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Author(s): Matthew W. Meskell

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An American Resolution: The History of Prisons in the United States from 1777 to 1877

Matthew W. Meskell*

In this note, Matthew Meskell traces the rise of the penitentiary system in the United States from 1777 to 1877. By focusing on how the penitentiaries adapted to social and economic pressures, Meskell offers an explanation for why the system changed from one predominantly concerned with reforming prisoners to one predominantly concerned with containing prison. Ultimately, the wardens' inability to quantify their rehabilitative successes led legislators to set a new goal for the prisons: economic profitability. Meskell concludes that this shift in priorities best explains the deterioration of the early penitentiary system.

In one corrupt and corrupting assemblage were to be found the disgusting objects of popular contempt, besmeared with filth from the pillory—the unhappy victim of the lash . . . the half naked vagrant—the loathsome drunkard—the sick suffering from various bodily pains, and too often the unaneled malefactor.

— *Roberts Vaux, describing Pennsylvania jails in 1776.*¹

They are all, so far as adult prisoners are concerned, lacking in a supreme devotion to the right aim; all lacking in the breadth and comprehensiveness of their scope; all lacking in the aptitude and efficiency of their instruments; and all lacking in the employment of a wise and effective machinery to keep the whole in healthy and vigorous action.

— *Enoch Wines and Theodore Dwight, describing U.S. prisons in 1867.*²

* Third-year law student, Stanford Law School. A.B. in Honors Economics and Philosophy, Stanford University, 1996. The author wishes to thank all who helped with this note including Professor Lawrence Friedman, Brian Matsui, Joshua Munn, and Gerald Martin.

1. HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA* 64 (1968).

2. ENOCH COBB WINES & THEODORE W. DWIGHT, *REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA, MADE TO THE LEGISLATURE OF NEW YORK, JANUARY 1867*, at 62 (1867).

INTRODUCTION

Two revolutionary reports bookend the most dynamic century in American prison history. In 1777, the Englishman John Howard published an extensive account of his visits to British jails entitled *The State of the Prisons in England and Wales*.³ Describing in graphic detail extensive administrative corruption and chronic abuse of prisoners, Howard's reports created severe agitation for reform in England.⁴ The work did not become widely known in the United States for another decade,⁵ but by 1786 it had stirred a self-critical examination of America's own prisons and the formation of the first prison reform societies.⁶ Beginning in 1790, America embarked on a remarkable experiment and forged an original penitentiary system that attracted the attention not only of its own citizens but of the world.⁷ Yet in 1867 American prison reformers Enoch Wines and Theodore Dwight published a monumental work entitled *Report on the Prisons and Reformatories of the United States and Canada*⁸ that contained descriptions of administrative corruption and prisoner abuse which rivaled those Howard had recounted almost a century before.⁹ This note is a tale of these two reports and an attempt to answer the obvious question they prompted: What happened?

Perhaps it would have been better to ask what did not happen, for, after researching the period, it is obvious that little remained constant in the United States from 1777 to 1867. During this time, the United States changed economically, demographically, intellectually, and politically. Prisons were no exception, and indeed seem to have been the focus of a remarkable number of controversies and debates. The story of what happened to the bold prison reform movement begun in America in the late 1700s encompasses a vast array of personal histories, financial incentives, academic movements, political maneuverings, and even architectural developments. In a sense, the only accurate answer to the question, "What happened?" this note can give is, "Too much."

Still the story of the rise of American prisons is immensely interesting. Much can be revealed by focusing on how broader social changes translated themselves into concrete demands placed on the prison system and how that system adapted over time. Most of the important developments in the period

3. See Randall McGowen, *The Well-Ordered Prison*, in THE OXFORD HISTORY OF THE PRISON 87 (1995).

4. See *id.*; see also ORLANDO FAULKLAND LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845, at 33 (1967).

5. See JOHN LEWIS GILLIN, CRIMINOLOGY AND PENOLOGY 388 (1926).

6. See BARNES, *supra* note 1, at 80-82.

7. See, e.g., GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (1833).

8. WINES & DWIGHT, *supra* note 2.

9. See *id.* at 134-220.

occurred in the northern states, and so they are the focus of this note. Though one scholar aptly noted that prison history is more like a river than a ladder,¹⁰ for purposes of clarity this note is divided into three main time periods. The first traces the creation and failure of the original penitentiaries at Walnut Street in Philadelphia, Pennsylvania, and Newgate in Greenwich Village, New York. The second recounts the rough development of the first modern prisons at Cherry Hill, Pennsylvania, and Auburn, New York, and ends with their maturity in the 1850s. The final section of the note details the 1867 report by Wines and Dwight and discusses the new wave of prison reform and ideology that followed.

I. THE CREATION AND FAILURE OF THE FIRST AMERICAN PRISONS

Early colonial criminal law was a curious mix of religion, English barbarity, and pragmatism. The relatively small populations of the early American colonies probably determined much of the character of the criminal law. As late as 1765, the majority of Massachusetts towns had fewer than 1000 inhabitants and only fifteen had over 2500.¹¹ Pennsylvania had fewer than 50,000 inhabitants in the entire province until well after 1730.¹² With populations so low, the colonists could neither afford nor probably felt the need to institutionalize convicts. Correspondingly, the character of criminal punishments was immediate and depended on self-policing in the communities. Some scholars have even argued that membership in the local church was so stressed because it provided an effective way of keeping track of community members and enforcing criminal codes.¹³ Whatever the merits of this argument, there is little dispute that many colonial criminal punishments depended on the criminal being recognized as a part of the community.

Most punishments were public and involved either quick, corporal tortures or more prolonged humiliation. Among the punishments designed to deter crime by inflicting pain, the colonials often used the whipping post, branding and maiming, gags, and a device known as the ducking stool.¹⁴ The latter device was essentially a chair connected to a pulley system where "slanderers, 'makebayts,' 'chyderers,' brawlers, and women of light car-

10. See EDGARDO ROTMAN, *BEYOND PUNISHMENT* 28 (1990) ("The history we are studying is not like a ladder, on which each rung marks a clear division between one stage and the one above. It is more like a river, arising from several tributaries, some of which, owing to the operation of changing climatic factors, tend to grow more powerful, while others show signs of drying up, yet, all are adding their respective flow to the main stream.") (quoting Thorsten Sellin).

11. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 12 (1971).

12. See BARNES, *supra* note 1, at 13.

13. See ROTHMAN, *supra* note 11, at 17.

14. See ALICE MORSE EARLE, *CURIOUS PUNISHMENTS OF BYGONE DAYS* 70-86, 96-106, 138-48 (1969).

riage,"¹⁵ were restrained and then repeatedly plunged into a convenient body of water. Punishments designed predominantly to humiliate the offender included public penance, the stocks, the pillory, and the scarlet letter.¹⁶ This group of deterrents depended largely, if not exclusively, for its effect on the shame and embarrassment arising from being punished in front of one's friends and neighbors. Indeed, strangers to communities were much more likely upon conviction to suffer physical punishment and banishment than the stocks or the pillory.¹⁷

The colonials designed their criminal punishments to deter criminals from acting. Calvinist doctrines taught that man was naturally sinful and evil and the focus of criminal punishment was thus not reformation but deterrence.¹⁸ It is hardly surprising, then, that the colonial criminal system liberally used capital punishment. Colonials punished offenders increasingly harshly for repeat crimes and "[t]hose who were raised within the community yet persisted in recidivating would, if not banished first, inevitably earn a trip to the gallows."¹⁹ There were also a number of crimes that were capital for the first offense. Colonial America was heavily influenced by the English criminal code which, until the end of the eighteenth century, defined 160 capital offenses.²⁰ Indeed, colonial codes were often directly superimposed from England.²¹ The dizzying number of capital crimes encompassed everything from traditional *malum in se* acts such as murder, kidnapping, and bestiality to lesser crimes such as blasphemy.²² The English code heavily influenced America until the time of the Revolutionary War, though Pennsylvania attempted in 1682 to institute a more humane system.²³

What led to eventual changes in the colonial criminal law in the late 1700s is an interesting question with no clear answer. Toward the end of the 1700s, colonial America experienced a huge population boom. In Pennsylvania there were approximately 430,000 inhabitants by 1790,²⁴ and Massachusetts experienced equally dramatic population growth.²⁵ Many of the punishments that had succeeded when communities were small, such as the pillory or the scarlet letter, were almost totally ineffectual when applied in larger, more mobile settings. Yet the population growth and concurrent dis-

15. *Id.* at 11.

16. *See id.* at 29-57, 86-96, 106-19.

17. *See* ROTHMAN, *supra* note 11, at 50.

18. *See* FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 51 (1982).

19. *Id.* at 49.

20. *See* LEWIS, *supra* note 4, at 9.

21. *See* BARNES, *supra* note 1, at 29.

22. *See id.* at 29.

23. *See id.* at 31-37.

24. *See id.* at 13.

25. *See* ROTHMAN, *supra* note 11, at 57.

tancing of communities cannot alone explain the major overhaul of the colonial criminal codes.

To be sure, the colonials could have simply increased the frequency of capital punishment and expanded the list of capital crimes. There are two main reasons such an approach would not have worked in the United States. First, Americans had a history of repulsion to the harshness of the English code. In 1682, for example, Pennsylvania instituted the "Great Law" which eliminated capital punishment for all but treason and premeditated murder.²⁶ Second, legislators were already concerned with increasing occurrences of jury nullification under the original colonial codes.²⁷ Jurors would often find facts that were clearly in contradiction to the evidence in order to spare defendants.²⁸ An expansion of capital offenses, assuming it did not meet with more concrete resistance, would have most probably died a quiet death in jury deliberations everywhere.

Perhaps because of its history of aversion to the harshness of the English criminal code and its recent victory in the Revolutionary War, America was also particularly receptive to emerging Enlightenment thought challenging the premises of the old social order. Montesquieu in *Persian Letters* and *The Spirit of the Laws* attacked the structure of the French criminal code and argued for more humane punishments.²⁹ Utilitarians such as Bentham and Blackstone similarly criticized the English code and began to paint a novel conception of human beings.³⁰ These thinkers rebelled against the Calvinist notion that people were born good or evil and would act on their predilections unless deterred through sufficiently cruel punishments. Rather, they contended that people were capable of calculating the costs and benefits of their actions and would decide how to act on the basis of their evaluations.³¹ From the American standpoint, these arguments reached their most persuasive and influential form in the works of Italian criminologist Cesare Beccaria.³²

Beccaria subscribed to the social contract theories espoused by thinkers like Montesquieu and Rousseau.³³ He argued that laws were the deliberate design of people who wished to elevate themselves above the state of nature and that the role of the law is to protect society and to rationally regulate the interactions between its members. Beccaria noted, however, that:

26. See BARNES, *supra* note 1, at 31-37.

27. See ROTHMAN, *supra* note 11, at 60.

28. See *id.*

29. See BARNES, *supra* note 1, at 77.

30. See CULLEN & GILBERT, *supra* note 18, at 28-33.

31. See *id.* at 29.

32. See Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1193 (1982).

33. See CULLEN & GILBERT, *supra* note 18, at 29.

If we look into history we shall find that laws, which are, or ought to be, conventions between men in a state of freedom, have been, for the most part, the work of the passions of a few, or the consequences of a fortuitous or temporary necessity; not dictated by a cool examiner of human nature, who knew how to collect in one point the actions of a multitude and had this only end in view, the *greatest* happiness of the greatest number.³⁴

Beccaria and other members of the Classical School of penology argued that the source of crime lay in the disorganized, arbitrary, and impossibly draconian criminal codes of the day.³⁵ As a solution, Beccaria recommended that: (1) legislatures strictly define punishments for various crimes and limit the power of judges to arbitrarily modify them, (2) laws be clear and public, (3) punishments be designed solely to specifically deter any given offender from further offense and to generally deter society from criminal acts, and (4) punishments be the "least necessary" to achieve deterrence.³⁶ These ideas gathered enormous support in Europe and in fact formed the basis for the French criminal code passed in 1791.³⁷

The newfound philosophy found a ready audience in America. Spurred by Beccaria's essay, William Bradford wrote a widely-circulated article entitled *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania, With Notes and Illustrations* in 1793 in which he quoted with approval many of Beccaria's arguments.³⁸ Bradford's essay was immensely popular and served to publicize further the Classical School's theories regarding criminal law. Even earlier, American thinkers had aired many of the Classical School's arguments. For example, in 1787 Dr. Benjamin Rush gave an address at the home of Benjamin Franklin. There Dr. Rush argued that reformation and deterrence of crime ought to be the sole goals of punishment, that the contemporary criminal codes tended to harden criminals and engender hatred towards the government, and that imprisonment be used as the primary criminal punishment.³⁹ Pennsylvania's "Great Law" of 1682 carefully laid out a code of punishments that ascended in severity depending on the depravity and social consequences of the crimes—the same careful balancing and proportionality Beccaria urged a century later.

In short, America in the late 1700s faced a powerful mixture of practical pressures and intellectual arguments, as well as a healthy dose of optimism from its newly won independence, that led to radical changes in the criminal codes.⁴⁰ It is difficult, if not impossible, to determine which forces were

34. GILLIN, *supra* note 5, at 324.

35. *See id.* at 325.

36. *Id.*

37. *See* CULLEN & GILBERT, *supra* note 18, at 31.

38. *See* BARNES, *supra* note 1, at 106.

39. *See id.* at 20-23.

40. *But see* Hirsch, *supra* note 32, at 1193-95. Hirsch argues that the British influences on American prison reform were more than evident even after the Revolutionary War. Though it is

most powerful in shaping the resulting reforms, but the trends just described were the major influences. These general trends quickly transformed into concrete political demands for change. In Pennsylvania, the Philadelphia Society for Assisting Distressed Prisoners helped to draft the new criminal code of 1786. The new code instituted a strict regime of hard labor for most crimes and did away with capital punishment except for treason and premeditated murder.⁴¹ New York passed a similar code in 1796 largely because of Quaker lobbying headed by Thomas Eddy.⁴²

Rationalists such as Beccaria had provided a clear recipe for reform of the criminal laws, but had offered little insight into what punishments ought to replace the older forms.⁴³ Pennsylvania relied on its heritage of hard labor stemming from the "Great Law" of 1682.⁴⁴ The idea that labor could function as a punishment as well as serving the government had already found expression in workhouses formed throughout the northern colonies in the 1700s.⁴⁵ Yet the early experiments with public convict labor were abysmal failures. Describing the situation from 1787 to 1790, Caleb Lowmes, a notable prison reformer, wrote:

The number of criminals increased to such a degree as to alarm the community with fears. The keepers (on the streets) were armed with swords, blunderbusses and other weapons of destruction. The prisoners were secured by iron collars, and chains, fixed to bombshells. . . . The old and hardened offenders were daily in the practice of begging and insulting the inhabitants, collecting crowds of idle boys, and holding with them the most indecent and improper conversations.⁴⁶

Even when the prisoners were kept in the local jails, the early penal system was totally inept at controlling them. One of the more amazing stories involves a mass held for the convicts in a Philadelphia jail. To keep order, the head jailer arranged for a deputy to stand beside the preacher with a lighted torch and loaded cannon aimed at the convicts and ordered him to fire should any man move.⁴⁷ Faced with public failures and embarrassments, the early reformers turned to a radical solution—private, cellular imprisonment.

true British thinkers and architects were to play no slight role in American prison reform, it is almost certain the colonies would not have changed much while still under British rule and that the victory in the Revolutionary War undid much of the social inertia of the time.

41. See BARNES, *supra* note 1, at 81.

42. See W. DAVID LEWIS, *FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848*, at 2 (1965).

43. See *id.* at 19.

44. See BARNES, *supra* note 1, at 31.

45. See ROTHMAN, *supra* note 11, at 41.

46. LEWIS, *supra* note 4, at 18.

47. See *id.*

The idea of imprisoning convicts in separate cells certainly did not originate in America. Of course, the notion of forcibly confining people is ancient, and there is extensive evidence that the Romans had a well-developed system for imprisoning different types of offenders.⁴⁸ The first modern correctional facility to use cellular design was the Hospice of San Michele constructed in 1704 at Rome, Italy.⁴⁹ Interestingly, the inscription over the main entry, "It is insufficient to restrain the wicked by punishment unless you render them virtuous by corrective discipline,"⁵⁰ was remarkably similar to much later American epigrams.⁵¹ Another influential correctional facility was constructed in 1772 at Ghent in Austrian Flanders. The management there presaged the American techniques of the 1820s and included "night separation of prisoners, separation of the sexes and separation of prisoners of the same sex according to categories based on age, degree of criminality, and length of sentence."⁵² If the idea of using cellular imprisonment as punishment was not new to the world, however, it was radical for England and its American colonies.

The first concrete reaction to the failure of the new criminal codes came from the Philadelphia Society for Alleviating the Miseries of Public Prisons [hereinafter Philadelphia Society]. The society, founded in 1787, evolved from the earlier Philadelphia Society for Assisting Distressed Prisoners.⁵³ Through a sequence of "memorials" to the Pennsylvania legislature, the Philadelphia Society began the movement to renovate the old jail at Walnut Street in Philadelphia. The memorials culminated in a report submitted in 1788 in which the Philadelphia Society urged:

The punishment of criminals by 'hard labour publicly and disgracefully imposed,' as indicated in the preamble to the law [of 1786], your petitioners wish the house would be pleased to revise, being fully convinced that punishment *by more private or even solitary labour*, would more successfully tend to reclaim the unhappy objects, as it might be conducted more steadily and uniformly, and

48. See NORMAN BRUCE JOHNSTON, *THE HUMAN CAGE: A BRIEF HISTORY OF PRISON ARCHITECTURE* 5 (1973).

49. See *id.* at 13.

50. AMERICAN CORRECTIONAL ASSOCIATION, *THE AMERICAN PRISON: FROM THE BEGINNING, A PICTORIAL HISTORY* 1 (1983).

51. One example is the inscription over the main gate of a New Jersey state prison:

That Those Who Are Feared
For Their Crimes
May Learn to Fear the Laws
And Be Useful.

Nic Labor. Hoc Opus.

GLEN A. GILDEMEISTER, *PRISON LABOR AND CONVICT COMPETITION WITH FREE WORKERS IN INDUSTRIALIZING AMERICA, 1840-1890*, at 16 (1987).

52. JOHNSTON, *supra* note 48, at 13.

53. See BARNES, *supra* note 1, at 80.

the kind and proportion of labour better adapted to the different abilities of the criminals.⁵⁴

Interested by this recommendation, the Pennsylvania legislature corresponded with the Philadelphia Society and through those letters the system of "solitary confinement to hard labour" developed.⁵⁵ The contemporaneous successes of Sir Thomas Beevor who ran an English prison at Wymondham in Norfolk involving cellular confinement helped the Philadelphia Society in its lobbying efforts.⁵⁶ Beevor's facility provided for separation of the genders, separation of prisoners by class of offense, and solitary confinement for each convict.⁵⁷ Finally, on April 5, 1790, the Pennsylvania legislature passed the law that established the legal foundation for America's first true prison system.⁵⁸

The 1790 law substituted hard labor as punishment for various crimes, ordered that jailers segregate the sexes and separate convicts from debtors, and provided for the construction of sixteen solitary cells in the Walnut Street jail for confinement of the most hardened criminals.⁵⁹ The total physical area of the refurbished prison was 400 by 200 feet which was bounded by an outer enclosure.⁶⁰ Convicts used 300 feet at the north end of the enclosure for their exercise, while debtors and witnesses used 100 feet at the south. Three buildings housed the convicts that were kept together at night. Spread through these buildings were eight "night rooms" which measured approximately eighteen feet by twenty feet. The debtors and vagrants were housed in a workhouse located just south of the main enclosure.⁶¹ Surrounded by gardens, a separate building held the sixteen solitary cells.⁶² Each cell was "8 feet long, 6 feet wide, and 10 feet high."⁶³ The cells had an outer wooden door, an inner iron door, and one window that was kept blinded and locked to prevent any glimpse of the outside.⁶⁴ This basic design was to be the model for all the prisons created in America during the next thirty years.

The main administrative policies at the new Walnut Street prison have already been touched upon. The most significant innovations were the separation of different classes of individuals confined in the prison, the separation of the sexes, mandatory labor for most prisoners, and provision for solitary

54. *Id.* at 87.

55. *See id.* at 87-93.

56. *See id.* at 92.

57. *See* AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 50, at 14.

58. *See* BARNES, *supra* note 1, at 93.

59. *See id.*

60. *See* LEWIS, *supra* note 4, at 26.

61. *See id.*

62. *See id.* at 27.

63. *Id.*

64. *See id.*

confinement.⁶⁵ Perhaps the reforms that most affected the everyday experiences of the convicts, however, are less spectacular and so less often recounted. Colonial jails, like their English predecessors, were run mostly for profit.⁶⁶ Jailers extorted often exorbitant sums from those in their care for food, clothing, and luxury goods like alcohol and tobacco.⁶⁷ If, at the completion of a prisoner's stay, the prisoner could not pay any remaining debt, often the jailer would continue to confine the prisoner.⁶⁸ At Walnut Street, prisoners were issued a uniform upon entry, provided a standard meal plan, and prohibited from using alcohol.⁶⁹ For the vast majority of prisoners, these changes were the most progressive results of the new prison.

It is important to note that the prison at Walnut Street was not based on the idea of solitary confinement without labor. Only those convicts who formerly would have been put to death and were specially sentenced to the solitary cells at Walnut Street underwent solitary confinement without labor.⁷⁰ Though the legislature had authorized the warden to punish unruly convicts by placing them in solitary cells,⁷¹ the punishment could not have been all that common given the small number of these cells. It was for New York, more than two decades later, to perform the first full-scale experiment with solitary confinement without labor.

A Quaker named Thomas Eddy who had strong affiliations with the Philadelphia Society began a crusade in New York in the early 1790s similar to that which had occurred in Pennsylvania at the end of the 1780s. In 1796, the New York legislature adopted a criminal code with hard labor as the main punishment and made provisions for two prisons modeled after Walnut Street.⁷² Ultimately, the legislature only provided funds for the prison known as Newgate, located in Greenwich Village. The basic layout of the prison was almost exactly that of its predecessor at Walnut Street. It had a workhouse and large night rooms for housing the less serious offenders. Unlike the Pennsylvania prison, the solitary cells were not separated from the main buildings but were instead placed in the wings of the central housing facility.⁷³ These major architectural differences arose because, from the beginning, Newgate was only to confine felons. The more elaborate segrega-

65. *See id.* at 26.

66. *See* McGowen, *supra* note 3, at 82.

67. *See id.*

68. *See id.*

69. *See* LEWIS, *supra* note 4, at 30.

70. *See* DE BEAUMONT & DE TOCQUEVILLE, *supra* note 7, at 39.

71. *See id.*

72. *See* LEWIS, *supra* note 42, at 29.

73. *See id.* at 31.

tion needed by the Walnut Street prison was therefore not necessary at Newgate.⁷⁴

Thomas Eddy, who had been the designer of and main advocate for the new prison, was also its first warden.⁷⁵ He was a skillful administrator and a dedicated reformer. Yet he was under no illusions about his charges. He viewed them as “wicked and depraved, capable of every atrocity, and ever plotting some means of violence and escape.”⁷⁶ Eddy maintained strict discipline and, from the very beginning of their sentences, the prisoners not doomed to solitary were forced to work. Like the wardens at Walnut Street, Eddy used the solitary cells not only for the most “hardened” criminals but also for those who would not abide by the rules of the institution.⁷⁷ Yet Eddy focused more than his colleagues in Philadelphia on the reformation of the convicts. He encouraged religious worship, established a night school, and tried to inculcate a sense of self-worth in the felons through their labor. For example, Eddy gave any convict who compiled a record of good behavior a portion of the profits he earned while in prison.⁷⁸ His program was a major stimulus for the burst of prison building that occurred in the early nineteenth century.

The successes of these two original prisons were impressive and politically powerful. Crime rates in Philadelphia dropped in the three years following the renovation of the Walnut Street jail.⁷⁹ In the four years preceding the reconstruction of the Walnut Street jail, 104 prisoners had escaped local jails, but none escaped from Walnut Street in the first four years of the new prison’s operation.⁸⁰ Newgate could boast an even more appealing statistic. In 1803 the prison’s shops earned a surplus net of all prison expenses.⁸¹ The reformers were quick to trumpet their achievements and a number of states followed with prisons of their own. New Jersey, Kentucky, Virginia, Massachusetts, Vermont, Maryland, New Hampshire, Ohio, and Georgia all built prisons in the first two decades of the nineteenth century.⁸² Despite all of these successes, this first burst of prison activity met with a rapid and ignominious end within twenty years.

74. *See id.*

75. *See id.*

76. *Id.*

77. *See id.* at 33.

78. *See id.*

79. *See* LEWIS, *supra* note 4, at 29.

80. *See id.* Fourteen prisoners did escape on opening day, but only because of the malicious efforts of a hostile jailer.

81. *See* LEWIS, *supra* note 42, at 33.

82. *See* U.S. DEP’T OF JUSTICE, 5 ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES: PRISONS 4 (1939).

The precipitous decline is very illuminating because so many of the ills that plagued the American penitentiary system towards the end of the nineteenth century found their roots in patterns shown in stark relief during this early era. One cause of these early prisons' failures came, literally, from the ground up. The prisons were designed predominantly to hold prisoners in large congregate rooms which made policing them difficult. In fact, Thomas Eddy, the designer of Newgate, later renounced the entire plan.⁸³ The congregate cells encouraged escape plots and riots. Both Newgate and Walnut Street faced a terrible string of prison uprisings and attempted escapes from 1817 to the early 1820s.⁸⁴ Concern about public safety is probably the main reason the prisons were scrapped.

Architecture was certainly not, however, the root cause of the breakdown in security at the prisons. Obviously the original structures functioned remarkably well for years. But the prisons were small in scale and by around 1820 the demands placed on them were beyond their capacities. The original Pennsylvania law which had ordered the Walnut Street jail reconstructed also allowed judges to send hardened criminals from all over the state to be housed in the solitary cells. By 1815 the prison housed over 220 convicts compared to the seventy-two it held in 1790.⁸⁵ Newgate was similarly overcrowded.⁸⁶ For years wardens attempted to keep prison populations under control through the liberal use of the pardon. At Newgate in 1816 and 1817, for example, the warden pardoned 573 convicts.⁸⁷ Conditions were even worse in other states, such as Massachusetts where over a five year period 740 convicts were released through pardons and only seventy-seven through expiration of their sentences.⁸⁸ Prisoners at Newgate expected to serve only half of their prescribed sentences and actually rioted if denied pardons.⁸⁹ Not only were the prisons themselves insecure, any deterrent effect they might have once brandished was a mockery by the early 1820s.

Stopping the analysis here, it might appear that these early prisons failed simply because they became overcrowded. That is absolutely true, but also superficial. Why the prisons became overcrowded is the important question. Part of the answer lies with the simple observation that populations probably grew faster than expected during the period. Yet Pennsylvania made absolutely no provision for expansion of the Walnut Street prison or creation of new prisons from 1790 to 1817. Even normal population growth would have

83. See LEWIS, *supra* note 42, at 51.

84. See BARNES, *supra* note 1, at 155.

85. See *id.* at 153, 154.

86. See LEWIS, *supra* note 42, at 42.

87. See LEWIS, *supra* note 4, at 60.

88. See *id.* at 58.

89. See LEWIS, *supra* note 42, at 42.

necessitated some new space. Probably most of the answer, then, rests with the prison administrations themselves.

Early on appointments to prison administration positions became political. By 1804, for example, the Jeffersonians had forced Thomas Eddy, who was a Federalist, to resign.⁹⁰ Pennsylvania was equally politicized, and by 1818 the original society which had been almost singly responsible for Walnut Street's renovation, gave up hope of reforming the prison.⁹¹ With political appointees came a total breakdown in the original ideals of the prisons. Wardens granted pardons excessively for purely administrative reasons. In New York, prison administrators asked for and received permission to use flogging and stocks in order to keep discipline, making the punishments of many offenders even harsher than under the old criminal codes.⁹² At both Newgate and Walnut Street, legislators put immense pressure on the wardens to cover prison expenses. Convict labor quickly became less of an instrument of reform than state-run slavery.⁹³ The politically appointed administrators thus sought to function day to day with no clear goals and no compelling reasons for new funding. Amidst this chaos and decay, reformers and legislatures turned to new ideas and grander penitentiaries. The Walnut Street prison did not formally close until 1835, but by the early 1820s it was already dilapidated and in disrepute.⁹⁴ New York finally abandoned Newgate in 1828.⁹⁵

II. THE RISE OF THE AUBURN AND PENNSYLVANIA PENITENTIARY SYSTEMS

In the wake of the riots and chaos that prevailed as Newgate and Walnut Street neared their ends, critics of the new prison system proliferated. A prominent New York lawyer argued that, "[o]ur favourite scheme of substituting a state prison for the gallows is a most prolific mother of crime," and dubbed Newgate prison a "grand demoralizer" of the people.⁹⁶ Legislative investigations lamented the rampant crime rates and the ease of prison life and called for harsher treatment of inmates.⁹⁷ Yet the early prisons had achieved some success and neither the legislatures nor the public wished a return to the old methods of criminal control. The opposition to the new prisons was thus diffuse and disorganized and without an effective response to the reformers' newest weapon: optimism.

90. *See id.* at 34.

91. *See BARNES, supra* note 1, at 155.

92. *See LEWIS, supra* note 42, at 46.

93. *See id.* at 40.

94. *See BARNES, supra* note 1, at 156.

95. *See LEWIS, supra* note 42, at 52.

96. *Id.* at 62.

97. *See id.* at 65.

The first wave of prison reform was clearly rooted in the Calvinistic teaching that people are born sinners and cannot fundamentally change. Though the designers of the original prisons sought to make punishment more humane, they never lost sight of the goals of deterring and horrifying criminals. With the breakdown in security and the evolution of revolving-door prisons, these first reformers were left without an adequate defense for their creations. The second wave of reformers in the 1820s held out a much grander enticement to legislatures and the public. Their rhetoric not only explained the failures of the old ways, but also outlined a clear plan for building a new system—a system that would protect society by making honest citizens out of criminals.

In a spirit that would later manifest itself in the writings of the Positivist criminologists Lombroso, Ferri, and Garofalo,⁹⁸ the new reformers argued from a uniquely American standpoint. With the rise of Jacksonians to power, many Americans viewed the increased mobility and fluidity of society with alarm and skepticism.⁹⁹ The new reformers argued that it was exactly this dissolution of social order that led to crime. Criminals were not born, they were created by poor social conditions. Bolstering these arguments were numerous studies cataloguing the early childhoods of criminals which seemed to confirm the hypothesis that social conditions bred crime.¹⁰⁰

If social ills were the cause of crime, the new reformers reasoned, then society should be able to cure criminals by separating them from corrupting influences and by inculcating in them healthy habits. The old prisons had failed not because imprisonment was wrong, but because offenders were indiscriminately mixed together. Inspectors of Walnut Street in 1803 described the situation:

The great number of vagrants, untried prisoners, etc. produces hurtful effects on the convicts, as the latter are, for want of room, obliged to be kept in too large numbers in one apartment, by which the amelioration of their morals is either prevented or greatly impeded.¹⁰¹

The new penitentiaries would not make the same mistakes, and their creators strove to ensure both absolute separation of prisoners and opportunity for reformation.¹⁰²

The idea of reforming prisoners through separation was relatively novel, and Americans had little in the way of precedent to guide them. Reformers received the most guidance in the area of prison architecture and design. Since the convicts were to be reconstructed in a way, everything in the new penitentiaries needed to instill the proper mental attitude. The building

98. See GILLIN, *supra* note 5, at 331-38.

99. See ROTHMAN, *supra* note 11, at 69.

100. See *id.* at 70.

101. BARNES, *supra* note 1, at 96.

102. See ROTMAN, *supra* note 10, at 35.

commissioners of Pennsylvania's Eastern Penitentiary opined that "the exterior of a solitary prison should exhibit as much as possible great strength and convey to the mind a cheerless blank indicative of the misery which awaits the unhappy being who enters within its walls."¹⁰³ The most predominant architectural influence on the new penitentiaries probably came from Bentham who had devised an elaborate design for a novel prison he called the *Panopticon*.¹⁰⁴ After years of lobbying, Bentham had not managed to persuade the English Parliament to build his dream, but he had caught the attention of American reformers and inspired an architect named John Haviland.¹⁰⁵ Haviland did not play a significant role outside of Pennsylvania, however, and the predominant prison design was uniquely American.¹⁰⁶

New York took the lead in the second wave of reform and ordered the construction of a new penitentiary at Auburn in 1816.¹⁰⁷ The prison was on a plot 500 feet by 500 feet enclosed by a 2000-foot-long wall that stood 30 feet high.¹⁰⁸ Two main wings housed the prison cells and each was 240 feet long and 45 feet deep.¹⁰⁹ The cells were 7.5 feet long, 3.8 feet wide, and 7 feet high. Each block of cells stood back to back with another block; a design that became the American standard and is evident still today.¹¹⁰ Guards walked along passageways that ran between the walls of the building and the cells. By 1825 when the north wing was complete, Auburn had 550 cells.¹¹¹ The total construction cost equaled \$450,000.¹¹²

Pennsylvania responded to the demise of Walnut Street by ordering the construction of two new penitentiaries. The legislature appropriated funds for the construction of the Western Penitentiary at Pittsburgh in 1818.¹¹³ This prison was remarkable mainly for its absolute failure. Designed by the Pennsylvania architect William Strickland, its plan drew heavily from the Ghent prison design.¹¹⁴ It was supposed to house a system of solitary confinement without labor. The 190 cells measured 9 feet long by 7 feet wide, and 3-foot-thick iron doors enclosed each cell.¹¹⁵ The design was a disaster. Almost no light could enter the cells, guards could not readily observe pris-

103. JOHNSTON, *supra* note 48, at 31.

104. See John Hirst, *The Australian Experience: The Convict Colony*, in THE OXFORD HISTORY OF THE PRISON 274, 275 (1995).

105. See *id.*

106. See ROTMAN, *supra* note 10, at 34.

107. See DE BEAUMONT & DE TOCQUEVILLE, *supra* note 7, at 40.

108. See LEWIS, *supra* note 4, at 89.

109. See *id.*

110. See JOHNSTON, *supra* note 48, at 39-40.

111. See LEWIS, *supra* note 4, at 89.

112. See *id.* at 239.

113. See BARNES, *supra* note 1, at 138.

114. See *id.* at 139.

115. See *id.*

oners, and the peculiar layout of the sewer pipes allowed inmates to communicate through gratings.¹¹⁶ When the Pennsylvania legislature passed a law in 1829 mandating labor for all prisoners, the already unwieldy Western Penitentiary proved unworkable. The cells were too small and too dark to allow inmates to labor in them. On February 7, 1833, lawmakers ordered the Western Penitentiary's cells demolished and completely reconstructed—a decision that cost the state \$60,000 in addition to the original \$170,000 spent to construct the penitentiary.¹¹⁷

On March 20, 1821, Pennsylvania authorized the construction of the Eastern Penitentiary at Cherry Hill.¹¹⁸ It was this institution that would become world famous and establish the system of administration known as the Pennsylvania system. John Haviland's plan for the prison won the approval of the building commissioners.¹¹⁹ This intelligently laid out design allowed for easy observation of the prisoners by a minimal number of guards. Seven wings radiated from a central observation center with cells that were twelve feet long, eight feet wide, and ten feet high. Attached to each cell were exercise yards, with the biggest located on the ground floor.¹²⁰ The original 1821 law provided for 250 cells but the legislature directed the building of "at least 400" more in 1831.¹²¹ Haviland took special care to ensure each cell had enough light so that prisoners would be able to labor. He also attempted as far as possible to make it impossible for convicts to communicate, but contentions abounded that prisoners could do so through the pipes for a short time each day.¹²² By the final completion date, the prison had cost Pennsylvania \$772,600.¹²³

New York and Pennsylvania built the penitentiaries at Auburn and Pittsburgh, respectively, to institute the policy of solitary confinement without labor. The warden at the Western Penitentiary tried to carry out this policy from 1827 to 1829 but the architectural difficulties of the prison rendered the endeavor impossible. From 1821 to 1823, however, the administrators at Auburn did adhere strictly to the new policy of solitary confinement without labor. When builders completed the north wing in late 1821, the prison administrators placed eighty prisoners there as an experiment.¹²⁴ The results were disastrous:

116. See LEWIS, *supra* note 4, at 120.

117. See BARNES, *supra* note 1, at 139-40.

118. See *id.* at 141.

119. See *id.* at 146.

120. See BARNES, *supra* note 1, at 142.

121. See *id.* at 145.

122. See LEWIS, *supra* note 4, at 125.

123. See BARNES, *supra* note 1, at 146.

124. See DE BEAUMONT & DE TOCQUEVILLE, *supra* note 7, at 40.

The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them had already succumbed during a single year [1821-1822]; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to precipitate himself from his cell running the almost certain chance of a mortal fall.¹²⁵

In 1823, the governor of New York pardoned twenty-six of the original eighty inmates and allowed the others to leave their cells during the day to work in common shops.¹²⁶

The conclusion that solitary confinement without labor causes mental breakdown and insanity has never been seriously questioned. Indeed, psychological studies in the 1850s purported to demonstrate conclusively the negative mental effects of the system.¹²⁷ Certainly, New York never again attempted the system after its original experiment. The Western Penitentiary at Pittsburgh could neither corroborate nor contradict the Auburn experience because it suffered so many problems from the beginning. For all its undoubted political force, however, the integrity of the New York experiment is questionable. Until 1825, prison officials were not authorized to transfer even obviously insane convicts to mental institutions.¹²⁸ Many of the eighty convicts may therefore have been insane before enduring the two year experiment. Whatever the ultimate truth about solitary confinement without labor, the administrators at Auburn were left without a system from almost the beginning.

The replacement system ultimately devised at Auburn became known as the congregate system. The inmates slept in separate cells, but worked in common shops during the day. To ensure that prisoners did not contaminate each other, the administrators maintained a strict rule of silence.¹²⁹ Only when absolutely necessary could inmates speak to a guard and never were they allowed to communicate with their fellows.¹³⁰ Indeed, absolute discipline permeated every aspect of a prisoner's life. When not sleeping, for example, inmates were required to remain standing in their cells.¹³¹ There is no clear evidence of who created this system, but many scholars of the time thought that Elam Lynds, the first warden at Auburn, was the major creative force.¹³²

125. *Id.* at 41.

126. *See id.* at 42.

127. *See* BARNES, *supra* note 1, at 295-99.

128. *See* LEWIS, *supra* note 42, at 47.

129. *See* LEWIS, *supra* note 4, at 86.

130. *See id.* at 87.

131. *See* LEWIS, *supra* note 42, at 122.

132. *See* DE BEAUMONT & DE TOCQUEVILLE, *supra* note 7, at 43.

To a certain extent, the history of early Auburn is the history of those who ran it, for the administrators wielded almost unchecked control over the institution. Lynds was an immensely practical man who scoffed at the idea that criminals were capable of true reform. His goal was to break a convict's spirit and turn a prisoner into "a silent and insulated working machine" while at the same time crafting the prison into a place of terror for potential offenders.¹³³ Whether the criminal ultimately became a better person was immaterial so long as he was obedient. Lynds' personal resolve won him many political converts and he enjoyed approval from legislators, foreign visitors, and even noted reformers such as Eddy.¹³⁴ Though some decried his methods as unduly harsh and the authorities investigated him several times, his enemies could not garner enough momentum to oust him until 1844. Lynd's harsh prison philosophy found receptive audiences both in the populace and in the legal community. When one of Lynd's men was brought to court for allegedly beating an inmate with a cane in clear contravention of the law, for example, the judge assigned to the case admonished the jury at length about how guards had a "common law right" to maintain order and make inmates "most deeply feel the awful degradation and misery, to which their vicious courses have reduced them."¹³⁵

A very different situation developed at Pennsylvania's Eastern Penitentiary where Samuel R. Wood became the first warden. Wood had been a member of the Philadelphia Society and had lobbied the legislature on behalf of the new penitentiaries. He served on the board of commissioners for the Eastern Penitentiary and personally believed in the system he was to institute.¹³⁶ Almost the polar opposite of Elam Lynds, Wood stressed reform from the first moments the convicts entered the prison. The jailers placed the convicts in their cells alone and without work so that they could reflect on their past wrongs. When they requested them, convicts received work and a Bible. Mr. Wood also ensured that illiterate prisoners were taught to read during their prison stay.¹³⁷ The only punishments at the Eastern Penitentiary were deprivation of work and the Bible and, in extreme cases, lowered rations.¹³⁸ This first administration functioned so well that the board of inspectors found fault only in that the legislature had not properly provided for a separate institution for insane convicts.¹³⁹

Besides the personal philosophies of the wardens, differences in the harshness of prison discipline and the focus of prison rules arose because of

133. LEWIS, *supra* note 42, at 88.

134. *See id.* at 89.

135. *Id.* at 97.

136. *See* BARNES, *supra* note 1, at 159.

137. *See* DE BEAUMONT & DE TOCQUEVILLE, *supra* note 7, at 82.

138. *See id.* at 72.

139. *See* BARNES, *supra* note 1, at 161.

the radically different labor systems used at Auburn and the Eastern Penitentiary. Because the inmates in the Eastern Penitentiary remained in their cells at all times, there was little need for especially rigid oversight. At Auburn, where one guard might watch over fifty or sixty convicts in a shop,¹⁴⁰ the guards had to constantly work to ensure absolute silence. Pennsylvania from the start viewed labor as a means to rehabilitation and never emphasized earning profits. The legislature's appropriation of enormous sums to renovate the Western Penitentiary to provide for solitary labor is a concrete indication of Pennsylvania's commitment to using labor predominantly for rehabilitation. Indeed, the entire idea of solitary labor is antithetical to good economic practice. As focused on reform as Pennsylvania was, however, so was New York fixated on profits. One European writer noted that the large communal shops at Auburn resembled the large industrial workshops of New York City precisely because the profit motive animated both.¹⁴¹ The need to squeeze quality work from an unskilled, unruly, and totally unmotivated workforce drove the guards at Auburn to increasingly harsh corporal punishments.

The systems that developed at Auburn and the Eastern Penitentiary defined the American approach to incarceration for the rest of the nineteenth century. Ultimately, only Pennsylvania maintained a system of solitary labor while all other states adopted the Auburn model.¹⁴² The landslide victory of the Auburn paradigm did not come, however, without a series of vociferous and seemingly never-ending debates that erupted during the 1830s and 1840s. While Pennsylvania was content merely to continue its system at home, advocates for the Auburn system campaigned with almost religious fervor. Theodore Dwight, a theology student who had dropped out of the ministry due to ill health caused by the inhalation of noxious chemicals while at Yale,¹⁴³ found an alternative mission in publicizing the Auburn system. He founded what became known as the Boston Prison Discipline Society and published annual reports on the state of prisons in America. These reports, which were later discredited by his own society as fraudulent, attacked the Pennsylvania system along three major lines.

Dwight argued that the Pennsylvania system induced ill health in the inmates, that it tended to make inmates insane, and that its costs were extravagant compared to the Auburn system.¹⁴⁴ Though the insanity claim and charges of ill health were probably more sensational than real, it was the clear demonstration of the Auburn system's economic potential that ulti-

140. See LEWIS, *supra* note 4, at 94.

141. See David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in THE OXFORD HISTORY OF THE PRISON, *supra* note 104, at 124.

142. See U.S. DEP'T OF JUSTICE, *supra* note 82, at 16.

143. See LEWIS, *supra* note 42, at 107.

144. See LEWIS, *supra* note 4, at 237-50.

mately won the day. The prison at Auburn cost \$584 per prisoner to construct while the Eastern Penitentiary cost \$1,023 per inmate.¹⁴⁵ Additionally, Auburn-style prisons produced annual surpluses¹⁴⁶ while the Eastern Penitentiary continually lost money.¹⁴⁷ Legislatures found in the Auburn system a program that was cheap, could protect society, and might help fill their coffers. The eccentric Pennsylvania system could offer only vague statements about reformation that were not only unsubstantiated, but also philosophically disputed. When de Tocqueville and de Beaumont summarized their visit to America, they wrote:

The Philadelphia 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 obligations.

If it be so, the Philadelphia system produces more honest men, and that of New York more obedient citizens.¹⁴⁸

With even the very notion of reform taken from it, the Pennsylvania system existed only in Pennsylvania while legislatures everywhere else began to construct their own Lyndsian profit makers.

Not many notable developments occurred in the evolution of American prisons from 1840 to around 1870. Some minor reform movements attempted to help rebuild inmates once the Auburn system had torn them down. In 1845, for example, Massachusetts instituted a system of post-incarceration counseling and maintained a sizable prison library.¹⁴⁹ One of the Massachusetts wardens, Frederic Robinson, organized a convict society dedicated to increasing morality among the inmates.¹⁵⁰ Connecticut ran a fully functional prison school by 1843.¹⁵¹ These reforms achieved little permanent alteration. Well into the 1840s, for example, New York spent only about one percent of all prison funding on reform-oriented projects.¹⁵² One reform movement in the 1840s that developed in response to the increasingly harsh discipline used to control inmates under the Auburn system did, however, achieve some fairly significant changes.

In the early 1840s, under the leadership of such reformers as Dorothea Dix, strong political pressure mounted against the use of the whip in prisons.

145. *See id.* at 239.

146. *See id.* at 259.

147. *See BARNES, supra* note 1, at 282.

148. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 7, at 91.

149. *See LEWIS, supra* note 4, at 166-67.

150. *See J.E. BAKER, THE RIGHT TO PARTICIPATE: INMATE INVOLVEMENT IN PRISON ADMINISTRATION* 31 (1974).

151. *See LEWIS, supra* note 4, at 184.

152. *See LEWIS, supra* note 42, at 225.

One of the most spectacular scandals of the day centered around an Irish woman who had become pregnant while in prison. The warden at Auburn ordered her flogged for continual insubordination. After delivering her child in July 1825, she died. The supervising physician testified that the beating had caused her death.¹⁵³ Though the truth of that particular story was hotly disputed, frequent beatings were well documented. Dorthea Dix in her treatise *Prisons and Prison Discipline* recorded that in the year 1844 to 1845, "the number of lashes in the men's prison [at Sing Sing] has diminished from one thousand one hundred and ninety-five per month, to about two hundred."¹⁵⁴ She contrasted these lashings, each delivered with the cat-o'-nine-tails, with the humane Eastern Penitentiary which maintained solitary confinement in a darkened cell as its only mode of punishment.¹⁵⁵

Largely due to public squeamishness when confronted with such staggering statistics, reformers succeeded in pressuring wardens to turn to alternative means of enforcing discipline. These alternatives, rather than being more humane, however, sometimes were bizarre and dangerous. Various forms of pulley systems in which convicts were raised by their hands, heads, and even thumbs were extremely popular around the time of the Civil War.¹⁵⁶ In New York, guards administered beatings with a paddle covered with "two thicknesses of sole leather" forty or fifty at a time to inmates' buttocks.¹⁵⁷ Two of the most dangerous disciplinary measures were the "shower" and the "gag." In the "shower," inmates were locked into a chair and then doused repeatedly with iced water forced through an extremely small outlet. The treatment caused severe headaches, deafness, and, in at least one reported case, death.¹⁵⁸ The "gag" was a simple metal plate placed into the convict's mouth and tightened around his neck by chains that attached to a pair of handcuffs. By tightening the chains in a certain way, guards could induce unconsciousness and feelings of asphyxiation.¹⁵⁹ Aside from remonstrations against excessive discipline in 1840s, however, prison wardens enjoyed almost unchecked freedom of action until the late 1860s.

III. WINES AND DWIGHT AND THE FIRST REFORMATORIES

Beginning around 1840, the American public's exposure to internal prison life declined steadily and consequently the plight of prisoners was not in the public mind. In 1867, Enoch Wines and Theodore Dwight once again

153. See *id.* at 94-95.

154. DORTHEA LYNDE DIX, REMARKS ON PRISONS AND PRISON DISCIPLINE IN THE UNITED STATES 16 (1845).

155. See *id.* at 23.

156. See DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE 19 (1980).

157. *Id.* at 20.

158. See LEWIS, *supra* note 42, at 271.

159. See Rothman, *supra* note 141, at 122-123.

focused America's attention on its penitentiaries with their work entitled *Report on the Prisons and Reformatories of the United States and Canada Made to the Legislature of New York*.¹⁶⁰ The report totaled almost 600 pages and included accounts of health conditions, descriptions of disciplinary regimes and rehabilitation efforts, interviews with wardens, and no small amount of editorializing. Wines and Dwight argued that the only relevant considerations for assessing a prison were: 1) how well it aimed at reformation and 2) how efficiently it pursued that end.¹⁶¹ Their unequivocal conclusion was that, "[t]here is not a prison system in the United States, which tried by either of these tests, would not be found wanting."¹⁶²

Wines and Dwight found that most punishments in prisons engendered "hatred" and were designed to degrade prisoners.¹⁶³ The forced labor in the large prison workshops "seemed a process adapted to crush out every noble aspiration, every manly sentiment, from the breasts of those who were subjected to its operation."¹⁶⁴ Physical conditions at many prisons were noxious. Most prisons had "an odor made up of animal secretions, damp walls, pent-up dormitories and musty clothing."¹⁶⁵ Few prisons provided educational facilities and, even when available, prisoners rarely received time to learn basic skills.¹⁶⁶ The report lamented the almost total lack of religious teaching and noted that no institution required chaplains to converse with prisoners with any regularity.¹⁶⁷ Wines and Dwight suggested an almost complete reconstruction of American prisons including barring prison administration appointments based on politics, granting wardens the power to remove guards at will, abolishing prison labor for profit, increasing religious and academic training, and even redesigning the basic prison buildings.¹⁶⁸

The causes of the disintegration of prison conditions by the late 1860s are more obscure than, but remarkably similar to, those which precipitated prison failures in 1820s. Social changes had molded a set of incentives for prison administrations that made the conditions Wines and Dwight recounted in 1867 predictable if not inevitable. The dismay that reformers in the 1860s felt at the almost total lack of emphasis placed on reforming the criminal is understandable but somewhat comic. From the start, the Auburn-style administrations scoffed at the notion of reform. Legislatures saw money spent on reform as wasteful and a hindrance to covering prison expenses. As

160. WINES & DWIGHT, *supra* note 2.

161. *See id.* at 61.

162. *Id.* at 62.

163. *See id.* at 166-67.

164. *Id.* at 176.

165. *Id.* at 239.

166. *See id.* at 222-24.

167. *See id.* at 142.

168. *See id.* at 72.

prison administration positions increasingly became political appointments, appointees quickly realized that profit was the true measure by which legislatures would judge them. By the time of the 1867 report, political reshuffling of administrators was so prevalent and frequent that Wines and Dwight concluded that "the cause . . . of [the deficiency in prison administrations], as lamentable as it is wide-spread, is to be found . . . in the controlling power given to party politics over the management of the prisons."¹⁶⁹ Even in the Eastern Penitentiary, where politics officially played no role in administration appointments,¹⁷⁰ political influences produced administrations that eroded the institution's staunch dedication to rehabilitation.¹⁷¹

Politics alone does not explain the atrophy of rehabilitative efforts. If wardens had possessed a ready way to demonstrate to legislatures and the public the relative success prisons had in reforming prisoners, then it is much less likely the decline would have occurred so quickly or at all. There were some early attempts at compiling recidivism statistics. For example, de Tocqueville and de Beaumont reported that one in nineteen criminals released from Auburn would later commit crimes.¹⁷² The statistics were never very reliable, however, and consequently carried little political weight. Indeed, Wines and Dwight complained that no central authority compiled data and that the only indicators of reformatory efforts were anecdotal stories from wardens.¹⁷³ While the success or failure of a prison's rehabilitation efforts was thus nebulous, its financial status was ruthlessly concrete.

Contract prison labor became a serious political force in the 1830s. Legislatures had attempted leasing prisoners to private contractors and selling finished goods, but the northern states settled on the contract system early.¹⁷⁴ A notable exception was the Eastern Penitentiary, which did not adopt congregate labor systems until 1913.¹⁷⁵ Under the contract system, prisoners worked within the prison shops to produce finished goods for private entrepreneurs. The system functioned much better than leasing convicts or selling finished goods, but was nonetheless rife with abuse. Because the prisoners remained within the prison, contractors demanded that a representative from the company be present in the workshops. These foremen used a variety of techniques to extract excessive labor from the convicts and to defraud the prisons. To induce convicts to labor more rapidly, the contractors would smuggle in fruit, tobacco, mail, and alcohol.¹⁷⁶ Convicts who were

169. *Id.* at 124.

170. *See id.*

171. *See* BARNES, *supra* note 1, at 240.

172. *See* DE BEAUMONT & DE TOCQUEVILLE, *supra* note 7, at 98.

173. *See* WINES & DWIGHT, *supra* note 2, at 282.

174. *See* GILDEMEISTER, *supra* note 51, at 30-35.

175. *See* BARNES, *supra* note 1, at 240.

176. *See* GILDEMEISTER, *supra* note 51, at 110.

too slow were reported as insubordinate and summarily punished.¹⁷⁷ Guards encouraged convicts to steal finished goods so the guards could resell them on the black market.¹⁷⁸ When the prisons finally did bill the private contractors, they often refused to pay full price, claiming that some of the prisoners had not been "able bodied" or had produced damaged goods.¹⁷⁹ Though the prison labor system declined in response to increasing pressure from free workers, it continued in basically the same form for the rest of the nineteenth century.¹⁸⁰

Despite the abuses and obstacles, prisons did manage to produce surpluses. For example, from 1828 to 1833 Auburn earned over \$25,000.¹⁸¹ The emphasis on profit by the legislatures and concomitant refusal to fund more prison space led, however, to severe overcrowding by the 1860s. Even the Eastern Penitentiary that had so long resisted many of the evils associated with the Auburn system eventually had to cease its policy of solitary confinement. By 1866 the institution housed 569 prisoners in its 540 cells.¹⁸² Similarly, in 1852, the New York penitentiaries had 254 more convicts than cells. Wardens responded by housing two or more inmates in a cell and by putting many of the convicts in the prison infirmary or chapel.¹⁸³ Such conditions led to a total breakdown in the rule of silence and convicts freely communicated. Penitentiaries were little more than holding bins for the dregs of society.

Aside from the legislative emphasis on frugality, it is difficult to explain why the public allowed such overcrowding. Public attitude was clearly less sympathetic towards prisoners than it had been during the 1820s. Some scholars have argued that the change in attitude occurred because of the increasing percentage of foreign-born convicts in the prison populations.¹⁸⁴ In the 1860s, 29.7 percent of the Auburn prisoners were foreign-born while only 25.8 percent of New York's general population was non-native.¹⁸⁵ Yet from 1797 to 1801, fully forty-two percent of all commitments to New York's prisons were foreign-born and public attitude towards prisons was not hostile.¹⁸⁶ Probably, it was the combination of increasing hostility to immigration, the indeterminacy of the debates between the Pennsylvania and Auburn supporters, and a general hardening of sentiment towards adult of-

177. *See id.* at 111.

178. *See id.*

179. *See* LEWIS, *supra* note 42, at 265.

180. *See* GILDEMEISTER, *supra* note 51, at 127-65.

181. *See* LEWIS, *supra* note 4, at 133.

182. *See* GILDEMEISTER, *supra* note 51, at 28.

183. *See* LEWIS, *supra* note 42, at 272.

184. *See* ROTHMAN, *supra* note 11, at 254.

185. *See* GILDEMEISTER, *supra* note 51, at 76.

186. *See* LEWIS, *supra* note 4, at 54.

fenders that eventually led to public and legislative apathy and contentment to merely confine rather than reform criminals.

The fervor Wines and Dwight generated, as spectacular as it was at the time, was short lived. In 1870 the National Prison Congress, made up of 130 delegates from twenty-four states, Canada, and South America, convened in Cincinnati, Ohio.¹⁸⁷ The delegates heard many papers, most notably a description of the revolutionary methods of Sir Walter Crofton and Alexander Maconocie collectively known as the Irish System.¹⁸⁸ In his report to the United States Congress, Wines described the most important of Maconocie's methods.¹⁸⁹ Maconocie's twenty-one principles¹⁹⁰ stressed rewarding convicts for good behavior by granting them privileges, including taking time off of their sentences.¹⁹¹ The National Prison Congress adopted most of these principles and advocated:

1. Reformation, not vindictive suffering, as the purpose of penal treatment of prisoners.
2. Classifications made on the basis of a mark system, patterned after the Irish system.
3. Rewards for good conduct.¹⁹²

The 1870 Congress and subsequent reform movement had little impact on the vast majority of convicts. One of the members of the National Prison Congress, Zebulon Brockway,¹⁹³ did manage, however, to found a reformatory for juvenile offenders at Elmira, New York.¹⁹⁴ The Elmira reformatory looked much like other prisons but had more of an emphasis on education and trade training. The two most radical provisions were that inmates' sentences were indeterminate and all convicts were grouped into classes. An inmate who flouted prison rules earned demerits which could push him lower in the class ranking. Upward movement earned the prisoners privileges and only prisoners in the highest class could earn parole.¹⁹⁵ Twelve states followed the Elmira model between 1876 and 1901.¹⁹⁶

187. See AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 50, at 70.

188. See *id.* at 71.

189. See ENOCH C. WINES, INTERNATIONAL CONGRESS ON THE PREVENTION AND REPRESSION OF CRIME, INCLUDING PENAL AND REFORMATORY TREATMENT: PRELIMINARY REPORT OF THE COMMISSIONER 150-202 (1872).

190. See *id.* at 154-202.

191. See *id.* at 164.

192. AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 50, at 71.

193. See WINES, *supra* note 189, at 241.

194. See U.S. DEP'T OF JUSTICE, *supra* note 82, at 22-23.

195. See *id.* at 23.

196. See *id.*

CONCLUSION

The story of what happened to American prisons between 1777 and 1867 is, in the end, common for it is retold by millions with each New Year's resolution. Disgusted with old habits, inspired by the optimism of the time, every resolver pledges to change and do things better in the future. For a time many succeed. Yet soon the luster of the resolutions dims, the determination of the resolver wanes, and a return to more convenient ways seems inevitable. There are a few who do manage the trick of carrying out their plans. Building on initial momentum, they create new habits which remain long after enthusiasm has passed.

So too goes the story of early American prisons. Each wave of reformers pointed to abuses of the past. The founders of Newgate and Walnut Street argued against harsh and illogical criminal codes and those of Auburn and the Eastern Penitentiary against moral contamination in the old prisons. Each generation of reform had its own version of New Year's optimism whether it came in the form of utilitarian rationality or Jacksonian resolve. Certainly, no reformer was without a laudable resolution. Only those goals which became ingrained into the system, however, survived the inevitable public apathy.

Most notable in this regard is the unique history of the Eastern Penitentiary. Though not without its own failures, it avoided relatively well the problems that beset the Auburn-style prisons. Founded on the idea of reform through solitary labor, every aspect of the Eastern Penitentiary revolved around that goal. The prison had specialized architecture, laws that prescribed strict adherence to solitary labor, administrators dedicated to reforming convicts, and vocal, though not ubiquitous, advocates. The penitentiary's founders had established self-perpetuating mechanisms, such as the architecture itself, that insulated the prison from many of the pressures that pushed other prisons, even Pennsylvania's Western Penitentiary, away from the initial goal of reforming convicts. Auburn started from the same intellectual resolutions, but its creators did not sufficiently inculcate them into the system. As time passed and public attention slipped, Auburn and those prisons modeled after it eased into convenient patterns. In large part the swiftness of the decline came from the elusiveness of the initial goal of reforming prisoners. Without a way to quantify reform results, legislators and administrators easily pushed aside reform efforts for more concrete achievements. Ultimately, pressure for economy was too powerful.

In all fairness, the American penitentiary system of 1877 boasted a considerable amount of improvement over the colonial system of a century before. The improvements that lasted, however, did so undoubtedly because they had become ingrained into American culture. In retrospect, the prison experiments at Newgate, Walnut Street, Auburn, and the Eastern Penitentiary cannot rightly be called failures despite their eventual declines. Each fur-

thered ideals of humanity and had enough success to propel future reformers for generations. Their histories are the remains of a uniquely American resolution, made over the course of a century, that literally changed the world.