



How influential were the reformers of the eighteenth century to the making of the Penitentiary Act and how important was this Act in punishing offenders in the eighteenth century?

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## DECLARATION

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# Dedication

I would like to dedicate this thesis to Nanna Beryl. You were a ray of sunlight in all of our lives and your determined attitude can be likened to that of William Eden. Thank you for the memories, you will be forever missed and I love you.

## Preface

Some three years ago I woke up bright eyed and ready to write a thesis on imprisonment. My initial intention was to write about the altering purposes of imprisonment since its enactment, but this was an investigation that needed refining. My search for when imprisonment began led me to the Penitentiary Act. In an era of social tension and executions this was an Act that intended to shift the balance of punishment from deterrent models to reformatory ones. Much secondary material talks about the American War of Independence suspending transportation and leaving the door open for reform, but the Penitentiary Act was not an Act that had been merely devised over three years (1776-1779). The culmination of reformatory thought from the 1750's onwards provided the essential ingredients for the making of the Penitentiary Act, but how important these ingredients were, will prove the defining question of this thesis.

I will be forever grateful to my family, friends and supervisors during my journey in writing this thesis. Through three years of studying I have gone through every range of emotion possible, and without you all this would have been so much harder. Firstly to Mum, Dad and Anna, thank you for being my constant rock, your love and support was felt throughout and for that I am eternally grateful. To Becky, thank you for sticking by me through thick and thin, I will always be thankful that I've had you by my side. Finally, a huge thank you must go to my supervisor, Richard Ireland. Without your invaluable guidance and support I would not have got to where I am today. Both academically and personally you have been a man to call upon, and your enthusiasm in life is something I will always remember. Writing a thesis can lead you into a world of academic loneliness and isolation, but you got me through the dark bleak days.

Special thanks must also go to Aberystwyth University and the National Library of Wales. Both have been thoroughly professional and supportive throughout and it is largely thanks to their resources that this thesis has been written.

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## Introduction

The social complexion of any century is always bound to have it ups and downs, but the journey that the eighteenth century went through was one of improvement and despair. A century of enlightenment and thought breathed an air of philanthropy in a social environment that was the polar opposite. Poverty was an increasing feature of the eighteenth century and merely three punishments were implemented to tackle it. These were capital punishment, transportation and imprisonment. Whilst crowds flocked to watch the latest felon hanged, and offenders were booted out of the country for seven to fourteen years, imprisonment sat motionless in its filthy immoral pit. Prisoners drank alcohol, played cards and discussed their criminal adventures, whilst other inmates died of gaol fever. However, a shift in the outlook of imprisonment did take place in the last quarter of the eighteenth century. The prisoner went from joking with the crowds of inmates to sheer isolation with only a chaplain to communicate with and a full day's labour to ensue. This shift is integral to the themes of this thesis. It will be contested that the Penitentiary Act was the defining part of the movement from corporal to carceral punishments. The primary question that will sink itself into the darkest depths of this thesis will be what produced this forward-looking Penitentiary Act? Did it arise from the mood of the times or the eccentrics who fought for reform from their own individual ideologies?

This thesis will attempt to outline a story of how and why the Penitentiary Act was introduced to the laws of the land without adopting any specific theory. The problem with introducing any theories is that you can lose all sight of the story itself and this is exactly what this thesis will not do. It will simply allow the reader to decide the outcome for themselves by outlining the conditions, individuals and events. However it must be conceded that it would be negligent of us to deprive this thesis of the theories that could attach themselves to it. Therefore we will briefly

engage with four theoretical viewpoints that could be adopted to the arguments of this research.

The first will be the 'presentist' theory which relates penal change to the present day. The major problem with this analysis is that there is always a need to exaggerate an unfolding of events. For example, the Penitentiary Act may be seen as the end of barbarism and the beginning of humanitarianism. However, such a shift is complex and does not emerge in such an absolute manner. The greatest example of this is the fact that religious tensions and reformatory thought increased the longer the eighteenth century progressed but capital punishment continued throughout this phase as late as the 1830s. The point being made is there was no tap to turn off barbarism and turn on humanitarianism as this thesis will outline through the chapters.

The Marxist theory would submerge itself into the greatest depths of chapter one, whereby, class divide and economy are commented upon. A Marxist stance would see class control being governed by the criminal law, and this is what makes chapter two so essential to us. Whilst we outline the social conditions in chapter one, we must appreciate societies responses in regulating such conditions. Could the Penitentiary Act have the power to enforce class control? Did the social climate of the eighteenth century provoke a change in the purposes of punishment or was it the reformers proposals that encouraged such a change? Again we must be careful when putting a Marxist slant on this thesis because certain crimes will have been punished by imprisonment before and after the Penitentiary Act. The difference was, before the Act the prisons were embracing a deterrent model and after they were implementing a reformatory one.

Foucault's line of theory has been a popular one which states that the 'enlightenment' shifted penalties that were meant to harm the bodies in public to new penal paths that reformed offender's souls. It is this shift that will be apparent throughout this thesis. Foucault would also contest that



government was expanding and concerns over the American war would have produced pragmatic effects as opposed to theoretical ones. Whether such pragmatic effects were a product of the 'enlightenment' or reformers will be answered in the conclusion.

Our final theory is humanitarianism which is an idea that mankind could be improved by deliberate social change. Whilst reformers altered in their fundamental beliefs, they could all unite under the umbrella of humanitarianism, and because of this we need to look at them as a whole. Chapter three will attempt to answer whether the humanitarian vehicle created the Penitentiary Act.

Other theoretical frameworks may be applied but these are merely a selection. The awareness of different viewpoints will enable the reader to decide for themselves. Although, an argument could be made that any narrative or story will have a direct or indirect bias towards one theory over another but this is not the intention of this thesis. There is no denial that certain theories may be touched upon closer than others and if we were to solely examine an author's theoretical beliefs it is highly possible that one theory would take precedent over another. However, this piece has been written in the most honest and transparent manner possible with merely an appreciation of theory in contrast to an implementation. In an age where people appear to be writing more and more about theory it can make it difficult to truly inherit the truth of events and in many respects lose the whole content and meaning of the primary investigation. This thesis will work from the characters, writing and events of the eighteenth century rather than the theory of the twentieth century in order to get a greater portrayal of the events that unfolded in the eighteenth century.

This thesis will comprise of five chapters in total. Chapters one and two to some extent complement each other because they outline the mood of the times. Chapter one paints the picture and provides us with the necessary backdrop to life in the eighteenth century. It examines poverty,

crime and religion which will allow us to understand how and why society punished such problems. The second chapter will focus on the punishments within the Penitentiary Act's penal spectrum. Whilst whipping and fining were prevalent it is not an area that the Penitentiary Act sought to address, therefore we shall examine capital punishment, transportation and imprisonment. The fluctuating movements between the three punishments in the eighteenth century are an area of much discussion, whereby John Beattie, Peter King, Sir Leon Radzinowicz and Philip Rawlings are all prominent writers. Why one punishment lost favour over another will provide us with an insight towards the vulnerability of crime and punishment amidst the changing social backdrop. Chapter three will be the part of the thesis that will contest that reformatory thought led to the Penitentiary Act. Fielding, Beccaria, Blackstone, Eden, Hanway and Howard all progressively engaged in proposals to change the face of punishments in the eighteenth century, and all looked to change the notions of deterrence to reformation which was installed in the Penitentiary Act's manual. Their input is essential to the foundations of this thesis. Chapter four will outline the immediate developments towards the Penitentiary Act. An examination of the three punishments health in the 1770s along with the legislative proposals of the age, will lead us to the Act itself, whereby the contents will be examined. It is here we will be able to investigate the true influences on the Penitentiary Act. If it is an Act filled with the reformers proposals then this would lead one to assume they all had an overwhelming impact on the Act. If not then perhaps the Penitentiary Act grew from the soil of enlightenment. The final chapter will examine the practical and theoretical influences the Penitentiary created. We will firstly look at the local efforts paying particular attention to the Gloucester Penitentiary which was opened in 1791, and then the theoretical influences, with an examination of Jeremy Bentham's Panopticon. These five chapters will provide the reader with the opportunity to understand and appreciate the journey to the Penitentiary Act, and enable them to evaluate the true justifications behind such a forward looking act.

The story of the Penitentiary Act is a messy affair, but a movement from deterring to reforming an offender was never going to be a seamless journey. Whilst proposals for reformation will be documented in chapter one from as early as the late seventeenth century, we will contest that the true birth of Penitentiary thought began in 1751 with Henry Fielding. Whether these mere thoughts alone were a product of the cultural climate in which Fielding lived in will be a consistent question throughout the whole thesis, but the emphasis of this work is firmly placed on how and why the Penitentiary Act came to exist. Without being too much of a plot spoiler, some even believed it to have a good end. “The story of punishing felony has been portrayed as a brash forward movement from the ‘enlightened sunshine’ of the eighteenth century on. It is a good story, with a good ending:”<sup>1</sup> It is hoped that this thesis will provide an honest and powerful portrayal of a moment in the history of crime and punishment that has been undermined. This it will be argued was the real beginning of imprisonment.

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<sup>1</sup> ‘Introduction’ in Devereaux, S.. & Griffiths, P. (eds) (2004) *Penal Practice and Culture, 1500-1900: Punishing the English* Basingstoke (Palgrave Macmillan) pg.3

# 01 - Social, Economic and Cultural Background of the Eighteenth Century

Whilst this chapter will be the shortest in the whole thesis, it will be one of huge importance to us, because it will provide us with the necessary foundations to appreciate the social climate in which the Penitentiary Act was born into. It is easy in any research study to focus on the light at the end of the tunnel, but sometimes you have to appreciate your surroundings and understand the environment you are in, rather than the environment you will be in. The Penitentiary Act had to begin its life inside this eighteenth century tunnel. Each step towards the light at the end of the tunnel would be a progression towards implementation, but each puddle would make it harder to make such progress. If you want to get to the light as fast as possible, you have to acknowledge your setting, and navigate a way around it to achieve your objective as soon as possible. This is exactly what the Penitentiary Act had to do. The Act's framers had to fully appreciate the social, economic and cultural background of the eighteenth century and manoeuvre a way through the contrasting thoughts of optimism and pessimism.

If we can broaden our understanding of the eighteenth century as a whole, then we will have the tools required to evaluate the progress and importance of the Penitentiary Act, and as a consequence be able to answer whether the Act was a product of the enlightenment or the individual reformers. Admittedly this chapter will only be a brief overview of the eighteenth century social conditions that will have affected the Penitentiary Act<sup>2</sup>, but it will certainly provide us with the necessary insight to the environment the Penitentiary Act was to work in. A critical component of this chapter will be derived from the motives of different punishments. To put it simply, punishments are methods to tackle crime; in the eighteenth century punishments were either designed to deter or reform the offender. In theory for a punishment to fulfil its purpose it had to understand the crimes it was punishing and consequently understand the social environment in which the crimes took place.

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<sup>2</sup> For an increased understanding of the eighteenth century society (particularly towards crime and punishment), Beattie (1986), Sharpe (1999) and McConville (1981) provide overviews that complement and emphasise many of the points we will make throughout this thesis.

Chapters one and two will essentially deal with these matters. This chapter will be broken up into three sections. The first will be an examination of the social conditions, which will look at the class divide, trade, population growth, poverty and war in the eighteenth century. The second will be a brief evaluation of religion and the third will examine crime. This will provide us with the knowledge required to evaluate and examine the effectiveness of the punishments in chapter two. The importance of these two chapters is outlined by McConville. “It is only against this background of social conditions and penological thinking, considered together (and however sketchily represented), that contemporary attitudes to prison policy and administration can be understood.”<sup>3</sup>

A problem we will certainly encounter in both chapters one and two is the limited statistical evidence this era provides us with. Firstly the eighteenth century appears to be a period void of vast statistical publications concerning social conditions such as crime, and secondly the limited data available appears to be predominantly from London.<sup>4</sup> A problem with this is that any attempt of a national overview of crime and punishment is likely to be exaggerated because London was the heart and the brain of the country. Therefore, we cannot with any great deal of confidence hail the statistics from London as nationally applicable, but we can certainly attempt to dissect the information we need to evaluate common and likely trends throughout the country. Two authors that certainly attempted to address this issue are Dr. Morgan and Dr. Rushton<sup>5</sup>, who it appears, took the time to visit as many Record Offices throughout the country as possible, in order to get a broader national perspective to crime relating to transportation.<sup>6</sup> “No one attempted to bring together the scattered decisions of the different courts of all the counties into a national picture of crime and punishment in the whole country.”<sup>7</sup> What we must do is attempt to provide a general overview of

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<sup>3</sup> McConville, S. (1981) *A History of English Prison Administration, Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.61

<sup>4</sup> Which was where the legislators were from.

<sup>5</sup> Morgan, G. & Rushton, P. (2003) *Eighteenth-century Criminal Transportation* New York (Palgrave MacMillan)

<sup>6</sup> Examples are Bristol Record Office, Kendal and Whitehaven Local Studies Centre and County Durham Record Office

<sup>7</sup> Morgan, G. & Rushton, P. (2003) *Eighteenth-century Criminal Transportation* New York (Palgrave MacMillan) pg.33

England and Wales, whilst appreciating that much of the data used will be from London and its surrounding suburbs.

In essence, this is a crimino-sociological chapter that will assist us in appreciating the circumstances surrounding the eighteenth century that led to a need for change in crime and punishment. An exploration of the progression of eighteenth century society as a whole will in turn be our vehicle to the more refined examination of the Penitentiary Act and its development.

## Social Conditions

*“Before 1750, very low food prices, combined with the wage stability of a relatively static population, probably increased the real earnings of the poor. The fearful problems arising from the Londoner’s thirst for gin - and the less damaging but at the time equally criticized liking of the poorer sort of tea - suggest that at least there was no shortage of disposable income at this time. After the mid-century, however, conditions seem to have deteriorated for many. A return to the older cycle of indifferent and even deficient harvests, together with the episodic slumps and unemployment characteristic of industrial economies, made life at the bottom of the heap a hazardous and harrowing business. Moreover, rapid population growth together with mechanical innovation helped to keep wages relatively low, and ensured that the advantages of industrial expansion were not necessarily shared with the humbler members of an emerging proletariat.”<sup>8</sup>*

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<sup>8</sup> Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.40-41



The eighteenth century was a progressive century, whereby new thought and development came to the fore. The Penitentiary Act was going to be a child of this new thought, but it was not until the last quarter of the eighteenth century that this happened. McConville outlines some of the advancements in the eighteenth century, and rightly points out the prison's slow start. "The eighteenth century was, for example, the century of large private houses with their associated culture, and substantial developments in music and the arts. Great libraries and museums were founded; naval, agricultural and mechanic sciences brought forth many notable discoveries and new techniques. There was even considerable innovation in lines of thought and modes of endowment and organisation which affected some public institutions, such as hospitals. In other words, prisons - in a seemingly inert (or deteriorating) state - did not reflect the other achievements or the moral and material potential of their society."<sup>9</sup> The conditions of the eighteenth century prison will become much clearer in the second chapter, but an observation for now is that institutions out of the penal system were developing quicker than the institutions in the penal system. What was more alarming amongst the social improvement of the eighteenth century was that whilst museums were being built, poverty appeared to be increasing amongst a growing poor class<sup>10</sup>.

The class-divide was a significant problem in the eighteenth century and the contrast between these classes is best reflected by the unequal system of land ownership and agriculture. In this case, rather than individual rights as we know today, a status was maintained in the social order, and certain privileges came with such status. An example of one of these privileges can be seen by land ownership (main form of wealth), whereby the land owning class were solely interested in managing the land for the benefit of themselves, leaving the labourers, apprentices and unskilled workers in a vulnerable inferior position. "Substantial capitalist farmers, were beginning to dominate an agrarian

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<sup>9</sup> McConville, S. (1981) *A History of English Prison Administration, Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.54

<sup>10</sup> See; Walters, C. (1920) *An Economic History of England: 1066-1874* Oxford (Clarendon Press) pg.295; "During the period 1660-1723 the poor-rate rose continuously. Many remedies were proposed, all based on the idea of setting the pauper to work, but it was not easy."

world in which all below them were reduced to landless labourers.”<sup>11</sup> This agricultural hierarchy was to continue throughout the eighteenth century because as Walters outlines, the Whig policy of the time was to encourage industry (Walters points out that agriculture was England’s greatest industry), which meant the land owner retained his power with ease and used it in his own interest. A consequence of this was that the poor without land ownership were left to profitless contact with the rich, whilst living standards rose more rapidly at the top of the social scale than the bottom.

To compound matters further, poverty alone was seen as a crime in itself, whereby the punishment of ‘rogues, vagabonds, sturdy beggars, and other idle and disorderly persons.’ was authorised.<sup>12</sup> Shoemaker covers this topic in greater depth and shares the point that the poor were now offending the laws of the land by simply being poor. “Many of the defendants committed simply for being “idle and disorderly” were probably accused of little more than being poor and able-bodied and not having a job.”<sup>13</sup> Statutes like 7 Jac. 1 c.4 were clearly put in place to protect the upper class and their property, and it is for this reason Douglas Hay<sup>14</sup> believed the upper classes cherished the death sentence. However, sooner or later something was going to have to give. One class, based on Hay’s argument was happy to execute poverty out of the kingdom, and the other class were left at the bottom of the heap with no resources and barely life itself. Hay’s conclusion to his essay ‘Property, Authority and the Criminal Law’ sums this area up, whereby the ruling classes imperfect power and manipulation, was leaving the poor in an ever more difficult situation. “A ruling class organises its power in the state. The sanction of the state is force, but it is force that is legitimized, however imperfectly, and therefore the state deals also in ideologies. Loyalties do not grow simply in complex societies: they are twisted, invoked and often consciously created. Eighteenth century

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<sup>11</sup> Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.39-40

<sup>12</sup> See; 7 Jac. 1 c.4

<sup>13</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.171

<sup>14</sup> See; Hay, D. et al (eds) (1975) *Property, Authority and the Criminal Law; In Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* London (Allen Lane)

England was not a free market of patronage relations. It was a society with a bloody penal code, an astute ruling class who manipulated it to their advantage, and a people schooled in the lessons of Justice, Terror and Mercy.”<sup>15</sup>

With a clear class divide, the next question that must be asked is why such a growing poor class of people existed. We already know that the ruling class gained much of their power from land ownership but how exactly did poverty become such a regular feature of the eighteenth century? Food prices, employment and population appear to be three core justifications for such poverty. All of them intertwined with each other to varying degrees. A simple theory is that poor harvests meant an increase in food prices and consequently unemployment or a reduction in wages. An increase in population meant greater competition for work and in turn reduced wages for the labourer. So if a poor harvest met population increase, it meant there was a reduction in food, an increase in food price and consequently a decrease in labour costs because of the demand for work. If a family of five was dependent on two labourers, who as a consequence of a poor harvest were unemployed, the options were clearly limited. The brutal reality for many was probably starvation or crime. Beattie clears this point up. “The price of basic foodstuffs was largely determined by the state of the harvests, and in a number of years over this period bad weather led to some significant shortages and very high prices. The strong increase in prices in the second half of the 1690s, for example, helped to make that decade a very difficult period for the working population of London, particularly the poor harvest years of 1697 and 1698. There followed a number of years in which harvests were good and food plentiful. Over most of the first decade of the eighteenth century prices fell relatively sharply, until further bad harvests in 1709 and 1710 drove prices up again before they moderated once more. Changes in food prices would be felt acutely by the very poorest, those whose wages were so low that even if they could continue to work, they would soon feel the effects of a sudden increase in the

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<sup>15</sup> Godfrey, B. & Dunstall, G. (eds) (2005) *Crime and Empire 1840-1940; Criminal Justice in Local and Global Context* Cullompton (Willian Publishing) pg.30

price of necessities.”<sup>16</sup>

Langford provides an alternative stance on such a problem, stating that newer industries could develop with low food prices, but this did not feed the poor in the short term. “In the 1730s and 1740s agricultural prices were exceptionally low; some important manufacturing regions, particularly the old textile centres, suffered serious unemployment and unrest. But there were also more promising developments. Low food prices permitted higher spending on consumer goods and thereby encouraged the newer industries, particularly in the Midlands. If agriculture was frequently depressed by these prices it was also stimulated by them, in East Anglia for example, to increase production.”<sup>17</sup> Even if we are to accept Langford’s belief in these new industries, there was still going to be an issue with competition for labour via an increase in the population. “Significantly enough, research on that most fundamental social fact of all, demographic movement, has demonstrated clearly a sudden transformation in population history: there was a long period of steady growth until about 1640, and then a period of stability until the next wave of demographic expansion began in the 1740s.”<sup>18</sup> At county level, King provides statistics to suggest Essex had an increase of over fifteen thousand people between the 1740s and the 1760s.<sup>19</sup> Of greater impact is Langford’s statistics stating, that had the abortive census proposed in 1750 been conducted then a population of 5.3 million in 1730 would have risen to 6.4 million by 1770.<sup>20</sup> This rate of growth gave rise to an increase in the poor, which represented obvious problems. More unemployed people, greater anxiety towards levels of crime and more people who could not support themselves. “The poor were not now the occasional beggar, such legitimate objects of charity as the old widow or the sick man, nor were they the sturdy beggars of Elizabethan trauma. They were that third or so of the population who

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<sup>16</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.42

<sup>17</sup> Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.32

<sup>18</sup> Sharpe, J.A. (1999) *Crime in early modern England 1550-1750 Second Edition* New York (Addison Wesley Longman) pg.263

<sup>19</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 133

<sup>20</sup> Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.37

despite work and good health, were unlikely to be able to support themselves from week to week without assistance.”<sup>21</sup>

To elaborate on this point further, Malthus<sup>22</sup> provided a scientific examination of the consequences of population growth, and in doing so outlines the effect this had on the poor. “An increase of population without a proportional increase of food will evidently have the same effect in lowering the value of each man’s patent. The food must necessarily be distributed in smaller quantities, and consequently a day’s labour will purchase a smaller quantity of provisions.”<sup>23</sup> The harsh reality was that the poor had to live for today rather than tomorrow, and this constant battle with the short term must have been one of desperate survival. A bad harvest accompanied by population increase must have left the poor in dire straits and it will come as no surprise if crime rates were higher during bad harvests, which we will examine later on. “On the most basic level of all, agricultural production could barely keep pace with population increase, with resultant high mortality and fear of disorder in years of bad harvest. Even the years of average harvest were not comfortable for the poor. A rising population meant a buyer’s market for labour, and real wages may have been lower in some trades.”<sup>24</sup>

Although the conditions of the poor were getting worse, other areas in eighteenth century life

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<sup>21</sup> Sharpe, J.A. (1999) *Crime in early modern England 1550-1750 Second Edition* New York (Addison Wesley Longman) pg.264; Sharpe outlines that this was after an era of relative stability in early eighteenth century and appears to have been influenced in his thoughts by Davison, L. Hitchcock, T. Keirn, K. (1992) *Stilling the Grumbling Hive: The Response to Social and Economic Problems in England, 1689-1750* Stroud (Palgrave MacMillan)

<sup>22</sup> Malthus, T.R. (1798) *An essay on the principle of population, as it affects the future improvement of society. With remarks on the speculations of Mr. Godwin, M. Condorcet, and other writers* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>23</sup> Malthus, T.R. (1798) *An essay on the principle of population, as it affects the future improvement of society. With remarks on the speculations of Mr. Godwin, M. Condorcet, and other writers* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.82

<sup>24</sup> Sharpe, J.A. (1999) *Crime in early modern England 1550-1750 Second Edition* New York (Addison Wesley Longman) pg.263

were progressing. National transport had made significant improvements<sup>25</sup>, thanks to the turnpike system. “The 1730s witnessed one of the most striking developments in the history of transport - the construction of a nation-wide turnpike system. Before 1730, only a handful of turnpike trusts had been established.”<sup>26</sup> The likes of Manchester and York had been three days travel from London in the 1720's; by 1780 it could take little over twenty four hours. There also appears to have been an emphasis on space, hygiene and order. “The expanding towns of Manchester and Glasgow were much admired by visitors for their spacious squares, and neat rows of houses and warehouses. By comparison, the cluttered townscape of the older centres, with its narrow streets and timber-and-thatch housing, seemed outdated and even barbarous.”<sup>27</sup> What is barbarous is that the poor if they could find work were on terrible wages for less food, whilst narrow streets were frowned upon, but this just reflects the distorted progression of the eighteenth century. The relief of poverty needed to be dealt with, but there was going to be no quick fix.

The consequence of the poor man's misery came in the form of gin. It was cheap and sold everywhere because a licence was not required to sell it. Whilst it ruined many of the poor's health, it probably acted as a comfort to them and gave them an escape from the brutal reality in which they were living. Although, some you could say were a little bit too reliant on it. “In one notorious case of 1734, a woman named Judith Dufour collected her two-year-old child from the workhouse, strangled him, dumped the body in a ditch and sold the child's new set of clothes for 1s and 4d to buy gin.”<sup>28</sup> Unsurprisingly this comfort was not accepted by the ruling class. They believed it to cause mischief, so the legislators got to work on preventing the poor from drinking their gin. “In a charge to the

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<sup>25</sup> Road conditions were terrible pre-eighteenth century. Even in fine weather, coaches would stick in the slough. See; Walters, C. (1920) *An economic history of England: 1066-1874* Oxford (Clarendon Press) pg.287; “A viceroy travelling to Ireland in 1685 took 5 hours to travel the 14 miles between St.Asaph and Conway, and coaches in the Weald were usually drawn by oxen. In the west and south-west everything was carried on horseback; in Cardigan villages in 1730 sledges were used instead of wagons. The main cause of the state of the roads was the want of any generally responsible authority. Each parish was responsible for the part that passed through it, and obvious injustice that was evaded by neglect.”

<sup>26</sup> Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.32-33

<sup>27</sup> Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.37-38

<sup>28</sup> <http://www.history.co.uk/explore-history/history-of-london/mothers-ruin.html> accessed on 05/03/13

Grand Jury in 1725 Sir Daniel Dolins, Chairman of the Middlesex Bench, denounced it in these words: ‘The Cry of the last mention’d Wickedness, I mean excessive drinking Gin, and other pernicious Spirits, is become so great, so loud, so importunate; and the growing Mischiefs from it so many, so great, so destructive...especially...(to) ... the lower, poorer Sort of People; that I can no longer doubt, but it must soon reach the Ears of our Legislators’. Similar calls were made by the Westminster Justices...and by committees of justices of 1726 and 1735.’<sup>29</sup>

The Gin Act of 1736<sup>30</sup> was inevitably going to lead to the curtailment of drinking gin among the poor<sup>31</sup> but it did not last even seven years. The reality was that the Gin Act had not prevented the poor from drinking gin, it had now become a dark trade whereby spirits were sold secretly and the vendors were concealed.<sup>32</sup> This Act did not just attack the poor, but the traders too, leaving even more people unemployed and needing support. The drinking of gin was the consequence of the lives the poor lived, but it is highly likely that many did commit crime whilst intoxicated. The argument as to whether crime was committed by unemployment or idleness could go on, but the simple facts were that imposing a restriction on gin was not going to solve the problem of crime and poverty alone, but it may have been the first steps to tackling such problems.

It turned out that the Gin Act of 1736 was quite simply an act too far for the poor. Sir Joseph Jekyll who promoted the Act found this out the hard way, as he had to be protected in his house against the fury of the mob. The saying, ‘treat others as you would want to be treated’ springs to mind, and this point is made by Defoe. “Moreover, as time went on, in the publications of the reforming societies there was an obvious tendency to thunder against the vices of the poor whilst

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<sup>29</sup> Radzinowicz, L. (1956) *A History of English Criminal Law and its administration from 1750 Volume 2 The Enforcement of the Law* London (Stevens and Sons Ltd) pg.11

<sup>30</sup> 9 Geo II, c.23

<sup>31</sup> Retailers selling less than two gallons of spirits at a time had to obtain a licence every year for £50 with a further twenty shillings to be paid on each gallon sold in any less quantity.

<sup>32</sup> Radzinowicz, L. (1956) *A History of English Criminal Law and its administration from 1750 Volume 2 The Enforcement of the Law* London (Stevens and Sons Ltd) pg.13

saying nothing about similar failings among the rich, and this was often criticised, notably by Defoe. ‘Till the Nobility, Gentry, Justices of the Peace and Clergy will be pleased either to reform their own Manners, and suppress their own Immoralities, or find out some Method and Power, impartially to punish themselves when guilty.’<sup>33</sup> Poor harvests again were to lead to further misery among the poor. If it had not stopped them from earning a living, it had now stopped them from drinking gin due to the rising cost of grain, although this curtailment was assisted by the Gin Act of 1751<sup>34</sup>. Although this may have been a positive step towards changing the habits of the poor it was not gin alone that would solve the issue of crime and poverty.

The reformers from chapter three will provide us with proposals for relieving poverty and crime (which often complimented each other), but it is important to note that efforts were being made to resolve this issue in early eighteenth century. ‘Attempts to find work for the pauper were made all over the country at different times, and in 1723 an Act was passed empowering every parish to build a workhouse for this purpose.’<sup>35</sup> What certainly exacerbated this situation was the longer the eighteenth century progressed the more exaggerated this problem of crime and poverty became, largely due to population increase. This in turn resulted in the shifting of responsibility, particularly in the second half of the eighteenth century. ‘The cost of maintaining poor persons increased alarmingly. As a result, parishes began to implement with some severity the settlement provisions of the 1662 Poor Law Act, returning paupers to other parishes if they had no settlement where they were seeking relief.’<sup>36</sup> The link between crime and poverty appeared to be increasing and led the ruling classes to protect their property more frequently through laws such as 7 Jac. 1 c.4 (which

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<sup>33</sup> Radzinowicz, L. (1956) *A History of English Criminal Law and its administration from 1750 Volume 2 The Enforcement of the Law* London (Stevens and Sons Ltd) pg.15

<sup>34</sup> 24 Geo II, c. 40

<sup>35</sup> Walters, C. (1920) *An Economic History of England: 1066-1874* Oxford (Clarendon Press) pg.296

<sup>36</sup> Watkin, T. (2012) *The Legal History of Wales; Second Edition* Cardiff (University of Wales Press) pg.163



made it a crime to be ‘idle’)<sup>37</sup>. The class-divide was becoming ever more apparent as the eighteenth century progressed, but there was no quick fix to this problem. Sokoll exemplifies a typical poor family in need of help via a pauper letter from George Oliver to Mr. Long (overseer of West Thurrock) in 1770. “Mr Long Overseer Sir I hope the gentleman will take it in consideration to allow me something a week for my family the gentleman you have got a family and you must now than a little how to keep a family I have been ill fourteen weeks and I aint had only ten shillings of you and haw do you thing I must keep my family so I have three shillings a week to pay house rent I never trouble you for any think when I am weell It aint my wish now If I could help it there is six of us in family there is nare a one of them able to bring anything in I cant set here and see my family want when I am close to my own parish I hope in a little while I shall be able to come out again and then I shant want to trouble you gentleman no more I thank you sir to send me an answer.”<sup>38</sup> This one letter consists of six people in need of help; it was simply not going to be sustainable for this to carry on. How long could parishes relieve their poor in such numbers?<sup>39</sup> The issue of poverty and crime was left largely unresolved throughout the eighteenth century, but the Penitentiary Act was going to attempt to solve this problem, as we shall see later on in this thesis.

The final part of this section is in relation to war time. It would be negligent of us to discuss the social factors that affected eighteenth century society without some appreciation of the wars Britain was involved in. After all, for over a third of the Hanoverian period, Britain was involved in international wars.<sup>40</sup> The three main wars that affected this thesis were the War of Spanish Succession (1701 to 1714), the Seven Years War (1756 to 1763) and the American Revolution War

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<sup>37</sup> See; Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press); “Commitments to both the Middlesex and Westminster houses increased dramatically between 1690 and 1717; over the period 1680-1725 commitments to the Westminster house increased by at least 86% and between 1660 and 1725 the number of prisoners in the Middlesex house of correction in Clerkenwell at the time sessions met increased by 165%.” pg.167

<sup>38</sup> Sokoll, T. (2001) *Essex Pauper Letters, 1731-1837* Oxford (Oxford University Press) pg.608

<sup>39</sup> See; Sokoll, T. (2001) *Essex Pauper Letters, 1731-1837* Oxford (Oxford University Press) pg.10; “Under the Old Poor Law, that is up to 1834, all parishes in England (or townships in the northern counties) were statutorily required to relieve their poor.”

<sup>40</sup> [http://www.bbc.co.uk/history/british/empire\\_seapower/overview\\_empire\\_seapower\\_01.shtml](http://www.bbc.co.uk/history/british/empire_seapower/overview_empire_seapower_01.shtml) accessed on 20/01/13

(1775 to 1782). The American War is of the greatest importance to us because it put a stop to transportation at a critical time for the protagonists of the Penitentiary Act, but there is no doubt the likes of the Seven years' war represented a high point of imperial achievement.<sup>41</sup> The domestic impact of these wars is of huge importance to us, and the cost of these wars was staggering given the proportion of the poor that needed support back home. "The cost of the wars amounted to almost £150 million in an age when peacetime expenditure was thought excessive at £2 million per annum. This vast outlay required a corresponding rise in levels of taxation, with widespread political repercussions. But more interesting in retrospect is the fact a large proportion of the bill, approximately one-third, was met by borrowing."<sup>42</sup> The income of unborn generations of taxpayers was being used as a mortgage.<sup>43</sup> Therefore the consequences of these wars were to live in society for far longer than the eighteenth century. In summary, unprecedented high taxes and the rapid growth of the National Debt reinforced the financial crisis and created serious economic problems. This in turn raised questions about the Government, Parliament, and the political system generally. Ethical questions could have been asked as to whether it was right to prioritise expenditure on war over the suffering of a country's own people, but such a question alone could fill a whole thesis. More importantly to us, is where was the money going to come from for a reform effort to the proposed scale of the Penitentiary Act? This was going to be a serious issue.

War time came with its own strengths and weaknesses, it sunk the nation into greater national debt but it also provided temporary relief to crime and punishment for it released large numbers of the poor and criminals. To elaborate on this, King points out (admittedly post Penitentiary Act) that large numbers of men who left the British Isles during a war tended to be young, and unemployed. Between 1782 and 1800 for home circuit sentences and reprieves for property crimes, six hundred

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<sup>41</sup> See; Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.69

<sup>42</sup> Langford, P. (2000) *Eighteenth-Century Britain; A very short introduction* Oxford (Oxford University Press) pg.6

<sup>43</sup> See; Walters, C. (1920) *An Economic History of England: 1066-1874* Oxford (Clarendon Press) pg.306 "During a period of 75 years 40 years of war added 124 millions to our National Debt."

and seventy two offenders out of one thousand three hundred and forty six were between seventeen and twenty six years of age. Also three hundred and twenty five were between twenty seven and thirty five, which reflects the rather young age of many offenders.<sup>44</sup> The removal of these young offenders obviously assisted in reducing crime but also provided less competition for employment until the coming of the peace.<sup>45</sup> “As wars began and the forces were recruited, large numbers of young men were carried off to the army and navy, willingly or not. Their removal from the capital must have created better chances to find work for those left behind, especially since war also stimulated some aspects of the economy. On the other hand, the coming of peace created a problem for all of those seeking work in London. The forces were always demobilized rapidly, and in London this increased competition in the labour market just as war stimulated work was coming to an end.”<sup>46</sup>

If a larger proportion of the population was likely to get employed this surely helped reduce the levels of crime, however society was still ever reliant on good harvests and no trade disruptions. There was also the question of what do you do when these troops come back after the war? Probably panic that there was another crime wave. Beattie outlines the effects the War of Spanish Succession had on society. “Better harvests and a fall in prices in 1700, on the other hand, relieved some of the difficulties experienced by the working population; and perhaps even more the war that began two years later, a war in which exceptionally large forces were raised for the army and navy, and in which a more effective convoy did something to protect English trade. Lower prices and the greater availability of work than in the 1690s seem likely to explain why the number of indictments for property offences fell sharply in the War of Spanish Succession, at least until, once again, the advantages of a wartime economy were offset by a sharp upturn in food prices in 1709-11 following

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<sup>44</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 288

<sup>45</sup> Although Beattie remarks that some 8,000 immigrants arrived in London every year. See Beattie, J.M. (2001) “*Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror*” Oxford (Oxford University Press) pg.41-42

<sup>46</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.42

two disastrous harvests and the fall in prosecutions that had been taking place since the early years of the century was arrested and reversed. In 1713 prosecutions for property crime rose even more sharply as the war ended and the troops were demobilized, even though food prices had moderated by then.”<sup>47</sup> To summarise war time clearly had a significant impact on crime and punishment. It appeared to provide temporary relief from crime and poverty, but created crisis in peace time. It offered imperial achievement but economically reduced the nation to large debts, and whilst it sent many young potential criminals out of the country, it still put a halt to some trade and punishments, which as we will see in chapter four, had dramatic effects.

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<sup>47</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.45

## Religion

*“Yet religion mattered a great deal in the eighteenth century to those who managed the criminal law, because Christianity is itself a system of criminal justice, the Christian worldview was dominant, and it was seen as normative. Today many hold the separation between religious belief and the law as an ideal, but at that time commentators tended to collapse the boundaries between sacred and secular.”<sup>48</sup>*

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<sup>48</sup> Throness, L. (2008) *A Protestant Purgatory; Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.8

It may seem that we are doing religion a disservice by merely writing five pages on this topic, but we must be disciplined. There is no doubt that the religious aspects of the eighteenth century played a key role in the birth of the Penitentiary Act. However, some of our reformers in chapter three will provide unique religious viewpoints through their own proposals, so we will be engaging with the religious aspects of the eighteenth century throughout this thesis. As Throness points out, these reformers, “made explicit reference to the integral place of the Almighty in the judicial framework.”<sup>49</sup> Therefore this section shall be a very brief overview of religion in England and Wales, and in doing so we shall satisfy Sydney’s criteria for completeness. “No sketch, however slight, of the social condition of England in the last century can lay any pretensions to completeness if it does not include some account, although it is but a very cursory one, of the religious world of the time.”<sup>50</sup> We will firstly examine the state of religion in the eighteenth century and then consider how it could affect or change crime and punishment and essentially assist in an effort towards the Penitentiary Act.

The state of religion in the eighteenth century was relatively calm, at least for the first eighty years. The seventeenth century had faced conflicting concepts of Protestant establishment, but the religious Settlement of 1662 recognised that religious uniformity would not be possible. Britain unlike many parts of Europe seemed tolerant towards religious minorities<sup>51</sup>; although divisions were made between Whigs and Tories as to how much toleration should be given to Protestant dissenters throughout the eighteenth century.<sup>52</sup> An interesting contrast in thoughts between the Protestants and the Catholics was the doctrine of a purgatorial intermediate state. Protestants were absolutely clear

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<sup>49</sup> Throness, L. (2008) *A Protestant Purgatory; Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.8

<sup>50</sup> Sydney, W.C. (1891) *England and the English in the eighteenth century* London (MacMillan) pg.322

<sup>51</sup> Unlike France; see Yates, N. (2008) *Eighteenth-Century Britain 1714-1815* Harlow (Pearson Longman) pg.6; “In most of southern Europe, and in France after the revocation of the Edict of Nantes in 1688, only the Roman Catholic Church was recognised and Protestants were persecuted.”

<sup>52</sup> The Toleration Act 1689 provoked this debate further.

that there could be no moral improvement after death but Catholics in contrast believed in purgatory. The Protestants believed that those who sinned in the hope of being purified went to hell, which was deemed the greatest of terrors. The greatest of terrors on earth for the majority of the eighteenth century was capital punishment, but this offered little opportunity for moral improvement before death. The Penitentiary Act was to attempt to change this notion in the last two decades of the eighteenth century.

This idea of reformation was a critical one towards the Penitentiary Act, and the story of Adam and Eve was one area of biblical thought that complimented proposals for the sinful to be reformed, as Throness argues. “It helps to explain the attempt to recreate for convicts that first condition of stillness and seclusion, the condition of Adam alone with God in the Garden. Solitude and darkness would activate the terror and repentance that resulted from the consciousness of His gaze, facilitating a ‘gospel conversation’ with the Almighty that would begin the heart’s amendment.”<sup>53</sup> If Adam could be reformed then other offenders could clearly be saved, it was this point that proved so valuable to the Penitentiary Act in the last quarter of the eighteenth century. “Mankind’s ‘first parent’ offered the faithful an illustration of the redemptive nature of correction. After Adam’s wilful disobedience he was thrust out of Eden and sentenced by God to a life of hard labour, in sorrow, on a ‘low diet.’ This work was not only punishing, however, the pattern of religious industry taught by the Sabbath showed that work was redemptive, producing the virtue that would lead Adam back to Paradise at death.”<sup>54</sup> It is unclear how much the Adam and Eve story shaped the opinions of those advocating reformation, but it does appear that there was a growing sense in the eighteenth century that crimes may be addressed on earth in order to get into heaven and this was a critical theory, for it eventually saved many lives from the gallows, and shifted the balance

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<sup>53</sup> Throness, L. (2008) *A Protestant Purgatory; Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.245

<sup>54</sup> Throness, L. (2008) *A Protestant Purgatory; Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.296

of punishments towards the Penitentiary Act.

Societies such as one for the Reformation of Manners<sup>55</sup>, in the last decade of the seventeenth century had already looked at reforming the manners of the people, to ‘awaken the sleeping vigour of laws against vice and immorality.’<sup>56</sup> These societies clearly had some effect, because the eighteenth century witnessed an influx of religiously inspired reformers.<sup>57</sup> Peter Nourse (chaplain to Queen Anne) believed breaking serious offenders on the wheel and putting minor felons in houses of correction would assist criminals in finding their mercy.<sup>58</sup> William Dawes, the Archbishop of York<sup>59</sup> asserted in a sermon that hard labour was retributive. MP William Hay<sup>60</sup> recommended a lifetime at hard labour because work would extend its benefit from body to soul and from this life to the next, and Alcock in 1752 believed that rogues and vagabonds should be brought to earn their own bread.<sup>61</sup>

Such optimism that the sinner could be saved brought us right up to the middle of the eighteenth century<sup>62</sup>, and clearly set the ball rolling towards reforming the offender. However, special attention must be provided to the Bishop of Cloyne, George Berkerley, who in 1735 asked questions that were to be highly relevant towards the Penitentiary Act (nearly half a decade before the Act’s drafting). He asked, “Whether some Way might not be found for making Criminals useful in public Works, instead of sending them either to America, or to the other World?.. Whether we may not, as well as other Nations, contrive Employment for them? And whether Servitude, Chains, and hard Labour, for a Term of Years, would not be a more discouraging, as well as a more adequate

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<sup>55</sup> 1691

<sup>56</sup> See; Radzinowicz, L. (1956) *A history of English Criminal Law and its administration from 1750 Volume 2 The Enforcement of the Law* London (Stevens and Sons Ltd) pg.4

<sup>57</sup> Even before our reformers from chapter 3

<sup>58</sup> Throness, L. (2008) *A Protestant Purgatory; Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.134; “Felons should find their mercy not through the penal system, but in God ‘through the Merits of Christ Jesus.’”

<sup>59</sup> Archbishop from 1714-1724

<sup>60</sup> MP from 1734-1755

<sup>61</sup> Alcock, T (1752) *Observations on the defects of the poor laws, and on the causes and consequences of the great Increase and Burden of the Poor. With a Proposal for redressing these Grievances. In a Letter to a Member of Parliament* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.69; “Instead of continuing Rogues and Vagabonds, and preying upon other Men’s Lives, and Labours, and Properties, they would be brought to earn their own Bread.”

<sup>62</sup> and the beginning of chapter 3



Punishment for Felons, than even Death itself?.. Whether there are not such Things in Holland as bettering Houses, for bringing young Gentleman to Order? And whether such an Institution would be useless among us?”<sup>63</sup> The fact that such questions were asked over four decades before the Penitentiary Act was established, may suggest that it was an age of enlightenment rather than the reformers that executed the movement towards the Penitentiary Act, but our conclusions from chapter three may suggest otherwise. What we can ascertain from this section is that religion became the rock towards reformation throughout the century. From William Hay to John Howard, the intentions remained religiously inspired.

The fact that established Churches in the eighteenth century did not have a complete monopoly of religious belief among the people probably assisted revolutionary thought towards crime and punishment. It safeguarded thoughts from different perspectives, which in turn offered hope that offenders could now be reformed. “To those, who believed that the increase in immorality and thus in crime sprang fundamentally from the disintegration of the manners and habits of the working poor and of their neglect of their religious duty, such training in prison promised the most direct possibility of real reformation.”<sup>64</sup>

Although these minor thoughts at the time were all religiously inspired, we must note that after eighty years of moderate religious tension, the first Catholic Relief Act<sup>65</sup> in 1778 provoked increased religious tension in the eighteenth century. This Act meant that Roman Catholic’s were now allowed to purchase land legally and priests were freed from the threat of arrest and imprisonment. This was a step too far for the Protestants because it supposedly put their constitution under threat. Consequently, many small towns and villages raised petitions for the repeal of the Act

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<sup>63</sup> Throness, L. (2008) *A Protestant Purgatory; Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.136

<sup>64</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.569

<sup>65</sup> 18 Geo III, c. 60

and prevention of any further Roman Catholic Relief. This opposition reached new heights in 1780 via the rioting of Chapels, Roman Catholics homes and prisons. “The rioters attacked Newgate gaol, released all the prisoners and set the gaol on fire. Other prisons and business premises were attacked, one being a distillery where the alcohol burst into flames burning several of the employees alive.”<sup>66</sup> Although the Penitentiary Act had already been implemented, these riots give us some indication as to the religious and political sensitivities of the day. One Act provoked riots and cost many their lives. The social climate was no doubt a testing one, but the likes of Alcock and Berkerley certainly lay a small path for the reformers in chapter three to follow. The idea of reforming the offender was to prove an intriguing proposal and would eventually conform itself to the heart of the Penitentiary Act.

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<sup>66</sup> Yates, N. (2008) *Eighteenth-Century Britain 1714-1815* Harlow (Pearson Longman) pg.43

## Crime

*“J.H.Plumb, mentioned crime and the criminal law as one element in the supposed brutality of the age. A familiar picture was conjured up of gin-drinking, ineffective parish constables, the London slums, and Tyburn, while ‘the brutality and ferocity of life ... prevalence of dirt, disease and poverty’ was commented upon. In such a world, it is little wonder that ‘angry mobs, burning and looting’ were as prevalent as disease’. Even works of this vintage claiming to deal with economic and social history had little of any value to say about crime.”<sup>67</sup>*

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<sup>67</sup> Sharpe, J.A. (1999) *Crime in early modern England 1550-1750 Second Edition* New York (Addison Wesley Longman) pg.2

All of the social factors we have looked at so far have affected crime or punishment in one way or another. What we must do now is examine how crime became such a problem in the eighteenth century and evaluate how this resulted in the reform towards the Penitentiary Act. An examination of crime and then punishment in chapter two should provide us with a general overview of how society perceived and punished crime, this will then lead us to the remaining chapters, outlining how thoughts in crime and punishment altered through the eighteenth century.

The first part of this chapter explained the problems with class divide, and King's statistics on crime will conclude this chapter with similar findings. We must firstly appreciate which crimes were being committed and then assess who was committing these crimes. For this part of the thesis, Peter King has been invaluable to us. To begin with, between 1748 and 1767, 61.8% of property crime indictments at the Essex Quarter Session were grand and petty larceny. Burglary and house breaking were the second biggest crimes at 10.6%.<sup>68</sup> This leads us to conclude with confidence that grand and petty larceny made up a significant proportion of crime in Essex. When we examine the occupation or social status of those indicted for petty larceny in Colchester and Essex, a correlation is found between crime and the poor. Between 1750 and 1775 at the Essex quarter sessions, 78.8% of males and 21.2% of females were indicted, and consequently 63.4% were labourers whilst a further 25.3% were tradesman and artisans<sup>69</sup>. A mere 0.6% were professionals and 1.2% were farmers or yeomen, so there was a clear divide between the poor and upper classes. At the Colchester borough sessions, between 1764 and 1782, 67.1% of those indicted for petty larceny were male and 32.9% female, 56% of these were labourers and 38% were tradesmen and artisans. No professionals or farmers were indicted. In fact husbandmen at 4% and sea and water trades at 2% completed this list.<sup>70</sup> These findings compliment the belief that the poor generally committed property crimes, which the

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<sup>68</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg.137

<sup>69</sup> Tradesman and artisans were divided as; innkeepers and victuallers, food processors, shopkeepers and traders, building workers, metal workers, metal workers, clothing and leather trades, cloth manufacturing trades and other trades.

<sup>70</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 209

Penitentiary Act sought to address.

Game theft was however one of the crimes that witnessed a broader social group of offenders, which suggests that the working class were not the only ones who committed crime. Between 1748 and 1804, 99.5% of males were summarily convicted of game theft, whereby 58.9% were labourers and 17.8% were tradesmen and artisans. These were the two most common offenders, however gentleman and farmers did form one fifth of game theft crime in Essex. 15.5% were yeomen or farmers and 5.4% were gentleman.<sup>71</sup> Wood and vegetable theft<sup>72</sup> along with yarn theft<sup>73</sup> was again predominantly committed by labourers, tradesman and artisans, but the game theft statistics are significant findings. It reflects a slight coming together of the class divide, and shows that the middle to upper classes were prepared to commit crime for game. We admittedly cannot exaggerate this situation too much because it is quite clear that labourers, tradesman and artisans committed a large proportion of grand and petty larceny, but it is evident that some of the gentry did commit crimes like the poor. It will always be a struggle to determine an absolute simple correlation between class and crime, but what King's statistics do provide us with is a common trend that the poor predominantly committed property crimes. How these crimes were to be punished will be explored in the second chapter, which will prove vital to the progression and implementation of the Penitentiary Act.

Another intriguing statistic in relation to crime in the eighteenth century is the varying nature of crime and prosecutions. The reason for such variety one would suspect was a consequence of the social conditions in this very chapter. "The last decades of the seventeenth century and the first of the eighteenth saw particularly sharp fluctuations in prosecutions. The 1670s and the 1690s were

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<sup>71</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 210

<sup>72</sup> 86.4% labourers, 7.3% tradesman and artisans, 0.9% yeomen or farmer, 0.9% gentleman; King, P. (2000) "*Crime, justice and discretion in England, 1740-1820*" Oxford University Press pg. 210

<sup>73</sup> 100% tradesman and artisans; King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 210

decades of higher than average levels, with the last years of the century sustaining a notably strong increase in prosecutions; the 1680s and the first decade of the eighteenth century were almost their mirror image.”<sup>74</sup> War, population growth, agriculture, trade and social harmony were all contributory factors towards crime levels. We gathered from King’s statistics that in Essex, labourers, tradesman and artisans dominated crime for petty and grand larceny. This would lead one to assume that many of these workers were unskilled and dependent on seasonal work. If these labourers were left unemployed due to a bad harvest or work was not available, each labourer was left in a vulnerable position.

How society was going to reduce crime within the poor class was going to be a tough assignment for any era. With a population increasing and consequently the number of poor increasing with it, immorality had the potential to spread like wild fire. “Vice and immorality were widely agreed to be the breeding grounds of crime: what began as blasphemy or breaking the Sabbath or gambling or drunkenness, it was frequently said, would almost certainly lead, if unchecked, to pilfering and theft and then on and on inexorably to the most serious offences.”<sup>75</sup> If these ‘breeding grounds of crime’ were not prevented, it is hard to see how society could get a grip on these crimes, and this is the point that Alcock makes. “You may hang, or transport, or cut off a Number of Felons at this Sitting, but, like Hydra’s Heads, there will be more spring up by the next, and ever will do so, as long as idle Vagrants, who continually furnish a fresh Supply, are suffered to go as they do, unmolested.”<sup>76</sup> The signals were that these core problems within society were there to stay. Society needed to sit up and listen to Alcock because hanging and transporting was in danger of

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<sup>74</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.40

<sup>75</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.323

<sup>76</sup> Alcock, T (1752) *Observations on the defects of the poor laws, and on the causes and consequences of the great Increase and Burden of the Poor. With a Proposal for redressing these Grievances. In a Letter to a Member of Parliament* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.69

losing its sting. The poor had the potential to breed and spread immorality through the heart of the country whilst executions and transportation would merely become a generic conveyor belt for punishing the poor. We will explore these problems in the next chapter.

The social, economic and cultural background of the eighteenth century is enthralling, intriguing and quite simply depressing. It is one of progression and development but also anxiety and dilemma. Whilst museums were being built, the poor were left starving, desperately awaiting their next shift. The land owners counted their profits whilst the poor battled for survival. At first you cannot help but feel sorry for the poor, but when you detach yourself from the problem and look at it analytically, this was a very real and serious issue. The population was growing and the poor were becoming a greater burden on society. The competition for employment was getting greater and greater and consequently crime was fluctuating. Upper classes were running scared of crime and creating legislation that had all ingredients of selfishness and ignorance, yet little was being done to solve the root cause of the problem. Religious reformers had what appeared to be the answer, reform the useless members of society into useful ones, but it was not quite that simple amid religious tensions. Capital punishment and transportation took the limelight for over half of the eighteenth century, but every crime wave left a deadly mark on the legitimacy of each of these punishments. The reformers may be needed to urge reform, but the social factors in the eighteenth century exposed a problem that would not go away easily. The poor were here to stay, and three punishments became major components in tackling such immoral behaviour. If society was ever at a crossroads it was at this very moment. How crime and poverty were to be addressed would influence the history of crime and punishment in the strongest of ways. Whispers of reform had breezed past the governments ears, but society was on the periphery of reform. The strengths and weaknesses of the punishments in the next chapter will help tip the balance and expose the dark truths of punishment in the eighteenth century. For now society stood tentatively awaiting a solution.

## 02 - The Punishments: Capital Punishment, Transportation & Imprisonment



The eighteenth century was a defining moment in the history of crime and punishment. A graph chart by Beattie<sup>77</sup> reflecting the pattern of punishment for crimes against property in Surrey, emphasises this point. Benefit of clergy and whipping were at their height in early eighteenth century, punishing over seventy per cent of offenders. By 1720 this was down to thirty per cent and it never got any higher for the rest of the century. In contrast, transportation and imprisonment was under thirty per cent until 1720 and after this point the lowest it got to was fifty per cent for the rest of the century. Meanwhile capital punishment remained consistent at under thirty per cent throughout the eighteenth century. This tells us that significant changes were taking place in crime and punishment. How and why this happened will be explored in this chapter, because the fluctuating dynamics of such punishments will prove to be an important catalyst towards the introduction of the Penitentiary Act.

Chapter one has reflected that the main products of crime were committed by the working class or idle and much of this crime was either grand or petty larceny. Whilst we must accept that punishments such as whipping and fining were used in punishing petty offences, this was not where the problem lay. The Penitentiary Act's penal spectrum was found within offenders destined for the gallows or transportation. In this chapter we must outline the purpose, practice and problems with capital punishment, transportation and imprisonment. In doing so, we will explore how notions of reformation came to exist against the deterrent theories behind capital punishment and transportation.

Whilst statistical evidence will prove to be an important component in explaining the purpose, practice and problems of each punishment, we must accept that there is no uncontested story. Statistical surveys on the eighteenth century have proved both rewarding and challenging. Attempting to tie all the statistical evidence into a solid argument would have tested even a

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<sup>77</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.620

mathematician at times. However, we should be grateful for the works of Beattie, Rawlings and King for attempting to outline the facts of the century. The statistics we will use may not correspond to the national picture in the perfect way, but should outline trends that were common in the era. As we mentioned in chapter one, much data is from London so trying to complement it with figures outside London has proved to be a limited area.

All three punishments were influenced in some way by the benefit of clergy and this is why it is important to address this now. Such a benefit was a mechanism of avoiding the death penalty for a lesser offence. This took place by the courts either deferring a punishment to Church officials or sentencing via the benefit of clergy themselves. It is important to note that some offences such as housebreaking and murder were deemed non-clergyable offences so had to be punished by the courts, but the use of this benefit was significant throughout the eighteenth century. For capital punishment it provided the courts with an alternative to execution, and for transportation and imprisonment it meant crimes could be reduced to either seven years transportation or a number of months or years in a house of correction. Although we will not explore the benefit of the clergy any longer the influence it had on each of these punishments will become apparent throughout.

At the conclusion of this chapter we should have the relevant knowledge required to appreciate the build up to the Penitentiary Act. Whether this was via the circumstances of the time or the individual reformers will remain an unanswered question. However, the decline of certain punishments in this chapter will provide us with the facts required to understanding the movement towards the Penitentiary Act.

## Capital Punishment

*“To put it simply, a society which is executing only a tenth of the criminals it was executing a century previously is either experiencing considerably less crime, worrying less about the crime it is experiencing, or being affected by a combination of these factors.”<sup>78</sup>*

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<sup>78</sup> Sharpe, J.A. (1999) *Crime in early modern England 1550-1750 Second Edition* New York (Addison Wesley Longman) pg.263

Capital punishment before the eighteenth century was seen as a useful tool in deterring the public. “75,000 people are thought to have been executed in the century 1530-1630, and nothing like this was seen again.”<sup>79</sup> However, whilst vast numbers of felons continued to be executed, there were signs of a decline in the build-up to the eighteenth century. Radzinowicz<sup>80</sup> documented that in the final eleven years of Henry VIII’s reign (sixteenth century) there was an average of five hundred and sixty executions per annum at Tyburn. By the reign of Charles I (seventeenth century) there were ninety executions per annum. A decline to this level would not be healthy for any punishment, but the hard facts were that capital punishment would continue into the eighteenth century because the limited penal framework needed it to.

Searching for a defined purpose of capital punishment in the eighteenth century proved far more difficult than first anticipated. However, Beattie’s explanation of capital punishment post 1660 is useful to us in that it is concise and accurate. “It remained widely agreed that some offences and offenders were particularly deserving of capital punishment and that in the course of a criminal career men reached a point of moral collapse from which they were unlikely to be reclaimable. Their execution rid society of dangerous individuals and at the same time served as a frightening example to others who might still pull back from that moral abyss.”<sup>81</sup> Therefore, capital punishment was essentially an effective way of getting rid of the dangerous in society, whilst deterring potential offenders. Hanging a criminal seems an obvious deterrent, but it was not just the death that was important but the spectacle of the death.

The death of the guilty criminal was a symbolic one and exposed the consequences of disobeying the law in a dramatic and public fashion. Felons were mounted for the crowds so they

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<sup>79</sup> Gatrell, V.A.C. (1994) *The Hanging Tree : Execution and the English people, 1770-1868* Oxford (Oxford University Press) pg.introduction

<sup>80</sup> Radzinowicz, L. (1948) *A history of English criminal law and its administration from 1750 Volume 1 The movement for reform* London (Stevens and Sons Ltd) pg.142

<sup>81</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.622

could recognise the power of the law, which in theory would deter immoral behaviour. Executions were so popular in Tyburn, that the triple tree was created in the sixteenth century, which allowed crowds to watch mass executions take place simultaneously. Men and women were hanged eight times a year at Tyburn and Newgate, or once or twice a year in most counties in front of an average crowd of five thousand people.<sup>82</sup> However the frequency of such executions questions whether the crowds were actually becoming detached from the reality of death. Whilst the spectacle element showed the might of the law it may have also hardened the minds of the public, which in turn weakened its deterrence. Perhaps a notable turning point in thoughts towards capital punishment may be found in 1777, in the case of Dr. Dodd.

The execution of Dr. Dodd brought with it a crowd of thousands and was a brutal awakening to society. Dr. Dodd was found guilty of forgery but was a respected and fashionable figure who had preached to many and even sat in parliament with Earl Ferrers. Most would have anticipated he would be pardoned from his crime, because men like Dr. Dodd simply did not get executed. However, in this circumstance he did. “May it ever be remembered, from the very striking example of Dr. Dodd, that an expensive man, who lives beyond the bands of his circumstances, soon loses the sensibility which is the guardian and protector of his honour.”<sup>83</sup> The timing of Dr. Dodd’s execution is significant to us because at the same time as agitation arose towards his death, legislative progress was being made towards the Penitentiary Act.

Capital punishment in practice appears to have been one in decline, but the extent of its decline appears to be varied by statistics. The greatest example of this is between Rawlings and King. Rawling’s stated that during Queen Anne’s reign (1702-1714) about 10% were executed and

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<sup>82</sup> See; Gatrell, V.A.C. (1994) *The Hanging Tree : Execution and the English people, 1770-1868* Oxford (Oxford University Press)

<sup>83</sup> “*An account of the life, death and writings of Dr. William Dodd*” pg.21

the rate continued to fall<sup>84</sup>. However, Beattie's statistics from Essex suggest that 40% of convicts were executed in the late 1740s and early 1750s, and then it dropped to 10% by 1760.<sup>85</sup> Whilst we must appreciate that statistics in such an era may not be nationally applicable, we must find a common trend.

This common trend finds that capital punishment was deeply rooted in uncertainty. Between 1660 and 1718 in property offences at the Old Bailey, 9.2% of offenders were executed compared with 5.6% between 1718 and 1750.<sup>86</sup> The seriousness of the offence was a crucial consideration in the life and death decisions by the judges, but the fact it found itself punishing a broad spectrum of crime cast doubt over the legitimacy of such a punishment. This is best reflected by King, who discovered 68.3% were hanged for forgery between 1755 and 1815 and only 3.3% for privately stealing in a shop or warehouse.<sup>87</sup> This means that over 95% of convicted offenders who privately stole escaped the gallows, but this appears intentional. "Most often, and in most parts of the country, the level of crime was such that an occasional terrifying reminder on the gallows of the consequences of falling into bad habits was found to be a sufficient demonstration of the power of the law."<sup>88</sup>

What society seemed to need was a secondary punishment, to ease the heavy burden of responsibility away from capital punishment. After 1718 transportation offered some relief to that (which will be discussed in the next section), but the reality was that too many offences were still punishable by death. The Black Act in 1723, only exacerbated this problem. "Men were hanged for offences of such wide disparity. It had not shocked the sensibilities of men in 1723 that the Black Act could appoint the death penalty for the offense of breaking down the head of a fish pond or for

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<sup>84</sup> Rawlings, P. (1999) *Crime and Power : a History of Criminal Justice: 1688-1998* London (Longman) pg.39

<sup>85</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 275

<sup>86</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.473

<sup>87</sup> King, P. (2000) *Crime, Justice and discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 274

<sup>88</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.623

setting fire to a handful of straw.”<sup>89</sup> It almost became a lottery, whereby one unfortunate man may lose his life but eighty others would escape punishment. In the case of the 3.3% who were executed for privately stealing from shops or warehouses, sixty were convicted but only two were executed.<sup>90</sup> This was the danger of a law that was only selectively applied.

There is little point in concentrating too much on the justifications behind the decline of capital punishment because we are trying to find a progression to the Penitentiary Act. However, the use of the pardon was no doubt a significant reason for its uncertain characteristics. In the City of London between 1690 and 1713 over half of those men convicted for execution were pardoned (50.7%<sup>91</sup>). To add to this three quarters of women convicted were pardoned (73.8%<sup>92</sup>). Pardons were probably seen as the easy solution. With the number of capital statutes increasing<sup>93</sup> and waves of crime and new thought emerging, the pardon in many respects was the courts only option, but it set an unhealthy precedent. Gatrell points out that in capital convictions in London and Middlesex, 67% were pardoned between 1701 and 1725, 42% between 1751 and 1760 and 65% between 1771 and 1775.<sup>94</sup> This is important because it reflects the problems the courts faced. Having spent a quarter of a century pardoning most capital offenders, the courts faced a crime wave in the 1750s and had to act by setting a greater example of the power of the law. Therefore when there was an increase in crime, pardons became less frequent, but the social climate of the time increased this problem. With population and poverty increasing, capital punishment was going through its most testing time, but it was to continue both before and after the Penitentiary Act so it must have had its supporters.

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<sup>89</sup> Beattie, J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.631

<sup>90</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 274

<sup>91</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* (Oxford University Press) pg.357

<sup>92</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.357

<sup>93</sup> “Blackstone estimated that by the 1760s there was 160 capital offences; in 1819 the figure was put at 223, and the modern historian Professor Radzinowicz plumped for 240.” Rawlings, P. (1999) *Crime and Power : a History of Criminal Justice: 1688-1998* London (Longman) pg.40

<sup>94</sup> Gatrell, V.A.C. (1994) *The Hanging Tree : Execution and the English people, 1770-1868* Oxford (Oxford University Press) pg.appendix2

William Paley<sup>95</sup> (who was an English philosopher) was one supporter who believed occasional executions fulfilled capital punishments purpose in deterring crime. An anonymously published 'Hanging not punishment enough'<sup>96</sup> and George Ollyffe went further and contested that capital punishment needed to become more severe. "An execution that is attended with more lasting Torment, may strike a far greater Awe, much to lessen, if not to put a stop to, their shameless Crimes."<sup>97</sup> These principles are contrasting thoughts to reform but perhaps they had an argument. If the most terrifying of punishments was struggling in its objectives, increasing the severity of its sanctions would at least in theory make the people more terrified in committing crime. The problem was, if judges continued to undermine the certainty of executions through their use of pardons, the effects may have satisfied Paley but would continue to be questioned. Rawlings concludes with the dilemma of the moment. "To hang too many risked popular outrage; to hang too few meant the message would not get through."<sup>98</sup>

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<sup>95</sup> Admittedly after the Penitentiary Act, see; Paley, W. (1794) *The Principles of Moral and Political Philosophy* London

<sup>96</sup> J.R. (1701) *Hanging, not punishment enough, for murtherers, high-way men, and house-breakers. Offered to the consideration of the two Houses of Parliament* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>97</sup> Ollyffe, G. (1731) *An essay humbly offer'd, for an act of Parliament to prevent capital crimes, and the loss of many lives; and to promote a desirable improvement and blessing in the nation* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.7

<sup>98</sup> Rawlings, P. (1999) *Crime and power : a history of criminal justice: 1688-1998* London (Longman) pg.40



## Transportation

*“Transportation to America for seven years, or in the case of a pardoned capital offender fourteen years, had introduced stability and flexibility into the administration of the law in the second quarter of the century. It had provided not only the secondary punishment that the courts had plainly sought for some time in their practice; it also made the discretionary application of the increasing capital statutes tolerable.”*<sup>99</sup>

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<sup>99</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.519

Our work on capital punishment made it clear that society needed a secondary punishment. It appears judges and juries in the late seventeenth century accepted that some crimes were worthy of execution whilst others were not. If we take property offences at the Old Bailey between 1663 and 1689, grand larceny and burglary made up over 70% of executions, whereas pick pocketing executed a mere 11.7% and housebreaking even less at 7%. It was these more minor crimes that needed addressing.<sup>100</sup> They were not worthy of execution but still needed to be punished. Transportation would address this problem.

Transportation involved sending convicted criminals out of the country to a penal colony for a defined length of time. Its primary motivations appear to be in the deterrent model whilst also embracing the banishment element of removing hardened criminals from society. The varying effects of banishment on the criminal are well documented by Morris and Rothman. “If the convict was a vagabond, without family or work in the first place, banishment merely continued a marginal existence. In short, banishment represented a severe punishment for the settled but a relatively light one for outsiders.”<sup>101</sup> How successful banishment was in deterring criminals will soon be explored in its practice.

The relief transportation provided to capital punishment was hugely significant because it empowered the judges with an alternative punishment that would be embraced for over half a century. Over one fifth of sentences at the Old Bailey between 1660 and 1718 resulted in transportation, but if we extend our statistics solely into the eighteenth century from the Old Bailey, we can find that 79.6% were transported between 1718 and 1750.<sup>102</sup> This dominance was defined by

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<sup>100</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.299

<sup>101</sup> Morris N & Rothman. D (eds) (1995) *The Oxford History of the Prison The Practice of Punishment in Western Society* Oxford (Oxford University Press) pg.62

<sup>102</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.473

the implementation of the Transportation Act 1718<sup>103</sup>, which provided the courts with an alternative way of punishing offenders. This is reflected by the differing sentencing policies before and after the Act. “In the first two sessions of 1718, held before the act came into force, men and women convicted of non-capital property offences had been sentenced to what had long been the familiar sanctions: twenty-one were granted clergy, burned in the hand and discharged, and six were ordered to be whipped. In stark contrast, at the April session the twenty-seven men and women convicted of non-capital theft were sentenced under the provisions of the new legislation. All were ordered to be transported; not a single offender was either clergied or whipped.”<sup>104</sup> Given there was such a contrast in sentencing it makes sense for us to emphasise the progress transportation made before and after the Transportation Act. This will allow us to appreciate the progression of transportation as a secondary punishment and also the impact legislation can provide to such a punishment.

Although many secondary sources have created a distorted view that transportation’s true beginning was in 1718, an argument could be made that transportation was a punishment progressing quietly in the dark. Whilst society pondered whether capital punishment was an effective punishment, convicts slowly but surely were sent to the colonies. “After 1660 transportation to the colonies developed as a secondary punishment, though without a statutory framework...It has been estimated that 4,500 convicts were sent to the colonies by 1700.”<sup>105</sup> In fact, much can be learnt from the efforts to change the face of punishments in this period, given there were numerous failed bills for transportation, that eventually led to the Transportation Act. “Bills were introduced in 1663 and 1664 to authorize those convicted of clergyable felony and petty larceny to be transported. It was noted in both bills that although the judges were empowered to imprison defendants for a year who successfully claimed benefit of the clergy as well as ordering them to be burned on the thumb, the

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<sup>103</sup> 4 Geo.I, c.11

<sup>104</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.432

<sup>105</sup> Morgan, G. & Rushton, P. (2004) *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* Basingstoke (Palgrave Macmillan) pg.12

threat of such punishments did not 'prevent persons from committing the like crimes again'. The legislation was intended to give judges the discretion to order anyone convicted of a clergyable offence or petty larceny to be delivered to a merchant and transported to Jamaica, Virginia, or any other plantation for five to nine years."<sup>106</sup> A failed bid in 1665 'for the better trial and conviction of such persons as shall be indicted for petty treason, murder, and felony'<sup>107</sup>, reflected the early rumblings of a society not happy to execute.

Whilst there were certainly positives with transporting convicts, there were two stumbling blocks in the way of such a punishment with no statutory framework. The first of these was the fact that many colonies such as Barbados and Maryland were establishing slave colonies and were unlikely to accept the elderly and unskilled that had been transported. The second was in its procedure because a significant proportion of convicts were allowed to transport themselves. This was not a problem if the convicts did transport themselves, but William Thompson, the Recorder of London in 1736 cast doubt on the trust of such convicts. "There were as yet no bureaucratic procedures for ensuring that felons actually left the country and reached their destination...When felons were usually pardoned on condition of transporting themselves in six months - they never performed that condition but stayed here (even at hazard of their lives) and followed the same wicked courses as before their conviction."<sup>108</sup> This clearly posed a threat to transportations purpose and if this was to become a secondary punishment on the scale envisaged, then government intervention and public money would be required. You simply cannot get away with hoping that one fifth of offenders will transport themselves, after all these were citizens working outside the bounds of the law. Late Stuart government seemed reluctant to intervene or spend money, hence the fact no

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<sup>106</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.292

<sup>107</sup> JHC, 8, 613; also see King,P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press)

<sup>108</sup> Morgan, G. & Rushton, P. (2004) *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* Basingstoke (Palgrave Macmillan) pg.12-13

statutory framework was provided and transportation remained a limited punishment but this all changed in 1718.

In 1718, transportation was to be given a much needed statutory framework. An anxious government had felt the pressure of the times and acted. Judges now had the power to impose transportation for seven years on those convicted of clergyable felonies and fourteen years for those with capital convictions.<sup>109</sup> Whether they would use transportation was at their discretion, which Morgan made clear. “The arrival of the judges travelling throughout England in the summer of the 1718, armed with the new Act, and willing to sentence to transportation those who were liable to branding in the hand or whipping (in effect those convicted of grand and petty larcenies), posed for many local authorities the dilemma of deciding whether or not to embrace the newly systematized punishment.”<sup>110</sup>

Counties did differ in their responses to the Transportation Act, for example Devon’s magistrates took advantage of such an Act by regularly transporting offenders immediately. County Durham however relied on corporal punishment<sup>111</sup> for some time after the Transportation Act (some evidence suggests as late as the 1740s<sup>112</sup>). A justification for County Durham’s reluctance to implement transportation may have been one borne out of logistical complications and expense. Moving a criminal around the country for transportation would not have been an easy task which perhaps confirms why capital punishment had varied so much in its implementation, because the transition from execution to transportation was not a smooth one.

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<sup>109</sup> 4 Geo.I, c.11

<sup>110</sup> Morgan, G. & Rushton, P. (2004) *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* Basingstoke (Palgrave Macmillan) pg.16

<sup>111</sup> Also appeared to favour whipping for some time after the Transportation Act; Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.446

<sup>112</sup> Morgan, G. & Rushton, P. (2004) *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* Basingstoke (Palgrave Macmillan) pg.16-18

On the broader national scale, the Transportation Act appeared to close the gap between capital and non-capital punishments. This is evident from the sentences at the Old Bailey between 1660 and 1750. As already mentioned, pre-Transportation Act<sup>113</sup>, 21.1% were transported, and post-Transportation Act<sup>114</sup> it had almost quadrupled to 79.6%. So there is no doubt this Act had a significant impact on punishments in this era, but this can be emphasised further given other punishments demise. Half a century before the Transportation Act, 9.2% were executed, 37.5% were given benefit of the clergy and 27.4% were whipped. Three decades after the Transportation Act only 5.6% were executed, 5.4% were given benefit of the clergy and 9.5% were whipped.<sup>115</sup> Therefore transportation had clearly taken on the bulk of secondary punishments.

Whilst transportation successfully punished crimes in the decades after the Transportation Act its limitations would soon become clear. Its major problem was the return of those offenders it had punished. Judges clearly embraced transporting felons to either seven or fourteen years of banishment, but little thought was provided for their return. It was only in the crime wave of 1750 that serious questions were raised as to transportation's purpose. "The important notion was that not only was it possible and necessary to reform those who refused to work, to train them in habits of mind and body that would enable them to support themselves, but that such intervention would also provide an effective way of dealing with the large number of offenders at the lower end of the crime/immorality spectrum in the capital. The failure of transportation to restrain such petty offenders was plain in the aftermath of wars in the middle decades of the century."<sup>116</sup> Such thought will have been a product of the enlightenment and possibly reformatory thought. As we shall see in the next chapter, Henry Fielding probably introduced his notions of reformation at a good time (1751), but whether such proposals would have any effect will be seen later in the thesis.

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<sup>113</sup> Between 1660 - March 1718

<sup>114</sup> April 1718 - 1750

<sup>115</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.473

<sup>116</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.628

A second limitation of transportation was its postponement during wars which meant gaols filled up with convicts until transportation could continue again. It was too dangerous to send a ship out at war but the longer a war went on the greater the demands were from local authorities for transportation to resume. This limitation would become critical to the Penitentiary Act in chapter four, whereby the American War of Independence put a halt to transportation.

“In 1769, the Virginia Gazette noted that the Conversation Club in London had debated the question, ‘is transportation a proper method of punishing criminals?’, but without noting the outcome.”<sup>117</sup> It is always a dangerous game predicting an outcome, particularly in the eighteenth century, but it was probably an answer filled with exhaustion. Transportation early on in the eighteenth century seemed to have been heralded as the secondary punishment that society needed, yet such enthusiasm appeared to fade in the latter quarter of the eighteenth century. An age of enlightenment and war time knocked transportation off its perch, and left it to suffer with capital punishment.<sup>118</sup> Transportation filled a temporary need, it saved many from the gallows and became a dominant punishment, but it was always going to have a limited life span. Colonies were developing, wars were becoming a regular occurrence and crime and punishment was changing along with society. Simply sending a man away for seven years was no longer good enough. New questions were being asked, and transportation lacked reformatory answers. An extract from the House of Commons in 1832 probably sums up transportations life in crime and punishment. “The only ideas which prevailed among those who framed and carried out the system were (1) to get rid of the convict as cheaply as possible, or to keep him as profitably in a pecuniary point of view, and with as little expenditure as possible; (2) to make the punishment as deterrent as severity could make it, and as the human frame could endure. The very notion of reformation seems hardly to have entered into

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<sup>117</sup> Morgan, G. & Rushton, P. (2004) *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* Basingstoke (Palgrave Macmillan) pg.155

<sup>118</sup> Although both were still implanted long into the nineteenth century (1830)

the thoughts of anybody able to give effect to it.”<sup>119</sup> Imprisonment may have been the answer to reforming the offender, but significant expense would have been required to do so, as we shall now explore.

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<sup>119</sup> Du Cane, E. Sir (1885) *The Punishment and prevention of Crime* London (London Macmillan and Co) pg.124



## Imprisonment

*“For hundreds of year’s men, women and children have found themselves incarcerated, and the institution of imprisonment appears at first sight to be a sturdy monolith. Yet a moment’s thought must reveal that the sorts of persons imprisoned, the reasons for that imprisonment, the location and conditions of that imprisonment, and the aims and justifications behind that imprisonment may have varied over centuries and even as between decades. A proper understanding of the use of imprisonment must involve an investigation of the institution in the context of the forces which create, mould and react to it.”*<sup>120</sup>

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<sup>120</sup> Harding, C., Hines, W., Ireland, R. & Rawlings, P. (1985) *Imprisonment in England and Wales A Concise History* London (Croom Helm Ltd) pg.introduction xi

Imprisonment came in three forms in the eighteenth century. The workhouses, houses of correction<sup>121</sup> and prisons (gaols) all confined individuals, but had contrasting purposes. The workhouse was designed to offer accommodation and employment for those who were unable to support themselves. The houses of correction set idle and disorderly people to work, and the prisons predominantly (although not exclusively) held prisoners awaiting trial. All three forms of imprisonment were distinct from the dominant trends of death, transportation and mutilation. The workhouse and houses of correction were based on similar foundations, but we will examine each form of imprisonment separately to gain a broader understanding to each of their merits.

Beginning with the workhouses, the poor law of 1601 assigned the responsibility of the poor to parishes, and some of these parishes subsequently built workhouses. Such houses were designed to accommodate the poor and consequently reform their manners through profitable work. As we found in chapter one the increase in population and poverty was becoming an ever increasing issue, so the implementation of these workhouses was a justified and admirable response. A whole range of paupers were accommodated in these houses, from young (children) to old and healthy to insane, but the houses had salaried staff to attend to each of their needs. Most of the labour appears to have been monotonous such as removing hemp or bone crushing but many workhouses hoped to gain a profit from this labour. For this reason the purpose of the workhouse was probably twofold; to increase the income for the parish and to alter the manners of the poor. However, finance was going to be the overwhelming problem with this practice.

At the beginning of the eighteenth century there appeared to be signs of an effort to increase the amount of workhouses nationally, thanks to John Cary (who created a workhouse in Bristol) and the Society for the Reformation of Manners. However, the parishes who cared for the poor appeared

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<sup>121</sup> In some texts houses of correction are called Bridewells.

to oppose such an idea. “In part this was a simple reflection of the high cost of maintaining an institutional provision. Between 1698 and 1713, a total expenditure of £34,644 was authorised in support of the Corporation [of London], while the earnings from manufacturing proved largely illusory.”<sup>122</sup> An argument could be made on the grounds of ‘speculate to accumulate’. If these workhouses could install laborious habits that would be useful to society then a case could be made that the economy in the long term would improve. However, the counter argument to this is the fact poverty was increasing with population. This was a dilemma that society faced throughout the eighteenth century.

Whilst the workhouse is important to us, it was not a punishment in the true sense of the word. It provided a relief to poverty and in doing so had the potential to reform the manners of those in need. Such a purpose had direct links to Henry Fielding’s proposals which we will examine in chapter three, but whether such a scheme could be more successful will prove to be an interesting part of the movement towards the Penitentiary Act. Lack of statistical data on the workhouses makes it difficult to evaluate how popular this form of poor relief was, but one website suggests it was a popular form of relief in London as late as 1776. “16,000 individual men, women and children were housed in one of the eighty workhouses in metropolitan London; between 1 per cent and 2 per cent of the population of London. Workhouses, institutions in which the poor were housed, fed and set to work, had by this time become the most common form of relief available to Londoners.”<sup>123</sup>

The houses of correction on the other hand were designed to punish idleness, immorality and vagrancy and were generally a method of tackling petty offences. The progression of the houses of correction may have even been assisted by the thought towards the workhouse in the late seventeenth century, as Rawlings outlines. “At the same time as Cary’s Bristol workhouse was creating interest

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<sup>122</sup> <http://www.londonlives.org/static/Workhouses.jsp> accessed on 23/02/13

<sup>123</sup> <http://www.londonlives.org/static/Workhouses.jsp> accessed on 23/02/13

and imitators, new houses of correction were being constructed to deal with the roots of crime - idleness, immorality and vagrancy: 'all-purpose places of confinement for people who it was thought should be kept off the streets'. In 1706 courts were empowered to put felons in the house of correction, and, although this did not lead to a wholesale shift towards imprisonment of such offenders, magistrates routinely incarcerated a wide range of people from petty thieves and prostitutes to runaway apprentices and 'suspicious persons' under vagrancy laws."<sup>124</sup> There is no doubt that the houses of correction were a unique institution and resembled many of the features that would be created into the Penitentiary Act. Its most important attribute to us, is the fact it departed from a solely deterrent purpose to a possible attempt at curing criminal instincts. Through hard labour it was believed that the poor convicted of petty offences could be reformed and made useful to society.

Statistics by Shoemaker suggest that commitments to the houses of correction grew in line with the thought towards expanding the workhouses, which was no coincidence. "Commitments to both the Middlesex and Westminster houses increased dramatically between 1690 and 1717; over the period 1680-1725 commitments to the Westminster house increased by at least 86% and between 1660 and 1725 the number of prisoners in the Middlesex house of correction in Clerkenwell at the time sessions met increased by 165%."<sup>125</sup> Whilst this may seem like a simple correlation, the reasons for an increased use of the houses of correction at a time of 'enlightened' reformatory thought, suggests notions towards reforming the offenders were being taken seriously. However, how seriously they were being taken is subjective because early eighteenth century possessed a time when social conditions were changing and thought was developing. Capital punishment appeared to be in decline and transportation was still awaiting a statutory framework. Therefore the climate of the

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<sup>124</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.57 also see Sharpe, J.A. (1999) *Crime in Early Modern England 1550-1750 Second Edition* New York (Addison Wesley Longman) pg.257

<sup>125</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.166-167

times may have resulted in a temporary experiment of using the houses of correction.

Another reason for the increased use in the houses of correction may be that definitions of crime expanded. Suspicious activities had become a crime, and this is reflected by the statute 7 Jac. 1 c.4. This statute authorised the punishment of ‘rogues, vagabonds, sturdy beggars, and other idle and disorderly persons’ in houses of correction. The phrase ‘idle and disorderly’ is clearly a broad one but was used regularly. “Using the language of 7 Jac. 1 c.4, more than one-fifth of the commitments state only that the defendant was accused of being “idle,” “disorderly,” or “loose, idle, and disorderly.”<sup>126</sup> Making such offences a crime suggests two things. One that the ruling class wanted to protect their property further and secondly that society did not know how to confront poverty.

When the houses of correction did come to tackle such crime it offered great flexibility in adapting to the nature of the offence and offender. “Virtually all the prisoners were put to hard labour, typically beating hemp. In addition, over half were whipped, particularly those deemed guilty of theft, vagrancy, and lewd conduct and night walking (prostitution). More than half of offenders were released within a week of their commitment, and two-thirds within two weeks. For the most part, punishment in houses of correction took the form of a short, sharp shock.”<sup>127</sup> This short, sharp shock form of imprisonment is reflected by Shoemaker’s<sup>128</sup> statistics whereby 62% of those committed for being loose, idle and disorderly were committed in a house of correction for less than a week.<sup>129</sup>

Our last examination will be of the prisons which accommodated those awaiting trial, those

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<sup>126</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and Rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.168-170

<sup>127</sup> <http://www.londonlives.org/static/HousesOfCorrection.jsp> accessed on 23/02/13

<sup>128</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and Rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.188-189

<sup>129</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and Rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.189

sentenced to a term of imprisonment and those who had not been discharged from their debts. The criticisms of the prison far outweigh the benefits and they were certainly not an advert for reformation. They were dismal immoral places of confinement that were the closest resemblance to hell on earth. “Prisoners are chained, like spirits in Hell. Prisons are dark and smelly, as is Hell. There are ‘mournful sighs and groans’ in prison as there are in Hell.”<sup>130</sup> The mixing of criminals and debtors, corruption of the gaolers and filthy conditions are all worth a brief mention. Firstly, debtors who were often innocent men who had fallen on difficult financial times were imprisoned until they paid their debts. A debtor could find himself amongst the vile murderers of the day and have no way of getting out. This was made worse by the corruption of the gaoler who was only interested in his own financial outlook. “Wealthy prisoners were able to purchase their freedom to live outside the confining walls, yet still within the ‘Rules’, or the technical definition, of the prison.”<sup>131</sup> A consequence of this corruption was neglect in the conditions of the prison which made the health of all surrounding the prison at risk of deterioration or death. The conditions at Newgate are a just example of this. “The foul and constant smell polluted what little good and water the prisoners could get hold of and impregnated their clothes and clung to their hair. It was everywhere and it was inescapable; revolting their nostrils and clogging their lungs, pervading their whole existence.”<sup>132</sup>

There are certainly a couple of justifications for the conditions of these prisons. One is that they reflected the social conditions that the poor lived in. The second is that these prisons were working in a time of mass executions. The mind-set may have been ‘we have not killed them so what more do you want us to do?’ An extra two shilling towards a prisoner’s welfare would have been seen as scandalous particularly in an era of national debt. However, an era of enlightened minds

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<sup>130</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.102

<sup>131</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.88

<sup>132</sup> McConville, S. (1981) *A History of English Prison Administration; Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.50

would ridicule these conditions as barbarous.

As the eighteenth century progressed a momentum can be seen towards altering the conditions of the prison, both via individuals and legislation. “In the 1730s the poor law reformer, William Hay, introduced several bills to promote new prisons and headed a committee which recommended reforms in gaols and houses of correction. Many others worked hard to stop abuses and overcrowding and to improve the health of prisoners, but the apathy and parsimony of the authorities and the claims of vested interest, such as from the keepers who earned their living by exploiting prisoners, stood in their way.”<sup>133</sup> Examples of legislative progress are found for both the prisons and the houses of correction. 6 Geo. I, c.19 provided powers to build and repair gaols and 17 Geo. II, c.5 ordered two justices to visit and report on the houses of correction. However, the implementation of these Acts appears to have been lost. “Except in few counties when some justice took the trouble to enforce these statutes, little was done till the legislation of the nineteenth century. It would probably be true to say that no part of the administrative duties of the justices was more neglected than these duties of supervising the gaols.”<sup>134</sup> Whether they were ever intended to be put into effect is debateable especially given transportation and capital punishment were the prime punishments in the eighteenth century.

Whilst imprisonment was clearly a useful tool in attempting to deter or reform an offender, the national trend of its practice appears similar to Beattie’s findings in property sentences at the Old Bailey. In this finding between 1660 and 1718, 4.8% were to put hard labour and 0.9% to a workhouse. Between 1718 and 1750 neither was used.<sup>135</sup> Although the likes of the houses of correction punished petty offences, and the prison often detained debtors this just reflects the inferior

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<sup>133</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.58

<sup>134</sup> McConville, S. (1981) *A History of English Prison Administration; Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.66

<sup>135</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.473

nature of imprisonment against the heavyweights of capital punishment and transportation. With this in mind the reform effort towards the Penitentiary Act was going to have to be a big one.

This chapter has enabled us to appreciate each punishment on its own merit. Capital punishment had its value, but society had progressed from the seventeenth century. When crime waves hit, capital punishment was first in the firing line and there is no doubt it was losing its deterrent value. The use of the pardon and benefit of clergy had diminished its authority, and society desperately sought a secondary punishment.

Transportation answered the mood of the times. With a statutory framework from 1718, judges began to banish offenders more and more frequently. It answered an urgent need and got rid of the offenders. The problem appears to have begun when these criminals returned. The social eye of scrutiny cast doubt on its reformatory effects, but a read of the script may suggest the promise of reformation was never there.

Imprisonment plodded on in the background. The initial signs were promising, there was an increase in sentences to the houses of correction and there was optimism towards the fact a punishment may actually be able to reform offenders. However, transportations dominance in 1718 took the limelight and imprisonment was left to look after convicts awaiting transportation and petty offenders, whilst government ignored plans to improve the prisons. How long this could go on for will be documented in chapter four. If society ever needed an answer to crime it was in the eighteenth century, with the social conditions creating tensions within society, and punishments that had been exposed and questioned, somehow crime and punishment needed reforming. Whether the reformers in the next chapter could assist in this effort will be the motivation of the chapter.



## 03 - The Development of Reform Ideology

The development of reform ideology is of huge importance to this thesis. We have outlined the social conditions and punishments that the eighteenth century experienced, but large proportions of these chapters have outlined the link between crime and poverty, without any significant solutions. Whilst we must accept the swarm of religious reformers from the first half of the eighteenth century, we must ask how influential they really were. It is of course a matter of subjectivity, but this chapter will contest that the road to the Penitentiary Act began in the second half of the eighteenth century. In our debate towards whether such a forward looking Penitentiary Act was a product of the individual reformers or an age of enlightenment, we can ask ourselves a simple yet very complex question. How would crime and punishment have fared without these reformers?

The six reformers we will be looking at all contributed in the movement towards the Penitentiary Act. Whilst they provided individual efforts, it is actually the collective effort of all six that must be given appreciation, and ultimately led towards the passing of the Penitentiary Act. We will examine each of the reformers one by one and then analyse their combined efforts towards the Penitentiary Act.

The first of our reformers will be a man who brought the problems of crime and punishment to the public domain. Henry Fielding attempted to address the increasing problem of crime by categorising the causes of crime into eleven sections. He then plotted his proposal for a more humane form of punishment. His proposed county work house and house of correction in Middlesex represented conceptions that were to be a progression towards the Penitentiary Act. He recognised the problems of the time, dismissed capital punishment and transportation and urged legal reform via imprisonment. In doing so, Fielding raised questions and provided answers close to the Penitentiary Acts heart. Critically he did so in the public domain, and set some form of precedent for other reformers to appreciate.

Cesare Beccaria will be our second reformer, who can be labelled as the philosopher of the pack. He developed three core principles to deter crime. These were promptness, certainty and proportionality. Beccaria also dismissed imprisonment as a form of punishment by questioning its ethics. This is an important point because it represents the reluctance even on some reformers parts that imprisonment was a solution. The movement towards the Penitentiary Act was going to have to engage with this problem.

William Blackstone, deemed the living authority on English law will be our third reformer. Whilst his book, 'Commentaries on the Laws of England'<sup>136</sup>, proved a global success, it was his name that was to be of more importance to the Penitentiary Act. Blackstone's fame provided an important weight to the validity of any Bill. This was exemplified in William Eden's effort towards the enactment of the Penitentiary Act, whereby Blackstone assisted him in doing so. Without Blackstone's name attached to such a reform, serious questions must be asked as to whether the Penitentiary Act would have been implemented, and also what the Act would have even been called.

William Eden played a central role towards the enactment of the Penitentiary Act, and for that reason he will be our fourth reformer. His greatest efforts were seen in a practical manner, whereby through his hard graft he knuckled down to business and set out on a path of reform with the Penitentiary Act being his primary goal. He was assisted by his former lecturer William Blackstone, and both influenced by Beccarian principles began their legislative efforts towards reform. Between 1776 and 1779, Eden had to tactically find a way to turn reluctance towards imprisonment to acceptance. This was by no means an easy task and his efforts in doing so were both

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<sup>136</sup> Blackstone, W. (1765) *Commentaries on the Laws of England* Oxford (Full text available from National Library of Wales; Eighteenth Century Collections Online)

admirable and engaging. William Eden was the engine to the Penitentiary Act, and Blackstone the wheels. Eden had the drive and passion to lead the reform but without the wheels he could not have gone anywhere quickly. Blackstone helped provide this authority and guidance.

Our penultimate reformer will be Jonas Hanway who was an engaging eccentric who maintained the pressure of the times and sought reform. He questioned the benefit of capital punishment, transportation and the hulks (prison ships) and in doing so became an advocate for a new reformatory model of imprisonment. He was disgusted by the corrupt and unethical form of imprisonment, and believed it needed a severe change. Hanway's reformatory punishment was based on honest employment being the firm foundation of order in society. He wanted to imprison via solitary confinement and consequently restore delinquents to a useful life. Hanway raised important questions as to the purpose of punishments, his idea of reforming the offender on the scale he intended was nothing but revolutionary.

Our final reformer is John Howard who provided the substance to the analysis of the problem. He created a statistical description of a social problem, and brought about a public scandal to the state of the prisons. In just over half a year, Howard travelled at least three thousand miles and visited over seventy prisons. His book, 'State of the prisons'<sup>137</sup> was to be the comprehensive guide to imprisonment, documenting such problems as the morals and bad customs in prisons. Such public scandal meant society had to wake up from its lethargic state. It was a brutal and honest portrayal, exposing the severe flaws to the conditions of prisons. The flaws Howard exposed inevitably assisted reform towards a more humane and rational form of imprisonment.

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<sup>137</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

Engaging with the minds and practices of these reformers will enable us to appreciate whether such efforts created the Penitentiary Act. Each reformer created a shift, a momentum, and an agreement to a problem. Each condemned and proposed. Without one reformer would another have emerged? As we have found in chapters one and two there were clear issues with the law and its punishments, but a distinct lack of direction to any solution. The Penitentiary Act was one answer to the problem, but how did it emerge and how was it justified, particularly given the state of the prisons going into the last quarter of the eighteenth century? This chapter will help answer such questions.

## Henry Fielding

*“If 6000 Hands which now sit idle can be employed, the Advantages resulting hence to the Public need not be explained to any who have the least Notion of Trade, or of the Benefits arising from it.”<sup>138</sup>*

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<sup>138</sup> Fielding, H. (1753) *A Proposal for Making an Effectual Provision for the Poor, for Amending their Morals, and for Rendering them Useful Members of the Society* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.65

Henry Fielding was a critical part of the jigsaw towards the Penitentiary Act, because he started it. He brought new ideas to the public domain and enticed others to listen. In a society that was still executing and transporting, he provided a positive prospectus towards change, something that had not been done before. He explained how the constitution was failing, and then propelled himself like a detective to discover what was causing such failure. With crime and punishment in disarray, he attempted to categorise crime into eleven sections, to enable the reader to appreciate the problems society faced. It was rather like a formula, a and b were the causes of crime but why were they, and how could they be reduced? Our attention will be cast on Fielding's causes of crime but more importantly on his plans to alleviate such problems via reform. His proposals to erect a County work house and County house of correction were detailed and set the precedent for any notion of reform via imprisonment.

In 'An Enquiry into the Late Increase of Robbers'<sup>139</sup> Fielding begins by discussing the constitution<sup>140</sup>, and the problems with it. He believed if the habits of the people change then so should the other parts of the constitution. If it does not then it is disproportionate and the whole constitution will fail. In the middle of the eighteenth century Fielding deemed the constitution as a failing one because of ignorance from a lethargic state. However, it was probably not just a lethargic state but one void of ideas. Take away capital punishment and transportation and what was the state left with? Whipping and branding played minor roles, and imprisonment was flooded with problems such as gaol fever and corrupt practice. A new punishment was needed.

Fielding was fixated on how to bring the constitution up to date. He believed an evasion of the law was a major reason towards the change in the habits of the people, but this was not the only

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<sup>139</sup> Fielding, H. (1751) *An Enquiry into the Causes of the Late Increase of Robbers and related writings* Oxford (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>140</sup> The constitution some believed to be either notions of the law, legislature, or the governing or executive part, or a combination of the three

cause of crime. In fact Fielding set out eleven causes of crime which combined problems with the law and the people. For example section two related to drunkenness in contrast to section four relating to the failing laws for the provision of the poor. It was through these causes of crime that Fielding made a statement linking poverty to crime, which was a direct problem the Penitentiary Act would be faced with. “The very Dregs of the People, who aspiring still to a Degree beyond that which belongs to them, and not being able by the Fruits of honest Labour to support the state which they affect, they disdain the Wages to which their Industry would entitle them; and abandoning themselves to Idleness, the more simple and poor-spirited betake themselves to a Stage of Starving and Beggary, while those of more Art and Courage become Thieves, Sharpers, and Robbers.”<sup>141</sup> The exposure of such problems provided a dark picture to just how outdated and neglected the law really was. If the lethargic state was not aware of its problems, it surely was now. However Fielding did not stop at exposing such problems, he proposed a remedy.

This remedy is what makes Fielding’s work so important to us. He did not just lay down his own justification to the problems with crime and punishment, but provided a solution in the public domain. Such a solution provided momentum that was to prove integral to the Penitentiary Act. Fielding’s solution can be witnessed in his ‘Proposal for making an effectual provision for the poor’. In this Fielding appears direct in his quest to make a useless, idle, and poor class of people, useful members of society. This is reflected in his plans for a county house to accommodate over five thousand paupers and a county house of correction to punish over six hundred petty offenders in Middlesex. What these houses were to do was revolutionary and such proposals set forward a model towards the Penitentiary Act. These transparent plans were to break the persons down via labour and teach them new habits valuable to society. These new habits of course would then assist in creating a proportionate constitution.

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<sup>141</sup> Fielding, H. (1751) *An Enquiry into the Causes of the Late Increase of Robbers and related writings* Oxford(Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.3



There were obvious differences between the two houses in practice but Fielding made this very clear, and the detail Fielding went into was admirable. For example, when entering the house of correction, prisoners were to be confined to the fasting room with nothing but bread and water for a day and then put to hard labour and solitude via religion. In contrast, the County work house admitted in a slightly more humane way, by stitching a badge on each person and confining them. When in both these houses they had to go through prayer, work and rest. Both were to be woken up at four in the morning followed by prayers in the chapel an hour later. The house of correction set work at six in the morning until seven in the evening and the work house six in the morning till nine, ten to one and two till six. At nine in the evening a bell was rang and all fires and lights were put out and the watch was set. Such a regime is clearly incomparable to the form of imprisonment we discussed in chapter two. Fielding's proposal had a reformatory undertone throughout whilst also punishing the offender, something other punishments had struggled to provide.

The transition from deterring offenders to reforming them was a huge one, but one that Fielding was justified in attempting. He had clearly witnessed an increase in crime, and such a problem needed desperate attention. He proposed a work house and house of correction for Middlesex and this was for good reason. Between 1675-1676 three hundred and sixty three defendants for offences against property were from the City of London, whilst Middlesex accounted for four hundred and seventy nine. By 1749-1750, three hundred and sixty seven defendants were from the city of London, in contrast to nine hundred and fourteen from Middlesex<sup>142</sup>. Whilst these statistics were only for the accused, it was still an alarming increase in defendants. Then when we look at the sentences in property offences at the Old Bailey, between 1718-1750 transportation was

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<sup>142</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.18

completely dominating at 79.6%, with whipping, clergy and hanging playing minor roles<sup>143</sup>, but questions would have to be asked as to whether any of these punishments were changing the habits of the people.

Fielding clearly believed imprisonment could reform the offender and eventually substitute transportation. What Fielding had proposed was not a completely new idea; in fact commitments to the house of correction in Middlesex between 1660 and 1725 had increased by 165%<sup>144</sup>. However, in practice Fielding was creating a form of imprisonment unknown to imprisonment itself. Bad practices and corruption were to be abolished for transparency and positive effects. Fielding's reform was thorough with tabs such as, men and women to be kept separate<sup>145</sup>, deductions from the labourer<sup>146</sup>, accounts to be kept<sup>147</sup>, governor to inspect accounts and sessions<sup>148</sup>, refusal to work<sup>149</sup> and frauds in the offices<sup>150</sup>. It is no exaggeration to say that Fielding's imprisonment was as good as a new form of punishment.

The critical point for us is that Fielding put these proposals in the public domain. Finally, readers could scrutinise the state of crime and punishment with some form of precedent. Fielding,

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<sup>143</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.473

<sup>144</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and Rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.167

<sup>145</sup> Fielding, H. (1753) *A Proposal for Making an Effectual Provision for the Poor, for Amending their Morals, and for Rendering them Useful Members of the Society* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.18

<sup>146</sup> Fielding, H. (1753) *A Proposal for Making an Effectual Provision for the Poor, for Amending their Morals, and for Rendering them Useful Members of the Society* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.38

<sup>147</sup> Fielding, H. (1753) *A Proposal for Making an Effectual Provision for the Poor, for Amending their Morals, and for Rendering them Useful Members of the Society* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.38

<sup>148</sup> Fielding, H. (1753) *A Proposal for Making an Effectual Provision for the Poor, for Amending their Morals, and for Rendering them Useful Members of the Society* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.39

<sup>149</sup> Fielding, H. (1753) *A Proposal for Making an Effectual Provision for the Poor, for Amending their Morals, and for Rendering them Useful Members of the Society* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.45

<sup>150</sup> Fielding, H. (1753) *A Proposal for Making an Effectual Provision for the Poor, for Amending their Morals, and for Rendering them Useful Members of the Society* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.46

created a formula, whereby the constitution was failing because the habits of the people had changed. The causes for such change were documented and then Fielding provided his solution to the problem. John Howard some twenty years later condemned the state of the prisons but Fielding had already done this. He believed imprisonment was the answer but with radical changes. Without Henry Fielding, who would have grabbed the bull by the horns and got the ball rolling? We could speculate as to Fielding's impact all day, but the truth is we cannot say with any real authority how influential Fielding was towards the Penitentiary Act. Like with all our reformers, we have no statistics to state how many books were sold but what we can see is a progression from Fielding's pamphlets. Our final point to be made is how similar Fielding's reform was to the Penitentiary Act (as we will see in chapter four). He was clearly an early starter but one critical to the progression of this chapter and thesis.

## Cesare Beccaria

*“In order that every punishment may not be an act of violence committed by one man or by many against a single individual, it ought to be above all things public, speedy, necessary, the least possible in the given circumstances, proportioned to its crime, dictated by the laws.”<sup>151</sup>*

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<sup>151</sup> Beccaria, C. (1767) *An Essay on Crime and Punishment* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.42

Beccaria produced a philosophical system that was to prove highly influential in the history of crime and punishment. His book, 'On Crimes and Punishment' represented principles of penology attempting to prevail against the established destructive laws and barbarous methods of procedure. His plea towards more humane practices essentially dismissed capital punishment and transportation, and questioned every other punishment. Our primary focus must be on his principles via his philosophical system and the impact this had on eighteenth century crime and punishment. This was not a reformer with direct proposals, but one with a system that helped evaluate the effectiveness of a punishment. We must justify how this assisted in the movement towards the Penitentiary Act.

The work of Beccaria is rather difficult to summarize, as many authors have shown<sup>152</sup>. However, we will only concern ourselves with his highly regarded core principles. These principles were based on the certainty, proportionality and promptness of a punishment. We will examine each principle and apply it to our core punishments from chapter two. In doing so, we are engaging with the justification for a change in punishment, whilst searching for the signs of movement towards the Penitentiary Act. Whilst other parts of his work proved important and certainly worthy of a read (such as his nature and division of crimes), they are not of great importance to this thesis, hence our focus on his core principles.

The first of Beccaria's principles was in relation to the certainty of a punishment. Certainty for Beccaria was a critical component towards deterring crime and deemed far greater than rigour and cruelty. He believed a moderate punishment was far greater with certainty than a severe one attached with the hope of impunity and escape from punishment.

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<sup>152</sup> See; Phillipson, C. (1923) *Three Criminal Law Reformers Beccaria, Bentham, Romilly* London (London and Toronto)

This issue of certainty was a clear flaw with capital punishment. Beattie summarises this problem which has already been discussed in chapter two, whereby only 41.1% of those sentenced to execution between 1714 and 1750 for property offences in London were actually executed.<sup>153</sup> This laxity in the application of the death penalty led to confusion as to the consequence of crime, therefore would have failed Beccaria's certainty test. The pamphlet 'Hanging Not Punishment Enough' would have contested Beccaria's certainty principle given its demand for rigour and cruelty to be increased and these two lines of thought did produce compelling contrasts in thought. In practice, one would execute everybody within the constraints of the law and the other would increase the severity. However, an observation on the success of these two principles would suggest Beccaria's principle held more strength over the pamphlet, thus leading to questions as to capital punishments effectiveness. With an age of enlightenment giving birth to greater levels of humane thought towards punishment and a society desperate for a sustainable secondary punishment it is difficult to see how capital punishment would ever pass Beccaria's certainty test.

Transportation was slightly different. It was a secondary punishment born to provide relief from the gallows, and was importantly a more moderate punishment compared to capital punishment. If Beccaria wanted certainty to prevail over rigour and cruelty, transportation offered this. However, a problem when looking at the statistics to support this, is that secondary punishments provided greater discretion to the judges. Therefore some crimes that were punishable via transportation were also punished via other punishments because some judges did not believe that every petty offender should feel the full force of the law. An example of this can be seen between 1714 and 1750, whereby, of those who pleaded guilty or were found guilty of non capital offences,

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<sup>153</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.457

74.9% of men and women were transported, whilst 15.8% were whipped.<sup>154</sup> Therefore, the certainty element was satisfied but not solely through transportation. However, there is no doubt it was a progression from the uncertainty of capital punishment and the same statistics we used for capital punishment exemplify this point. In the City of London between 1714 and 1750, of those sentenced to execution, 41.1% were executed and 48.2% were pardoned and transported.<sup>155</sup> Therefore, transportations role in punishment was integral to increasing Beccaria's certainty principle. It reduced the proportion of property offenders executed and reduced the number of felons being put back into society. The real problem with transportation was its long term sustainability because the punishment was contingent on affairs outside its control which will become clearer in chapter four. This through time made transportation fail Beccaria's certainty test.

Imprisonment probably suited the certainty test more than the other two punishments. It was a moderate punishment that could be adapted to each offence, providing the certainty element with a greater opportunity to succeed. In practice particularly in the early eighteenth century, the certainty test is difficult to judge because there are few statistics on imprisonment thanks to transportation and capital punishments dominance. However, the magisterial business conducted by Lord Mayor Brocas between 1729 and 1730 offers some insight to imprisonments certainty. Of those accused of assault, less than 14% were committed to trial, over 70% had their charge dismissed and just over 1% were committed to Bridewell.<sup>156</sup> Whilst the bulk of these assault allegations were probably petty quarrels as opposed to serious violence cases (and these cases were alleged), it still reflects an uncertainty within the framework of imprisonment. The fact that 14% of men and 27.1% of women in cases at the Old Bailey between 1690 and 1713 were granted a free pardon, as opposed to 4.7% of men and

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<sup>154</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.437-438

<sup>155</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.457

<sup>156</sup> Beattie, J.M. (2001) *Policing and Punishment in London, 1660-1750; Urban Crime and Limits of Terror* Oxford (Oxford University Press) pg.104

20.8% of women who were committed to a workhouse (closest form of imprisonment), further emphasises the uncertain element of imprisonment. However, imprisonment offered a potential to pass the certainty test with a long term vision, something the other two punishments would always struggle to replicate. Howard's damaging analysis as to the state of prisons in 1777 only served as a reminder as to just how bad the prisons were. In fact, judges may have been reluctant to imprison felons with certainty because gaol fever presented likely deaths. However, if we take Fielding's proposals it must be suggested that Beccaria's certainty test would stand a better chance, and importantly would potentially reform the offender as well as deter.

The second of Beccaria's core principles was proportionality. In essence this questioned whether the punishment did fit the crime. Beccaria believed the legislature should increase in proportion to the destruction of the public safety and happiness. Beccaria also wanted this balance between crime and punishment to be fixed, probably to provide a subtle element of certainty to his system.

Again this is an area that capital punishment struggled to satisfy. As already mentioned in chapter two, more than one hundred and sixty felonies were punishable by the death penalty in the middle of the eighteenth century. The question is whether these one hundred and sixty felonies were worthy of such a severe punishment? Judges clearly felt not given the number of pardons they distributed, which were certainly dependent upon the severity of the crime. For example, in the latter half of the eighteenth century, 68.3% were hanged for forgery, compared with 8.3% for larceny in a dwelling house<sup>157</sup>. This outlines capital punishments struggle with proportion, because each pardon resembled an acceptance that execution did not fit the crime. Admittedly sometime after the

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<sup>157</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg. 274  
These statistics do go past our focus years (1755-1815) but represent an important point.



Penitentiary Act (in 1790), Beccaria sat on a commission in Lombardy to discuss reforms in the penal system. In his report he directly questioned capital punishments proportionality, stating that for a penalty to be just; its intensity must not exceed the degree necessary to turn men away from offending. Beccaria believed that capital punishment was not turning men away from offending, adding that penal servitude for life was more terrible than death. Execution for setting fire to straw says all we need to know about capital punishment's proportionality.<sup>158</sup> Unsurprisingly, we can conclude that capital punishment was a disproportionate punishment.

Capital punishment was always going to suffer at the hands of secondary punishments in the proportionality argument. You either execute a man or you don't, transportation certainly offered greater flexibility. An example of this is found in 4 Geo.I, c.11, which allowed the courts to transport those guilty of clergyable felonies for seven years whilst those pardoned from capital convictions were to be transported for fourteen years. This brought the balance between the crime and punishment closer and also made it fixed which was important to Beccaria. A felon was either transported for seven or fourteen years, however it could be questioned whether this discretion was rather limited. To be transported for seven years for a petty offence was substantial and quite severe. In contrast, transportation for fourteen years for murder was a relatively soft punishment. This clearly raises questions as to transportations proportion. Yes, it provided significant amounts of relief for a disproportionate capital punishment, but this did not mean it was itself a proportionate punishment.

Imprisonment could adapt itself to the proportion of a crime in much easier fashion. It could vary the length of sentence and also the severity of the punishment whilst imprisoned. This was an important tool to have, because it meant that it truly was a secondary punishment that could punish

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<sup>158</sup> See; Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.631

according to the nature of the offence and offender. This is exemplified by King's statistics which support the argument that a sentence varied according to the crime. Between 1740 and 1775 of those imprisoned for petty larceny at the Essex Quarter Sessions, 13% were sentenced for one week or less, 25% between one week and one month, and 35% for one month to three months. Also 42% of those convicted were whipped as well as imprisoned<sup>159</sup>. The addition of whipping provided an important additional punishment dependant on the gravity of the offence. Shoemaker outlines in the houses of correction that thieves or fraudsters were the most likely to be whipped at 67.4% compared with prostitution at 39.2%. The difference between these contrasting crimes is also evident in the length of imprisonment. For theft and fraud, 44.5% were imprisoned for 0-7 days, compared with prostitution at 67% in the first quarter of the eighteenth century<sup>160</sup>. Based on these findings, imprisonment could certainly support Beccaria's principle of proportion.

Promptness of punishment is the third and final core principle we will examine. Beccaria believed the more speedily the penalty followed, the closer the connection would be to the crime. It would then create an association between the two and engage the mind to a realm of intellect. There does not seem to be a great amount of literature about the promptness of each punishment, so it will be difficult to give this principle the same level of scrutiny, but we will certainly explore from the limited literature we do have.

It is easy to appreciate how the time between committing a crime and execution is an important one. If a felon commits a crime and is not executed for months after, there will inevitably be a degree of detachment. Or to put it another way, if a felon is executed days after committing a crime, there has to be an association between the crime and punishment. Crowds at the scene of the execution would know that disobedience could lead to death within days. From the little sources

<sup>159</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg.271

<sup>160</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.188-189

available to us, it appears that the promptness of punishment varied with capital punishment. For example a court that met roughly every six weeks dealt with around seventy felons over the course of a few days, and several sessions every year would be followed by a hanging day at Tyburn. This perhaps reflects that promptness was seen as an important component to capital punishment.

The prompt nature of punishing via transportation was probably very varied, due to a number of factors such as war time and numbers to be transported. After the Transportation Act 1718, it became a dominant form of punishment (as discussed in chapter two), but again its long term sustainability probably led to question marks over how quickly offenders would be punished, especially given judges increasing dependence on the pardon. There is also the problem of where the offenders awaiting transportation were to be detained? Most appear to have been detained in gaols but some needed to be transported to a dock, which was made even harder by some counties delaying transportation because reprieves had not been confirmed by the Secretary of State. The county of Devon provides a just example of this. “We receive the convicts from 26 different gaols in which there will be at least 70 or 80 Transports in the course of a few days and our ship Isabella will be at her usual mooring near the hotwells ready to receive them on Monday the 20<sup>th</sup> Tuesday 21<sup>st</sup> and Wed 22<sup>nd</sup> of next month.”<sup>161</sup> The fact this quote states, ‘next month’ suggests it was not uncommon for felons to await transportation for over a month. Based on this evidence, transportation would fail Beccaria’s promptness criteria.

Imprisonment could probably punish far quicker than either transportation or capital punishment. Shoemaker made this point, stating that a commitment to a house of correction had a number of advantages over other methods of prosecuting petty crime. It had the potential to be

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<sup>161</sup> Morgan, G. & Rushton, P. (2004) *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* Basingstoke (Palgrave Macmillan) pg.22

certain, immediate and corporal<sup>162</sup>. In fact it was possibly too prompt given many defendants awaiting trial were imprisoned with offenders. There is no doubt that imprisonment would satisfy Beccaria's principle of promptness.

What Beccaria provides us with is a system that outlines the flaws in existing regimes and consequently a justification for change. Beccaria's core principles of certainty, proportionality and promptness could be applied to any punishment, but a flaw within the works of Beccaria is that he seems content with outlining the problems. What was his solution to the problem? Fielding outlined the problems then provided us with what he believed to be the answer. In contrast, Beccaria outlined the problems but did little else. If we accept Beccaria's principles then capital punishment and transportation struggled to satisfy his criteria. This you would suspect would leave Beccaria to become an advocate for imprisonment but that was not the case. Beccaria directly dismissed imprisonment based on the fact the accused and convicted were imprisoned together. However, this was not an unknown problem, and it is a problem many other reformers in this chapter will discuss. Beccaria's influence throughout this chapter is certainly an important one, but few seem to have criticised the fact he did not propose an answer to the problems he found. Yet he is still one of the greatest contributors to penal reform since time began, and his works for a 'fixed and graduated scale of more lenient but certain punishments' were widely canvassed in England.<sup>163</sup>

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<sup>162</sup> Shoemaker, R.B. (1991) *Prosecution and Punishment Petty Crime and the Law in London and rural Middlesex, c.1660-1725* Cambridge (Cambridge University Press) pg.167

<sup>163</sup> See; Hay, D. et al (eds) (2011) *"Albion's Fatal Tree: Crime and Society in Eighteenth Century England* London (Verso) pg.23

## William Blackstone

*“The only way to make (Blackstone’s) life vivid and significant would be to treat it as part of the eighteenth-century scene and to make Blackstone intelligible as a man by tracing with lavish detail his penetration into those two very select microcosms, the legal profession and the academic world of eighteenth century England.”<sup>164</sup>*

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<sup>164</sup> Prest, W. (2009) *Blackstone and his commentaries* Oxford (Hart Publishing) pg.4

William Blackstone played a central role in the legislation towards the Penitentiary Act. He was deemed the living authority on English law and this was exemplified by peers like William Eden asking for Bills to be reviewed by him<sup>165</sup>. In fact the relationship between Eden and Blackstone was an absolutely critical one towards the enactment of the Penitentiary Act. In 1776, Eden and Blackstone looked to expose the problems with transportation and replace it with imprisonment and hard labour. The attachment of Blackstone's name to any Bill was always going to assist it greatly, and there is no doubt it would take a brave man to question Blackstone on his specialised knowledge of the English law. In order to appreciate Blackstone's work we will briefly discuss his thoughts on capital punishment and imprisonment and then briefly touch upon his practical work with Eden.

Beginning with capital punishment, Blackstone in typical fashion was very clear as to what the law directed. "Execution is the completion of human punishment, and must be strictly performed in the manner which the law directs. 2. The warrant for execution is sometimes under the hand and seal of the judge, sometimes by writ from the King; sometimes by rule of court; but commonly by the Judge's signing the calendar of prisoners, with their separate judgements in the margin."<sup>166</sup> Blackstone was struck by the abrupt nature of so many offences being worthy of execution, stating that such punishments ironically increased crime, which in turn questioned its ultimate purpose. "Instead of diminishing," it "increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those

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<sup>165</sup> Such as the Hard Labour Bill which will be discussed in chapter four.

<sup>166</sup> Blackstone, W. Sir (1771) *An analysis of the laws of England Sixth Edition* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.157

laws, which long impunity has taught him to condemn.”<sup>167</sup> Such thoughts are clearly shared with Beccaria’s notions of crimes being prevented via certainty rather than severity. Therefore Blackstone clearly felt a more moderate punishment was needed.

Imprisonment certainly offered the scope to provide greater certainty in punishing felons. However, the major problem for Blackstone was the moral and physical conditions in these prisons as John Howard documented in 1777. Blackstone’s support of Howard reflects his concern towards the eighteenth century prison. “Blackstone was the first of the King’s judges to encourage and support the efforts of Howard; and in this effort he was strenuously supported by his former pupil, Jeremy Bentham. They both felt strongly that in a Christian country such a shameful state of things should no longer be permitted to exist; for it ruined both the morals and the health of those who were under the care of the State.”<sup>168</sup> The state of the prisons was to eventually prove an important catalyst towards change, and with Blackstone’s name behind it, it created an attractive brand of reform.

Some would contest that Blackstone merely agrees with others rather than stating his own views and this is probably true. He looks at capital punishment and is in agreement with Beccaria; he looks at imprisonment and is in agreement with Howard. However, the very fact he publicly agrees with these viewpoints was just as important as the formulation of the principles themselves. This was a man that was the global figure for law. His book, ‘*Commentaries on the laws of England*’<sup>169</sup> propelled himself to celebrity status within the microcosm of law. “All over the Continent the *Commentaries* carried the fame of Blackstone, being published at least once in almost all of the languages of Europe. More than that the Near and Far East applauded the work of the Commentator

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<sup>167</sup> Blackstone, W. Sir (1795) *Commentaries on the laws of England Twelfth Edition* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.18-19 (admittedly this edition of the book was published after the Penitentiary Act)

<sup>168</sup> Odgers, B. W. (1919) *Sir William Blackstone* The Yale Law Journal pg.556; For Bentham’s role in this thesis see chapter 4.

<sup>169</sup> Blackstone, W. (1765) *Commentaries on the laws of England* Oxford (Full text available from National Library of Wales; Eighteenth Century Collections Online)

and editions appeared in many of the languages of Asia and Asia Minor, including Chinese and Japanese.”<sup>170</sup> When Blackstone agreed, the world of law listened. His name alone provided the support any reformer sought, and this is exactly the reason he is crucial to this chapter. As we will find when discussing William Eden’s work, Blackstone gave Eden the authority to continue with his work and change the outlook of crime and punishment on as bigger scale as he could ever have expected. Without Blackstone’s support Eden’s progress would have surely stalled or struggled. The importance of William Blackstone towards the Penitentiary Act cannot be underestimated, and this will be revealed in chapter four. Pre-Penitentiary Act he was an integral supporter of the vehicle towards reform, which added legitimacy to the proposals of other reformers such as Eden and Howard, a year after the Penitentiary Act, he died.

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<sup>170</sup> Warden, L. (1938) *The life of Blackstone* Charlottesville (The Michie Company) pg. preface XI



## William Eden

*“Severe penalties, the instruments of despotism, may give a sudden check to temporary evils; but they have a tendency to extend themselves to every class of crimes, and their frequency hardens the sentiment of the people ‘Une loi rigoureuse produit des crimes.’ The excess of the penalty flatters the imagination with the hope of impunity, and thus becomes an advocate with the offender for the commission of the offence.”<sup>171</sup>*

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<sup>171</sup> Eden, W (1771) *Principles of Penal Law* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.12

William Eden played a critical role towards the enactment of the Penitentiary Act, but his contribution appears to have been somewhat undervalued. He is most famous for his book, 'Principles of Penal Law'<sup>172</sup>, which was a highly renowned English text on penal reform. However it is his practical works that prove far more important to this thesis. Had he not been the figure to take on the hard graft of implementing Bills to move closer to the Penitentiary Act, then the history of crime and punishment could have been very different. This may seem like a bold statement to make, but it was only Eden that stepped out of the box and fought for what he believed to be right. So far we have had Fielding who exposed problems and provided a solution. Beccaria, who provided a philosophical system, and Blackstone who was the man with the big reputation but only really agreed with other reformers. William Eden was the man to take these ideas from theory to practice. In our examination of Eden we will examine his thoughts towards the punishments from chapter two, and then briefly investigate his practical work towards implementing reform, which will be discussed in greater detail in chapter four.

Eden's values can be likened to Beccaria with his emphasis firmly placed on deterring crime via the certainty and proportionality of punishments. He cast doubt on whether capital punishment or transportation achieved such purposes. For Eden a lack of execution in both led to a greater hope of impunity, which ended up having the effect of potentially encouraging crime rather than deterring. From our examination of Beccaria we found statistics that support Eden's prognosis, but this certainty issue was only half the problem. The second problem was that punishments were simply not fitting the crime, because they were disproportionate. Criminals were prepared to risk execution based on common humanity saving them. Eden ridiculed such disproportion, stating that it was a transportable offence to assault another with a weapon but execution for writing an anonymous letter

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<sup>172</sup> Eden, W (1771) *Principles of Penal Law* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

with a fictitious name, and he was right. If crimes were proportionate then certainty was likely to follow, but capital punishment and transportation were clearly struggling in both departments.

Eden believed capital punishment was not a mode of punishment but a last resort for those inconsistent with public safety. He also questioned whether transportation held any deterrent value at all, for it deprived the state of a subject and held no terror to the offender because the colonies were far too civilised and developed. These were interesting arguments, because you would suspect execution should have held the greatest deterrence of all, yet Eden dismissed it entirely as a form of punishment. His argument against transportation holding any form of deterrence could have been opposed because of the distance the felons were from their families. However, for some offenders it may have been a positive to start a new life in a 'civilised and developed' colony. Therefore, once again we are left with imprisonment.

If transportation and capital punishment had been dismissed by Eden, imprisonment was in for a pounding. The simplest way of explaining Eden's perceived flaws with imprisonment is by splitting them into four sections and these will be the separation of debtors, one punishment for a variety of crimes, the restrictive nature and conditions and finally the corruption of the gaolers. Whilst it may feel that exposing these flaws may lead us away from the Penitentiary Act, they certainly are not, because such problems will have moulded Eden's thoughts and tactics towards the Penitentiary Act. In fact these criticisms will prove integral to our understanding of the inherent problems within imprisonment that the Penitentiary Act would have to tackle. Therefore, we will engage briefly with such problems.

One of the reforms Eden felt most strongly about appears to be the separation of debtors from criminals and those awaiting trial from those convicted. Eden logically stated how accusations were

not proofs and innocence should be proved at every point until a charge of guilt. Therefore, how can it be justified that the accused are in the same environment as the convicted? “It should be particularly observed that it is contrary both to public justice and public utility, to throw the accused and convicted, the innocent and the guilty, indiscriminately, into the Dungeon.”<sup>173</sup> Eden appears to be driven by an ethical framework, whereby you are innocent until proven guilty, a stance imprisonment clearly did not accept. However, such separation had been addressed by Fielding’s proposals, so was by no means a new criticism.

Eden also did not like the idea of the same punishment for a variety of crimes. For Eden felt great sympathy towards those who were made insolvent and deemed it more of an unfortunate crime than perhaps intended. “Debtors therefore tho’ certainly a species of Criminals, should in general be considered rather as unfortunate, than culpable. Humane treatment they have a claim to; nor can we, consistently with any good principle; either of morals or government, refuse the same to persons accused, or even to the most atrocious convicts. It will follow, that a special care should be taken, lest the necessary miseries of a gaol be aggravated by the unrestrained cruelty of the gaoler.”<sup>174</sup> However, what Eden appears to be missing is the fact that imprisonments proportionality was probably one of its stronger points. In the years of Eden’s work at the Essex assizes, 2% were imprisoned for one week or less, 17.6% for between one week and one month and 23.5% for between one year and two years<sup>175</sup>. What this tells us is that the gravity of the offence was addressed; therefore if the corruption of the gaolers was dealt with, then imprisonment could accommodate the likes of debtors, via greater leniency compared with other criminals.

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<sup>173</sup> Eden, W (1771) *Principles of Penal Law* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.45

<sup>174</sup> Eden, W (1771) *Principles of Penal Law* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.45-46

<sup>175</sup> King, P. (2000) *Crime, Justice and Discretion in England, 1740-1820* Oxford (Oxford University Press) pg.271; sample taken from 1770-1779

Eden's third point concerned the airing and restrictive nature of the prisons. This is an area that we will discuss in greater detail when examining John Howard's works, but the fact such problems were raised by Eden exemplifies the conditions offenders were imprisoned in, and the recognition before Howard of the issues surrounding such prisons. It is important to note that the conditions were so horrendous that it was not just the prisoners that were at risk. There are accounts of judges dying from gaol fever because the prisoners were so disease ridden when they entered court. So this was an area that needed to be addressed for public safety alone, but John Howard certainly woke society up in 1777 to the harsh realities of the moral and physical health of the nation's prisons.

Eden's final point is in relation to the gaolers who he described as 'a merciless race of men' who frequently abused their powers. "If a prisoner dies in duress of the gaoler by hard confinement and severities unnecessary to the safe custody, it is murder."<sup>176</sup> Again, we will go into greater detail in this area with John Howard but what these points represent is a problem that people were aware of, but had accepted up until the 1770s. The corruption and conditions had become a regular feature of imprisonment, but the likes of Eden wanted change. Many gaolers regularly abused their powers in some way or another. Whether this was via confining prisoners indoors with no water and disease ridden air or by being bribed financially to the severity of a prisoners punishment. Du Cane demonstrated this point after the Penitentiary Act. "In order to extract money from the prisoners, the practice was to iron them heavily unless they paid for lighter irons, or for their entire removal- some of them being so heavy that walking, and even lying down to sleep, was difficult and painful. Those who could pay for it were allowed superior accommodation to that which was given to those who could not."<sup>177</sup>

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<sup>176</sup> Eden, W (1771) *Principles of Penal Law* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.47

<sup>177</sup> Du Cane, E. Sir (1885) *The Punishment and prevention of Crime* London (London Macmillan and Co) pg.37

A final remark to make about imprisonment is in relation to the prisoner. Many reformers seem to outline the flaws but do not look specifically at what imprisonment was doing to each prisoner, particularly mentally. Eden addresses this in the conclusion of his chapter on imprisonment. In this conclusion he provides a story from the prison of Pinero (admittedly not in Britain) whereby a prisoner in solitude became attached to a spider residing with him in his cell. Every morning the prisoner would collect flies for the spider until the gaoler realised the prisoner had made a companion and destroyed the spider. The prisoner remarked that losing the spider was worse than losing a child such was his mental state. The point in this story is that it clearly affected Eden. Conclusions make a point and summarise a theme, so this was clearly an important matter for Eden. This may well have fuelled Eden's quest towards reform and justice, but also raised questions to the legitimacy of confining men to long periods of solitary confinement.

From a theoretical view we can appreciate Eden's core Beccarian themes that certainty and proportion in punishment were the aims of penal reform and neither transportation nor capital punishment achieved those aims. What is important to us is that we are now beginning to see a consistent pattern of thought. From Fielding to Eden they were all heading in a similar theoretical direction. The following paragraphs will explain how Eden had an effect in a more practical manner towards the Penitentiary Act.

Eden's practical efforts towards reform were born within a year of 'Principles of Penal Law'<sup>178</sup>, where he secured his role as secretary of state to the Earl of Suffolk in 1772. This provided him with the opportunity to put his ideas about reform into practice, none more so than after the outbreak of war with America in 1775, which consequently put a halt to transportation. Such

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<sup>178</sup> Eden, W (1771) *Principles of Penal Law* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

problems were exacerbated when John Robinson<sup>179</sup> in the same year fell ill within the ministry, which led Eden to temporarily fulfil Treasury and parliamentary duties alongside good friend Lord North. This appointment enabled Eden to gain essential experience to the management of the Commons and importantly become his own man via political connections, which put him in an excellent position to attempt reform. In the summer of 1775, Robinson resumed his duties, but there is no doubt this experience was invaluable to Eden, and came at a critical time. With transportation struggling and capital punishment dependent on transportation, other punishments were few and far between. Eden had the opportunity to battle, to put his beliefs into practice, and attempt reform.

Eden had a long-term solution lined up and secured Lord North and Lord Chief Justice Mansfield's approval. This was the beginning of a long road to reform. Eden's first step was to implement the Hard Labour Act<sup>180</sup> which was to consist of hard labour confined on prison hulks that were moored on the Thames. To implement such an Act Eden relied on support and timing, which were to prove critical towards such a reform.

The support Eden gained for the passage of the Hard Labour Act was about as good as it could get. Lord North led the measure for the Act in the commons and Blackstone, deemed the living authority on English law, reviewed it. Support was always going to be critical but so was timing. Together, it provided reform with a fighting chance of success. "Eden had Lord North himself lead the measure in the Commons, thereby throwing all the force which the government could muster behind it. Government control was enhanced by introducing the bill late enough in the session that members would be forced to accept it, partly under the pressure of time and a lack of practical alternatives to transportation before the next session, and partly because the attendance of MPs was invariably low near the end of the session, leaving the Commons vulnerable to determined action on

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<sup>179</sup> Dealt with Treasury and Parliamentary duties alongside Lord North

<sup>180</sup> 16 Geo III, c.43

the part of the ministry.”<sup>181</sup> A government void of alternative solutions with severe time constraints paints a desperate picture, and one that Eden clearly exposed and took advantage of.

The Hard Labour Act was Eden’s first step towards the bigger picture, the Penitentiary Act. We will continue his efforts towards such an Act in our progression section in the next chapter. It would make no sense for us to regurgitate Eden’s story, and this chapter’s role is to build us up to the immediate years before the Penitentiary Act with individual reformers criticisms and proposals of crime and punishment in the eighteenth century. What we have learnt from Eden is that his practical quest for reform was through Beccarian ideologies. This provided him with a foundation to build a sustainable punishment that would shift the balance from a reliance on transportation to an institutionalization of hard labour. His aim all along was clear and direct, the passing of the Penitentiary Act. Eden’s progress in this matter will be well documented in the next chapter, but through support and timing he had a fighting chance of success.

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<sup>181</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.415



## Jonas Hanway

*“Let a great number of prisons be forthwith built, larger, stronger and better calculated for the purpose of a secure confinement and a more rational and humane correction.”<sup>182</sup>*

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<sup>182</sup> Hanway, J. (1775) *The defects of police the cause of immorality, and the continual robberies committed, particularly in and about the metropolis* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.3

Jonas Hanway is important to us because he maintained the mood towards penal reform. He agreed with many of our reformers and demanded a new form of imprisonment. Transportation and capital punishment were not deterring offenders, so Hanway looked to reform offenders instead. His proposals for a new form of imprisonment looked to shake terror into the offender and reform them via solitary confinement, labour and religion. We will focus briefly on Hanway's condemnation of crime and punishment and then discuss his proposal for reform, which can be likened to Beccaria and Fielding.

Hanway's examination of the world he lived in was remarkably similar to Fielding's own observations. He dismissed transportation and capital punishment because it was failing in its purpose to deter and his solution was to find a way to alter the habits of the people (very similar to Fielding's thoughts). Drunkenness, gaming, idleness and self-indulgence were all prevalent in not only causing crime but continuing after the crime, and this was a major justification for Hanway's idea of reforming the offender. The rejection of transportation and capital punishment left Hanway with imprisonment which at first he did not appear happy with, but as we know imprisonment offered a potential the other two punishments did not.

The bad customs that imprisonment had developed angered Hanway because they posed no reformation qualities. From chaining men to the ground to evil communication they did little to change the habits of the people. So how exactly was Hanway going to change these bad habits? Hanway's solution was a new form of imprisonment accompanied by labour, solitary confinement and religion. This form of imprisonment had not been tried before but Hanway was confident that this was the answer because it would save delinquents and restore them back to the world, upright and honest.

Solitary confinement would break the prisoner down with only his own spirit to combat, and this was important because Hanway believed without such solitary confinement a prisoner would have to overcome ‘two or three hundred evil spirits’. Once the prisoner was broken down, Hanway believed labour would reform him to honest ways without distraction, and therefore make him useful to society. A final critical point to make with regard to Hanway’s solitary confinement was that it was to be complimented by religious instruction. Therefore, the prisoner would have visits from the clergyman and keeper to enable him to focus on his wrongs and become a good Christian. From these three components of solitude, labour and religion, Hanway believed the habits of the people could change and therefore the useless in society could become useful, and it was certainly not without its economic gains. Admittedly some two years after the enactment of the Penitentiary Act, Hanway believed that in thirty years transportation or death accounted for the loss of ten to twelve thousand able bodies at £200 each. Hanway calculated that this resulted in a loss of £2,000,000 at a time<sup>183</sup> when the National Debt was increasing. This was always going to be a strong argument for reformation but perhaps Eden’s story of the prisoner in Pignerol is a valid counter argument against solitary confinement, because the mental state of these prisoners would surely be put in jeopardy. How important a prisoner’s mental state was in a society that was still executing remains to be seen.

It is always difficult to evaluate the effectiveness of a punishment that has never been implemented before. However, Hanway provided some early signs of solitary confinement in practice and this probably helped form his proposals. His best example can be seen in the Clerkenwell-Bridewell. “I found the good sense and humanity of the justices of that division, had induced them to provide a room divided into twelve apartments, with a passage in the middle, and apertures in the wall, for light and air; six are cells for refractory apprentices, and opposite to them

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<sup>183</sup> See; Hanway, J. (1781) *Distributive justice and mercy: shewing that a temporary real solitary imprisonment of convicts, supported by religious instruction and well-regulated labour is essential to their well-being and the safety, honour and reputation of the people* London (Full text available from National Library of Wales; Eighteenth Century Collections Online); Although this quote is found after the passing of the Penitentiary Act.

are their six dormitories, into which they are removed at night. These cells, as well as I remember, are ten or twelve feet in length, and seven or eight in breadth. The divisions were made of thick boards, but intended to be rebuilt with brick. These apartments are calculated to awaken the hearts and understandings of unruly turbulent young persons, and culprits in petty crimes, to a due sense of the offences they have been guilty of; and preserve them from the poisoned breath of abandoned wretches, with whom they must otherwise have been associated. By this means they are usually restored, in a short time, in a humble state, to God and their country.”<sup>184</sup> The reformatory qualities this Bridewell produced left Hanway with a very strong case for reform. “The event has fully justified their most sanguine hopes: one of them assured me, every person committed to those solitary apartments, had been, in a few days, reformed to an amazing degree.”<sup>185</sup> This example is an interesting find, because it probably questions the importance of the reformers. Hanway had found the membrane to his proposals already in practice but this was by no means nationally applicable and was in effect a very isolated case. The Clerkenwell-Bridewell needed public exposure to spread its ideologies, and Hanway needed the example of the Bridewell to enforce the strength of his proposals. This point directly uproots the age of enlightenment and individual reformers debate, because Hanway is proposing something that was already in existence, however Hanway’s importance to us is that he maintained the pressure of the times.

At a time when Eden was forcing the issue of the hulks on MP’s, Hanway was creating a reform in a similar direction. The combined works of Fielding, Beccaria, and Eden must have added some weight on MP’s minds when searching for a solution, and when you add Hanway’s absolute

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<sup>184</sup> Hanway, J. (1776) *Solitude in imprisonment: with proper profitable labour and a spare diet, the most humane and effectual means of bringing malefactors, who have forfeited their lives, or are subject to transportation, to a right sense of their condition; with proposals for salutary prevention ...* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.74-75

<sup>185</sup> Hanway, J. (1776) *Solitude in imprisonment: with proper profitable labour and a spare diet, the most humane and effectual means of bringing malefactors, who have forfeited their lives, or are subject to transportation, to a right sense of their condition; with proposals for salutary prevention ...* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.75

proposals for reform, you get the impression government was a little bit isolated. Change was definitely needed, but solutions were few and far between. What Hanway did, was reiterate a problem and demand change. By adding his work to the debate it increased the pressure that bit more. Hanway's solution meant the useless were to become useful and the economy was to be better off. The tide was turning, the government was under real pressure and Hanway made sure this was maintained. With Eden's practical work and Hanway's reiteration of the problems, government was left with little option but to listen.

## John Howard

*“Air which has been breathed, is made poisonous to a more intense degree by the effluvia from the sick; and what else in prisons is offensive...The leaves of my memorandum book were often so tainted, that I could not use it till after spreading it an hour or two before the fire.”<sup>186</sup>*

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<sup>186</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.13

John Howard's life was a journey fuelled towards justice. His journey was to result in one of the most powerful books towards reform in the eighteenth century, but was created via sadness, courage and passion. His mother died when he was five, and father some eleven years later, and to add to this, he was twice widowed. This sadness it could be said developed Howard with an inner courage and passion, and formed a truly inspirational reformer. Many reformers had written about the terrible conditions and practices in prisons but none had gone to the effort Howard did to expose such problems. It was a great act of Christian virtue to visit these prisons and his work certainly did not go unnoticed. His heroic effort to transform and revolutionise the terrible state of prisons pre-1777, was a benchmark in the history of crime and punishment. By exposing such problems, he made society and government wake up from its lethargic attitude and act. How he went about doing this we will explain in the following paragraphs. We will then examine the effect he had on crime and punishment.

The birth of Howard's quest towards reform probably began in 1773. During his appointment as Sheriff he became disturbed over a number of matters. In particular he was struck by the fact acquitted prisoners were returned to a gaol when they had not paid fees to the gaoler and he was also struck by the horrendous conditions in these prisons. Such concerns saw Howard pass an Act of Parliament. "His first concerns was to promote the passing of an Act of Parliament "for the relief of acquitted prisoners in the matter of fees" and the payment of salaries to gaolers. While making enquiries he discovered also the atrocious conditions in which prisoners were kept, and a second Act was passed "for preserving the health of prisoners." Both Acts he had printed at his own expense and distributed to every gaol in the country."<sup>187</sup> We will explore these Acts further in chapter four.

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<sup>187</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.preface.iv

Once his term of office as Sheriff was over, few would have anticipated his next quest. From November 1773 to June 1774 Howard travelled thousands of miles and visited over seventy prisons, as he prepared a book that would galvanise society into acting towards reform. To put this into some kind of perspective over the space of just over half a year Howard travelled approximately the distance between London and New York.<sup>188</sup>

Howard was driven to improve prisons in England and Wales, his vision for how was enhanced by his trips abroad, particularly in Holland. The cleanliness and tranquil noise impressed Howard along with the humane practices used by the magistrates. With this vision it provided him with a foundation for what to achieve and set his expectations to a decent level. Howard did not want prison conditions to be cruel and degrading, pleading for proper sanitation, ventilation and light. However, he was by no means an advocate for luxury in prisons, stating that prisoners must be shown the rules and must consequently adhere to such rules.

Howard's book, 'The State of the Prisons'<sup>189</sup> released in 1777 came in a decade of crisis in English penal practice, and as we know an era of real scrutiny. It impressed the public not just by its moral stance but its research. For every prison in the country Howard recorded; dimensions of buildings, diet, the fee table, inmate population on day of his visit, charitable bequests available for relief of the population, weight of the chains used and any other details that caught his eye. "Howard provided a great deal of actual data about English prisons that no doubt helped to shape opinion."<sup>190</sup>

The practice and conditions of these prisons came as little surprise, but the scale and substance of Howard's work along with its faultless scientific nature led to its impact. Historian

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<sup>188</sup> [http://www.mapcrow.info/cgi-bin/cities\\_distance\\_airpt2.cgi?city3=-3578172%2CL&city4=12101%2CN](http://www.mapcrow.info/cgi-bin/cities_distance_airpt2.cgi?city3=-3578172%2CL&city4=12101%2CN) accessed on 12/02/12

<sup>189</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>190</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.568



Ignatieff summarises this superbly. “It was common knowledge long before Howard that prisoners were gouged for fees, cheated on their provisions, loaded with irons, exposed to disease, and liable for detention after acquittal. Nor did Howard denounce these abuses in a language that was foreign to his contemporaries’ ears. The originality of Howard’s indictment lies in its “scientific”, not in its moral character....Howard was one of the first philanthropists to attempt a systematic statistical description of a social problem.”<sup>191</sup>

‘The State of the Prisons’<sup>192</sup> was a logical and comprehensive guide to imprisonment of the age. He begins by presenting the general view of distress in prisons. For this analysis we will examine his thoughts and documents towards, water, air and bedding, morals and vicious examples, bad customs consisting of gaming, the use of irons, gaol delivery and debtor’s families and finally gaol fever.

Beginning with water, air and bedding all three seemed scarce. Many prisons had no water at all<sup>193</sup>, and if they did it was provided at the discretion of the keeper, which of course left itself open for corruption. For the sake of hydration and cleanliness it was clearly an area that needed attention. The issue of air was a severe problem; so much so, Howard’s plans for improved prisons were focussed strongly on every prison and county-gaol being built on land that was airy and ideally near a river or brook. Knaresborough prison<sup>194</sup>, provided a justification for such reform given it left prisoners faces disfigured. Bedding is the final issue of this section, whereby most prisons seemed to have no bedding at all, whilst others if lucky had straw that was eventually worn to dust.

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<sup>191</sup> Ignatieff, M. (1978) *A Just Measure Of Pain The Penitentiary in the Industrial Revolution 1750—1850* London (MacMillan Press Ltd) pg.52

<sup>192</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>193</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.439; See the County Bridewell at Preston.

<sup>194</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.410

Morals and vicious examples were also of significant importance to Howard. He believed that the confining of all sorts of prisoners together was a major issue; debtors and felons, men and women and the young beginner and old offender. Howard seemed particularly concerned about the young offenders learning from the old offenders, whereby Howard remarked that boys of twelve would sit and listen to stories of crime and escape from old hardened criminals. You would suspect that Hanway's solitary confinement would certainly have alleviated the problem of communication between the confinements of all these prisoners, but this would have required a severe reform of the existing prisons.

Howard also provided an intriguing review to the bad customs in prisons. Gaming was a clear issue, not only because it was an idle habit but because of the consequent riots and brawling. The use of irons was flooded with corruption. The rich could pay the gaolers fees to live in comfort, whilst the poorer were loaded with heavy irons, making it difficult to even lie down and sleep, such was the pain. Gaol delivery was shocking in the respect the innocent may have had to wait twelve months for a trial to prove their innocence. The final point in relation to bad customs was the fact debtors crowded the gaols with their wives and children. Not only did this potentially corrupt the morals of children but physically put more people at risk of disease, which leads us to that deadly animal within the prison walls.

Gaol fever was probably the most terrifying and real element of Howard's works. Its effects could not have been more brutal given it took away the life of Howard himself. "From my own observations in 1773 and 1774, I was fully convinced that many more were destroyed by it, than

were put to death by all the public executions in the kingdom.”<sup>195</sup> This is a frightening thought, certainly one that you would suspect would deter, but this was a deterrent completely out of control. A common view was, ‘if they are in prison they deserve to be so let them rot’, but the consequence of this had lasting effects on society. “At the Lent Assize in Taunton, 1730, some prisoners who were brought thither from Ivelchester Gaol, infected the court; and Lord Chief Baron Pengally; Sir James Sheppard, Serjeant: John Pigot, Efg. Sheriff, and some hundreds beside died of gaol-distemper. At Axminster, a little town in Devonshire, a prisoner discharged from Exeter Gaol in 1755, infected his family with that disease; of which two of them died; and many others in that town afterwards.”<sup>196</sup> All these deaths were by no means coincidental; gaol fever was not a rare case. “Reluctance to visit the neighbourhood of Newgate was based on more than delicate sensibilities: the miasma tic theory of disease transmission made even the district appear dangerous...In 1750, for example, after a new ventilation system had been provided at Newgate, seven of the eleven workmen who installed the machinery contracted gaol fever, as did some of their relatives.”<sup>197</sup> The justification for such filth can only be deemed a necessary attribute to the instrument of terror. The complacency which society had towards such a justification was alarming and consequently killed the innocent.

What is refreshing about the ‘State of the Prisons’<sup>198</sup> is the honesty Howard provides. Whilst he was overwhelmingly condemnatory of the many prisons he visited he remained truthful to the core when finding the odd prison to be praiseworthy of. An excellent example of this is from his report of Newcastle Town & County Gaol (Newcastle Upon Tyne Northern Circuit), where he stated, “All the rooms except the condemned room are upstairs, and airy: I always found them remarkably

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<sup>195</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.16-17

<sup>196</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.19

<sup>197</sup> Mc Conville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.50

<sup>198</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

clean, strewed with sand...They also allow brooms, mops, and all such necessaries.”<sup>199</sup> This was not a man on a set agenda to condemn every prison he went to, but a man searching for the truth. He simply wrote about what he witnessed, which was ultimately critical to the authenticity of his works and success.

What Howard documented was not new to us, the reformers before Howard all knew of the terrible conditions and morals in prisons, but none had provided a science to the problem. Howard gave society that statistical evidence to lift it up from its complacent state and encourage reform. Such a damning report could not go unnoticed, and with the influx of ideas towards imprisonment, a change was inevitably required. Within these years, Eden had implemented the hulks (prison ships) as a form of punishment and was gaining momentum towards a new form of imprisonment, whilst Hanway had provided a viable solution to many of imprisonments exposed problems. Howard’s ‘State of the Prisons’<sup>200</sup> came at a much needed time, because it confirmed all the problems with imprisonment. In an era of crisis for crime and punishment, Howard added that pressure and made sure that imprisonment was exposed for what it was. However, such brutal facts ironically may have been the best thing that ever happened to imprisonment.

When we consider what impact these reformers had on crime and punishment it is difficult to evaluate exactly how successful they were individually. We have no statistics to say Howard sold more books than Fielding, or more people read Beccaria than Hanway, but this is not all that important to us. Naively, there was some great expectation at the beginning of this thesis to award one reformer the tag of implementing the Penitentiary Act, but the fact is, there is not. Blackstone is

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<sup>199</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)pg.421-422

<sup>200</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

just as important to us as Hanway, even though Hanway's book<sup>201</sup> is far more relevant to us than Blackstone's<sup>202</sup>. The point being made is that, this momentum towards the Penitentiary Act was a collective one. Whether these reformers were a product of enlightenment or not, is an extremely difficult question. Each reformer had to work within a similar climate, and it could be suggested that each reformer that published work encouraged another to do the same. Eccentrics are born in every age, but amongst the knowledge of the terrible conditions in the prisons, only one man decided to scientifically prove such conditions. We cannot say with any authority whether other individuals would have replaced these men, but what we can say is that each of these reformers contributed significantly to the progression of the Penitentiary Act.

Fielding gave us something to work with; we had a justification for crime and a reason for change, followed by a solution. Crime and poverty were linked and a workhouse and prison were suggested to the Magistrates of Middlesex. If we then take on the influential Beccarian core principles, we can scrutinise the legitimacy of each and every punishment we want to, and so we did. Capital punishment and transportation were promptly dismissed to the agreement of Blackstone. The fact Blackstone agreed made others listen because he was the living authority on the law. So in summary we needed a certain, prompt and proportionate punishment, and just in time Eden entered the frame. Eden gave much thought to the question of secondary punishments<sup>203</sup> and in doing so exposed many of imprisonments flaws whilst condemning transportation and capital punishment. However, Eden did have a practical plan up his sleeve with the assistance of his many friends and the living authority of law on his side. Through intelligence, support and timing the hulks were

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<sup>201</sup> Hanway, J. (1776) *Solitude in imprisonment: with proper profitable labour and a spare diet, the most humane and effectual means of bringing malefactors, who have forfeited their lives, or are subject to transportation, to a right sense of their condition; with proposals for salutary prevention ...* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>202</sup> Blackstone, W. (1765) *Commentaries on the laws of England* Oxford (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>203</sup> Radzinowicz makes a similar point; Radzinowicz, L (1948) *A History of English Criminal Law and its Administration from 1750* London (Stevens & Sons Ltd) pg.311

implemented and extended, which bought Eden time to gain public confidence towards imprisonment, which will be well documented in the next chapter. Hanway, maintained the pressure towards reform, but founded his works on the foundation of religion via solitary confinement for all prisoners. When the prisoner was removed from evil communication and contamination, reformation of the offender could take place. Hanway's ideas were noted by Howard, and it was this reformer that became the leading voice for reform. Howard confirmed the very state of the prisons, which emphasised the importance of reform under a growing humanitarian backdrop. Consequently ideas towards the prison grew, from architectural to moral improvement, something needed to be done. It was rather ironic that the exposed limitations of imprisonment led to renewed interest in that very form of punishment, but the potential of imprisonment under the right conditions far outweighed any of the other punishments ability to reform and deter the offender. The reformed prison would satisfy the core themes in each one of our reformers proposals; neither transportation nor capital punishment could do this.

A point that Devereaux and Griffiths make is critical to this chapter. They state that one reformers voice can easily be dismissed but a chorus of voices were not so easy to ignore. "The occasional comment of a Mandeville or Fielding could be dismissed as the musing of an exceptional individual. The apparent lack of discussion became a singular fact that reinforced the impression created by the size of the capital code... After the English publication of Beccaria's *On Crime and Punishment* in 1764 the complaints against a regime that relied upon the gallows multiplied as penal reformers attacked its inhumanity and irrationality. The demand for a transformation of incarceration followed, and new ideas and programme multiplied."<sup>204</sup> This quote is important to us because it was this collection of reformers that widened the path to the Penitentiary Act. Fielding began on a very

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<sup>204</sup> Devereaux, S. & Griffiths, P. (eds) (2004) *Penal Practice and Culture, 1500-1900: Punishing the English* Basingstoke (Palgrave Macmillan) pg.211

isolated narrow path, laid out by the occasional society and reformer from chapter one. Society walked on a different path, but the longer the eighteenth century progressed the bigger Fielding's path became. This gave Beccaria, Blackstone, Eden, Hanway and Howard room to walk and consequently lay firm foundations down for a sustainable path for the future. Suddenly, this path was seen as a desirable one, but could it have got to this point without Fielding? Could it have been built without the social conditions surrounding the path? Perhaps, these reformers bought into the enlightenment. The climate of opinion may have encouraged them to display enlightenment values and create a fashionable group of reformers, but we are still faced with the dilemma of whether crime and punishment was inevitably heading towards the Penitentiary Act.

The fact that religious reformers before 1750 discussed reform reflects the grumblings of a volcano ready to erupt, but the reformers after 1750 ignited this volcano to a state of fierce tension. Even before the Penitentiary Act, legislative and local improvement could be found. For example, Howard introduced three Acts for improving the prisons in 1773 and 1774<sup>205</sup>, and 1776 witnessed a new prison at Horsham as Griffiths outlines, "The first person roused by Howard's revelations to the necessity for reform was the Duke of Richmond, Lord Lieutenant of Sussex, who in 1776 built a new prison at Horsham under Howard's advice and co-operation. The effects of the new system were so remarkable that twelve years afterwards a learned judge, Lord Mansfield, remarked that the number of prisoners for trial was reduced by half; whereupon the Governor of Horsham gaol replied, "Although in days of yore my prisoners were very frequent in their visits to me, discharged at one assize and in again within the old walls long before the next, yet such, my lord has been the effect of separate confinement, and of making a rogue think a little, and become acquainted with himself, that in the course of the last twelve years I can solemnly declare that only one prisoner has been twice

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<sup>205</sup> We will discuss these Acts in greater depth in chapter 4

within these walls.”<sup>206</sup> Clearly improvements were being made in correspondence with reformers published works, but significant progress on a national scale was still not witnessed. Chapter four will signal how important these reformers were to the immediate progress, content and implementation of the Penitentiary Act, which will then enable us to summarise exactly how important these reformers were to the very Act itself.

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<sup>206</sup> Griffiths, A. (1875) *Memorials of Millbank, and chapters in prison history* London (Henry S.King & Co) pg.9-10; however as Griffiths rightly states, we must be careful when outlining local success; “Such satisfactory results said much of course for the discipline of Horsham Gaol, and its effect in diminishing crime in the particular district in which it was situated. But if Horsham were empty - other prisons were perhaps more full. A “tight” prison may often clear its immediate neighbourhood of offenders; but not necessarily because it reforms them, - more probably because it drives them elsewhere. Thieves are quick to discover the localities that fright or favour them.” pg.10



## 04 - Progression, Content and Implementation of the Penitentiary

### Act

“The eighteenth century reflected the simultaneous desire to strike and reform the evildoer, and there was always a tension between the two.”<sup>207</sup> This tension began to shift the longer the eighteenth century progressed, and was to reach new heights in the immediate build up to the Penitentiary Act. Thanks to the reformers efforts from chapter three, the desire to reform the evildoer had become a feature of public discussion in the 1770s, but legislative progress was still some way off. Howard had emphatically condemned the prisons in England and Wales as morally bankrupt and physically tired, but many of the reformers proposals for change, involved imprisonment. Something surely had to give and eventually it did, as McGowen confirms. “Disorder and neglect were the dominant features of the eighteenth-century prison. On entering the jail, one was confronted with the noise and smell of the place...There was little evidence of authority. Some prisoners gambled while others stood drinking at the prison tap. On the other hand, the prison in the mid-nineteenth century was quiet and orderly, if also drab and functional.”<sup>208</sup> Clearly developments had been made but we need to see these changes inside the eighteenth century, to outline the Penitentiary Act’s immediate impact. What was the catalyst for such change? Did the reformers galvanise society into a realisation that punishment needed to change to reform the evildoer, or did an age of enlightenment simply prevail in its own inevitable progressive manner? Throness touches on this argument, stating that there was a century of proposals to substitute reformatory hard labour for the death penalty, long before the likes of Howard and Eden.<sup>209</sup> William Hay and George Berkerley from chapter one are just examples of this. However, the rather hypothetical question we must attempt to answer is quite simple; would the Penitentiary Act have occurred if the six reformers from chapter three had not engaged in a journey of reform? In other words, would an age of enlightenment have replaced these

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<sup>207</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.295

<sup>208</sup> McGowen, R. (1998) *The Well-Ordered Prison. 1780-1865*; in Morris N & Rothman. D (eds) (1995) *The Oxford History of the Prison The Practice of Punishment in Western Society* Oxford (Oxford University Press) pg.79

<sup>209</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.298; The appearance of the unconventional evangelical John Howard was vital as a political catalyst, but as has been shown, his ideas followed a century of proposals to substitute reformatory hard labour for the death penalty, a process underway among London justices even before Howard became High Sheriff of Bedfordshire in 1773.

reformers with other individuals to contribute towards the enactment of the Penitentiary Act?

The next two chapters will be a journey of optimism and failure entangled with a complex battle for success. Having painted the picture towards the eighteenth century's social factors and punishments along with the models for reform, we now have a solid foundation to explore a phase in the eighteenth century when new directions in social and penal philosophy were well underway. As Simon Deveraux points out, the Penitentiary Act did not come about as a fully conceived measure in its own right, it was the culmination of thoughts and legislative proposals which had the common aim of altering the balance between transportation and imprisonment.<sup>210</sup> This whole thesis has been geared up to this very point of reform. We must engage in this battle of reformation over deterrence, in order to appreciate a truly remarkable moment in the history of crime and punishment.

Rawlings noted a question from a London newspaper that will attach itself to this chapter throughout. The question is a simple yet intricate one. "How are we to punish Criminals who fear not Death?"<sup>211</sup> It is probable that such a question had been muttered in the early eighteenth century, but the deeper society fell into the eighteenth century, the louder this question became, thanks in large part to the reformers. Answering a question normally proves much harder than asking one, and the first part of this chapter will engage in a brief attempt to tidy up where punishments stood in the 1770s. This will provide us with the tools required to appreciate the climate the Penitentiary Act was born in. We will then look at the legislative efforts in the build up to the Penitentiary Act, exploring the path legislators were taking towards creating the 'most forward-looking penal measure of its time', which will assist us in evaluating whether an age of enlightenment or reformers created the Penitentiary Act. The content of the Penitentiary Act will follow on from this, whereby we will scrutinise its purpose and qualities, whilst dissecting the influences it adopted. We shall then

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<sup>210</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.406

<sup>211</sup> Rawlings, P. (1999) *Crime and power : A History of Criminal Justice: 1688-1998* London (Longman) pg.49

conclude the chapter with a look into the Penitentiary Acts implementation, which will stand us in good stead for chapter five in evaluating the impact such an Act had on crime and punishment in the final two decades of the eighteenth century.

## Progression

*“Light begins to be shed in the last quarter of the century (if their account is accepted) and from then on penal history is represented as progress - however slow and hard fought.”<sup>212</sup>*

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<sup>212</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.49

By the strict letter of the law, many criminal offences were still punishable by death in the 1770s, but as we testified in chapter two, the practice was very different from the theory, and the widespread use of secondary punishments often relieved capital punishment from its brutal sanctions. However, we must be careful when labelling capital punishment as a diminishing one, because as Gatrell points out, seven thousand felons were still executed in an era of significant penal reform.<sup>213</sup> This emphasises the point that capital punishment was still very much an active punishment. “I estimate that some 35,000 people were condemned to death in England and Wales between 1770 and 1830. Most were reprieved by the king’s prerogative of mercy and sent to prison hulks or transported to Australia. But about 7,000 were less lucky. Eight times a year at Tyburn or Newgate, once or twice a year in most counties, terrified men and women were hanged before large and excited crowds. Audiences of up to 100,000 were occasionally claimed in London, and of 30,000 or 40,000 quite often. Crowds of 3,000 - 7,000 were standard. When famous felons hanged, polite people watched as well as vulgar.”<sup>214</sup> This continued use of capital punishment reflects judges continued dilemma when dealing with those hardened felons guilty of a serious crime. A look at the Sussex Assizes outlines this problem. Of those sentenced between 1750 and 1759, 54.3% were executed, however, between 1770 and 1779 (our focus years for this chapter) only 22.2% were executed. Remarkably, between 1780 and 1789 this figure rose significantly back to an execution rate of 50.8%<sup>215</sup>, therefore something was taking place in the 1770s. It may be possible that the voyage of reform proposals that the decade created, put too many question marks over the legitimacy of executing criminals, or that an outbreak of war in America reduced crime, but the figures a decade after the Penitentiary Act appear to have provoked many policy makers back into an over reliance on the gallows, as stated by McConville. “When faced by an apparently continual rise in crime, the first response of policy-makers who adopted the deterrent strategy was to increase the effectiveness of the

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<sup>213</sup> To complement Gatrell’s quote we will say this era was 1770-1830.

<sup>214</sup> Gatrell, V.A.C. (1994) *The Hanging Tree : Execution and the English people, 1770-1868* Oxford (Oxford University Press) pg.7

<sup>215</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.588

central component by calling for more terrifying sanctions.”<sup>216</sup> This deterrent strategy was also not without its supporters; William Paley for example, supported the doctrine of maximum severity as late as 1785 in his published, *Moral and Political Philosophy*.<sup>217</sup> “The uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed; must be contravened by additional penalties and increased terrors.”<sup>218</sup> These conflicting opinions were reaching their peak in the 1770s, and one side at some point was going to have to concede. In the one corner we had Paley and company demanding maximum severity, whilst in the other; we had Howard and company demanding a reformatory punishment. A case could be made for both arguments. Hard labour might not just reform but also deter, however more terrifying executions may make fewer executions actually necessary.<sup>219</sup> This argument went on throughout the 1770s but it certainly appears that capital punishment was going through a lull in the 1770s, whilst our reformers from chapter three were in high spirits.

Whilst capital punishment was left in a state of self-doubt and inconsistency, transportation had a firm grip on punishing a wide range of crimes (as mentioned in chapter two), at least until 1776. Many condemned to death were in fact transported via being pardoned, and this was a punishment that embraced all the penal purposes of retribution, deterrence and reformation, which meant it was easy to stick with. The continued popularity of transportation was anticipated in the 1770s, given that the Transportation Act 1768<sup>220</sup> was an Act for the more speedy and effectual transportation of offenders. It was believed that any delay in the dispatch of serious offenders would

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<sup>216</sup> McConville, S. (1981) *A History of English prison administration volume 1 1750-1877* London (Routledge & Kegan Paul) pg.60; also see Murder Act 1752

<sup>217</sup> Paley, W. (1785) *The Principles of Moral and Political Philosophy* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>218</sup> Paley, W. (1785) *The Principles of Moral and Political Philosophy* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.531

<sup>219</sup> Throness makes a similar point; Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.132

<sup>220</sup> 8 Geo.III, c.15

severely reduce the impression of the punishment on the public mind,<sup>221</sup> which in turn satisfied Beccaria's core promptness principle. The significant point to be made from this statute is that it was a progressive statute, representing an increased reliance on transportation, particularly in punishing serious offenders, who were likely to have been pardoned from execution. It also shows us that punishment was still generally used as a lesson to the public, given prompt transportation was required to increase the impression of deterrence on the public mind. In some respects, this was transportation's very own, terrifying sanction, with banishment at the earliest opportunity. The potential growth of transportation can also be witnessed between 1769 and 1773, by Governments pursuit of more intimidating destinations for transports. However, serious attention was not given to this until legislative proposals after 1775 made it imperative, which will be made clearer later on in this chapter.<sup>222</sup> The final point that we need to make about both transportation and capital punishment, is the expense of both these punishments. Given that they were both borne by an individual locality. This meant maintaining such system's was relatively simple, and kept central Government happy, as Deveraux outlines. "In both ideological and fiscal terms, then, the costs of maintaining a system dominated by capital punishment and transportation were fairly easy to bear."<sup>223</sup> These financial costs of punishments will become of increasing relevance the longer this chapter develops, so capital punishment and transportation's financial outlays will be an important point to us, further down the line.

Of all of the punishments in the 1770s, imprisonment developed the most, at least in theory. It simply had to because it was both morally and physically bankrupt and needed a mass cleansing as

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<sup>221</sup> 8 Geo.III, c.15 also see; Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.409

<sup>222</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.410; "Many contemporaries believed that a new, more suitably intimidating destination for transports should be found, and, between 1769 and 1773, the government considered new sites in Africa or the East Indies. But serious attention would not be given to the problem of finding a more effective destination until after the events of 1775 and the ensuing legislative proposals made the matter imperative."

<sup>223</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.408



Harding et al stated. “The major objection to imprisonment had always been that it was a place where the hardened felons were mixed with, and consequently passed on vicious habits to, the first offenders and those merely awaiting trial. Also, the unhealthy state of prisons meant that there was an excellent chance that a term of imprisonment would turn out to be a death sentence.”<sup>224</sup> We do not need to regurgitate the problems with imprisonment, because they are well documented in chapters two and three, but what is of huge importance to us, is the changes in legislation that did take place in the 1770s. All of our reformers from chapter two (apart from Howard and Hanway) had published their works into the public domain before 1775, and public reaction slowly but surely demanded a change from these miserable and dangerous institutions. “What began to happen, though not all at once, or even at a rapid pace, was that public reactions to the misery and dangerous pestilences of prisons - which could be accepted as functional and tolerable within a system based on general and maximum deterrence - changed, and these things came to be seen as a threat to the well-being of society.”<sup>225</sup> The problem was that reform within the prison had been proposed and public discussion had gained speed, yet the institutions themselves remained without any enforced standards or universal rules. The decade of the 1770s was to change this, and the legislative progress in this decade must not be underestimated. Three Acts in total set the legislative wheels in motions towards reforming the prison. The first of these was in 1773, ‘An Act for providing Clergyman these to officiate in Gaols within that Part of Great Britain called England.’<sup>226</sup> It was rather ironic, that the morality of these prisoners was of greater importance than the health, but providing clergymen in gaols, was no doubt a progression towards reforming a prisoner, and outlined the importance of religion within imprisonment. As the preamble announces, ‘the Appointment of Ministers to such Gaols, with a proper salary, for the due execution of their duty as Clergymen, would alleviate the Distress of the Persons under Confinement, and would greatly contribute to the purposes of morality

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<sup>224</sup> Harding, C., Hines, W., Ireland, R. & Rawlings, P. (1985) *Imprisonment in England and Wales A Concise History* London (Croom Helm Ltd) pg.114

<sup>225</sup> McConville, S. (1981) *A History of English Prison Administration volume 1 1750-1877* London (Routledge & Kegan Paul) pg.86

<sup>226</sup> 13 Geo III, c.58

and religion.<sup>227</sup> Two Acts of 1774 followed the Act of 1773, the first relieved prisoners who had been acquitted or discharged without trial from having to pay gaolers fees before their release<sup>228</sup>; and the second required local officials to regularly clean and ventilate their gaols and to make basic provisions for the personal cleanliness of their charges.<sup>229</sup> It is important to note that none of these measures had direct support from central government probably to avoid conflict with the local landed elites who had a monopoly of moral and social power in the counties,<sup>230</sup> however, there was no doubt that this was a progressive move towards a reform of the prisons, and importantly the Penitentiary Act.

Both these Acts certainly did bear Howard's imprint even before his famous book, 'The State of Prisons.'<sup>231</sup> These Acts were essentially improving the health and morals of prisoners through a restriction on the staff-prisoner relationship, a certain contrast to the 'let them rot' philosophy in the early eighteenth century. Care for a prisoner, had rarely been witnessed particularly in legislation before 1770, but as we have found with capital punishment, theory can be very different to practice. The Health of Prisoners Act 1774<sup>232</sup> for example, required prisons to be ventilated, regularly cleaned, provided with sick rooms, baths and a surgeon, and it prohibited, wherever practicable, underground cells. This Act was also to be transparent and clear in the prison, as the Act states, 'To order this Act to be painted in large and legible characters upon a Board, and hung up in some conspicuous part of each of the said Gaols and Prisons; and to appoint an experienced Surgeon or Apothecary, at a stated salary, to attend each Gaol or Prison respectively, who shall, and he is hereby directed to report to the said justices by whom he is appointed, at each Quarter Sessions, a state of health of the Prisoners

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<sup>227</sup> 13 Geo III, c.58

<sup>228</sup> 14 Geo.III, c.20

<sup>229</sup> 14 Geo.III, c.59

<sup>230</sup> Deveraux S. (1999) "*The Making of the Penitentiary Act, 1775-1779*" *Historical Journal*.42 pg.409; "The political difficulty of imposing legislation that would have expensive consequences for local authorities is a fundamental consideration in explaining the course and character of the legislative measures of 1776-9."

<sup>231</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>232</sup> 14 Geo.III, c.59

under his care or superintendence.’<sup>233</sup> Howard even sought to supplement every gaol in the country with the two Acts of 1774 at his own expense, but negligence still appeared towards these Acts. “Although Acts further strengthened the position of the justices in gaol administration... There was a strong sense that the purpose of such legislation was to show the local gentleman what their duties were, but it would have been improper thereafter to check on their degree of compliance.”<sup>234</sup> It would probably be right to think that the legislators wanted to look busy and concerned, without actually being concerned. Howard later labelled that these Acts were under a ‘loosely organised system of public administration and weak executive government’, and he certainly had a point. “During subsequent visits he found that the Acts ‘had been strictly obeyed and literally carried into effect, in only 15 out of 130 of the prisons that he inspected.’”<sup>235</sup> An impression is given that it was becoming a do or die situation for imprisonment. Much had been documented about what they could become, and legislation had begun to move in the right direction, but in truth the prisons remained the same. With transportation taking the limelight, a change of circumstances was required to provide imprisonment with an opportunity for reform, but there is no doubt, that through the works of Fielding, Beccaria, Eden, Blackstone, Hanway and particularly Howard, imprisonment had become a serious candidate to eventually replace capital punishment and transportation. Theory at some point needed to meet practice, but how this was to happen, is another question.

### Developments in 1776

1776 was a remarkable year in the history of crime and punishment, firstly because

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<sup>233</sup> 14 Geo III, c.59

<sup>234</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.87

<sup>235</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.87-88

transportation stopped<sup>236</sup>, and secondly because such a popular punishment needed replacing. The American war created agitation that grew out of complacency late in the day in 1775, because concerns grew that the rebellion across the sea was not going to pass over as expected and transportation was not going to resume. “It was not until November 1775 that the ministry finally decided that some intervention in the interrupted process of transporting convicts might be required. Circular letters were dispatched to the high sheriffs of all counties, requesting information on all convicts under sentence of transportation who were still in their care. These data - name, age, gender, date of committal, the offence of which they had been convicted, the term of years (seven, fourteen, or life) of their sentence, and ‘(so far as it can be learnt) the several Trades and Occupations followed by the said convicts previous to their imprisonment’ - were clearly intended to provide the government with the information necessary to settle alternative conditions of pardon on those convicts still awaiting execution of their transportation sentences.”<sup>237</sup> Government had no other option but to act fast, because suddenly there was nowhere to send those sentenced to transportation. Newgate was soon to be bursting at its seams because it was the staging point for transportees brought from the county jails. The eighteenth century punishments were exposed, isolated and shamed. Government could not execute every felon, but it also could not provide free pardons, and to compound matters the Lord Mayor expressed fears over the health of inmates in prison.<sup>238</sup> The likes of Howard and Eden must have been licking their lips. “It was decided that the prisoners still in Newgate waiting for ships should simply be put on board vessels in the Thames and kept there until something could be done with them. Many were subsequently freed on condition that they transport themselves.”<sup>239</sup> Government had no sustainable alternative, but William Eden did, and along with the

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<sup>236</sup> Harding, C., Hines, W., Ireland, R. & Rawlings, P. (1985) *Imprisonment in England and Wales A Concise History* London (Croom Helm Ltd) pg.111; although, despite the general belief to the contrary, some convicts were apparently landed on the North American continent even after 1776

<sup>237</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.413-414

<sup>238</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.414; “About the same time that the circular was dispatched, the government ordered that approximately 140 transports still confined in London’s Newgate prison be removed on board a ship in the Thames, ‘as if in due course for transportation’, after the lord mayor expressed fears that they posed a threat to the health of other inmates.”

<sup>239</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.565

compliance of the Commons and the judiciary, 1776 marked a new beginning, whereby Eden drafted and implemented the first Act through Parliament of long prison terms at hard labour for serious offenders.<sup>240</sup> It passed the demands of an urgent crisis, and enabled convicts to be set to work on the Thames, housed in disused naval hulks, but of greater importance to the Penitentiary Act, it focussed the minds on a need for the prison. “Moreover, the interruption to transportation caused by American independence concentrated minds on the need for the prison - or, as the institution was more commonly referred to, the penitentiary - as an alternative.”<sup>241</sup>

The preamble of the Hard Labour Act<sup>242</sup>, must have raised a few eyebrows. It was brought forward in legislation to serve the urgent needs of the times, but was to temporarily remodel the role of punishment. The 1776 Act declared that offenders might be “reclaimed from their evil courses” and with “proper care and correction” be turned away from the habits and behaviour that had led them into crime. You get the impression that Eden was not around for the short term with this Act. ‘Whereas the transportation of convicts to his Majesty’s colonies and plantations in America, now in use within that part of Great Britain called England, by virtue of the several statutes authorising transportation, is found to be attended with various inconveniences, particularly by depriving this kingdom of many subjects whose labour might be useful to the community, and who, by proper care and correction, might be reclaimed from their evil courses: And whereas, until some other more effectual provisions, in the place of transportation to his Majesty’s Colonies and Plantation in America, can be framed, such convicts, being males, might be employed with benefit to the public in raising sand, soil, and gravel from, and cleansing the River Thames; or being males unfit for so severe labour, or being females, might be kept to hard labour of another kind within England.’<sup>243</sup>

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<sup>240</sup> See; Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg52

<sup>241</sup> Schofield, P. (2009) *Bentham: a guide for the perplexed* London (Continuum) pg.71

<sup>242</sup> 16 Geo III c,43; many commentators also call this act ‘The Hulks Act’.

<sup>243</sup> 16 Geo III c,43

This concept was a new one, but the Hard Labour Act<sup>244</sup> was going to try and make the offenders labour useful to the community and perhaps this is the point that the legislative seeds were sewn for the Penitentiary Act.

The Hard Labour Act<sup>245</sup>, was by no means imprisonment in a pure form, as Beattie states, “It had undoubtedly grown out of the experience of transportation of which it was conceived as a temporary substitute.”<sup>246</sup> However, there was always more to this than meets the eye. A brief look at the contents of the Hard Labour Act, will explain this. The first few sections were as expected, section one, stating, ‘Any male convicted in England of any crime punishable by transportation on to America, may, instead thereof, be kept to Hard Labour in cleansing the River Thames &c. for any term not less than three, nor more than ten years.’ Sections five and eight outlined the integral role of the overseer, and McConville in fact, sums this role up superbly. “When the hulks came to be put in charge of an overseer by appointment of the Middlesex justices, Duncan Campbell, an experienced transportation contractor was chosen. Under the Act the overseer was obliged to keep his charges at hard labour ‘in raising Sand, Soil and Gravel from, and cleansing the Thames, or in any other laborious Service for the Benefit of the Navigation of the Thames’; but in no other kind of work. His authority extended to punishment by whipping and to commendation for a shortening of sentence. He was obliged to make returns, on oath, to the Court of King’s Bench on the first day of every law term; but, apart from this last, Campbell (who also was contractor for the custody and maintenance of the prisoners) was subject to no control after his appointment. He immediately had two ships - the *Justitia* (which he had used for transportation) and the *Censor* - fitted out and moored in the river, and received his first prisoners in the summer of 1776.”<sup>247</sup> Section seven stated that prisoners were to ‘be fed and sustained with bread, and any coarse or inferior food, and water or small beer, and also

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<sup>244</sup> 16 Geo III c,43

<sup>245</sup> 16 Geo III c,43

<sup>246</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.567

<sup>247</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.106

clothed; and such offender shall not ... be permitted to have any other food, drink or clothing.’<sup>248</sup> All these sections were to be expected, but then there were the revolutionary aspects of the Hard Labour Act. Inmates for example being able to earn early release for their good behaviour, and section nine, stating that at the end of confinement the inmate was to receive money. ‘At the end of the term of such service, and upon being restored to his liberty, receive from the overseer or overseers under whom he shall have so served, such sum of money, not being less than forty shillings, or more than five pounds, together with decent clothing.’<sup>249</sup> This was a new scheme, rewarding prisoners was unheard of, but Eden probably thought that devising such measures in a temporary expedient may prove to be a valid acid test, and was to be a valuable experiment before the grander scheme of the Penitentiary Act.

There were also measures in place for women and those men who were incapable of working on the river because of age or health. They were to be confined in houses of correction, kept to hard labour and housed separately from the other inmates. Section thirteen obliged Justices for every County in England to prepare Houses of Correction for the reception of such offenders. Justices of the Peace were to, ‘Take into consideration the state of their respective Houses of Correction’ so they, ‘may be prepared for the reception of such offenders as shall be ordered to hard labour therein, by force of this Act.’<sup>250</sup> There is no doubting, that the Hard Labour Act was a significant penal departure from transportation and had the ingredients of incarceration ingrained into its body, but it still had some way to go to satisfy the doubters of incarceration. However, Eden knew exactly what he was doing. He could have seen the pressure of the times as a huge opportunity to thrust imprisonment on society, but the Commons and judiciary would have probably stood in the way of such a radical movement. Eden also knew that he needed patience and composure, as Deveraux stated. ‘The Hulks Act was not only a striking innovation in itself: it was also a deliberate attempt to

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<sup>248</sup> 16 Geo III c,43

<sup>249</sup> 16 Geo III c,43

<sup>250</sup> 16 Geo III c,43

forestall the more extensive innovation that Eden knew could not yet succeed. Eden was biding his time and establishing his credentials with those more radical penal reformers whose support would become more necessary when the time came for the truly ambitious measure of hard labour which, almost certainly, he was already contemplating.<sup>251</sup> Eden was certainly given the time to contemplate his next moves in the battle for reform, when the Hard Labour Act was continued by 18 Geo. III, c.62, and 19 Geo. III, c.54. He now had two years to advertise the virtues of hard labour, and the climate and mood of the times were probably ideal for such an experiment. The reasons for this are twofold; firstly, society had to experiment, it was void of ideas and options, so in some respects Eden had a free opportunity to implement his proposals on the grounds of necessity. Secondly, with the American war taking place, it meant a decrease in crime was likely, so his main role was to essentially deal with existing prisoners. Once he found a way to deal with them (via the Hard Labour Act) he had time to devise his next strategy. Beattie confirms this point. “Both expedients emerged out of the experience and discussion of the previous twenty years and in some cases had been anticipated by much earlier practice, but the incarceration and labour now being undertaken was on a larger scale than ever before. The numbers involved were not enormous, at least not immediately, for as usual the level of offences declined when the war with America began.”<sup>252</sup> Beattie went on further to add that eighty per cent of offenders sentenced at the Surrey assizes for noncapital punishments were either sent to the hulks or houses of correction (or in few cases the county jail). The quarter sessions did differ, preferring to order whipping or whipping with a short term in jail, but still over a quarter of offenders were sentenced to imprisonment at hard labour.<sup>253</sup> This was a significant shift, and one admittedly borne out of necessity, but the Hard Labour Act had somehow found a gap to fill, and whilst the development of the hulks edged itself closer to the Penitentiary Act, the houses of correction did likewise.

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<sup>251</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.420

<sup>252</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.567

<sup>253</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.567



One of the most interesting developments of the hulks was the fact it did not detach itself from the spectacle element, which was embedded so deeply in capital punishment. Whilst Eden was hard at work, drawing his next plans for reform up, crowds appeared to flock to the hulks, like well drilled robots, born to watch suffering. This it appears was not necessarily in Eden's plans, but to an extent may have assisted the hulks in its popularity. "As criminals were sentenced to hard labour beginning in 1776 at highly visible locations on the shores of the Thames, groups of sightseers became so frequent that a brick wall had to be erected to keep them at a distance...It was part of the fascination of the age with the public torments of the criminal."<sup>254</sup> The fact that a brick wall had to be erected would suggest the spectacle or popularity element of this punishment was not anticipated in such volumes, but it probably gave law-abiding citizens great pleasure to watch the prisoners suffer in their own sweat. Two years on and the spectacle element was the least of Eden's concerns, for he had to devise a plan to accommodate those who supported hard labour as a complete substitute for transportation against those who did not.

### Two years on

In 1778, the Hard Labour Act was up for renewal, but within this time frame a certain John Howard had entered the frame and you knew exactly what you are going to get from him. This was the Hard Labour Act's judgement day. As we already know Howard's investigations into the jails and houses of correction had an immediate influence on society, but Howard also investigated the hulks, and the report was damaging. Conditions on board were deemed atrocious and the mortality rate reflected such a report. "Howard called attention to the condition of the hulks as regards the health of the prisoners and a public enquiry showed that between August 1776, when the convicts were first put on board the *Justicia*, and March 1778, out of 632 prisoners who had been received 176

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<sup>254</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.90

had died.”<sup>255</sup> A committee of the House of Commons established in 1778 under Sir Charles Bunbury to look into the workings of the Act, took evidence from Howard along with Duncan Campbell and other witnesses. The verdict was conclusive, and in line with Howard’s report, the conditions on board the hulks were dismal. It was not just the conditions though; security also became a major issue. A number of battles were fought between the prisoners, and their keepers, and some men even escaped. The public was becoming increasingly concerned, and to add to this the people in London became nervous about cargoes of desperate men chained up so near the capital.<sup>256</sup> To a much lesser extent, the hulks were in a similar position to imprisonment, the exposed problems had entered the public realm, and solutions needed to be found. The Hard Labour Act’s report could not have really been more damning, given its high mortality rates, but remarkably enough, the committee concluded that evidence provided by Campbell persuaded them that conditions on the hulks were improving and that they should be retained.<sup>257</sup> “Its report, delivered by Bunbury himself, noted that there had initially been a high rate of mortality on board the hulks owing to crowded and insanitary conditions and a poor dietary regimen. But it also observed that circumstances had substantially improved since then. The committee endorsed a one-year extension of the Hulks Act which was passed into law under Bunbury’s supervision and with no apparent controversy.”<sup>258</sup> One interesting observation from this report is that the houses of correction do not seem to have been commented upon. It was almost as if, something else was to be expected. Having set the foundations of hard labour deep in the public’s minds, the committee was now striving to bring a new institutional form of it to the centre stage.<sup>259</sup> However, the wheels were already in motion for this new institutional form of punishment, the hulks and houses of correction had somehow done their job, even with staggering mortality rates.

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<sup>255</sup> Du Cane, E. Sir (1885) *The Punishment and prevention of Crime* London (London Macmillan and Co) pg.118-119

<sup>256</sup> See; Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.573

<sup>257</sup> See; Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.573

<sup>258</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.421

<sup>259</sup> Deveraux makes a similar point; Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.424

Of course, everything was not plain sailing. Lord North for example produced a speech to the House in March 1778, announcing that the experiment of the Hulks, ‘had answered beyond all expectation; and hinted at a further extension of the plan over the whole kingdom.’ A few certainly contested this opinion, as Throness pointed out, “Charles Whitworth had visited the *Justitia* and stated his concerns about the prisoners’ health. Bunbury and Burke pushed for transportation to Canada or the Floridas. Sir William Meredith claimed the hulks had proved to be much more severe than transportation and therefore ‘totally repugnant to the general frame of our laws.’”<sup>260</sup> The hulks against transportation argument could go on, but we need to focus on this path to the Penitentiary Act, and Bunbury was certainly walking the path. A year before the aforementioned speech Bunbury secured an order for ‘a Bill for better regulating the Gaols and Houses of Correction’ in England. To add to this the judges at the summer assizes in 1777 had urged grand juries and magistrates to consider the benefits of houses of hard labour in each county, because a bill was being prepared to authorize the establishment of such a scheme.<sup>261</sup> It was in this climate, with the support of those who favoured reformatory confinement at home, as opposed to exile, that with Howard’s close advice, Eden and Blackstone drafted the Hard Labour Bill which was to be the direct vehicle to the Penitentiary Act.

The Hard Labour Bill of 1778 was Eden’s child, and put forward an elaborate plan to divide the country into nineteen districts. Each of these districts would have a “house of hard labour” in which work, religious instruction, and solitary confinement at night would combine to impose an entirely new regimen of discipline on prisoners.<sup>262</sup> These “Houses of Hard Labour”, would be wholly distinct and separate from the Gaols, Workhouses and Houses of Correction, and would be amalgamated into districts for the benefit of finance and administration. These districts would hold

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<sup>260</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.145

<sup>261</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.574

<sup>262</sup> See; Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.574

different capacities, calculated on the basis of past committal rates accommodating for example around fifty convicts a year in Wales, to almost nine hundred in the district of London (excluding the City).<sup>263</sup> The costs of each house were to be borne by the counties in proportion to the number of offenders each county confined there, and this certainly distanced the Hard Labour Bill from any previous Bills.<sup>264</sup> Officials were not obliged to sentence transportable offenders to the new houses of labour, but each district had to provide sufficient space in its house (or houses) for three times as many offenders as it had on average transported each year.<sup>265</sup> This was as clear an indication of the Bills long term ambition, as we had seen. The Bill was supported by the philosopher Jeremy Bentham (and some would say significantly modified as a consequence) and although often altered, this became the embryo of the Penitentiary Act. It is interesting that the committee did not simply extend the hulks given the committee's verdict that the hulks had 'significantly improved', but this suited Eden. As Deveraux points out, Eden was probably hoping the activity of 1778 would witness a shift in emphasis from the hulks, 'to a more general acceptance and a broader institutionalization of hard labour in place of transportation.'<sup>266</sup> This was Eden's opportunity to reform crime and punishment.

The 1778 Bill would provide control of the new hard labour houses to the local magistrates, who were to be appointed at the General Sessions of each county.<sup>267</sup> The conduct was to be supervised and enforced by visitors who would discipline misconduct<sup>268</sup> and recommend reduced sentences for good behaviour.<sup>269</sup> Salaried officials were responsible for the day to day running of each house, and it was even hoped the salary of the governor would be paid for by the labour of the

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<sup>263</sup> McConville, S. (1981) *A History of English prison administration volume 1 1750-1877* London (Routledge & Kegan Paul) pg.107

<sup>264</sup> This was the first Bill to actively separate the country into sizeable districts.

<sup>265</sup> see; Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.421

<sup>266</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.426

<sup>267</sup> Hard Labour Bill, s.6

<sup>268</sup> Hard Labour Bill, s.48

<sup>269</sup> Hard Labour Bill, s.49

prisoners.<sup>270</sup> Unsurprisingly the practice in these houses was not too dissimilar from that in the hulks. Prisoners were to be kept ‘to Labour of the hardest and most servile Kind’<sup>271</sup>, fed on ‘inferior food, and Water, or Small Beer’, and clothed to humiliate.<sup>272</sup> Offenders who abused the regime of the house were to be ‘whipped in proportion to the nature of the offence’ or confined to the dungeon<sup>273</sup>. The houses were to be built in a healthy location<sup>274</sup>, allowing for prisoners to take exercise and get fresh air. These prisoners were also to be separated in cells at night, and separated during the day, as much as the labour allowed.<sup>275</sup> For all of the positives this Bill created, particularly for the supporters of reformation, it still inevitably had the problem of expense. Society was stuck with filthy immoral institutions, and would always struggle to find the funds to implement these new houses. “No matter how reasonably it sought to apportion the costs and responsibilities involved in building and administering the new houses, it still imposed on local authorities both the initial cost of building and the subsequent cost of running them.”<sup>276</sup> This was always going to be the elephant in the room for Eden, and he had to find a solution.

Even without the problem of expense, such a level of reform would inevitably need countless amendments, and Eden was certainly aware of this, hence the circulation of the drafts Bill in the spring of 1778. “The Matter is too complex to be brought to any degree of Perfection except by continued Attention and repeated Alterations.”<sup>277</sup> One of those to receive a copy of the remodelled Hard Labour Bill was Jeremy Bentham who admitted that the progress of such a Bill had escaped him, which either indicated neglect in research by Bentham himself, or a Bill that had not widely reached public attention. Nonetheless, Bentham immediately saw an opportunity for public

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<sup>270</sup> Hard Labour Bill, s.23

<sup>271</sup> Hard Labour Bill, s.37

<sup>272</sup> Hard Labour Bill, s.40

<sup>273</sup> Hard Labour Bill, s.50 & s.51

<sup>274</sup> Hard Labour Bill, s.11

<sup>275</sup> Hard Labour Bill, s.38

<sup>276</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.422

<sup>277</sup> Semple, J. (1993) *Bentham's Prison; A study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.49

comment, and was in no mood to delay his thoughts on the matter. “It seemed hardly worthwhile to delay this publication in expectation of further materials that may either never come.”<sup>278</sup> Bentham wasted no time on this matter, and in a three week period he, “assembled a detailed, 114-page pamphlet called, ‘A view of the hard labour bill’ in which he made numerous suggestions for administrative improvement but identified fully with its fundamental aims and plan, saying that it ‘promises to operate one of the most signal improvements that have ever yet been made in our criminal legislation.’”<sup>279</sup> Bentham welcomed the 1776 Hulks Act as a substitute of transportation for hard labour, but he wished to find a punishment adopting solitary confinement combined with labour<sup>280</sup>, the Hard Labour Bill it seems would be right up his street.

Whilst Bentham, praised certain aspects of the Hard Labour Bill, ‘A view of the hard-labour bill’<sup>281</sup> was really a pamphlet that would expose the Bill’s grey areas, and suggest improvements. These suggested improvements would prove vital not only to both Eden and Blackstone, but also to the moulding of the Penitentiary Act. In order to reflect the pamphlets diverse range of praise and criticisms we will explore the praise Bentham gave to the Bill’s salary of the governor, followed by some of its fundamental flaws, such as the powers of the governor, heating, working hours and cell size. We will then explore a selection of Bentham’s more minor problems, such as the size of the districts, reward for good behaviour and measures in place for escape. This will provide us with a greater appreciation to the Hard Labour Bill, whilst detecting some of its defects.

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<sup>278</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg. preface xi

<sup>279</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg. 146

<sup>280</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg. preface ii

<sup>281</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

Beginning with the positives, the clause in the Bill which appeared to give Bentham the greatest pleasure was the provision that the salary of the governor was to be proportionate to the profits made by the prison. This provision gave powers for any two of the three members of the committee of management to allow payment of profits to diligent and meritorious offenders for the use and benefit of themselves or their families.<sup>282</sup> To Bentham this provided an important junction of duty and interest, and meant the Governor had an interest in the work. “It directs that this salary shall be so ordered by the Committee as to ‘bear a constant proportion to the quantity of labour performed in each house;’ and arise chiefly, or, if possible, totally from that source: and this to the end, that ‘it may become the interest as well as the duty of each governor to see all persons under his custody be regularly and profitably employed.’”<sup>283</sup> This principle will be found later on in chapter five, in Bentham’s very own prison, the Panopticon.

Whilst the junction of the duty and interest of the Governor was a positive for Bentham, the powers of the Governor certainly were not. Bentham appeared deeply concerned about corruption within the Governor’s powers, but in doing so tread a fine line between being pedantic and helpful. Section forty seven helps explain this point whereby visitors were given authority to inspect the Houses on a regular basis (at least once every fortnight). Here they would ‘examine the state of the house’, ‘see every convict’, and generally ‘examine into the conduct and management of the house’. However, to swerve away from corruption it was outlined that these visitors would fulfil their duty for no longer than two successive years. ‘Of these visitors, one is to be changed every year: no one is to continue for more than two successive years.’ Bentham initially approved of this but still went on to find a fault. “Were both visitors to go out at once, the fresh corners would for a time be new and awkward in their office; and the fund of experience collected at each period, would be dissipated by

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<sup>282</sup> A point that Semple makes; Semple, J. (1993) *Bentham’s Prison; A study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.47

<sup>283</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception.* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.26

every fresh appointment.”<sup>284</sup> This reflects Bentham’s awkward attitude, but it could be contested that this constant determination for perfection may have been just what the Bill required in its amendment phase.

The role of the governor was clearly an important part of the Bill and the power given to the governor over the awarding of contracts to supply the prison along with its powers to punish, appear to have been Bentham’s main issues. Section twenty five established the economic powers of the Governor, empowering him to solely contract the articles wanted in the house. However, for Bentham this left the Bill vulnerable to abuse. “This power is committed solely to the governor, without any express reference to the Committee for their concurrence.”<sup>285</sup> The second of Bentham’s documented problems was in relation to the ambiguous nature of the Governors power to punish convicts via sections fifty and fifty one. Section fifty limited the power of the governor to ‘punish by close confinement in a “cell or dungeon,” for any term not exceeding three days.’ In contrast, fifty one empowered visitors and the committee to punish severer instances of bad behaviour. However, it was in this section that the governor was given more power. ‘He is hereby required to, order such offender to the cells or dungeons, - and is immediately, or at the next coming of the Visitors, to report such offence to such Visitors.’ As we know from section forty seven, these Visitors were obliged to visit the Houses at least every fortnight, but the question Bentham wanted answering was how long these offenders were to be punished for. “Now, for what time the convict committed in this manner to a dungeon is to remain there, is not expressly said; as no time is mentioned for his releasement, it seems impossible to put any other construction upon the clause than that he is to stay there till the coming of the Visitors. But the Visitors may not come for a fortnight. So long then may

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<sup>284</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.81

<sup>285</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online)pg.34



a convict remain in one of these dungeons by the authority of a Governor. The consequence is that indirectly a power is given to this officer, of inflicting a punishment more than three times as great as that which it is thought proper.”<sup>286</sup> Whilst it could be argued that the issues Bentham has raised are merely minor complications, they are not. Imprisonment before this point had been suffocated by corruption, so for a new reformatory form of imprisonment to leave itself exposed to exactly the problems it was trying to address, makes Bentham’s observations very important to us.

Semple rightly points out that Bentham was passionate about domestic detail, and in this pamphlet Bentham wanted a garden to be provided, dungeons to be airy, and inmates to have sheets and a bedstead<sup>287</sup>, but one form of domestic detail that really stood out was the heating of these Houses. Alarming, the original Hard Labour Bill made no provision for heating, but as Eden stated, this was what the circulation of such a Bill was all about, the amendments. Bentham was not shy of attempting such amendments either, as proven in his detailed evaluation of heating. “It is by no means necessary, nor even advisable, that there should be a fire to every room, nor between every two rooms, nor indeed that there should be in any of the rooms any fire-places at all. The most economical way as yet in use, of generating and applying heat for this purpose, seems to be that which is practised in hot-houses, by means of flues or lateral chimnies, in which the smoke deposits its heat in its passage to the atmosphere. The fire employed in heating the bread oven, might, perhaps, be occasionally made useful in this way. I have heard it suggested that the steam of boiling water might perhaps be applied to the purpose of heating rooms, in a method that might be more economical than that of heating them by smoke. If this expedient were employed, the coppers in

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<sup>286</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.88-89

<sup>287</sup> Semple, J. (1993) *Bentham’s Prison; A study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.46-47

which the victuals were boiled might perhaps be adapted to this purpose.”<sup>288</sup> On economical and practical grounds, it would probably be hard to dispute Bentham’s form of heating, and this outlines his valuable input at such a critical time to the Bill.

Another one of Bentham’s fundamental flaws within the Hard Labour Bill was the working hours. The Bill required the measure of the working day to correspond to the amount of daylight each day brought. “In the depth of winter, the time of working can scarcely begin so early as eight in the morning, nor continue so late as four in the afternoon. In the height of summer, it may begin earlier than three in the morning, and it may continue later than nine in the evening; but if from eight till four, that is eight hours, be enough, from three to nine, that is sixteen hours, were even nothing more than the duration of the labour to be considered, is surely too much. But labour of the same duration and intensity, is severer in summer than in winter: heat rendering a man the less able to endure it.”<sup>289</sup> Essentially Bentham believed the working day to be too long in the summer and too short in the winter, so Bentham proposed the same working hours throughout the year, which probably made sense. “The better way, therefore, seems to be, if not to make the time of working longer in the winter than in summer, at least to make it an equal length. As eight hours, or the least time of day-light, therefore is evidently too short a time, this will make it necessary to have recourse to lamps or candles. As the walls and floors will of course be of brick or stone, without any combustible linings, these artificial lights can scarcely be attended with any danger.”<sup>290</sup> This was clearly an integral part to the Bill, given it outlined the length of hours a prisoner was to be punished via labour, so Eden and Blackstone were going to have to think hard about the current plan of work

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<sup>288</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.71

<sup>289</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.51-52

<sup>290</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.52

by daylight, to Bentham's more regimented plan of set hours.

The final fundamental flaw is found in the ambiguity of section thirty eight. In this section it states that lodging rooms should not exceed twelve feet in length, eight feet in breadth and eleven feet in height, yet there is no minimum size outlined. Such issues were addressed in the Penitentiary Act which would have delighted Bentham. "With regard to the size of the rooms, this we see has limits set to it on the side of augmentation; on the side of diminution it has none."<sup>291</sup>

The first of our more minor assertions that Bentham made, is in regard to preventing escape. The Bill laid down that convicts were to wear humiliating uniforms, but to Bentham's displeasure the Bill did not mention face dye, which happened to be Bentham's unique measure to prevent prisoners escaping. The idea is a rather novel one, and reflects his attention to detail and fascination with full and proper regulation. The idea of face dye came from Bentham's exploration of inherent marks produced by either mechanical or chymical means. Mechanical means was the 'partial shaving of the head or of the beard, or the chin, or mouth; or the shaving of one eye-brow.'<sup>292</sup> Chymical means on the other hand produced marks. "Instances of chymical means of producing marks are washes applied to the forehead, or to one or both cheeks, or, in short, to the whole face, so as to discolour it. Chymistry furnishes many washes of this sort. Of several of these I have often undersignedly made trial upon myself."<sup>293</sup> It is a rather novel point and almost comical given that Bentham was probably exploring the world of face dye on himself, at the same time as Howard was battling for his life visiting horrendous prisons, but to an extent this is exactly what reform was about. The two in a

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<sup>291</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.50

<sup>292</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.61

<sup>293</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.62

bizarre manner, complemented each other. Howard was doing the groundwork and providing the brutal hard truths, whilst Bentham was exploring the potential practices of the prisons. Bentham's attention to detail must not be underestimated.

Providing a certificate for the well behaved prisoners upon release, served Bentham with contrasting thoughts. Whilst he hoped very few convicts would fail to earn a certificate, he could not detach himself from the thought of the prisoners who would not obtain such a certificate. "But supposing an offender's behaviour to have been such as renders it improper for the Visitors to give him the certificate here mentioned. What is to become of him then? Were no certificates to be given in any case, some persons might, perhaps be induced to run the hazard of employing a convict to whom it would not have been proper to have granted one. But when it is known that a certificate of good behaviour is granted to the generality of the convicts, the denial of such a certificate to any one amounts in fact to a certificate of the contrary. In such a case, it is not very probable that he will find employment anywhere."<sup>294</sup> The assumption that every prisoner would obtain a certificate after such a course of discipline was not enough for Bentham, and rightly so. The stigma of prisoners leaving the Houses without a certificate would no doubt have had an adverse effect to their reformation, and this was clearly another matter for the Bill to consider.

The final point we are going to make on Bentham's observations of the Hard Labour Bill is in relation to the country being split up into nineteen districts, because it outlines Bentham's broad spectrum of thought. He approved of the proposed divisions, but was concerned by the size of the districts and in particular the length some magistrates would have to travel for meetings, which would 'impose onerous new burdens on the country gentlemen.'<sup>295</sup> This was an issue that could have

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<sup>294</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.67

<sup>295</sup> Semple, J. (1993) *Bentham's Prison; A study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.50

probably passed by without so much as a worry, but it did not get past Bentham. The whole principality of Wales together with Cheshire was included as one district.<sup>296</sup> Bentham went on to add that in this principality a whole body of Committee-men from Wales were to travel out of their principality, and a Pembrokeshire Justice would travel the length of Wales (near two hundred miles) before he would reach his destination.<sup>297</sup> Bentham's solution was to make the districts less than the circuits, whilst at the same time bigger than the counties via adjusting the buildings to a convenient size. "An establishment for the reception of a large number of persons may be conducted, as the preambular part intimates, at a proportionably less expense than an establishment for the reception of a small number. The uses of making them less than the circuits are two: 1<sup>st</sup>, the lessening the expenses of conveying the convicts from the place of trial to the place of punishment; 2<sup>dly</sup>, the lessening the trouble and expense of the Justices, who are to travel out of their own counties to the town where they are to meet to carry the act into execution."<sup>298</sup> Again this would be a matter that the authors of the Bill would have to consider, but Bentham certainly displayed an economical awareness of the times, which was always critical given the national debt the nation was suffering from.

Much to Eden and Blackstone's pleasure Bentham even had the audacity to try to rename the actual houses<sup>299</sup>, perhaps to make his presence really felt, but this measure as we shall find came to

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<sup>296</sup> Hard Labour Bill, s.6

<sup>297</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.13

<sup>298</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.9

<sup>299</sup> Bentham, J. (1778) *A view of the hard-labour bill; being an abstract of a pamphlet, intituled, draught of a bill, to punish by imprisonment and hard-labour, certain offenders; and to establish proper places for their Reception*. London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg. 5; "It might, perhaps be as well to call them Hard-Labour Houses, or Labour-houses at once. This, or some other equally compendious, is the name that will undoubtedly be given them by the people at large: the tendency of popular speech being to save words and shorten names as much as possible. Such a name should be analogous to the names Rasp-huys (Rasp-ing-house) and Spin-huys (Spinning-house) in use in Holland; and in short, to our English word Work-house. The technical name would by this means be the same as the popular. This would, pro tanto, save circumlocution, ad guard against error in law proceedings."

no avail. These comments written in the space of just three weeks were published in March 1778, so provided enough time for his suggestions to be incorporated. Bentham approved of the Bill, and believed his comments on the Bill influenced the contents of the Penitentiary Act. Whilst he was certainly influential, he was not as important to us as our reformers in chapter three. Fielding, Beccaria, Blackstone, Eden, Hanway and Howard laid the table and Bentham was trying to drink from it. Semple is spot on, suggesting that the publishing of this work meant, ‘Bentham may have been motivated by worldly ambition.’<sup>300</sup> All of this aside, his contribution was no doubt helpful, and he certainly assisted in the effort towards the Penitentiary Act. How much he did, will probably be found in the next section of this chapter which relates to the content of the Penitentiary Act.

### The war now disrupts the Bill

A further motive for Eden’s acceptance that the Bill was not the finished article and would need circulation was probably because he knew he would be taking a break from the Bill itself. After the Bill was sent to committee on 23 March 1778, Eden was chosen to travel to America with two other commissioners (Lord Carlisle and George Johnstone) to negotiate a settlement with the American colonies. He did not leave the Bill in bad shape though, or at least he did not think he had. Having drafted the measure in consultation with Blackstone and Ashhurst and produced a long list of MPs who he thought should sponsor the bill (including Bunbury)<sup>301</sup>, the Bill seemed stable. It had been read twice and committed within three days of its introduction, but unbelievably died with the session. Deveraux believes a reason for this may have been because of the King’s, “growing distaste for Eden, who’s increasingly transparent and aggressive desire for place and status offended him.”<sup>302</sup> Therefore, North stayed well clear of antagonizing his royal master, and Bunbury followed suit. However, it probably was not this alone, perhaps the experience of the hulks had drawn many back

<sup>300</sup> Semple, J. (1993) *Bentham’s Prison; A study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.44

<sup>301</sup> See; Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.424-425

<sup>302</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.425

to supporting transportation. A year before this point, Howard had sent a humanitarian impulse through the heart of the nation. Previously accepted prisons were now condemned prisons, and you cannot help but think the mortality rates of the convicts on board the *Justicia*<sup>303</sup>, alarmed the public that this was just another disaster waiting to happen. When your supporters start leaving, demise is expected, and in this case, North and Bunbury were reluctant to support Eden, along with many others on Eden's 'long list' of MPs, including Burke and Meredith.<sup>304</sup> On the 15<sup>th</sup> April 1778, Eden learned that North was to dismiss the bill, the next day he was to set sail on the *Trident* and not to return until 20 December 1778.<sup>305</sup> As far as preparations go for a long journey, this was not the best, but let's not forget Eden still had the King of Law on his side, William Blackstone.

It was not really until Eden returned that things got moving again, however, in rather ironic fashion, Bunbury was the man to provide this renewed momentum. "Bunbury and his associates had introduced and brought to committee stage their own bill to achieve general measures of reform and hard labour in all places of criminal confinement throughout England and Wales."<sup>306</sup> Its main features were the health, cleanliness, regulation and proper separation of prisoners in gaols and houses of correction. It certainly appeared to be a combination of the 1773<sup>307</sup> and 1774<sup>308</sup> Acts (regarding the health and regulation of prisoners) along with features of the Hard Labour Act<sup>309</sup> (such as the separation of offenders). However, this bill came at an interesting time given it had been documented that the Justices of the County of Middlesex were not too happy with the outcome of those females, boys and men unable to work on the hulks that were sent to London prisons. Throness stated, "No profit has ever been got from the labour of the convicts." Structural alterations alone had

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<sup>303</sup> As already mentioned, 176 prisoners died out of 632.

<sup>304</sup> See; Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.425

<sup>305</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.147

<sup>306</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.431

<sup>307</sup> 13 Geo III, c.58

<sup>308</sup> 14 Geo III, c.20 & 14 Geo III, c.59

<sup>309</sup> 16 Geo III, c.43

cost £2000, the costs of housing them were ‘near £600 a year’, and now the surgeon, the clerk of the peace, prison keepers, and others were asking for more. They demanded the insertion of a clause that would specify that costs borne by the County would be paid by Parliament.”<sup>310</sup> This was certainly not an ideal climate for Eden to attempt reform. The elephant was again in the room and this problem of duty and cost on local officials was clearly not going away. Along with this, the novelty of the exposed hulks seemed to be wearing thin, Eden needed a master plan, but the fact Bunbury was bringing forward a bill to reform via hard labour must have encouraged him. There was still hope.

Judgement day arrived on the 1 April 1779. A suitable form of punishment was still required, and the hulks, transportation and imprisonment sat motionless awaiting a verdict on its future from the parliamentary committee’s<sup>311</sup> report. This took into account advice from John Howard on options for prison labour, answers from Dr. Smith about his visits to the hulks and explored Botany Bay as a potential place to start a new prison colony. The report is narrowed down sufficiently by Beattie. “Their resolution fell into three categories. In the first place, the committee once again gave approval to the hulks and indeed recommended that they be extended to other rivers and ports. They thought that the minimum sentence might be shortened to one year - that was subsequently adopted - and they suggested a number of other minor changes. But in essence they were content to leave the hulks as they were, at least until transportation could be re-established. In the second place, they heard a good deal of evidence on the question of transportation and resolved that it should be re-established when a suitable place was found. But the committee focused particularly on the houses of correction that the 1776 Act had intended would be enlarged in order to provide separate accommodation for the large numbers of offenders sentenced to hard labor outside the hulks.”<sup>312</sup> The report condemned the prison system as ‘chiefly calculated for the safe custody of the persons confined without due

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<sup>310</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.148

<sup>311</sup> Select Committee on Convicts

<sup>312</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.574



Attention to their Health, Employment, or Reformation.’ Nonetheless, the regime of Eden’s hard labour bill consisting of solitary confinement, work, and religious instruction still appeared desirable. There was still a hope it would ‘raise a general Spirit of Reformation’ through the whole kingdom, therefore a recommendation was put in place for a scaled-down version of a nationwide system of houses of hard labour to just two prisons. One house for six hundred men and the other for three hundred women. If these were successful, it was hoped magistrates would rush to copy them, but this was little consolation. The disapproval of the Hard Labour Acts of 1776 and 1778 was probably to be expected, and Eden would have probably been happy to abandon the hulks for his Hard Labour Bill. However it is unlikely Eden would have expected the Commons committee to promote the resumption of transportation, and this must have been a bitter pill for the authors of the Hard Labour Bill to swallow. It must have felt like one step forward, three steps back. However, as Deveraux correctly points out, perhaps it should have been anticipated. An examination of the preamble in the three successive versions of the Hard Labour Bill outlines renewed optimism each time that transportation was to resume. The preamble of the Hard Labour Bill of 1778 describes transportation as, ‘become inconvenient, and frequently impracticable’ and having ‘at all Times been found insufficient, both for the Reformation of Criminals, and also for the deterring others by Their Example’. The second stated that it had ‘now become impracticable’ and the third merely stated ‘attended with many Difficulties’.<sup>313</sup> Although the Hard Labour Bill’s ambition had been greatly reduced, there was still an opening for Eden and Blackstone to utilise. In much the same way as the implementation of the hulks, these two houses were to be an experiment. All was certainly not lost.

Blackstone was quick to realise this, he took the committee’s report and proposed three principles. The resumption of transportation, the hulks to punish the worst class of offenders, and the

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<sup>313</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.428

establishment of two houses of hard labour, to be discontinued or made universal.<sup>314</sup> In rather authoritative fashion he also tackled the expense issue, departing from localities bearing the cost and deferring it to government to erect the two buildings. “Blackstone now conceded that the institutions contemplated in the new version of the Hard Labour Bill could never be brought into being unless the central government shouldered their entire cost: ‘this Experiment, being national, must be carried into Execution (if at all) under the immediate Direction of Government.’”<sup>315</sup> The hard labour regime was to be continued in this scaled down version of the Hard Labour Bill, but the name of these houses was to change, and this was an area that Bentham certainly did not influence.

Blackstone appeared to approve of either Penitentiaries or Ergastularies as the new name for the houses of hard labour. After some thought preference went to ‘penitentiary’ for it would represent a new national institution aimed at reformation of the offender through penitence. This was probably worthwhile, given it would now distinguish itself from other forms of imprisonment whilst also letting Bentham know who was boss.<sup>316</sup> If Bentham’s effort of creating a one hundred and fourteen page pamphlet in three weeks was impressive, Blackstone’s remodelling of the bill to correspond to the committee’s recommendations within ten days was equally as impressive. He did however call it a ‘garbled’ bill, given it had changed so much from 1776.<sup>317</sup> A final twist in the tale almost killed off the new Penitentiary Bill before it had even begun. Bunbury in the final draft of the Penitentiary Bill decided to eliminate the phrase that the new penitentiary houses ‘shall be wholly distinct and separate from the Common Gaol and Gaols, and from all Workhouses, or Houses of Correction...and from all Houses of Industry, Hospitals, Workhouses, and Almshouses.’<sup>318</sup> Along

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<sup>314</sup> See; Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.149

<sup>315</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.430

<sup>316</sup> Although it was quite a departure from Bentham’s Hard-labour houses or Labour houses given ‘penitentiary’ had religious connotations.

<sup>317</sup> Throness talks about this in a letter from Blackstone to Eden; Throness, L. (2008) *A Protestant Purgatory Theological origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.151

<sup>318</sup> Penitentiary Bill

with an insertion for county magistrates to regularly inspect the penitentiary house, it essentially meant that the Penitentiary Houses and other forms of imprisonment were barely different from one another. This was a step too far and Blackstone was ready to abandon the Penitentiary Bill. Optimism had faded through the three years, and Bunbury's last amendments nearly killed the whole Bill. "Bunbury and his allies risked losing even Eden and Blackstone's less extensive version of it. The Lords, too, found their hands were tied. The Penitentiary Act was designed to take over from the expired Hulks Act on 1 July. In the event, both the final one-month extension of the Hulks Act and the Penitentiary Act which replaced it received royal assent only on the respective last days before they took effect."<sup>319</sup> Blackstone may have been drained by the whole event, but at least he now knew his experimental penitentiary houses had the opportunity to shine and fly for the flag for reformation. There was now a glimmer of hope that it would eventually engage the whole country and spread to the design the original Hard Labour Bill intended.

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<sup>319</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.432

## Content

*“In 1779, the preamble of the new act had different justifications, emphasizing that punishment ‘might be the means under Providence not only of deterring others...but also of reforming the Individuals and inuring them to habits of industry’, thus showing a new concern for the individual soul and a new faith in the reformatory worth of work and discipline.”<sup>320</sup>*

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<sup>320</sup> Semple, J. (1993) *Bentham's Prison; A study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.46

There is no doubt that this act was a retreat from an original desire to replace transportation with imprisonment at hard labour. The Hard Labour Bill appeared to go through wave after wave of amendments, and was shredded down to become a much more limited project than Eden and Blackstone had anticipated. However, the passage of the Penitentiary Act was to mark a significant point in the history of crime and punishment. It proposed many of the features that Howard had admired overseas, solitary confinement, religious instruction, and a labour regime.<sup>321</sup> It also offered a hope that the prisoner could be both reformed and deterred, something only the hulks had temporarily attempted. “It put forward the notion that the prison might be more than simply a morally and physically healthy place of incarceration, that it might be used in a positive fashion to change the prisoner and to act as a general deterrent.”<sup>322</sup> This contents section will go through what exactly the Penitentiary Act was authorised to do and how it was going to execute these intentions. Whilst there will be clear similarities to the Hard Labour Bill that we discussed in the previous section, it is critical that we understand exactly what the motives of the Act were and how a culmination of social conditions and reformers developed such a forward looking Act.

The revolutionary powers and intentions of the 1779 Act can be found right at the beginning of the Act in its preamble. “And whereas, if many Offenders, convicted of Crimes for which Transportation hath been usually inflicted, were ordered to solitary Imprisonment, accompanied by well-regulated Labour, and religious Instruction, it might be the Means, under Providence, not only of deterring others from the Commission of the like Crimes, but also of reforming the Individuals, and inuring them to Habits of Industry.”<sup>323</sup> This preamble made the intentions of the Act very clear, its justifications were that solitary confinement would awaken reflection, religious instruction would implant new principles into the heart of the offender and a labour regime would instil valuable habits

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<sup>321</sup> Morris N & Rothman. D (eds) (1995) *The Oxford History of the Prison The Practice of Punishment in Western Society* Oxford (Oxford University Press) pg.89

<sup>322</sup> Harding, C., Hines, W., Ireland, R. & Rawlings, P. (1985) *Imprisonment in England and Wales A Concise History* London (Croom Helm Ltd) pg.118

<sup>323</sup> 19 Geo III, c.74

of industry into the offender prior to leaving the Penitentiary House. Such a preamble you would anticipate would be a culmination of all of our reformers viewpoints from chapter three.

Section fifteen of the Penitentiary Act<sup>324</sup> empowered the Crown to appoint a committee of three gentleman to superintend the said houses. The three supervisors appointed were Howard, Fothergill and Whatley but their involvement will be discussed in the following section regarding implementation. Section five complemented fifteen in that it authorised the supervisors to fix upon a site for the Penitentiary Houses to build on.<sup>325</sup> Special regard also had to be found with healthiness and accommodation of water, so this was not a case of finding waste land and building on it. It had to meet the healthy and reformatory criteria set out in the Act. ‘Regard shall be especially had to healthiness and the accommodation of water, avoiding as far as possible, any place where other buildings are or may be erected contiguous to, or within a small distance from the outward fence or enclosure of such houses, or a situation within any populous town.’<sup>326</sup> Sections six to thirteen were responsible in authorising the powers to sell and buy land, and these sections were to prove vital to the logistics of the Penitentiary Act.

Section fourteen reflected a manoeuvre away from existing institutions and also the Hard Labour Bill itself. It provided supervisors with the power to superintend the erection of two houses; ‘sufficiently large to contain, the one of them six hundred male convicts and the other of them three hundred female convicts; and each of such houses, or the Buildings and Enclosure thereunto belonging, shall contain proper storehouses, warehouses, workhouses, and lodging-rooms, a

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<sup>324</sup> 19 Geo III, c.74

<sup>325</sup> 19 Geo III, c.74 s.5; ‘The said supervisors, or any two of them, shall as soon as conveniently may be, fix upon any common, heath or waste, or any other piece or pieces of ground which may be lawfully under the powers of this Act, and which shall be situated within any one of the counties of Middlesex, Essex, Kent, or Surrey, upon which they, or any two of them, shall erect, or cause to be erected, two plain, strong and substantial edifices or houses, which shall be called the Penitentiary Houses, for the purpose of continuing and employing in hard labour, in one of the said house, such male convicts, and in the other such female convicts.’

<sup>326</sup> 19 Geo III, c.74

infirmary, a chapel and burying ground, a prison divided into dark but airy dungeons, a kitchen garden, and also proper airing grounds, yards, offices and servants herein.<sup>327</sup> This was certainly a humanitarian progression from the filth of the early eighteenth century prisons, with the chapel adding a religious undertone to the punishment that both Hanway and Howard would have been proud of.

Section sixteen dealt with electing officers and materials for employing offenders. Section seventeen consisted of an enumeration of offices to be appointed by the Committee. Here, a ‘Governor, a Chaplain, a Surgeon or Apothecary, a storekeeper, and a task-master; and also, in the house set apart for female convicts, a matron’<sup>328</sup> were to be appointed. Section eighteen, came much to the delight of Jeremy Bentham because salaries of governors and task-masters were to arise as much as possible from the profits of the work done in the House.<sup>329</sup> Therefore, the governor would have an interest in maximising the profits of the prison, which was a critical concept to Bentham, particularly in his later ‘Panopticon’ writings which will be discussed in chapter five.

Sections nineteen to twenty three specified specific roles assigned to the governor and section twenty four outlined that courts could sentence a person to imprisonment at hard labour in one of the penitentiaries instead of transportation.<sup>330</sup> Although we must accept that this was not quite to the scale that Eden and Blackstone had hoped for, as section twenty five outlines. ‘During the continuance of this Act, not more than two offenders shall be sent to such penitentiary houses, from all the Great Sessions to be holden within any one of the four circuits of Chester or Wales, either in

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327 19 Geo III, c.74

328 19 Geo III, c.74

329 19 Geo III, c.74; ‘The salaries of the respective Governors and Task Masters shall totally, if possible, or at least in great measure, arise from the profits of the work that shall be done and performed in each several Penitentiary house.’

330 19 George III, c.74; ‘Imprisoned and kept to hard labour, in one of such Penitentiary Houses, for any term not exceeding two years, in case of petty larceny; and for any term, if such offender be a male, not less than one year, or if such offender be a female, not less than six months, nor exceeding, in either case, five years, if he or she is liable by law, an account of any other crime, to be transported for seven years; and for any term not less than two years, not exceeding seven years, in any case any such offender is liable by law to be transported for fourteen years.’

Spring or Summer.’<sup>331</sup> These two sections really bring home the limited scheme at which the Penitentiary Act was provided with. It was originally intended to be a monster of a punishment but it was now resigned to merely punishing nine hundred offenders. This harsh reality, made it increasingly evident that the Penitentiary Act was an experiment.

Section twenty six<sup>332</sup> was a rather symbolic section for it empowered courts to sentence non capital offenders to hard labour in the houses of correction until the new penitentiary houses were built. It was no doubt a subtle shift from the old regime to the new, but reflected a minor triumph towards the imprisoning of offenders. Section twenty seven also showed reliance on older forms of punishment, whereby the hulks were to continue. ‘Any male convicted in England or Wales of any crime (except petty larceny) punishable by transportation, may if of competent age and bodily strength be kept to hard labour in cleansing the Thames for any term not less than one year nor more than seven years...shall be punished by being kept on board ships or vessels, properly accommodated for the security, employment, and health of the persons to be confined therein, and by being employed in hard labour in the raising sand, soil, and gravel from, and cleansing, the River Thames, or any other River navigable for ships or burthen, or any port, harbour or haven, within that part of Great Britain.’<sup>333</sup> Section twenty eight<sup>334</sup> provided the mercy for those punishable by death to be kept to hard labour in a Penitentiary House or the Thames, thus reflecting the desire for punishments to offer an alternative to death, like transportation did.

Sections twenty nine to thirty one outlined the powers of the gaolers, such as delivery of

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<sup>331</sup> 19 Geo III, c.74

<sup>332</sup> 19 Geo III, c.74; ‘Until certificate shall be made, the Court, in which such offenders shall be convicted, may order the number above specified to hard labour in the House of Correction for the County; all of whom shall be transferred to the Penitentiary Houses as soon as they are ready for their reception.’

<sup>333</sup> 19 Geo III, c.74

<sup>334</sup> 19 Geo III, c.74; ‘His Majesty shall be graciously pleased to extend the Royal Mercy to any such offender, upon condition of being kept to hard labour, during any specified term, in any Penitentiary house to be erected in pursuance of this Act.’



certificates for each offender to the gaoler. Section thirty two outlined the labour feature of the penitentiaries and closely resembled the works of Fielding. Those who were able were put to ‘labour of the hardest and most servile kind, in which drudgery is chiefly required, and where the work is little liable to be spoiled by ignorance, neglect, or obstinacy, and where the materials or tools are not easily stolen or embezzled, such as treading in a wheel...polishing marble, beating hemp.’<sup>335</sup> The weaker convicts were to be provided with suitably weaker labour such as, ‘Picking oakum, weaving sacks, spinning yarn, knitting nets.’<sup>336</sup> The point of this labour was to clearly install a program of labour into the prisoner, and as section eighteen outlined; if profits could arise from this labour then the economic benefits would certainly become a major part of the Penitentiary Houses armour. This potential was an important aspect of the Penitentiary Act, particularly when we remember the National Debts of the time from chapter one.

Section thirty three enforced the solitary confinement component of the Penitentiary Act, so close to Hanway’s own reform proposals. During the offenders hours of rest they were to be lodged in small rooms separate from one another. This was where the instrument of religion was to get to work, and unlike previous prison regimes, solitary confinement was to exclude visitors, except for the chaplain as laid down in section forty two, whereby Chaplains were to read morning and evening prayers and preach two sermons each Sunday.<sup>337</sup> This religious aspect of the Penitentiary Act was left relatively intact from the Hard Labour Bill.

Section thirty four in contrast to the previous section of rest laid down the hours of work during the different parts of the year. Offenders were to work every day in the year, except Sundays, Christmas-day and Good Friday. As we mentioned earlier, Bentham believed that the hours of labour

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<sup>335</sup> 19 Geo III, c.74

<sup>336</sup> 19 Geo III, c.74

<sup>337</sup> 19 Geo III, c.74; ‘The said Chaplain shall visit with the leave of the Governor any of the offenders, either sick or in health, that may desire or stand in need of his spiritual advice and assistance, provided that such visitation, to such of the offenders as shall be in health, shall not interfere with their stated hours of labour.’

should be the same for each season, but the Penitentiary Act departed from such thought. ‘The houses of work in each day shall be as many as the season of the year, with an interval of half an hour for breakfast, and an hour for dinner, will permit, but not exceeding eight hours in the months of November, December and January, nine hours in the months of February and October, and ten hours in the rest of the year; and when such hours of work are passed, the working tools, implements, and materials, or such of them as will admit of daily removal, shall be removed to places proper for their safe custody, and there be kept till the hour of labour shall return.’<sup>338</sup>

Section thirty five regarded how the offenders were to be fed and clothed<sup>339</sup>, whereby inmates were to be fed on bread and coarse meat, to drink water or small beer and wear badges on a coarse uniform to largely hinder escape. Section thirty six punished any persons supplying the offender with money or provisions. Section thirty seven outlined a reformatory method in dealing with offenders, whereby offenders brought to the Penitentiary Houses were to be separately lodged, washed and examined by the surgeon, and further to this when discharged they were to be furnished with decent clothing and money with a further sum of money upon reputable service for one year. ‘When such offender shall be finally discharged, such other decent clothing as shall be judged necessary and proper by the Committee aforesaid, shall be delivered to such offender, and also such sum of money, for his or her immediate subsistence, as the said committee shall think proper, so far as such sum shall not exceed three pounds, nor be less than twenty shillings.’<sup>340</sup> This was the shining light of reformation through the Penitentiary Act. Unlike the punishments from chapter two, the offender was given a motivation to use his habits of industry to good effect.

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<sup>338</sup> 19 Geo III, c.74

<sup>339</sup> 19 Geo III, c.74; ‘During the time of his or her confinement therein, be fed and sustained with bread, and any coarse meat, or other inferior food, and water, or small beer, and also be clothed with a coarse and uniform apparel, with certain obvious marks or badges attired to the same, as well to humiliate the wearers as to facilitate discovery in case of escapes.’

<sup>340</sup> 19 Geo III, c.74

Section thirty eight divided the offenders into three classes. The first class would be the strictest and most severe, the second would be moderate and the third more relaxed. Section thirty nine even provided the right to employ offenders in the third class as servants. This again, reflects a reformatory notion that if good behaviour was witnessed then positive consequences could follow, ingraining a belief into the offender that life did not necessarily have to result in mischief.

Section forty outlined the furnishings of the lodging rooms<sup>341</sup> and forty one allowed Justices for the County to inspect at all reasonable times. ‘To visit and inspect every part of such Penitentiary houses, or places of confinement, in order to make report to the Quarter Sessions, or give notice to the Inspection, herein-after mentioned, of any abuse or mismanagement which he or they may observe therein.’<sup>342</sup> Also section forty five obliged two of the committee to attend each Penitentiary House every fortnight.<sup>343</sup> This was clearly a positive measure for transparency, but as we know from previous Acts<sup>344</sup>, whether such an Act would be implemented is another question, but the intentions were certainly clear and worthy of praise.

Section forty two has already been touched upon, and sections forty three and forty four regarded the health of prisoners via airing and inspection by the surgeon. Section forty six outlined the measures in place to punish the disobedient offenders in the Penitentiary Houses. Here the Governor was empowered to provide a variety of punishments for offences such as swearing to negligence in work. He, ‘May punish such offences, either by moderate whipping, or by ordering the offenders to close confinement in the dungeons of such house, and by keeping them upon bread and

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<sup>341</sup> 19 Geo III, c.74; ‘Shall be provided with an iron bedstead, with matting for lying upon, one or more hempen sheets, a coberlit, and two or more coarse blankets.’

<sup>342</sup> 19 Geo III, c.74

<sup>343</sup> 19 Geo III, c.74; ‘Shall inspect the accounts of the Governor and Storekeepers, and also examine the conduct and management of such house.’

<sup>344</sup> Such as the Health of Prisoner Act 1774

water only, for any term not exceeding three days.<sup>345</sup> Section forty seven also allowed a Governor to reduce an offender down to a worse class. Such measures admittedly provided an element of discretion to the governor but it may be contested that sections forty one and forty five were measures to tackle any corruption, so in theory the Act was morally astute.

Section forty nine was an interesting section in that it offered the possibility of a shortened term of confinement for those prisoners who showed ‘extraordinary diligence or merit (which was a departure from any previous attempt to punish an offender), and section fifty one must have pleased Bentham for its domestic detail, whereby a large garden to raise vegetables was to be provided for the use of offenders. In fact Bentham must have been pleased with many of the Penitentiary Act’s amendments from the Hard Labour Bill. One further example is section fifty six, where it stated that ‘Every offender at the end of confinement shall receive not less than 20s nor more than 3l with decent clothing.’ The Bill of course outlined that on discharge the prisoners should be given decent clothes and a sum of money along with a certificate for good behaviour, if they deserved it. However, Bentham, if we remember was wary of a certificate because he believed it may have an adverse effect on those offenders without one. The Penitentiary Act appeared to address this issue and replaced the certificate with financial gain after one year’s honest employment. Although this was not Bentham’s proposal (he believed the prisoner should stay in the prison until he gained a certificate or be forcibly enlisted in the sea or land service)<sup>346</sup> it certainly outlined an influence that Bentham did have on the final Act. The remaining sections of the Penitentiary Act relate to the formalities that are to be expected, such as, the state of the accounts of each Penitentiary House to be laid before every Quarter Sessions for the County.<sup>347</sup>

Having explored the contents of the Penitentiary Act, we now have the knowledge to

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<sup>345</sup> 19 Geo III, c.74

<sup>346</sup> See; Semple, J. (1993) *Bentham's Prison; A study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.47-48

<sup>347</sup> 19 Geo III., c.74, s.64

appreciate the progress imprisonment made from its medieval features in early eighteenth century to its attempts at moral purification via solitude, repentance and labour in 1779. The penitentiary was not content at separating the prisoners to ensure moral contamination and good health, it wanted to reform the morals and habits of the offenders whilst also deterring others from crime. “A criminal with deeply-ingrained sinful habits would require a more intensive regime. The penitentiary was designed to assist at every step in this process. Just as God had given everyone sufficient time to repent, so the justice system did the same, first for vagrants in bridge wells and houses of correction, then for malefactors in condemned cells, and finally for serious felons in penitentiaries.”<sup>348</sup> This was the punishment ‘worse than death’, with the criminal personality isolated in a religious structure designed to produce reformation. However, converting theory to practice can prove difficult, as many of our reformers have proven, so an examination of the Penitentiary Act’s implementation will now take place.

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<sup>348</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.292

## Implementation

*“The institution proposed under the Penitentiary Act were never built.”<sup>349</sup>*

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<sup>349</sup> Deveraux S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.406

The Penitentiary Act had been on a long journey to get to this very point, but the path had been made clear. Section five authorised three supervisors to fix upon a site for the first Penitentiaries to be built. However, in rather farcical fashion Blackstone again had to lead the measure. “Blackstone once again led the agenda by prevailing upon John Howard to serve on a volunteer basis, who agreed only on condition that his friend John Fothergill be named as well. Blackstone assented and submitted their names to Eden, along with that of George Whately, treasurer of the Foundling Hospital. The judge pressed Eden to act, and insisted that he ‘appoint some Evening when they may meet, & that soon.’ They probably met that very night, because two days later the supervisors were named by the king.”<sup>350</sup> This early optimism soon faded because the supervisors could not agree on a suitable site for the Penitentiary houses to be built, and consequently the project waned. It appears that Howard and Fothergill chose Islington in contrast to Whately who chose Limehouse, but what seems bizarre is that Whately’s grounds for choosing Limehouse seem to be unknown. On the other hand Howard and Fothergill seemed much more transparent in their desire for Islington. They believed it was a healthy situation, had a decent water supply, and was in a close proximity to London. The proximity was an important criteria for Howard, because he wanted the Penitentiary houses to be a model for future houses, and he believed London provided the greatest emphasis towards inspection.<sup>351</sup>

Blackstone’s worst hour was on his deathbed in early 1780. He asked Fothergill what progress had been made with the Penitentiary houses, and Fothergill outlined the disagreement. Blackstone’s advice was simple, ‘Be firm in your own opinion.’<sup>352</sup> Sadly, the three supervisors were firm in their opinion and no compromise towards location was found. Blackstone’s efforts and passion had ended in anti-climax, and on Valentine’s Day in 1780, Blackstone’s love affair with the

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<sup>350</sup> Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.152

<sup>351</sup> See; Griffiths, A. (1875) *Memorials of Millbank, and chapters in prison history* London (Henry S.King & Co) pg.13

<sup>352</sup> See; Throness, L. (2008) *A Protestant Purgatory Theological Origins of the Penitentiary Act 1779* Aldershot (Ashgate) pg.152-153

Penitentiary Act ended along with his life.

It is incredible that such an Act could go through so many waves of problems yet fail at the final hurdle, but perhaps this should have been expected. The individual reformers were eccentrics, and if they had not been firm in their values and opinions from the offset, the Penitentiary Act may not have even been drafted. It could even be argued that this struggle to agree on a location was a blessing in disguise, because the setting these Penitentiary houses were to be built on would be critical to the reformatory Penitentiary machine. Any site, with little regard to healthiness and moral improvement would have merely been a resort back to imprisonment before the Penitentiary Act. Imagine if the three supervisors agreed on a filthy site with sewers running through the houses. They would have possessed no reformatory qualities in an age of increased humanitarian thought, and wasted money the Government did not have.

The disagreement between the three supervisors went to the High Court for resolution, and three new supervisors were appointed. These were Sir Gilbert Elliot, Sir Charles Bunbury and Thomas Bowdler. “Although the triumvirate speedily found a new site at Battersea Rise, and held an architectural competition (won by Howard’s friend, William Blackburn<sup>353</sup>), they were still no more successful than their predecessors. The Treasury refused their application for the funds necessary to begin building in September 1782, stating that ‘new measures were about to be taken with respect to felons who made the hastening of the Penitentiary Houses less necessary.’”<sup>354</sup>

In 1783 the public was still waiting for some settlement regarding the Penitentiary plan, but there simply was none. Howard, the man of reform who risked his own life visiting prisons could not

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<sup>353</sup> An architect who it could be said translated Howard’s visions into practice.

<sup>354</sup> McConville, S. (1981) *A History of English prison administration volume 1 1750-1877* London (Routledge & Kegan Paul) pg.108-109



agree with Whately on a location, and in the same year as Blackstone, Fothergill died. Even the subsequent supervisors failed in their attempts to bring the Penitentiary Act to life, so questions had to be asked as to whether this was an Act destined to fail. The individual reformers had driven their theoretical belief into an assembled Penitentiary Act, but the true reflection of an Act is how it works in practice. Morris and Rothman are probably right in suggesting that the publication of Howard's book in one sense climaxed the passage of the Penitentiary Act.<sup>355</sup> Whilst the Penitentiary Act was not implemented in the eighteenth century, it will be worthwhile to examine the impact such an Act did have on society, and if any local or national changes did occur. If there was no impact then the reformers work was pointless and this thesis has been a desperate affair of wasted words.

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<sup>355</sup> Morris N & Rothman. D (eds) (1995) *The Oxford History of the Prison The Practice of Punishment in Western Society* Oxford (Oxford University Press) pg.89; "The agitation that coincided with the publication of Howard's book in one sense climaxed in the passage of the Penitentiary Act of 1779...The proposal combined many of the features Howard had admired in continental institutions-solitary confinement, religious instruction, a labour regime."

## 05 - The Lasting Effects of the Penitentiary Act

The damning news that prisons under the Penitentiary Act were not to be built, was far from ideal. The likes of Eden and Blackstone had fought tirelessly to get this Act implemented, but all was certainly not lost. This chapter will contest that such an Act created a legacy and precedent that would alter the historical outlook of crime and punishment, and bring with it reformed notions of imprisonment. Hesitation and experiment followed the ashes of the Penitentiary Act, but this was a phase that would attempt to galvanise the thoughts and theories of the Penitentiary Act into practice. Although the great promoter of the Penitentiary Act had sadly passed away, Blackstone had left an Act that could be examined and dissected, and it is the role of this chapter to examine how the Penitentiary Act was examined and dissected.

In this chapter the works of Beattie<sup>356</sup> and Rawlings<sup>357</sup> have been invaluable to us. Beattie's broad analysis of crime and punishment after the Penitentiary Act is both detailed and insightful, whilst Rawling's broader analysis of national trends as a whole, provides a clearer national perspective to patterns of crime and punishment. In many respects this chapter will bear some resemblance to the previous chapters, because we will firstly examine the social conditions and punishments in the years directly after the Penitentiary Act, followed by an analysis of the impact this Act had in the eighteenth century.

The reason we will look at the social conditions immediately after the Penitentiary Act is to try to gain an understanding of class tensions and circumstances surrounding the 1779 Act. This will enable us to confirm the social environment in which capital punishment and imprisonment were working in, which will consequently allow us to understand the trends of punishment during the American war. These trends will prove insightful to how much immediate influence the Penitentiary Act had on punishing offenders. A broader analysis of punishment after the war will follow on from

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<sup>356</sup> Beattie, J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press)

<sup>357</sup> Rawlings, P. (1999) *Crime and Power: A History of Criminal Justice: 1688-1998* London (Longman)

this, which will confirm the true intentions of government, given transportation in theory could resume again.

The focus of this chapter will be on the impact of the Penitentiary Act in the final two decades of the eighteenth century. We will examine inspired legislative improvements born out of the Penitentiary mould via efforts such as The Gilbert Acts of 1782<sup>358</sup> and 1784<sup>359</sup>, and also the practical reforms which subsequently followed. “The Penitentiary Act ‘influenced penal practice not through the construction of a national penitentiary as envisaged by the Act, but through a series of local reforms some of which embodied its theoretical premises.’”<sup>360</sup> There will be two reforms we will concentrate on, the first will be the Gloucester penitentiary which was inspired by Sir George Onesiphorus Paul who wanted to achieve an inner change in prisoners without endangering the physical health of the prisoners through core Penitentiary themes, and the second will be through Jeremy Bentham’s proposal for a ‘Panopticon’. The Panopticon was an architectural masterpiece designed to reform the confined prisoner to a life of labour, but was a proposal rather than a building. We will argue that these two reforms had their foundations deeply rooted into the soil of the Penitentiary Act.

At the conclusion of this chapter, we will have a broad overview of the eighteenth century and the importance of the Penitentiary Act. The impact this Act had on crime and punishment is vital to us, because if it was merely a dead Act then how did imprisonment evolve? This will be the focus of this chapter.

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<sup>358</sup> 22 Geo III, c.64

<sup>359</sup> 24 Geo III, c.55

<sup>360</sup> Deveraux, S. (1999) *The Making of the Penitentiary Act, 1775-1779* Historical Journal.42 pg.432-433

## Social conditions & punishments after the Penitentiary Act

*“In 1782 the government decided to deny pardons to robbers, burglars and housebreakers, and the number of people hanged rose to levels not seen before in the eighteenth century.”<sup>361</sup>*

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<sup>361</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.39

In chapter one, we talked about religious tension between the Catholics and Protestants. In 1780 this tension appeared to snap when the Gordon Riots destroyed at least eight London prisons and houses of correction. The well humoured would suggest that they were saving the government a job in destroying such old filthy institutions, but the brutal reality was that these prisons were still needed. The American War of Independence meant convicts had to be incarcerated, and government clearly had a problem on its hands. If religious tensions were not enough, further riots were on there way. In 1782 the harvest failed meaning food prices increased, and as a consequence food riots began. “Stephen Barlow was hanged after a Newcastle crowd had stopped a boat loaded with cheese and flour - his distraught wife killed herself the next day; two more were hanged after a crowd had marched in columns of twos into Halifax market, seized corn and sold it at what they considered a fair price. But in spite of such repression food rioting was widespread from Wrexham market, where Welsh colliers sold corn they had stopped from being exported, to Whitby, where the towns people removed corn from a sloop in the harbour.”<sup>362</sup> The following year sailors rioted throughout the country for a number of reasons, such as non-payment of wages and employment of foreign sailors on low wages.<sup>363</sup> A society that was frequently rioting was clearly an unhappy one, and the correlation between crime and poverty appeared to have reached new heights. A short text from the Whitehall Evening Post on 13 March 1783 exemplifies this point. “If the gentleman in the different counties do not exert themselves...in providing employment for the numbers that will shortly be turned adrift, they must relinquish the comfort of enjoying (their) property in security.”<sup>364</sup> There is a strong sense here that the government needed to control the people, before the people controlled them, and government’s greatest tool to control these rioters was through punishment.

This was to be an interesting test for the Government because the Penitentiary Act had sent a humanitarian pulse through the heart of the nation, but the riots were getting out of control. Without

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<sup>362</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.38

<sup>363</sup> See; Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.37

<sup>364</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.38

transportation, there was no hiding place and Beattie noted a shift back to severity and deterrence. “The judges were instructed, for example, to order that some condemned prisoners be hanged within a few days of their conviction (on the model of the Murder Act of 1752), since rapid execution would both forestall petitions for pardons and serve to make the sentence more frightening”<sup>365</sup> This renewed reliance on prompt and severe executions questions the impact of the Penitentiary Act, but the reality was that the gallows provided the most effective deterrent, and the government needed to deter the masses quickly. In 1783 alone, one hundred and seventy three people were sentenced to death at the Old Bailey, which was more than double the figure for 1750 and was the highest annual total of the century<sup>366</sup>, and this execution rate continued to rise. “The percentage of the condemned who were hanged increased from around 30 per cent to about 65 per cent between 1783 and 1785, rising to just over 80 per cent in 1787. This pattern was repeated outside the Old Bailey: for instance, on the Home Circuit (the assizes for the counties around London) the number condemned more than trebled, as did the number executed.”<sup>367</sup> Martin Madan<sup>368</sup> in 1785 (who pleaded for the strictest possible severity in the administration of the capital laws) may have had an impact on the increase in execution rates, but this is of little importance to us. Our concern has to be that for all the good the Penitentiary Act potentially offered execution rates after the Act, reached an all-time high. The last decade of the eighteenth century did witness a decline in executions<sup>369</sup>, but the question marks had already been raised. For all of our reformers efforts, capital punishment was at its peak immediately

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<sup>365</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.583

<sup>366</sup> See; Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.39

<sup>367</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.39 also see; Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford University Press pg.584 “The courts clearly remained persuaded in the 1780s that the gallows provided the most effective deterrent against serious offences. As robberies and burglaries mounted in the postwar years, executions mounted with them. In 1785 alone, twenty-two offenders were hanged in Surrey, more by far than in any other year in the second half of the century ... A total of sixty-four prisoners were hanged in the five counties of the Home Circuit in that same year, for example, compared with an average during the previous thirty years of thirteen.”

<sup>368</sup> Madan, M. (1785) *Thoughts on Executive Justice* London (Full text available from National Library of Wales; Eighteenth Century Collections Online); “Yet, if these laws are not duly, constantly, and impartially enforced and executed, the condition of the people will be but little, if at all, benefited by them” pg.3

<sup>369</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.587; “There was also a substantial decline of prosecutions in the late 1780s and through the 1790s in Sussex and a sharp decline in the level of hangings, until the turn of the new century, when prosecutions for capital offences rose again (particularly in the years of very high food prices) and there was a brief increase in the number of executions.”

after the Penitentiary Act.

It is interesting to note that not one author seems to have mentioned the fact that even if the Penitentiary Act had been implemented, the houses under the Act would probably not have been built in time to accommodate offenders during capital punishment's greatest moments. Whether this would have altered the amount of executions is an intriguing and hypothetical question. The hulks and houses of correction however, did assist in the short term and were an important tool in a decade of crisis. "The punishments handed out at the Surrey assizes over the war years 1776-82 show the impact of these changes, for almost ninety per cent of the prisoners convicted of non-capital property crimes were sentenced to some form of hard labour in the houses of correction or the hulks."<sup>370</sup> The hulks were clearly an important method in relieving those offenders who would have been destined for transportation, but how sustainable such a temporary measure would be was questioned in 1785. "Problems with the hulks became public by 1785 when Mansfield, the Lord Chief Justice, was alarmed to receive a report which revealed overcrowding and insufficient work for the convicts, and also that the county gaols were still full of prisoners waiting to be transferred to the hulks. The hulks were shown to have appallingly high mortality rates, and in 1786 a riot on a hulk moored at Portsmouth ended only after eight prisoners had been shot dead and another 36 wounded."<sup>371</sup> The fact that a 'temporary expedient' had lasted nearly ten years was bordering on impressive<sup>372</sup>, but its conditions and mortality rates were certainly not a good advert for a new form of imprisonment, built on reforming the offender.

Whilst offenders were executed and imprisoned, legislative movement was also made. The

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<sup>370</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.577

<sup>371</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.62

<sup>372</sup> However, this was by no means a dying punishment; McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.109; "In 1787 the hulk establishment was extended to Portsmouth and in 1788 to Woolwich, making the dock-yard labour of the convicts more widely available."



Gilbert Acts of 1782<sup>373</sup> and 1784<sup>374</sup> allowed local justices to rebuild houses of correction, the Penitentiary Act expired (because the government could not contemplate the estimated cost of £200,000<sup>375</sup>), and the power to transport was renewed<sup>376</sup>. It is difficult to evaluate which of these Act's is most critical to this thesis. The fact the Penitentiary Act expired and transportation was resumed by law leaves a bemusing thought. For half a century there were intense proposals accompanied by optimism that the offender may be reformed, by 1784 this effort was reduced to almost nothing. However, the Gilbert Acts did offer a form of hope, because there must have been a reason for these Acts. Years earlier the houses of correction would not have been rebuilt, but now there were measures to do so. This may have been a signal that the government was prepared to implement features of the Penitentiary Act without risking huge financial sums for the Penitentiary experiment. The shifting of financial outlay from central government to local authorities may have been a shrewd and ruthless decision but the house of correction in Petworth provides us with an example of a local authority prepared to bear the brunt of the financial pain.

Whilst imprisonment largely substituted transportation in the years of warfare, 1787 marked the resumption of transportation. Between 1788 and 1802 in non-capital offences in Surrey a third of the men were convicted and sent to Australia.<sup>377</sup> However, this time around transportation struggled, because its vulnerability had been exposed, which meant questions towards its infallibility would always linger around the punishment. Whether it lost its sting through the war or the Act is a matter of discussion, but it is likely that the notions of imprisonment and reformation at least contributed to its vulnerable condition. This is a point that Schofield hints at. "Transportation had resumed when convicts were first sent to Botany Bay in New South Wales in 1787, but prisons were on, and

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<sup>373</sup> 22 Geo.III, c.64

<sup>374</sup> 24 Geo III, c.55

<sup>375</sup> As we will discover; see; Semple, J. (1993) *Bentham's Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.98

<sup>376</sup> 24 Geo III, c.56

<sup>377</sup> See; Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.600

remained on, the political agenda.”<sup>378</sup> Beattie outlines that the cost of sending these convicts to a colony in need of support along with population increase in England and Wales contributed to such a demise<sup>379</sup>, and for the first time in half a century, imprisonment seemed to be holding a dominance over transportation. “For the vast numbers of non-capital offenders the sanction of imprisonment remained essential, even as the ships were carrying off hundreds of prisoners regularly to Australia. By the 1790s incarceration was the common punishment for offenses against property that did not involve some particularly heinous aggravation, and imprisonment under the right conditions carried the hopes of many for a punishment that would not only penalize the offender and deter him and others but also reform and rehabilitate him in such a way as to make possible his return to society and to honest employment.”<sup>380</sup>

In 1751, Fielding wrote about the changing the habits of the people, and some forty years later this effort intensified. Executing or banishing offenders was not going to reform offenders, so initiatives at a local level appear to have taken place to address the concern about the stability of social order in society. These initiatives largely involved imprisonment, and the prison in Newington is a just example of this. “The magistrates also moved in a more fundamental way in the last decade of the century to embrace the new views of imprisonment by building a new county jail at Newington, replacing the old building in Southwark with a prison in which prisoners could be more effectively classified and separated, in which some forms of solitary confinement might be imposed, and in which hard labor would be a central element of discipline. A variety of improvements had been made in the old jail in the 1780s (improvements in the arrangements for housing sick prisoners, for example), and a committee of magistrates was clearly by then paying more attention to the internal management of the jail and the condition of the prisoners than would have been the case

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<sup>378</sup> Schofield, P. (2009) *Bentham: A Guide for the Perplexed* London (Continuum) pg.71

<sup>379</sup> See; Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.601

<sup>380</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.601

earlier in the century.”<sup>381</sup>

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<sup>381</sup> Beattie.J.M. (1986) *Crime and the Courts in England 1660-1800* Oxford (Oxford University Press) pg.604-605

## Reform in the eighteenth century

*“Although the government shied away from the expense of a national penitentiary, local magistrates were more active. In 1784 and 1791 Gaol Acts were passed encouraging the counties to build prisons in accord with Howardian principles. Altogether forty-two new gaols and houses of correction were built in the years between 1779 and 1787, notable among them was those at Petworth in Sussex and at Gloucester. The latter was the work of the magistrate and influential prison reformer Sir George Onesiphorus Paul who was destined to play a role in the later history of the Panopticon.”<sup>382</sup>*

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<sup>382</sup> Semple, J. (1993) *Bentham's Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.98-99

Away from the social conditions and tensions of the eighteenth century the problem the Penitentiary Act faced after it had not been implemented was found in two strands of thought. The first was whether existing prisons could be adapted for penitentiary imprisonment or whether a new build of prisons was necessary. The second was how the Penitentiary Act would be adopted without an Act to rigorously adhere to. Conflicting thoughts and interpretations can produce very different outcomes, as we shall see between the Gloucester Penitentiary and the Southwell House of Correction. A number of efforts were made to embrace the facets of the Penitentiary Act and we will predominantly explore two of these, the Gloucester Penitentiary, and Bentham's proposed Panopticon. One measure was practical and the other was theoretical but the conflicting views of penal policy will reflect how broadly interpreted an Act can be.

In the 1780s there were a number of local experiments in penal reform but one of the most notable ones was by Sir George Onesiphorus Paul, who began building his Gloucester Penitentiary<sup>383</sup> in 1785 which opened in 1791. He wanted his penitentiary to both deter and reform the offender without endangering the inmates physical health. The impact of the Penitentiary Act on this local effort was certainly evident as Sharpe outlines. "Paul regarded imprisonment as a punishment of the mind rather than the body: solitary confinement, scanty food and hard labor would reduce the prisoner to a state of mind in which religion could reform him."<sup>384</sup> This form of imprisonment clearly satisfied the Penitentiary Act's three main features of hard labour, solitary confinement and repentance; however there were some differences in its implementation. In Paul's penitentiary, solitary confinement would prevent the spread of immorality whilst making the wicked face up to their own wickedness. Repentance would reform them away their evil spirit and hard labour would reform the offender. For Paul the work element was not terror or an act of deterrence but

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<sup>383</sup> Under 25 Geo. III, c.10

<sup>384</sup> Sharpe. J. (1990) *Judicial Punishment in England* London (Faber and Faber Ltd) pg.62

reformation<sup>385</sup>, which made the Gloucester Penitentiary's labour less onerous compared to the original intentions of the Penitentiary Act, which were of a more punitive nature. Mc Conville summarises the practice of the Gloucester Penitentiary concisely. "The new penitentiary was opened in July 1791, and provided thirty-two cells for males and twelve for females (later increased to fifty-four and eighteen). The regulations enjoined solitude, which was interpreted both in preventative and reformatory terms; prisoners had separate cells both day and night. But solitude was not unbroken: they met their fellows when washing and at chapel, and there was also association at exercise. Moreover, they were taken from their cells (two at a time) to work the tread wheel which raised water. The daily routine was punctuated by visits from the governor, chaplain, task-master or instructor, while the surgeon was obliged to see each prisoner at least twice a week."<sup>386</sup>

The executive authority at Gloucester was provided to the Governor. He appointed and supervised staff and was subject to an extensive code of rules of regulations. Books and accounts were also updated for inspection by the visiting justices. The chaplain and surgeon were to take their duties seriously; the chaplain held services and read prayers daily whilst the surgeon was responsible in seeing each prisoner twice a week. To add to this they were also responsible in maintaining the moral and reformatory climate of the Penitentiary. "It is made part of the Chaplain's duty frequently to see and confer with the prisoners without the governor or other officer being present, to enquire into their situation, and to observe the state of their cells." Indeed, the inspection role of the chaplain was put forward as the main reason why he (and the surgeon) should be appointed and paid directly by the justices; otherwise "There would be no protection from the ill-treatment of a governor, from the inspection of officers appointed by himself, and removable at his discretion."<sup>387</sup> Such a measure

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<sup>385</sup> See; Harding, C., Hines, W., Ireland, R. & Rawlings, P. (1985) *Imprisonment in England and Wales A Concise History* London (Croom Helm Ltd) pg.124

<sup>386</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.101

<sup>387</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.129

embraced section forty one of the Penitentiary Act, which ‘allowed Justices to inspect the houses at all reasonable times.’<sup>388</sup>

Although the Gloucester Penitentiary embraced many of the themes of the Penitentiary Act, it was still a significantly reduced scheme from the initial intentions of the Act itself. If we remember the Hard Labour Bill plotting to split the country up into nineteenth districts with a hard labour house (subsequently to become Penitentiary houses) in each, it becomes clear that that the discussion of one Penitentiary House in the 1790s embraced a wholly reduced plan from the original intentions of the Act. This is emphasised further by the fact the Gloucester Penitentiary was merely a trial playing understudy to both capital punishment and transportation as it did in the decades before the Penitentiary Act. “The Gloucester Penitentiary received prisoners only indirectly: they were not sent there by sentence of the court; the punishment imposed in the first instance was transportation or death. Then convicts awaiting transportation (including those whose death sentence had been commuted) were closely observed in the period before their intended removal.”<sup>389</sup>

Of course the Gloucester Penitentiary was not an isolated case of its own but the Penitentiary Act had clearly been butchered to an individual county’s needs and objectives. Southwell is an adequate example of this, which looked to change the life of the prisoner in contrast to the heart (which the Gloucester Penitentiary attempted to do). The Southwell house of correction attempted to bring men to obedience and duty through rewarded work. The profits from the labour would be divided between three parties; the county, the governor and the prisoner and it was hoped all parties would benefit from this arrangement. The county’s would be assisted towards the running costs of the house, the salary of the governor would be improved and the prisoners could live a better lifestyle inside the prison (better diet, food and heating) and after (unspent balances from profits were

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<sup>388</sup> 19 Geo III, c.74

<sup>389</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.101

retained for the prisoners release). The Southwell inmate was to be a suspect awaiting trial, non-capital felon or disorderly apprentice<sup>390</sup>, but the point being made is that whoever these prisons were punishing, the influence of the Penitentiary Act had been significantly compromised to perform different experiences of imprisonment. In total forty two new gaols and houses of correction were built between 1779 and 1787<sup>391</sup>, but the significance of them is best reflected by the lack of material on these houses. Each of these gaols and houses of correction will have its own story and individual archive, which hopefully at some point will be researched to provide a clearer picture to the impact of the Penitentiary Act. Many commentators instead have focused on the theory rather than the practice, and if the Penitentiary Act did not fill one with a sense of anti-climax and failure then Jeremy Bentham's prison reform would.

As we already know from chapter four, Bentham was a man of minute details and observations, but his involvement in the Penitentiary Act led him to create his very own reform against the backdrop of the French Revolution in the 1790s. The news that transportation was about to start again and an advertisement in the St James' Chronicle requesting designs for a house of correction in Middlesex<sup>392</sup> prompted Bentham into his very own prison reform which would later become known as the Panopticon. His thoughts can be likened to the Penitentiary Act, with a belief that labour could reform the criminal, and he founded his Panopticon on three fundamental principles that would reform the prisoner. These were the principles of lenity, severity and economy. Lenity meant the prisoner would only be deprived of liberty and not health, severity meant prisoners would not be punished disproportionately and economy was essential to the profits that the prison would depend on. "By the rule of lenity, the prisoner would not be subjected to corporal punishment or his health endangered. By the rule of severity, the condition of the prisoner would not 'be made more

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<sup>390</sup> See; McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.116-117

<sup>391</sup> Rawlings, P. (1999) *Crime and Power : A History of Criminal Justice: 1688-1998* London (Longman) pg.63

<sup>392</sup> See; Semple, J. (1993) *Bentham's Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.100



eligible than that of the poorest class of subjects in a state of innocence and liberty' (a principle that he later adopted for his industry-house Panopticon, as we shall see). And by the rule of economy, everything would be done to minimize the expense to the public (or, as we would say, the state).<sup>393</sup>

Through these beliefs and thoughts Bentham created the Panopticon.

The Panopticon was an architectural masterpiece. It was circular in shape with a central inspection lodge in the middle surrounded by cells around the border. The inspection lodge was at the very heart of the building<sup>394</sup> allowing an ever present inspector to observe and supervise the activities of prisoners and staff. "The building is circular. The apartments of the prisoners occupy the circumference. You may call them, if you please, the cells. These cells are divided from one another, and the prisoners by that means secluded from all communication with each other, by partitions in the form of radii issuing from the circumference towards the center...The apartment of the inspector occupies the center: you may call it if you please the Inspector's lodge."<sup>395</sup>

The central component of this design was the inspectors lodge. It was not just the physical presence of authority that attracted Bentham to this design but the symbolic nature of it. The inspector would be able to see each prisoner, whilst visitors and inspectors would also be welcome to inspect the prison, governor and his staff<sup>396</sup>. It essentially created an institution of transparency and Bentham accounted for every last detail in his design. "Each cell has in the outward circumference, a window, large enough, not only to light the cell, but, through the cell, to afford light enough to the correspondent part of the lodge. The inner circumference of the cell is formed by an iron grating, so

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<sup>393</sup> Schofield, P. (2009) *Bentham: A Guide for the Perplexed* London (Continuum) pg.77

<sup>394</sup> Semple makes a similar point; Semple, J. (1993) *Bentham's Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.116

<sup>395</sup> Bentham, J. (1791) *Panopticon; or, The Inspection-House* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.5

<sup>396</sup> Schofield, P. (2009) *Bentham: A Guide for the Perplexed* London (Continuum) pg.73; "Moreover, the inspection would extend to the prison officers, who would not be able to commit any abuse without being detected by the inspector. The whole prison would be open not only to magistrates, who would be appointed as visitors, but also to the general public - 'the great open committee of the tribunal of the world' - who would ensure that no abuse could be perpetrated by the inspector."

light as not to screen any part of the cell from the Inspector's view. Of this grating a part sufficiently large opens, in form of a door, to admit the prisoner at his first entrance; and to give admission at any time to the inspector or any of his attendants."<sup>397</sup> This answered the problems of inspection that were so prevalent in the gaols of the time. The outside world could now inspect the prison on transparent terms and engage in an understanding to the motives and workings of the prison. Semple outlined the five different aspects of the inspection. "First, the prisoners were watched by authority to ensure discipline and good behaviour; secondly, the governor would watch the actions of his subordinates; thirdly, these subordinates would watch the governor; fourthly, the inmates would spy on each other; and fifthly, the whole structure would be thrown open to the public. The only darkness in this dome of light was that the eyes of the prisoners were veiled, they could not see their inspectors, their visitors or the inmates of other cells. And they could never know when the eye of inspection was upon them."<sup>398</sup> The critical point for Bentham was that the prisoners always believed they were being watched, but it does make you ponder whether Bentham was ahead of his time because he was putting a surveillance system in place before it had even began.

Bentham had even accounted for how the governor was to communicate with his prisoners. "To save the troublesome exertion of voice, that might otherwise be necessary, and to prevent one prisoner from knowing, that the inspector was occupied by another prisoner at a distance, a small tin tube might reach from each cell to the inspector's lodge, passing across the area, and so in, at the side of the correspondent window of the lodge. By means of this implement, the slightest whisper of the one might be heard by the other, especially if he had proper notice to apply his ear to the tube."<sup>399</sup> Another humane effort from Bentham in his proposals was that the governor would live in the centre of the prison, which would have ensured the health of the prisoners against the disease ridden air so

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<sup>397</sup> Bentham, J. (1791) *Panopticon; or, The Inspection-House* London (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.6

<sup>398</sup> Semple, J. (1993) *Bentham's Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.140

<sup>399</sup> Bentham, J. (1791) *Panopticon: or, The Inspection-House* Dublin (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.7

commonly found in the gaols. With such transparent foundations in place it will now be beneficial to address the regime inside the Panopticon.

The regime of the Panopticon followed common trends that were found deep inside the Penitentiary Act. All three of the principles of the Act were discussed, so we will now briefly touch upon the labour, repentance and confinement of the prisoners. Firstly Bentham believed labour to have two objectives. The first was to provide reformation within the prisoner and the second was for it to be a source of profit to the governor. He believed work would inure habits of industry into prisoners and consequently develop them into honest citizens. However, he also believed that prisoners should be forced into labour that was decided by the governor. “Nor do I see why labour should be the less reforming for being profitable.”<sup>400</sup> This measure clearly made in the interests of the governor to excite the prisoners to labour so he could maximise his profits, however the prisoner was also to be rewarded by receiving a quarter of the earnings which would consequently assist in altering the habits of the offender. Such an arrangement would have made it beneficial for both parties to adhere to the rules of the Panopticon. In relation to religion Bentham allowed for a chapel in his Panopticon. Although his thoughts did not exemplify a reformer that was deeply religious, he still believed it would be beneficial to the prisoner. “The necessity of a Chapel to a Penitentiary-House is a point rather to be assumed than argued. Under an established Church of any persuasion, a system of penitence without the means of regular devotion would be a downright solecism. If religious instruction and exercise be not necessary to the worst and generally the most ignorant of sinners, to whom else can they be other than superfluous?”<sup>401</sup> For Bentham solitary confinement was the most problematic of the Penitentiary features. Initially he appeared to believe that solitary confinement would force the criminal to reflect on his sins and bring about reformation, but in the

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<sup>400</sup> Bentham, J. (1791) *Panopticon; or, The Inspection-House* Dublin (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.48

<sup>401</sup> Bentham, J. (1791) *Panopticon; or, The Inspection-House* Dublin (Full text available from National Library of Wales; Eighteenth Century Collections Online) pg.168

writings of the Panopticon he appeared to change his mind. There appears to be two reasons for this change of thought, firstly Bentham believed solitary confinement was more likely to lead to madness than reformation and secondly the economic benefits of confining more than one prisoner to a cell were much more sustainable.<sup>402</sup> Therefore he decided to mix the prisoners together in the hope that the prisoners would assist each other in their reformation. “His solution was to place two, three, or perhaps four prisoners in a cell. This would create carefully assorted companies of men who would eat, sleep, work, pray, and exercise together; form innocent attachments to each other and give each other aid and comfort: ‘Each cell is an island: - the inhabitants, shipwrecked mariners ... partners in affliction, indebted to each other for whatever share they are permitted to enjoy a society, the greatest of all comforts.’”<sup>403</sup> It is hard to gauge whether this represents a progression or a retreat. As we know, the common feature of the gaol was the fact prisoners mixed together, but Bentham’s Panopticon would allow the governor to observe such mixing. It certainly would have been an interesting development to see how prisoners would have assisted each other in their reformation. One complication may have been that it would not have been in a prisoner’s interest to help others, because he would have potentially ended up losing a proportion of his own labours work in doing so.

Bentham maintained his obsession to detail throughout his works on the Panopticon. Eleven years after the Gordon riots he placed the governor at the heart of the prison, which would have made escape virtually impossible for prisoners, but this did not stop him proposing further safeguards from a prisoners escape. His new method was by prisoners coats having one sleeve to the wrist and one to the elbow (which made prisoners easily identifiable), which was a clear deviation from his famous face dye solution found in the View of the Hard Labour Bill.<sup>404</sup> He even wanted the

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<sup>402</sup> See; Semple, J. (1993) *Bentham’s Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.130-131

<sup>403</sup> Semple, J. (1993) *Bentham’s Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.130

<sup>404</sup> Bentham, J. (1778) *A View of the Hard-Labour Bill; Being an Abstract of a Pamphlet, Intituled, Draught of a Bill, to Punish by Imprisonment and Hard-Labour, Certain Offenders; and to Establish Proper Places for their Reception.* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

prison to be protected by the army at all times, but perhaps this corresponded to the mood of the times, given riots had taken place frequently in the last two decades of the eighteenth century. His constant shrewd search for economical perfection also drove him to minute details. The best examples of this are in his bedding and exercise arrangements. In the Penitentiary Act the bedsteads were to be made of iron, Bentham wanted wood or hammocks because they were cheaper and more convenient. In relation to exercise he wanted prisoners to walk in a wheel so the wheel could pump water to the annular tank at the top of the building. Such measures may be seen as rather novel, but as we know with the Penitentiary Act, expense was a critical obstacle to reform, so Bentham's economical plans certainly had their merit. Although, prisoners may have differed on this stance given that their exit from the Panopticon was filled with clauses that could have affected their integration back into society as Schofield outlines. "At the end of his sentence, a prisoner would be discharged only if he agreed to enter the army or navy or if he found a householder who would be bound for the sum, Bentham suggested, of £50 for his good behaviour (£50 was above twice the annual wage of an agricultural labourer). Otherwise, he would be placed in a 'subsidiary establishment', another Panopticon, most beneficially undertaken, suggested Bentham, by the contractor of the prison."<sup>405</sup>

Bentham's Panopticon took away the liberty of the individual but accommodated suffering with care towards the prisoner's health. Doctors and chaplains were to attend to moral and physical health and labour was to provide a valuable habit for the outside world. Bentham's Panopticon was designed to reform and deter whilst adding an economic element that would assist not just the governor and prisoner but the government itself in a time of national debt.

Although a war was taking place with revolutionary France, the prospects of Bentham's Panopticon seemed positive in 1793. However, Bentham's desire for his Panopticon to be built near

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<sup>405</sup> Schofield, P. (2009) *Bentham: A Guide for the Perplexed* London (Continuum) pg.79

London in 1794 may well have made Blackstone come out of his grave, because society did not need another ego driven debate towards the best location for reform. Unfortunately, it was issues with land acquisition and Bentham's incompetence that would prove to be the downfall of the Panopticon. "He had hoped that the Penitentiary Act 1779 (on which he had commented on A View of the Hard-Labour Bill) would give him the authority to build the Panopticon prison, but legal objections meant that a new Act of parliament was necessary. Between October 1793 and February 1794 Bentham drafted a Bill for Parliament to enact. In the event, the government lawyers, dissatisfied with Bentham's Bill, drafted their own measure instead, which became the Penitentiary Act of 1794, and gave the Treasury powers to acquire land and enter into a contract for a profit-making prison."<sup>406</sup> Given such implications Bentham decided to attempt to persuade landowners to give up their land voluntarily, which resulted in one landowner saying, 'I can hardly conceive it possible that you can really be subjected to a penalty for not doing what seems to be absolutely impracticable without the authority of Parliament.'<sup>407</sup> Given that the original Act did not allow Bentham to acquire common land he drafted a number of Bills, and in 1799 he managed to acquire an estate at Millbank. Creeping into the nineteenth century, Pitt resigned as Prime Minister largely due to religious tensions with George III<sup>408</sup> and some months later the treasury proposed that Bentham was to build an experimental Panopticon based on five hundred prisoners in contrast to the two thousand as initially intended. In 1803 the new government fronted by Henry Addington rejected the Panopticon on the grounds of finances, and that was the end of Bentham's Panopticon (as originally intended).

The failure of the Panopticon represented conflicting times in the history of crime and punishment. The Penitentiary Act may not have been implemented but it introduced new notions of reform and deterrence. Its effect at a practical level was only really witnessed at a local level, but the Penitentiary Act itself had been reduced down to an experimental act. If the likes of the Gloucester

<sup>406</sup> Schofield, P. (2009) *Bentham: A Guide for the Perplexed* London (Continuum) pg.90

<sup>407</sup> See; Semple, J. (1993) *Bentham's Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.170

<sup>408</sup> See; Semple, J. (1993) *Bentham's Prison; A Study of the Panopticon Penitentiary* Oxford (Clarendon Press) pg.218

Penitentiary could provide positive effects then the potential was that the scheme would spread the nation. However, you have to wonder whether the circumstances of the time reduced each reformatory notion to a lottery of implementation. Bentham's Panopticon offered some hope but the French Revolution and resumption of transportation must have had some effect on government's eagerness towards imprisonment. All of the reform efforts towards imprisonment in the final two decades of the eighteenth century must have been influenced in some way by the Penitentiary Act. The examples of Gloucester, Southwell and the Panopticon all offer varied interpretations of the role of imprisonment and display character features born out of the Penitentiary Act. All three systems used the Penitentiary Act's core features of labour, confinement and religion in different ways. The most obvious of these is Southwell and the Panopticons emphasis on profitable and rewarded labour.<sup>409</sup> However it seems rather strange to write a chapter on the impact of the Penitentiary Act and be clinging on to local reform efforts, but let's not underestimate the progress that had been made, whether they were local or national efforts. Much like building a housing estate, the theory creates the foundations and the local efforts provide the initial acid test to how successful the estate will be. If it was to be a success then expansion would be likely but this process takes time. The Penitentiary Act during the close of the eighteenth century was in this 'acid test' phase, but this was an important movement.

The impact the Penitentiary Act on the eighteenth century was almost completely theoretical, but it set society up for a shifting of emphasis from that old tried and tested theory of deterrence to the bright lights of reformation. The potential was amazing, poverty and crime could be reduced and the classes could live in greater harmony with one another. However, the nineteenth century was going to provide the clearer answers as to how successful and influential the Penitentiary Act was going to be towards crime and punishment.

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<sup>409</sup> McConville, S. (1981) *A History of English Prison Administration Volume 1 1750-1877* London (Routledge & Kegan Paul) pg.119

## Conclusion

Whilst a critical evaluation of the Penitentiary Act's impact in the longer term would have been useful in examining the legacy of the Act, it was simply too much work. An attempt to discuss the developments in the nineteenth century and beyond would have proved intriguing and exciting, but such discussions would have required substantive levels of further research and discipline, whilst also compromising the narrative towards the making of the Penitentiary Act. This narrative is critical to us because this is not a thesis about theory. The story outlined towards the Penitentiary Act was put in place to allow the reader to evaluate the historical process for him or herself. Different readers have different views, much like the theories themselves. The journey of the Penitentiary Act can be construed in whichever way the reader would like; although the introduction to this thesis can assist if one would like to adopt a theory.

What has been important to us in this thesis is the process, drafting and passing of the Penitentiary Act and the immediate consequences after it. We have submerged ourselves in an exploration of the reasons and needs for the Act, but still have the simple question unanswered. How influential were the reformers to the making of the Penitentiary Act? At the beginning of this thesis we hoped to gain a clear answer towards whether the Act was a product of the spirit of the times or the reformers, but history is a complicated beast. There is no doubt that chapter one displayed signs that things were happening within society. The social conditions provided religious tensions, varying crime levels and population increase. The key question was how such a movement in the eighteenth century was going to be addressed. The links between poverty and crime became ever more apparent the deeper we fell into the eighteenth century, but opinion varied towards tackling this problem.



Ollyffe<sup>410</sup> called for more terrifying executions, whilst a range of religiously inspired individuals including Alcock<sup>411</sup> believed offenders could be reformed. Within the time of such thoughts, capital punishment still executed occasionally and transportation through a statutory framework became a dominant punishment leading up to the middle of the eighteenth century. Imprisonment for a large proportion of the eighteenth century played second fiddle to transportation, but the houses of correction in theory presented a notion that the prisoner could be reformed.

The point being made is that developments towards the Penitentiary Act had been made before the reformers from chapter three took to the stage, but the efforts were sparse and lacking the penetration required to create reform. When the reformers from chapter three did begin their quest towards reformation they were not creating new punishments but addressing the problems of the day via their own proposals in the public domain. Henry Fielding in 1751 advertised the belief that hard labour and solitude via religion could both reform and deter the offender. A decade later Beccaria produced a philosophical system that meant crimes needed to be punished in a certain, proportionate and prompt manner. Blackstone deemed the living authority on the English law agreed with Beccaria's principles and Eden followed with a condemnation of imprisonment before he embarked on a practical journey towards reforming crime and punishment. At the same time as Eden attempted to shift his proposals to practice, Hanway maintained the pressure of the times, believing prisons should be built larger and stronger in order to secure the confinement of the prisoner and provide humane correction. Finally Howard provided the data to condemn the existing prisons, and consequently brought the topic of crime and punishment to the height of public discussion. These six reformers all had a galvanising effect on thought towards imprisonment. However, without one the

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<sup>410</sup> Ollyffe, G. (1731) *An Essay Humbly Offer'd, for an Act of Parliament to Prevent Capital Crimes, and the Loss of Many Lives; and to Promote a Desirable Improvement and Blessing in the Nation* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

<sup>411</sup> Alcock, T (1752) *Observations on the Defects of the Poor Laws, and on the Causes and Consequences of the Great Increase and Burden of the Poor. With a Proposal for redressing these Grievances. In a Letter to a Member of Parliament* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

other may not have arrived which is what makes them so important to us. Supporters of the enlightenment could argue that other individuals would have replaced the reformers but it is hard to imagine any other man going to the efforts of John Howard through such acts of Christian virtue and benevolence.

Texts on crime and punishment in the eighteenth century all seem to herald Howard as the great reformer of the time, but what he documented was not actually all that new to society. Richard Ireland touches on this point in his exploration of crime and punishment in Wales. “The County Gaols themselves came in for attention in the eighteenth century, in some cases well before the publication of Howard's *The State of the Prisons* in 1777, so often seen as the turning point for prison reform. Indeed from the first half of the century Welsh figures associated with the SPCK, notably John Vaughan of Carmarthenshire and his friend Sir John Philips of Pembrokeshire had urged penal reform. In 1725 the Society resolved that a ‘Copy of each of such Welch Books as the Society have in store be added to the Packets sent to the Prisons in North and South Wales.’”<sup>412</sup> Such findings reflect that the need for reform was apparent early on in the eighteenth century, but the bottom line is that it took until 1777 in Howard’s ‘*State of the Prisons*’<sup>413</sup> for conditions in the prisons to be deemed scandalous on a national level. A man had to risk his own life in doing so and this is why it must be questioned that no other man in this era would have filled Howard’s detective boots. If they would have, then why did John Vaughan or Sir John Philips not expand their penal reform to the nation and visit the prisons on the scale Howard did? The answer is probably because neither were as lonely as Howard who had been twice widowed and without parents since eleven.

We are by no means underestimating the impact the other reformers did have on crime and punishment but Howard at the end of the conveyor belt of reform towards the Penitentiary Act

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<sup>412</sup> Ireland, R. *White Gloves? A History of Crime and Punishment in Wales* Routledge (forthcoming)

<sup>413</sup> Howard, J. (1777) *The State of the Prisons* London (Full text available from National Library of Wales; Eighteenth Century Collections Online)

confirmed the state of the nation's prisons, and in doing so promoted the proposals of reform by the likes of Fielding, Eden and Hanway. There is no doubt that penal reform was always going to happen, but when it was is a much more ambiguous question. A very strong case could be made that the American war in 1776 was as important to the Penitentiary Act as the reformers, but this would leave us with no real answer as to who created the Act, but perhaps this is the problem. With any thesis of this nature you want clear well-constructed answers, but we must conclude that the Penitentiary Act was passed because of two reasons. The first is that the circumstances of the time meant that the much loved transportation had to be halted because of the war and the second is that the gathering of serious reform proposals towards imprisonment popularised the matter in the public domain.

The impact of the Act is one of contrasting thoughts. On the one hand local initiatives meant forty two new gaols and houses of correction were scattered across the country bearing marks of the Penitentiary Act. On the other hand, no significant national change was witnessed in the eighteenth century and nothing was built directly under the Act. Even proposals such as the Panopticon which were influenced by the Act failed, and this emphasises the consistent battle the eighteenth century had with implementation. Much of the time it appears to have been down to finances and for this reason the constant backdrop of war time, population increase and national debt must have significantly compromised the attempts of any reform to the extent proposed in the Penitentiary Act. The nineteenth century was to be a century of practice driven by theory, but sadly for this thesis the eighteenth century was a time of great theory but little practice and for this reason the Penitentiary Act can be deemed a successful failure.

We must concede that this conclusion that the Penitentiary Act was a 'successful failure' is borne out of an initial optimism that this was to be a glorified thesis hailing the Penitentiary Act as

the true birth of imprisonment. However, the expectations for this thesis were too great; this was to be a much longer term process while the contestation between transportation and imprisonment was still being played out. This thesis has witnessed notions towards imprisonment completely change and in this time go through hurdles of war time and social change. There was going to be no smooth transitional change from deterrence to reformation because this was a society that was loyal to deterrence. There needed to be a change in thoughts, a theory that would provide alternatives to the known. These thoughts do not magically appear and this thesis contests that from 1751 to 1777 the reformers helped provide an alternative. To expect such an alternative to become a national success within two decades is bordering on ludicrous. The centralisation of the penal system was still some time away, the national debt had increased by war time and population increase left the economy in a vulnerable state, so the first developments were bound to be local. The ideas behind the Penitentiary Act needed to prove themselves on a local level to be provided an opportunity on a national level. One thing is for sure, the nineteenth century was going to be an exciting and experimental century in crime and punishment (the opening of Millbank in 1816 and Pentonville in 1842 being two examples), the foundations had been built but the impact of the Penitentiary was yet to be seen at the close of the eighteenth century, and that is why it was both a success and a failure.

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## Relevant Legislation

**43 Eliz.1, c.2 (1601)** – ‘An Act for the Relief of the Poor.’

**7 Jac.1, c.4 (1609)** – ‘An Act for the due Execution of divers Laws and Statutes heretofore made against Rogues, Vagabonds and Sturdy Beggars, and other lewd and idle Persons.’ (Houses of Correction to be provided in every Shire)

**7 Jac.1, c.16 (1609)** – ‘An Act for the encouraging of many poor People in Cumberland and Westmorland, and in the Towns and Parishes of Carptmeal, Hawkeshead and Broughton, in the County of Lancaster, to continue a Trade of making Cogware, Kendals, Carptmeals and coarse Cottons.’

**14 Car.II, c.12 (1662)** – ‘An Act for the better Relief of the Poor of this Kingdom.’

**1 Anne.1, c.25 (1701)** – ‘An Act for the Relief of poor Prisoners for Debt.’

**4 Geo. I, c.11 (1717)** – ‘An Act for the further preventing Robbery, Burglary and other Felonies; and for the more effectual Transportation of Felons, and unlawful Exporters of Wool; and for declaring the Law upon some Points relating to Pirates.’

**9 Geo.II, c.7 (1722)** – ‘An Act for amending the Laws relating to the Settlement, Imployment and Relief of the Poor.’

**10 Geo.II, c.11 (1723)** – ‘An Act for the more effectual employing the Poor by encouraging the Manufacturers of this Kingdom.’

**9 Geo.III, c.23 (1736)** – ‘An Act for laying a Duty upon the Retailers of Spirituous Liquors, and for licencing the Retailers thereof.’

**24 Geo II, c.40 (1751)** – ‘An Act for granting to His Majesty an additional Duty upon Spirituous Liquors, and upon Licences for retailing the same; and for repealing the Act of the twentieth Year of His present Majesty’s Reign, intituled, An Act for granting a Duty to His Majesty to be paid by Distillers upon Licence to be taken out by them for retailing Spirituous Liquors; and for the more effectually restraining the Retailing of distilled Spirituous Liquors.’

**25 Geo.II, c.37 (1752)** – ‘An Act for better preventing the horrid Crime of Murder.’

**13 Geo. III, c.58 (1773)** – ‘An Act for providing Clergymen to officiate in Gaols within that Part of Great Britain called England.’

**14 Geo. III, c.20 (1774)** – ‘An Act for the Relief of Prisoners charged with Felony, or other Crimes, who shall be acquitted or discharged by Proclamation, respecting the Payment of Fees to Gaolers, and giving a Recompence for such Fees, out of the County Rates.’

**14 Geo. III, c.59 (1774)** – ‘An Act for preserving the Health of Prisoners in Gaol, and preventing the Gaol Distemper.’

**16 Geo. III, c.43 (1776)** – ‘An Act to authorise for a limited time, the Punishment by hard Labour of Offenders who, for certain crimes, are or shall become liable to be transported to any of his Majesty’s Colonies and Plantations.’ (continued by 18 Geo. III, c.62; until 1<sup>st</sup> July 1779)

**18 Geo. III, c.60 (1778)** – ‘An Act for relieving His Majesty’s Subjects professing the Popish Religion from certain Penalties and Disabilities imposed on them by an Act made in the Eleventh and Twelfth Years of the Reign of King William the Third, intituled, An Act for the further preventing the Growth of Popery.’

**19 Geo. III, c.74 (1779)** – ‘An Act to explain and amend the Laws relating to the Transportation, Imprisonment and other Punishment of certain Offenders.’

**22 Geo. III, c.64 (1782)** – ‘An Act for the amending and rendering more effectual the Laws in being relative to Houses of Correction.’

**24 Geo. III, c.55 (1784)** – ‘An Act to explain and amend an Act, made in the Twenty Second Year of the Reign of His present Majesty, intituled, An Act for the amending and rendering more effectual the Laws in being relative to Houses of Correction.’

**24 Geo.III, c.56 (1784)** – ‘An Act for the effectual Transportation of Felons and other Offenders; and to authorise the Removal of Prisoners in certain Cases; and for other Purposes therein mentioned.’

**25 Geo. III, c.10 (1785)** – ‘An Act for building a new Gaol, a Penitentiary House and certain new Houses of Correction, for the County of Gloucester, and for regulating the same.’



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Candidate's Forenames: John Brian

Candidate for the Degree of Mphil

Full title of thesis: How influential were the reformers of the eighteenth century to the making of the Penitentiary Act and how important was this Act in punishing offenders in the eighteenth century?

**Summary:** This thesis addresses the process, drafting and passing of the Penitentiary Act 1779 accompanied by an evaluation of its immediate consequences in the final two decades of the eighteenth century. Through an examination of the social conditions and punishments in the eighteenth century it attempts to determine whether the Penitentiary Act was a product of the enlightenment or individual reformers. This absorbing journey goes through waves of disappointment and optimism and consequently leaves a question as to just how important this Act was to the history of imprisonment.