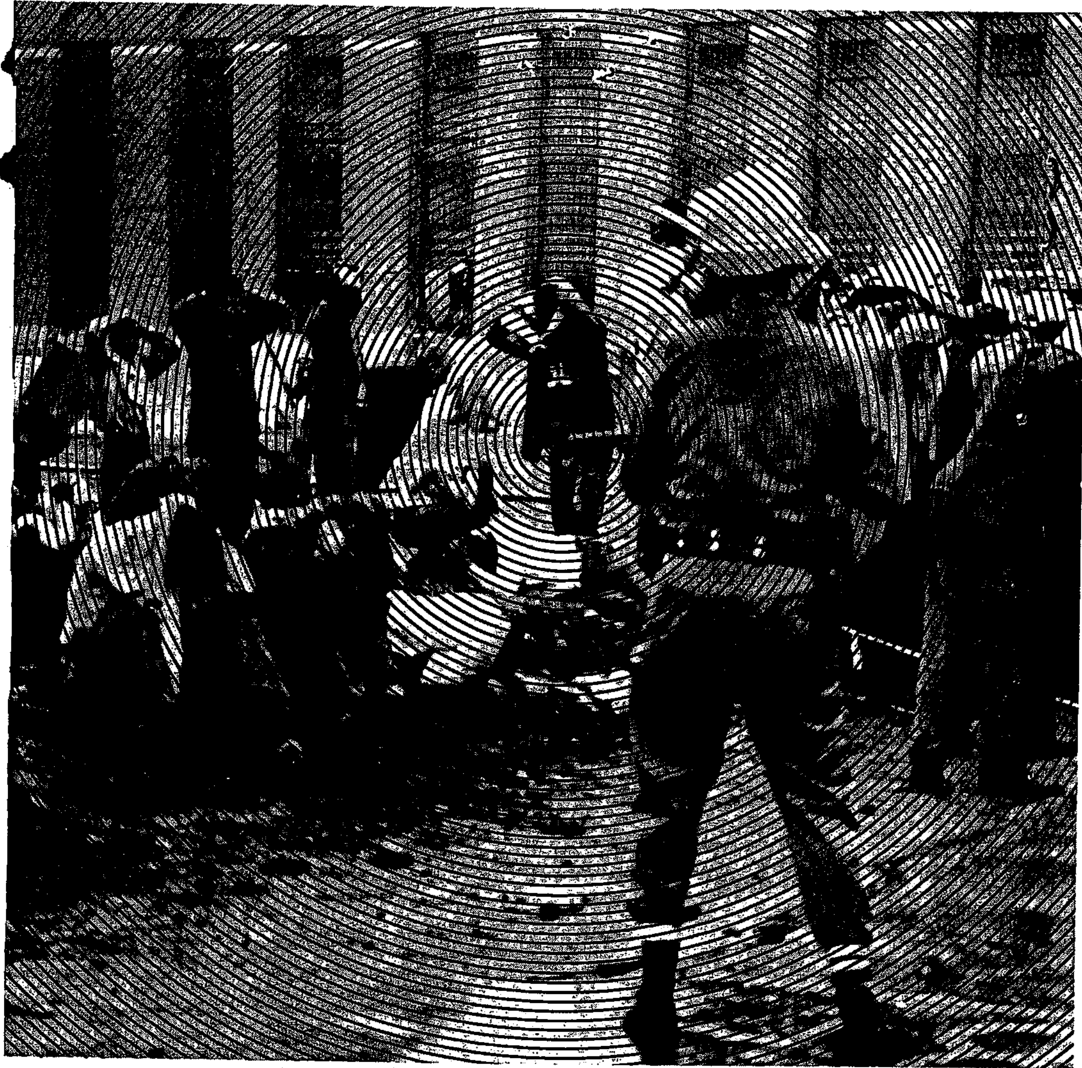

VE ARE THE VING PROOF..."

JUSTICE MODEL FOR CORRECTIONS

Second Edition

by David Fogel

vord by LLOYD OHLIN, Harvard Law School

"...WE ARE THE LIVING PROOF..."

David Fogel

"Fogel well knows the practicalities of prison cages, but his work is also informed by a sense of history and a vigorous attachment to human rights. This is an innovative and important book which will have lasting impact on sentencing and imprisoning."

Norval Morris
Dean,
University of Chicago Law School

"An impressive integration of history, intellectual comment and personal analysis on the American system of punishment and prisons. Fogel's "justice model" for corrections should be a pathfinder and, as he demonstrates, its seeds are already in the wind."

Daniel L. Skoler
Staff Director,
Commission on Correctional Facilities and Services,
American Bar Association

"Mr. Fogel's thoughtful manuscript presents both an historical perspective against which immediate decisions can be measured, and a mix of conclusions sufficiently precise to suggest to the policy-maker what he ought to try to do right now to make some sense out of the criminal justice system. Mr. Fogel's proposals have been carefully read and broadly discussed at the highest levels of the Federal government, and have been immensely helpful in catalyzing some of the thinking which went into drafting the President's special message on crime."

Richard Tropp
Special Counsel,
Presidential Clemency Board

PHOTO—Attica Rebellion, 1971

State Police herd subdued inmates into A yard before stripping and searching them.

not a dup of 28601

"...WE ARE THE LIVING PROOF..."

THE JUSTICE MODEL FOR CORRECTIONS

Second Edition

By

David Fogel

B.A., M.S.W., Dr. of Criminology

Executive Director
Illinois Law Enforcement Commission

Criminal Justice Studies
Anderson Publishing Co.

"...WE ARE THE LIVING PROOF..."

Copyright© 1979 by Anderson Publishing Co.
Copyright© 1975 by The W. H. Anderson Company

All rights reserved. No part of this book may be used or reproduced by any means without written permission from the publisher.

Library of Congress Catalog Card Number: 78-67806
ISBN: 0-87084-284-6

for carl bingham

"The law must serve everyone, those it protects as well as those it punishes."

Article VI, *Declaration of the Rights of Man,* 1789

NCJRS

APR 14 1980

ACQUISITIONS

CONTENTS

Foreword by Lloyd Ohlin vii
Preface xi
Preface to First Edition xiii
Chapter 1. Prison Heritage 1
the church / early practice / colonial punishment / post-revolution development / Philadelphia Society for Prisons / the fortress prison emerges / pioneers / the new penology / prison and prisoner population growth / aimless growth / prison labor / women in prison / the rehabilitation model / the continuum
Chapter 2. Guarding in Prison 69
evolution of the guard's role / custody vs. rehabilitation / professional prison literature / American Correctional Association / Wardens' Association / Administrators' Organization / ethnography of the guard / a pseudo-guard / Vienna, Illinois
Chapter 3. From Patient to Plaintiff 111
program services and "The Interchangeability of Penal Measures" / up from "Slave of State" / summary
Chapter 4. Pursuing Justice 179
a perspective on justice / justice in the consumer perspective / sentencing and parole granting / the purpose of prison — a restatement / a justice model for prison / operationalizing justice in prison / an alternative to the fortress prison
Chapter 5. The Immediate Future 273
hopes and hang-ups / justice without therapy
Postscript — An Indeterminate Sentence 299
Appendices:
I A. Soft on Crime? Not Prisoners 301
B. An Expression of Inmate Concern 305
II Memoirs of a Jailhouse Lawyer 306
III Plea Bargaining 309

IV A Letter from a San Quentin Convict 311
V Excerpts from "The Official Report of the New York State Special Commission on Attica" 314
VI The Effect of Flat Time Sentences on Time Served 317

Bibliography 323

Index 333

FOREWORD

A rising tide of criticism challenges the prevailing policies and practices of criminal justice agencies throughout the United States. Public disillusionment and professional cynicism is widespread, fueled by the constantly rising crime rates which large, new appropriations of government funds seem unable to curb. These criticisms focus most sharply on the failure of the correctional agencies to reduce recidivism among convicted offenders. The climate of public opinion lends itself most readily to new demands for more repressive measures to increase the punitive and deterrent effect of correctional decisions. Advocates of more punitive sanctions are convinced that only more certain, more visible and more severe sentences of imprisonment for offenders will provide an adequate measure of deterrence and public protection.

Another group of critics espouse an opposing set of premises. They feel that it is not the underuse but the overuse of large maximum security prisons and uncontrolled administrative discretion in sentencing and parole decisions that constitute the failure of correctional policies to deal more effectively with the crime problem. These critics recommend the abolishment of the fortress prison, a moratorium on current prison construction, and the elimination of the indeterminate sentence and parole boards. They locate the failure of current correctional policies in the brutalizing and degrading effects of prison life and the destructive impact on offenders of unreviewable discretion by judicial, prison and parole authorities.

The position expounded in this book does not fit neatly into either of these opposing camps. On the one hand the author seeks to enhance both the certainty and the predictability of the operation of the criminal justice system. On the other he insists that the correctional system must be above all both humane and fair in its operation and conditions of confinement. In this book he is less interested in utopian solutions than in devising short-

term and middle-range solutions to shape a rational and accept able set of correctional policies.

The issues the author must deal with are made no less difficult by this more limited and practical approach. If we do not place our confidence in the utility of fortress prisons, what types of correctional confinement or alternatives to imprisonment should we substitute instead? If our efforts to rehabilitate offenders and reintegrate them into law-abiding communities are ineffective, what principles and objectives should guide the management of prisoners? If the indeterminate sentence and parole board control over release decisions ought to be abandoned, how are we to maintain order in prison or to motivate offenders to change their lives? If the fortress prison is to be abandoned, how are we to identify and deal with that residual population of intractable, dangerous offenders from whom the public must be protected?

In this book the reader will find provocative, thoughtful and often iconoclastic answers to these and other questions. The author shows compassion and empathy not only for the prisoner but also for the neglected victims of crime and the harassed custodial guard force trying to administer conflicting and irreconcilable objectives in the fortress prison. His proposals constitute an integrated system which deals with central features of the malaise that now afflicts current correctional policies and practices. His solution is built on the idea that "Justice-as-fairness represents the superordinate goal of all agencies of the criminal law," and the propositions which flow from this basic principle.

In considering the application of this overriding principle, Fogel deals with the appropriate role of legislative, judicial, and administrative discretion in the setting of sentences. He considers the relative balance between the use of imprisonment and its alternatives, the role and design of maximum security facilities in the prison system, the problems of maintaining prison discipline and order, the place of rehabilitation and treatment programs for offenders, the participation of prisoners in setting the conditions of confinement, and other problems of infusing the prison system, its conditions, and practices with "justice-as-fair-

ness." In seeking answers for such fundamental questions, the author sketches the broad outlines of a philosophy and a design for a new system of sentencing and corrections. Inevitably, he leaves many details undeveloped while making it clear that the process and the problems of reform in different states will vary considerably. However, he attacks in uncompromising fashion hypocritical attitudes and defensive postures which obscure our capacity to devise realistic and rational alternatives. In short, he outlines a more constructive model of corrections and a new sense of purpose and direction for the future.

The author's proposals for change are fundamental and cut deeply into basic supports of a system long taken for granted. The system he describes is an integrated one which must supplant the present system in its entirety in order to be effective. There is always a measure of risk in proposing such major departures from existing practices. One of the greatest dangers is that parts of the new system will be adopted on a piecemeal basis without essential corrective changes in the existing system. This approach, for example, might result in more frequent use of confinement and for longer periods than is now the current practice. Will the older, outmoded fortress prisons really be closed as new model units are opened? Will the risk of arbitrary and discriminatory parole decisions be supplanted by equally arbitrary and discriminatory sentencing by judges? The proposals advanced here can only be properly tested if they are instituted as a comprehensive alternative to the present system of correctional policies and practices.

There is also a danger that the author's stress on "justice-as-fairness" might be adopted as a guiding principle for the development of a new model of prisoner rehabilitation. The author clearly intends that it should be the basic principle for organizing the correctional system itself in a manner that is both defensible and consistent with the ideology of a democratic society. He also believes that strict adherence to this principle will remove many of the sources of discontent with the present system. Will such a system also teach the individual offender to act more lawfully in his relationships with others? Will he learn

better to understand and respect the rights of others in his future conduct? Though the author suggests at various points that this may in fact occur in some cases, this is not his prime objective. Adoption of the "justice-as-fairness" principle as a superordinate goal for corrections is justifiable in that it provides a more rational ground for the construction of correctional policies. He is not therefore proposing a new model for the rehabilitation of individual offenders so much as a set of principles for the rehabilitation of the correctional system itself.

In presenting the proposals advanced in this book, the author picks up where most critics leave off. Though he traces the evolution of the maximum-security fortress prison and identifies its many problems and defects, he also tries to answer the question, "Where do we go from here?" His long experience with the treatment of convicted offenders and his thoughtful and critical exploration of the failure of current correctional policies have generated a deep concern and understanding of the plight of both prisoners and correctional personnel caught in the irreconcilable conflicts of current correctional policy. His analysis of problems and his proposals for change do not yield a utopian formulation for reform. Instead they invite debate and creative contributions at many different points so that individual states may develop their own policies along lines consistent with the principles articulated here. Major change in our correctional systems now seems inevitable and this book helps us by proposing why, where, and how we might begin.

Lloyd E. Ohlin
Roscoe Pound Professor of Criminology
Harvard Law School

PREFACE

I have simply left the first four chapters intact (with a few minor corrections) since the history (Chapter I) has not changed much, the plight of the correctional officer (Chapter II) has changed less, and the case law (Chapter III) has, as projected in 1975, simply grown while no dramatic therapeutic breakthroughs have emerged. Chapter IV still contains the major theoretical underpinnings of the justice model and some practical program ideas for its implementation.

Chapter V has been revised and enlarged. It now updates some developments in case law and legislation affecting prison conditions, sentencing procedures and the abolition of parole as a release mechanism in three major jurisdictions. Lastly, I present a response to the "abandonment of rehabilitation" argument.

As with the first edition, the intent of this edition is not to present panaceas but to advance the debate in our continuing pursuit of justice.

David Fogel
Chicago, January, 1978

PREFACE TO FIRST EDITION

Following a series of Midwestern prison disturbances in the summer and fall of 1973, the Law Enforcement Assistance Administration (Region V Office*) invited each of its member state's criminal justice planning directors and correction department heads to a meeting in Chicago. Two years earlier I had attended a hastily convened session of the Association of State Correctional Administrators (A.S.C.A.) in San Francisco. This latter session was in response to the Attica uprising and a series of other less publicized riots throughout the United States. None of the 1973 Midwestern prison disturbances approached the horror of the 1971 Attica uprising. I attended the California meeting in my capacity as Commissioner of the Minnesota State Department of Corrections and the Chicago session as Director of the Illinois Law Enforcement Commission (the agency for L.E.A.A. state planning).

Outside of the meeting room of an elegant San Francisco hotel, the press clamored for admittance. We voted it down. We permitted silent TV footage, and our host had a press release prepared for the newspapers. Individual commissioners could be interviewed following the meeting. The meeting itself was to be a closed one. It did not make much difference. We didn't have much to say anyway. The agenda consisted of a parade of directors whose prisons or jails had recently experienced riots. Commissioner followed commissioner to the podium reliving anxious moments—Procunier at Folsom, Soledad, and San Quentin; McGrath at the New York City Tombs; Oswald at Attica; and others. Many would experience new disturbances in the months to follow. One was destined to himself be taken hostage, another was to offer himself in place of a guard hostage, and several others would negotiate the release of other hostages. Finally, a few would lose their jobs following new riots.

*Consisting of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

The San Francisco meeting was reactive. Most of us were still stunned by the New York tragedy, which has been described by the Attica Commission as the "bloodiest one-day encounter between Americans in this century." If America expected answers from its correctional leadership, the A.S.C.A. was not ready to offer them. Under the leadership of Bill Leeke, Director of the South Carolina D.O.C., and his assistant, Dr. Hugh Clement, a number of studies and action programs were developed (the series included a study on collective violence, grievance procedures, prisoner rights and a statement by the A.S.C.A. itself on guidelines for prison management), but all of this occurred later.

In 1973, following the most expensive prison riot in history (Oklahoma, $28 million*), the mood of the meeting in Chicago was less reactive and more deliberative. Each state represented had experienced some sort of violent disturbance between Attica and the L.E.A.A. invitation. The Chicago meeting was the first of six months' of regular sessions which moved from the directors' level down to the assistant wardens' level and was complemented by the presence of state planning agency corrections specialists. In 1971 the preoccupation, perhaps justifiably, was with riot suppression; by 1973 it was with violence prevention. The California session heard "evidence" of nationwide Black militant and Maoist revolutionary conspiracies to disrupt our prisons. A few of us had urged extended discussion on the problem of racism in the prison. The noise of Attica, however, was too loud to permit thoughtful deliberation.

In Chicago we tried to assess the meaning of the civil rights movement of the sixties, the erosion of the traditional "hands off" doctrine of the courts in relation to prisoner complaints, and the subsequent explosion of correctional case law, the student demonstrations, the women's liberation movement, the anti-war demonstrations, the ferment created in America by the War on Poverty, the Peace Corps, VISTA, Job Corps—all of these in

*National Clearinghouse of the Northwestern University Law School (July, 1973) said it was "... one of the most disasterous events in the American correctional history."

relation to a changing prison population. We did not come up with a conspiratorial theory; rather we found human dignity was reaching for a new plateau and both guards and prisoners were anxious to share in it.

The Chicago group was not a group of naive liberals. They had no illusions about prisons and the motivations of many prisoners. Contingency plans for violence suppression and new technological and hardware needs were examined. "Highlighting this committee's work was the need for preventive measures rather than riot control," reported Dr. Bennett Cooper, chairman of the group (and Director of the Ohio Department of Corrections and President of the A.S.C.A.). Michigan prepared a contingency plan which included continuous training of officers, pinpointed responsibilities for supervisors, and spoke to the need for negotiation as a model for settling disputes. Wisconsin developed a critical incident report that was shared with the other states and provided computerized feedback on how such incidents were resolved. It included ". . . reporting the action taken and . . . what policy change occurred after an incident was reported to prevent repetition."

A final action taken was to approve a grant to this writer providing for a three-month leave-of-absence to develop longer range thinking about prisons. This work is a part of the continuing Chicago Group's agenda. My charge was to develop an elaboration of what I have called the "justice model" of prison administration. It rests on the notion that justice—as fairness—is the pursuit we should be involved with in prison rather than the several treatment models to which we have given lip service in the past. My thesis is that the best way to teach non-law-abiders to be law-abiding is to treat them lawfully. My concern is less with the administration of justice and more (as Edmond Cahn suggested) with the *justice of administration.*

Lest there be any question of bias, the reader should be aware that I am identified with the movement that calls for the abolition of the fortress prison. It is before all else the task of this

generation of administrators to lead in the demise of this medieval relic.

> *... if any person is addressing himself to the perusal of this dreadful subject in the spirit of a philanthropist bent on reforming a necessary and beneficient public institution, I beg him to put it down and go about some other business. It is just such reformers who have in the past made the neglect, oppression, corruption, and physical torture of the common goal the pretext for transforming it into that diabolical den of torment, mischief, and damnation, the modern model prison.*
>
> George Bernard Shaw,
> *The Crime of Imprisonment,* 1922.

> *Let us face it: Prisons should be abolished. The prison cannot be reformed. It rests upon false premises. Nothing can improve it. It will never be anything but a graveyard of good intentions. Prison is not just the enemy of the prisoner. It is the enemy of society. This behemoth, this monster error has nullified every good work. It must be done away with.*
>
> John Bartlow Martin,
> *Break Down the Walls,* 1953.

My intended audience is the prison and corrections administrator. My charge evolving from the Chicago meetings is to elaborate the justice model. In order to accomplish this task I have found it necessary to take a few excursions.

Chapter One deals with our inglorious prison history. Prison administrators are notoriously ahistorical.

> *In recent years a small group of radicals and naive nincompoops have adopted slogans like 'Tear down the walls!' and 'Prison are failures.' These slogans have become so popular*

that I find myself discussing them as though we need to justify ourselves.

Warden Russell Lash,
Indiana State Prison,
New York Times, 1971.

It was once a truth so fully realized as to become proverbial that a criminal came out of a prison worse than he went in.

John Clay,
The Prison Chaplain, 1837.

Chapter Two will examine the plight of the "Keeper." When administrators have been given diametrically opposed tasks to undertake, they have always resolved custody-treatment disputes in favor of security. But this is not an attack on custody; it is quite the contrary. We will examine the inherent contradictions, the neglect and the fossilization of the role of the custodian, and we will suggest some new dignified roles.

Chapter Three will deal with two related phenomena: the rehabilitation (treatment) programs attempted in the last quarter of a century and the burgeoning correctional case law of the last decade. We will look at the failure of the former and try to assess the meaning of the latter. I have conceptualized both as a struggle by treaters and prisoners to gain power in correctional settings. Corrections' response to both processes has been to date largely unimaginative.

Chapter Four will propose an operational definition of criminality and suggest that the quest for a scientific unified theory is fruitless. It is not likely that our scholars will or even can produce such a theory. This will not stop the library shelves from filling up with volumes of attempts. In any event we cannot wait. The on-the-firing-line administrator lives in a rapidly changing field of action. In this chapter I will recommend viewing the criminal as largely volitional and propose an elaborated justice model for prison administration. A major point I intend to make is that justice requires the harnessing of discretion in sen-

tencing, parole, and administration—not its elimination, but its narrowing. I will propose a new sentencing procedure and the abolition of parole. Finally, looking to the future, a short discussion of a new institutional environment will follow.

Chapter Five contains my doubts about the unintended consequences of proffered innovations. It will, however, mainly be concerned with the residual offender, that member of the elusive "irreducible minimum" who must be incapacitated. We will also look at the newest group of enthusiasts to come on the correctional horizon—the behavioral modifiers (a very loose term, broadly used to describe too many interventions) and their armamentaria (or what Matt Dumont describes, less charitably, as "technological fascism"). Finally, I will comment on our need to go the "high visibility" road with our constituency—the public, the legislature and the prisoner—in order to reduce distortions in practice. While the lessons of Watergate are still fresh, I will urge that we profit from the example of the high walls built around the White House which, as with prisons, kept the public out even as it imprisoned and corrupted its occupants.

I have no illusions about reforming the fortress prison. It has to go. Rather my intention is to help make it a safe and sane work and living environment (until we can quickly get out of it) for both the keepers and the kept—who, although they have a shared fate in prison, have invariably treated each other as natural enemies in the past. It is in this sense of modernizing our approach that I offer this work in fulfillment of the Chicago group's mission.

This project was accomplished in residence at the Harvard Law School Center for Criminal Justice upon the invitation of its Director, James Vorenberg. Located on the fifth floor of the Roscoe Pound Building, the Center provided the physical, and more significantly, the human resources for a stimulating experience. Lloyd Ohlin, as a consultant to the project, provided sustained encouragement and incisive criticism throughout the entire project. Without his guidance and assistance it would be difficult to conceive completion of this work. David Rothman of

Columbia University served as an historical consultant, generously sharing his thoughts, time and his Barnard, Vermont home with me. Irving Piliavin of the University of Wisconsin also served the project in his usual stimulating and challenging way. He assisted in focussing the work toward practical application, suggested innovative sentencing programs and inmate-staff self-governance models.

A number of people in the field also shared their as yet unpublished works with me. I gratefully acknowledge such magnanimous gestures on the part of: Richard A. McGee for his "A New Look at Sentencing: Part II" (since published in September, 1974 *Federal Probation*); David Greenberg of New York University for his research papers to be included in the Final Report of Senator Goodell's Committee for the Study of Incarceration; James B. Jacobs and Harold G. Retsky of the University of Chicago for their pioneering ethnographic study entitled the "Prison Guard," (since published in *Urban Life and Culture,* Vol. 4, No. 1., April, 1975); to Hans Mattick, Director, Center for Research in Criminal Justice, of the University of Illinois at Chicago Circle for his "Reflections of a Former Prison Warden" (forthcoming in *Essays in Honor of Henry D. McKay*); Stanley Griffith, a Chicago attorney, for his "A Training Experience as a Pseudo-guard" written for the Illinois Law Enforcement Commission; and Richard Wilsnack and Lloyd Ohlin of Harvard for their materials on "Prison Disturbances-(Winter 1973-1974)."

With the constraint of a tight schedule, three research assistants worked furiously to collect assigned information: Ann Morelli, a law student at Harvard, assisted in legal research concerning case law; Diane Gutman, a psychology student at Tufts, assisted in research dealing with experiments in correctional rehabilitation; and Toby Yarmolinsky, a political science student at Antioch, assisted with everything, even after the L.E.A.A. funds were depleted. Roberta Curtis, a recent Harvard graduate, must be the world's second fastest and most accurate typist (but I have not yet met the first). Finally, the Criminal Justice Center contains a number of people who provided unplanned but fruit-

ful inputs into this study by way of chats, reading of drafts and a seminar (Walter Miller, Lloyd McDonald, Craig McEwen, Robert Coates, Alden Miller, Dale Sechrest, Arlette Klein, Dan Miller and Judy Caldwell). None of this would have been possible without the generous cooperation and assistance of Rosanne Kumins, who keeps the Center and its activities harmoniously orchestrated and in high spirits.

Since my return to the Illinois Law Enforcement Commission I have received much assistance from staff, commissioners and other colleagues, most notably from Chester Kamin, Hans Mattick, Norval Morris, Stephen A. Schiller, Richard A. McGee, Robert Schuwerk, Edmund Muth, Eugene Eidenberg, J. David Coldren and Lawrence Meyers. Special gratitude goes to Cheryl McLinden for her tireless effort in typing and retyping revisions in the manuscript on weekends.

There is no way, other than the actual publication of this book, to thank my wife for her assistance, confidence, and patience.

With all the encouragement and assistance I received, the responsibility for the biases and final content remains with me. I first conceived of the notion of operationalizing justice in corrections while waiting to testify at the U.S. House Select Committee on Crime in December 1971 as it inquired into the Attica riot. Inspiration came from watching (former Senator) Representative Claude Pepper of Florida preside over the Committee as it provided (in several volumes) this century's most sane legislative debate concerning the mission of corrections.

This project was funded by the L.E.A.A.'s National Institute of Law Enforcement and Criminal Justice (Grant No. 74-TA-05-0001).

August, 1975 **DF**

"On Change"

It must be remembered that there is nothing more difficult to plan, more doubtful of success, nor more dangerous to manage than the creation of a new system. For the initiator has the enmity of all who would profit by the preservation of the old institutions and merely lukewarm defenders in those who would gain by the new ones. The hesitation of the latter arises in part from the fear of their adversaries, who have the laws on their side, and in part from the general skepticism of mankind which does not really believe in an innovation until experience proves its value. So it happens that whenever his enemies have occasion to attack the innovator they do so with the passion of partisans while the others defend him sluggishly so that the innovator and his party are alike vulnerable.

Niccolo Machiavelli, 1513

1
Prison Heritage

Those who cannot remember the past are condemned to repeat it.

George Santayana

We will try to account for the emergence of prisons in America. In order to do so we must hazard an historical journey replete with its problems of selectivity and incompleteness. Institutions never arrive full blown; they are historical products of layer upon layer of custom emerging from the distant past into hesitant shapes. The modern prison is a product of such a process. In order to best understand our own prison development we must appreciate what was on the minds of the contemporaries who built them. But we need also to examine the influences pressing upon early Americans—namely, their English heritage.

There is no linear legacy to trace. We know only the problem our ancestors faced—how to control deviance in a strange wilderness. They would be astounded to see a modern fortress prison. They would not have understood the notion of rehabilitation. "You do not rehabilitate Quakers—you whip and banish them," a Puritan might have said. Quakers did not understand why practically all felonies upon third commission necessitated death. The Philadelphia Society for Alleviation of the Miseries of Public Prisons might have said, "Penance, labor and solitude will transform a criminal." But these Puritan-Quaker notions would have been anathema to Elam Lynds of Sing-Sing, who said, "Break the convict's spirit, whip him and he'll learn!" Zebulon Brockway of Elmira would recoil in horror. He was superintendent of America's first reformatory. "Habits of industry, school, individual attention and an indeterminate sentence are ingredients of rehabilitation," he might have said. Ragen of Stateville, Illinois, preferred the iron-fisted discipline while his contemporaries in the West were putting together the most ambitious program of rehabilitation using the "medical model." California would develop medical facilities, intake and classification processes, and a host of therapies under an umbrella of the indeterminate sentence. Thomas Jefferson, who also had a prison plan, would be baffled to see Vacaville.

If there was no "grand scheme" for American prison development there were also few proud moments and fewer heroes. Our

heroes do not leap out of the pages of history with any quality of instantaneous recognition. We have had no Isaac Newtons, no Albert Einsteins, and no Marie Curies. No one has ever won a Nobel Prize for prison work. With the exception, perhaps, of the ideas of an 18th century Italian Count (Cesare Beccaria, 1738-1794), the programs initiated by a Scottish sea captain and ex-prisoner (Alexander Maconochie, 1787-1860), and the vision of an American contemporary, a shoemaker and a court volunteer (John Augustus, 1785-1859), corrections has made very little progress beyond the prison walls.

There were some proud moments by several heroic types, but they were short-lived. It seems reforms never out-lived reformers. John Haviland (1792-1852), the architect, set into concrete the basic pattern of cellular confinement that was to set the parameters of correctional development to the modern day both physically and morally.[1] The cell is the legacy. From its crudest beginnings in castle dungeons through the concept of prison architecture as a "moral science," to its technological perfection in a modern prison-hospital, the cell remains the legacy—the medium has always been the message. The message has, at the bottom line, always been the same. We have called the occupiers of the cell heretics, sinners, criminals, offenders, paupers, revolutionaries, defectives, and patients. "We are all brought up to believe that we may inflict injuries on anyone against whom we can make out a case of moral inferiority," observed George Bernard Shaw.[2]

IN THE BEGINNING WAS THE CHURCH

Gerhard Mueller said the prison "was inherited as an institution from the medieval bushwhackers and highway robbers, who used imprisonment as a means of coercing cities to pay ransom for captured merchants."[3] Frederick Kuether believes that the church greatly influenced the history of prison development. He points out that Thomas Aquinas described penance as: "the payment of temporal punishment due on account of the offense

committed against God by sin."[4] Because the church did not allow its courts to impose death sentences, it developed institutions called "penitentiaries" where presumably one paid up his account. Kuether claims that the secular state copied this practice at first only to detain until trial and to hold for execution. Pope Clement XI had St. Michael Prison built in 1703, and it was described as a "house of correction for younger offenders" with a program of silence, work and prayer. Its punishments included: "isolation, bread-and-water diet, solitary work in the cells, floggings and the black hole."[5] William Nagel also speaks of church-government prisons in which "certain heretics having been spared death, were imprisoned for life, often in single rooms underground . . . a Portuguese religious prison . . . contained cells for witches, sorcerers, and sinners."[6]

> . . . Some of the monastic quarters provided totally separate facilities for each monk so that it was a simple matter to lock up an errant brother for brief periods. As 'mother houses' of monastic orders had satellite houses often located in less desirable places, it was also the practice to transfer monks for periods of time to such locations. There is some evidence that some of these satellites came to be regarded as punitive facilities.[7]

Nagel also agrees that when the feudal system began to crumble and social unrest increased, the church invented the "workhouse,"—the forerunner to the modern prison.

SOME EARLY PRACTICES

In Roman and early English law incarceration as punishment was unknown. While both used imprisonment for detention, the Romans had outlawed it as a punishment. As far back as the Saxon invasion castles are known to have been used as jails. In canon law, the Roman principle of custody, not punishment, was followed in spirit, but history records some English clergy

spending years, even life, in early English institutions doing penance upon conviction of a crime.[8]

With the erosion of the feudal system (14th century) and the consequent disruption of the labor market, vagabondage greatly increased. In the 16th century the criminal law was used heavily to control the wandering unemployed, those who left their masters and the lawless.[9] A major departure (probably occasioned by the need to deal with increasing numbers of itinerant poor) was the establishment in 1557 in London of a workhouse for vagrants. Ironically, the site was an abandoned castle famous for its well that was said to produce water of medicinal quality—St. Bridget's Well. Bridewell is the currently surviving corruption of that name. Bridewell is still used to identify many municipal workhouses.[10] This type of institution also proliferated on the continent.

Imprisonment was then a "secondary" type of punishment—secondary to capital punishment—but was not as commonly used as transportation or exile to a colony. From the earliest days of colonization, America received about 2,000 convicts a year until the Revolution. During the years of American Revolution, England turned to Australia for transport. For eight decades to follow, Australia and other Pacific penal colonies received no less than 100,000 convicts, about the same number as had earlier come to our shores. Transportation was interrupted periodically by the American Revolution and later by the Napoleonic Wars. However, the English did not build a prison system during these respites, rather they imprisoned convicts on "hulks"—prison ships tied to piers. Transporting prisoners worked admirably for the English. It rid the country of criminals and provided the colonies with cheap labor. As Rubin points out, it takes a flight of the imagination to consider other more lofty motivations for transportation such as a reduction in punishment or as a rehabilitative opportunity for a new start in a colony, in light of the large profits awaiting shipowners and the treatment of "passengers."

Conditions in slow-going vessels were worse than even

> those prevailing in the jails. The crowding, the vice, and the filth were unspeakable, and great numbers died on the voyage . . . [In the penal colonies, convict gangs] worked in irons and recalcitrant prisoners were subject to frequent lashing.[11]

The social cost of the mercantile and industrial revolutions and the great land discoveries were devastating to the poor. A labor market requiring stability and predictability could not tolerate roaming vagrants and thieves but neither did it provide a social program short of repressive control. The Renaissance and Enlightenment which produced:

> great surges of human creativity . . . also produced . . . widespread impoverishment, [and] some of the grimmest chapters in the history of penology. Transportation, which killed and degraded many, was a by-product of discovery and colonization. Practically the entire law of theft was written in the eighteenth century, and it was routine to write the penalty of death in the laws. [Radzinowicz notes] 'Practically all capital offenses were created more or less as a matter of course by a placid and uninterested Parliament. In nine cases out of ten there was no debate and no opposition!'[12]

COLONIAL PUNISHMENTS

In trying to trace our own penal institutions we must have a picture of the frame of mind of our ancestors. The colonies operated under English criminal law standards and practices, although frequently modified in a rustic setting. Early penalties which may now shock our sensibilities were frequent, common and accepted. They changed only when the concept of man changed.

A stroll through Boston Commons today takes one through areas marked for colonial punishment for Sabbath-Breakers (wooden cages), the pillory, the stocks, ducking stools, the whip-

ping post and the gallows. In Philadelphia, the City of Brotherly Love, Sellin described the practice of gibbeting as capital punishment followed by placing the carcass in an iron cage until it decomposed. The public presumably would take heed of such a ghastly sight in conducting its own affairs to avoid a similar fate.[13]

Americans were also widely accustomed to huge fines, ear clippings, mutilation, hanging, drawing and quartering, dismemberment, blinding, burning, branding and maiming. A nineteenth century account of punishments describes the temper of the colonial times:

> In these barbarous methods of degrading criminals the colonists in America copied the laws of the fatherland. Our ancestors were not squeamish. The sight of a man lopped of his ears, slit of his nose, or with a seared brand or great gash in his forehead or cheek could not affect the stout stomachs that cheerfully and eagerly gathered around the bloody whipping post and the gallows.[14]

If being unemployed or a vagabond was an offense in England, simply being a Quaker in Massachusetts was little better. The penalty for such "blasphemous hereticks" and any who read books of their "devilish opinions" was:

> . . . if male for the first offense shall have one of his ears cutt off; for the second offense have his other ear cutt off; a woman shall be severely whipt; for the third offense they, he or she, shall have their tongues bored through with a hot iron.[15]

New York and Virginia were no less ferocious. Church absence in Virginia was a capital offense. In Maryland and Virginia the hog occupied an unusually lofty place in the penal codes. Men of power were able to minutely define penal sanctions against their particular property. For hog theft:

> . . . It was enacted in the New York Assembly that for the first offense the criminal should stand in the pillory 'four compleat hours,' have his ears cropped and pay treble damages; for the second offense he be stigmatized on the forehead with the letter H and pay treble damages; for the third be adjudged 'fellon,' and therefore receive capital punishment. In Virginia . . . 'twenty-five lashes well laid on at publick whipping-post;' for the second offense he was set two hours in the pillory and had both ears nailed thereto, at the end of the two hours to have the ears slit loose; for the third offense, death.[16]

Nor was "clerkly"—the exculpatory plea of "benefit of clergy"—available for hog stealers. For over five centuries the English permitted its use for some to avoid more savage punishments. Originally granted in the 12th century, it was a way of having the clergy escape secular punishment. Gradually, anyone passing the test of reading could escape the gallows. Since the ability to read was associated with the privileged classes, only they could avoid the heavier penalties. The "benefit" that replaced the gallow was branding, which was in force until the close of the 18th century in America. Branding was in ubiquitous use in the colonies; S L stood for seditious libel and was burned on the cheek, M for manslaughter, T for thief (usually on the left hand), R for rouge (and Quakers), F for forgery, B for burglary, H for heretic (and hog stealers). Other symbols, unless impressed on the skin, had to be worn as symbols of degradation on the "uppermost" garments. Hawthorne immortalized this practice in *The Scarlet Letter.* The real Hesters wore the letters upon pain of public whippings. This primitive classification system presumably recognized lesser offenses: A for adultery, B for blasphemy, V for viciousness and D for habitual drunks. Public aid recipients wore a color patch on their sleeves signifying the name of the parish that furnished relief. Other offenders stood on blocks with inscriptions detailing their transgressions: "A Wanton Gospeller"; "An Open and Obstinate Condemner of God's Holy Ordinances"; "A Defacer of Records"; "Public Destroyer of Peace"; "Lampoon-riter"; "False Accuser"; "Defamer

of Magistrates"; and as many others as there were specific offenders.[17]

These were not colonial inventions. Labeling and branding were ancient English customs accompanied in the old country by a procession and trumpets. It is not clear how many of the spectators of this three-century-old practice could read, but they did understand from the fanfare that a solemn event was taking place when the offender mounted the block and stood there for hours with words scrawled on a sign around his neck.

Burdened with a barbarous English heritage in a frightening wilderness, the shadow of Calvin cast itself upon the deliberations of those meting out punishment to the "destroyers of the peace." And there were many of them. The search for order in isolated settlements produced all sorts of "deviants." Could it have been otherwise with witches stalking the land in Massachusetts, as they had in Europe a few centuries earlier, with boat loads of convicts arriving regularly (2,000 a year from 1607 to the Revolution until 100,000 had arrived*), runaway slaves, indigenous poor, red savages and Quakers.

Comprehension of the moral world view of the powerful, who could enforce the law in the early period, leads us to an understanding of the regimen they believed necessary for controlling the miscreant. Such an understanding will tell us something of the physical facilities they considered necessary to contain offenders. This is the major thrust of our quest. Although we will learn how prisons were rationalized, we will need to look to a more contemporary period—our own—to understand their persistence. But we begin in the colonial period.

*Little is known of the thousands of ex-convicts coming later to the west coast from Australia until 1867. H. H. Bancroft, the verbose chronicler of Pacific coast history, records a settlement in San Francisco known as the Sydney Town at the foot of Telegraph Hill. The ex-convicts were said to take advantage of fires they set which ravaged the city and in the confusion come out of Sydney Town to steal as much as they could carry off. They were a constant problem for the Committee of Vigilance of 1851. (H.H. Bancroft, *Popular Tribunals*, 1887, pp. 73-74).

If the colonists had elaborate punishments, they did not have elaborate views toward the deviant. The deviant was the pauper-criminal-stranger-defective. Rothman, in his remarkable *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, says of colonial enforcement that it

> stood midway between poor relief and crime prevention measures, [it] was one basic technique by which colonial communities guarded their good order and tax money. Towns everywhere used their legal prerogatives to exclude the harmless poor, who might some day need support, and suspicious characters, who could disturb their peace.[18]

The escalation of penalties to death for third-timers, as earlier noted in the case of hog stealers, was built into the penal codes of the settlements as a response to recidivism. "The colonists' rationale was clear: anyone impervious to the fine and the whip, who did not mend his ways after an hour with a noose about him, was uncontrollable and therefore had to be executed."[19] The jail, not to be confused with the as yet undeveloped prison, was simply a place of confinement for debtors or those awaiting summary punishment. Self-preservation, not correction, was on the mind of the colonist.

> Given their [colonists'] conception of deviant behavior and institutional organization, they did not believe that a jail could rehabilitate, or intimidate or detain the offender. They placed little faith in the possibility of reform. Prevailing Calvinist doctrines that stressed the natural depravity of man and the powers of the devil hardly allowed such optimism. Since temptations to misconduct were not only omnipresent but practically irresistible, rehabilitation could not serve as a basis for a prison program.[20]

The colonists saw the deviant as willful, a sinner, immoral, a captive of the devil, simply pauperized or defective. Isolated settlements engendered xenophobic feelings; the stranger aroused natural fear. Internal transportation was in widespread

use. The offender was marched to the town line and sent off to plague another community. Shame, banishment, and summary punishment, including mutilation and death, were the colonial deterrents. Yet the imagery of institutional confinement as punishment was invoked early by William Penn. It was short-lived and forgotten, and had to await the end of English dominion in America for its resurrection.

> The Great Law of 1682 drafted by Penn read in part that every County within Pennsylvania . . . shall build or cause to be built in the most convenient place in each County, respective, a sufficient house, at least twenty foot square, for Restraint, Correction, Labor and Punishment of all such persons as shall be thereunto committed by law . . .[21]

This was the first known statement in American history that spoke of imprisonment at hard labor in place of corporal or capital punishment as the prescribed punishment for serious crime.

POST-REVOLUTION DEVELOPMENTS

After the Revolution, it was Penn's idea that became operational, then failed and finally led to the notion of cellular confinement. With the end of the War of Independence there was a slow dismantling of things English in the new United States. Enlightenment ideas gained currency and the barbarities of the English sanguinary law gave way to the new Rationalism. "Enlightenment ideas challenged Calvinist doctrines; the prospect of boundless improvement confronted a grim determinism."[22] Beccaria's *On Crimes and Punishments* was already known to leaders at the time of the Revolution.

> . . . The essay was a tightly reasoned devastating attack upon the prevailing systems for the administration of criminal justice. As such it aroused the hostility and resistance of those who stood to gain by the perpetuation of the barbaric

> and archaic penological institutions of the day. . . . It had the power to rally to the cause it pleaded, the energies and efforts of most of the enlightened minds of eighteenth-century Europe. . . . It is not an exaggeration to regard Beccaria's work as being of primary importance in paving the way for penal reform for approximately the last two centuries. The reader will find proposed in his essay practically all of the important reforms in the administration of criminal justice and in penology which have been achieved in the civilized world since 1764.[23]

Beccaria's ideas were quite fitting to the young Republic intent upon ridding itself of Old World ideas and practices. But it was more complex than a clash on the ideational level. America itself was becoming complex: travel, resettlement, new communication methods developed during the war, the sense of community transcending parochial local boundaries, social mobility, the beginnings of a factory system, urbanization, and immigration all combined to erode the Puritan methods of social control. We could hardly be expected to continue to rely on laws that had driven us to rebel. Probably more important was a congruity between a post-Revolutionary image of man in freedom and a keen sense of pragmatism which sensed that the old ways of social control would no longer work in a burgeoning new nation. Rationalism's main tenent was:

> The first conviction that social progress and advancement was possible through sweeping social reforms carried out according to the dictates of 'pure reason' . . . so barbarous and archaic a part of the old order as the current criminal jurisprudence and penal administration of the time could not long remain immune to the growing spirit of progress and enlightenment.[24]

Thus in 1776 in Pennsylvania, under heavy Quaker influence, and probably with a fresh remembrance of their treatment in Massachusetts and elsewhere under colonial rule, the provisional state constitution read in part: 'The Penal Laws heretofore used

shall be reformed by the future legislature of the State, as soon as may be, and punishment made in some cases less sanguinary, and in general more *proportionate to the crimes*."[25] If it was shades of William Penn it was also the hand of Beccaria who a dozen years earlier had written "punishment . . . should be . . . *proportional to the crime*."

Imprisonment was visualized as a substitute for capital punishment. The purpose of the penal law, stated the Pennsylvania constitution, is:

> To deter more effectually from the commission of crimes, by continual visible punishment of long duration, and to make a sanguinary punishment less necessary houses ought to be provided for punishing at hard labor those who shall be convicted of crimes not capital wherein the criminals shall be employed for the benefit of the public or for reparation of injuries done to private persons. And all persons at proper times shall be admitted to see the prisoners at their labour.[26]

But during the war years this law was not able to be implemented. However, by 1786, Rubin states that most crimes were punishable by imprisonment at hard labor. An Act in that year called for punishment to be: "publicly and disgracefully imposed . . . in the streets of the cities and towns, and upon the highways."[27] This system, which appears to be the embryonic chaingang (prisoners "dressed in motley and weighted down") of public works, failed because of riots, escapes, and as a result of public displeasure over degrading practices. The time for change was ripe. The war was now over, the old system was in a cycle of failure and a new enthusiasm for prison reform was beginning to emerge.

THE PHILADELPHIA SOCIETY FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS

Yet how might such a program come about? Dr. Benjamin

Rush, a signer of the Declaration of Independence, proposed a new method for treating criminals. At the home of Benjamin Franklin in March, 1787, a group of influential Philadelphians gathered to hear Dr. Rush's radical ideas. He read a paper proposing the establishment of a prison program that would:

1. Classify prisoners for housing.
2. Provide prison labor which would make the institution self-supporting.
3. Include gardens to provide food and outdoor areas for recreation.
4. Classify convicts according to a judgment about the nature of the crime—whether it arose out of passion, habit, temptation or mental illness.
5. Impose indeterminate periods of confinement based upon the convict's reformative progress.[28]

"So persuasive and logical," notes Bennett, "were the pamphlets and views of Franklin's group that the American penal system abolished the practice of mutilation and execution as a method of deterring crime."[29]

Armed with a plan, the Philadelphia Society for Alleviating the Miseries of Public Prisons (formed in May, 1787, but known as the Pennsylvania Prison Society since 1887) now went about organizing to implement its program. In January, 1788, the Society wrote to the Supreme Executive Council of the Commonwealth and in a month the latter recommended changes in the penal law to the Pennsylvania legislature

> calculated to render punishments a means of reformation, and the labour of criminals of profit to the state. Late experiments in Europe have demonstrated that those advantages are only to be obtained by temperance, and solitude with labour.[30]

There had indeed been "late experiments" in this direction in

Europe (Belgium, Italy, England). But the great significance of these memorable years (1787-1790) in Philadelphia was the beginning of a continuous, systematic and permanent departure that would indelibly mark a change in the official methods of dealing with criminals in America.[31] The Legislature provided for the renovation of the old Walnut Street Jail in Philadelphia; the new facility (1790) would include a "cellhouse."

Yet it would be an oversimplification to suggest, as some have, that inside the Walnut Street Jail was born the present prison system of the civilized world. Sellin finds that Blackstone had earlier recommended—without the slightest reservation—a system of solitude and constant labour. "What can be more truly beneficial, he queried," . . . for the riotous, the libertine . . . the idle delinquent, than solitude? . . . Solitude will awaken reflection; confinement will banish temptation; sobriety will restore vigour; and labor will beget a habit of honest industry.*"[32] William Paley published his "Principles of Moral and Political Philosophy" in 1785, and in discussing reformation and deterrence as the goals of punishment concluded: "Of the reforming punishments which have not yet been tried, none promises as much success as that of solitary imprisonment, or the confinement of criminals in separate apartments."[33] Further evidence of British, not Quaker, beginnings for the solitary system is cited by Sellin, noting that John Howard had described the Bridewell at Petworth as a cellular facility: "The rooms are on two stories, over arcades [just like the Walnut Street 'penitentiary house'], sixteen on each floor, thirteen feet three inches by ten and nine feet high."[34]

> On the basis of the facts it is reasonable to claim that the philosophy of solitary confinement, with cellular labor or

---

*Later Jeremy Betham spoke with equal enthusiasm about the possibilities of general reformation:

> "Morals reformed, health preserved, industry invigorated, instruction diffused, public burdens lightened, economy seated as it were upon a rock, the Gordian knot of the poor laws not cut but untied." (Hermann Mannheim, ed., *Pioneers in Criminology,* p. 64)

> with congregate labor insuring the non-intercourse of prisoners, had fully matured in England before the 'penitentiary house' in the yard of the Walnut Street Jail was even contemplated. Indeed, it is fair to assume that it was the ideas of Howard, Blackstone and Paley that spurred the members of the Philadelphia Society to action. We know that they were fully conversant with Howard's work and writings and acknowledged their indebtedness to him on more than one occasion.[35]

Thus, if we had earlier sought an escape from the sanguinary British penal practices, we were to begin a new era under the influence of British reformers, legal scholars, and theologians.

What made this new penology between 1790 and about 1830 possible was the post-Revolutionary image of the criminal. He was rational, willful in his behavior and repetitively criminal because of the evil British sanguinary laws. The treatment regimen called for was imbedded in Beccarian law reform; a reduction of penalties, particularly the barbarities of execution; flogging; branding; and maiming. Incarceration in place of the gallows would deter the prospective criminal. Just laws would cure criminality. Further, physical facilities were necessary to confine the criminal for purposes of useful work and good habit formation, and from his labor the prison would pay for itself. But this first reform thrust was to collapse in a decade "due to overcrowding, idleness and incompetent personnel."[36]

Until these problems overtook and defeated the Walnut Street Jail program, it apparently worked well.

> Each male prisoner was paid for his labor at the same or somewhat lower wages than those paid for similar work on the outside and female prisoners had opportunity to earn small sums. All were debited with the cost of their daily maintenance. Some prisoners earned as much as a dollar a day. Moreover the prisoners were informed that good conduct would be rewarded by recommendation to the governor for a pardon, and many were pardoned. No chains or irons were allowed. Guards were forbidden to use weapons

> or even canes. Corporal punishment was unknown. The silence rule was enforced in the shops but prisoners could talk in the night rooms before bedtime.[37]

Slowly, as the population increased, housing classification gave way to overcrowding and personal attention yielded to mass care. In Massachusetts convicts began wearing half red and blue uniforms, while in New York only second termers could be so distinguished. Massachusetts later put "two timers" in suits of red, yellow, and blue and except on the Sabbath fed them bread and water as a third meal daily.[38] By 1808 Newgate (New York) was granting so many pardons as to make discharges equal to commitments, while Ohio simply pardoned convicts whenever the population rose above 120 in number, just enough to make room for newcomers.[39] Escapes, violence, indiscriminate housing of all types of offenders, corruption and idleness brought forth a report in 1820 from the Visiting Committee of the Philadelphia Society (that had earlier played such a key role in reorganizing the Walnut Street Jail) finding: (1) the present building unfit for a penitentiary; (2) classification non-existent; (3) the prison overcrowded; and (4) the prisoners idle. These conditions caused them to conclude: "It is with deep regret the Visiting Committee feel themselves obliged to state, they have not been able to perceive any reformation among the prisoners."[40] To overcome idleness the Walnut Street Jail administration introduced the treadmill—which had failed at Charlestown the year before.[41]

At the very moment when the idea of imprisonment itself was in doubt,* indeed a near total failure, a new burst of enthusiasm came from New York and again from the Pennsylvania Society.

*"The decline of the early American prison was evident as early as 1800, and in 1817 it was a question whether the whole penitentiary system should not be abandoned in favor of a return to the former system of capital and corporal punishment. In a 'Report of the Penitentiary System,' issued in 1821, Daniel Chipman of Vermont wrote, 'the projectors of the penitentiary system were peculiarly exposed to an enthusiasm which led them to expect beneficial effects which could never be realized.' " (*The Attorney General's Survey of Release Procedures*, as cited in George Killinger and Paul Ciomwell, *Penology*, pp. 25, 34)

These new programs would become the celebrated Auburn and Pennsylvania systems. At the early signs of the collapse of the Walnut Street Jail, the Philadelphia Society for the Alleviation of the Miseries of Public Prisons had already put together ideas for a new prison.

> This plan called for complete solitude with labor in the cells and recreation in a private yard adjacent to each cell. Again the Pennsylvania Legislature embodied the Society's plan in an 1821 enactment. One prison would be built at Pittsburgh [The Western Penitentiary opened in 1826] and one in Philadelphia [The Eastern Penitentiary opened in 1829].[42]

Contact with the outside world was to be entirely eliminated. A Bible would be furnished each inmate for moral guidance.

The New York and Pennsylvania systems unleased a pamphlet war, each side proclaiming the virtues of their own systems; Pennsylvania's, total solitary isolation of the inmate, work in the cell and penance; and Auburn's, congregate work program in silence by day and separation at night—enforced seclusion from the contaminants of the outside community through silence, separation and work. Auburn's program simply had the virtue of being cheaper to operate and, as we shall see, developed the extraordinary will on the part of its administrators to organize a program of "calculated humiliation" to enforce non-communication between convicts. While the Pennsylvania Quakers relied upon penitence and seclusion, the New Yorkers relied upon the breaking of the convict's spirit. But Auburn itself did not initially set out with such a planned program.

It was becoming increasingly difficult to maintain order even after New York returned to legalized flogging of convicts and use of stocks and irons.[43] While the post-Revolutionary zeal took criminals out of society, it had also created a society of criminals inside the institutions.

> Faced with such a problem, New York prison reformers groped for an answer throughout the decade which fol-

> lowed the war of 1812. Experimenting with ideas that had originated in Europe and were being implemented in Pennsylvania, which was experiencing penal difficulties at the same time, prison administrators in the Empire State eventually devised a system which, for all its borrowing from outside resources, possessed a high degree of originality.[44]

The key, as John Howard had earlier suggested, was seclusion. American reformers now proclaimed that the criminal was both a product and a victim of his environment.

THE FORTRESS PRISON EMERGES 1820-1870

The literature reflects a desperate attempt on the part of reformers to save the faltering prison system through a minute ordering of the relationships and environment of the offender. Jacksonian America was caught up in the ambivalence of a process which saw rapid movement away from colonial values of order and regularity but with a clinging nostalgia to restore them lest the republican experiment die.

> . . . Assuming that social stability could not be achieved without a very personal and keen respect for authority, they looked first to a firm family discipline to inculcate it. Reformers also anticipated that society would rid itself of corruptions. In a narrow sense this meant getting rid of such blatant centers of vice as taverns, theaters, and houses of prostitution. In a broader sense, it meant revising a social order in which men knew their place. Here sentimentality took over, and critics in the Jacksonian period often assumed that their forefathers had lived together without social strain, in secure, placid, stable, and cohesive communities. In fact, the designers of the penitentiary set out to recreate these conditions. But the results, it is not surprising to discover, were startlingly different from anything that the colonial period had known. A conscious effort to instill discipline through an institutional routine led to a set work

pattern, a rationalization of movement, a precise organization of time, a general uniformity. Hence, for all the reformers' nostalgia, the reality of the penitentiary was much closer to the values of the nineteenth than the eighteenth century . . . The prison would train the most notable victims of social disorder to discipline, teaching them to resist corruption. And success in this particular task should inspire a general reformation of manners and habits. The institution would become a laboratory for social improvement. By demonstrating how regularity and discipline transformed the most corrupt persons, it would reawaken the public to these virtues. The penitentiary would promote a new respect for order and authority.[45]

With the offender redefined from sinner (Colonial Era) to victim of bad laws (Post-Revolutionary Era), and now in the Jacksonian Period to victim of his environment—the wayward child—prison reformers and, incidentally, administrators (the latter were becoming estranged from the former, their spiritual godfathers), received a new lease on life. Pennsylvania and New York took different roads, but optimism pervaded both camps. The first generation of fortress prisons were built in the late 1820s. In Pennsylvania, separation was built in physically.*

---

*Sellin notes:

"But the philosophy of the system was a British importation and the 'penitentiary house' of the Walnut Street Jail was no innovation. English reformers gave us both the fundamental ideas that their application in practice to such an extent that no Pennsylvanians can lay claim to be the inventors of the Pennsylvania System.

Roberts Vaux in his Letter on the Penitentiary System of Pennsylvania addressed to William Roscoe, a British critic, in 1827.

'The treatment of prisoners,' he wrote, 'should be of such a nature, as to convince them 'that the way of the transgressor is hard;'

'In separate confinement, every prisoner is placed beyond the possibility of being made more corrupt by his imprisonment . . . In separate confinement, the prisoners will not know who are undergoing punishment at the same time with themselves . . . [Separate confinement will provide an opportunity] . . . for promoting his restoration to the path of virtue, because seclusion is believed to be an essential ingredient in moral treatment, . . .

In New York it was accomplished through a paramilitary program.** The program and physical facility were both seen as being in the service of reformation. Once again an attempt would be made to transform the offender. But from this era forward, a century and a half of redefinitions would have to conform to the architecture of the fortress prison. Whatever notions of convict reformation were to prevail, most prisoners would have to be behind the high walls of the fortress prison designed in Jacksonian enthusiasm.

PIONEERS OF PENAL ADMINISTRATION

The 1820-1850 era produced the most extraordinary penologists. They carried the day, transforming any vestige of individual self-discipline to a program of compulsive, en masse compliance, enforced with the whip if necessary. It began with the strictest seclusion. No visits, letters or communication with

---

'In separate confinement, a specific graduation of punishment can be obtained...

'In separate confinement, the same variety of discipline [will be available].

'By separate confinement, other advantages of an economical nature will result; among these may be mentioned a great reduction of the terms of imprisonment...'

(Thorsten Sellin, "The Origin of the Pennsylvania System of Prison Discipline," *Prison Journal*, summer, 1970, p. 14-15).

** Auburn first experimented with the Pennsylvania system of complete solitary confinement, but it collapsed in a series of self-mutilations, suicides and other deaths.

Eighty-three prisoners, classified as the most dangerous, were placed in solitary confinement. "In less than a year five of [them] had died, one became an idiot, another when his door was opened dashed himself from the gallery, and the rest with haggard looks and disparing voices begged to be set to work." (Paul F. Cromwell, Jr., *Auburn: The World's Second Great Prison System*, p. 69); and Lewis notes that "the stage was set for a new order, and a state that had already conducted two major penological experiments [Newgate and Auburn] now embarked upon another." (W. David Lewis, *From Newgate to Dannemora*, p. 80).