

A REGIME OF SOCIAL DEATH: CRIMINAL PUNISHMENT IN THE AGE OF PRISONS

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INTRODUCTION:

REHABILITATION IN A PRISON-CENTERED REGIME

It is not unfair to say that if men had deliberately set themselves the task of designing an institution that would systematically maladjust men, they would have invented the large, walled, maximum security prison.

— Hans Mattick¹

The rehabilitative ideal in American penological thought and practice has suffered a severe, and perhaps fatal, crisis of faith in the past two decades.² This crisis has profound implications for the future of criminal justice in this country because the rehabilitative ideal underlies our correctional system's central institutions and practices, most notably the penitentiary, whose nineteenth-century inventors established imprisonment as the presumptive penalty for serious crime.³ The rehabilitative ideal also inspired the Progressive reformers at the turn of the century, who introduced probation and parole as alternatives to imprisonment for certain worthy offenders.⁴ Most recently, the same ideal generated important support for the prisoners' rights movement.⁵

The persistence of the rehabilitative ideal, and its ability to weather previous crises of faith,⁶ make its sudden collapse all the more surprising and unsettling. As recently as 1971, an influential report on criminal punishment referred to the "nearly unanimous support" for rehabilitation among those working in the criminal justice field.⁷ Just a few years later, such a statement would not have been possible.⁸ Criminal justice professionals, academics, and the public at large all became disillusioned with

1. GORDON HAWKINS, *THE PRISON: POLICY AND PRACTICE* 45 (1976) (quoting Hans Mattick, a noted criminologist, who worked as an assistant prison warden early in his career and later became a leading critic of the prison system).

2. For an especially perceptive analysis of this development, see generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

3. See discussion *infra* part II.B.2.

4. See *infra* notes 192-96 and accompanying text.

5. On the limited successes of the prisoners' rights movement, see *infra* notes 241-47 and accompanying text.

6. See discussion *infra* part II.C.

7. AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* 83 (1971), quoted in ALLEN, *supra* note 2, at 7.

8. See ALLEN, *supra* note 2, at 7; Michael Vitiello, *Reconsidering Rehabilitation*, 65 *TULANE L. REV.* 1011, 1012-15 (1991).

rehabilitation as an achievable goal, or even a desirable one.⁹ On the empirical front, it became the "new orthodoxy" that rehabilitation was largely unattainable and that past efforts had failed to reduce recidivism to any appreciable degree.¹⁰ On the theoretical front, academic writers and others attacked rehabilitative efforts from all sides. One school of thought condemned these efforts as nothing more than mechanisms of social control designed to oppress the powerless and to further the interests of the dominant social classes.¹¹ At the opposite end of the spectrum, law-and-order advocates attacked rehabilitation for allegedly placing the interests of criminals over the more pressing need for order and social control.¹² Between these extremes, another influential group, wedded to notions of moral autonomy and egalitarianism, called for the adoption of a retribution-based regime of "just punishment" or "just deserts."¹³ None of these competing views has established a new hegemony, but in combination they have established a theoretical consensus against rehabilitation—a consensus increasingly reflected in legislative enactments.¹⁴

Francis Allen has identified a number of social and political reasons for the collapse of the rehabilitative ideal: the disillusionment with political and governmental institutions in the post-Vietnam and post-Watergate period; the related loss of faith in the ability of social institutions such as the family, schools, and the psychiatric profession to shape or change character; increasing disagreement about what conduct should be deemed criminal, and thus what constitutes cure or rehabilitation; and the unfavorable climate created by the widespread impression (whether accurate or not)

9. At least with respect to the attitudes of the general public, this assertion requires some qualification. According to one recent study based on public polling data, support for rehabilitation has significantly eroded in recent years, but still retains substantial support among the public. Francis T. Cullen, Sandra E. Skovron, Joseph E. Scott & Velmer S. Burton, Jr., *Public Support for Correctional Treatment: The Tenacity of Rehabilitative Ideology*, 17 CRIM. JUST. & BEHAV. 6 (1990). The authors conclude that "[d]espite politicians' and criminologists' continual attempts over the past 15 years to undermine its legitimacy, the public believes that rehabilitation should be a goal of corrections." *Id.* at 15.

10. See ALLEN, *supra* note 2, at 57.

11. *Id.* at 9.

12. *Id.*

13. *Id.* at 9, 66-74. Probably the most influential modern statement of this last position is found in ANDREW VON HIRSH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976). This book is the report of a private blue-ribbon commission sponsored by the Field Foundation to study the failings of modern methods of criminal punishment.

14. The most dramatic example of this is Congress's renunciation of rehabilitation as a goal of the federal criminal system in the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3559 (1988 & Supp. V 1993) and 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993). The Act advocates retributive, deterrent, educational, and incapacitative goals in sentencing, 18 U.S.C. § 3553(a)(2) (1988), and explicitly rejects imprisonment as a means of promoting rehabilitation. 28 U.S.C. § 994(k) (1988). The Senate Report on the legislation refers to the "outmoded rehabilitation model" for federal criminal sentencing and declares the general consensus among those involved in the criminal justice system that "rehabilitation [cannot] be induced reliably in a prison setting . . ." S. REP. NO. 225, 98th Cong., 2d Sess. 38 (1983), reprinted in 1984 U.S.C.A.N. 3182, 3221.

that crime has become more and more rampant.¹⁵ In this article I argue that a further, and perhaps more fundamental, dynamic has been at work: the tension between the ideal of rehabilitation and a prison-centered regime of punishment. Although critics of rehabilitation have been willing to recognize that this fundamental tension exists,¹⁶ few have considered the reasons why this might be so, or have asked whether we have made the right choice in rejecting rehabilitation as a goal rather than questioning imprisonment as a means.

Most rehabilitative approaches to criminal punishment begin with the premise that society and the offender are irrevocably connected. Advocates view the offender as an errant, but continuing, member of the community; as such, the offender is worthy of the community's concern and attention and is not an appropriate object for venting retributive impulses. Further, many versions of rehabilitative theory recognize that the community itself is responsible—at least in some measure—for the offender's conduct and that to redeem the offender is also to redeem and heal the community harmed by the offender. Imprisonment is fundamentally inconsistent with this approach because it banishes the offender from the community, both physically and psychologically, and thus exacerbates rather than ameliorates the sense of estrangement from the community that underlies the conduct of many criminal offenders. The end result is that imprisonment, even when it is being used for putatively rehabilitative ends, actually incites and encourages the very forms of criminal behavior it professes to condemn and punish.

Paradoxically, since the time of the penitentiary's creation, advocates of rehabilitation have promoted incarceration as the primary means of achieving their goals.¹⁷ In so doing, they have unwittingly perpetuated criminality and violence by endorsing the psychological and physical violence visited on the imprisoned offender. It probably was inevitable that, at some point, these contradictions would undermine the vitality of the rehabilitative ideal itself.

Those who have abandoned rehabilitation do not escape the contradiction between rehabilitation and incarceration. Rather, they merely endorse more openly the objectification of the offender inherent in imprisonment and, therefore, the resulting cycle of violence and violation it produces. Rehabilitation as traditionally conceived may not work; but if our answer to this impasse is to reject rehabilitation as our goal, we have

15. ALLEN, *supra* note 2, at 18-30.

16. *See, e.g.*, S. REP. NO. 225, *supra* note 14.

17. As discussed *infra* in part II.B.2., many of the nineteenth century reformers who were responsible for the creation of the penitentiary believed that rehabilitation could work only by isolating criminal offenders as completely as possible from the corrupting influences of family and society. This represented a dramatic shift from earlier styles of criminal punishment, which, as discussed *infra* in part II.A., treated offenders much more as continuing members of the community.

only committed ourselves to the incoherence and contradictions of our present circumstances.

In the remainder of this article, I explore these themes more fully by means of three different "stories." Although each of these stories may appear, at first glance, unconnected to the others, my hope is that the patient reader will conclude that these stories actually tell the same basic tale by means of differing methodologies. I believe that, taken together, these stories help to illuminate the impasse we have reached in modern penological thought and, perhaps, show something about how we might move out of that impasse.

Part I uses Jack Henry Abbott's account of life in the modern American penitentiary¹⁸ to suggest that the use of imprisonment objectifies the offender by banishing him¹⁹ from the community. This objectification, in turn, breeds a climate of rampant fear and violence within the prison walls, which is directed as much against the minds and souls of the inmates as against their bodies.

Part II traces the history of the penitentiary from its creation in the early nineteenth century, contrasting the penitentiary's regime of punishment with the physically bloodier, but in some ways less socially destructive, preceding regime. This historical account reveals that the rehabilitative ideal in this country, from the first, was tied to the institution of the penitentiary and its explicit organizing principles of isolation and banishment. This account also suggests that the contradictions between these principles and the ends sought by rehabilitation caused a breakdown in the internal controls of the prison. The result is the prison we know today—a socially-created space outside of society in which violence against both body and soul flourishes with few constraints.

The remaining parts of the article explore the larger consequences of this state of affairs for the offender and for society as a whole. In part III, I use the insights of recent feminist Freudians to examine the psychological climate created by a regime of punishment that explicitly seeks to ostracize the offender from the community, and the drastic consequences such a climate has for the imprisoned offender. This story requires an exploration of the complex and ill-understood world of early childhood relationships. It focuses on the difficult, conflictual process by which the infant emerges

18. JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* (First Vintage Books 1982) (1981).

19. My use of the masculine pronoun in discussing the history of prisons and the experiences of prisoners in the remainder of this article reflects, in part, the reality that the vast majority of inmates in American prisons—94 percent, according to one recent study—are male. Michael de Courey Hinds, *From Bench, Aid for Women in Prison*, N.Y. TIMES, Oct. 15, 1993, at B18. It also reflects the fact that most available accounts of prisoners' experiences, including Abbott's, are limited to life in men's prisons; I do not presume that they necessarily represent the experiences of inmates in women's prisons.

from its initial experience of the world as a largely undifferentiated extension of itself into the bewildering world of multiplicity and relationship. The result of this process, I argue, is a fundamental condition of estrangement, or alienation, between the self and all others, which, in turn, provides the pattern for the forms of oppression and domination that exist, in greater or lesser degree, in every human society. Those subjected to such oppressive or dominating treatment suffer severe consequences. In particular, I argue that the ostracism and violence visited upon the imprisoned offender incite a reaction in kind, as the spurned offender desperately strives to force the community once again to bestow its attention and concern on him—the attention and concern each of us needs in order to feel integrated and whole.

Finally, part IV explores the broader social consequences of our reliance on imprisonment as the presumptive penalty for serious crime. Chief among these consequences is that law-abiding citizens who witness this scene of punishment learn to accept objectification and control of others, and even physical violence against them, as permissible responses to troublesome others. By acquiescing in the banishment and brutalization of criminal offenders, those of us outside the prison walls unwittingly participate in a downward spiral of domination and objectification that encourages violence in both criminals and ourselves. In exploring these themes, I return to the story of Jack Henry Abbott, whose experiences upon his release from prison after spending virtually his entire adult life in penal institutions testify to the predictable consequences of our current regime of punishment. I conclude by suggesting that whatever path we choose to escape from our current impasse must involve a decisive turn away from reliance on incarceration in total institutions such as the modern penitentiary.

I

THE BELLY OF THE BEAST:

JACK HENRY ABBOTT AND THE MODERN AMERICAN PRISON

Reading Abbott's letters did not encourage sweet dreams. Hell was now clear to behold. It was Maximum Security in a large penitentiary.

— Norman Mailer²⁰

When Jack Henry Abbott published *In the Belly of the Beast*, he had been imprisoned, with the exception of two periods totaling less than ten months, for twenty-five of his thirty-seven years. He was paroled in 1981, the year the book was published, but was returned to prison when, six weeks later, he killed a man in a street fight.²¹ Abbott will not become

20. Norman Mailer, *Introduction* to ABBOTT, *supra* note 18, at xi.

21. See *infra* part IV.B.2. for a discussion of the events leading to his return to prison.

eligible for parole again until the year 2001. His conviction for the 1981 killing was his first conviction for a violent crime committed outside of prison.²²

The story of Jack Henry Abbott is an exceptional one. Few can claim the dubious distinction of having spent almost their entire adult lives in prison and of having been, in effect, raised by the state in penal institutions. Even fewer can claim to have fought the odds and educated themselves, within that setting, in a wide array of human knowledge. And of those few, probably none besides Abbott can claim the distinction of publishing a brilliant, best-selling book about the conditions of his confinement.

Abbott is exceptional in other ways as well. Like many prisoners, Abbott learned to hate not only his confinement, but also his keepers; unlike most others, he refused to take the abuse dispensed by the guards and fought back, thereby earning repeated beatings and long terms in solitary confinement.²³ Like most prisoners, Abbott longed for his freedom; unlike most others, he was determined to understand the system that deprived him of that freedom. Resistance became a matter of personal and even moral conviction to Abbott, an organizing principle that helped him endure the long years of imprisonment. Abbott, however, set out to challenge the system not only physically, but intellectually as well, by writing one of the most disturbing and compelling indictments of American prisons ever published.

Although Abbott's exceptionality might seem to vitiate the value of his account as representative of life in the typical American prison, I believe it actually does the opposite. The modern penitentiary is one of the few American institutions (the mental institution is another) that, virtually by design, is beyond the experience of the typical citizen and largely impervious to the society outside of its walls. Society is concerned much more with putting offenders behind the prison's walls than with what awaits the offenders once they arrive. An almost willful ignorance typifies the general attitude toward modern prison conditions.²⁴ In this setting, it takes an exceptional person to articulate the normal circumstances of life inside the prison walls, and to force those who remain in society to gaze within those walls.

22. These basic biographical facts are culled from statements appearing in both his first book, *supra* note 18, and the book he wrote after being returned to prison, *MY RETURN*, *infra* note 52, written with Naomi Zack. Abbott was first institutionalized at the age of twelve as a juvenile offender. Released when he turned eighteen, Abbott was arrested again within six months and convicted of cashing a check with insufficient funds. Three years into his five-year term for this offense, Abbott killed a fellow inmate (he claims in self-defense) and was sentenced to a maximum term of twenty years. In the early 1970s, he escaped for a period of six weeks before being recaptured and sentenced yet again.

23. On one occasion Abbott spent more than two years in solitary confinement. *ABBOTT*, *supra* note 18, at 21-22.

24. See FRANCIS A. ALLEN, *THE CRIMES OF POLITICS: POLITICAL DIMENSIONS OF CRIMINAL JUSTICE* 39 (1974).

The story Abbott tells is one of unrelenting tension, violence, and brutalization, both physical and spiritual. Prison, in his words, is "a violent whirlwind of moral, mental and physical destruction."²⁵ Much of the violence is inflicted by inmates upon other inmates, but Abbott reserves his most venomous comments for prison administrators and guards.²⁶ Of the "varieties of punishment"²⁷ imposed on prisoners by their keepers, Abbott finds solitary confinement the most terrifying and most profoundly affecting:

My first acquaintance with punitive long-term solitary confinement had a more adverse and profound spiritual effect on me than anything else in my childhood. . . .

The air in your cell vanishes. You are smothering. Your eyes bulge out; you clutch at your throat; you scream like a banshee. Your arms flail the air in your cell. You reel about the cell, falling.

Then you suffer cramps. The walls press you from all directions with an invisible force. You struggle to push it back. The oxygen makes you giddy with anxiety. You become hollow and empty. There is a vacuum in the pit of your stomach. You retch.²⁸

The claustrophobia eventually passes, to be replaced with despair, then finally a listless apathy. The experience, Abbott says, is deeply transformative and amounts to a kind of "living death": "You sit in solitary confinement stewing in nothingness, not merely your own nothingness but the nothingness of society, others, the world. . . . Solitary confinement in prison can alter the ontological makeup of a stone."²⁹

Formerly, the most horrifying form of solitary was the "blackout cell," where the inmate was confined for days or weeks at a time in a cell with no light. The privation was absolute:

[The cell] was in *total* darkness. Not a crack of light entered that cell *anywhere*—and I searched, in the days that followed, for such a crack along every inch of the door and the walls. The darkness was so absolute it was like being in ink. . . .

The only light I saw was when I closed my eyes. Then there was before me a vivid burst of brilliance, of color, like fireworks. When I opened my eyes it would vanish. . . .

My eyes *hungered* for light, for color, the way someone's dry mouth may *hunger* for saliva. They became so sensitive if I

25. ABBOTT, *supra* note 18, at 132.

26. For example, he almost always refers to the guards as "pigs." See, e.g., *id.* at 19, 27, 36, 63, 80.

27. See *id.*, ch. 2.

28. *Id.* at 29.

29. *Id.* at 52-53.

touched them; they exploded in light, in showers of white sparks shooting as if from a fountain.³⁰

Abbott reports that blackout cells were supplanted by their opposite, "strip cells."³¹ A strip cell has no running water (water must be requested—or begged for—from a guard). There is no bed and no toilet; a hole in the middle of the floor takes the place of the latter. The smell of urine and feces fills the cell. A bare light bulb, out of reach, stays lit night and day. The light becomes so penetrating that it remains present, Abbott says, "even when you close your eyes. It penetrates the eyelids and enters your visual sensations in a grayish-white glow, so that you cannot rest your eyes. It *throbs* always in your mind."³²

The effects of solitary confinement, as vividly described by Abbott, are merely a more extreme form of the "social death" that imprisonment is designed to inflict on the criminal offender.³³ Abbott himself connects the two:

A man is taken away from his experience of society, taken away from the experience of a living planet of living things, when he is sent to prison.

A man is taken away from other prisoners, from his experience of other people, when he is locked away in solitary confinement in the hole.

Every step of the way removes him from experience and narrows it down to only the experience of himself.

There is a *thing* called death and we have all seen it. It brings to an end a life, an individual thing. When life ends, the living thing ceases to experience.

The *concept* of death is simple: it is when a living thing no longer entertains experience.

So when a man is taken farther and farther away from experience, he is being taken to his death.³⁴

Abbott estimates that he has spent "a good fourteen or fifteen years" in some form of solitary confinement.³⁵

Abbott endured other punishments and "treatments" as well, including electroshock and forced drug therapy.³⁶ These various penal techniques, formerly employed in order to reclaim the inmate, now merely brutalize him, robbing him of his soul and his integrity. Banished from society, and starved for the most minimal respect, the inmate's character

30. *Id.* at 30-31.

31. *Id.* at 32.

32. *Id.* at 33.

33. *See infra* part II.B.2.

34. ABBOTT, *supra* note 18, at 62.

35. *Id.* at 8.

36. *Id.* at 41-43.

and personality are slowly twisted and deranged, even to the point of madness.³⁷

These conditions have extreme and corrosive effects on relationships between inmates.³⁸ Abbott states, for example, that he had “never come into bodily contact with another human being in almost twenty years except in combat; in acts of struggle, of violence.”³⁹ Pervasive violence forces inmates to cultivate an “automatic suspicion” of those around them. The prisoner learns that he is completely on his own and that concern or caring for another is a ticket to death. Abbott calls his “most important lesson” the knowledge that “I will betray anyone and anything in extreme situations.”⁴⁰

This environment turns the inmate into “a thing, no longer a man,”⁴¹ inured to violence. Inmates call prisons “gladiator schools,”⁴² Abbott says, because prisons teach men how to kill. Inmates are taught “the way the bull is taught—through *torment*.”⁴³ Conditions were particularly bad at San Quentin, Abbott relates, and “[t]hat is why San Quentin has the very best hospital for traumatic medicine in America. Army doctors even come there to learn.”⁴⁴

This environment makes murder seem a sensible, even necessary reaction to the slightest offense. Killing becomes an act of “[m]oral self-defense,” an inevitable response to an intolerable situation.⁴⁵ In a highly sensuous and revealing passage,⁴⁶ Abbott describes how such a killing is executed:

Here is how it is: You are both alone in his cell. You’ve slipped out a knife (eight- to ten-inch blade, double-edged). You’re holding it beside your leg so he can’t see it. The enemy is smiling and chattering away about something. You see his eyes: green-blue, liquid. He thinks you’re his fool; he trusts you. You see the spot. It’s a target between the second and third button on his shirt. As you calmly talk and smile, you move your left foot to the side to step across his right-side body length. A light pivot

37. Abbott reports: “I have seen men around me through the years fall apart morally, seen them go mad in subtle ways and seen them surrender their will to the routine of prison, and I have resisted it all much, much longer than others.” *Id.* at 27.

38. Abbott notes that, before the prison reform movement helped improve inmates’ position with respect to the guards and other staff, relations between inmates were more peaceful than later came to be the case. He explains that the guards, once they became constrained in their ability to resort to force, learned to control the inmates by inciting suspicion and violence among them. *Id.* at 179-84.

39. *Id.* at 63.

40. *Id.* at 114-15.

41. *Id.* at 78-79.

42. *Id.* at 86.

43. *Id.*

44. *Id.* at 66.

45. *Id.* at 89.

46. For a fuller account, see *infra* notes 277-80 and accompanying text.

toward him with your right shoulder and the world turns upside down: you have sunk the knife to its hilt into the middle of his chest. Slowly he begins to struggle for his life. As he sinks, you will have to kill him fast or get caught. He will say "Why?" or "No!" Nothing else. You can feel his life trembling through the knife in your hand. It almost overcomes you, the gentleness of the feeling at the center of a coarse act of murder. You've pumped the knife in several times without even being aware of it. You go to the floor with him to finish him. It is like cutting hot butter, no resistance at all. . . . Things register in slow motion because all of your senses are drawn to a new height. You leave him in the blood, staring with dead eyes.⁴⁷

Abbott leaves no doubt where he places the responsibility for such acts: "It's the prison system in America that drives them to outrages on one another. [They] are not to blame. . . . What is forced down their throats in spite of themselves is *the will* to commit crimes."⁴⁸

The prison system not only incites violence in those it ensnares; it teaches our culture to tolerate inhumanity. It informs the law-abiding that cruelty is a defensible, even validated means of reducing crime. In Abbott's words:

Tell America that as long as it permits the use of violence in its institutions—in the whole vast administrative system traditional to this country—men and women will always indulge in violence, will always yearn to achieve the cultural mantle of this society based on swindle and violence.

When America can get angry because of the violence done to my life and the countless lives of men like me, then there will be an end to violence, but not before.⁴⁹

Understandably, prison taught Abbott to desire retribution—to dominate his oppressors as they had dominated him. Abbott states:

There are wardens and prison guards in my life for whom the very notion that I should forgive them is insane. Retribution is a great part of the subjective condition for revolution. Call it vengeance if you want.

. . . We could never live side by side with such monsters—the day after the revolution—on equal terms. That is asking for too much. They must pay. Because we are not machines.⁵⁰

He adds: "There will be a 'day after the revolution.'"⁵¹

47. ABBOTT, *supra* note 18, at 89-90.

48. *Id.* at 100, 144.

49. *Id.* at 128.

50. *Id.* at 74-75.

51. *Id.* at 75.

* * *

Early on the morning of July 18, 1981, six weeks after his release from prison on parole, Jack Henry Abbott killed Richard Adan, the night manager of the Binibon cafe on the Bowery in New York City, in a fight on the street outside the cafe. Abbott was tracked down and arrested ten weeks later in Louisiana and was returned to New York for trial. Following his conviction, he was sentenced, as a repeat offender, to a term of fifteen years to life in a New York State penitentiary.⁵²

II PRISONS AND PUNISHMENT: THE TRANSFORMATION AND PRIVATIZATION OF VIOLENCE

Despite a personal revulsion, we think of [prisons] as always having been with us, and therefore as always to be with us. We tend to forget that they were the invention of one generation to serve very special needs, not the only possible reaction to social problems.

— David J. Rothman⁵³

Although prisons, as institutions of punishment, are less than two centuries old, most of those who think and write about prisons take for granted the centrality of prisons to criminal punishment. This belief seems to be one of the few tenets uniting adherents of the three main strains of modern penological thought—the retributive, the deterrent, and the rehabilitative schools. This section seeks to unsettle the assumption that criminal offenders should, or must, be segregated from society for some period of time—that they should, or must, be physically and symbolically banished from the community of law-abiding citizens.⁵⁴

52. See JACK HENRY ABBOTT & NAOMI ZACK, *MY RETURN* 11-56 (1987). See also *infra* part IV.B.2.

53. DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 295 (1971). Adam Hirsch, in his recent history of the prison in early American society, begins his account on a similar note:

Today most Americans accept the penitentiary as a given. Imprisonment is the routine sanction for serious crime in our system of justice—seemingly as elemental and inevitable a part of criminal process as police arrest, state prosecution, and judgment by one's peers. . . . [But] [t]he wholesale incarceration of criminals is in truth a comparatively recent episode in the history of Anglo-American jurisprudence.

ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* xi (1992).

54. To avoid overstating the case, it should be recognized that, virtually from the beginning of the penitentiary's existence, certain critics have advocated its abolition or radical curtailment. These voices have been muted and few in number, however, particularly in the present century. For a discussion of modern prison abolition sentiment, see HAWKINS, *supra* note 1, at 5-12; JESSICA MITFORD, *KIND AND USUAL PUNISHMENT: THE PRISON*

In this section, I trace the historical development and increasing popularity of the prison in the late eighteenth and early nineteenth centuries in England and the United States. This new regime of punishment sharply contrasted with the preceding era, which knew no prisons in the modern sense. Specific historical forces, rather than anything inherent in the nature or notion of criminal punishment, propelled the rise of the prison.

Traditional wisdom tells of bloody, brutal pre-modern forms of justice, and trumpets the creation of the penitentiary as a victory for enlightened and humanistic values.⁵⁵ Although I do not advocate a return to pre-modern forms of punishment, I do argue that the traditional story ignores key truths: that the rise of the prison only transformed, but did not overcome, the violence of the blood sanctions; that the new forms of violence, largely psychological rather than physical, were in many ways more insidious and socially destructive than the older forms they replaced; and that we have something important to learn from the psychological and social climate that surrounded the infliction of pain and death in these older forms of punishment. I do not seek to glorify or apologize for bodily punishments, but to question the presumption of superior wisdom that attaches to our own, assertedly more humane, methods of punishment.

A. *A Regime of Pain and Death:
Criminal Punishment in an Age Without Prisons*

1. *The Political Logic of Public Executions*

Michel Foucault, one of the few chroniclers of the prison to challenge the received truths about punishment in the eighteenth century and before, begins his book on prisons with a description of the public execution of an attempted regicide, Robert-François Damiens, in Paris in the spring of 1757. The brutality of the announced sentence is horrifying to modern sensibilities:

[T]he flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said [attempted] parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted

BUSINESS 295-325 (Vintage Books ed. 1974) (1973). For examples of abolitionist arguments, see ROBERT SOMMER, *THE END OF IMPRISONMENT* (1976) (advocating the elimination of long-term imprisonment); LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* (1994) (arguing that imprisonment should be used only as an alternative of last resort); KARL MENNINGER, *THE CRIME OF PUNISHMENT* (1966) (arguing on psychological grounds for the radical transformation, or disappearance, of prisons in their present form).

55. The varieties of punishment employed in England and the American colonies prior to the rise of the prison are discussed *infra* in part II.A. The story of the rejection of these traditional forms of punishment in favor of imprisonment as the default sanction for serious crime is discussed *infra* in part II.B.

together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.⁵⁶

The actual execution, as related by an eyewitness, was even more gruesome due to problems encountered by those who carried out the sentence:

The horses tugged hard, each pulling straight on a limb, each horse held by an executioner. After a quarter of an hour, the same ceremony was repeated and finally, after several attempts, the direction of the horses had to be changed, thus: those at the arms were made to pull towards the head, those at the thighs towards the arms, which broke the arms at the joints. This was repeated several times without success. [Damiens] raised his head and looked at himself. . . .

After two or three attempts, the executioner Samson and he who had used the pincers each drew out a knife from his pocket and cut the body at the thighs . . . ; the four horses gave a tug and carried off the two thighs after them . . . ; then the same was done to the arms, the shoulders, the arm-pits and the four limbs

When the four limbs had been pulled away, the confessors came to speak to him; but his executioner told them that he was dead, though the truth was that I saw the man move, his lower jaw moving from side to side as if he were talking.⁵⁷

The extreme torture that Damiens suffered was unusual, as the most severe punishments were reserved for regicides, whether successful or not. However, the use of torture, or at least painful forms of execution, was quite typical, as was the public spectacle made of Damiens' execution.⁵⁸ In fact, it may be difficult to determine which offends our sensibilities more—the torture itself, or the elaborate display of it. Although the use of capital punishment declined greatly in the seventeenth and eighteenth centuries,⁵⁹

56. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 3 (A. Sheridan trans., 1979) (quoting 3 PIÈCES ORIGINALES ET PROCÉDURES DU PROCÈS FAIT À ROBERT-FRANÇOIS DAMIENS (1757)).

57. *Id.* at 4-5 (quoting eyewitness account, as recounted in A. L. ZEVAES, *DAMIENS LE RÉGICIDE* 201-14 (1937)).

58. Since the focus of this section is on the Anglo-American experience, some qualification of this statement is necessary. Torture, on the European Continent, was used in two different ways: "judicial" torture, which was a carefully regulated and precisely ordered method of proof; and torture used as punishment, often preceding or accompanying the execution of the offender. The Damiens episode clearly is an example of the latter, and this use of pain and torture was shared by the English. Apart from some early exceptions, the English did not, however, use torture as a mode of proof, having opted early in their history for jury deliberation as the preferred method of determining the truth in criminal trials. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME* 137-38 (1976) (discussing the use of the prosecutorial trial system, rather than torture, as the means of determining the guilt of the accused).

59. See *infra* note 74 and accompanying text.

it remained the formal default sanction for serious crimes throughout this period. The spectacle of highly visible public executions remained conceptually vital to the logic and coherence of the pre-modern system of criminal punishment even after its actual use began to decline.⁶⁰ Any attempt to understand the underlying dynamics of this regime of punishment must, then, begin by examining more closely the political and cultural meanings embedded within the execution spectacle and the power struggles enacted through it.

Fundamentally, the execution of the criminal offender was part of a process by which the "truth" of the crime—its social meaning—was dramatically and publicly presented to the people via the body of the condemned. In Foucault's words, "[i]t added to the conviction the signature of the convicted man. A *successful* public execution justified justice, in that it published the truth of the crime in the very body of the man to be executed."⁶¹ The "truth" of the crime—any crime—was that all crime was regicide; a crime attacked not only its immediate victim, but also the person of the sovereign, for the law represented the sovereign's will and his power. What Damiens attempted to do literally, all criminals did figuratively. Crime challenged the sovereign's authority, and the execution reasserted that authority through an overwhelming display of power, in order to persuade the offender and the crowd to acknowledge the "truth" that the sovereign's will was supreme and deserved obeisance. The execution was "a ceremonial by which a momentarily injured sovereignty [was] reconstituted. . . . Its aim [was] not so much to re-establish a balance as to bring into play, at its extreme point, the dissymmetry between the subject who has dared to violate the law and the all-powerful sovereign who displays his strength."⁶²

The problem was that not all executions were "successful," and the risk that they would not be successful made the role of the condemned a crucial one. The power imbalance between the sovereign and the condemned, and between the sovereign and the crowd (for whose edification the execution was performed), could be inverted with startling suddenness. If the condemned did not acquiesce—did not repent and admit guilt—then his defiance could incite the crowd to rebellion:

60. J. M. Beattie, the author of one of the leading treatises on crime and punishment in England during the seventeenth and eighteenth centuries, emphasizes the "mental gulf" that separates our society, in which "strong sentiment in favor of capital punishment" remains only for murder, from "a society in which men and women were liable to be executed for what we would regard as trivial offenses . . ." J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800*, at 77 (1986).

61. FOUCAULT, *supra* note 56, at 44 (emphasis added).

62. *Id.* at 48-49. Beattie also emphasizes the centrality of "massive physical terror" to this regime of punishment and the particularly gruesome forms of execution that were visited upon those whose crimes (e.g., treason) directly offended the sovereign. BEATTIE, *supra* note 60, at 139, 451.

If the crowd gathered round the scaffold, it was not simply to witness the sufferings of the condemned man or to excite the anger of the executioner: it was also to hear an individual who had nothing more to lose curse the judges, the laws, the government and religion. The public execution allowed the luxury of these momentary saturnalia, when nothing remained to prohibit or punish. Under the protection of imminent death, the criminal could say everything and the crowd cheered. . . . In these executions, which ought to show only the terrorizing power of the prince, there was a whole aspect of the carnival, in which rules were inverted, authority mocked and criminals transformed into heroes.⁶³

Both the condemned and the crowd thus played ambiguous and unpredictable roles. The crowd was expected to confirm the sovereign's authority by roaring its approval of the execution and execrating the condemned, or at least by witnessing the execution without protest. But the crowd could easily turn the other way:

Preventing an execution that was regarded as unjust, snatching a condemned man from the hands of the executioner, obtaining his pardon by force, possibly pursuing and assaulting the executioners, in any case abusing the judges and causing an uproar against the sentence—all this formed part of the popular practices that invested, traversed and often overturned the ritual of the public execution.⁶⁴

Occasionally, pre-existing unrest or a crime's political nature inspired these disruptions, but more often they seemed provoked "directly by a verdict and an execution," perhaps where the crowd deemed the sentence too harsh or especially favored the offender. This gave rise to "small, but innumerable 'disturbances around the scaffold.'" ⁶⁵

Foucault depicts mainly eighteenth-century France, but his descriptions largely hold true for the English of this period as well. According to historian Michael Ignatieff, there were many instances where the crowd, with its "highly developed sense of the rights due the condemned," vented its wrath on the authorities—sometimes freeing the condemned, sometimes attacking the sheriff or destroying his house after the execution, sometimes even maiming or killing the executioner who failed to dispatch

63. FOUCAULT, *supra* note 56, at 60-61.

64. *Id.* at 59-60.

65. *Id.* at 60. Pieter Spierenburg also notes that executions could incite rebellious reactions from the crowd — especially, in his view, when the condemned's crime had political overtones — but argues that Foucault overstates the degree of restiveness that existed around the scaffold during this period. PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION FROM A PREINDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE* 91-109 (1984).

the condemned swiftly and with a minimum of pain.⁶⁶ Ignatieff, like Foucault, also stresses the unusual power possessed by the condemned in the execution spectacle:

[The execution] officials tried to maneuver offenders into using the influence of their dying words to exhort the crowd to eschew crime and give obedience to the civil power. But the authorities could not guarantee this happy outcome. The offender had a choice of roles in the theater of death, either the one of contrite repentance offered by the parson, or the defiant and drunken one offered by the crowd. Such a choice necessarily followed from the fact that the crowd and the state shared in the making of the ritual. . . . Sometimes the dying man would go so far as to contest the justice of his sentence, thus turning the ritual from a vindication of the law into a public disputation about its justice.⁶⁷

Frequently, the crowd treated the execution as an occasion for drunken public revelry, hailing the condemned (who often was also drunk and rowdy) as the bacchanalian hero of the occasion, thus challenging the sovereign's authority not by defiance or protest, but by indifference and mockery. By the early or mid-eighteenth century, this increasingly was the norm with English executions.⁶⁸

66. MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850*, at 22, 24 (1978).

67. *Id.* at 22. Beattie likewise notes the difficulties caused by the fact that "some men were defiant on the gallows and refused to show remorse or play their part in the morality tale the state wished to mount on this public stage." BEATTIE, *supra* note 60, at 488-89.

68. A well-known account of the revelry on a typical "Tyburn Fair" (the term for execution day in London) during this period appears in 1 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 166-78 (1948). This account reads in part:

A criminal lying under sentence of death was allowed to indulge in almost any excess and dissipation. For his last supper . . . he could order anything he desired. . . . Three days before his execution in 1774, John Rann had seven girls to dine with him at Newgate. . . . For their last journey to Tyburn condemned offenders were allowed to dress as they liked and usually took great care to appear in their best clothes. . . . Executions were looked upon as notable public events. . . . From early morning factories and workshops were deserted, while at the coffee-houses and taverns parties even formed the previous day. . . . The carts were driven slowly through the streets, the journey usually lasting about two hours. Sometimes the assembled spectators showed their reprobation of the criminal, but this was exceptional; he was almost invariably applauded and fruits and flowers were thrown at him. . . . During the journey the convicts were allowed to converse with any of their relatives or acquaintances who happened to be in the crowd, for which purpose the procession would stop for a while. . . . They were allowed to stop at taverns to enjoy some drink which was never refused to them by the tavern-keepers. . . . This drinking during the journey . . . caused great numbers of delinquents to arrive at Tyburn heavily intoxicated. They often behaved in an unseemly manner. . . . In the crowd which usually assembled to witness executions there were people from all walks of life. . . . It was a ribald, reckless, brutal mob, violently combative, fighting and struggling for foremost places, fiercely aggressive, distinctly abusive. Spectators often had their limbs broken, their teeth knocked

Whatever the frivolity, the spectacle of execution remained a deadly serious business. Executions were a contest between the sovereign's authority and the crowd's resistance to that authority, through the medium of the condemned's body. But the condemned was important not simply as a convenient physical symbol of what was at stake. The condemned, by his words, often controlled the balance of power between sovereign and subjects. If he repented, he reaffirmed the sovereign's authority; but if he refused to repent, or perhaps even denounced the justice of the sentence or conviction, the crowd might easily erupt. The condemned's ability to incite rebellion undoubtedly explains why he had to be so visibly and brutally destroyed. Not only was every crime a figurative regicide, but every execution was a potential regicide: the condemned might compound his offense by words of open defiance, and the crowd might respond with open revolt.

In stark contrast with the modern equivalent to this spectacle,⁶⁹ the condemned stood in a clear, and clearly visible, social space. If he expressed defiance, he took his stand with the crowd, the community of which he was still a member, and the crowd quite possibly would stand with him. If he repented, he took his stand with (or, more precisely, submitted to) the sovereign; further, sincere repentance earned the condemned a place in the community of God, if not, any longer, that of Earth. Either way, the condemned occupied a potent, visible place; he was not (yet) a lost and abandoned soul.

2. *The Cultural Logic of Noncapital Sanctions*

By the eighteenth century, most varieties of serious crime, while still nominally capital, typically earned less extreme sanctions.⁷⁰ While many of the noncapital sanctions seem harsh, one punishment was *not* typically imposed: imprisonment. Some commentators explain the severity of the capital and noncapital sanctions of this era by reference to the absence of a developed prison system.⁷¹ This, however, does not explain why prisons were not considered a viable alternative. An examination of the character of the various noncapital sanctions suggests an answer. The eighteenth-

out, sometimes they were crushed to death. . . . The number of women and adolescents was very considerable; even children were brought there to witness the scene.

Clearly, executions of this sort lacked any real authoritative or terrorizing power over the crowd, even if the assembled mob never attempted to save the condemned or challenge the justice of the punishment.

69. See *infra* part II.B.3.

70. The continued existence of the "Bloody Code" (as the laws establishing capital offenses were called), even as more alternatives to death were devised, reveals the continuing vitality of the basic conception of all crime as regicide, and thus punishable, at least in theory, by death—the only punishment proper for regicide.

71. See, e.g., LANGBEIN, *supra* note 58, ch. 2. Cf. 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 452 (2d ed. 1898; reissued 1968) ("The one punishment that can easily be inflicted by a state which has no apparatus of prisons and penitentiaries is death.")

century Europeans generally viewed criminal offenders as temporarily errant members of the community whose actions, although worthy of opprobrium, did not condemn them to physical banishment from society. Foucault notes this attitude, stating that despite the extreme character of criminal punishments in the eighteenth century, "criminals . . . were perfectly tolerated by the population. There was no autonomous criminal class."⁷²

The sovereign's view of crime and criminals, of course, was decidedly less tolerant, because crime was considered as an almost literal attack against the king. This perhaps explains the seeming contradiction between the ferocity of punishments in this era and the relatively benign view of crime among the people. However, even the sovereign's treatment of the offender—perhaps *especially* this treatment—allowed the offender a place within the community. The power in the hands of the condemned, the rebellions of the crowd on behalf of the condemned, the bacchanalian revelry that often surrounded the execution, and the belief that a repentant criminal would enter the kingdom of God after execution—all of these circumstances indicate that the condemned occupied not only a visible social space, but one invested with considerable power and privilege. Similarly, although the social space occupied by noncapital offenders was much less visible and certainly less potent, it was no less a space within, rather than outside, the community.

Although the number of crimes for which death was the nominal penalty increased in England during the eighteenth century,⁷³ the number of actual executions decreased dramatically.⁷⁴ In theory, the death penalty applied to all serious crimes. This category encompassed an enormous variety of offenses, ranging from murder to any petty theft of money or goods worth more than a shilling.⁷⁵ In practice, the capital sanction increasingly

72. MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977*, at 41 (Colin Gordon ed., 1980). Although Foucault perhaps overstates the extent of toleration for criminals, others have likewise noted that there was little conception of criminals as a separate class prior to the nineteenth century. Beattie, for example, explains that although the English viewed crime as a serious and persistent problem throughout the eighteenth century, it was only toward the end of the century that they began to view crime as "the work of an alienated fringe population living in idleness, immorality, and depravity, in fact a criminal, and a dangerous, class . . ." BEATTIE, *supra* note 60, at 198. See also *id.* at 632, 637.

73. IGNATIEFF, *supra* note 66, at 16.

74. Langbein reports that "executions were running at around 800 per year in England in Elizabeth's last years," whereas, in the year 1805, only 68 executions were recorded—a decline of more than 90 percent. The available evidence seems to indicate a fairly steady decline over the course of these two centuries. LANGBEIN, *supra* note 58, at 40.

75. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 36 (1983).

was reserved for the most serious crimes or for repeat offenders. The earliest of the "escape hatches" used to avoid the death penalty was the "benefit of clergy."⁷⁶ At first a medieval privilege protecting members of the clergy who were brought before royal courts, it expanded gradually until, by the early eighteenth century, most first offenders convicted of lesser capital crimes could use it to escape the gallows. Convicts received a brand on the thumb, and perhaps a whipping, before being discharged. Major crimes were not subject to the clergy privilege, nor were minor crimes committed by second offenders (as determined by the presence of the brand on the offender's thumb). However, in practice, royal pardon or judicial reprieve spared many convicted of these offenses.⁷⁷ In one commentator's words, "[b]enefit of clergy drained much of the blood from a system of criminal sanctions that remained nominally based upon capital punishment."⁷⁸

Transportation, the practice of shipping convicts to the American colonies to serve terms of labor as indentured servants, became another hugely popular alternative to the death penalty in eighteenth-century England.⁷⁹ When it became clear in the 1780s that the former American colonies were forever lost for this purpose, England established the Botany Bay penal colony as an alternative.⁸⁰ Originally intended as a stronger penalty than branding and whipping for those who pled clergy, transportation came to be used frequently even for offenses not eligible for the clergy privilege.⁸¹

76. See generally *id.* at 36-41; BEATTIE, *supra* note 60, at 141-48 (discussing the evolution and use of the benefit of clergy).

77. See BEATTIE, *supra* note 60, at 420, 430-36.

78. LANGBEIN, *supra* note 58, at 39.

79. For informative discussions of the emerging use of transportation and the American colonists' reluctance to receive English convicts, see BEATTIE, *supra* note 60, at 470-83, 500-19, 538-48, 592-601; A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775* (1987); ABBOT E. SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776*, at 89-203 (1947); H. B. SIMPSON, *Penal Servitude: Its Past and Its Future*, 15 L. Q. REV. 33 (1899); LANGBEIN, *supra* note 58, at 39-43. Although transportation was not used on the European Continent, a similar noncapital sanction was developed: the galley sentence, whereby those convicted of nominally capital offenses were sentenced to service as oarsmen on galley ships, which survived as military vessels into the eighteenth century. See *id.* at 29-33.

80. LANGBEIN, *supra* note 58, at 43; BEATTIE, *supra* note 60, at 599-600. The decision to found a penal colony at Botany Bay was made in 1786; the first ship sailed early the following year. *Id.* at 599.

81. IGNATIEFF, *supra* note 66, at 18-19. According to Ignatieff: "By the late 1760s, transportation to the American colonies for terms of seven years, fourteen years, or life accounted for 70 percent of all sentences at the Old Bailey, and a higher though indeterminate percentage if we include those convicts whose death sentences were later commuted." *Id.* at 20. Beattie's study of sentences in the county of Surrey during this period yielded similar figures, though there was a noticeable drop in the use of transportation in the years just before the declaration of American independence. See BEATTIE, *supra* note 60, at 538, 546, 560.

Sympathetic juries practiced another less formal alternative to the capital sanction, commonly acquitting the guilty or deliberately undervaluing stolen goods in order to convict offenders of noncapital petty larceny.⁸² This widespread practice, known as "pious perjury," provided a crucial, though largely unregulated, means of ameliorating the severity of the capital laws.⁸³ In a variation on this informal clemency, the victim would decline to press charges or would deliberately "undercharge" the offense by declining to allege the circumstances or amount that would make an offense ineligible for the clergy privilege.⁸⁴

A final category of punishment relied primarily on public shame for its efficacy. Public whippings (which added a dose of pain to the shame) often were used in lieu of transportation for those convicted of minor offenses subject to the clergy privilege.⁸⁵ For certain types of petty noncapital offenses, courts employed the pillory: the offender would be locked in the stocks for a certain period of time (typically an hour) and subjected to the crowd's abuse.⁸⁶

The efficacy of these noncapital sanctions depended to a large extent on the cooperation of the public.⁸⁷ While the noncapital offender lacked the power of the criminal condemned to the gallows, and the citizenry's power was much less visible and more diffuse than in the spectacle of the execution, the community could nonetheless dissent from the sovereign's assertion of authority over the offender. Jury nullification provided perhaps the most obvious example of this,⁸⁸ but transportation and the punishments of shame also allowed society to express its dissent. A crowd that disagreed with a pillory sentence could confound the authorities by cheering and lauding the stockaded offender. Indeed, in one celebrated case, the crowd brought the offender refreshments and decorated his head with a garland of flowers.⁸⁹ While the crowd could not directly challenge a transportation sentence, evidence shows that offenders who escaped from the authorities' grasp or surreptitiously returned before the end of their

82. BEATTIE, *supra* note 60, at 424-26; IGNATIEFF, *supra* note 66, at 19.

83. BEATTIE, *supra* note 60, at 424-25.

84. *Id.* at 39, 181, 333; LANGBEIN, *supra* note 58, at 40-41.

85. BEATTIE, *supra* note 60, at 461-64, 485-87, 544-48.

86. *Id.* at 464-68; IGNATIEFF, *supra* note 66, at 21.

87. Beattie describes the public punishments practiced during this era as "moral-degradation ceremonies in which the crowd that watched played an important part. They were engaged in a renewal of community values by their recognition and disapproval of the deviant act committed by the offender on display." BEATTIE, *supra* note 60, at 468-69. *See also id.* at 614 ("The essential characteristic of the pillory was the participation of the community in the denunciation of the offender and his deed.")

88. For an excellent study of the historical development and importance of jury nullification, see THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (1985). For briefer discussions of the topic, see PATRICK B. DEVLIN, THE JUDGE 117-31 (1979); Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989).

89. IGNATIEFF, *supra* note 66, at 21. *See also* BEATTIE, *supra* note 60, at 133, 466, 616 (noting several incidences where the crowd sympathized and even honored the offender).

sentences could live peacefully in or near their communities as long as their neighbors declined to turn them in.⁹⁰

This regime of punishment stands out in its acceptance of the offender (albeit with some ambivalence) as a continuing member of the community. The punishments of shame certainly humiliated and, to some extent, ostracized the offender (unless, of course, the crowd sided with him). But the punishments took place in a clearly visible public space, permitted (and even encouraged) interaction between the offender and the crowd, and returned the offender to the community immediately afterward. Even transportation did not utterly expel convicts from society. Offenders served a sentence of years, after which they might return; more importantly, offenders were not banished entirely from society, but merely were transported, temporarily, to another social location.⁹¹

The predominance of these alternatives to incarceration did not result from an unfamiliarity with the prison as an institution. The English had used prisons since medieval times to hold suspects awaiting trial, to coerce recalcitrant parties into taking some procedural step (e.g., payment of a civil judgment), and to hold convicted offenders awaiting punishment⁹² (debtors were added to the list later⁹³). The courts, however, allowed only brief terms of confinement and, more to the point, refused to use imprisonment as punishment for serious crimes.⁹⁴ Imprisonment might be employed for minor crimes (e.g., vagrancy, minor thefts, and game law offenses), but whippings or fines were the more typical sanctions.⁹⁵

90. See BEATTIE, *supra* note 60, at 540-41; SMITH, *supra* note 79, at 99, 106. See also BERNARD MANDEVILLE, AN ENQUIRY INTO THE CAUSES OF THE FREQUENT EXECUTIONS AT TYBURN 47 (1725) (noting the means criminals used to avoid transportation), *quoted in* SMITH, *supra* note 79, at 367 n.55.

91. One contemporary commentator criticized the efficacy of transportation on just these grounds: "[The transported criminal] is merely transferred to a new country; distant indeed, but as fertile, as happy, as civilized, and in general as healthy, as that which he hath offended. It would not be incredible then, if this punishment should be asserted in some instances to have operated even as a temptation to the offence . . ." W. EDEN, PRINCIPLES OF PENAL LAW 33 (2d ed. 1771), *quoted in* RADZINOWICZ, *supra* note 68, at 312. Beattie notes that this opinion was increasingly common during the eighteenth century: "It came to seem that it might be doing some men a favor to transport them to a place where their prospects of employment and prosperity were better than those of the honest laborer at home, a positive inducement indeed to commit a crime, rather than a deterrent." BEATTIE, *supra* note 60, at 541.

92. LANGBEIN, *supra* note 58, at 28-29.

93. See IGNATIEFF, *supra* note 66, at 29-30, for a concise discussion of debtors' prisons in eighteenth-century England.

94. At the Old Bailey, the main criminal court serving London and the surrounding area, imprisonments accounted for only 2.3 percent of felony sentences in the period between 1770 and 1774. Most of these offenders were sentenced to terms of a year or less. See *id.* at 15.

95. As late as 1776, a prison census revealed that only 653 petty offenders were imprisoned in England and Wales—15.9 percent of the total prison population. Of the remainder, 59.7 percent were debtors, and 24.3 percent were felons awaiting trial, felons convicted and awaiting execution or transportation, or (in a small handful of cases) felons serving actual sentences of imprisonment. See *id.* at 28.

3. *Crime and Punishment in Colonial America*

The American colonists, lacking colonies of their own, did not have the alternative of transportation. With limited exceptions,⁹⁶ the colonists punished crime within the community. The inability to expel offenders temporarily might be expected to have generated pressure to adopt an internal segregative penalty, such as imprisonment, but it is striking to discover that the colonists did no such thing.⁹⁷

The colonists did not consider crime to be a critical problem and did not expect to eradicate it.⁹⁸ The colonial penal codes, like their English counterparts, listed a wide variety of offenses as nominally capital, but in practice death was reserved for only the more serious offenses.⁹⁹ The colonists viewed crime as a species of sin. Although the sinner had to be punished, the universality of sin created a bond between the offender and others in the community.¹⁰⁰ According to Lawrence Friedman, this conception of crime made criminal trials "a ceremony of some importance. It was an occasion for repentance and reintegration: a ritual for reclaiming lost sheep and restoring them to the flock."¹⁰¹ At the same time, the religious underpinnings of the colonists' systems of justice "lowered their expectations and made deviant behavior a predictable and inevitable component of society."¹⁰² This religious attitude toward crime may have been more prevalent in the religiously dissident colonies than in England or on the European Continent, but it supplemented rather than displaced the more political conception of crime as regicide.

Despite its harsh punishments, the colonial criminal justice system made no systematic attempt to isolate the offender from society—either

96. The colonists did devise a system that somewhat paralleled the English transportation system, but it was reserved for use in a limited class of cases. See *infra* note 107 and accompanying text.

97. "Before the nineteenth century, offenders faced a variety of sanctions, including the pillory, the lash, the gallows, and exile. Though not unknown, 'the sentence of confinement' was a rarity." HIRSCH, *supra* note 53, at xi.

98. ROTHMAN, *supra* note 53, at 3.

99. HIRSCH, *supra* note 53, at 5-6. As in England, "[w]idespread evasion of capital statutes held the carnage to a minimum." *Id.* at 6. Lawrence Friedman reports that in Pennsylvania, for example, the execution rate was only about one per year prior to the Revolution. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 42 (1993).

100. ROTHMAN, *supra* note 53, at 15-16. The list of capital crimes reflected the religious convictions of the colonists. Blasphemy and adultery, for example, were capital offenses in Massachusetts, though this was contrary to English practice. HIRSCH, *supra* note 53, at 6. For a more extended discussion of the conception of crime as sin in early American society, see FRIEDMAN, *supra* note 99, ch. 2.

101. FRIEDMAN, *supra* note 99, at 25.

102. ROTHMAN, *supra* note 53, at 17.

for the purpose of protecting the community, deterring criminality, rehabilitating the offender, or venting retribution.¹⁰³ As in England and Europe, citizens viewed the offender as a part of the social order, even if a somewhat troublesome one, not as a serious threat to it. Adam Hirsch emphasizes the communal conception of crime and criminal punishment in the colonial era:

Because towns experienced little turnover in population, most criminal offenders were life-long residents, well known to everyone, rather than outsiders. The first impulse of all concerned was to heal the wounds as best they could. The preferred sanctions accordingly operated to draw resident offenders back into the community. . . . [M]ost offenders subjected to public punishment were successfully reintegrated into their communities.¹⁰⁴

The colonists favored the fine (“‘the sanction par excellence’”) and the whip (“‘the afflictive penalty most favored’”) as criminal sanctions, followed closely by the pillory.¹⁰⁵ Benefit of clergy, imported from England, spared most first offenders from the scaffold, but recidivists usually were condemned to hang.¹⁰⁶ The Americans did have a distant cousin of the English transportation sanction, expulsion from the community, but they used it mainly for the nonresident offender — the roving rogue or vagabond without ties to the community. Communities rarely applied this sanction to their own members.¹⁰⁷

During most of the colonial period, executions in the colonies resembled those in England. In both places, they were public spectacles intended to impress the assembled populace with the sovereign’s power and morality plays intended to dramatize the wages of sin.¹⁰⁸ As in England, the condemned played a pivotal role in both respects. The authorities eagerly

103. *Id.* at 3. *See id.* at 1-56 for a discussion of similar colonial attitudes toward the poor and the insane, who typically were cared for in their own homes or in the homes of neighbors.

104. HIRSCH, *supra* note 53, at 33, 35.

105. ROTHMAN, *supra* note 53, at 48-49. *See also* FRIEDMAN, *supra* note 99, at 37-40 (discussing colonial criminal sanctions); HIRSCH, *supra* note 53, at 4-5, 33-35 (discussing the use of public admonition as punishment and noting that expulsion from the community was reserved for only the most serious crimes). As with the similar system of punishments inflicted by the English, “an audience was essential to the effectiveness” of many of the criminal sanctions used by the colonists. *Id.* at 34.

106. ROTHMAN, *supra* note 53, at 51.

107. HIRSCH, *supra* note 53, at 33; ROTHMAN, *supra* note 53, at 50. The shortsightedness of an expulsion penalty is obvious: it encouraged the growth of a wandering class of criminals and made it imperative that communities carefully examine any strangers who arrived in town. In Rothman’s words: “By expelling nonresident offenders, each town increased the likelihood that men on the move might be criminals. . . . In brief, a system of banishment demanded a rigorous oversight of admissions.” *Id.*

108. The religious element involved in using the condemned as a cautionary example served to strengthen the bond of identification between the spectator and the offender, ensuring that the latter was viewed as occupying a social space little different, at bottom, from that occupied by the former. One minister sermonized that “the difference [between

sought his repentance in order to reconfirm the civic and religious values challenged by his offense.¹⁰⁹ Although the evidence is sketchy, it also appears that his defiance could roil colonial crowds as it did those in England and France.¹¹⁰ By the time of the founding of the American republic, however, the authorities were increasingly selecting foreigners, transients, and other outsiders for execution.¹¹¹ Juries' greater tendency to convict outsiders and their sense that outsiders presented the greatest threat to social stability may account for this trend.¹¹² But condemning an outsider also prompted a more peaceful execution day, one that matched more closely the ideal envisioned by the secular and religious authorities who conducted the pageant.¹¹³ At the same time, however, this strategy reduced the crowd's ability to identify with the condemned, thereby mitigating the execution's value as a cautionary exercise or a triumph of sovereign authority.

Colonial prisons and jails conformed to the English model and were used mainly to house debtors or felons passing through the mills of justice.¹¹⁴ In contrast to the nineteenth-century penitentiary, the eighteenth-century American prison or jail resembled a normal household in architecture and routine. The keeper and his family lived in the jail in quarters little different from those given to the inmates. Prisoners wore no uniforms or other special clothing and were not chained or cuffed. They often had free run of the jail and, occasionally, limited run of the community outside the jail, and friends and family members had relatively easy access to the

the criminal and the crowd] may consist only in this, that he is detected and condemned, but they as yet are concealed from human eye." Another asserted that "it is possible, yea probable, that there are some in this audience who are even more guilty than the prisoner; but their crimes are not yet detected . . ." Yet another minister phrased it even more succinctly, telling one execution gathering that "You are all sinners." *Quoted in LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 43 (1989).*

109. Those condemned to hang "were expected to play the role of the penitent sinner; it was best of all if they offered a final confession, a prayer, and affirmed their faith, in the very shadow of the gallows." *FRIEDMAN, supra note 99, at 26.*

110. *See, e.g., NEGLEY K. TEETERS, SCAFFOLD AND CHAIR: A COMPILATION OF THEIR USE IN PENNSYLVANIA, 1682-1962, at 24-29 (1963).*

111. *MASUR, supra note 108, at 38-39.*

112. *Id.* at 39.

113. Masur writes: "The absence of conflict between spectators and the State [in the late colonial and early republican periods] might be explained by the biographical profile of gallows victims. Since the condemned was typically an outsider, a marginal, transient suspect, there was little basis for social ties and mutual obligations between the prisoner and any one segment of the population. There was no obvious constituency to challenge the probity of the hanging." *Id.* at 46.

114. *FRIEDMAN, supra note 99, at 48-49; HIRSCH, supra note 53, at 7-8; ROTHMAN, supra note 53, at 52-53; see also THOMAS L. DUMM, DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES 98 (1987) (noting that prior to 1786, Philadelphia jails had been only holding places for convicts awaiting sentencing). Hirsch notes the irony that "modern law enforcement officers would surely grimace to discover their eighteenth-century counterparts petitioning courts to expedite the trials of criminals—not so that they could lock the criminals up, but so that they could free the criminals from jail." *HIRSCH, supra note 53, at 8.**

prisoners.¹¹⁵ In David Rothman's words, "at the close of the colonial period, there was no reason to think that the prison would soon become central to criminal punishment."¹¹⁶

*B. A Regime of Social Death:
Criminal Punishment in the Age of Prisons*

In the years between 1790 and 1830, a momentous change swept over the theory and practice of criminal punishment in virtually every Western nation. The ascendancy of republican ideals, increasing urbanization, and industrialization altered the social landscape irrevocably and prompted the perception that crime was a crucial social problem in need of solution.¹¹⁷ Following the lead of reformers in the United States and England, most Western nations abolished their draconian sanctions and replaced them with prison-centered punishments. The reformers thus transformed the prison from a decidedly peripheral institution serving a small range of discrete functions into a total institution dedicated to the reformation of the criminal.¹¹⁸ Although executions persisted, they became marginalized as a means of punishment and were displaced, and even absorbed, by the prison: by the 1830s, executions had moved from the public square to the prison yard.¹¹⁹ Criminal punishment, previously the most public of civic functions, became privatized. The criminal, previously deemed a member of the community, now became an outcast, an "other" who was forced to suffer the social death of banishment—not just from his community, but from all community and from all society. Prisons swallowed the social

115. FRIEDMAN, *supra* note 99, at 49; ROTHMAN, *supra* note 53, at 55-56. Although Hirsch also notes the large differences between the colonial jail and the nineteenth-century penitentiary, he, more than Rothman, stresses the very real indignities and dangers that incarceration in the colonial jails could entail. See HIRSCH, *supra* note 53, at 9-10. Ignatieff describes patterns and routines in English prisons of the period similar to those noted by Rothman, stressing in particular the "easy commerce between the prison world and the street." IGNATIEFF, *supra* note 66, at 29-42. In debtors' prisons, this "commerce" went so far as to give the debtor the right to live with his family inside the jail, all at the creditor's expense. *Id.*

116. ROTHMAN, *supra* note 53, at 56; see also HIRSCH, *supra* note 53, at 10-11 (noting that the jail stood at the periphery of the colonial justice system, "little cared for and only gradually cared about").

117. See *infra* part II.B.1. Although Hirsch acknowledges the use of republican rhetoric by many of the penal reformers in the latter part of the eighteenth century, he cautions against the conclusion that there was a direct connection between republican ideology and the rise of the penitentiary. See HIRSCH, *supra* note 53, at 47-56. Although his point is well taken, it seems equally clear, as discussed in the pages that follow, that penal reformers motivated at least in part by republican values played a crucial role in the move from the colonial regime of punishment to the new regime centered on the penitentiary.

118. See *infra* part II.B.2.

119. See *infra* part II.B.3.

space previously occupied by the offender, formerly a place of considerable, openly acknowledged power. The hell described by Jack Henry Abbott began here, with the carefully constructed purgatory of the nineteenth-century penitentiary.¹²⁰

1. *Crime Becomes a Problem*

The American colonists, as noted earlier,¹²¹ saw crime as a worrisome but controllable problem. Crime, as sin, was ineradicable, and the colonists had little concern for the rehabilitation of the criminal offender.¹²² Crime, as regicide, was of course a matter of considerable concern, but mainly to the sovereign and his minions; and they were more concerned with publicly shaming or destroying the criminal offender than with rehabilitating or understanding him.

Toward the close of the eighteenth century these attitudes began to change. Criminal acts and other forms of deviant behavior became, for the first time, problems to be solved. The spirit of the new republican age made the blood sanctions seem barbaric, and the displacement of political authority from the sovereign to the citizenry effaced the need for dramatic public spectacles. The "body of society" replaced the "King's body" as the unifying social and political principle and eliminated the social space where struggles over the authority of the sovereign previously had taken place.¹²³

120. The two leading accounts of the early history of the American prison are Rothman's *THE DISCOVERY OF THE ASYLUM*, *supra* note 53, and Hirsch's *THE RISE OF THE PENITENTIARY*, *supra* note 53. Hirsch's study is the more recent and comprehensive of the two, and he is critical of many of Rothman's conclusions. On the points I most wish to stress, however, Hirsch and Rothman agree more than they disagree. I also rely in what follows on Thomas Dumm's somewhat idiosyncratic and heavily Foucaultian *DEMOCRACY AND PUNISHMENT*, *supra* note 114, which is useful for drawing out the political and cultural consequences of the rise of the American prison. Other instructive accounts include DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* (G. Cousin trans., 1981); MICHAEL S. HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878* (1980); and W. DAVID LEWIS, *FROM NEWGATE TO DANMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848* (1965). For informative accounts of the English experience during the same period, see IGNATIEFF, *supra* note 66, and BEATTIE, *supra* note 60.

121. See *supra* text accompanying notes 72, 98-102.

122. This is not to say, however, that pre-Revolutionary Americans were completely unconcerned with crime or uninterested in rehabilitation. The colonists did worry about crime, see HIRSCH, *supra* note 53, at 52-53, although it was only toward the end of the eighteenth century that criminals came to be seen as a "separate and distinct 'criminal class'" and that crime took on the character of a "palpable crisis." *Id.* at 36, 114. Hirsch also notes that the idea of rehabilitating criminals became a goal of the criminal justice system even before the Revolution, countering Rothman's account suggesting that rehabilitation became a concern only in the nineteenth century, when the penitentiary was born. *Id.* at 14-31, 147 n.115.

123. See FOUCAULT, *supra* note 72, at 55. Foucault goes on to state: "In place of the rituals that served to restore the corporal integrity of the monarch, remedies and therapeutic devices are employed such as the segregation of the sick, the monitoring of contagions, the exclusion of delinquents." *Id.*

The new age also was an increasingly secular age, making public displays of repentance seem increasingly irrelevant and requiring a new understanding of the nature and causes of crime—if not sin, then what?¹²⁴

The new conception of crime that developed during this period also owed its origins to mounting social instability, seen in increasing social and geographic mobility, in the problems caused by the dramatic growth of urban populations, and in the unsettling of traditional hierarchies through the action of republican principles.¹²⁵ New sources of cohesion and stability were needed, and it was natural to begin searching for them by studying the causes of criminal and other forms of deviant behavior. Rothman describes this social anxiety and its effects:

What . . . was to prevent society from bursting apart? From where would the elements of cohesion come? More specifically, would the poor now corrupt the society? Would criminals roam out of control? Would chaos be so acute as to drive Americans mad? All of these questions became part of a full, intense, and revealing investigation of the origins of deviant and dependent behavior. To understand why men turned criminal or became insane or were poor would enable reformers to strengthen the social order. To comprehend and control abnormal behavior promised to be the first step in establishing a new system for stabilizing the community, for binding citizens together.¹²⁶

The initial focus of blame fell not on the criminals or the social forces that incited criminal behavior, but rather on the criminal codes themselves. Inspired by European writers such as Cesare Beccaria, American reformers condemned the bodily punishments of the colonial period as inhumane and self-defeating. In Beccaria's words, "the severity of punishment of itself emboldens men to commit the very wrongs it is supposed to prevent," because they "are driven to commit additional crimes" in order to avoid detection.¹²⁷ Further, the very severity of the punishments dissuaded victims, juries, and courts from applying them, thus guaranteeing arbitrary and erratic enforcement.¹²⁸

124. See ROTHMAN, *supra* note 53, at 58-59, 68-69.

125. HIRSCH, *supra* note 53, at 35-39; ROTHMAN, *supra* note 53, at 57-58. Population growth and increasing urban density were perhaps the most visible and dramatic of these changes. Between 1790 and 1830, the population of Massachusetts doubled and that of Pennsylvania tripled; in New York, the population increased five-fold. At the beginning of this period, only 200,000 Americans lived in towns with more than 25,000 people; at the close, the number topped one million. ROTHMAN, *supra* note 53, at 57. In 1650, by which time most of the features of the colonial system of punishment were in place, "the whole population of the American colonies . . . would not fill a good-sized baseball stadium today." FRIEDMAN, *supra* note 99, at 36.

126. ROTHMAN, *supra* note 53, at 58-59.

127. CESARE B. BECCARIA, ON CRIMES AND PUNISHMENTS 43 (Henry Paolucci trans., Bobbs-Merrill 1963) (1st ed. 1764).

128. ROTHMAN, *supra* note 53, at 60. See generally *supra* part II.A.2.

Beccaria and his American followers proposed milder but surer punishments on the theory that "[t]he certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity. . . ."¹²⁹ The reform spirit swept through the states in the first two decades of the nineteenth century and fostered the enactment of new codes that either abolished or restricted the death penalty, fines, and shame-oriented punishments, and replaced them with moderate terms of incarceration.¹³⁰ Society now sought to reform and reclaim the offender.¹³¹ For the first time, the criminal justice system used prisons as a means of punishment on a wide scale.¹³² During this early period of reform, however, attention continued to focus on the codes, not the prisons.¹³³ Reformers viewed the prison as a necessary, but uninteresting, part of the larger reform program. "A repulsion from the gallows rather than any faith in the penitentiary" lay behind this early use of incarceration; the fact of imprisonment, not its internal routine, was of chief importance.¹³⁴

129. BECCARIA, *supra* note 127, at 58. See also MASUR, *supra* note 108, at 52-53 (stating that Beccaria promoted a system of rational punishment based on certainty rather than severity). For somewhat conflicting accounts of Beccaria's importance to American penal reformers, compare ROTHMAN, *supra* note 53, at 59-62 (arguing that the young republic quickly took Beccaria's message to heart), with HIRSCH, *supra* note 53, at 26-27 (questioning the extent to which Beccaria's arguments influenced American penological reform).

130. ROTHMAN, *supra* note 53, at 59-62; see also HIRSCH, *supra* note 53, at 26 (noting that Beccarian ideology prompted the abolition of the death penalty in Pennsylvania and New York); FRIEDMAN, *supra* note 99, at 73 (discussing the reform movement during the early republican period to reduce the use of the death penalty); DUMM, *supra* note 114, at 97 (stating that the Pennsylvania penal reform movement, which advocated proportionality and uniformity in sentencing, was consistent with the penal theory of Beccaria).

131. HIRSCH, *supra* note 53, at 23-25. This ambition was expressed in explicit terms in the preamble to the Pennsylvania statutory reform of 1786, which repealed the death penalty for a number of crimes and asserted that "it is the wish of every good government to reclaim rather than destroy," and that "punishments directed by the laws now in force . . . do not answer the principal ends of society in inflicting them, to wit, to correct and reform the offenders" and to serve as a deterrent. 12 Pa. Stat. at Large 280, *quoted in* MASUR, *supra* note 108, at 76.

132. ROTHMAN, *supra* note 53, at 61.

133. Hirsch emphasizes, for example, that the penal reforms advocated by Beccaria and his American followers had no direct effect on the move toward incarceration that was developing during this period:

Though perfectly compatible with a carceral program, Beccaria's structural proposals could have been implemented without recourse to any novel penalties. Beccaria's insistence that the degree of punishment be proportioned to the crime cannot be directly connected to the rise of the penitentiary.

HIRSCH, *supra* note 53, at 26.

134. ROTHMAN, *supra* note 53, at 62. Dumm argues that, although this was true in general, Pennsylvania was interested in its prisons from the start and began experimenting at this time with the radically new designs and procedures that eventually would take the world by storm. DUMM, *supra* note 114, at 96. Even in Pennsylvania, however, the reforms were tentative and piecemeal until the construction of two newly-designed penitentiaries in the early 1820s. *Id.* at 105-06. Hirsch similarly argues that at least some penal reformers in Massachusetts, Pennsylvania, and New York were interested, even at this relatively early period, in structuring the internal routines of the prison to serve rehabilitative ends.

By the 1820s, a later generation of reformers announced the failure of this first reform movement, noting that rational codes and imprisonment not only failed to reduce crime, but encouraged it as inmates initiated fellow offenders into lives of crime.¹³⁵ Reformers now focused on the criminal himself. Prison officials in the Jacksonian era recorded life histories of the criminals they supervised, and thus created a new profession devoted to interpreting these histories so as to understand better the causes of crime.¹³⁶ These researchers concluded that the roots of crime generally could be traced to a failure of upbringing, especially a collapse in the family structure or in the family's control over the offender during his formative years.¹³⁷ Society no longer equated crime with intractable, unfathomable sin; science had opened crime to human comprehension, intervention, and cure.

David Rothman notes a paradoxical quality to the thinking about crime during the Jacksonian period:

Many Americans . . . judged their society with eighteenth-century criteria in mind. As a result, they defined as corrupting the fluidity and mobility that they saw. . . . They were embarrassed about the cruelty and shortsightedness of earlier punishments, and hoped to be humanitarian innovators. Yet they also believed that their predecessors, fixed in their communities and ranks, had enjoyed social order. . . . This ambivalence gave a very odd quality to their thinking. On the one hand, they aimed at the heights, about to eliminate crime and corruption. On the other, they doubted the society's survival, fearing it might succumb to chaos.¹³⁸

HIRSCH, *supra* note 53, at 23-27. Like Dumm, Hirsch also notes, however, that the vision of these reformers was quite different from that of the later generation that founded the penitentiary as we now know it. *Id.* at 25.

135. ROTHMAN, *supra* note 53, at 62, 93. One commentator of the period lamented that "[o]ur favorite scheme of substituting a state prison for the gallows is a prolific mother of crime Our state prisons, as at present constituted, are grand demoralizers of our people." JOHN BRISTED, *THE RESOURCES OF THE UNITED STATES OF AMERICA* 436 (1818), quoted in ROTHMAN, *supra* note 53, at 93.

136. ROTHMAN, *supra* note 53, at 62-71. Hirsch notes that the Jacksonians were not the first to use criminal biographies, however, and traces their origin to eighteenth century Massachusetts. HIRSCH, *supra* note 53, at 154 n.172.

137. These researchers were, according to Rothman, "certain that children lacking discipline quickly fell victim to the influence of vice at loose in the community. Inadequately prepared to withstand the temptations, they descended into crime." ROTHMAN, *supra* note 53, at 66. See also FRIEDMAN, *supra* note 99, at 77 (noting that studies identified "weakness in the family" as a new source of crime).

138. ROTHMAN, *supra* note 53, at 69. See also MASUR, *supra* note 108, at 60-61 (describing society's conflict between its anxiety over the apparent rise in criminal activity and its developing "republican moral code").

This anxiety fueled a search for a solution that would fulfill the extravagant dreams of many of the Jacksonian reformers. The peril they sensed magnified their faith that great things could be accomplished if they succeeded.¹³⁹ The solution they settled on was the penitentiary—a new form of prison dedicated to the proposition that placing the offender in splendid isolation from the world's corrupting influences would eradicate the problem of crime.¹⁴⁰

2. *The Birth of the Penitentiary*

Among democratic peoples new families continually rise from nothing while others fall, and nobody's position is quite stable. The woof of time is ever being broken and the track of past generations lost. . . . Thus, not only does democracy make men forget their ancestors, but also clouds their view of their descendants and isolates them from their contemporaries. Each man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart.

— Alexis de Tocqueville¹⁴¹

The penitentiary grew out of a sense of impending social chaos in a rapidly changing world, one in which the traditional array of sanctions, the efficacy of which depended on the existence of relatively small and stable communities, came to be seen as increasingly ineffective and irrelevant.¹⁴² In the more extravagant dreams of some of the penitentiary's founders, this new form of prison would not only cure the criminal by removing him from

139. The optimism of the reform spirit in this period was noted by Tocqueville, who saw in the spirit of American democracy a fundamental and seemingly ineradicable faith in the "indefinite perfectibility" of humankind and human society. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 420 (J. P. Mayer & Max Lerner eds. & George Lawrence trans., 1966). The overweening confidence of some reformers in their ability to solve even the most intractable problems prompted Benjamin Rush, one of the earliest supporters of the penitentiary, to propose a treatment for turning the skin of black people white, thereby ridding the United States of its race problem once and for all. See DUMM, *supra* note 114, at 91. By comparison, reforming criminals must have seemed like child's play.

Hirsch, in contrast to Rothman, argues that most of the penal reformers of this era actually had modest expectations concerning the efficacy of their reforms and that only a minority of the penitentiary's advocates viewed it as a vehicle for broad social reformation. HIRSCH, *supra* note 53, at 66-68.

140. ROTHMAN, *supra* note 53, at 79. Although Rothman stresses the novelty of the conception that inspired the founders of the penitentiary, Hirsch argues persuasively that the general idea of incarcerating offenders as a form of criminal sanction, and many of the specific elements of the American reformers' vision as well, can be traced to various institutions and ideologies prevalent in England and the colonies before the eighteenth century. See HIRSCH, *supra* note 53, at 13-31 (tracing the origins of incarceration as a form of sanction). Hirsch also notes, however, that it was not until the latter part of the eighteenth century that incarceration as the default sanction for serious crime became "an idea whose time had [finally] come." *Id.* at 32.

141. TOCQUEVILLE, *supra* note 139, at 478.

142. FRIEDMAN, *supra* note 99, at 77; HIRSCH, *supra* note 53, at 37-43, 46.

the corrupting influences of family and community, but would do so by creating an artificial, hermetically-sealed model of a perfectly-ordered society based on rigid discipline and scientific procedures. These reformers seemed to say that, if family and society were self-corrupting, then the solution was to teach individuals in society to resist corruption by internalizing the perfect isolation imposed upon the inmate of the penitentiary. In this way, the penitentiary enacted in literal terms the metaphysics of self-reliance and the priority of the individual expressed in liberal political thought. Criminals were germs infecting the body politic and had to be removed for their own health and that of society; but their disease was a social one, and the method of its cure could also serve as a lesson for the larger society. Although the penitentiary was a physically marginal place, with the prison walls marking a rigid boundary between the society without and the inmates within, its organizing impulse was aimed at the heart of American society, offering a vision of democracy based on solitude, rigorous self-discipline, and obedience to authority. The literal solitude of the inmate modeled the ideal image of each citizen confined within "the solitude of his own heart."¹⁴³

The success of the penitentiary's creators was stunning: by the 1830s, penitentiaries had spread to most of the states in the union, and the American penitentiary system had become world famous.¹⁴⁴ All was not peaceful within the reform camp, however, as two competing penitentiary models contended for supporters. One, the "separate" system, originated in Pennsylvania; the other, known as the Auburn or "congregate" system, arose in

143. Although Tocqueville praised the Americans for devising institutions that inhibited the inherent tendency of democracy toward radical individualism (or that at least used that very tendency to forge a network of common bonds), *see* TOCQUEVILLE, *supra* note 139, at 481-84, he failed to take account of the counterposing force of institutions such as the penitentiary and the industrial factory, both of which were beginning to make their effects felt during the period of Tocqueville's travels in the United States. Ironically, the occasion for Tocqueville's visit was a commission by the French government to study the American prison system, which resulted in the classic 1833 study by Tocqueville and Beaumont, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE*, *infra* note 144.

144. ROTHMAN, *supra* note 53, at 79-81. The reformers' goals were not met with universal approbation. One early critic of incarceration, Stephen Burroughs, a preacher's son who was subjected to one of the first experiments with incarceration after being convicted of counterfeiting, accused adherents of the penitentiary of violating republican principles: "How is this," he asked, "that a country which has stood the foremost in asserting the cause of liberty, that those who have tasted the bitter cup of slavery, and have known from hence the value of liberty, should so soon after obtaining that blessing themselves, deprive others of it?" All the reformers had succeeded in accomplishing, he charged, was substituting "slavery for death." MEMOIRS OF STEPHEN BURROUGHS 126 (1798), *quoted in* MASUR, *supra* note 108, at 87-88. This challenge anticipated Beaumont and Tocqueville's later observation that although "society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism." GUSTAVE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 79 (Herman R. Lantz et al. eds. & Franz Lieber trans., 1964) (1883).

New York. The differences between the systems seem rather trivial today, but their respective partisans viewed them as critically important at the time.¹⁴⁵ The debate persisted even after it became clear that other states overwhelmingly preferred the simpler and more economical Auburn system.¹⁴⁶

Both systems featured a rigorous isolation of the prisoner from the general community.¹⁴⁷ Imprisonment severed virtually every tie between the prisoner and the outside world by denying the inmate any family visits, correspondence, books, or newspapers. Reformers boasted that the penitentiary inmate was "perfectly secluded from the world . . . hopelessly separated from one's family, and from all communication with and knowledge of them for the whole term of imprisonment."¹⁴⁸ A chaplain at Sing-Sing in the 1830s explained that "[t]he prisoner . . . was taught to consider himself dead to all without the prison walls."¹⁴⁹ The warden of the same prison similarly addressed a new batch of convicts in 1826: "It is true that while confined here you can have no intelligence concerning relatives or friends You are to be literally buried from the world."¹⁵⁰

The differences between the Auburn and Pennsylvania systems became apparent only when one examined the routines and procedures that held sway within the prison walls, but even here there was much that united the two systems. Prisoners, previously allowed to wear their own clothes, now wore uniforms. They marched rather than walked around the prison, and every action was minutely scheduled, observed, and analyzed. Even in the less extreme Auburn system, the odor of social death permeated the

145. The two systems differed primarily in that the prisoners were completely isolated from both the outside world and their fellow inmates in the Pennsylvania system, while prisoners in the Auburn system slept alone in individual cells at night but worked together during the day (though they were not permitted to speak with one another). See *infra* text accompanying notes 159-65.

146. ROTHMAN, *supra* note 53, at 79-81.

147. Benjamin Rush, one of the most influential among the early reformers, argued that "the reformation of a criminal can never be effected by a public punishment" because such punishment destroys any sense of shame in the offender, damages character, and lasts too short a time to produce the changes "in body and mind" that are essential "to reform obstinate habits of vice." In fact, Rush was convinced, public punishments actually incited and encouraged crime in the spectators, either by eliciting sympathy for the criminal, which led the observers to "secretly condemn the law which inflicts the punishment," or, where sympathy was not aroused, by "excit[ing] . . . terror in the minds of the spectators," thereby corrupting their moral constitution. Rush concluded that "if public punishments are injurious to criminals and to society, it follows, that crimes should be punished in private, or not punished at all." The solution lay in the creation of a "house of repentance," or penitentiary, that punished criminals in private. BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY 4-12 (Joseph James 1787), quoted in MASUR, *supra* note 108, at 79.

148. Quoted in ROTHMAN, *supra* note 53, at 95.

149. Quoted in *id.* at 96.

150. Quoted in *id.* at 96. Rothman aptly notes that the imposing walls surrounding the penitentiary "were not only to keep the inmates in, but the rest of the world out." *Id.*

prison: “[E]verything passes in the most profound silence,” noted Beaumont and Tocqueville, “and nothing is heard in the whole prison but the steps of those who march, or sounds proceeding from the workshops.”¹⁵¹ After the inmates were returned to their individual cells in the evening, “the silence within these vast walls . . . is that of death. . . . [W]e felt as if we traversed catacombs; there were a thousand living beings, and yet it was a desert solitude.”¹⁵²

This new regime of punishment required the establishment of a disciplined routine and a thorough understanding of the individual inmate. Because the reformers thought crime arose from temptations to corruption in the outside world and from families’ failure to instill self-discipline, the prison had to teach self-control to the offender through isolation, regimentation, hard and constant labor, and, if necessary, beatings.¹⁵³ Prison trained and corrected those who could not learn self-discipline on their own and provided an example to society as a whole. “[The penitentiary] would become a laboratory for social improvement,” Rothman writes. “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.”¹⁵⁴

Penitentiary design showed how far the institution had traveled from its distant cousin, the colonial jail. Some penitentiaries resembled medieval fortresses—monumental in size, forbidding in appearance, and virtually impregnable. Designers modeled others after factories—long and low in dimension, symmetrically arranged, and imbued with a forceful ethos of order and fixity.¹⁵⁵ Whatever the design, no observer could mistake the Jacksonian penitentiary for a home. And the differences were just as noticeable inside as outside: rows of identical cells housed the inmates, efficient work areas provided places for their labor, and the internal design permitted the authorities to keep the inmates under constant, penetrating surveillance. Jeremy Bentham’s “panopticon,” his design for the ideal

151. BEAUMONT & TOCQUEVILLE, *supra* note 144, at 65.

152. *Id.*

153. Rothman stresses the close connection between punitive measures and the reform principles:

The prevailing concepts of deviancy put a premium on rigorous discipline. The premises underlying the penitentiary movement placed an extraordinary emphasis on an orderly routine. Confident that the deviant would learn the lessons of discipline in a properly arranged environment, everyone agreed that prison life had to be strict and unrelenting. And with regularity a prerequisite for success, practically any method that enforced discipline became appropriate. Reformers and prison officials agreed on the need for inmates to obey authority. Criminals, in their view, had never learned to respect limits. To correct this, the penitentiary had to secure absolute obedience, bending the convicts’ behavior to fit its own rigid rules.

ROTHMAN, *supra* note 53, at 102-03. Factories were beginning to introduce the same values and many of the same procedures to discipline workers’ lives. *Id.* at 105.

154. *Id.* at 107.

155. *Id.*

prison, perfectly captured the aspiration of the American reformers and their English counterparts.¹⁵⁶ The inmates' cells were to surround a central observation column, thus permitting the observers, themselves unseen, to see anything at any time. The inmate, never knowing if he was being observed, would behave at all times as though he were, with a state of "conscious and permanent visibility [thus ensuring] the automatic functioning of power"¹⁵⁷ and teaching the inmate to internalize the observer's gaze.¹⁵⁸

Given the similarities between the Auburn and Pennsylvania systems, the differences seem trivial. The Pennsylvania scheme isolated prisoners in their cells for the entire period of confinement, requiring them to eat, work, and sleep there. Inmates were permitted no contact with other inmates, and their only human contact was with prison authorities and, perhaps, an occasional authorized visitor such as a minister.¹⁵⁹ Under the Auburn system, by contrast, inmates labored together in the penitentiary's workshops and took their meals together, but slept alone in their cells at night. Although they could see their fellow prisoners during meals and in the workshops, the inmates were forbidden to speak with one another or even to exchange glances. The differences between the two systems thus hinged upon the narrow issue of "whether convicts should work silently in large groups or individually within solitary cells."¹⁶⁰

This minor difference, however, masked a more fundamental divergence of goals between the two schools of thought, a divergence that made the disciplinary consequences of the Auburn model more attractive to a democratic society seeking greater order and fixity. Ironically, the Auburn system was created by a mistake—design flaws in the Auburn prison, which initially was to operate on the Pennsylvania "separate" model, forced prison officials to remove inmates from their cells during the day.¹⁶¹ Making a virtue out of necessity, the officials elaborated a complete theory of punishment to justify their actions. In addition to making the construction

156. JEREMY BENTHAM, *Panopticon; or, The Inspection-House* (1791), in 4 THE WORKS OF JEREMY BENTHAM (John Bowring ed., Russell & Russell, Inc. 1962) (1838-1843). See generally FOUCAULT, *supra* note 56, at 195-228 (discussing "panopticism" in all of its various forms). See also IGNATIEFF, *supra* note 66, at 109-13. For a detailed discussion of Bentham's panopticon writings, and his efforts to convince the British government to build a penitentiary based on his design, see JANET SEMPLE, BENTHAM'S PRISON: A STUDY OF THE PANOPTICON PENITENTIARY (1993).

157. FOUCAULT, *supra* note 56, at 201.

158. Although no prison ever implemented Bentham's scheme in pure form, HIRSCH, *supra* note 53, at 23; IGNATIEFF, *supra* note 66, at 112-13, its underlying impulse pervaded the organization not only of the penitentiary but also, increasingly, the factory, the school-house, hospitals, and insane asylums. FOUCAULT, *supra* note 56, at 209-28.

159. DUMM, *supra* note 114, at 108; see also ROTHMAN, *supra* note 53, at 82.

160. ROTHMAN, *supra* note 53, at 82; see also FRIEDMAN, *supra* note 99, at 79; HIRSCH, *supra* note 53, at 65.

161. DUMM, *supra* note 114, at 116. The designers failed to ventilate the cells adequately and made the cells too small for inmates to exercise, or even to walk more than a step or two. Within six months of the opening of Auburn's new prison wing in 1821, five of the original eighty inmates were dead, and more than half of the remainder had suffered

and maintenance of prisons considerably cheaper (a major consideration for states when deciding which system to adopt), the Auburn "congregate" system claimed to benefit the inmates by subjecting them to the temptation to communicate with one another (a temptation tellingly parallel to the kinds of temptations they would face in society following their release) and then training them, often by the crack of the whip, to resist the temptation.¹⁶² The administrators of the Auburn system professed to be unconcerned with moral reclamation, unlike the partisans of the Pennsylvania system. The Auburn officials emphasized changing the convict's behavior rather than changing his inner being.¹⁶³ As Sing-Sing's warden, Elam Lynds, assessed:

I do not put great faith in the sanctity of those who leave the prison. I do not believe that the counsels of the chaplain, or the meditations of the prisoner, make a good Christian of him. But my opinion is, that a great number of old convicts do not commit new crimes, and that they even become useful citizens, having learned in prison a useful art, and contracted habits of constant labour. This is the only reform which I ever have expected to produce, and I believe it is the only one which society has a right to expect.¹⁶⁴

The Auburn system sought a diligent worker and moderate, self-disciplined citizen—"[i]n short, the released inmate was to be a member of the great middle class" then emerging as a dominant force in American life.¹⁶⁵

severe physical or emotional distress. The prison's administrators, in response, began removing the inmates from their cells to eat, work, and exercise. *Id.*

162. *Id.* at 117.

163. HIRSCH, *supra* note 53, at 92.

164. Quoted in BEAUMONT & TOCQUEVILLE, *supra* note 144, at 164. Beaumont and Tocqueville echoed these comments in their own remarks about the penitentiary system:

We have no doubt, but that the habits of order to which the prisoner is subjected for several years, influence very considerably his moral conduct after his return to society.

The necessity of labor which overcomes his disposition to idleness; the obligation of silence which makes him reflect; the isolation which places him alone in presence of his crime and his suffering; the religious instruction which enlightens and comforts him; the obedience of every moment to inflexible rules; the regularity of a uniform life; in a word, all the circumstances belonging to this severe system, are calculated to produce a deep impression upon his mind.

Perhaps, leaving the prison he is not an honest man, but he has contracted honest habits . . . and if he is not more virtuous he has become at least more judicious

Id. at 90.

165. DUMM, *supra* note 114, at 120.

Thomas Dumm argues that the Auburn system's more modest goals¹⁶⁶ forged citizens better suited to the emerging vision of liberal democratic equality. The two systems fought, in essence, over the definition of good citizenship. To the more republican-minded supporters of the Pennsylvania model, the Auburn approach betrayed the ideals of the American Revolution by denying that good citizenship required moral citizens. While they might agree with the Auburn advocates on the abnormality of complete isolation, supporters of the Pennsylvania system nonetheless felt that isolation was a vital feature of any system of reform that hoped to make the offender worthy of returning to normal society.¹⁶⁷ Adherents of the Auburn model responded by charging their opponents with naivete for aspiring to comprehend the criminal offender's inner state. The best that could be hoped for, and the only thing society had a right to demand, was a change in the objectionable habits that laxity in upbringing and corruption in society had bred in the offender.¹⁶⁸ While the Pennsylvanians advocated a greater dose of isolation in the pursuit of a more publicly-minded citizen, the less extreme Auburn system actually produced a more perfect isolation in result by encouraging a duality between the inner and the outer self. By leaving the inner self not only untouched but also beyond their range of concerns, the Auburn advocates consigned it to a space outside the realm of social intercourse. In the end, the Auburn system and its conception of citizenship emerged victorious.

Paradoxically, by refusing to concern itself with the inner self, the Auburn system affected it profoundly. Here Dumm locates a deep similarity between Tocqueville's analysis of the Auburn system and his theory of

166. Beaumont and Tocqueville noted that, while the Pennsylvania system produced "the deepest impressions on the soul of the convict," thus effecting a more significant reformation, the Auburn system was effective on a greater number of inmates insofar as it limited its goals to "the external fulfillment of social obligations." BEAUMONT & TOCQUEVILLE, *supra* note 144, at 91.

167. Complete isolation was thought necessary for inducing the proper state of penitence and moral regeneration, but it was also acknowledged to be a horrifying experience for those subjected to it. The following is taken from a series of interviews with inmates of Pennsylvania's Eastern Penitentiary:

Solitary confinement seems to have made a profound impression upon this young man. He speaks of the first time of his imprisonment with horror; the remembrance makes him weep. During two months, he says, he was in despair; but time has alleviated his situation. At present, he is resigned to his fate, however austere it may be. He was allowed to do nothing; but idleness is so horrid, that he nevertheless is always at work He ended the conversation by saying: Solitary confinement is very painful, but I nevertheless consider it as an institution eminently useful for society.

DUMM, *supra* note 114, at 109. The desperate craving for companionship caused by such extreme isolation is poignantly captured in another prisoner's statement: "This summer, a cricket entered my yard; it looked to me like a companion. If a butterfly, or any other animal enters my cell, I never do it any harm." *Id.* at 110.

168. See *id.* at 120-28. Beaumont and Tocqueville summed up the controversy this way: "the [Pennsylvania] system produces more honest men, and that of [Auburn] more obedient citizens." BEAUMONT & TOCQUEVILLE, *supra* note 144, at 91.

democratic despotism.¹⁶⁹ The tyranny of the majority that Tocqueville traces to tensions within and between the values of democracy and equality is, as Tocqueville declares in a striking passage, a despotism different from any known before:

Princes made violence a physical thing, but our contemporary democratic republics have turned it into something as intellectual as the human will it is intended to constrain. Under the absolute government of a single man, despotism, to reach the soul, clumsily struck at the body, and the soul, escaping from such blows, rose gloriously above it; but in democratic republics that is not at all how tyranny behaves; it leaves the body alone and goes straight to the soul.¹⁷⁰

The example Tocqueville then provides implicitly links this democratic despotism to the kind of tyranny operative in the Auburn penitentiary system:

The master no longer says: "Think like me or you die." He does say: "You are free not to think as I do; you can keep your life and property and all; but from this day you are a stranger among us. You can keep your privileges in the township, but they will be useless to you, for if you solicit your fellow citizens' votes, they will not give them to you, and if you only ask for their esteem, they will make excuses for refusing that. You will remain among men, but you will lose your rights to count as one. . . . Go in peace. I have given you your life, but it is a life worse than death."¹⁷¹

No longer did the criminal suffer the tortures of Damians or the humiliations of the pillory; no longer was social authority enforced by marking the body in visible public spaces. The new regime instead marked the soul—not directly, by insisting that the inner self be transformed, but indirectly, by subjecting the inmate whose inner self was different and who let it show, to the "life worse than death" of social and psychic banishment. Equality and democracy were reconciled in this new regime by generalizing the condition of isolation imposed on the criminal or social deviant. "Equality," says Tocqueville, "puts men side-by-side without a common link to hold them firm. Despotism raises barriers to keep them apart. It disposes them not to think of their fellows and turns indifference into a sort of public

169. DUMM, *supra* note 114, at 134. Roger Boesche is one of the few other scholars to have linked Tocqueville's work on prisons with his analysis of American democracy in this way. See Roger Boesche, *The Prison: Tocqueville's Model for Despotism*, 33 W. POL. Q. 550 (1980).

170. TOCQUEVILLE, *supra* note 139, at 236, *quoted in* DUMM, *supra* note 114, at 134. Foucault's epigrammatic description of the modern condition expresses a similar view: "The soul is the effect and instrument of a political anatomy; the soul is the prison of the body." FOUCAULT, *supra* note 56, at 30.

171. TOCQUEVILLE, *supra* note 139, at 236, *quoted in* DUMM, *supra* note 114, at 134-35.

virtue."¹⁷² When equality is based on the common experience of isolation, the tyranny of the majority is consistent with, rather than contradictory of, equality. The social banishment imposed by the tyrannous majority on the criminal, the dissident, or the merely different portrayed for the majority the isolation it was expected to internalize in the name of equality. The Auburn system modeled this equality perfectly: men forcibly isolated among their fellows learned that to be free, to be worthy of democratic self-rule, they first had to learn to rule themselves by resisting the urge to communicate with those around them and by learning to internalize the observer's gaze.¹⁷³

3. *The Privatization of Executions*

The prison-yard . . . has been the scene of terrible performances. Into this narrow, grave-like place, men are brought out to die. . . . From the community it is hidden. To the dissolute and bad, the thing remains a frightful mystery. Between the criminal and them, the prison-wall is interposed as a thick gloomy veil. It is the curtain to his bed of death, his winding-sheet, and grave. From him it shuts out life, and all the motives to unrepenting hardihood in that last hour, which its mere sight and presence is often all-sufficient to sustain. There are no bold eyes to make him bold; no ruffians to uphold a ruffian's name before. All beyond the pitiless stone wall, is unknown space.

— Charles Dickens¹⁷⁴

Opposition to capital punishment pervaded the initial debates over revising the colonial penal codes, but the death penalty survived in every state, albeit in greatly restricted form. Beccaria's American followers opposed the death penalty and argued that it violated the principles of balance, proportion, and benevolence demanded by Enlightenment and republican principles. The penal reformers also based their opposition on their new-found discovery of the social roots of crime, and their conviction

172. TOCQUEVILLE, *supra* note 139, at 481.

173. Dumm sums up the parallels between Tocqueville's analysis of democratic tyranny and his work on prisons with these words:

The penitentiary isolated the inmate, yet did so in such a way as to emphasize that isolation was a shared characteristic of all the inmates. Democratic tyranny operated through the principle of isolation, throwing the violator of majority will into a prison without walls, one maintained through the same silence that was imposed on the inmate, but inverted: while the violator might speak, he would not be heard.

DUMM, *supra* note 114, at 139.

174. CHARLES DICKENS, *AMERICAN NOTES* 133 (John S. Whitley & Arnold Goldman eds., Penguin Books 1972) (1842).

that the offender could be reformed.¹⁷⁵ Capital punishment seemed to fit with neither the general spirit nor particular ambitions of the new age.

Most states abolished the death penalty for the vast majority of formerly capital crimes and substituted incarceration in its place, retaining death only for the most serious offenses (such as first-degree murder).¹⁷⁶ The opponents of the death penalty failed to eliminate completely this last vestige of the sanguinary punishments of the old penal regime, but they succeeded in molding it to fit the new regime. By the 1830s, executions had been moved within the prison walls, consolidating the penitentiary's near-monopoly on punishment for serious crime.¹⁷⁷

In some ways this shift was curious, for even some of the penitentiary's early supporters believed that, if the state continued to execute criminals, it had to do so in public. Private executions, they argued, smacked of private revenge and lawless assassination; further, how could state-sponsored death edify the public if the public could not see it?¹⁷⁸ These protests, however, failed to hamper the transition to private executions, which met with little public comment or controversy and enjoyed widespread support from most penal reformers. As noted below, the disturbing frivolity of the spectators at many executions and the tendency of the crowd to sympathize with condemned criminals help explain the reformers' support for privatization.¹⁷⁹ However, these features had been accepted parts of the execution spectacle for too long to account for the sudden transformation that swept through the states in the decade of the 1820s.

The answer, or a part of it, lies in the disappearance of the political and cultural matrix that created the contested public space of the execution ground. The same forces that caused the abandonment of the brutal punishments of the colonial era and that erected prison walls between criminals and the community had, by the 1820s, robbed public execution grounds of intelligible social meaning. The "King's body," formerly the unifying principle of political life, had been replaced by the "body of society," the new republican citizenry. The increasingly secular and republican spirit of public life thus eliminated the need for public displays of repentance. Not only did the new republican principles eliminate the driving

175. MASUR, *supra* note 108, at 51-54; *see also supra* part II.B.1.

176. MASUR, *supra* note 108, at 71.

177. *See generally id.* at 93-116 (describing the transition from public to private executions and its relevance to American society in the 1830s and 1840s); *see also* FRIEDMAN, *supra* note 99, at 75-76 (describing the gradual withdrawal of executions from the public arena).

178. MASUR, *supra* note 108, at 95.

179. *Id.* at 95-96.

rationale for public executions, they also made such spectacles seem positively barbaric, violative of human dignity and the new spirit of moderation and moral sobriety.¹⁸⁰

Reformers also maintained that public executions promoted crime by inuring people to agony and brutality, and by aggravating passions (like greed or ambition) that might lead to crime.¹⁸¹ The elite's general anxiety over public order¹⁸² and their accompanying concern with unruly execution spectators provided a further impetus for privatizing executions.¹⁸³ The general cultural shift during this period toward privacy, class regimentation, and social exclusivity likewise influenced the disappearance of public executions.¹⁸⁴ The perception of public chaos inspired the elites and the newly-emergent middle class to strive for control over their private lives, causing unprecedented hostility toward public spectacles and, indeed, the public arena generally.¹⁸⁵

By moving executions behind the prison's walls, the new regime sanitized the last traces of physical punishment. Robbed of the power and privilege conferred by the execution spectacle, deprived of the public space he formerly had occupied, and forsaken even by the assurance that the kingdom of God awaited him if only he repented sincerely, the condemned prisoner who was executed within the prison walls was truly a lost and abandoned soul. The old regime had supported the offender within a community—usually of this world, but if not, then of the next. By contrast, the new democratized and secularized punishments expelled the criminal from the community into a radically new kind of space that had never before existed—the twilight purgatory of the penitentiary. Justice now demanded not the condemned's repentance but his recognition that he was utterly forsaken and stood completely alone, and that his former community approved of this result. The efficacy of death no longer lay in the power of an exemplary display of sovereign might, but rather in the fear of utter banishment aroused by the unseen murder of an anonymous soul.

180. As noted above, a quiet dissident viewpoint held that *private* executions were inconsistent with republican values in that they removed the event from the watchful eye of the citizenry. See *supra* text accompanying note 178.

181. See MASUR, *supra* note 108, at 97-98.

182. See *supra* text accompanying notes 125-26.

183. MASUR, *supra* note 108, at 100-02. "A republican nation born of crowds," notes Masur, "the greatest threat in America seemed suddenly to be crowds in a republican nation." *Id.* at 101.

184. See *id.* at 102-03; see generally RICHARD SENNETT, *THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF CAPITALISM* (1978) (discussing social changes that altered class attitudes toward public rituals and resulted in a decisive shift from the public to the private domain).

185. The household, which previously was almost as much a public space as a private one, was rededicated to serving the new cult of privacy and domesticity. The front parlor, for instance, "became a vehicle to screen out visitors and seclude the personal rooms of the house." MASUR, *supra* note 108, at 103.

C. *The Persistence of the Penitentiary*

The optimism of the penitentiary's creators did not survive long. Heralded as an advance of breathtaking dimensions and possibilities in the 1820s, by the 1850s reformers acknowledged that the institution was in deep trouble. Crime was as pressing a problem as ever, and there was no evidence that incarceration made released offenders any less likely to commit crimes.¹⁸⁶ To make matters worse, the carefully constructed routines and procedures detailed by the inventors of the Auburn system broke down almost completely by mid-century. Starved for funds and facilities, prison officials abandoned the rule of silence among inmates. Overcrowding became so severe in some places that by 1867 more than a third of all inmates shared cell space.¹⁸⁷ Brutality by guards concerned only with keeping order was rampant in many places; in others, the same concern led prison officials to abdicate almost complete internal control of the institution to the inmates themselves. Prisoners now communicated freely with the outside world, and reformers gave up any realistic hope of rehabilitation. The penitentiary had become almost entirely a custodial institution.¹⁸⁸

Despite these failures, penitentiaries survived and even flourished as their populations increased. In part, the very failure of prisons to rehabilitate criminals contributed to their endurance: the public was unwilling to have hardened criminals (particularly the poor and foreign-born) remain in the community, and prisons were the ideal place to hold them.¹⁸⁹ A society that had become only more unsettled by rampant urbanization and industrialization in the years since the penitentiary's birth contented itself in the thought that incarceration controlled deviant and dependent populations.¹⁹⁰ In Rothman's words, "[t]he promise of reform had built up the asylums; the functionalism of custody perpetuated them."¹⁹¹

The penitentiary's failures thus did not inspire a call for the institution's abolition. The abandonment of the myriad routines designed to isolate inmates from one another and from those outside the prison had brought prisoners closer to society, but the loss of faith in rehabilitation accentuated the huge gap that remained. Society now justified segregating

186. ROTHMAN, *supra* note 53, at 237-42.

187. *Id.* at 242-43. See also FRIEDMAN, *supra* note 99, at 155-56 (attributing the demise of the silent prisons to their high costs).

188. ROTHMAN, *supra* note 53, at 240-42.

189. Rothman explains that similar thinking prevailed among prison administrators: "As wardens looked more closely at the actual nature of the inmate population, they lost patience with the goals of reform; as they lessened their insistence on silence and separation, security became more of a problem. The result was that they gave still less attention to rehabilitation. In short order they were complacently administering a custodial operation." *Id.* at 249.

190. *Id.* at 253-55.

191. *Id.* at 240.

criminals solely for its own protection, thus confirming the outcast status of criminals by abdicating any duty to reclaim them.

The reformers of the Progressive Era breathed new life into the rehabilitative ideal and introduced a number of dramatic innovations, but their reforms did little to change the fundamental psychology of criminal punishment.¹⁹² The Progressives expressed disgust with the horrors they found within the penitentiary and developed innovative alternatives to imprisonment, but their major lasting reforms—probation and parole—reaffirmed the centrality of incarceration. This latest generation of reformers deemed the threat of imprisonment or reimprisonment vital to the proper motivation of probationers and parolees, and there remained many offenders for whom such alternatives were deemed inappropriate. More intriguingly, probation appears to have been less an alternative to prison than a mechanism for drawing greater and greater numbers of people into the maw of criminal justice: “Rather than think of probation (as the reformers did) primarily as an alternative to the prison or the jail,” Rothman argues, “it seems most appropriate to conceive of it as an alternative to doing nothing at all. In effect, probation may have been a supplementary and add-on program, increasing the number of persons brought under the aegis of the criminal justice system.”¹⁹³ Prisons remained at capacity. The new system, in essence, extended the state’s authority to people who previously would have been left alone.¹⁹⁴

Early supporters of parole touted it as a way of controlling restless prison populations (by providing an incentive for good behavior) and relieving prison overcrowding.¹⁹⁵ But parole, like probation, extended rather than curtailed state control over the offender: parole added a period of state supervision following release from prison, and the system of indeterminate sentencing that accompanied the introduction of parole may actually have increased the average period of incarceration.¹⁹⁶

192. See generally DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980) (analyzing Progressive reformers’ impact on the theory and practice of criminal punishment in the United States).

193. *Id.* at 110.

194. A study by The Sentencing Project, a non-profit research group, suggests the persistence of this tendency. The study reported the remarkable finding that almost one out of every four young black men in the United States is in prison or on probation or parole at any given moment. This number exceeds, by more than a third, the number of young black men enrolled in college. See Bill McAllister, *Study: 1 in 4 Young Black Men is in Jail or Court Supervised*, WASH. POST, Feb. 27, 1990, at A3.

195. ROTHMAN, *supra* note 192, at 183-89.

196. *Id.* at 193-98. For an excellent critical history of parole from the Progressive Era to the present day, see JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL UNDERCLASS, 1890-1990* (1993). Simon’s principal argument is that both the penitentiary and alternatives to it such as parole “can be understood as efforts to deal with shifts in the way labor is organized, distributed, and understood.” *Id.* at 45.

The Progressives' reforms, then, merely saved the penitentiary from the consequences of its own failure. In doing so they illuminate the tendency of total institutions to adapt institutional changes to their own organizational imperatives. They also reveal and confirm the resilience of both the penitentiary and its organizing ethos: the privatization of punishment and the banishment of the criminal from the community.

This ethos has remained constant, but conditions within the prison walls have not. After the Progressives' partial, temporary improvements, prison conditions deteriorated dramatically until the carefully constructed purgatory of the Auburn and Pennsylvania penitentiaries gave way to the hell so graphically described by Jack Henry Abbott.¹⁹⁷ Faith in rehabilitation has once again foundered upon the realization that, for reasons no one seems to understand, rehabilitation in a prison-centered regime does not work.¹⁹⁸ Most people cannot imagine punishment without prisons, and so we lock up as many offenders as we can, reluctantly and fearfully letting the rest go.¹⁹⁹ Within the prison, even as the grip of psychological coercion on the inmate loosens, physical violence among the keepers and the kept has reasserted itself—but this time unconstrained by any political or cultural logic such as informed the spectacle of the scaffold and the punishments of shame. The absence of any logic constraining that violence does not mean, however, that it teaches no lessons. It is the purpose of the next section to lay the theoretical groundwork for understanding those lessons.

197. For a sobering sociological portrait of the modern prison, see the essays by Erik Olin Wright and others in ERIK OLIN WRIGHT, *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* (1973). See also *PRISON VIOLENCE IN AMERICA* (Michael Braswell, Steven Dillingham & Reid Montgomery, Jr. eds., 1985); *THE CRIMINAL IN CONFINEMENT* (Leon Radzinowicz & Marvin E. Wolfgang eds., 1971).

198. See *supra* text accompanying notes 2-16.

199. One stark result of this prevailing attitude is that incarceration rates in the United States have reached all-time highs and show no signs of letting up. According to the United States Department of Justice, the number of inmates in American prisons topped the one million mark for the first time in 1994, when the rate of incarceration reached 373 out of every 100,000 Americans. This contrasts with an incarceration rate in 1980 of only 139 people for every 100,000. Steven A. Holmes, *Ranks of Inmates Reach One Million in a 2-Decade Rise*, N.Y. TIMES, Oct. 28, 1994, at A1. The United States currently ranks second in the world, behind Russia, in rates of incarceration; we imprison more than four times as many people as Canada, more than five times as many as England, and fourteen times as many as Japan. *Id.* Lawrence Friedman comments: "We throw people into prison at an astonishing rate. There has never been anything like it in American history. Penology is overwhelmed by the sheer pressure of bodies. The general public is not interested in rehabilitation, not interested in what happens inside the prisons, not interested in reforms or alternatives. It wants only to get these creatures off the streets." FRIEDMAN, *supra* note 99, at 316.

III
DOMINATION AND OTHERNESS:
PSYCHOANALYSIS AND THE PROBLEM OF VIOLENCE

[W]e are never so defenseless against suffering as when we love, never so helplessly unhappy as when we have lost our loved object or its love.

— Sigmund Freud²⁰⁰

The modern American prison occupies a socially-created space outside society, a space where violence against body and soul flourishes with few constraints.²⁰¹ With rehabilitation abandoned, prisons today merely incapacitate and isolate criminal offenders. Although robbed of its original purpose and logic, the prison nonetheless continues to work powerful—albeit unintended—effects on the society that created it. If the minutely regulated procedures of the Auburn prison system taught prisoner and society alike how to live alone, yet side by side, the unregulated brutality of the modern penitentiary teaches both parties that physical and psychological violence are permissible tools for achieving ones goals in an increasingly complicated and confusing world.

This section focuses on the dramatic consequences that flow from this lesson. Using the insights of certain strands of modern psychoanalytic thought, I will argue that by banishing the criminal offender to the violent and degrading world of the modern penitentiary, we invite a violent reaction in kind as the offender attempts to force his way back into the community's attention and concern.

I have chosen psychoanalysis as the language of this story because psychoanalytic theorists—most especially, certain feminist psychoanalytic writers²⁰²—have produced in recent years some remarkable insights into the social and psychological roots of violence and other forms of objectifying and oppressive behavior. Although psychoanalytic thought alone

200. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 29 (James Strachey trans., 1961) (1930).

201. See *infra* notes 241-47 and accompanying text for a discussion of the legal constraints that do exist, and their limitations.

202. After a protracted period of suspicion or outright rejection of Freudian thought, increasing numbers of feminist theorists have turned to psychoanalysis for help in explaining the persistence and seeming intractability of patriarchal patterns of domination, the mechanisms of their transmission from one generation to the next, and their internalization in the emotional and cognitive lives of both women and men. In the discussion that follows I rely heavily on the work of a number of these feminist writers, including: JESSICA BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION* (1988); NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); and JULIET MITCHELL, *PSYCHOANALYSIS AND FEMINISM: FREUD, REICH, LAING AND WOMEN* (1974). The significance of the specifically feminist implications of their arguments for my own project will become clear in what follows.

cannot hope to unlock these problems, I believe that no examination of them can afford to ignore the insights that psychoanalysis has to offer.

A. *The Divided Self*

Psychoanalysts have always sought the sources of human violence. Freud, late in his career, posited a fundamental "death instinct" that, when deflected outward, operates continuously to tear apart the social bonds forged by Eros, its "immortal adversary."²⁰³ Against this view, many contemporary theorists prefer those earlier elements of Freud's thought that emphasize the deep psychological ambivalences that emerge early in life as the infant strives to make sense of itself and its bewildering environment.

My conception of the psychoanalytic categories of id and ego reflect the emphasis of these contemporary theorists. Freud saw the id as the reservoir of instinctual energy, a deep, mysterious, virtually inaccessible realm removed from society and its effects. Society, Freud argued, influences the id only externally, through the ego, which mediates between the demands of the id and the outside world.²⁰⁴ In contrast, I posit that *both* id and ego are social constructs because society shapes both our instincts and our conscious thoughts and perceptions, thus reaching to the deepest levels of the psyche.²⁰⁵ As explained below, the terms id and ego serve best to label two distinct and conflicting psychic motives that emerge as the infant struggles

203. See generally FREUD, *supra* note 200. The quoted phrase appears in the closing passage of the book. *Id.* at 92.

204. See generally SIGMUND FREUD, AN OUTLINE OF PSYCHO-ANALYSIS 2-3 (James Strachey trans., 1969) (1939).

205. The anthropologist Clifford Geertz has expressed this view colorfully:

The extreme generality, diffuseness, and variability of man's innate (that is, genetically programmed) response capacities means that without the assistance of cultural patterns he would be functionally incomplete, not merely a talented ape who had, like some underprivileged child, unfortunately been prevented from realizing his full potentialities, but a kind of formless monster with neither sense of direction nor power of self-control, a chaos of spasmodic impulses and vague emotions. Man depends upon symbols and symbol systems with a dependence so great as to be decisive for his creatural viability

CLIFFORD GEERTZ, *Religion as a Cultural System*, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 99 (1973).

In adopting this position, I do not mean to take sides in the ages-old "nature vs. nurture" debate. While my position emphasizes, more than some might like, the influence of society on our biology, I by no means deny the very real effects of biology on human society. Furthermore, my argument intentionally tries to skirt this debate by focusing on the psychological and cognitive implications of the fact that we are, to some undetermined extent, products both of society and of our biology. The key point of contact, for my purposes, is the emergence of the self/other distinction in infancy and childhood: our biology mandates that we learn to make such a distinction, but it is nevertheless an emergent, constructed process, and the manner in which the distinction is made has a profound impact on the patterning of our instinctual drives and our relationships with the world of society.

Even within the context of the "nature vs. nurture" debate itself, the position expressed above by Geertz is fairly uncontroversial. There is general agreement that humans differ from other animals in that we are born with inherently diffuse and incomplete instinctual "programming" (exactly how diffuse and incomplete is, of course, a controversial matter)

to comprehend its passage from blissful undifferentiation, to an increasingly troubled but still rapturous mutuality with the mother, and finally to a bewildering and frightening awareness of cacophonous diversity.

1. *Psychic Ambivalence and the Paradox of Recognition*

The infant initially makes no firm distinction between itself, its mother, and the world. These distinctions emerge slowly as the infant struggles to comprehend the inevitable frustrations it experiences in trying to obtain satisfaction of its urgent, but inchoate, drives and as it discovers the joys and disappointments of the "first bond" with the mother.²⁰⁶ Were the infant merely a *tabula rasa*, it would easily assimilate the differences between itself and others. But the infant is far from passive: its actions and frustrations set the process in motion; its responses carry the process forward; and its resistance to the process ironically serves to confirm it.²⁰⁷ More importantly, the infant's highly ambivalent resistance to differentiation splits its own newly-emergent subjectivity while also rupturing its relations with the world.

Jessica Benjamin, one of the most provocative and thoughtful of the recent feminist Freudians, discusses these developments in terms of the "paradox of recognition."²⁰⁸ This paradox, according to Benjamin, lies in the fact that, to provide the meaningful recognition the infant craves, the mother must have a will and identity independent of the infant's own.²⁰⁹ And yet it is just this independent subjectivity that most frustrates the infant and inspires resentment against the mother. What begins as a delicate, joyous experience of mutual recognition, attunement, and resonance breaks down as the infant discovers that the mother's independent will, so necessary to the attention and recognition that underlies the infant's own sense of identity, often opposes the infant's own will. The infant comes to realize that "[n]either separateness nor union is possible," that "aloneness

and that we therefore require cultural systems of meaning in order to survive. For a persuasive statement of this perspective from a Darwinian evolutionary standpoint, see PETER J. WILSON, *MAN, THE PROMISING PRIMATE: THE CONDITIONS OF HUMAN EVOLUTION* (2d ed. 1983). For a broader anthropological perspective, in addition to Geertz, see ALEXANDER ALLAND, JR., *THE HUMAN IMPERATIVE* (1972). For more partisan broadsides, see EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975), on the one side, and R. C. LEWONTIN, STEVEN ROSE & LEON J. KAMIN, *NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE* (1984), on the other.

206. See BENJAMIN, *supra* note 202, at 11.

207. Psychoanalytic theorists have not always viewed infants as active participants in what happens to them. It was only with the advent of "object relations" and similar schools within psychoanalysis in the 1940s and 1950s that psychoanalysts began with any consistency to focus on the child's early relations with others and the importance of the infant's responses to its environment. For brief surveys of this shift, see *id.* at 16-18; CHODOROW, *supra* note 202, at 40-54. These developments helped move psychoanalysis away from an excessive focus on instincts and drives (as evidenced, to take but one example, by Freud's theories on violence) toward an appreciation of the infant as a fundamentally social being.

208. BENJAMIN, *supra* note 202, at 31.

209. *Id.* at 24.

is only possible by obliterating the intrusive other [and] that attunement is only possible by surrendering to the other."²¹⁰

The severity of the psychic tension and ambivalence flowing from this "negative cycle of recognition"²¹¹ depends upon a number of factors,²¹² yet a fundamental ambivalence of the self towards others remains a permanent legacy of this first bond with another. This ambivalence takes the form of a basic psychic estrangement, or alienation, wherein one part of the psyche (the id, in my use of the term) perpetually seeks the lost other in order to mend the absence created by differentiation, while another part (the ego) seeks to protect the psyche's fragile autonomy, fearing the search for the other as a threat to its own independence.

Aggression and violence, in this account, arise not from an innate biological instinct of aggression or death, but rather from the self's unceasing, ambivalent desire to possess and control the other—on the one hand, so that the id may repair the rupture that separates the self from the other, and on the other hand, so that the ego may prevent the other from engulfing the self and annihilating its hard-won independence. The "divided self"²¹³ born of this conflict remains torn between the impossible alternatives of radical isolation and total absorption. Violence and aggression result when, for whatever reasons, this conflict intensifies and focuses on some particularly troublesome other or category of others.²¹⁴

210. *Id.* at 28.

211. *Id.*

212. Among these factors are the extent to which this psychic tension obliterates the original mutuality that characterized the relationship with the mother, the nature of other early relationships beyond the mother, and the resonances the original tension and ambivalence have with relationships, anxieties, and projects in later life.

213. The term comes from R. D. Laing's influential book, *THE DIVIDED SELF: AN EXISTENTIAL STUDY IN SANITY AND MADNESS* (1965).

214. Laing offers a fascinating and instructive account that can help explain this dynamic. Laing's discussion mainly concerns the relationship with self and world that characterizes the schizoid personality, but he argues that his account applies as well, in less dramatic and thus less visible form, to the personality of "normal" persons. The schizoid, Laing says, is "an individual the totality of whose experience is split in two main ways: in the first place, there is a rent in his relation with his world and, in the second, there is a disruption of his relation with himself." *Id.* at 17. More specifically, the schizoid feels that his individuality is constantly in danger of being "engulfed" by others or by the world in general. The only way to fend off this terrifying threat, the schizoid reasons, is to become walled off from the world: "Thus, instead of the polarities of separateness and relatedness based on individual autonomy, there is the antithesis between complete loss of being by absorption into the other person (engulfment), and complete aloneness (isolation). . . . The individual oscillates perpetually between the two extremes, each equally unfeasible." *Id.* at 44, 53.

Precisely this fear of loss of identity through "engulfment" unconsciously characterizes the ego's stance toward the world in the "normal" personality. We unconsciously fear being engulfed by the other (as originally we feared being engulfed by the mother), and so in defense we attempt to meet the threat by positing that we are radically and irreconcilably independent of the other. The self, estranged from the other, necessarily both loves and hates the other. Love is inspired because the existence of the other is what allows the self to recognize itself at all; without the other, there would be no self, and the self constantly

It is here, then, in the primordial and seemingly innocent world of infancy, that we find the beginnings of an explanation for the extreme—and ultimately self-defeating—treatment we inflict upon violent criminal offenders, who constitute an especially distressing and frightening category of troublesome others.

2. *The Oedipal Period and the Gendering of Otherness*

Most of us are able to regain, at some later point in life, a sense of the importance of maintaining the original tension between togetherness and separateness, a sense that the other's subjectivity is important to our own. (Benjamin describes this as "the joy in the other's survival" after we have tried to destroy the other in fantasy.²¹⁵) But there always remains a part of us, often slumbering but never dead, that refuses to recognize the other's independence from our will—and it is this that enables us to enact in reality, as adults, the aggression and domination that, as children, we visit upon

needs the reassurance that the other's presence and attention can provide. The ego's position is inherently untenable and contradictory, however, for the presence of the other is also perceived as the primary threat to the self—the fact that the other exists at all (and has to exist for there to be a self at all) is a threat to the splendid isolation the ego strives to achieve. This is the paradox of recognition noted by Benjamin: "at the very moment of realizing our own independence, we are dependent upon another to recognize it." BENJAMIN, *supra* note 202, at 33. Hatred, then, "is also necessarily present," according to Laing, "for what else is the adequate object of hatred except that which endangers one's self?" LAING, *supra* note 213, at 99.

The common root shared by love and hate leads to a common flowering in the self's relations with the world—an impulse to possess and control those others who become important to us. As Benjamin reveals, the fear that the other will withdraw its love, and thus the attention and validation it provides for the ego, places enormous power in the hands of the other. At the same time, that love is feared for the suffocation and engulfment it may bring. The only resolution possible for these conflicting impulses is to capture the other—to prevent the other from leaving, from withdrawing its love, but also to keep the other at a safe distance, unable to engulf the self. Forgotten is the paradox that true freedom depends crucially on the mother's—and subsequent others'—independent subjectivity.

The id, like the ego, strives to control the other, but for different reasons. The infant feels an acute sense of loss when it is torn, as Dorothy Dinnerstein puts it, from "the 'oceanic feeling' that it enjoyed at the outset, from the passive infinite power that lay in unity with the all-providing mother . . ." DINNERSTEIN, *supra* note 202, at 121. The infant (or one part of its psyche) longs to undo the separation, to repair the sense of loss, by reuniting with the mother and returning to the state of original bliss. This longing, however, is every bit as untenable as the competing desire of the ego, for it involves a similar contradiction and a similar ambivalence: the very desire to reunite with the mother helps confirm her status as a separate individual, someone with a will and intention other than, and often opposed to, the infant's own. There is love for the mother, that is, for the state of mutuality that is gone but might be regained; but there is also fear and hatred, for the infant comes to blame the mother for the separation and to resent her power to withhold satisfaction of the infant's desires. *Id.* at 100. The id's desires thus incite an impulse to control the other, for it is only by virtue of such control that the id can hope to realize its chimerical quest for reunion.

215. BENJAMIN, *supra* note 202, at 41.

the other in fantasy. In Benjamin's words, "[t]he breakdown in the fundamental tension between assertion of self and recognition of other . . . is . . . the best point of entry to understanding the psychology of domination."²¹⁶

Because, in virtually every known society, it is the mother (or some other woman or women) who cares for the infant, the mother becomes the first and paradigmatic other, and thus the locus of the entire array of ambivalent feelings that accompany the infant's emergence into the world of multiplicity. The beginnings of this process, as we have seen, reside in the pre-Oedipal period of early childhood, when the infant struggles with an increasingly ambivalent, but still dual, relationship with the mother. With the advent of Oedipalism, this duality gives way to a bewildering multiplicity as the larger world beyond the infant-mother dyad crashes in on the child (with all the trauma such a metaphor implies), initially in the form of the father's entry into the relationship between mother and child. During this crucial period the child's ambivalent feelings toward the mother are magnified to encompass the larger world of women—a process that differs crucially between girls, who find that they also belong to this larger group, and boys, who discover that they do not.

While Oedipal relationships are decisive in this process, the events that underlie the more visible and dramatic events of this period reside in the "dark continent" of the pre-Oedipal period.²¹⁷ Oedipalism represents the reworking and extension of pre-Oedipal patterns on the template of the world outside the infant-mother dyad. Although there appear to be few significant psychological differences between the sexes in the pre-Oedipal period, this period, as Juliet Mitchell says, later "comes to have a very different meaning—it becomes, in a sense, vastly more important for a girl than for a boy."²¹⁸ Specifically, the ambivalent feelings toward the mother that infants of both sexes feel become crucially different phenomena only when the girl begins to identify with the mother as another female; it is at this point, which occurs decisively during the Oedipal period, that the girl becomes divided against herself in a way the boy never experiences.²¹⁹ As the ensuing discussion will make clear, one particular consequence of this process is that society's treatment of criminal offenders mirrors, and takes

216. *Id.* at 49.

217. MITCHELL, *supra* note 202, at 43. Freud recognized the crucial importance of the pre-Oedipal period only late in life, remarking that "everything that is to be seen upon the surface has already been exhausted; what remains has to be slowly and laboriously dragged up from the depths." SIGMUND FREUD, *Some Psychological Consequences of the Anatomical Distinction Between the Sexes* (1925), in 5 COLLECTED PAPERS 187 (J. Strachey ed., 1953), quoted in MITCHELL, *supra* note 202, at 43. In many ways, this is precisely the project that the feminist Freudians (among others) have been pursuing.

218. MITCHELL, *supra* note 202, at 53.

219. Much of my analysis in what follows is based on Chodorow's account of the Oedipal period in her important and influential book, *THE REPRODUCTION OF MOTHERING*, *supra* note 202. The connections made between this analysis and the theory of the divided self are my own.

its pattern from, society's treatment of women and other oppressed groups, and has the same negative consequences for both society and the offender.

Traditional psychoanalysis describes the Oedipal transformation as involving, for the girl, a definitive rejection of the mother for the father's affection and power; for the boy, too, the mother is said to become less important as his identification with the father increases, despite his retaining the mother as a love object. Freud himself realized there were problems with this story, and since his time psychoanalysts increasingly have come to realize that the mother remains at center stage throughout this period. The child's recognition of the father and other new others is prompted by the child's growing ambivalence toward the mother, and the vicissitudes of these new relationships are influenced deeply by ongoing problems in the relationship with the mother. The pre-Oedipal period thus casts a long shadow over the individual's Oedipal and post-Oedipal relationships.

The child turns toward the father, the initial representative of the world beyond the mother, in an effort to anchor its individuality on some object other than the mother, whom the child's ego, we have seen, perceives as a threat to its very existence. The child's id tenaciously opposes this pivotal turn, although, as we shall see, it later finds uses for the father in its ceaseless quest for refusion with the mother. The figure of the father, like that of the mother, thus is also an object of ambivalence (as are all subsequent others), but the intensity of this derivative ambivalence is less extreme and less determinate of the child's self than that felt toward the mother.

One important consequence of the turn toward the father is that, insofar as the child knows its father as a separate being from the start, the father comes to represent for the child the "reality principle," understood as the entire array of social rules and hierarchical representations that depend for their power on the clear delineation of place and space—that is, on the clear and consistent separation of self from others. While the mother remains a much more mythical and problematic figure, the father (and later men in general) becomes the symbol of clear separation and differentiation. The mother (and later women in general) comes to symbolize, in Nancy Chodorow's words, "dependence, regression, passivity, and the lack of adaptation to reality," while the turn from the mother represents "independence and individuation, progress, activity, and participation in the real world."²²⁰

220. *Id.* at 82. Chodorow and the other feminist Freudians are careful to emphasize that these symbolic identifications, while quite genuine, do not by any means reflect the actual roles played by the mother and father in the child's development. Benjamin makes the point well:

The problems start, I suggest, when we take the symbolic figures of father and mother and confuse them with actual forces of growth or regression. There is no denying that unconscious fantasy is permeated with such symbolic equations. But

The turn toward the father, which signals the onset of the Oedipus complex, results from the desire by children of both sexes to strengthen their sense of individuality, but this turn is a more arduous process for the girl than for the boy. Chodorow locates the cause of this difficulty in the girl's longer and more intense pre-Oedipal period, which in turn is caused by the mother experiencing and treating her differently than if she were a boy:

[A] mother, of a different gender from her son and deprived of adult emotional, social, and physical contact with men (and often without any supportive adult contact at all), may push her son out of his preoedipal relationship to her into an oedipally toned relationship defined by its sexuality and gender distinction.²²¹

The mother's attitude toward a daughter is much different: "the mother does not recognize or denies the existence of the daughter as a separate person, and the daughter herself then comes not to recognize, or to have difficulty recognizing, herself as a separate person."²²² Girls therefore "seem to become and experience themselves as the self of the mother's fantasy, whereas boys become the other."²²³ This experiential difference between the sexes is strongly reinforced by the girl's growing recognition that she is the same gender as her mother and the boy's realization that he is not—it is far easier for the boy to recognize himself in his father than it is for the girl.²²⁴

What the traditional psychoanalytic account of the Oedipal period fails to account for is why the girl, but not the boy, feels compelled to switch love objects at this crucial time. It also fails to explain the deep ambivalence in the girl's turn and the continued importance of the relationship with the mother. Chodorow frames the problem by asking "why a girl, but not a boy, seems to be looking for an excuse to 'drop' her mother" at this time.²²⁵ The answer, at least in part, lies in the peculiarly acute nature of the girl's ambivalence—the fact that she experiences a longer and deeper period of pre-Oedipal fusion and semi-fusion with the mother than

even if the father does symbolize growth and separation—as he does in our culture—this does not mean that in actual fact the father is the one who impels the child to develop. . . . Real mothers in our culture, for better and worse, devote most of their energy to fostering independence. It is usually they who inculcate the social and moral values that make up the content of the young child's superego. And it is usually they who set a limit to the erotic bond with the child, and thus to the child's aspiration for omnipotent control and dread of engulfment.

BENJAMIN, *supra* note 202, at 151-52.

221. CHODOROW, *supra* note 202, at 107.

222. *Id.* at 103.

223. *Id.* The complement to this is the father's more ready identification with his son than his daughter, which further compounds the girl's difficulty in separating from her mother. See BENJAMIN, *supra* note 202, at 109.

224. BENJAMIN, *supra* note 202, at 104.

225. CHODOROW, *supra* note 202, at 120.

does a boy. This experience is immensely satisfying to the girl's id, but terrifying to her ego. Unlike the boy, who is actively pushed out of pre-Oedipal fusion by his mother, the girl must actively struggle to establish a measure of independent subjectivity. The boy's turn to the father, then, is not the desperate affair it is with the girl, whose attraction to the father is more of a reaction of flight than an affirmative expression of desire. In the words of another psychoanalytic researcher, "[w]omen do not wish to become men, but want to detach themselves from the mother and become complete, autonomous *women*."²²⁶ But the girl's ego is doubly disadvantaged in its effort to establish itself: it feels the threat of engulfment by the mother more intensely than does the boy's ego, and it lacks the boy's ease of identification with the father as an aid to differentiation.²²⁷ The girl's turn to the father is reinforced by the desires of the id. At some point the girl begins to realize that her mother prefers to be intimate with people, like her father, who are male, and she comes to identify with the father, and to fantasize about being him or like him, in order to win her mother's love and recognition and to reunite with her.²²⁸

The Oedipal period, then, is traumatic for both sexes, but more deeply so for the girl. The child's struggle to develop a sense of self independent of its relationship with the mother, as complicated by its contradictory impulse to reunite with her, has a more fateful result for the girl than the boy: because of her deeper identification with her mother, and her realization that she is female, like her mother, the girl comes to fear and loathe, while she also loves and desires, herself as she does her mother. She is thus divided against herself in a way the boy is not; she not only shares his desire to possess and control the mother (and by extension all women), but she

226. Janine Chasseguet-Smirgel, *Feminine Guilt and the Oedipus Complex*, in *FEMALE SEXUALITY* 118 (Janine Chasseguet-Smirgel ed., 1970), quoted in CHODOROW, *supra* note 202, at 123.

227. Chodorow, Benjamin, and other feminist psychoanalytic writers attempt to rescue the controversial concepts of "penis envy" and the castration complex from the essentialist assumptions of earlier theorists by linking the concepts to their analysis of the girl's greater difficulty in dealing with differentiation from the mother. Whereas the traditional psychoanalytic account assumes rather than explains a disposition toward penis envy, Chodorow, for example, argues that the girl comes to desire a penis as a visible marker of her difference from her mother and as an aid in separating from the mother. The girl, in comparison with the boy, is disadvantaged because she "does not have something different and desirable with which to oppose maternal omnipotence. . . ." CHODOROW, *supra* note 202, at 122. In contrast to the standard account, the symbolic power of the phallus thus results from "the fantasy of maternal power, not maternal lack." BENJAMIN, *supra* note 202, at 94.

228. See CHODOROW, *supra* note 202, at 125. Chodorow and Benjamin, again, argue that this helps explain the phenomenon of penis envy. For both the boy and the girl, the penis is seen not only as a way to differentiate the self from the mother (in my terminology, the ego's desire), but also as a way of reuniting with the mother through intercourse (the id's desire). In Benjamin's words, "the phallus symbolizes both difference from the mother and desire for reunion with her." BENJAMIN, *supra* note 202, at 124. The penis thus is not intrinsically or naturally the symbol of desire, but becomes so because of the child's contradictory struggle for separation and reunion with the mother.

also directs this desire against her own self. Women are thus implicated as unwitting accomplices in their own subjugation.²²⁹

The paradox of domination is that freedom is sought in slavery, that is, in submission to the power of the masculine. The male, in the clutches of the "negative cycle of recognition,"²³⁰ strives to control the simultaneously threatening and seductive other, as represented by women, so as to control the recalcitrant source of recognition; the female, hobbled by a self-alienation not shared by men, seeks recognition through submission to an other who is powerful enough to bestow it—an other who is, like the father, a male other. The futile result of such strategies, as we have seen, is the complete failure of recognition as the other's subjectivity, upon which recognition depends, is replaced on both sides by a brute, and potentially violent, objectification. The tragic irony of domination is that in seeking recognition, we destroy the possibilities for it, creating "an absence where the other should be."²³¹ What gets lost (and only partially regained in the psychic lives most of us lead) is the ability to appreciate difference and connection, to maintain the tension and ambivalence of recognition, to achieve a balance, or compromise, among the contending intrapsychic forces. "No doubt many individuals are flexible enough to forge less extreme solutions," Benjamin comments, "but the polarities tug mightily whenever dependency is an issue."²³²

B. Otherness, Violence, and Criminality

The account given in the preceding pages has important implications for understanding both society's treatment of criminal offenders and the reaction of offenders to that treatment. For society's part, the psychoanalytic story can help us understand the impulse, so evident in the modern history of our treatment of criminals, to banish them to the purgatory of the prison rather than attempting to reintegrate them into the community. For the offender's part, the psychoanalytic account reveals that a predictable consequence of treating offenders in this manner is to inspire an objectifying and violent reaction in kind, as the offender desperately seeks to force the community that has rejected him to once again cast its gaze in his direction.

229. There is a strong, and understandable, resistance among many feminists to acknowledging women's role in their own oppression, for fear, in Benjamin's words, that "in admitting woman's participation in the relationship of domination, the onus of responsibility will appear to shift from men to women, and the moral victory from women to men." BENJAMIN, *supra* note 202, at 9. I share this concern, as any feminist must, but also subscribe to Benjamin's incisive rejoinder: "a theory or a politics that cannot cope with contradiction, that denies the irrational, that tries to sanitize the erotic, fantastic components of human life cannot visualize an authentic end to domination but only vacate the field." *Id.* at 10.

230. See *supra* note 211 and accompanying text.

231. BENJAMIN, *supra* note 202, at 219.

232. *Id.* at 172.

Society's impulse to banish criminal offenders is rooted in the unresolved tensions of our early psychic life and the profound effects they have on the nature of our social relationships. So long as the infant remains unaided (culturally and otherwise) in sustaining the tension between independence and submission, the adult likewise will be ruled by the impulse to dominate troublesome others. Any intervention that seeks to change this state of affairs must, therefore, address the cultural and political relations of domination that flow from and, in turn, reproduce and reinforce the polarities of our psychic youth.²³³ These broader social patterns of domination arise when a category of others comes to seem especially troublesome to some more or less cohesive group, as criminals were viewed in the early years of the American republic and as they continue to be seen today. The self uses coercion and violence to control or annihilate the troublesome other and to appropriate the other's power to withhold recognition and attention. Predictably, those others whom we perceive as threats to social stability or to our personal security become favored targets of domination and violence.

The complex twining of emotions that the self feels toward the other is, we have seen, refracted through the Oedipal prism of gender, with the social oppression of women by men serving as a template for other forms of domination. Otherness in all its forms thus becomes gendered, as those who dominate seek to "feminize" the dominated, that is, to place them in the subjugated position that women, the victims of perhaps the most fundamental form of oppression, are forced to occupy. The implicit ambition of strategies of domination is to force the dominated to acquiesce in their own subjugation by internalizing the hatred and objectification visited upon them.

History gives eloquent testimony to the success such strategies all too often achieve. Why do some oppressed groups cooperate in their oppression, while others answer violence with violence? This is an immensely complex question, certainly, but I believe one important factor is the extent

233. Chodorow, Dinnerstein, and Benjamin all agree that a necessary step in overcoming male domination in society is the alteration of childrearing arrangements so that fathers are as likely as mothers to form the "first bond" with the child, or even more ideally, so that the child forms bonds with both father and mother from the start. Benjamin weighs in on the side of the latter when she expresses her belief that "given substantial alteration in gender expectations and parenting, both parents can be figures of separation *and* attachment for their children; that both boys *and* girls can make use of identifications with both parents, without being confused about their gender identity." *Id.* at 112.

But these writers also agree that changes in parenting arrangements must be accompanied by a dismantling of the broader identification of the male with subjectivity and desire at the level of culture. As Benjamin notes, "the idealization of the father as the representative of the outside world seems to operate as powerfully (or nearly so) even when the real parents do not reinforce it. It remains active as a shared longing, joined to the cultural representation of desire." *Id.* at 123. Male domination "works through the cultural ideal, the ideal of individuality and rationality that survives even the waning of paternal authority and the rise of more equitable family structures." *Id.* at 173.

to which the subjugated group is actually banished from the presence of the dominators — as criminals have been since the advent of the modern prison. As noted earlier,²³⁴ the “negative cycle of recognition” described by Benjamin involves the paradox that freedom from oppressive conditions often is sought in a figurative (and occasionally literal) kind of slavery — that is, in submission to the authority and power of the dominator. So long as a subjugated self is kept within the orbit of the dominating other, as the slave is with the master, the self can keep alive the hope that the other’s recognition will provide the redemption and transformation it seeks. The slave thus may accept enslavement and look for salvation in submission to the power and paternalistic love of the master. But when subordination takes the form of utter rejection—when the threatened withdrawal of the other’s love and attention becomes brute reality—the slave may react violently, desperately striving to force his way back into the other’s gaze. The former slave, in other words, may seek the master’s place in order to reestablish the broken connection. Without the other, the self is literally nothing, and so the slave must become the master in order to guarantee the other’s presence.

In the psychoanalytic account provided by Benjamin and others, the oppression of women (and, by extension, the subjugation of many other discrete social groups) succeeds precisely because the bond between the oppressor and oppressed is not severed in this way; the subjugated self and the dominating other coexist in an uneasy, inherently unstable relationship that constantly threatens to sever the ties that bind them, but never (or rarely) does so. With criminal offenders, however, the bonds that historically kept the criminal within the community were sundered when we made the fateful decision to adopt imprisonment as the presumptive penalty for serious crimes. By inflicting a kind of social death on the criminal, we may incite in him the very behavior we claim to punish, as the offender seeks to reestablish the broken connection by means of the same oppressive and coercive means that have been used against him. Society seeks to “feminize” the offender by incarcerating him, but rather than internalizing his subjugation, he may instead seek to invert the relationship by dominating his dominator.

As the next section explores, the “negative cycle of recognition” in which both society and the criminal offender are ensnared has far-reaching consequences not only for the offender, but also for the law-abiding citizen who witnesses the officially sanctioned banishment of the criminal. For both, the lesson is a grim one.

234. See *supra* text accompanying note 230.

IV

THE LIMITS OF THE LAW:
VIOLENCE AND THE PSYCHOLOGY OF CRIMINALITY

I have been twisted by justice the way other men can be twisted by love.

— Jack Henry Abbott²³⁵

Criminals are, arguably, the preeminent troublesome others in our society today—the only group capable of uniting the entire American populace in condemnation and fear. And yet there is a noticeable difference between our attitudes toward the accused offender, on the one hand, and the offender once he has been judged guilty, on the other—a difference that holds out the promise for a transformation of our treatment of criminals even as it reveals the limits of our law as presently constituted. Beginning in the 1960s, our criminal law has undergone a revolution in the treatment of criminal suspects, extending to them a range of constitutional and statutory protections that protect their dignity and cushion them from the power of the state.²³⁶ Before conviction, we recognize the accused as legally and morally part of the broader community, worthy of its concern and protection. Although there are glaring deficiencies in our treatment of accused offenders, with impersonal assembly-line justice all too often replacing the individualized adjudication contemplated by law,²³⁷ there nonetheless exists an important impulse and ambition, episodically realized in fact, to treat the criminal suspect as a self deserving of respect and not as an objectified and despised other.

235. ABBOTT, *supra* note 18, at 45.

236. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (barring use of incriminating statements if obtained in custodial setting without advising defendant of right to remain silent and to have lawyer present during questioning); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (applying the sixth amendment right to jury trial to the states); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (extending to states the sixth amendment right to appointed counsel); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending to states the prohibition on use of evidence obtained from unreasonable searches and seizures).

These and other similar rulings are important for the limits they place on the coercive powers of the state. But, beyond this, they are important also for the psychological effects they have on suspects, providing them with sources of attention and respect other than the state. Robert Burt has argued that the *Miranda* ruling is important for precisely this reason. Robert A. Burt, *Loving Big Brother: Comments on Seidman, Police Interrogation, and the Fifth Amendment*, 2 YALE J. L. & HUM. 181, 187-88 (1990).

237. For a graphic and disturbing picture of the breakdown in criminal justice in one American city, see the series of 1983 *New York Times* articles entitled *Turnstile Justice*, concerning the New York City criminal courts: *The Criminal Court: A System in Collapse*, N.Y. TIMES, June 26, 1983, at 1; *A Day in Court: The Judge, the Prosecutor, the Defender*, N.Y. TIMES, June 28, 1983, at 1; *How Criminal Court Fails: The 8 Key Areas*, N.Y. TIMES, June 30, 1983, at 1; and *In Search of Efficient Justice: Reforming the Criminal Court*, N.Y. TIMES, July 2, 1983, at 1. See also Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1987).

Abbott sees more of a continuity than a discontinuity between the treatment of the criminal suspect and the imprisoned convict:

After conviction, the defendant metamorphoses from suspect to criminal, and with his presumption of innocence goes the community's respect. The community deliberately diverts its gaze from the offender—less to deny the criminal's existence (though there is a strong element of that) than to wreak vengeance by renouncing our concern for him by withholding the attention he needs to feel whole and secure. The convicted criminal's crime (assume it was a calculated and violent one) challenges the community's commitment to him by deliberately objectifying and brutalizing another of its members. The community retaliates by renouncing all concern for the criminal, by casting him out. Both the crime and our response to it are exercises in domination. Our response rejects the possibility of reconciliation and relationship and denies the common ground we share with the criminal.²³⁸ In doing so, we reject not only the criminal, but also the part of ourselves that seeks domination and is capable of violence. We sacrifice the criminal offender in a confused, futile effort to deny, while at the same time vent, the criminality in our own hearts.

Criminals have not always been outcasts. As we have seen,²³⁹ the state in the eighteenth century treated offenders as continuing members of the community. Admittedly, the scheme of corporal punishments deserves no praise; it, too, participated in and perpetuated the cycle of domination and retaliation. In my terminology, this regime of punishment, like the one that succeeded it, systematically "feminized" the criminal offender, in the sense that it subjugated the offender to the coercive power of the state, following the primordial pattern of domination that leads, most fundamentally, to the social oppression of women.²⁴⁰ But in sharp contrast with modern punishments, these earlier styles of punishment avoided the extreme, futile, and ultimately self-defeating step of negating the relationship itself.

A prisoner begins his "training" in an American courtroom. He is told to shut his mouth unless spoken to. He is told he is a fool if he tries to be his own lawyer. He is told his motivations are not the subject matter of his indictment for crime.

His court-appointed lawyer tells him what law he violated and how many years in prison the punishment carries. He is told that if he informs on and betrays his friend, he will receive leniency. If he is the only one charged with the crime, he is told that if he helps solve other crimes, he could get leniency. He is told that because he knows the hour of the day and the day of the year and that he is in jail, he cannot claim to be insane. It does not matter that he cannot either read or write or understand the vocabulary or the rules of the court. It does not matter why he robbed a store — just that he robbed it.

ABBOTT, *supra* note 18, at 130-31.

238. One aspect of the psychology of this situation involves an implicit perception that the criminal's act is an attempt to dominate and control the victim and, by process of identification, the rest of society. The reaction against being placed in such a subjugated position is so strong that it overflows the boundaries of domination and aspires to end the relationship completely. This identification also disables society, or its representative, the state, from seeing its task as healing the rift that the criminal's action has caused between him and his victim.

239. *See supra* part II.A.

240. *See supra* part III.B.

Even within our modern regime, however, there are signs that matters need not remain as they are. The law does not completely ignore prisoners, nor does it lack norms for recognizing a prisoner's right to dignity and social concern.²⁴¹ Unfortunately, prisoners' rights have expanded far less dramatically than those afforded to the accused.²⁴² To take only a few examples, courts are reluctant to correct overcrowded or violent prison conditions,²⁴³ refuse to find a constitutional right to rehabilitative services,²⁴⁴ and increasingly restrict prisoners' access to courts.²⁴⁵ The death penalty, once on the verge of abolition, has made a judicially-sanctioned comeback.²⁴⁶ Any further reforms must overcome a general attitude that prison

241. To take the most obvious example, consider the Constitution's prohibition of "cruel and unusual punishments." U.S. CONST. amend. VIII.

242. See generally DAVID RUDOVSKY, ALVIN F. BRONSTEIN, & EDWARD I. KOREN, *THE RIGHTS OF PRISONERS: A COMPREHENSIVE GUIDE TO THE LEGAL RIGHTS OF PRISONERS UNDER CURRENT LAW* (4th ed. 1988); JOHN W. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* (4th ed. 1991) (providing a comprehensive overview of prisoners' rights). For an account of the early history of the prisoners' rights movement, see RICHARD L. BERKMAN, *OPENING THE GATES: THE RISE OF THE PRISONERS' MOVEMENT* (1979).

243. *Rhodes v. Chapman*, 452 U.S. 337 (1981), marked a turning point in the adjudication of constitutional challenges to prison conditions. Swimming against a growing tide of lower court decisions mandating the reform of degrading prison conditions, the Supreme Court rejected a challenge to double-bunking and other policies of the Ohio prison authorities. The Court held that, under the Eighth Amendment, prisoners must demonstrate that the punishment either involves the "wanton and unnecessary infliction of pain" or is "grossly disproportionate to the severity of the crime warranting punishment" before a federal court can intervene. *Id.* at 347. The Court further stated that "the Constitution does not mandate comfortable prisons" and that, in fact, prisons that "house persons convicted of serious crimes, cannot be free of discomfort." *Id.* at 349. Courts normally should show great deference to the judgment of prison authorities, the Court continued, and should intervene only when prison conditions are found to be "deplorable" or "sordid." *Id.* at 352 (citing *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)). More recently, in *Wilson v. Seiter*, 501 U.S. 294 (1991), the Court held that prisoners must show "deliberate indifference" on the part of prison officials, in addition to the objective standards articulated in *Rhodes*, in all cases challenging the conditions of confinement.

244. See PALMER, *supra* note 242, at 155-59.

245. The Supreme Court in recent years has significantly narrowed state and federal prisoners' access to federal courts under the writ of habeas corpus. See, e.g., *Herrera v. Collins*, 113 S. Ct. 853 (1993) (holding that claim of actual innocence based on newly-discovered evidence normally provides no ground for federal habeas relief); *McCleskey v. Zant*, 499 U.S. 467 (1991) (barring the raising of new claims in successive federal writs unless petitioner can demonstrate cause and prejudice); *Teague v. Lane*, 489 U.S. 288, 296 (1989) (refusing to apply new constitutional decisions retroactively in habeas cases unless decision was dictated by precedent at time petitioner's conviction became final); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (applying *Teague* to death penalty cases); *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (requiring complete exhaustion of state court remedies before federal court may hear habeas claim of state prisoner); *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) (barring habeas where defendant cannot show good cause for failing to follow state procedural rule and cannot demonstrate actual prejudice).

246. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court invalidated a death penalty statute in a manner that seemed to cast doubt on the ability of any such statute to pass constitutional muster. The promise of this holding was short-lived, however, for the Court ruled only four years later that, if accompanied by certain procedural safeguards, the death penalty was consistent with the Constitution. See *Gregg v. Georgia*, 428 U.S. 153 (1976). For a critical appraisal of the Court's jurisprudence in these and other death penalty

inmates deserve little state funding or legislative or judicial time. Still, reformers have planted seeds that may yet yield more fruitful results.²⁴⁷

In the remainder of this section, I will explore more fully the consequences of imprisonment for imprisoned offenders and for society more generally, both in the historical context of the penitentiary's birth in the early nineteenth century and in the contemporary context of the modern American prison. In doing so, I will attempt to draw together, into a more satisfying whole, the disparate stories told in the preceding sections.

A. *The Auburn System and the Conditions of Criminality*

As we have seen, the concern with crime and criminals in the early years of the American republic arose from anxiety over perceived threats to social order and stability inspired by increased urbanization, industrialization, and the undermining of class boundaries and other social hierarchies by republican principles.²⁴⁸ Mobility and change everywhere unsettled traditional social patterns and assumptions.

The young republic's crises and anxieties have clear affinities with the crisis of the self as it emerges from the relatively untroubled world of mutuality into the bewildering world of multiplicity and change. To stretch the analogy a step further, we might say that rapid social and political change threatened the new republic's ego stability, causing an ambivalent nostalgia for the lost security of colonial society and an equally ambivalent defense of its hard-won independence. As the infant seeks to control the mother, whom it both loves and hates, so the new American polity sought to control the criminal class, on which its ambivalent anxieties became focused. The violation of the new boundaries of republican society that criminal activity represented was, we may speculate, seductively attractive to the nostalgic impulse in the collective psyche, but was, at the same time, terrifying to the new collective self that was being forged.

The urge to control these newly troublesome others, however, fell victim to the "paradox of recognition." By constructing the penitentiary and utterly segregating the criminal from society, the social engineers of the early republican period attempted to resolve the social anxieties that criminals inspired by symbolically killing the criminal, placing him (if only for a time) beyond the gaze of society and outside the web of social relationships. Because the self needs the other's recognition in order to exist, it is ironic that prison builders attempted to preserve the integrity of the communal self by removing an element vital to its self-definition. If, as Emile Durkheim said, society needs criminals in order to define and mark the

cases, see Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Colloquium, *Challenging the Death Penalty* (pts. 1 & 2), 18 N.Y.U. REV. L. & SOC. CHANGE 243, 537 (1990-1991).

247. See generally Colloquium, *Challenging the Death Penalty*, *supra* note 246.

248. See *supra* part II.B.1.

boundaries of acceptable conduct,²⁴⁹ then attempts to excise criminals from society are doomed to failure and can only undermine our sense of collective security.

To be sure, the initial proponents of the penitentiary did not aspire to break all connections between criminal and society. As discussed earlier,²⁵⁰ the Auburn and Pennsylvania reformers used isolation as a means toward rehabilitating the prisoner, in preparation for his return to society, not as an end in itself. But the types of rehabilitation sought by the two competing systems differed dramatically, and this difference illuminates the pernicious effects of the victorious Auburn system.

The "separate" system used in the Pennsylvania prisons, although it imposed more extreme physical isolation, ironically was the more communitarian of the two systems. Isolation was viewed as medicine to cure the inmate's soul, displaying society's concern even as society withdrew its gaze. The ambition of the Pennsylvania system was to reclaim the offender and return him to the community morally worthy of living among his fellow citizens.²⁵¹ By contrast, the Auburn "congregate" system, adopted by most other states over the Pennsylvania model, used isolation to develop alienated, solitary citizens. The seemingly more benign Auburn system thus produced a more extreme isolation by encouraging a duality between the inner and the outer self, where the inner self languished unnoticed and unmourned.²⁵²

The Auburn system taught offenders (as society would teach its members) to internalize society's gaze as a perpetual censor. Such perfect isolation is untenable and inherently unstable; the isolated self eventually must rebel, seeking the tangible reality of the other's presence and attention. The "paradox of recognition" requires that the other be present in all of its recalcitrant reality and not merely in fantasy; the internal image of the other cannot satisfy the need for recognition. A regime of isolation inevitably sparks a rebellious reaction, as the spurned self strives to reestablish the broken connection with the other.²⁵³ The prisoner cannot hope to effect such a connection while still incarcerated, but may well do so after being released. Like the former slave who seeks the master's place in order to

249. See EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 64-75 (Sarah A. Solovay & John H. Mueller trans., George E. G. Gatlin ed., 8th ed. 1938).

250. See *supra* part II.B.2.

251. See *supra* text accompanying note 167.

252. See *supra* text accompanying notes 168-69.

253. The terror and hopelessness associated with rejection by an other undoubtedly is more extreme when that other is not a person, but the community as a whole. Just as the infant initially feels a sense of mutuality and symbiosis with the mother, so citizens feel themselves to be part of the larger body of the community; and just as the infant regards the mother as a mysterious, all-powerful presence, both seductive and frightening, so too citizens, on some level, regard the community of which they are members. If the community should choose to banish one of its members, then, that individual's reaction is likely to have all of the intensity of the infant's reaction to the rejection it fears from the mother.

ensure the presence of the absent other,²⁵⁴ the released prisoner may pursue this quest for connection through force or violence, by conquering and subjugating the other. Imprisonment on the Auburn model thus encourages the very forms of behavior it professes to punish.²⁵⁵

For the law-abiding citizen who witnesses this regime of punishment, the lessons are two-fold. First, to the extent that he has internalized the object lesson of the Auburn system, the citizen will rebel against isolation, as the offender does, and will strive to reestablish connection with others, that is, will seek the comforting love and attention only others can provide. But—and this is the second lesson—the alienated patterns of domination arising from the breakdown of mutual recognition will infect this search. The Auburn system's treatment of prisoners and the lonely, anonymous death inflicted upon condemned criminals model this breakdown of mutual recognition. The citizen learns that objectification and control of the other, and constrained, regulated physical violence against—or even annihilation of—the other, may be used to recapture the other's gaze and to deal with troublesome others. Whether or not the person ever actually commits acts of crime—a chance increased by witnessing this scene of punishment—his relations with others will incorporate, to some greater or lesser extent, the spirit of criminality. In Abbott's words: "If society punishes its members by death and imprisonment, why is anyone surprised when a *member of society punishes his enemies with 'death and imprisonment'?*"²⁵⁶

B. *The Modern Prison and the Conditions of Criminality*

1. *The Beast Roars*

Punishment in the modern prison has transformed Auburn's purposeful, scientifically deployed violence into almost unconstrained brutality.²⁵⁷ The collapse of the rehabilitative ideal²⁵⁸ transformed imprisonment into an end in itself. The prisoner is banished from society not as a means of transforming him or, by way of example, transforming society more generally, but for the sole purpose of removing the criminal from the community. The violence of the Auburn system, which was directed mainly

254. See *supra* part III.B. Adam Hirsch provides an informative historical comparison of the status of the prison inmate and the slave in nineteenth century American society. See HIRSCH, *supra* note 53, at 71-111.

255. In a simpler and more perfect world, such an assertion would be testable by comparing recidivism rates before and after the introduction of the Auburn-style penitentiary. Unfortunately, the little data that exist are too partial and unreliable to provide a basis for comparison. Even if reliable data did exist, there simply are too many variable factors contributing to repeat criminal behavior for any such study to be more than suggestive.

256. ABBOTT, *supra* note 18, at 151.

257. See *supra* text accompanying notes 197-99.

258. See *supra* text accompanying notes 2-16.

against the mind and the soul of the inmate, has degenerated into a violence that indiscriminately marks both body and soul and that is constrained by no political or cultural logic.

The lack of a defined logic, as noted earlier, does not mean that the violence of imprisonment has no consequences.²⁵⁹ The isolation imposed on the inmate of the modern prison may be less complete, at least in a practical sense, than under the Auburn system—there exists extensive interaction among prisoners and between prisoners and the outside world—but the psychology of the situation is more extreme. With the abandonment of the rehabilitative goals that motivated the Auburn reformers, the attention and concern of society are withdrawn utterly. The modern prison is thus even more likely than the Auburn system to incite in prisoner and community alike the very forms of hateful objectification and violence that the criminal justice system presumes to prevent and punish. We fear the Jack Henry Abbotts of the world because we know that we may have created them—and that we may not be as different from them as we like to think.

2. *Abbott Redux*

The death of Richard Adan at the hands of Jack Henry Abbott²⁶⁰ can be read in different ways, as can the curious play Abbott later wrote about the incident.²⁶¹ One can read it, as Abbott would have us do, as a tragic misunderstanding between an unarmed aggressor and an armed defender who mistakenly thought his attacker was wielding a knife. It can be read as a simple tale of the senseless violence that haunts the modern metropolis. Or it can be read as the predictable consequence of a system of criminal justice that uses violence and victimization to achieve its ends.

The truth probably resides in a combination of all these readings and more besides. Although my preferred reading, as might be guessed, is the third, it is important to recognize that innumerable factors condition the actions of people, killers included. Focusing on one alone may distort the truth as much as it may help to reveal it. Thus, in the following discussion, I proceed with a tempered sense of the light that the story can cast.

The uncontested facts are straightforward. Early one summer morning in 1981, Abbott, accompanied by two women of recent acquaintance, was returning from a nightclub to his halfway house on the Bowery in Manhattan, where he had lived for the six weeks since being paroled from prison. With the exception of two periods totaling less than ten months, this was the first taste of freedom that Abbott, then thirty-seven years old,

259. See *supra* part IV.A.

260. See *supra* text accompanying note 52.

261. The play, entitled "The Death of Tragedy," comprises more than half of the text of Abbott's second book, *MY RETURN*, *supra* note 52.

had experienced in twenty-five years. Abbott, recovering from a long hunger strike, still bore visible marks of his imprisonment.

The three friends stopped for breakfast at a twenty-four-hour cafe near the halfway house. While they waited to be served, the night manager of the cafe, Richard Adan, exchanged words with Abbott. The two men left the cafe for the sidewalk outside, where a fight ensued. In the struggle, Abbott stabbed Adan, who collapsed and later died. The police found only one knife at the scene—Abbott's.²⁶²

On the surface, there was nothing unusual in Abbott's decision to carry a knife. The neighborhood to which Abbott was paroled is exceptionally violent, and Abbott carried the knife as a reasonable precaution. Nor is there any compelling reason to doubt that, at least in Abbott's view, Adan began the incident, or that Abbott sincerely believed he saw a knife flash in Adan's hand when the fight started, as he later claimed.²⁶³ However, there is cause to question Abbott's relentlessly repeated claim that there was nothing more to the incident than this—that he was merely the passive victim of circumstance, that he acted purely in rational self-defense. We need not doubt Abbott's sincerity, but we do need to question his understanding of the event.

As an entree into the psychological atmosphere of the scene, consider the similarities between the prison world Abbott had left only six weeks before and the world of freedom in which he now found himself. Although Abbott was intermittently feted in the weeks after his release by the literary establishment that had adopted him, the terms of his parole required him to spend most of his time at or near the halfway-house where he lived. Abbott testified at his trial for Adan's murder that, in the weeks since his release, he had witnessed one murder and three stabbings and had been assaulted himself several times.²⁶⁴ The Bowery section of New York is extremely violent, but no more so than the prison world that Abbott had just left. Abbott notes the connection, stating that everyone in his halfway house carried knives as a matter of course, just as they had in prison.²⁶⁵ Consider also the situation that, by his own account, confronted Abbott on the sidewalk outside the cafe: for no apparent reason, a person with authority over the place where Abbott found himself threatened him with physical violence. Abbott describes Adan as looking "like a convict,"²⁶⁶ but we may speculate that the real association Abbott made in his mind was with the guards (or "pigs") who had repeatedly brutalized him in

262. ABBOTT & ZACK, *supra* note 52, at 11-56.

263. *Id.* at 49. Abbott continued to claim that Adan had pulled a knife, reasoning that it must have been lost among the debris on the street. *Id.* at 87.

264. *Id.* at 38-39.

265. *Id.* at 39.

266. *Id.* at 44.

prison. His act, then, may have been an unconscious act of revenge, such as Abbott earlier had promised for the "day after the revolution."²⁶⁷

While in prison, Abbott had been unusual among convicts in lashing out at his keepers, not just occasionally, but regularly, as a matter of principle. He had never gone so far as to kill a guard, but in prison the guards had the advantage, and Abbott knew he would not survive if he crossed that line. Now, however, Abbott was on the outside. He was, so it seemed, a free man, free to express himself as he pleased, free to act as he wanted. When Adan's behavior threatened to rob him of that freedom by returning him symbolically to the status of demeaned convict, Abbott lashed out in defense of himself, carrying the act through to its logical, deadly end. It is quite plausible that Abbott thought he saw a knife in Adan's hand, whether it actually was there or not. In his world, where inmates often used knives to attack one another,²⁶⁸ knives symbolized the objectification and aggression that Adan displayed toward him.

On a more elemental level, Abbott's killing of Adan may have been a desperate, reactive attempt to dominate the dominator, to force the other who had refused to return his gaze in prison to do so now. We may suppose that Abbott was somewhat bewildered and disappointed with the world of freedom he found on the far side of the prison walls. In a remarkable passage from his first book, written within those walls, Abbott shared with the reader his vision of the world outside prison:

Every society gives its men and women the prerogatives of men and women, of *adults*. Men are given their dues. After a certain age you are regarded as a man by society. You are referred to as "sir"; no one interferes in your affairs, slaps your hands or ignores you. Society is solicitous in general and serves you. You are shown respect. Gradually, your judgment is tempered because gradually you see that it has real effects; it impinges on society, the world. Your experience mellows your emotions because you are free to move about anywhere, work and play at anything. You can pursue any object of love, pleasure, danger, profit, etc.²⁶⁹

He believed the world outside would give him the attention and concern that he craved. Instead he found a world as violent and unconcerned as the one he had left. He would have to win the respect and attention he needed

267. See *supra* text accompanying notes 50-51.

268. This is demonstrated most dramatically by Abbott's account in his first book of the murder, by knife, of one prisoner by another. See *supra* text accompanying note 47, and the discussion of the incident, *infra* text accompanying notes 277-80.

269. ABBOTT, *supra* note 18, at 13-14. Elsewhere Abbott seemed to recognize the unreal aspect of such visions: "To be in prison so long, it's difficult to remember exactly what you did to get there. So long, your fantasies of the free world are no longer easily distinguishable from what you 'know' the free world is really like. So long, that being free is exactly identical to a free man's dreams of heaven." *Id.* at 3.

the only way he knew how—by demanding it, fighting for it, taking it by force.

Abbott, the state-raised convict, had a fantastic concept of the world of freedom, but his disillusion and disappointment probably resulted as much from the psychological effects of his imprisonment. The forsaken self, desperate for recognition, fantasizes that freedom from imprisonment will deliver him from exile. Upon release he discovers that his freedom is merely an elaboration on his imprisonment—a discovery that can easily trigger an explosive reaction. Abbott tried to reclaim the attention and concern of the other, and in doing so he killed the other—just as, symbolically, society had killed him by banishing him to prison. Abbott may very well have been “surprised” and “stunned” that Adan ended up dead,²⁷⁰ but it is unlikely that it was, as he claims, a purely fortuitous accident.²⁷¹

The liberal intellectual community that had lionized Abbott upon the publication of *In the Belly of the Beast*²⁷² largely renounced him after the Adan killing.²⁷³ One telling indication of this is the great difficulty Abbott had in getting his later book, *My Return*, published, and the near-universal silence that greeted the book after it appeared.²⁷⁴ Abbott's supporters may have felt betrayed, but they should not—if they believed his tales of prison—have been surprised.

But what seems, at first glance, more surprising than the liberal establishment's incomprehension is Abbott's own inability to comprehend the possible causes of his actions—causes laid out in his first book. He not only refuses to consider that his prison conditioning may have brought on the Adan incident,²⁷⁵ but his book on the subject reveals an obsessive concern with justifying and explaining his actions—as though he were trying to

270. ABBOTT & ZACK, *supra* note 52, at 18, 19.

271. *Id.* at 26.

272. Terrence Des Pres, for example, called Abbott's book “brilliant” in his glowing review of it in the *New York Times*. See Terrence Des Pres, *A Child of the State*, N.Y. TIMES, July 19, 1981, § 7 (Book Review), at 3. Ironically, Des Pres' review appeared one day after the Adan killing.

273. See, e.g., Michiko Kakutani, *The Strange Case of the Writer and the Criminal*, N.Y. TIMES, Sept. 20, 1981, § 7 (Book Review), at 1 (discussing reaction to Adan killing).

274. A search of a number of book review indexes and of the NEXIS database turned up no reviews of the book and only a small handful of articles about it. One of these articles declared that “Jack Henry Abbott has returned, but no one appears to care very much” and reported that the publisher had not even sold out of its tiny print run of 3,500 copies. David Streitfeld, *Book Report*, WASH. POST, Jan. 10, 1988, § 10 (Book World), at 15. The publisher, Prometheus Books, agonized over its decision to publish the book. Prometheus president Paul Kurtz was quoted as saying that perhaps “we made a mistake” in publishing it. *Id.* The book itself opens with an unusual “Publisher's Statement” that expresses considerable ambivalence over the decision to publish it. ABBOTT & ZACK, *supra* note 52.

275. Consider in this regard the following passage from *My Return*:

A wise man once said the most dangerous threat to a nation or to an individual is to be convinced he is guilty of sins he is not guilty of. To burden his conscience with crimes unjustly, crimes he has never committed, is one of the darkest secrets of the human soul: *He is driven by his conscience to commit the crimes in reality*, so that he might have a chance of redeeming himself. This has been of

convince himself as much as his reader.²⁷⁶ One telling reflection of Abbott's resistance to deeper understanding is his treatment in *My Return* of the passage from his first book that describes, in sensuous detail, the calculated knifing of one prisoner by another.²⁷⁷ The first book leaves unclear whether the "killer vignette"²⁷⁸ recounts an actual assault and, if so, whether Abbott himself was the killer. The repeated use of the pronoun "you" in the passage, however, suggests that if the assault was real, Abbott committed it.²⁷⁹ I believe this ambiguity was purposeful (if not fully conscious) and that it served to emphasize, in rather dramatic fashion, the prison environment's tendency to turn its inhabitants into potential killers. In the later book, Abbott rightly protests the prosecutor's use of this passage at his murder trial. But Abbott goes further than this, claiming not only that he had never deliberately killed anyone (an assertion we may grant him) but also that he was incapable of murder: "If it was written by the kind of man who would do such a thing, it would not move you, would it? You wouldn't understand it, and it wouldn't upset you, would it? It is the point of view of an observer."²⁸⁰ In my reading, the killer vignette, whether literally true or not, does not readily lend itself to such an interpretation—it seems, in fact, to suggest just the opposite.

On further reflection, Abbott's resistance to understanding his own motives becomes more comprehensible. Abbott derived his strength and insight from resistance; he sought to emerge from prison unbowed. To admit the possibility that Adan's killing evidenced a fundamental alienation produced by his prison experience would have required him to admit that the beast had won—not by killing him, but by making him a beast as well.²⁸¹ This, in the end, he could not do.²⁸²

some consolation to me. This is why I cannot accede to a share of guilt, where it does not have reality, in the events that resulted in my trial. . . . Because when a man has been convinced he is guilty of sins he is innocent of, there is no other chance of getting rid of his consciousness of guilt. The doer and the deed must come together, and I refuse to make a criminal of myself.

ABBOTT & ZACK, *supra* note 52, at 123.

276. The play he wrote to portray his version of events occupies 68 pages of *My Return*, and in it Abbott recounts his story three separate times, each time in painstaking detail. His obsession with the subject reaches almost absurd proportions in the 50 pages of supplementary material appended to the play. There are notes providing yet more detail, elaborate annotated diagrams of each stage of the key events, and point-by-point refutations of the testimony of witnesses at the trial.

277. See *supra* text accompanying note 47.

278. This is the term Abbott uses to describe it in *MY RETURN*, *supra* note 52, at 103.

279. Abbott frequently uses the word "you" in passages that are explicitly about his own personal experience. See, for example, the account of his first experience in solitary confinement, *supra* text accompanying note 28.

280. ABBOTT & ZACK, *supra* note 52, at 61.

281. Abbott explicitly discusses this dreaded possibility in a possibly prophetic passage from his first book: "I feel that if I ever did *adjust to prison*, I could by that alone never adjust to society. I would be back in prison within months. Now, I care about myself and I cannot let it happen that I cannot adjust to freedom." ABBOTT, *supra* note 18, at 17.

CONCLUSION

Imprisonment, as conceived and implemented in this country over the past two centuries, is a part of, not an antidote to, the psychological climate that fosters violent crime. In supporting this argument, I have tried to avoid glorifying either criminality or the criminal. Society rightly punishes the conduct of criminal offenders for the good of both society and the criminals themselves. Violent criminal conduct, it should be clear, exhibits an impulse to objectify and dominate others; society cannot and should not leave such conduct unanswered.

But we serve neither society nor the criminal if the means we choose to answer such conduct only make it worse. When objectification and victimization are answered in kind, we can expect a downward spiral of degradation and negation rather than the uplifting vision of redemption and reconciliation that, in our better moments, we are capable of expressing. We have overcome, if only incompletely and with great difficulty, our baser

282. An inmate in a Connecticut prison wrote a remarkable letter to a local newspaper several years ago that exhibits some of the understanding that has eluded Abbott. The letter is worth quoting in full:

To the Editor:

Will those who compile violent crime statistics notice a rise in the statistics upon my release from the Cheshire Correctional Center in a few months?

During the previous two decades, I have been released from state prisons several times. Posthaste, in disguise, and with meticulous planning, I would proceed to commit 50 to 60 masked armed robberies.

I will be fully discharged in about six months after serving nearly nine years for a string of armed robberies committed in Connecticut in 1981. I escaped prosecution in Massachusetts and Maine for similar offenses.

Over the years, I have cost the taxpayers an amount that would stagger one's belief: years of incarceration, court costs, clogging up the criminal justice system, local, state and FBI investigations and other costs.

Special state police units, local police overtime, roadblocks and area sweeps were so costly for one small municipality that it had to raise its property taxes the following year.

Although 95 percent of my sentence has been completed, the Department of Correction has offered me nothing as to any rehabilitative effort that provides society some measure of protection upon my release. The prison staff has done nothing to help prepare me for release.

Will my release pose a risk to the public? I will be released into society a little more dangerous than I was in 1981. Based on 25 years of practical experience and theory, I would suggest that any release of a repeat and violent offender, from prison cell to complete freedom on the same day[,] constitutes a lethal health hazard.

I will be released with no job skills and no job, no clothes, no room, no friends nor relatives to turn to, no identification to even cash the gate money check or Social Security card to obtain food stamps—if I should cho[o]se to struggle to survive legally.

If I am released in six months without help and a horrible situation occurs, I must, of course, be held accountable, but prison officials' interest and involvement in my prerelease preparation should be closely scrutinized.

Peter H. Remick
Cheshire

NEW HAVEN REGISTER, Mar. 8, 1990, at 12.

impulses in way we treat criminal suspects. Our unfinished agenda is to extend the same concern and respect to those whom we judge guilty.

This agenda requires that we reclaim the rehabilitative ideal, with its recognition of a continuing connection between the community and the offender, from the contradictions and confusions created by its fateful alliance with the regime of the penitentiary. In my view, this would not necessarily mean abandoning entirely the practice of temporarily separating offenders from the community. However, society should view imprisonment as a last resort, a punishment employed with great reluctance after other sanctions have failed. I have sought in this article to explore the unintended and largely unrecognized consequences of our commitment to imprisonment as the presumptive penalty for serious crime. I recognize, however, that this only begins a broader and more difficult project—rethinking the goals we seek and the methods we use in confronting the problem of violent crime. If not prison, what?

I do not presume to have answers to this question, although I believe that we must commit ourselves to a more serious exploration of alternatives to imprisonment, as traditionally conceived, if we hope to emerge from our current impasse. Unfortunately, the current climate of rampant fear of crime and criminals fosters short-sighted punitive approaches at the expense of creative explorations of more community-based alternatives to incarceration, or a radical rethinking of the concept and design of the prison. Without such efforts, however, we condemn ourselves to continued reliance on a disastrously counterproductive institution.

Whatever alternatives we consider, they must emphasize, not deny, a continuing connection between the criminal offender and the community. Although I prefer nonincarcerative forms of punishment, some form of imprisonment may serve a useful, though limited, role in a new regime of punishment. The prison I envision would be a place that sincerely sought to transform the offender, but not by means of the objectifying forms of rehabilitation inaugurated by the Auburn prison reformers. Rather, it would transform the offender by methods designed to break the negative cycle of domination in which both criminal and community currently are enmeshed. It would be a place spiritually within and not outside the community, a place that might serve to model redemptive rather than regressive forms of relationship.

Such a vision might be utopian, I concede, but no more so than the vain hope that our current methods can reap anything other than continued failure. Before resigning ourselves to the latter, I believe we should try the difficult task of realizing the former. If we nonetheless fail, at least it will not be through a failure of vision or will.

