the most timeless of all sanctions — a blow to the pocketbook will be painful, no matter how many onlookers witness the event. Yet, there remains one instance in which a fine imposes no pain — namely, when the offender's pocketbook is already empty. One of the few freedoms that indigents have always enjoyed is the freedom from fear of large fines or judgments. The culprits responsible for the upsurge of property crime in provincial Massachusetts were primarily vagrants and transients and belonged to this judgment-proof class: threatening to fine them would have been tantamount to suggesting that they eat cake.²⁷²

Even punishments that sought to exclude criminals from the community were weakened by social change. In the seventeenth century, banishment had effectively incapacitated offenders because they were well known and could not return;²⁷³ likewise, indigent strangers were instantly recognizable and could be "warned out," in the contemporary phrase, before they had a chance to commit crimes.²⁷⁴ But as communities swelled, recognition of strangers and persons under sentence of banishment became increasingly difficult.²⁷⁵ Even branding might not be a sufficient stigma in some quarters. Capital punishment remained the only sure way to hand offenders a one-way ticket out of town — and, as it happened, even *that* punishment was not quite so reliable as it might seem.²⁷⁶

2. Reaction

The people²⁷⁷ of Massachusetts were well aware that they had a

271. 46 HOUSE JOURNAL, *supra* note 15, at 108 [1770].

272. See 1 PROV. LAWS, *supra* note 12, at 122 [1693], 287 [1695]; 3 *id.* 711-12 [1754].

273. See, e.g., 2 COURT OF ASSISTANTS, *supra* note 23, at 59.

274. See generally J. BENTON, WARNING OUT IN NEW ENGLAND (1911). Given the demographic trends of the eighteenth century, the incidence of warning out initially rose sharply. C. BRIDENBAUGH, CITIES IN THE WILDERNESS, *supra* note 254, at 231; Cook, *supra* note 252, at 569; Kulikoff, *supra* note 251, at 399-400; Lockridge, *supra* note 252, at 72-73.

275. 1700-1728 BOSTON TOWN RECORDS, *supra* note 14, at 93, 97; C. BRIDENBAUGH, CITIES IN THE WILDERNESS, *supra* note 254, at 231; R. KELSO, THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS, 1620-1920, at 54-55 (1922).

276. See notes 292-300 *infra* and accompanying text.

277. By "the people" I mean those people who favored crime control and who registered their opinions in the literature of the day. Whether such "people" included, or spoke for, the honest poor is a splendid question which I shall not attempt to answer here. On the relationship between crime control and class control, cf. Muraskin, *supra* note 69; Ignatieff, *State, Civil*

problem on their hands, and they quickly drew the connection between escalating crime rates and the failure of traditional sanctions. "It must give every man of feeling the most sensible pain, when he observes how insufficient our penal laws are to answer the end they were designed to," wrote one critic. "Scarce a morning arrives, but we hear of some house or store having been broke open the past night."²⁷⁸ Crime waves have always triggered anxiety over the manner of criminal justice, and the prospect must have been especially frightening in societies, like provincial Massachusetts, that lacked a professional police force; for little stood between the criminal and his victim but effective social discipline.²⁷⁹ Under popular pressure, the landscape of criminal justice in Massachusetts began to change.

Some time-worn punishments simply disappeared. One of the first to go was public confession, which quietly bowed out of the records after 1700.²⁸⁰ Banishment and "warning out" hung on a while longer, expiring shortly after independence.²⁸¹

Other punishments remained in effect, but took on different functions. The lash and other humiliatory punishments had initially served to instill shame and to reintegrate offenders into the community. But when offenders failed to reform, or were outsiders to begin with, the sanctions' purpose shifted from reintegration to expulsion: Public punishment ceremonies alerted townspeople to the offenders' infamy. It thus became common as the century progressed to hold the public punishment of a single offender on multiple occasions, so that all the more citizens could take careful notice of him.²⁸²

Still other punishments which remained viable were extended to cover a broader range of crimes. A growing number of provincial statutes prescribed short-term imprisonment in the common gaol as a deterrent, though this sanction's utility was limited by the infeasibility of longer sentences.²⁸³ More promising were the first few

Society, and Total Institutions: A Critique of Recent Social Histories of Punishment, 3 CRIME & JUST. ANN. REV. RESEARCH 153 (1981). For works analyzing the rise of the penitentiary in Europe from the standpoint of class, see note 79 *supra*.

278. Mass. Centinel, Oct. 16, 1784, at 1. See note 254 *supra*.

279. See note 254 *supra* and note 310 *infra*. For an early example of anxiety over crime in Massachusetts, see W. BRADFORD, OF PLYMOUTH PLANTATION, 1620-1647, at 316-20 (S.E. Morrison ed. 1970).

280. Zagari, *supra* note 228, at 18.

281. R. KELSO, *supra* note 275, at 53-60.

282. The practice was codified in the last Massachusetts code incorporating public punishments. 1784-1785 Mass. Acts 134, 157, 169-70, 175; 1786-1787 *id.* at 89.

283. See E. POWERS, *supra* note 9, at 239-40. Imprisonment was also used to facilitate the process of multiple public punishments, serving as a way-station between such punishments. See note 282 *supra*.

statutes mandating long-term hard labor in the workhouse, which appeared on the statute books by mid-century.²⁸⁴

The most notable legislative response, however, was a wider recourse to capital punishment for the major types of property offenses. In 1692, when the new provincial government passed its first set of criminal laws, the only property crimes punishable by death were third offenses of burglary and robbery.²⁸⁵ But in 1711, citing the growing insecurity of the highways, the House prescribed the death penalty for second-time robbery offenders.²⁸⁶ Four years later, again pointing to the rising frequency of crime, the House added first-time burglaries to the capital list.²⁸⁷ In 1736, the gallows was mandated for theft, if it was a second offense — the first time that category of crime had ever been punishable by death in Massachusetts.²⁸⁸ In 1761, the robbery statute was revised yet again to send first offenders to the gallows.²⁸⁹ Finally, in 1770, once again finding the old provisions “ineffectual,” the House expanded the definition of burglary (which was subject to capital punishment) to include entry into a dwelling in the day or night, with or without a breaking, as long as the offender broke out at night.²⁹⁰

In retrospect, the legislators' reaction seems to have been perfectly natural. As criminal penalties prove increasingly ineffective, the reflexive response is surely to move along the prevailing spectrum of sanctions to more severe alternatives.²⁹¹ But the flaw in this solution quickly became apparent. The people of Massachusetts had never had much stomach for the gallows, even when the victims were outsiders, and the thought of expanding the penalty into the range of common property crimes was more than most jurymen could swallow. So they set about thwarting the new capital statutes, just as earlier generations of Puritans had thwarted previous ones.²⁹² And in a contest between jurymen and the rule of law in Massachu-

284. See note 212 *supra* and accompanying text.

285. 1 PROV. LAWS, *supra* note 12, at 52. This provision traces back to 1642. COL. LAWS, *supra* note 13, § 2, at 12-13.

286. 1 PROV. LAWS, *supra* note 12, at 673-74.

287. 2 *id.* at 5.

288. 2 *id.* at 838.

289. 4 *id.* at 488-89.

290. 5 *id.* at 43. Several sorts of counterfeiting were also made capital. See E. POWERS, *supra* note 9, at 307-08.

291. A recent example of this reflex may be the New York drug law of 1973. For the analogous background of that legislation, see Note, *Drug Abuse, Law Abuse, and the Eighth Amendment: New York's 1973 Drug Legislation and the Prohibition Against Cruel and Unusual Punishment*, 60 CORNELL L. REV. 638-40 (1975).

292. See note 99 *supra*.

setts, law had rarely stood a chance.²⁹³

Juries frustrated the new capital statutes in several ways. At the indictment stage, grand juries often refused to charge persons with capital crimes. The indictments were simply downgraded to noncapital charges of the jurymens' invention: thus, burglary was often transmuted into "theft in the night time."²⁹⁴ Even when an indictment for burglary was sealed, its harsh consequences could still be avoided by the petit jury. Of course, the jurymen could always acquit the defendant outright, but on many occasions they chose instead to convict him of a lesser crime.²⁹⁵ (This version of jury nullification, known in England as "pious perjury," had also been used in the mother country to avoid the rigors of the bloody code.)²⁹⁶ Finally, even if the box did nothing to mitigate the penalty, the bench often did so, in blatant disregard of statutory sentencing prescriptions.²⁹⁷ This last datum indicates that laymen had no monopoly on moral aversion to the gallows in provincial Massachusetts.

In the face of such determined resistance, the gallows could not replace other failing sanctions. The legislators recognized that the capital law against burglary "is *so severe* that many offenders escape

293. On jury power in colonial America *see generally* Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 904-17 (1978).

294. *See, e.g.*, *Commonwealth v. Cook*, Sup. Jud. Ct., Sept. 1785, f. 180; *Commonwealth v. Baker*, Sup. Jud. Ct., Feb. 1786, f. 75 (Suffolk County Court House). It remains possible, however, that factual matters distinguished such cases.

295. *E.g.*, *King v. Robinson*, Super. Ct., Aug. 1765, ff. 126-27; *Commonwealth v. Mount*, Sup. Jud. Ct., Aug. 1785, ff. 81-83; *Commonwealth v. Coldbroth*, Sup. Jud. Ct., Aug. 1797, f. 240. Again, factual distinctions may have been made: on other occasions, the death penalty was meted out for property crime, *e.g.*, *Commonwealth v. Grout*, Sup. Jud. Ct., Aug. 1784, f. 230; *Commonwealth v. Covin*, Sup. Jud. Ct., Aug. 1784, f. 232; *Commonwealth v. Dixon*, Sup. Jud. Ct., Oct. 1784, f. 316; *Commonwealth v. Campbell*, Sup. Jud. Ct., Feb. 1785, ff. 70-71 (Suffolk County Court House).

296. *See generally* J. BENTHAM, *supra* note 30, at 196-97, 325; 4 W. BLACKSTONE, *COMMENTARIES* *238-39; M. MADAN, *supra* note 93, at 13-14, 68, 87; L. RADZINOWICZ, *supra* note 82, at 83-97. The "bloody code" was Great Britain's accumulation of over 200 capital statutes during the eighteenth century.

297. *See* *King v. Brown*, Super. Ct., June 1763, ff. 67-68 and *King v. Grosman*, Super. Ct., Oct. 1763, ff. 193-94, for examples of second theft convictions being punished as if they were first convictions under the 1736 theft act. *See* note 288 *supra*. Likewise, *see* *Commonwealth v. Powers*, Sup. Jud. Ct., Apr. 1785, ff. 177-78, and *Commonwealth v. Titcom*, Sup. Jud. Ct., Aug. 1785, f. 80, for examples of burglary convictions punished according to the provisions of the overridden 1692 act, instead of the 1715 and 1770 acts. *Cf.* notes 285, 287, 290 *supra*. Another string of burglary cases also reach this outcome, though they appear to have involved a sort of incipient plea bargaining: defendants pleaded innocent, and subsequently entered amended guilty pleas. In any event, the sentences pronounced in these cases had no statutory mandate. *See, e.g.*, *Commonwealth v. Joyce*, Sup. Jud. Ct., Aug. 1784, f. 231; *Commonwealth v. Smith*, Sup. Jud. Ct., Sept. 1784, ff. 263-64; *Commonwealth v. Fanueil*, Sup. Jud. Ct., Feb., 1785, ff. 75-76; *Commonwealth v. Daken*, Sup. Jud. Ct., Feb. 1785, ff. 67-68 (Suffolk County Court House).

Punishment,"²⁹⁸ and they balked at lengthening the capital list further.²⁹⁹ Here, then, were the horns of a dilemma: While "[a]t present, our laws are no more a check to simple robbery [than] they are to getting money honestly," the alternative of "tak[ing] a man's life for every trifling theft, as is done in England, is a disgrace to a civilized nation; humanity recoils from the idea."³⁰⁰ Only after the slide toward harsher traditional sanctions, the path of least resistance, proved to be a *cul de sac* did Massachusetts lawmakers turn "side-ways" to explore new solutions to the problem of crime.

The penitentiary was not the only remedy suggested by reformers. Another proposal, which retained a following as late as the 1820s, was transportation of criminals, on the English model. Since banishment by way of escort to the town limits could no longer guarantee an offender's permanent removal, transportation advocates hoped that a more distant exile would effectively prevent his return. The idea was always rejected because of both its cost and the suspicion that no expanse of ocean would keep unreformed offenders away.³⁰¹

Hard labor, on the other hand, offered several enticing attractions to Massachusetts lawmakers.³⁰² The problem that they faced

298. 47 Mass. Archives 498-99 [1762] (emphasis added) (unpublished manuscript, Mass. Archives). See Answer of the Senate, n.d., May 1819 Mass. Resolves 33.

299. REPORT [ON THE STATE PRISON] 1-2 (1822) (Harvard Law Library); 47 Mass. Archives 498-99 [1762], 507-08 [1766], 555-58 [1773] (unpublished documents, Mass. Archives); Tudor, *supra* note 80, at 430.

300. Mass. Centinel, Oct. 16, 1784, at 1. Practical difficulties of enforcement were buttressed by theoretical opposition (per rationalist ideology) to an expanded capital list. See, e.g., The Independent Chronicle, Feb. 7, 1793, at 1, *continued* Feb. 14, 1793, at 1-2; Mass. Centinel, Oct. 20, 1784, at 1 (statutes violate the principle of proportionality discussed at note 92 *supra* and accompanying text). And the famous anecdote about pickpockets who did their briskest business at the hangings of their comrades — which made such a mockery of the practical deterrent value of the capital sanction — was already current. The Independent Chronicle, Feb. 14, 1793, at 2. The story is still repeated. See L. CARNEY, CORRECTION AND THE COMMUNITY 26 (1977).

301. Boston Gazette, Nov. 29, 1784, at 3 (possibly facetious); G. BRADFORD, *supra* note 1, at 61-63; 1817-1822 Mass. Legislative Documents no. 1, at 21-22 & n (1817) (State Library Annex); REPORT [ON THE STATE PRISON] 15 (May 1830); REPORT [ON THE STATE PRISON] 5, 14-15 (1822) (Harvard Law Library). This idea blended easily with the "back to Africa" solution for freed slaves. See *id.* For an English criticism of transportation making many of the same points, see J. BENTHAM, *supra* note 122, at 173.

302. Apart from the attractiveness of carceral punishment, one may speculate about its feasibility at alternative dates. James Stephen has argued that "in the days of Coke it would have been impossible practically to set up convict establishments" in England, even if they had been deemed advisable, for want of economic resources and managerial expertise. 2 J. STEPHEN, *supra* note 123, at 92. Criminal incarceration thus might have appeared in the late eighteenth century, not because it was at last prudent, but because it was at last possible. But this argument will not stand up to analysis. Though the financial resources of Massachusetts grew substantially in the eighteenth century, the fact remains that funds sufficient to build and run carceral institutions had always been found; gaols and workhouses were constructed from the earliest days of the colony. See notes 11-12, 240-41 *supra* and accompanying text. And

was not crime in general, but *property* crime, committed in the main by an identifiable class of vagrants. Because "the idle and poor [have] much increased among [us]," Boston had already built a new workhouse in 1739, and the legislature had encouraged other towns to follow suit.³⁰³ Active criminals from the same class would also benefit singularly from this treatment,³⁰⁴ and since it was believed to be "a sentence more dreadful to the Lazy [and] the dissolute than almost any which could be inflicted," it would constitute an effective deterrent as well.³⁰⁵ Advocates also observed that if all else failed, incarceration did at least incapacitate the criminal offender. Public punishments, which had relied on rehabilitation, deterrence, and notoriety, set the offender immediately at liberty, and the frequent repetition of offenses impressed upon advocates the importance of physical restraint as an additional bulwark against crime.³⁰⁶ By the late eighteenth century, incarceration constituted a more reliable means of incapacitation than either banishment or (when filtered through the jury process) capital punishment.³⁰⁷ Finally, some advocates promised that the prisoners' labor would pay the expenses of the otherwise costly punishment.³⁰⁸ These arguments were persua-

according to the prevailing theory of rehabilitation, the process of hard labor would at least contribute to, if not support, the facility in which it was carried on. See note 136 *supra* and note 308 *infra* and accompanying text. Furthermore, the managerial expertise of pre-nineteenth-century penologists has been underestimated. At least several large-scale workhouses were constructed in England in the eighteenth century, and Massachusetts itself undertook an ambitious workhouse project in Boston as early as 1737 without fear of administrative impracticality. See M. IGNATIEFF, *supra* note 45, at 13-14; notes 128 & 191 *supra*. Finally, legal historians of Massachusetts have emphasized that criminal incarceration remained infeasible as long as the population of the colony was too low to bear reductions in the labor pool. See G. HASKINS, *supra* note 9, at 116; Zanger, *supra* note 227, at 474-75. On the contrary, the theoretical motive for rehabilitative incarceration was the *promotion* of industry in persons otherwise idle. A labor-scarce society had a *greater* incentive to introduce such therapy. And again, institutional construction (for other purposes) upon the colonists' arrival in Massachusetts belies suggestions of impracticality.

303. 2 PROV. LAWS, *supra* note 12, at 756 [1735]; 3 *id.* at 108 [1743]. See note 191 *supra*.

304. See notes 169-70 *supra* and accompanying text. It is no coincidence that the first active criminal offenses to be made punishable by service and incarceration in the workhouse were all property related. See notes 209-13, 243-48 *supra* and accompanying text. Ideologically, hard labor had never been a panacea, and it would not have been prompted by an epidemic of moral offenses, for example. Notice that the first movement toward institutional hard labor had also occurred during a period of mounting vagrancy, see text at note 125 *supra*.

305. Report Respecting Convicts, *supra* note 30. See Governor's Message, Jan. 11, 1799, 1798-1799 Mass. Acts. 636; Mass. Centinel, Oct. 16, 1784, at 1; G. BRADFORD, *supra* note 1, at 14-15; Salem Mercury, Dec. 30, 1788, *quoted in* Kealey, *supra* note 254, at 306.

306. See Mass. Centinel, Sept. 22, 1784, at 1; *id.*, Oct. 16, 1784, at 1; Governor's Message, Jan. 15, 1802, 1800-1801 Mass. Acts 583-84; Answer of the House, Jan. 19, 1802, *id.* at 479-80; Sargeant, "Court Minutes," [n.d.] (unpublished manuscript, Essex Institute), *quoted in* Kealey, *supra* note 254, at 306-07.

307. See notes 275, 281, 294-98 *supra* and accompanying text.

308. See G. BRADFORD, *supra* note 67, at 10; notes 392-93 *infra*.

sive,³⁰⁹ and in 1785 the Castle Island prison was inaugurated.

With the rise of criminal incarceration in Massachusetts, old concepts of crime control befitting small, intimate communities finally gave way to new ones, more appropriate to the large, anonymous communities that were spreading across the state. In the seventeenth century, the criminal was generally looked upon as a person who had wandered astray, but whose basic loyalties still ran to the community he had injured. By the end of the eighteenth century, the criminal was more commonly viewed as a member of an antagonistic subculture, whose allegiances disposed him to villainy from the outset. One by-product of this changing outlook was the institution of a professional police force in post-revolutionary Boston. Once criminals were perceived as out-and-out adversaries, physical enforcement became a crucial vehicle for the prevention of crime.³¹⁰

The prison fit snugly into the new social framework. Whereas early rehabilitative punishments had sought to draw the offender back into the community to which he already belonged, criminal incarceration sought a dual objective: to wrench the offender out of the community he had afflicted, and only later to return him to it, shorn of his prior hostility.

Equally appropriate was the transfer of the situs of punishment from town centers to a pocket of the legal system hidden from public view. Some students of incarceration in Europe have interpreted this movement as a ploy by the ruling elite to wrest political control of punishment away from the popular mobs that had clustered around the old public ceremonies.³¹¹ But in Massachusetts, at least, the demise of public punishment seems explicable on strictly practical grounds. Once criminal offenders ceased to be persons who respected or cared about the community, punishment in the community's presence could no longer have a salutary effect on them.

The old punishments were also intended to weigh upon the public, as opposed to the offender, by providing general, as opposed to

309. See notes 169-70 *supra* and accompanying text. There is no evidence that the 1785 initiative in Massachusetts was directly stimulated by reformist undertakings outside the state; still, that possibility cannot be denied. Several American *mandates* for criminal incarceration shortly preceded the Castle Island statute, see notes 207 *supra* & 338 *infra*. On the other hand, Castle Island was the first *operational* facility for criminal incarceration in America during this period, see note 351 *infra*. Cf. text at notes 360-62 *infra*. Given post-revolutionary antagonism for England, the influence of the British Hard Labor Act of 1779 on Massachusetts is ambiguous, see note 327 *infra* and accompanying text.

310. See generally R. LANE, *POLICING THE CITY* 3-13 (esp. 6-7) (1967).

311. M. FOUCAULT, *supra* note 79, at 57-65, 126-31; M. IGNATIEFF, *supra* note 45, at 21-24, 88-90, 105.

specific, deterrence.³¹² In the ancient, community-oriented model, general deterrence was believed to arise from the spectacle of punishment. As Cotton Mather once put it, "notorious Sinners were put to open penance in this World, that their Souls might be saved . . . and that others admonished by their Example, might be more afraid to offend."³¹³ Later rationalist literature continued to reiterate this theme; Bentham referred to it as the "exemplarity" of punishment.³¹⁴

From the standpoint of exemplarity, incarceration could well appear to be defective. As English rationalist William Eden warned, a prison sentence "can[not] communicate the benefit of example, being in its nature secluded from the eye of the people."³¹⁵ Yet, in sprawling and bustling cities, spectacles intended to edify the community were increasingly futile and out of place. "[S]uch exhibitions," Massachusetts reformer Gamaliel Bradford commented in 1821, "are very limited in their extent. If a person is to be hanged, not one in a thousand in the community sees the tragedy performed."³¹⁶

Rather than make this point directly, early advocates of incarceration in Massachusetts found a way to steal the exemplarists' thunder. In perhaps their most artful stroke, the advocates identified exemplarity as yet another *virtue* of incarceration. "When a thing is out of sight, it is soon out of mind," one commentator noted; the spectacles of the old public punishments had always been palliated by the brevity of their duration. Long-term incarceration, on the other hand, would expose offenders "to con[stant] public view." "[S]uch living examples of justice," another writer agreed, "would have a better tendency than the sight of an execution, which is transitory."³¹⁷ Prison advocates thus disarmed their critics by stressing the longevity, rather than the drama, of the spectacle of incarceration. Subsequent theorists in Massachusetts did take the final step and deny the value of spectacle entirely.³¹⁸ But it is likely that the striking architecture of the Massachusetts State Prison was inspired

312. See the terminology in J. BENTHAM, *supra* note 30, at 19-20.

313. C. MATHER, *supra* note 232, at 141 (emphasis omitted). See *id.* at 148; E. POWERS, *supra* note 9, at 199.

314. J. BENTHAM, *supra* note 30, at 45-46.

315. W. EDEN, *supra* note 86, at 50. See J. BENTHAM, *supra* note 30, at 113.

316. G. BRADFORD, *supra* note 1, at 7. Cf. J. QUINCY, *supra* note 256, at 29.

317. The Independent Chronicle, Feb. 14, 1793, at 2; Mass. Centinel, Oct. 20, 1784, at 1. The root idea probably derived from Beccaria. See C. BECCARIA, *supra* note 83, at 47-50.

318. G. BRADFORD, *supra* note 1, at 8-9, 46; J. QUINCY, REMARKS ON SOME OF THE PROVISIONS OF THE LAWS OF MASSACHUSETTS AFFECTING POVERTY, VICE, AND CRIME 26-28 (Cambridge 1822); Senate 1831 Mass. Legislative Documents 527-29 (State Library Annex).

precisely by this conception; it was not a herald of the new, as some have supposed,³¹⁹ but a last intellectual vestige of the old.³²⁰

In sum, the penitentiary closed the books on community involvement in punishment because such involvement no longer seemed constructive: Neither humiliation nor terror could be instilled through the old media of public participation. Still, public punishment did not completely disappear with the turn to incarceration. Most ironically, it lived on for a short time within the walls of the State Prison itself. By statute, violations of prison discipline were punishable by up to thirty lashes, and a platform was constructed in the prison yard on which offending prisoners were forced to stand, holding signs or wearing dunce caps.³²¹ Even as public sanctions were discarded by society at large, they were retained by the very institution that was to serve as a substitute. Of course! The penitentiary was one "community" in Massachusetts still intimate enough for the old formulas to remain effective.

3. *Independence*

Rothman argues that the American Revolution was central to the emergence of the penitentiary. Independence, he asserts, brought Americans a repugnance for old English institutions, a political freedom to replace them, and most of all an activist spirit that renounced Calvinist complacency in favor of a belief in man's boundless potential for improvement.³²² Rothman's Revolution-as-watershed hypothesis once again assumes that incarceration was un-English and a product of intellectual innovation. Neither of these assumptions is valid.

Given the English origins of the rehabilitative program,³²³ it is hardly plain that the Home Government would have rejected colonial legislation creating a penitentiary. One cannot assume that the

319. See D. ROTHMAN, *supra* note 50, at 79, 83-84, 89-90.

320. The spectacular value of prison design was stressed in England by Bentham, who urged construction in or near populous cities, and who favored open admission of the public to prison grounds, all to further "the exemplarity of imprisonment." Bentham added: "However, if the prisoners are not seen, the prison is visible. The appearance of this habitation of penitence may strike the imagination and awaken salutary terror. Buildings employed for this purpose ought therefore to have a character of seclusion and restraint, which should take away all hope of escape, and should say, 'This is the dwelling place of crime.'" J. BENTHAM, *supra* note 30, at 113, 353-54; J. BENTHAM, *supra* note 122, at 174; J. BENTHAM, *supra* note 6, at 32.

321. G. HAYNES, AN HISTORICAL SKETCH OF THE MASSACHUSETTS STATE PRISON 24-25, 37 (1870); Act of Mar. 14, 1806, ch. 113, 1804-1805 Mass. Acts 549. Humiliatory punishments had also been authorized within the Boston workhouse. 1729-1742 BOSTON TOWN RECORDS, *supra* note 14, at 239.

322. D. ROTHMAN, *supra* note 50, at 57-61.

323. See text at notes 123-36 *supra*.

Revolution permitted Massachusetts a freedom that had previously been denied. The crown did retain veto power over provincial legislation and, ironically, had exercised it over several capital statutes passed in 1692.³²⁴ But the acts of 1749 and 1750, which mandated the sanction of hard labor, drew no apparent resistance.³²⁵ If anything, the Home Government encouraged such developments by issuing several instructions for the construction of workhouses.³²⁶ To the extent that post-revolutionary animus against English institutions affected Massachusetts at all, it could have *discouraged* resort to hard labor as much as it promoted it. In any event, Massachusetts' diatribes against English criminal justice were largely confined to the bloody code, a body of enactments that had no counterpart in the province.³²⁷

Evidence of a perceived need for new sanctions to halt the deterioration of crime control has already been presented. There is little evidence of a post-revolutionary expectation that the move to incarceration would serve the more ambitious end of eliminating crime. Just as Rothman overstates the pessimism inherent in the colonial concept of original sin, so he also exaggerates the optimism inherent in the post-revolutionary belief in human perfectibility. Once again, Massachusetts criminologists drew the practical conclusion that some offenders could be reformed while others could not.³²⁸ Youths were still believed to stand the best chance.³²⁹ Incarceration could

324. See E. POWERS, *supra* note 9, at 303-05.

325. Even the "Great Law" of Pennsylvania, instituting hard labor comprehensively in 1682, passed with only limited objection. Its repeal in 1718 constituted a presumed tactical gambit by the Pennsylvania legislature, not a direct-response to royal indignation. See H. BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA* 37-39 (1927); Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, 60 PA. MAGAZINE 248 n.24, 247-52 (1936). In 1700, a Home Government review of Pennsylvania statutes resulted in the disallowance of several criminal laws on the basis of vagueness, overbreadth, technicalities, and (as in Massachusetts) unreasonable harshness. See note 324 *supra*, and accompanying text. Significantly, no *per se* objection to hard labor as a penalty was raised, see 2 STATUTES AT LARGE, *supra* note 178, at 479-97.

326. Such instructions were issued annually from 1686-1689, and again from 1702-1715. 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at 342-43 (L. Labaree ed. 1935).

327. Cf. Mass. Centinel, Jan. 5, 1785, at 3; *id.*, Oct. 16, 1784, at 1; Independent Chronicle, Feb. 14, 1793, at 2. On the bloody code, see note 90 *supra*. Notice that the British Hard Labor Act of 1779, see text at note 204 *supra*, preceded the Massachusetts initiative. It was ignored by the early American commentators.

328. REPORT [ON THE STATE PRISON] 7 (1822); REPORT [ON THE STATE PRISON] 7 (May 1830); REPORT [ON THE STATE PRISON] 25-26 (Sept. 1830) (Harvard Law Library) (also printed in Mass. Legislative Documents 151 (1830)); REPORT [ON THE STATE PRISON] 24 (1831) (also printed in 1832 Mass. Legislative Documents 218 (1832) (State Library Annex)); G. BRADFORD, *supra* note 1, at 10-11, 17-18; J. QUINCY, *supra* note 256, at 19.

329. G. BRADFORD, *supra* note 1, at 29-30, 48; J. QUINCY, *supra* note 256, at 12, 19-20; Resolve of Nov. 17, 1786, ch. 134, 1786-1787 Mass. Acts 413; 1817-1822 Mass. Legislative

prevent some, but not all, crime. While the published criminologists did, on occasion, refer to the hope that *all* criminals could be reformed and *all* crime prevented, they invariably rejected it as unrealistic.³³⁰

To be sure, some elements of revolutionary ideology did facilitate the transition to the penitentiary. Many post-revolutionary reformers spoke of the project as an "experiment" at a time when all America was ablaze with self-conscious experimentalism.³³¹ And the very fact of a radical change in government led Americans to review the efficacy of the institutions that they had inherited from colonial times.³³² Many reformers thus coupled their arguments against the old sanctions with a plea for new ones more "suited to the genius of a Republic."³³³ Still, the social and demographic forces that had undermined the old sanctions preceded independence by many decades; the Revolution was not pivotal to the transition.

Perhaps the most unequivocal evidence of the pre-revolutionary prospect for criminal incarceration is that Massachusetts had seriously considered implementing such a system as early as 1765. In that year, the legislature appointed a committee "to prepare a Bill to make the Punishments of Criminals more subservient to the public Interest, by altering the punishment of certain Felonies, and by providing a Method for a publick Work-House, to which criminals of

Documents no. 1, at 7-9 (1817); Senate 1831 Mass. Legislative Documents 523 (State Library Annex).

330. G. BRADFORD, *supra* note 1, at 4, 10-11, 16-17; Answer of the House, May 1820 Mass. Resolves 237; Governor's Message, Jan. 30, 1793, 1792-1793 Mass. Acts 694 (object is to "check the progress of crime"); *Remarks*, *supra* note 80, at 23; 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 33-35 (1826); 8 *id.*, 29-30 (1833); Tudor, *supra* note 80, at 418, 435-36; Austin, *Book Review*, 10 N. AM. REV. 235, 246-49 (1820) (reviewing W. ROSCOE, *supra* note 189).

331. See, e.g., Dane & Sewall, *supra* note 100; Governor's Message, Jan. 10, 1822, Jan., 1822 Mass. Resolves 396; Communication from Gamaliel Bradford, Jan. 27, 1824, Senate Document no. 7029 (1824) (unpassed) (unpublished manuscript, Mass. Archives); G. BRADFORD, *supra* note 1, at 4-5; G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 41-42 (H. Lantz ed. 1964) (1st ed. Paris 1833); E. POWERS, *supra* note 9, at 243; Governor's Message, June 2, 1828, 1828-1831 Mass. Resolves 23; Governor's Message, Jan. 6, 1830, *id.* 222; Governor's Message, Jan. 8, 1833, 1832-1834 Mass. Resolves 277, 280. On post-revolutionary experimentalism, see E. MORGAN, *Challenge and Response: Reflections on the Bicentennial*, in THE CHALLENGE OF THE AMERICAN REVOLUTION 196-218 (1976).

332. Dissolution of the provincial government in no wise required reconsideration of the criminal code, however. By the Constitution of the Commonwealth of Massachusetts, pre-revolutionary statutes remained in effect; the *structural* inertia of the legislative process was not affected. MASS. CONST. of 1780, Pt. II, ch. VI, art. VI.

333. E.g., Governor's Message, Jan. 30, 1793, 1792-1793 Mass. Acts 694; Answer of the House, Feb. 15, 1793, in *id.* at 242; Mass. Centinel, Jan. 5, 1785, at 3; 2 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 56 (1827).

every Part of the Province may be committed.”³³⁴ The list of public servants recruited for this work reads like a Who’s Who of the Massachusetts political aristocracy. Among them were Peter Oliver, Justice of the Superior Court (who would become Chief Justice in 1772), Edward Trowbridge, Attorney General of the province (who would also rise to the bench in 1767), Thomas Hutchinson, Chief Justice and Lieutenant-Governor of Massachusetts, and James Otis, former Advocate General and, since 1761, an influential representative from Boston.³³⁵

As a preliminary step, the committee prepared a report formally recommending the replacement of capital and corporal punishments with “long confinement to hard labor in a House of correction,” built “in one of the maritime towns of the province where work of various kinds may be procured.”³³⁶ The plan apparently suited the genius of a province, if not yet a republic, for the legislature instructed the committee to go ahead and draft the bill.³³⁷ But at this point the project appears to have been dropped. No further entries, not even a formal discontinuance of the project, found their way into the house minutes. The plan, and the committee itself, simply disappeared.

The bits and threads of this curious episode are too scant to provide much more than food for speculation.³³⁸ In its brief justification of the proposal, the committee did stress the failure of old sanctions. Were their plan adopted, the members commented, “the great end of punishment *viz* the deterring [of] the criminals and

334. 41 HOUSE JOURNAL, *supra* note 15, at 186.

335. Also drafted to serve on the committee were Oxenbridge Thacher, a respected lawyer and Otis ally; Samuel Dexter, a merchant who would serve on the Supreme Executive Council of State during the Revolution; and Joseph Lee, who sat on the Inferior Court of Common Pleas. W. DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS 141, 155 (1900); E. WASHBURN, SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS 221-24, 300-11 (1840).

336. 44 Mass. Archives 538-39 [n.d.] (unpublished manuscript, Mass. Archives).

337. 41 HOUSE JOURNAL, *supra* note 15, at 230.

338. It is even possible that the 1765 move to institute criminal incarceration in Massachusetts was not the only such initiative before the Revolution. A legislative report prepared in 1822, briefly tracing the heritage of the State Prison, asserted that “*At different times* the House voted to prepare places of confinement for criminals, where they might be kept at hard labor; and *after* the revolution they were confined for this purpose at Castle William.” REPORT [ON THE STATE PRISON] 2 (1822) (emphasis added) (Harvard Law Library). Nor was Massachusetts alone in proposing such projects. In 1773, during the period of relative calm that preceded the Boston Tea Party, Connecticut passed an act to create a “Public Gaol or Work-House” and to mandate long-term hard labor as the sole penalty for six property crimes. Act of Oct. 1773, 1773-1783 Conn. Acts & Laws 385-89. The revolution followed, however, and during this period the Connecticut prison lodged mainly political prisoners. At the end of the revolutionary war, in 1782, the prison was abandoned following a destructive fire, and was not rebuilt as a state prison for criminals until 1790. R. PHELPS, NEWGATE OF CONNECTICUT 5-9 (2d. ed. Hartford 1844); N. PHELPS, A HISTORY OF THE COPPER MINES AND NEWGATE PRISON 11-18 (Hartford 1845).

others from committing the like crimes would be better answered than it is at present."³³⁹ That the proposal emerged in the midst of a severe crime wave, stretching over 1764 and 1765, further suggests its connection to social desperation.³⁴⁰

Given such a connection, and the prestige of the politicians appointed to deal with the matter, the sudden collapse of this first call for criminal incarceration seems especially puzzling. Nowhere does the record indicate Home Government action to head off the proposal — on the contrary, Lieutenant-Governor Hutchinson's service on the committee hints at the blessing of higher imperial officials.³⁴¹ The timing, however, is once again suggestive, for the committee's labors in the spring of 1765 were quickly overshadowed by the Stamp Act crisis. Soon, James Otis became immersed in leading the fight against Parliamentary taxation of the American colonies; for Thomas Hutchinson, a suspected supporter of the tax, the problem of protecting the people from crime became subordinate to the problem of protecting his person from the crimes of the people.³⁴² Under the circumstances, it may not be so surprising that the proposal for incarceration fell by the wayside. If this hypothesis is correct, then the temporal proximity between independence and the penitentiary must be deemed deceptive: Far from precipitating its rise, the American Revolution may instead have delayed it for a generation.³⁴³

V. EPILOGUE: TO 1830

A. *The Legislative Transition*

The legislation establishing the Castle Island prison in 1785 did not spell the end of the old public sanctions in Massachusetts. The drafters ventured only a tentative step in that direction. Although the old punishments seemed to be failing, the alternative of large scale incarceration — whatever its promise — remained untested. The experimental zeal of the new Commonwealth government did not extend to an immediate and total break with the colonial past.

339. See note 336 *supra*.

340. Boston Gazette, Sept. 27, 1764, at 3; *id.*, Nov. 12, 1764, at 3; Grand Jury Charge by Hutchinson, C.J., Super. Ct., Aug. 1766, in J. QUINCY, *supra* note 43, at 223.

341. On the other hand, the combination of Thomas Hutchinson and James Otis did not bode well for the smooth operation of the committee. On the gulf of animosity that separated these two politicians, see E. MORGAN & H. MORGAN, *THE STAMP ACT CRISIS* 266 (rev. ed. 1962).

342. See generally *id.*

343. Perversely, the Revolution may have done more to stimulate the rise of criminal incarceration in England than it did in America. See note 429 *infra* and accompanying text. See also note 338 *supra*.

Twenty-four categories of crimes were made subject to hard labor on Castle Island,³⁴⁴ yet, with two minor exceptions,³⁴⁵ the sanction constituted an alternative to, not a replacement for, the old public punishments. The new statutes simply added hard labor to the judge's list of options. Even where hard labor replaced capital punishment, the public sanctions were resurrected as alternatives. Indeed, many of the new provisions significantly widened the latitude of judges to choose among *traditional* punishments. Whereas arson against a building other than a dwelling had previously been punishable by whipping only, the revised statute of 1785, with typical inclusiveness, authorized sentences to hard labor "for life or years," the pillory, whipping, imprisonment in the gaol (again, any term), binding to good behavior, fining, "or to any or all of these punishments, according to the nature and aggravation of the offence."³⁴⁶

What can one make of such a statute? Is it a sign of legislative uncertainty, born of social upheaval? Or does it represent a recognition that, in a time of change, the judicial system would benefit from a maximum of leeway? Whatever the answer, judges retained their wide discretion to choose among sanctions for some twenty years — and they hardly availed themselves of every opportunity to impose hard labor.³⁴⁷ The Massachusetts legal system eased its way from pillory to penitentiary.³⁴⁸

344. These were: attempted robbery, fraud, buying or receiving a convict's clothing, assisting or harboring an escapee, accessory after the fact to rape, sodomy, robbery, arson, or burglary, accessory before or after the fact to larceny, three grades of forgery, three crimes against the Massachusetts Bank, three grades of arson, and five grades of larceny. Act of Mar. 11, 1785, ch. 58, 1784-1785 Mass. Acts 157-58; Act of Mar. 9, 1785, ch. 52, *id.* at 135; Act of Mar. 14, 1785, ch. 63, *id.* at 167; Act of Mar. 15, 1785, ch. 65, *id.* at 169-70; Act of Mar. 15, 1785, ch. 66, *id.* at 171-74; Act of Nov. 1, 1785, ch. 21, *id.* at 473-74.

345. Prescriptions of hard labor for buying or receiving a convict's clothing, and for assisting or harboring an escapee, were alternative to a fine only. *Id.* at 167.

346. *Id.* at 157.

347. See, e.g., *Commonwealth v. Ewers*, Sup. Jud. Ct., Aug., 1785 ff. 83-84 (two indictments); *Commonwealth v. Cleaves*, Sup. Jud. Ct., Nov. 1785, ff. 324-26 (two indictments); *Commonwealth v. Tack*, Sup. Jud. Ct., May 1785, f. 222. (Suffolk County Court House).

348. The legislative treatment of theft is an interesting side-light to this transitional phase. Under the provincial statute in force since 1736, common thieves had been subject to a session on the gallows with a rope around the neck, a whipping, and treble damages payable to the aggrieved. 2 PROV. LAWS, *supra* note 12, at 838. (The gallows provision was rarely enforced, see, e.g., *King v. Allen*, Super. Ct., June 1752, ff. 64-65 (Suffolk County Court House)). The treble damages award, ostensibly a form of civil compensation, had also served as a tacit mechanism of rehabilitation when translated into a term of service. See notes 244-48 *supra* and accompanying text. The larceny statute of 1785 reflected the decline of the convict labor market not by abolishing restitution outright — that decision was not taken until 1805 — but by making it *interchangeable* with hard labor on Castle Island. There remained, apparently, a hope that some offenders could be disposed of (or were solvent): the law still provided that all offenders were to make treble restitution in either specie or service. Only if the aggrieved

It arrived there in due course. Over its fourteen-year history, the

proved unable to sell the offender within thirty days was the offender to perform up to three years hard labor "without sentencing him to make satisfaction."

(The quoted explanatory phrase appears in the manuscript draft of the bill, but was omitted (by mistake?) from the printed version, though no deletion was authorized in the bill of amendments. Compare Act of Mar. 15, 1785, ch. 66, 1784-1785 *id.* at 171, with 1785 Acts, ch. 66 (passed) (unpublished manuscript, Mass. Archives). The quoted phrase is in fact critical to the interpretation of the act (*i.e.*, the offender is not "sold" to the state, nor do the profits from his labor adhere to the aggrieved), without which it would have stood ambiguous; in any event, it was without question interpreted accordingly.)

The structure of this act invites notice for a number of reasons. For one thing, it underscores once again the rehabilitative intentions of the drafters. Had effective restitution lain uppermost in their minds, the drafters would have consigned the proceeds of convict labor under state auspices to the aggrieved, or simply required the aggrieved himself to assume custody. As drafted, if the aggrieved failed to sell the convict within thirty days, he forfeited his rights to monetary recovery entirely. If, on the other hand, the drafters had aimed for more effective deterrence, the obvious move would have been to pile a sentence to hard labor on top of the restitution requirement. By correlating the two sentences, the drafters ensured that the offender would perform a set term of labor, one way or the other. Labor was the common denominator, esteemed, one must conclude, for its rehabilitative powers first of all.

If the larceny statute is notable for its ideological underpinnings, it is equally striking for its anthropological implications. Here we have a statute that mandates a criminal penalty plus a restitutionary payment to the victim — but which provided that if restitution proves infeasible, a further *criminal* penalty (hard labor) will be tacked on in its stead. The result is a thorough confounding of the concepts of criminal and civil liability, for all appearances a prime specimen of *rusticum judicium* sure to warm the heart of any remaining exponents of the "frontier theory" of American law. (The "frontier theory" holds that early American law was rude and untechnical due to the general scarcity of trained lawyers in the colonies. The classic statement of the theory appears in Reinsch, *The English Common Law in the Early American Colonies* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367-415 (1907-1909). The theory is generally disavowed today, and was the target of one of Professor Goebel's better known scoffs: "that *pons asinorum* of American historiography. . ." Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 420 (1931).)

Did the drafters of 1785 actually lack the sophistication necessary to distinguish civil from criminal liability? Of course not. As early as 1662, Massachusetts legislation had, for example, drawn a legal line between prisoners for debt (or "any persons . . . Committed to Prison in any Civil Action") and gaol inmates who faced criminal charges, by prescribing special provisions for the former group. COL. LAWS, *supra* note 13, § 2, at 6-7.

The statute of 1785 therefore indicates something different: a cheerful willingness among early American legislators to disregard the finer points of legal technicality, when such technicality obstructed, or was simply irrelevant to, American needs. There may be, then, a touch of rightness in the frontier theory, after all — a reformulation I should like to christen the "missing link" theory of American law.

(One critic of the frontier theory has argued that if a period of untechnical law had preceded the common law in America, then the two must have been separated by a conscious point of "reception" — but no such link can be found. See Chafee, *Colonial Courts and the Common Law*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 74-76 (D. Flaherty ed. 1969). But if early law was, in some instances, untechnical *by design*, no subsequent intellectual reception would have been necessary; for another possible example of the phenomenon, see Konig, *Community Custom and the Common Law: Social Change and Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL HIST. 137 (1974).)

Whatever we choose to call it, the statute of 1785 left the status of the treble damage award quite ambiguous. The issue reached the Supreme Judicial Court in *Commonwealth v. Andrews*, a case whose ingenious argumentation must be abbreviated here. *Commonwealth v. Andrews*, 2 Mass. 13 (1806). In *Andrews*, the accused was charged with receiving stolen goods. Under the larceny statute of 1785, receivers were liable to the "like punishment" as the thief himself. Act of Mar. 15, 1785, ch. 66, 1784-1785 Mass. Acts 173. So the issue was raised squarely: did "like punishment" cover only the whipping, or did it include treble damages as well? The attorney general, taking the latter position, argued *inter alia* that the treble damage

Castle Island prison entertained an average of fifty prisoners at a time, "criminals of almost every species, and from every part of the Commonwealth."³⁴⁹ By 1797, the sanction of hard labor had become sufficiently familiar to enter the vocabulary of banal humor.³⁵⁰ But it had also won the confidence of persons in high places. "I believe it will not be doubted," Governor Sumner lectured the legislature, "that the Commonwealth, since the Institution of that mode of punishment, has been abundantly more free from high-handed offences, than at any former period."³⁵¹ The question of the sanction's future came to the fore in 1798, when the federal government prevailed upon the state to convert Castle Island into a federal military fortification. By allocating funds to build a far larger prison at Charlestown from the ground up,³⁵² Massachusetts signalled a quantum leap in its commitment to the sanction of incarceration.³⁵³

The criminal statutes of the Commonwealth were revised for the second time in twenty years to reflect this new commitment. The legislature appointed Nathan Dane and Justice Samuel Sewall to draft a code "applicable . . . to the spirit and nature of the proposed es-

award should be equated with its alternative: confinement to hard labor. "Will it be said that *this* is no part of the punishment?" he demanded. The defense counsel, arguing for the contrary construction, denoted the hard labor contingency *inter alia* "an inducement to the defendant [thief] to make the satisfaction." The Court, however, held for the state: restitution had been transformed into a criminal sanction. 2 Mass. 13, 27, 28 (emphasis added). *See* Smith v. Drew, 5 Mass. 513 (1809). (Both opinions imply that the restitution requirement would have been categorized differently before the contingency provision of the 1785 act was added.) For an early case in this line, in accord with the later holdings, see *Commonwealth v. Cleaves*, Sup. Jud. Ct., Nov. 1785, ff. 324-26 (2 indictments).

This issue was, in any event, mooted in 1805, when the provision for treble damages was eliminated from the code. Act of Mar. 16, 1805, ch. 143, 1804-1805 Mass. Acts. 240.

349. Governor's Message, Nov. 5, 1785, ch. 39, 1784-1785 Mass. Acts 755. *See* note 191 *supra*.

350. "The punishment of the man of *ninety-three* for a *rape*, it seems, is imprisonment for two years, and to be kept at *hard labor*! This proceeds upon a very nice calculation, a *rape* at *ninety-three* equal to *two years hard labor*!" Massachusetts Mercury, Mar. 28, 1797, reprinted in *Trivia*, 3 ser. 36 WM. & MARY Q. 460 (1979) (emphasis in original).

351. Governor's Message, Jan. 11, 1799, 1798-1799 Mass. Acts. 636. Castle Island also earned an international reputation. *See* S. STEARNS, THE AMERICAN ORACLE 258-59 (London 1791). Massachusetts' position in the vanguard of the penitentiary movement in America has often been overlooked. In fact, Castle Island was the first *operational* experiment in criminal incarceration in post-Revolutionary America, preceding both Pennsylvania (1786) and New York (1796). *Cf.* note 338 *supra*.

352. Castle Island had likely been selected as the first site for criminal incarceration because its pre-existing facilities minimized the size of the requisite capital investment. Castle Island had received special prisoners on occasion since colonial times. E. POWERS, *supra* note 9, at 220-21. The initial flow of inmates was accommodated in the existing barracks, although an additional "gaol" was soon constructed on the Island. Governor's Message, Nov. 5, 1785, ch. 39, 1784-1785 Mass. Acts 756; Governor's Message, Nov. 7, 1786, ch. 78, 1786-1787 Mass. Acts 950.

353. *See* notes 65-67 *supra*, and accompanying text.

tablishment.”³⁵⁴ Adopted to coincide with the opening of the State Prison in 1805, the new code finally abandoned the public sanctions that had been used in Massachusetts for almost two centuries. From that point on, all crimes were punishable by fine, incarceration, or the death penalty, in the vein of all modern American statutory schemes.³⁵⁵

There remains one curiosity in this legislative transition: the lag in efforts to formalize it. A catch-all statute making hard labor the alternative sanction for *every* crime meriting corporal punishment was passed by the House in 1785 but rejected by the Senate.³⁵⁶ This statute did not become law until 1813, years after the corporal punishments had been effectively interred.³⁵⁷ Meanwhile, a law to formally abolish the old punishments was drafted by Dane and Sewall as part of their code of 1805, but it too died in the Senate, even as the rest of their statutes were passed.³⁵⁸ Corporal punishments were not abolished *de jure* until 1826.³⁵⁹ Just what caused the legislators to delay these enactments is difficult to say. It was apparently less jarring to turn the pages of the old laws than to close the book on them entirely.

B. *Patterns of Ideology*

The prison on Castle Island conformed to the workhouse tradition. Congregate hard labor by day and congregate confinement by night set the tone of the facility. But in the years following that prison's inception, the ideological innovations then dawning in England began to infiltrate Massachusetts. Harmonious in 1785, the theory of carceral rehabilitation soon developed divergent strands, and the proponents of each alternative fought for control of the state's prison program.

The new ideological element that caused all the commotion was solitary confinement and the theory of reclamation. Not a whisper of this approach was audible in 1785; but humanitarian prison litera-

354. Resolve of Feb. 23, 1804, ch. 108, 1802-1803 Mass. Acts & Resolves 906-07. For the duo's report, see Dane & Sewall, *supra* note 100.

355. See 1804-1805 Mass. Acts 172, 179, 202, 209, 240, 504, 517, 522, 546.

356. Senate Document no. 333 (1785) (unpassed) (unpublished manuscript, Mass. Archives).

357. Act of Feb. 27, 1813, ch. 134, 1807-1816 Mass. Acts 427.

358. Senate Document no. 3283 (1805) (unpassed) (unpublished document, Mass. Archives); Dane & Sewall, *supra* note 100.

359. Act of Feb. 28, 1826, ch. 105, 1826-1828 Mass. Acts 174.

ture rapidly became available in Massachusetts and elsewhere.³⁶⁰ In fact, another state's effort may have served to focus attention on the new ideology. In 1790, the Pennsylvania legislature ordered the construction of an inner block of solitary cells within the Philadelphia prison at Walnut Street. Whereas most prisoners suffered hard labor, "the more hardened and atrocious offenders" were thereafter to undergo a solitary regime.³⁶¹ Caleb Lowmes, a Pennsylvania reformer, soon published a pamphlet extolling the Walnut Street facility and its system of solitary confinement. When in 1799 the Massachusetts legislature began to plan a replacement for Castle Island, it ordered three hundred copies of Lowmes' pamphlet.³⁶²

Still, the legislature proceeded cautiously. The committee appointed to study the Walnut Street plan was impressed,³⁶³ but the representatives decided only that the Massachusetts Prison should "be constructed with interior cells and apartments [,] that the Legislature may adopt if they see fit, the mode of confinement in solitary apartments without any alteration in said buildings."³⁶⁴ An inroad had nonetheless been made, and when Dane and Sewall drafted the new code in 1805, they provided for a combination of the two schemes. Upon conviction under any criminal statute mandating incarceration in the State Prison, the judge was to set two successive terms: an initial term of solitary confinement, and a subsequent term of hard labor, each to be served within the Charlestown facility.³⁶⁵ This dual sentencing structure may well have been fashioned to satisfy both of the emerging ideological camps.³⁶⁶

360. *See, e.g.*, the Howard extracts in 1 MASS. MAGAZINE 639-40 (1789), *continued in 2 id.* at 476-78, 685-88 (1790); Tudor, *supra* note 80, at 440.

361. H. BARNES, *supra* note 325, at 118-20.

362. Lowmes, *supra* note 178; Senate Document no. 2445 (1799) (unpassed). This narrative corrects E. POWERS, *supra* note 9, at 242. Lowmes was a member of the Board of Inspectors of the Walnut Street prison. His pamphlet is by and large descriptive and does not contain an elaboration of the underlying ideology.

363. Report Respecting Convicts, *supra* note 30.

364. Resolve of Feb. 19, 1799, ch. 135, 1798-1799 Mass. Acts 273.

365. *See* note 355 *supra*.

366. No surviving legislative history speaks to this matter, nor does the Dane-Sewall report to the legislature offer any sort of explanation for the extraordinary sentencing structure contained in the drafters' bills. Oddly, the Dane-Sewall report never once mentions solitary confinement, only "imprisonment and confinement to hard labor" (imprisonment in this context almost certainly referred to imprisonment in local gaols mandated for some minor offenses, not to solitary confinement. *See, e.g.*, 1804-1805 Mass. Acts 202), Dane & Sewall, *supra* note 100. But years later, Dane complained that "When Judge Sewall & myself drew the bills enacted for governing the State prison[,] we fully expected that adequate means would be provided for giving full effect to solitary confinement." Letter from Nathan Dane to Josiah Quincy (May 6, 1822) in Quincy Papers, reel 40 (unpublished document, Mass. Historical Society).

If this was a compromise, it did not endure. By the beginning of the 1820s, different reformist circles vied for influence on the Prison's internal management. At one extreme stood the Board of Directors of the Massachusetts State Prison. Thoroughgoing advocates of solitary confinement, the Board members insisted that the only way to reform a convict was "to turn the mind in upon itself [and] awaken remorse" — in short, to bring about a "change of heart."³⁶⁷ From the Directors' perspective, hard labor had no therapeutic value. On the contrary, labor obstructed the process of arousing remorse, by offering "relief . . . [from] the painful monotony of self-contemplation."³⁶⁸ Hard labor did, however, generate revenue to help support the facility. On this basis, the Directors concluded that "economy and reformation are adverse objects in the establishment of the Massachusetts State Prison. They are antagonistic principles . . . [S]training the one relaxes the other." The problem was to bring the two into some reasonable balance, so that neither was altogether sacrificed.³⁶⁹

At the other extreme stood Gamaliel Bradford, warden of the State Prison from 1812 to 1824. His was the voice of the rehabilitative tradition, under which hard labor remained the be-all and end-all of the rehabilitative process: "Industry is the nurse of virtue, and the enemy of vice [T]o overcome habits of idleness, and beget a custom and taste for labour, would be the most acceptable offering which could be laid on the altars of religion and morality."³⁷⁰ From this perspective, both economy *and* reformation flowed from the same source and were not antagonistic principles at all.³⁷¹

Though well-acquainted with the theory of solitary confinement, Bradford remained decidedly skeptical of its rehabilitative powers. This skepticism emanated, perhaps, from the lingering influence of Puritan axioms.³⁷² One of the most essential of these axioms was

367. *Remarks*, *supra* note 80, at 4, 21-22.

368. *Id.* at 4-5.

369. *Id.* at 4, 9-10, 27. For other expositions of this philosophy, see J. QUINCY, *supra* note 318, at 20-26; 1817-1822 Mass. Legislative Documents no. 2, at 3 (1818) (State Library Annex); Austin, *supra* note 330, at 249-50, 259.

370. G. BRADFORD, *supra* note 1, at 13, 20, 24, 45. See the report of a committee investigating alternative American prison systems, 1817-1822 Mass. Legislative Documents no. 1, at 8-13 (1817).

371. G. BRADFORD, *supra* note 1, at 19, 24, 38-39; 1817-1822 Mass. Legislative Documents no. 1, at 17-18 (1817) (State Library Annex); 3 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 14-15 (1828).

372. Edmund S. Morgan has argued that the revolutionary generation perpetuated, and often pursued policies directly shaped by, Puritan values. See Morgan, *The Puritan Ethic and the American Revolution*, 3 ser. 24 WM. & MARY Q. 3 (1967) (reprinted in E. MORGAN, *supra* note 331, at 88).

that men must live within their sinful world, and not seek to escape it.³⁷³ Bradford echoed that

Man was made for society, and although some men, for pious purposes, have withdrawn themselves from the world — and to avoid the corruptions which abound in it, have shut themselves up in monasteries or caves, yet it is not allowed that the cause of religion and virtue is promoted by such retirement [A] long confinement in total solitude, might destroy [the convict's] social feelings, and produce a sort of stupid apathy which would render him very unfit for an useful or happy member of any society.³⁷⁴

In addition, Calvinist perceptions of human frailty suggested that attempts to influence fundamental moral values held little promise of success.³⁷⁵ Finally, a term of idle solitary confinement ran counter to the work ethic.³⁷⁶ Bradford concluded that, because of its relative severity, solitary confinement could play a useful role within the prison — but only as a deterrent against internal offenses, crimes committed by persons already serving terms of hard labor.³⁷⁷

In short, both camps were prepared to accept a combination of solitary confinement *and* hard labor — but for different reasons and with different intentions. For advocates of rehabilitation, hard labor meant therapy as well as economy, and solitary confinement served

373. This theme is treated extensively in E. MORGAN, *supra* note 9.

374. G. BRADFORD, *supra* note 1, at 19. Cf. note 149 *supra* and accompanying text. But Bradford's philosophical premise was no longer shared universally in Massachusetts. See, e.g., *Ode to Solitude*, 4 MASS. MAGAZINE 517 (1792).

375. "[W]hat faith may be placed in resolutions (let them, when made, be perfectly sincere,) formed in the bosom of solitude, against the temptations of the world when that solitude is at an end? It requires but a slight knowledge of the human heart to answer this question. St. Paul has answered it — 'when I would do good evil is present with me.'" G. BRADFORD, *supra* note 1, at 19. See G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 331, at 90. The early Puritans *had* sought to enlighten the consciences of offenders, but only those of community members whose histories and characters were well known, and whose subsequent progress could be carefully scrutinized. See notes 228-32 *supra* and accompanying text.

376. A term of reformatory solitary confinement would "leave the men enfeebled, and unable to work, when they left the Prison; and as ignorant of any useful business, as when they were committed." In contrast to the gloomy silence of a solitary prison, institutions of labor reverberated with "the busy hum of industry." 2 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 58, 66 (1827); G. BRADFORD, *supra* note 1, at 19; REPORT [ON THE STATE PRISON] 12-13 (May 1830) (Harvard Law Library). See note 399 *infra* and accompanying text. Cf. G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 331, at 57, 84 (mirroring English humanitarian theory, note 153 *supra* and accompanying text).

377. G. BRADFORD, *supra* note 1, at 47-48. See 1817-1822 Mass. Legislative Documents no. 1, at 20 (1817); *id.* no. 2, at 3 (1818) (State Library Annex); G. BRADFORD, *supra* note 67, at 36; Act of Mar. 14, 1806, ch. 113, 1804-1805 Mass. Acts 549-50. The idea of using solitary confinement as a deterrent may have originated with John Howard, see J. HOWARD, *supra* note 3, at 40, and it has continued to be used in that capacity to the present day. Some advocates of rehabilitation did allow that the "reflection" and "remorse" induced by solitude could have a positive impact, but they did not stress it, see G. BRADFORD, *supra* note 1, at 19; 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 8 (1826); Governor's Message, Jan. 2, 1828, 1824-1828 Mass. Resolves 635; Governor's Message, June 2, 1828, 1828-1831 Mass. Resolves 24.

as a deterrent; the object of the exercise was to break bad habits. For advocates of reclamation, hard labor meant economy only, and solitary confinement served as the therapy; the object of the exercise was to reach the offender's heart. This conceptual disagreement ultimately caused trouble within the prison administration. The Directors made "repeated representations" to the legislature for funds to extend the use of solitary confinement; the Warden favored other priorities.³⁷⁸ An overlap in the administrative responsibilities of the contending factions further aggravated matters.³⁷⁹ By 1824, the two sides were not on speaking terms, and the Directors sought to have the Warden's office abolished.³⁸⁰

Even as rival advocates locked horns over policy, they also locked arms in a rear-guard action against die-hard opponents of the penitentiary system. Like Castle Island, the State Prison at Charlestown had been devoted from the beginning "to the purposes of safe confinement and penitentiary reformation,"³⁸¹ and like Castle Island, the State Prison had therefore been subject from the beginning to extensive regulations and oversight.³⁸² Had these been the only

378. Introduction of extended solitary confinement would have required structural changes, for the solitary cells proved unfit for long terms of confinement. As a consequence, judges generally restricted the solitary confinement stage of prison sentences to ten days or less. J. QUINCY, *supra* note 318, at 20-22, 25; *Remarks, supra* note 80, at 20-21; 1817-1822 Mass. Legislative Documents no. 2, at 3 (1818); *id.* no. 1, at 20 (1817) (State Library Annex). Bradford opposed construction of additional cells for full time solitary confinement, though he favored construction of the smaller cells necessary for separate confinement at night. Significantly, Bradford's first priority was greater space for the prison workshops. G. BRADFORD, *supra* note 1, at 49-51; Letter from G. Bradford to W. Roscoe (Sept. 10, 1823) in W. 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 52-53 (Liverpool, n.d.) [c.1827]; Communication from Gamaliel Bradford to the Legislature, Jan. 27, 1824, Senate Document no. 7029 (1824) (unpassed) (unpublished manuscript, Mass. Archives).

379. Both parties complained of this problem. G. BRADFORD, *supra* note 1, at 33-34, 49; *Remarks, supra* note 80, at 18-19; see 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 29-31 (1826); 3 *id.* 37-39 (1828).

380. See G. HAYNES, *supra* note 321, at 45-46; *Remarks, supra* note 80, at 18-19 (claiming to be on good terms with Bradford, personally). Haynes speculates that Bradford's state of "indisposition" may have caused the conflict; he had sickened, and died in 1824.

381. Resolve of June 23, 1802, ch. 54, 1802-1803 Mass. Acts 380-81.

382. Even before the State Prison was constructed, the subject of its proposed internal administration (or "prison discipline") had been recognized as "intimately connected with the peace & welfare of the Public." Report Respecting Convicts, *supra* note 30. For subsequent reaffirmations, see Answer of the Senate, Jan. 1807, Jan. 1807 Mass. Resolves 6; Answer of the Senate, June 15, 1811, May 1811 Mass. Resolves 193; Governor's Message, May 31, 1817, May 1817 Mass. Resolves 397-98; Answer of the House, n.d., *id.* at 404. The object was expressly to avoid the shortcomings of the local gaols, Answer of the House, Jan. 18, 1804, 1802-1803 Mass. Acts 875; Governor's Message, Jan. 13, 1804, *id.* at 980-81. Thus, plans for the structure of the State Prison were carefully reviewed for their efficacy, and recommendations put forward for frequent inspection and a code of internal bylaws. *Id.* at 875, 980-81; note 67 *supra*. These recommendations were followed: A physician and chaplain were appointed to the State Prison staff, and a Board of Directors was established to furnish the facility, appoint its officers, write

similarities between the two institutions, all might have been smooth sailing for the early advocates. But unfortunately, the State Prison also shared a third characteristic of Castle Island: for all the government's interest, it was an administrative fiasco.

A generation after the State Prison opened, Governor Levi Lincoln looked back and demanded, "Whence it arises, that disappointment in results so often follows the best promises of success, in the affairs of that establishment."³⁸³ The disappointment had not been long in coming. From at least 1809, the prison had been plagued by inmate violence, escapes, and expenses far in excess of earnings. In 1813, the inmates contrived to burn their workshops, and three years later they staged a full-scale insurrection that resulted in one death. The frequency of recommitments, moreover, cast doubt on the facility's rehabilitative capability.³⁸⁴

By 1818, a popular reaction had set in. Rothman contends that the early administrative failure of American penitentiaries helped to draw attention away from statutory schemes of deterrence and toward an emerging ideal of rehabilitation.³⁸⁵ In Massachusetts, at least, precisely the opposite occurred: The legislators considered abandoning "the beautiful and brilliant theory of reclaiming the unprincipled," as "vain and illusory," and substituting a policy intended "to deter and restrain the atrocity of offenders."³⁸⁶ Many of the critics favored an increase in both the length of sentences and in the harshness of the prison regime. A few refugees from the seven-

the bylaws ("not repugnant to the laws of the Commonwealth"), and inspect the Prison monthly. In addition, the Governor, Council, and Supreme Judicial Court justices were all to make an annual inspection of the Prison. Act of June 15, 1805, ch. 23, 1804-1805 Mass. Acts 427; Act of Mar. 14, 1806, ch. 113, 1804-1805 Mass. Acts 546; G. Haynes, *supra* note 321, at 25-27. Sketchy at first, the bylaws of the State Prison were ultimately elaborated in detail and periodically updated. *Id.* at 17; G. BRADFORD, *supra* note 67, at 27-37; *Remarks*, *supra* note 80, at 44-62; LAWS OF THE COMMONWEALTH FOR THE GOVERNMENT OF THE STATE PRISON (Boston 1839).

383. Governor's Message, Jan. 2, 1828, 1824-1828 Mass. Resolves 632. *See, e.g.*, 1817-1822 Mass. Legislative Documents no. 2, at 3 (1818) (State Library Annex).

384. G. HAYNES, *supra* note 321, at 20-38; Governor's Message, Jan. 25, 1811, Jan. 1811 Mass. Resolves 66; Governor's Message, June 7, 1811, May 1811 Mass. Resolves 189; Answer of the Senate, June 15, 1811, *id.* at 193; Governor's Message, Jan. 8, 1812, Jan. 1812 Mass. Resolves 282; 1817-1822 Mass. Legislative Documents no. 1, at 4 (1817) (State Library Annex); G. BRADFORD, *supra* note 67, at 9-12; REPORT [ON THE STATE PRISON] 1 (1827) (Harvard Law Library). In 1825, it was discovered that counterfeiters had been carrying on their trade *within* the State Prison's walls. 2 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 11-12, 21-23 (1827). In the area of prison hygiene, however, the State Prison did achieve a record of sustained success — prison mortality was consistently low. *See, e.g.*, May 1811 Mass. Resolves 189; 2 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 35 (1827).

385. D. ROTHMAN, *supra* note 50, at 62.

386. Answer of the Senate, n.d., May 1818 Mass. Resolves 587; Governor's Message, June 2, 1818, *id.* at 578-79; 1817-1822 Mass. Legislative Documents no. 2, at 2 (1818) (State Library Annex).

teenth century even advocated a return to the ancient public punishments, scrapping criminal incarceration entirely.³⁸⁷

This popular reaction against the prison brought the rival advocates together. All advocates in unison defended the penitentiary's potential for rehabilitation by emphasizing the number of inmates who never returned, as opposed to the recommitment rate.³⁸⁸ All advocates in unison underscored the penitentiary's value as a means of incapacitation.³⁸⁹ And all advocates, though not quite in unison, disputed the adequacy of a system of criminal law that relied entirely on deterrence, as some legislators had proposed.³⁹⁰

Prison advocates in Massachusetts also wrestled with the old problem of reconciling rehabilitation and deterrence. A charge repeatedly leveled by armchair critics of the State Prison ("men who sit quietly over a fire or round a luxurious table on a cold winter day") was that the facility lacked sufficient hardship to terrify prospective offenders. The advocates responded by detailing the dreadful severity of prison life and recounting the long record of escape attempts. What few amenities the prison offered were essential to the rehabilitative process, the advocates explained; any further harshness would tip the precarious balance.³⁹¹

All of the advocates also defended the fiscal responsibility of the State Prison, in spite of its persistent deficits. Like the English humanitarians, American advocates portrayed the penitentiary as a philanthropic enterprise. The costs represented "a beneficent gratu-

387. *Id.* no. 1, at 8, 15 (1817) (State Library Annex); *id.* no. 2, at 1-3 (1818); REPORT [ON THE STATE PRISON] 2-3 (1822) (Harvard Law Library); REPORT [ON THE STATE PRISON] 1 (1827); Tudor, *supra* note 80, at 423-25; Austin, *supra* note 330, at 245.

388. G. BRADFORD, *supra* note 1, at 17-18; *Remarks*, *supra* note 80, at 22.

389. G. BRADFORD, *supra* note 1, at 11-12, 15-16; G. BRADFORD, *supra* note 67, at 15; *Remarks*, *supra* note 80, at 3-4.

390. Whereas Bradford demonstrated the inadequacy of deterrence on the basis of sensational psychology, the Directors did so on the basis of religious notions of the "lost soul." Compare G. BRADFORD, *supra* note 1, at 15-16, and REPORT [ON THE STATE PRISON] 13-14 (May 1830) (Harvard Law Library), with *Remarks*, *supra* note 80, at 25-26.

391. *Remarks*, *supra* note 80, at 22-25 (quote at 24); G. BRADFORD, *supra* note 1, at 14-15, 31-33; REPORT [ON THE STATE PRISON] 8-9 (1822); REPORT [ON THE STATE PRISON] 11-12 (May 1830) (Harvard Law Library); Tudor, *supra* note 80, at 434-35. Like English reformers, Bradford believed it therapeutically necessary for each prisoner to be "made to understand, that this punishment has been inflicted from necessity, and with a view to his own improvement; that he has brought it upon himself; that the government can have no pleasure in chastisement, and that it holds out encouragement, and rewards for good behaviour, for the very purpose of avoiding the painful necessity of punishing." G. BRADFORD, *supra* note 1, at 47. Cf. note 155 *supra* and accompanying text. In its quest to discourage "revengeful" attitudes, however, the State Prison was not always successful. See G. BRADFORD, *supra* note 67, at 10; Report [on the State Prison] 7 (May 1830). The criticism that incarceration lacked sufficient severity was so outlandish as to cause some of the usually patient advocates to lose their tempers: "Another error which it might be presumed a moment's reflection would destroy, has been propagated with thoughtless alacrity. . . ." REPORT [ON THE STATE PRISON] 8 (1822).

ity . . . which humanity and heaven required," and were alleged to be fewer per capita than those of other social projects borne by the state.³⁹² To satisfy persons unmoved by such appeals, the advocates also insisted that what appeared to be red ink on the State Prison's balance sheet was in reality black. As Warden Bradford explained, a system of incarceration and hard labor ensured that each offender at least "produces something." Without it he produced nothing, "and probably would have been twice as much damage to society as the amount of all the expenses of the Prison establishment." Consequently, *any* amount that he earned "ought to be considered as clear gain to the State."³⁹³ But even as advocates argued the sufficiency of prison labor, they were whipsawed by the converse accusation that convicts "work too much," undercutting the market for goods produced by free labor. So, from the other corner of their mouths, the advocates depicted the economic impact of prison production as minimal.³⁹⁴

The problem of maintaining the rehabilitative integrity of the penitentiary system could not be as easily dismissed. Critics charged that the State Prison had become "a sink of corruption," a collection point where novices in crime learned the state of the art from older, more accomplished, offenders. Contact between prisoners, so the argument ran, harmed inmates morally more than the rehabilitative therapy helped them.³⁹⁵ In fact, as early as 1799, a legislative com-

392. *Remarks*, *supra* note 80, at 9-11; J. QUINCY, *supra* note 318, at 12, 23-26; G. BRADFORD, *supra* note 67, at 15; Austin, *supra* note 330, at 250-51, 257, 259.

393. G. BRADFORD, *supra* note 1, at 12-13, 16-17; *Remarks*, *supra* note 80, at 3; Austin, *supra* note 330, at 252, 259. Cf. 1817-1822 Mass. Legislative Documents no. 1 at 7, 15 (1817) (State Library Annex). William Tudor spiced the argument with a dash of ridicule:

To that class of economists, and unfortunately they are not few in number, who are apt to look at this branch of legislation exclusively in reference to expense, and to calculate every thing only in dollars and cents, it may be suggested, that the hanging of one culprit costs the community in the loss of labor of the thousands who flock to behold it, a thousand times as much as it would to keep him in prison a century.

Tudor, *supra* note 80, at 431-434.

394. *Remarks*, *supra* note 80, at 13, 26-27; G. BRADFORD, *supra* note 1, at 45; REPORT [ON THE STATE PRISON] 13-14 (1822) (Harvard Law Library). This complaint was also heard in England. Henriques, *supra* note 165, at 67.

395. Prisoner association was also believed to facilitate collusive disruptions and escape attempts. See 1817-1822 Mass. Legislative Documents no. 1, at 7 (1817) (State Library Annex); 2 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 58 (1827); Governor's Message, Jan. 9, 1822, Jan. 1822 Mass. Resolves 392-97; Governor's Message, Jan. 4, 1826, 1824-1828 Mass. Resolves 252; Governor's Message, Jan. 6, 1830, 1828-1831 Mass. Resolves 223-24. See generally J. QUINCY, *supra* note 318, at 20, 26; Governor's Message, Jan. 6, 1830, 1828-1830 Mass. Resolves 223-34; Letter from N. Dane to J. Quincy, *supra* note 366; *Remarks*, *supra* note 80, at 4-5, 8; G. BRADFORD, *supra* note 1, at 16, 29-30; 1817-1822 Mass. Legislative Documents no. 1, at 2-4, 6-8 and *passim*. (esp. 7) (1817); REPORT [ON THE STATE PRISON] 6-7 (1822); 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 15-16 (1826); Governor's Message, Jan. 4, 1826, 1824-1828 Mass. Resolves 252; Report Respecting Convicts, *supra* note 30; S. BURROUGHS, *supra*

mittee had identified prisoner congregation as a critical flaw in the Castle Island facility. The planners of the State Prison at Charlestown had been urged to take steps to remedy it. But this warning had fallen upon deaf ears: As finally constructed, the State Prison provided supervised, congregate workshops for hard labor in the daytime and unsupervised, congregate cells for the night hours — cells that eventually lodged anywhere from four to sixteen prisoners each. The block of cells provided for solitary confinement in the first phase of a sentence was far too small to be put to any more extensive use.³⁹⁶

Rather than deny that inmate congregation created a problem, the advocates answered the indictments with a call for prison renovation. Advocates of reclamation seized on the problem as yet another argument in favor of using solitary imprisonment throughout the inmate's confinement.³⁹⁷ Advocates of rehabilitation, on the other hand, were caught in a bind. While they felt compelled to agree (if somewhat less enthusiastically) that congregation could corrupt,³⁹⁸ they still considered it necessary to the process of learning a practical skill. *Solitary* hard labor, as suggested by some advocates of solitary confinement, would not do, for it reduced productivity and tended to "render labor irksome and disgusting" instead of making it "habitual and easy."³⁹⁹ Warden Bradford thus urged continued supervised congregate hard labor by day, but single-celling by night, when supervision was impractical. This was the system prescribed in the English Hard Labor Act and advocated by many Eng-

note 182, at 177-78; 1825-1826 Mass. Legislative Documents no. 40, at 4-7 (1826) (State Library Annex).

396. Report Respecting Convicts, *supra* note 30; Governor's Message, Jan. 4, 1826, 1824-1828 Mass. Resolves 252; 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 38 (1826); Report of 1815, in G. HAYNES, *supra* note 321, at 232.

397. Solitary confinement of course represented the *ne plus ultra* of separation. J. QUINCY, *supra* note 318, at 20-21; *Remarks*, *supra* note 80, at 4-5, 8; Report Respecting Convicts, *supra* note 30.

398. "We have it from the highest authority, that 'evil communications corrupt good manners' [1 Cor. 15:33] — but the communication even between convicts is not always evil — they have been known to pray in their rooms with each other, and to form associations for religious purposes — and it is not altogether unreasonable to suppose, that examples and practices of this kind should have their influence, as well as wicked ones." G. BRADFORD, *supra* note 1, at 18-19; see Tudor, *supra* note 80, at 438.

399. "[A] man works much more cheerfully when in company than when alone; when he sees all around him at work, it encourages him to be active from example, and a sort of feeling of sympathy: he becomes industrious." *Id.* at 18-20. A standard solitary prison industry was treadmill pumping (to grind grain, or, often, mere air), hardly a useful trade. See REPORT [ON THE STATE PRISON] 12-13 (May 1830) (Harvard Law Library); G. DE BEAUMONT & A. DE TROCQUEVILLE, *supra* note 331, at 202; G. HAYNES, *supra* note 321, at 45; *Remarks*, *supra* note 80, at 4-5.

lish rationalists.⁴⁰⁰

The advocates ultimately succeeded in rebuffing the critics' assaults; the State Prison, and the goal of rehabilitation, were not abandoned. Instead, in 1818, the legislature made its first attempts to reform penal reform in Massachusetts.⁴⁰¹ An act passed in that year for "the better regulation of the State Prison" set sterner guidelines for enforcing discipline in the facility and provided for progressively harsher sentences for second and third offenders.⁴⁰² And while the legislature was reluctant to mandate expensive structural changes to separate convicts,⁴⁰³ it did take a less costly step in that direction: henceforth, the prison population was to be split into three classes according to deportment, each class lodged and employed separately from the others.⁴⁰⁴ Another law gave judges discretion to divert offenders sentenced to three years or less to local gaols, to avoid contamination by contact with more hardened State Prison inmates.⁴⁰⁵

Initially, the Massachusetts government felt confident of these reforms. Governor Brooks and the legislators congratulated each other for setting matters right at the State Prison and reacclaimed the principle of carceral rehabilitation as ardently as each had con-

400. G. BRADFORD, *supra* note 1, at 49, 51; Communication from G. Bradford, Jan. 27, 1824, Senate Document no. 7029 (1824) (unpassed) (unpublished document, Mass. Archives); Letter from G. Bradford to W. Roscoe, *supra* note 378, at 53; 1817-1822 Mass. Legislative Documents no. 1 *passim*. (1817) (State Library Annex); note 204 *supra*.

401. The internal reform efforts of the 1820s were uniformly described not as a break with a prior deterrent prison discipline, or a careless prison discipline, but rather as a means of curing and improving a rehabilitative prison discipline implemented "before accurate ideas had been obtained of the wants of such an establishment." *Remarks, supra* note 80, at 20. See REPORT [ON THE STATE PRISON] 8 (1829) (also printed in 1829-1830 Mass Legislative Documents 135 (1829); Governor's Message, Jan. 8, 1833, 1832-1834 Mass. Resolves 280; Governor's Message, Jan. 9, 1822, Jan. 1822 Mass. Resolves 395-97; REPORT [ON THE STATE PRISON] 6 (1822); Answer of the Senate, n.d., May 1819 Mass. Resolves 33; G. BRADFORD, *supra* note 1, at 4-5; 1817-1822 Mass. Legislative Documents no. 1, at 21-23 (1817) (State Library Annex); REPORT [ON THE STATE PRISON] 1-2 (1827) (Harvard Law Library); Governor's Message, Jan. 5, 1831, 1828-1831 Mass. Resolves 451-52.

402. Act of Feb. 23, 1818, ch. 176, 1815-1818 Mass. Acts 602-05; see also REPORT [ON THE STATE PRISON] 18-19 (1831) (Harvard Law Library). For the first time, guards were given explicit authority to use deadly force to compel obedience (a right previously ambiguous). Cf. G. HAYNES, *supra* note 321, at 20-22, 38-39.

403. As a subsequent committee report noted dryly, "The legislature . . . adopted every [proposal] which involved no expenditure, and rejected or postponed every [proposal], that required an appropriation." REPORT [ON THE STATE PRISON] 3 (1822).

404. See note 402 *supra*. On the notion that classification substituted for separate confinement, see G. BRADFORD, *supra* note 1, at 48; 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 15 (1826). This concept, once again, sprang from England. See Henriques, *supra* note 165, at 66-67.

405. Act of Feb. 19, 1819, ch. 123, 1818-1822 Mass. Acts 196. This provision had been strongly pressed for in 1817-1822 Mass. Legislative Documents no. 1 *passim*. (1817) (State Library Annex).

demned it the year before.⁴⁰⁶ But these jubilations proved premature. Escapes and disruptions continued as before, and the closefisted measures to ensure separation of convicts quickly disintegrated.⁴⁰⁷ In 1826, Governor Levi Lincoln reported that the State Prison was at last turning a profit, but added "a melancholy reverse to the picture" — namely, "the system is utterly ineffectual, to purposes of reform or amendment." Structural alterations to accommodate separate confinement were still "imperiously required," and the legislators finally resigned themselves to this expense.⁴⁰⁸

By this time the two competing rehabilitative ideologies had matured into full-fledged institutional systems in other states. In Pennsylvania, the Walnut Street Jail with its experimental block of solitary cells was replaced in 1826 by the Western State Penitentiary, where all prisoners underwent solitary confinement without labor.⁴⁰⁹ In New York, at around the same time, the Auburn Prison thoroughly overhauled its system of discipline. The new Auburn system featured separate confinement at night and congregate hard labor by day (as had been urged in Massachusetts), supplemented by a cluster of disciplinary innovations: a strict rule of silence, orderly marching to and from the cells (which became famous as the "lockstep") and constant oversight by prison authorities while the inmates were at labor.⁴¹⁰ For the advocates of rehabilitation, these administrative

406. Compare May 1819 Mass. Resolves 29-30, 33, with May 1818 Mass. Resolves 578-79, 587.

407. G. HAYNES, *supra* note 321, at 40-46, 131-37; REPORT [ON THE STATE PRISON] 6 (1822) (Harvard Law Library); Governor's Message, Jan. 9, 1822, Jan. 1822 Mass. Resolves 392-95; Governor's Message, Jan. 1, 1823, Jan. 1823 Mass. Resolves 564; Governor's Message, 1824-1828 Mass. Resolves 24; Governor's Message, Jan. 6, 1830, 1828-1831 Mass. Resolves 223-24. The Directors argued that the criteria of the classification scheme had, in any event, been misconceived. See *Remarks*, *supra* note 80, at 20-21. As for the diversion program for low level offenders, its creators had neglected to ensure the serviceability of *local* gaols. The result was another fiasco. See G. BRADFORD, *supra* note 1, at 22-23; J. QUINCY, *supra* note 318, *passim*; REPORT [ON THE STATE PRISON] 3-5 (1822); Austin, *supra* note 330, at 255-59.

408. Governor Lincoln sweetened the pill by shrewdly suggesting that the prison profits accrued up to that time be allocated to the new construction project, that convict labor be used to reduce the project's cost, and that future prison profits be pledged to make up the difference. All of these proposals were followed. Governor's Message, Jan. 31, 1825 ch. 62 1824-1828 Mass. Resolves 105; Governor's Message, Jan. 4, 1826, *id.* 251-254; Governor's Message, Jan. 3 1827, *id.* 447-48; Governor's Message, Jan. 6, 1830, 1828-1831 Mass. Resolves 224-25. A similar request by Governor Brooks, made in 1822 under less promising fiscal circumstances, had gotten nowhere. Governor's Message, Jan. 9, 1822 Mass. Resolves 391-97.

409. In 1829 solitary labor was introduced, and a second, more successful, institution based on the latter program (which came to be known as the Pennsylvania Plan) was opened. H. BARNES, *supra* note 325, at 168.

410. See generally W. LEWIS, *supra* note 138, at 81-110. The Auburn measures were home-grown, not borrowed from abroad. See M. IGNATIEFF, *supra* note 45, at 178. The *ideals*, however, of silence, strict discipline, and constant oversight can all be found in Massachusetts prison regulations long before the Auburn reforms, even if not scrupulously enforced. See Report of 1815 in G. HAYNES, *supra* note 321, at 232-35; Rules and Orders of 1816 in G.

devices fully reconciled the dual imperatives of congregate therapy and inmate separation. Though he labored in a team, each prisoner under the Auburn system of order and silence would nevertheless find himself "surrounded by an invisible wall."⁴¹¹

In 1826, the Massachusetts legislators made the critical decision to renovate the State Prison according to the Auburn model, rather than the solitary model.⁴¹² This decision accorded with Governor Lincoln's own preference,⁴¹³ as well as the counsel of Reverend Louis Dwight, whose influential Prison Discipline Society had been formed in the preceding year.⁴¹⁴ In 1829, the so-called "New Prison" opened, administered under a new code of regulations which ordained the Auburn discipline.⁴¹⁵

The underlying philosophy of the Massachusetts State Prison thus remained decidedly rehabilitative. Relying "on the presumption that habit will have some influence," the prison authorities assigned each convict to "that [prison] occupation . . . for which he seems best qualified, and by which therefore he may be most likely to earn a subsistence after his release." Once his sentence expired, the convict was launched back into the world, prepared to "obtain an honest livelihood with less exertion and risk than a dishonest one [whereby he] may perhaps pay some regard to [his] own interest."⁴¹⁶

BRADFORD, *supra* note 67 at 35-36; Rules and Orders of 1823 in *Remarks*, *supra* note 80, at 53-54, 56-59.

411. W. LEWIS, *supra* note 138, at 90.

412. Act of Feb. 15, 1826, ch. 84, 1825-1828 Mass. Acts 144; Governor's Message, Jan. 3, 1827, 1824-1828 Mass. Resolves 447; REPORT [ON THE STATE PRISON] 1 and *passim*. (1827) (Harvard Law Library).

413. Governor's Message, Jan. 4, 1826, 1824-1828 Mass. Resolves 253-54.

414. The annual reports of the Prison Discipline Society propagandized relentlessly for the Auburn plan. *See, e.g.*, 1 PRISON DISCIPLINE SOCIETY, *supra* note 117, at 57-60 (1826). These reports were widely circulated; the first report (1826) went through four editions in a year and five hundred copies were purchased by the Massachusetts Legislature. In addition, the Society conducted a lobbying campaign, which, so it claimed, was instrumental in securing the renovation legislation. *See* 2 *id.* at 60-61. Among other influences that may have swayed the legislators were the Puritan values already mentioned, *see* notes 372-76 *supra* and accompanying text, and the relative frugality of the income-generating Auburn scheme, *see* W. LEWIS, *supra* note 138, at 109. In addition, while solitary confinement continued to constitute a subject of which "there is great interest excited at the present time," it had recently been tested in New York with disastrous results — a bit of empirical data which the Prison Discipline Society happily trumpeted. *See* 2 PRISON DISCIPLINE SOCIETY, *supra* note 117 (1826); 2 *id.* 61-69 (1827); G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 331, at 41-42, 56; W. LEWIS, *supra* note 138, at 68-70.

415. The "New Prison," later known as the "North Wing" was built within the original Charlestown prison compound. For a description, *see* REPORT [ON THE STATE PRISON] 1-8 (1829). The rule of silence, the lockstep, vigilant inspection at labor, and solitary sleeping and dining were all introduced, *per* the Auburn plan. *Id.* at 8-9; Act of Mar. 11, 1828, 1825-1828 Mass. Acts 825; Governor's Message, Jan. 6, 1830, 1828-1831 Mass. Resolves 222-24.

416. REPORT [ON THE STATE PRISON] 10-14 (May 1830) (Harvard Law Library).

Retained as an internal sanction, solitary confinement all but disappeared as a preliminary stage of a convict's sentence.⁴¹⁷ As if to crown the rehabilitation advocates' victory, the Board of Directors of the State Prison, having previously sought to eliminate the Warden's office, was instead itself dissolved.⁴¹⁸

By all accounts, the Massachusetts State Prison turned a corner in 1829. Internal disruptions ceased under the new discipline, convict labor remained productive, and the voice of opposition to the penitentiary system finally fell silent.⁴¹⁹ In short, the 1828 reforms settled both the debate over the penitentiary's choice of ideologies *and* the debate over its fundamental practicability. While that settlement relied on some home-grown administrative innovations, it also signaled a final triumph for a deeply rooted intellectual tradition.

417. *Id.* at 10. Under the Revised Statutes (code) of 1836, the old format of specifying two successive sentences, the first to solitary confinement and the second to hard labor, standard since 1805, was terminated. Thereafter, the statutes specified single terms of hard labor, the judge retaining discretion to set a preliminary term of solitary confinement of up to 20 days in all cases (far shorter than under previous statutes). MASS. REV. STAT. pt. IV, tit. II, ch. 139, § 8 (1836).

418. Act of Mar. 11, 1828, ch. 118, 1825-1828 Mass. Acts 819; G. HAYNES, *supra* note 321, at 47. (Sadly, Warden Bradford did not live to see this outcome). The conflict of ideologies remained active in other climes, where penitentiaries remained to be constructed. Often European visitors of American penitentiaries carried their ideological allegiances along with them, coloring their appraisals of what they saw: English inspectors of Auburn Prison thus described its discipline alternatively as "moral machinery" and as a "mere manufactory[]." M. IGNATIEFF, *supra* note 45, at 194-95. Within the United States, advocates of the new Auburn plan struggled with the advocates of the new Pennsylvania plan, see *supra* note 409, to guide construction in the 1830s and 1840s. While *both* of these later programs combined elements of solitude and labor, they appear to have remained sufficiently distinct ideologically to prompt de Tocqueville's salient contrast:

Now, to what point is this reformation actually effected by the different systems which we have examined? Before we answer this question, it will be necessary to settle the meaning attached to the word "reformation". . . . The [Pennsylvania] system being also that which produces the deepest impressions on the soul of the convict, must effect more reformation than that of Auburn. The latter, however, is perhaps more conformable to the habits of men in society, and on this account effects a greater number of reformations, which might be called "legal," inasmuch as they produce the external fulfillment of social obligation. If it be so, the [Pennsylvania] system produces more honest men, and that of New York more obedient citizens.

G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 331, at 80-91 (quotes at 87, 91). Cf. D. ROTHMAN, *supra* note 50, at 79-88, who draws his ideological distinction between an ancient deterministic theory and a modern optimistic theory, rather than between alternative contemporary theories (one old and one new). The Auburn advocates "fully shar[ed] the axioms and optimism of its rival," differing only over the administrative details that would best fulfill the penitentiary's promise. *Id.* at 87. Given "the basic similarity of the two programs," Rothman traces the "startling" intensity of the debate, *id.* at 81, to the magnitude of the opportunity: "With the stakes so high . . . every element in penitentiary organization assumed overwhelming importance." *Id.* at 85. Facial similarities in the two systems may, however, obscure the disparity between their intellectual foundations.

419. For a sampling of plaudits, see, e.g., REPORT [ON THE STATE PRISON] 3-4, 18-27 (Sept. 1830); REPORT [ON THE STATE PRISON] 4-7 (1831) (Harvard Law Library); 1828-1831 Mass. Resolves 222-24, 451-54; 1832 Mass. Resolves 32-34, 277-80, 596. The disintegration of opposition was a widespread phenomenon. Lieber, *Translator's Preface*, in G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 331 at 13-14 (1833).

VI. CONCLUSION

The 1830s marked the heyday of the penitentiary in America. Facilities proliferated, the literature thrived, and visitors traveled vast distances to view American prisons in action. As Rothman says, the penitentiary in the 1830s "became the pride of the nation" — and the Jacksonians never tired of reminding others and themselves of their institutional achievement.⁴²⁰

Ballyhoo has always had a way of obscuring context. But even if contemporaries get caught up in their own excitement, the historian must not allow himself to be beguiled. The Jacksonians deserve due credit for their contribution, but the true origins of the penitentiary in Massachusetts will be found in a coalition of ancient European criminological theory and immediate, palpable social need.

In part, the assumption that the penitentiary was intellectually novel has probably sprung from an optical illusion. What we *see* before us, when we view the Massachusetts State Prison, is a structure without precedent: a facility with looming walls, holding hundreds of prisoners. Its very scale bespeaks innovation. But there is less here than meets the eye. Once state planners resolved to initiate a general policy of criminal incarceration, they had little choice but to design a new facility to accommodate it. The old ones were simply inadequate for the task.

It is unlikely that historians would have been so impressed with the novelty of criminal incarceration in America had it been instituted in the local workhouses that had long dotted the colonies. This possibility was pondered briefly in Massachusetts,⁴²¹ but was rejected as impractical. Without refurbishing, the old facilities simply could not accommodate large numbers of long-term inmates. When the sale of Castle Island to the federal government forced the state to disperse its prisoners among local workhouses, the results were so unsatisfactory that judges temporarily ceased ordering sentences to hard labor.⁴²² Though the state might have upgraded these old facil-

420. D. ROTHMAN, *supra* note 50, at 79.

421. See Report Respecting Convicts, *supra* note 30; Resolve of June 26, 1798, ch. 47, 1798-1799 Mass. Acts 196-97.

422. Act of Mar. 14, 1785, ch. 63, 1784-1785 Mass. Acts 163 (preamble); Act of Nov. 1, 1785, ch. 21, *id.* at 472 (preamble); Resolve of June 26, 1798, ch. 47, 1798-1799 Mass. Acts 196-97; Governor's Message, Jan. 13, 1804, 1802-1803 Mass. Acts 980; Petition of a number of Prisoners confined in Concord Jail, appended to 1802 Resolves ch. 54 (passed) (unpublished manuscript, Mass. Archives); Report Respecting Convicts, *supra* note 30. Supreme Judicial Court manuscript minute books reveal an abrupt cessation of sentences to incarceration in the Feb. 1799 term; such sentences did not resume until the State Prison opened in 1805. Part of the problem was mere security: once the transfer to local workhouses had been effected, nearly half the previous Castle Island inmates escaped, a fact unsatisfactory in a theoretical, as well as

ities rather than build one new one on a grand scale, centralization offered a number of advantages: economies of scale, convenient oversight, and ready access to the Boston marketplace.⁴²³ Thus, compelling administrative considerations determined the construction of the Massachusetts State Prison. The bare demands of penal ideology could have been met in far less dramatic a fashion.

Equally deceptive is the wealth of attention that visitors lavished on the Jacksonian penitentiaries.⁴²⁴ The deluge of European delegations in the 1830s masked a subtle shift in the intellectual center of penal reform. Before 1800, European theorists dominated the field of criminology, supplying the basic concepts and programs on which American facilities were built. Even the name "penitentiary" was coined by English reformers.⁴²⁵ But as the American efforts got off the ground, the new builders gained increasing renown. The Jacksonians offered, not fresh theories of what the penitentiary should accomplish, but fresh ideas about the practical implementation of old paradigms: primarily innovations in the realm of administration and design. European delegations flocked to American penitentiaries to learn these valuable, but secondary, lessons.

The English experience illustrates this intellectual migration. Having operated workhouses since the sixteenth century, English lawmakers had toyed with the idea of more extensive carceral programs over the years. The Hard Labor Act of 1779 was drafted by the towering figures of Howard, Eden, and Blackstone, and reviewed by Bentham; it certainly owed nothing to the rudimentary American efforts of that time. Though the Act itself was stillborn, English penitentiaries did open in the late eighteenth century, based upon local plans without American input.⁴²⁶

By 1834, things had changed. Before embarking on a major new prison project, the English government sent William Crawford to tour American prisons. When Pentonville opened in 1842, its structure and internal routine strongly reflected the Philadelphia Penitentiary, with which Crawford had been most favorably impressed. Yet

a practical, sense, "for if any hope can be entertained of an escape, the sentence will make but a feeble impression on the mind, and be of little use in preventing future offences." Report Respecting Convicts, *supra* note 30; Governor's Message, Jan. 15, 1802, 1800-1801 Mass. Acts 583. English advocates were also influenced in the direction of new construction by the unsatisfactory state of existing workhouses. J. BENTHAM, *supra* note 6, at 6.

423. Report Respecting Convicts, *supra* note 30; Governor's Message, Jan. 13, 1804, 1802-1803 Mass. Acts 980-81; Answer of the House, Jan. 18, 1804, *id.* at 875; see 1817-22 Mass. Legislative Documents no. 2 at 1-2, 4 (1818) (State Library Annex).

424. Cf. D. ROTHMAN, *supra* note 50, at 94.

425. M. IGNATIEFF, *supra* note 45, at 94.

426. See generally *id.* at 93-109.

the later English criminologists never lost track of the facility's lineage. As Crawford insisted, the penitentiary was "British in its origin, British in its actual application, British in its legislative sanction."⁴²⁷ And he was right. The Jacksonians reared the penitentiary; they did not conceive it.

In fact, ideological conception is but one chapter in the story of the penitentiary. Had ideology been all, the penitentiary might have appeared only in the pages of some dusty tomes. For only under conditions of intense social crisis could one expect a legislature to undertake a policy as wrenching and expensive as that represented by the move from pillory to penitentiary. The theorists themselves were first to bemoan their inability to make headway against the forces of legal inertia. "The voice of a philosopher is too weak to contend against the tumults and the cries of so many who are guided by blind custom," Cesare Beccaria lamented. "How fortunate humanity would be if laws were for the first time being decreed for it. . . . If these monarchs, I say, suffer the old laws to subsist, it is because of the infinite difficulties involved in stripping from errors the venerated rust of many centuries."⁴²⁸

How much more unyielding is that rust when reinforced with the virtues of economy? Jeremy Bentham learned the answer not once but twice. As a young critic of the Hard Labor Act, Bentham noticed that the logistical impediments to transportation of convicts brought on by the American Revolution "gave great weight to the inducements, if they were not the sole inducements, that led to the institution of this plan." The novice prison reformer was amused that it had required "the misfortunes from which those difficulties took their rise . . . [to] force us into the adoption of a plan that promises to operate one of the most signal improvements that have ever yet been made in our criminal legislation."⁴²⁹ But the elaborate Hard Labor Act was never implemented, and the lesson of the episode, so perceptively recognized, did not sink in. Bentham's imagination had been warmed, and he spent the next twenty years beseeching Parliament to transform his own carceral scheme, the Pa-

427. *Id.* at 193-200 (quote at 195); see 8 PRISON DISCIPLINE SOCIETY, *supra* note 117; at 4 (1833); F. GRAY, PRISON DISCIPLINE IN AMERICA 59-61 (1847).

428. C. BECCARIA, *supra* note 83, at 52.

429. J. BENTHAM, *supra* note 6, at 5. Added Bentham: "It may not even be altogether extravagant to suppose, that at the end we may be found to have profitted not much less than we have suffered by these misfortunes, when the benefits of this improvement [the penitentiary system] come to be taken into the account."

nopticon, into reality. These efforts came to naught,⁴³⁰ and Bentham eventually abandoned the project embittered rather than amused: "A jail," he wrote to Lord Pelham, "is not quite so easily built as talked of, not even in England, as I have had occasion to know but too well."⁴³¹

Indeed, Massachusetts was particularly prone to the forces of resistance, for it lacked a Jeremy Bentham to press the penitentiary's cause. In Pennsylvania, activist Benjamin Rush and the Philadelphia Society for Alleviating the Miseries of Public Prisons lobbied tirelessly for reform legislation, while in New York, Thomas Eddy pushed the idea with equal determination.⁴³² The great names of prison advocacy in Massachusetts do not appear until well after criminal incarceration had been instituted in that state. Gamaliel Bradford assumed his post as Warden (and unofficial cheerleader) of the Massachusetts State Prison in 1812, while the Reverend Louis Dwight founded the Boston Prison Discipline Society in 1825. Both arrived on the scene early enough to help fend off attacks on the fledgling penitentiary program, but far too late to influence its emergence.⁴³³

The early stages of the penal reform movement in Massachusetts were shaped less by intellectuals than by popular clamor for action. The dominant theme was not enlightened principle but glaring necessity. "It appears to be the general and ardent desire of the people, that our penal laws may be immediately revised and corrected," one spokesman contended.⁴³⁴ Another warned the legislature that the growing crime rate was "truly alarming — to your august body we

430. The story of Bentham's crusade has been often told. See, e.g., C. PHILLIPSON, *THREE CRIMINAL LAW REFORMERS* 127-31 (1923).

431. J. BENTHAM, *supra* note 122, at 194-95.

432. See N. TEETERS, *THEY WERE IN PRISON* 1-50 (1937); W. LEWIS, *supra* note 138, at 1-5.

433. For a biographical sketch of Dwight, see O. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845* at 289-92 (1922). On Dwight's influence, see *supra* note 414. Bradford wrote a pamphlet to "vindicate" the institution in the face of its detractors, see G. BRADFORD, *supra* note 1 (first published in the *Palladium*), see also Communication from Gamaliel Bradford to the Legislature, Jan. 27, 1824 Senate Document no. 7029 (1824) (unpassed) (unpublished) (Mass. Archives), and encouraged outside manufacturers to contract for prison labor. In one letter, Bradford assures a businessman: "I think there is no doubt but you could have the mechanical part of your work done cheaper here than at any other place, but I should decline your friendly offer of becoming personally interested in any work established here, from motives of propriety." Letter from G. Bradford to F. Rotch, July 2, 1815, in Rotch Family Papers (unpublished manuscript, Mass. Historical Socy.). See letter from G. Bradford to F. Rotch, Aug. 18, 1815, in *id.* On the importance of individual efforts to spur reform, see generally Cooper, *Ideas and Their Execution: English Prison Reform, 10 EIGHTEENTH CENTURY STUD.* 87, 93 (1976).

434. Mass. Centinel, Oct. 20, 1784, at 1. See 2 A. BRADFORD, *supra* note 188, at 251.

look for redress — from you we have a right to expect it — and from you we will no doubt receive it.”⁴³⁵ These were the sorts of arguments that could get things moving in the Massachusetts statehouse. Intellectual imagination had little influence on the process. As another columnist put it, “That the mode of punishment with respect to criminal cases, now in force, is derogatory to the principles of humanity, as well as impolitick, needs no great stretch of philosophy to discover.”⁴³⁶ Only after the publicly perceived need for change had overcome the forces of inertia and economy did Massachusetts move in the direction of criminal incarceration.

Indeed, the years of reform were numbered by this stubborn fact. Once the immediate perception of crisis had passed, criminologists who sought additional institutional improvements encountered the familiar roadblocks. We have already noticed the legislature’s reluctance to authorize funds for renovation, above the initial outlay to construct the State Prison.⁴³⁷ On another front, the legislature in 1819 responded to the pleas of activists by passing a sweeping reform of local houses of correction for juveniles and low level offenders.⁴³⁸ But the crucial section of the act mandating construction of individual cells and workshops was repealed within four months,⁴³⁹ and the rest of the act soon stood “little more than a dead letter upon the statute book.” “Why” Josiah Quincy grieved, “should not the ancient houses of correction be revived? . . . There is but one reason; — that mistaken reason; — that abused word; — economy! The expense! — As if any expense was of weight, when put into the scales against humanity; against the duty, incumbent on every society, to multiply the means of moral advancement.”⁴⁴⁰ Quincy’s cry from the heart has a timeless quality: In the real world, it takes a crisis to open the window to reform.

And therein lies the real tragedy in the rise of the penitentiary. For it is hardly clear, however much the theorists touted this reform, that the penitentiary ever really constituted an effective solution to crime. Under the early schemes of public punishment, the commu-

435. Mass. Centinel, Oct. 16, 1784, at 1.

436. Mass. Centinel, Jan. 5, 1785, at 3.

437. See notes 403 & 408 *supra* and accompanying text.

438. Act of Feb. 19, 1819, ch. 123, 1818-1822 Mass. Acts 196.

439. Act of June 18, 1819, ch. 158, *id.* at 246.

440. Quincy continued: “It is not pretended, that there is any thing new, in these suggestions. Would to heaven that there did not rest upon our state any deeper stain than that of ignorance!” J. QUINCY, *supra* note 318, at 12-19. Mayor Quincy’s personal efforts did bear fruit within his own domain of influence: Boston. See J. QUINCY, *supra* note 256, at 102-09; 1826-1827 Mass. Legislative Documents no. 100, at 7 (1827).

nity had played an integral role in the rehabilitative process, reaccepting the offender, or even shepherding him back into the fold of society. Demographic change rendered these mechanisms of reconciliation increasingly unworkable and, rather than endeavor to cure them, the turn to incarceration sealed their abandonment. In this sense, the transition represented a retreat in the face of adversity, not an effort to forge ahead. With the rise of the penitentiary, the rehabilitative focus shrank from the offender and his place in the community to the offender alone. *His* orientation was the only factor that the process sought to correct. And once the penitentiary was frozen into place, the old, wider approach to rehabilitation was irretrievably lost.

The reformers themselves eventually came to appreciate the importance of their omission. "[T]he system is incomplete," the Directors of the State Prison admitted in 1823,

and therefore the evil complained of necessarily occurs. Convicts are discharged who have no friends, acquaintances or money; or who, by being known as convicts, are avoided as infections and driven by necessity to commit new crimes. They are willing to labour, but can get no employment; and cannot consent to starve, even at the hazard of renewed imprisonment.⁴⁴¹

Nor, in their haste to isolate offenders, had reformers kept sight of another shortcoming of criminal incarceration: its impact on the offender's innocent dependents. The early Puritans had not been so careless. In 1695, a statute mandating a fine or twenty days imprisonment for unlicensed sale of liquor was abruptly amended to make whipping the alternative to the fine. As the new preamble explained the change, "divers ill disposed and indigent persons . . . if detected and convicted of any such offense, are unable to satisfy the fine imposed by law for the same, and cannot be punished by imprisonment without wrong to their families."⁴⁴² Yet the later criminologists' efforts to correct these systemic defects were pitifully meager and simplistic.⁴⁴³

441. *Remarks*, *supra* note 80, at 26. See S. BURROUGHS, *supra* note 182, at 173, 176, 178; Report Respecting Convicts, *supra* note 30; REPORT [ON THE STATE PRISON] 8 (1822); 1817-1822 Mass. Legislative Documents no. 1, at 20-21 (1817) (State Library Annex). The problem was also recognized in England. See, e.g., W. PALEY, *supra* note 87, at 293 & n.k, who went so far as to oppose incarceration of petty criminals "until this inconvenience be remedied." The practice of tattooing State Prison inmates, instituted in 1818, hardly improved the situation. See Act of Feb. 23, 1818, ch. 176, 1815-1818 Mass. Acts 602-05; Act of Mar. 11, 1828, ch. 118, 1825-1828 Mass. Acts 830; G. HAYNES, *supra* note 321, at 40-41; REPORT [ON THE STATE PRISON] 11 (1829) (Harvard Law Library).

442. 1 PROV. LAWS, *supra* note 12, at 287 (1695). An interesting twist on this theme appears in 2 COURT OF ASSISTANTS, *supra* note 23, at 65, 125 (imprisonment of a servant unjust to the master!).

443. The practice of tattooing inmates was abolished in 1830, Act of Mar. 12, 1830, ch. 114,

The ultimate irony of the rise of the penitentiary is that even as reformers waxed eloquent about the promise of rehabilitation, the scheme that they devised to accomplish it merely reinforced the conception of a criminal underclass. It built a wall, instead of a bridge, between offenders and society. If rehabilitation is inherently a reciprocal process, if it requires not only contrition but forgiveness as well, then the concept of criminal incarceration was flawed from the start.

Still, the penitentiary persists. Hallowed by time, it has ceased to constitute an "experiment" and instead has become second nature — just as the pillory had been before it. In an age of spiraling costs, explosive internal conditions, and escalating crime rates despite all, a sufficient crisis may well be approaching to sweep away the penitentiary and move on to something else. In any event, the historian can do his part by broadening the modern criminologist's horizons. If legal history does not tell us how things ought to be, it can at least tell us that they need not be the way they are. If "the venerated rust of many centuries" can be loosened a bit, then perhaps others will step forward to strip the errors bare.

1828-1831 Mass. Acts 459. The warden and the chaplain gave recommendations to those convicts whom they deemed worthy, and by statute in 1828, every convict left the State Prison with "a decent suit of cloths" and up to five dollars in cash (at the warden's discretion). Act of Feb. 23, 1818, ch. 176, 1815-1818 Mass. Acts 602-05; Act of Mar. 11, 1828, ch. 118, 1825-1828 Mass. Acts 825, 830; REPORT [ON THE STATE PRISON] 15-16 (1827); REPORT [ON THE STATE PRISON] 11 (May 1830); REPORT [ON THE STATE PRISON] 21 (1831). Warden Bradford simply asserted that society was "obligat[ed]" to welcome ex-convicts back into the fold and suggested that community groups participate in the process. G. BRADFORD, *supra* note 1, at 51-52. At least one prison official acted on his own initiative to help ex-convicts find employment. Austin, *supra* note 330 at 254. Government-sponsored programs to provide employment to ex-convicts, or to open a half-way house, were contemplated at various times, but never implemented. See 1817-1822 Mass. Legislative Documents no. 1, at 20-21 (1817) (State Library Annex); Resolve of Mar. 3, 1826, ch. 93, 1824-1828 Mass. Resolves 307; REPORT [ON THE STATE PRISON] 15, (1827); Resolve of Mar. 4, 1830, ch. 64, 1828-1831 Mass. Resolves 283; Governor's Message, May 31, 1830, ch. 2, *id.* at 392; and the delightfully reasoned REPORT [ON THE STATE PRISON] (May 1830) (Harvard Law Library). An "agent" whose sole duties were to "counsel and advise" discharged convicts was finally appointed in 1845, sixty years after criminal incarceration had been instituted, Act of Mar. 22, 1845, ch. 176, 1845-1846 Mass. Acts 504; Act of Mar. 24, 1848, ch. 82, 1847-1849 Mass. Acts 647. The problems posed by the loss of support for convicts' dependents received even less attention. Bradford could be so callous as to identify loss of support as part of the *deterrence* inherent in the punishment. G. BRADFORD, *supra* note 1, at 14-15. The custom of "overstint," by which convicts could earn a salary for work performed over and above the daily stint assigned to them, was instituted in part to facilitate family support. But the practice was associated with internal abuses, and was abolished c. 1829. See *Remarks*, *supra* note 80, at 21; REPORT [ON THE STATE PRISON] 9-11 (1827); REPORT [ON THE STATE PRISON] 11-15 (1828) (also printed in 1827-1828 Mass. Legislative Documents 734 (1828) (State Library Annex); REPORT [ON THE STATE PRISON] 8-9 (1829).