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"This Province, so Meanly and Thinly Inhabited": Punishing Maryland's Criminals, 1681-1850

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In the last quarter-century historians have reached an unusual if imperfect degree of consensus on the origins of the penitentiary. Most recent works treat the penitentiary as but one of a complex array of "total institutions," the rise of which distinguished a new "disciplinary" society. Total institutions such as insane asylums, schools, navies, almshouses, and penitentiaries isolated their inmates from society in order to socialize them. Through hard work, reflective solitude, and scrupulous time management, creators of asylums hoped to prepare inmates for reintegration into society. This system of discipline encapsulated the values of a particular part of society, mainly those attuned to an increasingly impersonal and market-driven culture.[1]

Naturally there are limits to this scholarly consensus. Within the parameters of this generally neo-Orwellian discourse vigorous debates still

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[1] For a recent review of the literature, see David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971; rev. ed. New York, 1990), introduction. See also Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York, 1979); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (New York, 1978); Adam Hirsh, *The Rise of the Penitentiary: Prisons and Punishment in Early America* (New Haven, 1992); and Clive Emsley, *Crime and Society in England, 1750-1900* (New York, 1987). On "total institutions," see Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Garden City, NY, 1961), chap. 1.

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rage: is there *any* room for humanitarian explanations for the rise of the asylum? Did total institutions actually succeed at straitjacketing the souls of wayward individuals? Above all, what caused the rise of the penitentiary and other disciplinary institutions? Description has proved easier than explanation, though explanations abound. A long-established school that still dominates the popular imagination sees the penitentiary as a sign of progressive humanitarianism. A more sophisticated and defensible version of that tradition emphasizes the influence of Enlightenment thought, with its confidence in the perfectibility of human society through the application of rigorously rational thought. In the last three decades, however, the most persuasive interpretations have come to focus on the links between the rise of disciplinary institutions and social, cultural, and ideological transformations during the same era. David Rothman's classic *The Discovery of the Asylum: Social Order and Disorder in the New Republic* weaves the story of the rise of "total institutions" into a much broader tale about a crisis of legitimacy and order in the early republic. Rothman's premise was that "the idea of the asylum took form in the perception, in fact the fear, that once-stable social relationships were now in the process of unraveling, threatening to subvert social order and social cohesion." A disciplinary institution could "at once rehabilitate the inmates, thereby reducing crime, insanity, and poverty, and would then, through the very success of its design, set an example for the larger society," particularly through its imposition of good order, punctuality, and steady work habits.[2] Rothman's focus, then, is on social change in the United States.

Part of Rothman's genius was to discern the potential significance of Michel Foucault's work for understanding American developments. Foucault developed a grand archeology in which "discipline" increasingly meant writing power relations into the soul instead of onto the body. Like Rothman, Foucault emphasized the new institutions' functions as instruments of a new, more invasive organization of state and society along the lines of industrial work discipline. Unlike Rothman, Foucault, a moral philosopher unfettered by the need for chronological precision, close attention to material and social circumstances, or the search for representative people and events, was free to focus on a grand *cultural* transformation that he discerned in the late eighteenth and early nineteenth centuries. In Foucault's vision, state and society did not simply create disciplinary

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[2] Rothman, *Discovery*, xxix, xxx.

institutions; instead they created a new, disciplinary society that largely fulfilled the hopes of its architects.[3]

Recent writers invariably have had to come to terms with the neo-Orwellian interpretations of Rothman and Foucault, but they have also, in the past decade, opened up fertile new ground for explaining the rise of the penitentiary. Louis P. Masur, for example, focusing on the flip side of the rise of the penitentiary—the decline of capital punishment—incorporates both Rothman's emphasis on social developments and Foucault's awareness of cultural change and goes a step beyond them by adding the dimension of ideology. Masur locates the birth of the prison in the movement against public executions, which was rooted in "republican ideology, liberal theology, and environmentalist psychology combined with the experience of the American Revolution." In a remarkably concise account, Masur encompasses social change (the "formation of middle-class sensibilities," dependent upon the existence of a middle class and thus upon the economic foundations of a class society); cultural change (fundamental assumptions about the source of criminality, shifting from a belief in innate depravity to a belief that social influences caused crime); and ideology ("punishments were bound up . . . with questions of the nature and power of the state," and when the state was put on a new footing with the American Revolution, so too were punishments). An impressive recent book, Michael Meranze's *Laboratories of Virtue*, similarly emphasizes ideological developments, particularly the aspiration of reformers to create a liberal state. In a dangerous contradiction that lay at the core of liberalism, argues Meranze, reformers attempted to mold people into submission to that liberal ethic.[4]

Still, the near-consensus on the terms of debate remains: clearly something was afoot in the late eighteenth and early nineteenth centuries when a wide array of disciplinary institutions cropped up throughout the North Atlantic world. The near-consensus extends to chronology. The penitentiary and other disciplinary institutions arose within a fifty year period dating from the 1770s. Few accounts (and none of the ones discussed in the preceding paragraphs) even claim to deal fully with

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[3] *Ibid.*, 339n. Foucault, *Discipline and Punish*; see also Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (New York, 1965). For Foucault's ideas on the nature of historical change, see Foucault, *The Archaeology of Knowledge* (New York, 1972). *Madness and Civilization: A History of Insanity in the Age of Reason,* wrote Rothman, was "the most stimulating starting point."

[4] Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865* (New York, 1989), 4-5; Michael Meranze, *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835* (Chapel Hill, 1996).

developments before the 1770s; one has only to look at the dates emphasized in the subtitles to see that. But this makes sense, for the consensus extends to another proposition, one that fully justifies such a truncated periodization: this was a revolution, in the sense of a sudden and fundamental departure from old ways. "There is no disputing the fact of a revolution," writes Rothman. For Masur, the American Revolution figured heavily in the transformation of American culture, of which penal reform was one manifestation, and for Foucault, this was a pan-Atlantic phenomenon but nevertheless a "transformation" in which "the entire economy of punishment was redistributed."[5]

Collectively, these works do a great deal to illuminate the rise of the penitentiary. They are particularly helpful for understanding what reformers hoped to achieve, how their aspirations for the penitentiary meshed with their aspirations for society as a whole, and how those aspirations translated into specific forms of organization and discipline within the walls of the penitentiary. But some important questions remain. This essay examines three such questions, in each case using the colony and state of Maryland as a case study. First, why did some states adopt the penitentiary so much earlier than others? Pennsylvania opened one in 1790, but South Carolina waited until 1868 to do so. Given the variations in timing, did different states establish penitentiaries for different reasons? That seems to have been the case, as a comparison of Maryland's path to the penitentiary with that of other jurisdictions will demonstrate. Second, was the penitentiary truly revolutionary? Perhaps in some places, but not in Maryland. Third, did the diverse paths to the penitentiary produce equally diverse forms of the penitentiary? At least in the case of Maryland, that seems not to have been the case. Maryland's original penitentiary and subsequent reform efforts closely resembled those in other states, not only in their form, but also in their timing. Reforms in the 1820s and 1830s were not related intrinsically to conditions in Maryland; instead the penitentiary took on a life of its own, and changed primarily because of conditions within its walls, or in response to national and even international debates about penal reform, and—here we return to the work of Rothman, Foucault, and Masur—perhaps on a more fundamental level, in response to deep social and cultural change. In sum, the case of Maryland generally complements rather than overturns current ideas about the rise of the penitentiary, but it also challenges the notion that it was a revolutionary development, and it roots the penitentiary in a regional, even local context.

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[5] Rothman, *Discovery*, xxv; Foucault, *Discipline*, 7-8.

Although Pennsylvania clearly led the way when it came to penal reform, Maryland was among the first to make imprisonment a common criminal sanction. Maryland opened a true penitentiary aimed at the moral reformation of its inmates in 1811, twenty-eight years before Massachusetts prison entered its "reform era." Southern states typically lagged behind the North in opening penitentiaries, probably because the South already possessed total institutions containing those perceived as inherently criminal: slaves incarcerated on plantations. A penitentiary would have been redundant.[6]

So why did Maryland, a slave state, take so quickly to the penitentiary? Although broad intellectual and ideological currents did shape Maryland's penal development, the idea of the penitentiary fell on fertile soil in Maryland because it comported well with over a century of evolutionary change in penal practices. Moreover, persistent elements of traditional penal philosophy and practice severely undermined attempts at fully implementing the penitentiary ideal. In this essay the penitentiary emerges as but one of several strategic shifts in Maryland penal practices between 1681 and the early nineteenth century. A radical departure from English law of larceny in 1681, the sale of prisoners to satisfy their debts during the following century, sentences to labor on public works projects between 1789 and 1811, and ultimately the penitentiary itself were all part of an ongoing search for an effective system of punishments. Each of these experiments remained faithful to the demands imposed by Maryland's system of unfree labor and, at the same time, to traditional penal philosophy. Deterrence, even terror, always hung over potential criminals, and the vitally important notion of dual proportionality, with punishments indexed to both the crime and the criminal, retained its central place in each experiment in penal practice.

This story climaxes, but does not end, with the Penitentiary Act of 1809. The authors of this statute drew their central ideas and key words from popular treatises on penal reform, incorporating (among others) Cesare Beccaria's Enlightenment critique of the ancien régime of punishment. Writing in 1764, the Milanese aristocrat asserted that punishments ought to be certain, with no possibility of a light sentence or a pardon; prompt, to emphasize the direct connection between the crime and its punishment; proportional only to the crime, without considering the status of the criminal; and mild, barely exceeding the advantage derivable

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[6] Michael Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (Chapel Hill, 1980).

from the crime (and certainly milder than death). A criminal code requiring no interpretation should replace judicial discretion in sentencing.[7]

Beccaria's ideas quickly gained currency among educated men throughout Europe and America. Writers, jurists, and ultimately legislators took the Beccarian principles of certainty, mildness, and proportionality, and grafted onto them three additional elements: reformation of the criminal as a goal of punishment; a turn away from corporal punishments; and a prescription for implementing those mild, proportional, and certain punishments through imprisonment. Out of these components Maryland legislators created the penitentiary. In following narrative, then, we must look for the moment at which each of these components became an integral part of Maryland penal policy or practice.

Beginning in the seventeenth century, Maryland's legislators sharply deviated from English law in a conscious effort to reinforce the province's plantation-centered political economy. Unlike England, where lawmakers feared "the multitudes of poor migrants on the tramp across England," Maryland experienced chronic labor shortages. During the middle decades of the seventeenth century a substantial emigration of white indentured servants filled the colony's labor needs. Later, during the eighteenth century, large numbers of African slaves and English convict servants provided Maryland's propertied class with laborers. In the late seventeenth century, though, the supply of indentured servants dried up, and neither slaves nor transported convicts had begun to arrive in large numbers.[8]

Maryland's assembly chose this moment—the labor crisis of the late seventeenth century—to remove the death penalty from most larcenies. The "Act for the Speedy Trial of Criminals" passed in 1681 clearly flowed from the social and economic realities of Maryland's system of unfree labor: "The severity of the Laws of England against all Thieving stealing and Purloyning are verry suitable to that and all other populous Kingdomes [*sic*] but not agreeable to the nature and constitution of this Province, so

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[7] Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci (1764; rep. New York, 1985).

[8] Russell R. Menard, "British Migration to the Chesapeake Colonies in the Seventeenth Century," in Lois Green Carr *et al.*, eds., *Colonial Chesapeake Society* (Chapel Hill, 1988), 99-132; Peter Clark, "Migration in England During the Late Seventeenth and Early Eighteenth Centuries," in Clark and David Souden, eds., *Migration and Society in Early Modern England* (Totowa, NJ, 1988), 213-52; E. A. Wrigley and R. S. Schofield, *The Population History of England, 1541-1871: A Reconstruction* (Cambridge, MA, 1981), 528-32.

meanly and Thinly Inhabited."[9] The "Act for the Speedy Trial of Criminals" punished larceny (simple theft without any aggravating circumstances) far less severely than in England, where grand larceny (stealing goods valued at twelve pence or more) carried the death penalty. Maryland set the division between grand and petty larceny at about £3 sterling (one thousand pounds of tobacco). Consequently, virtually all larcenies became petty larcenies, and the penalty changed from death to a mixture of corporal punishments and fines. Convicted thieves returned their loot, paid four times the value of the stolen goods, submitted to up to forty lashes, and spent up to an hour in the pillory.[10]

The 1681 statute not only kept potential laborers alive; it also sank them into debt. Fines, including fourfold restitution for larceny, fell due immediately after sentencing. Those unable to pay went to jail. At this point the courts frequently imposed an alternative penalty: sale into servitude, with the proceeds used to pay fines and fees. In addition, convictions for mulatto bastardy brought automatic sale into servitude. It would be easy to underestimate the significance of sale into servitude as a secondary punishment, for court clerks recorded these sales only on loose papers. Fortunately, a rare complete set of such papers survive from Frederick County for 1786 and 1787. From them we can calculate that this court (Maryland's busiest in the late eighteenth century) sold into servitude—at an absolute minimum— fifteen percent of all convicts.[11] But this figure excludes a substantial number of informal arrangements, for citizens routinely paid criminals' fines and fees or stood as security for eventual payment. Kinship or friendship motivated some of these favors, but others simply needed servants. Lydia Green Brooke, for example, cut

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[9] [General Assembly of Maryland], *Laws of the State of Maryland* (Annapolis, 1681), chap. 3; Lois Green Carr, *County Government in Maryland, 1689-1709* (New York, 1987), 146-47, 231, 261-62.

[10] A decreasing proportion of convicts were actually hanged, however, as pardons, benefit of clergy, and merciful fictions about the value of stolen goods allowed English authorities to hang fewer and fewer convicts. J.M. Beattie, *Crime and the Courts in England* (Princeton, NJ, 1986), chaps. 9-10; *Laws* (1681), chap. 3; *Laws* (1715), chap. 26. Other colonies departed from English practice, albeit for their own distinctive reasons. Peter Charles Hoffer, *Law and People in Colonial America* (Baltimore, 1992), 1-24, 80-84.

[11] Some statistics in this essay come from the "Frederick County Court Database" (hereinafter referred to as FCC database), a ParadoxSE file summarizing all records of over seven thousand criminal prosecutions in Frederick County, Maryland, between 1748 and 1837. These remarkably complete records are housed at the Maryland State Archives. Additional databases for Maryland's Assize, Provincial, and General Courts were compiled in the same manner.

her own deal: she entered into an indenture for two and a half years of service in exchange for costs and prison fees of £11.1.3.[12]

Of course, the rise of slavery in Maryland soon inspired race-specific alterations in penal practices. The 1681 statute exempted slaves from the new punishments prescribed for larceny. Fining them made no sense, because their owners would have to bear the punishment. Instead, a single justice of the peace tried slaves for larceny, punishing them with up to thirty-nine lashes. Legislators subsequently created a number of new offenses (such as selling liquor to slaves) to support a slave-based economy. They also modified the punishments for existing offenses. A distinction between fornication and mulatto bastardy appeared, for instance, condemning illegitimate mulatto children to thirty-one years of servitude and their parents to seven years of servitude—compared to a thirty-shilling fine for the parents of illegitimate white children, with no servitude.[13] Although racially based slavery inspired new penal practices, slave penology conformed whenever possible to existing practices. Thus the substitution of whipping for the standard punishment of death for larceny effectively combined plantation justice with the trappings of judicial authority, while differential punishments served the dual purposes of controlling criminals and controlling the new slave labor force.

On the eve of the American Revolution, Maryland penal practices remained firmly rooted in the traditional premises of English penal philosophy: terrifying sanguinary punishments, with the terror magnified by the majestic pageantry of courts and executions; the occasional execution of prominent citizens to dramatize the impartiality of the justice being meted out; and frequent pardons and commuted sentences to demonstrate the merciful nature of those who ran the system. Thus where penitentiary reformers advocated certainty of punishment, traditional sanctions were very selectively enforced. Where reformers wanted punishments that were as mild as possible, and in any case proportional to the crime, traditional sanctions were designed to maximize the terror felt by potential miscreants, and thus often seemed severe in relation to the crime (such as hanging for stealing goods worth twelve shillings).

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[12] Indenture for Lydia Green Brooke, "Presentments & Indictments" bundle, FCC (Court Papers), Nov. 1798 [MSA T 176]. The standard Maryland State Archives citation form indicates the record group, box, and file in brackets. Christine Daniels discovered that court minutes and dockets grossly understate the incidence of debt servitude, which was often an informal, private agreement. Daniels, "Debt Servitude in Colonial Maryland," Paper presented at the Washington Area Seminar on Early American History, February 21, 1991.

[13] A. Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (New York, 1978).

Reformers wanted to minimize judicial or executive discretion in sentencing, while the traditional policy was to maximize discretion. As Douglas Hay notes, this system of bloody, terrifying punishments, selectively enforced, made it possible to "terrorize the petty thief and than [*sic*] command his gratitude, or at least the approval of his neighborhood."[14]

Although Maryland's penal *philosophy* continued to hold sway into the early nineteenth century, certain new penal *practices* created precedents that the architects of the Maryland penitentiary would soon draw upon. The new combination of punishments for larceny remained severe enough to inspire terror, but also made possible exquisitely fine calculations of proportionality: fourfold restitution indexed the punishment to the crime, while whipping and pillorying allowed justices to tailor punishments to the status and character of the defendant. Later statutes specifying different punishments for slaves and free persons also allowed justices to mete out punishments proportional to the defendant's status. For instance, levying fines against slaves would have been inappropriate, but (given the first principles of a slave society) whipping made perfect sense: judges could tailor the number of lashes to the severity of the offense and to the character of the offender. Even death sentences under such statutes left room for mercy and proportionality towards slaves (and their owners), for governors sometimes issued pardons conditional on transportation to the Indies. Selling prisoners to satisfy their debts also combined deterrence with proportionality. A combination of the market for labor, the amount of fines and fees owed, and limitations set by the court determined terms of servitude. Moreover, the 1681 statute remained consistent with the reality of limited government: in the absence of a police force, fourfold restitution encouraged victims (who received the proceeds) to prosecute thieves. Most importantly, the practice of selling prisoners into servitude (including thousands transported from England during the colonial period) established

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[14] Douglas Hay, "Property, Authority, and the Criminal Law," in Douglas Hay *et al.*, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York, 1975), 17-64 (quotation at 48). This is a pioneering but not conclusive account of the philosophy and practice of criminal sanctions in early modern England. Among those offering important qualifications and elaborations are Beattie, *Crime and the Courts*; J.A. Sharpe, *Crime in Early Modern England, 1550-1750* (London, UK, 1984); Emsley, *Crime and Society in England*; and Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," *Journal of British Studies*, 25 (Oct. 1986), 380-435.

a precedent that would be drawn on at a later date, when harnessing convict labor became central to the penitentiary experiment.[15]

For all that colonial Maryland had diverged from the English tradition of capital punishments, the gulf between the state of penal practice in 1789 and postpenitentiary penology remained considerable. The links between deterrence, proportionality, hard labor, and reformation remained so tenuous that Maryland lawmakers showed no interest in creating a penitentiary in 1789. Instead they wrote into law just one of those connections by passing the "Wheelbarrow Act," which made hard labor on the roads and in the harbor of Baltimore City the standard punishment for most serious offenses.[16] The link between punishment and hard work, once limited to the sale of some prisoners into servitude or to the far-off example of continental Europe's galleys and houses of correction, suddenly became a central feature of Maryland's system of criminal sanctions.

Significantly, lawmakers omitted the key words of the emerging discourse of penal reform ("proportionality," "fixed punishments," "mildness," and "certainty") from the act. Instead, they justified hard labor in traditional, pragmatic terms: they needed road crews because "the commission of burglary, robbery, horse-stealing and other crimes hath greatly increased in this state."[17] This perception conveniently dovetailed with the peak of Baltimore's astonishingly rapid rise from a village to a major city. Baltimore's phenomenal growth created numerous public works projects, on which few people except convicts could be induced to labor. Internal developments in Maryland society, leavened by the examples of sale, transportation, and Philadelphia's recently created road crews, inspired this experiment in penal practice.

Road crews spent their nights under close guard and their days wielding picks, shovels, and wheelbarrows.[18] With these tools they maintained Baltimore's city streets and considerably expanded the territory covered by city roads. Only healthy men could sustain the effort demanded from them by overseers and guards; for others it constituted a death

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[15] For information on Maryland law see, Carr, *County Government*, 231, 262. Venerable European institutions such as galleys and houses of correction provided more distant examples of institutional attempts to instill disciplined work habits in the idle and disorderly. Blake McKelvey, *American Prisons: A History of Good Intentions* (Montclair, NJ, 1977), chap. 1.

[16] *Laws* (Nov. sess. 1789), chap. 44; Pennsylvania, *Statutes at Large of Pennsylvania* (Harrisburg, 1896), xii, 280-81.

[17] *Laws* (Nov. sess. 1789), chap. 44, s. 1.

[18] Benjamin Todd's statement, June 3, 1789, Governor and Council (Pardon Papers), folder 63 [MSA S 1061-4] (hereafter cited as Pardon Papers).

sentence. Thus John York's judges sentenced this "decrepit" horse thief to death rather than subject him to the rigors of the wheelbarrow, all the while hoping for a pardon from the governor. Hard-bitten overseers and guards added to the convicts' woes. Decades after the demise of the Wheelbarrow Act, the memory of horrors visited on convicts in full public view inspired penal reformers to redouble their own efforts: "The cruelties to which the objects of this mode of punishment were subjected in all the detail of its enforcement—unmitigated by any soothing circumstances, but on the contrary, incited and kept alive by the very spirit of its institution—that of revenge for infracted laws and the infliction of public and enduring infamy—but too surely stifled every lingering spark of sensibility." Contemporaries acknowledged the cruelty of overseers and guards. Thus a mentally ill convict won a pardon because "the misery, and horrid sufferings this unfortunate man must experience at the roads from his Keepers who will be ignorant of his infirmities, or too unfeeling to regard them" aroused the sympathy of all who learned of his plight.[19]

Although Marylanders now associated punishment with hard labor, the international movement for penal reform had yet to make a distinct mark on Maryland law. In fact, judicial discretion in sentencing actually expanded under the Wheelbarrow Act, violating a central tenet of the emerging reform movement. Judges could now impose on the one hand, service on the roads, *or* on the other, pre-road crew penalties. Thus petty thieves faced whipping, the pillory, and fourfold restitution, *or* up to seven years on the roads (fourteen years for slaves). Manslaughter and the frequently prosecuted offenses of breaking and entering with intent to commit a felony still carried the death penalty, but now the judges could, at their discretion, impose brief terms on the roads instead. More than ever, Maryland law allowed justices to tailor their sentences to both the crime and the criminal. The Wheelbarrow Act forged a solid link between punishment and hard work, which would become a central element of the penitentiary ideal.

Therefore, as of 1789 even the most rudimentary Beccarian principles had yet to take root in Maryland. The language and ideology of penal reform only gradually became a part of Maryland penal practice during the twenty-two year tenure of the wheelbarrow law (1789 to 1811). It entered

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[19] "Petition of John York," [1790], *ibid.*, folder 47 [MSA S 1061-5]; Maryland Penitentiary, *Report of the Directors of the Maryland Penitentiary Made to the Executive* (Baltimore, 1834), 6; Arthur Shaaf to Benjamin Ogle, June 24, 1799, Pardon Papers, folder 72 [MSA S 1061-8]; Pardon of William Lynch, July 14, 1799, Governor and Council, (Pardon Record) [MSA S 1107-2] (hereinafter cited as Pardon Record).

first through the back door, through pardon petitions that increasingly mixed traditional appeals with the new language of penal reform. Supporters of a convicted larcenist, "Negro Jeffrey," emphasized his "penitent" demeanor. This assertion became common, though not standard, by 1800; by the time the penitentiary opened in 1811 the spirit of reform had penetrated so far that a convict breathlessly informed the governor that he "[felt] with joy the salutary influence which the punishment he has already endured has produced on him."[20]

A new version of "proportionality" also gained currency. Dual proportionality, the practice of indexing punishments to both the seriousness of the offense *and* the character of the offender, served as the foundation of Maryland penal practice in the eighteenth century. In contrast, penal reformers called for punishments indexed only to the crime, eliminating differential punishments based on status or character (but not necessarily race). In 1796, for example, two successful pardons cited the need for punishments in proportion to the offense alone. When a judge sentenced Sam, a slave, to have an ear cropped for defending himself against an overseer, Sam's master argued that "the punishment to be inflicted far exceeds the enormity of the offence." That same year, Corbin Sprigg sought a pardon for manslaughter "if a punishment in any degree *proportioned to the offence* can be resorted to." Appeals based on proportionality and penitence coexisted with more traditional appeals, even within individual petitions. Henry Schultz, for example, invoked both his penitence and the more traditional principle of dual proportionality. A short time behind the wheelbarrow should be sufficient, because "by him the punishment inflicted has very probably been more severely felt, than might have been by others of a lower class."[21]

Lawmakers saw the Wheelbarrow Act as a permanent solution to the problem of rising criminality (or at least the perception of rising crime rates

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[20] Petition for Negro Jeffrey, [1790], Pardon Papers, unnumbered folder marked "Negro Jeffrey," [MSA S 1061-5]. See also Petition for William Burton, [1789], *ibid.*, folder 84 [MSA S 1061-4]; "Petition of Turbutt Wright," May, 19, 1789, *ibid.*, folder 88 [MSA S 1061-4]; Petition for Henry Schultz, [1796], *ibid.*, folder 28 [MSA S 1061-7]; Gabriel Duvall to John Stone, Sept. 17, 1798, *ibid.*, folder 30 [MSA S 1061-8]; Elijah Davis to Edward Lloyd, Mar. 4, 1811, *ibid.*, folder 8 [MSA S 1061-15]; Petition of James Nicholson, [1806], *ibid.*, folder 20 [MSA 1061-12].

[21] Petition for Negro Sam, June 6, 1796, *ibid.*, folder 57 [MSA S 1061-7]; Emphasis added to the Corbin Sprigg quote: John Mason to John Stone, Apr. 16, 1796, *ibid.*, folder 12 [MSA S 1061-7]; see also Petition of Elizabeth Lambeth, Sept. 13, 1790, *ibid.*, folder 9 [MSA S 1061-5]; "Petition . . . on behalf of his Negro Called Bob," [1794], *ibid.*, folder 92 [MSA S 1061-6]; George Duvall *et al.* to John Henry, Aug. 30, 1798, *ibid.*, folder 1 [MSA S 1061-8]; Petition for Henry Schultz, [1796], *ibid.*, folder 28 [MSA S 1061-7].

in Baltimore City).[22] Yet the Wheelbarrow Act quickly failed on its merits, with no more than an assist from penitentiary advocates. Two serious problems quickly became apparent. First, road crews lived and worked together day and night, thus exposing convicts to the worst kind of people: other convicts. Citizens feared that once a prisoner joined the wheelbarrow gang, he would fall in "amongst a number of hardened and depraved fellow prisoners," where "he would become more corrupted and lost to his family and all good society forever." Convicts might even teach each other to become more effective criminals. Hence "the probability of [a prisoner] forming such connections, and receiving such information, respecting the prosecution of villainous enterprizes as will render him at the expiration of his term a pest to society."[23] Second, convicts conducted these schools for vice on public byways. Baltimore residents understandably considered it dangerous to put packs of convicted felons on the streets. A series of events in the summer of 1797 exacerbated these fears: William Townsley escaped from a Baltimore City road crew and made his way to Harford County (on the road to Philadelphia), where he attacked his seventy-seven-year-old father-in-law. Happily, Townsley rather than his elderly relative perished in the struggle. This episode provided ammunition to critics who charged that the road crew system "excited its victims to reckless desperation . . . and to acts of fierce retaliation upon communities at large."[24]

The manifest failures of the Wheelbarrow Act inspired a search for alternative systems of punishment that began at the very moment that politicians, lawyers, and social theorists throughout the western world engaged each other on that very issue. Much of this transatlantic debate centered on potential ways of combining Beccaria's recipe for deterrence ("certainty," "mildness," and "proportionality") with new methods for the

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[22] Urbanization actually led to lower crime rates, but to contemporaries the sheer volume of reported offenses in large cities (rather than the per-capita crime rate) shaped perceptions of criminality. Ted Gurr, "Historical Trends in Violent Crime: A Critical Review of the Evidence," in *Crime and Justice: An Annual Review of Research*, ed. Michael Tonry and Norval Morris (21 vols., Chicago, 1981), III, 295-353. Rothman, *Discovery*, chap. 3.

[23] Richard Soderstrom to Benjamin Ogle, Aug. 19, 1799, Pardon Papers, folder 81 [MSA S 1061-8]; "The Humble Petition of Philip Sumvalt," [1792], *ibid.*, folder 6 [MSA S 1061-6]. See also Petition for William Burton, [1789], *ibid.*, folder 84 [MSA S 1061-4]; Petition for Negro Jeffrey, [1790], *ibid.*, unnumbered folder marked "Negro Jeffrey," [MSA S 1061-5]; "Petition of Daniel Bowley . . . on behalf of his Negro Called Bob," [1794], *ibid.*, folder 92 [MSA S 1061-6]; Elijah Davis to Edward Lloyd, Mar. 4, 1811, *ibid.*, folder 8 [MSA S 1061-15].

[24] Pardon of John Libb, Aug. 17, 1797, Pardon Records, [MSA S 1107-2]. See also Pardon of Peter Murphy, Aug. 28, 1792, *ibid.* [MSA S 1107-2]. *Report of the Directors*, 6.

permanent reformation of criminals. Consequently, Beccaria's treatise went through American printings in 1773, 1777, 1778, 1793, 1809 (twice), and 1819. English reformers such as John Howard, Samuel Romilly, Joseph Priestly, and Jeremy Bentham, tied together more by their nonconformist religious and political perspectives than by a conscious identification with continental figures such as Beccaria, Voltaire, and other Enlightenment thinkers, nevertheless pushed hard for a vision of penal reform that closely resembled (and occasionally cited) Beccaria's.[25] Moreover, lawyers and lawmakers could hardly avoid consulting Blackstone's *Commentaries on the Laws of England*, the fourth volume of which ("Of Public Wrongs") began with a cautious but clearly positive endorsement of Beccarian principles.

Maryland's immediate neighbors provided additional food for thought. In 1777 Thomas Jefferson, working with four other prominent members of the Virginia gentry, drafted a "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," a document heavily influenced by Beccaria. James Madison introduced the bill to the Virginia House of Burgesses in 1785; although the bill failed, a state penitentiary opened in Richmond barely a decade later. Marylanders also witnessed penal experiments on their northern border, where Pennsylvanians fairly leapt into the new age of penology, opening the first penitentiary in the United States in 1786 and then installing a comprehensive system of penal discipline in Philadelphia's revamped Walnut Street Prison in 1790. Bracketed by states in which terms such as "reformation," "proportionality," "mildness," and "certainty" shaped the discourse in lively public debates over penal reforms, and connected through the world of print and through private correspondence to social theorists and legal minds on both sides of the Atlantic, Marylanders could not help but consider the possibility of opening a penitentiary.[26]

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[25] Henry May, *The Enlightenment in America* (New York, 1976), 118; David Brion Davis, *From Homicide to Slavery: Studies in American Culture* (New York, 1986), 19; Ralph Shaw and Richard Shoemaker, *American Bibliography*, (New York, 1961), IX, 22; and *ibid.*, XIX, 37; Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the Nineteenth-Century American South* (New York, 1984); Hirsch, *Rise of the Penitentiary*; Ignatieff, *A Just Measure of Pain*, chap. 3; Emsley, *Crime and Society in England*, chap. 9; Rothman, *Discovery of the Asylum*, chap. 4; Beattie, *Crime and the Courts in England*, chap. 10.

[26] Gilbert Chinard, ed., *The Commonplace Book of Thomas Jefferson* (Baltimore, 1926), 298-317; *The Papers of Thomas Jefferson*, ed. Julian Boyd and John Catanzarati (27 vols., Princeton, 1950-1997), I, 490, 505; *ibid.*, II, 305-31, 492-507, 663-64; Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (1787; rep. New York, 1972), 143-46; George Taylor, *Substance of a Speech Delivered in the House of Delegates in*

Although the language of penal reform bombarded Maryland legislators from all sides and even percolated into a few pardon petitions, they proved reluctant to write the new penal philosophy into law without first exploring other alternatives. Transportation and servitude offered one well-known alternative to the penitentiary. England lost its Chesapeake penal colonies in the Revolution but gained its Botany Bay, and the French also turned to transportation. But wholesale transportation proved impractical for Maryland, which could neither dump its convicts on other states nor make room for them in its thickly settled western parts.[27]

Substantial support remained for a return to the traditional English emphasis on public spectacles of suffering. Indeed, a 1799 statute reaffirmed the death penalty for horse theft and for burning a ship. So why not return to the pre-1789 state of affairs? David Rothman argues that penitentiaries and other "asylums" arose in response to a general loss of "community" in large eastern cities and their hinterlands. Maryland and other states that adopted the penitentiary had a large and rapidly growing commercial center and port city. Baltimore, Philadelphia, Richmond, New York City, and Boston all appeared to breed crime. Although Baltimore had far too short a history to have ever experienced the kind of community that Rothman describes, it experienced rapid and massive demographic changes. A small village in 1752, Baltimore became the new nation's third largest city in the space of five decades. Baltimore simply outgrew the old penal system; the crisis in penal practice stemmed as much from a demographic crisis as from a spiritual one. Rapid population growth in Baltimore brought together people with no prior history of accommodation and negotiation over ordinary conflicts, rendering impractical neighborhood-level dispute resolution and assessments of character based on long familiarity with each participant in a criminal prosecution.[28]

Virginia, on the bill to Amend the Penal Laws of This Commonwealth (Richmond, 1796). See also Paul Keve, *The History of Corrections in Virginia* (Charlottesville, 1986), chap. 1; and Ignatieff, *A Just Measure of Pain*, 64-74; Masur, *Rites of Execution*, 74-81.

[27] Gordon Wright, *Between the Guillotine and Liberty: Two Centuries of the Crime Problem in France* (New York, 1983), 105-08, 132-35; Philip Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705-1865* (Baton Rouge, 1988), 27-29.

[28] A Citizen of Maryland, "An Oration on the Unlawfulness and Impolicy of Capital Punishment, and the Proper Means of Reforming Criminals," *American Museum*, 1 (Jan.-Apr. 1790), 7-8, 69-71, 135-37, 193-95. *Laws* (Nov. sess.1799), chap. 61. Beattie, *Crime and the Courts*, 314-449; James D. Rice, "The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681-1837," *American Journal of Legal History*, 40 (Oct. 1996), 455-75.

Once the paucity of alternatives became clear, the penitentiary arrived in a rush. An 1804 resolution authorized the construction of a penitentiary, but without any explanation or statement of purpose. A long pause followed in which not one word of penal reform made its way into a Maryland statute. Then, in 1808, lawmakers suddenly announced that "universal experience hath proved, that the commission of crimes is more effectually restrained by the certainty than the severity of punishments."[29] A year later the legislature produced the Penitentiary Act. This ambitious reorganization of Maryland's penal policy embodied the most fundamental and commonly held principles of the movement for "rational" penal reform: prompt, certain, and minimal yet deterrent sanctions, meted out in proportion to the crime but not the person.

Though the Maryland penitentiary struck some observers as the ideal solution to the crime problem, others came to support it only after eliminating the alternatives. Having eliminated those alternatives, Marylanders accepted the penitentiary with surprisingly little fuss, because the penal practices that had evolved in Maryland since 1681, particularly deterrence and proportionality, remained at the heart of the new experiment (although proportionality underwent a subtle redefinition). The linkage between hard work and punishment had already been made in the Wheelbarrow Act, with antecedents in the sale of indebted convicts into servitude. Moreover, the initial rush of enthusiasm for the penitentiary among western reformers coincided with a crisis in Maryland, as the unpopular Wheelbarrow Act came under attack, the rise of Baltimore as a major port city presented new problems, and the dearth of places to which convicts could be transported blocked the alternatives to the penitentiary.

The penitentiary constituted a change in strategy, not in the basic goals of criminal sanctions. Maryland's penitentiary experiment shifted the emphasis of punishments from exemplary sanctions to the reformation of criminals. Yet penal revisionism stemmed from an ongoing concern over the well-being of society, not of criminals, for utilitarian logic dictated that reformed convicts would cease their depredations on society. Deterrent punishments retained an important role within this utilitarian framework. Naturally, everyone assumed that the penitentiary would pay for itself rather than becoming a fiscal burden on the state.

In its original, theoretical formulation, the architects of the Maryland penitentiary planned to reduce crime by two means: brute deterrence and moral reformation. In language lifted almost directly from Beccaria, the authors of the Penitentiary Act of 1809 asserted that the triad of proportion-

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[29] *Laws* (1808), chap. 72.

ality, mildness, and certainty was "the surest way of preventing the perpetration of crimes." The Penitentiary Act created a new scale of punishments by doing away with most capital offenses and indexing penitentiary terms to the severity of the offense. For example, it restored the ancient English distinction between degrees of larceny by stipulating a maximum sentence of one year for petty larceny (stealing goods valued at under five dollars) and a minimum term of one year for stealing goods worth five dollars or more. In short, the new law of larceny embodied the Beccarian principles of mildness and proportionality.[30] It also (in theory) reduced the possibility of an acquittal or pardon by a soft-hearted jury or governor, consequently increasing the likelihood of punishment—a step towards implementing the principle of certainty. Thus the Penitentiary Act fulfilled (again, in theory) the Beccarian axiom that the cost of committing a crime should slightly exceed the benefit to be derived from the offense.

Not even the robustly optimistic reformers of 1809 imagined that their milder, more certain, and proportional punishments would prevent all crimes. Their optimism emerged when they turned their attention to the world within the walls of the penitentiary. By a proper system of discipline, they hoped, inmates could be reformed. Good prison discipline would inculcate reform by getting at the root causes of criminal behavior: vice and indolence. Vice came under attack first. Judges sentenced each inmate to an initial period of solitary confinement, with coarse fare and no amusements. There, in the absence of any distractions, the convict's mind turned to "its own harrowing reflections."[31] At this crucial first stage, reflection led the convict to achieve penitence, the prerequisite for reformation.

Penitence did not constitute the whole of reformation, but it cleared the ground on which the convict's character would be rebuilt. At the heart of this human reconstruction project was hard physical labor. Convicts toiled away as textile workers, cordwainers, nail makers, coopers, carpenters, tailors, comb and brush makers, dyers, hatters, seamstresses, housekeepers, cooks, and launderers. Ideally, these jobs subjected convicts to "labour of the hardest and most servile kind," performed whenever possible in solitude so that convicts could continue to reflect on their past and future lives. Inmates worked every day of the year, excepting only Sundays, Christmas, and days spent in solitary. Hard labor would inculcate habits of

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[30] *Laws* (1809), chap. 138, s. 1, 6.

[31] *Report of the Committee Appointed . . . to Visit the Penitentiaries and Prisons in the City of Philadelphia and State of New York* (Baltimore, 1828), 8; *Laws* (Nov. sess. 1809), chap. 138, s. 28. Masur, *Rites of Execution*, 79-83.

industry in the notoriously indolent convicts who "when abroad in society were too lazy to earn an honest livelihood."[32] Penitent convicts would carry their newly acquired work ethic and trade skills along on their next foray into society.

Subsequent changes in penitentiary government built upon this foundation of reformation through solitary confinement and hard labor by giving added emphasis to religious instruction, by tinkering with floor plans and groupings of convicts, and by stepping up surveillance and tightening discipline within the prison walls. The first change, a stepped-up campaign of religious instruction, began in 1823 when a witness before a committee of the Maryland General Assembly admitted that because the penitentiary offered no religious instruction beyond Sunday morning services, the Sabbath afforded inmates more opportunities for "improper indulgencies and corrupt association" than any other day of the week.[33] The directors of the penitentiary concurred with this critique, enthusiastically endorsing an investigative committee's recommendation that Maryland emulate New York's Auburn Penitentiary. At Auburn convicts could talk only on the Sabbath and after services, when the chaplain visited convicts in their cells: "and as he is the only human being with whom they are at liberty to enter into familiar conversation, his visits are always of the most grateful character. His instruction and advice are received with gratitude, and the impressions made are deep and permanent." By 1830 Maryland's penitentiary boasted a Sunday school and an ordinary school, and prison officials restricted Sabbath-day conversation to religious and philosophical topics. Methodist preachers and representatives of bible tract societies enjoyed free access to inmates on the Sabbath.[34]

Observers of the Maryland Penitentiary also unanimously agreed that promiscuous mixing of convicts undermined efforts at reformation. In 1823, for example, Dr. W.M. Wallis testified that the keeper made no effort to separate prisoners according to their offenses, characters, and time

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[32] *Laws* (Nov. sess. 1809), chap. 138, s. 29-30; John Pitt, *Report of the Committee Appointed to Inspect the Situation of the Maryland Penitentiary* (Annapolis, 1823), 1-5.

[33] Testimony of J. McEvoy, *Depositions Taken at the Penitentiary by the Committee Appointed for that Purpose by the Legislature of Maryland* (Annapolis, [1823]); *Report of the Directors* (1829); *ibid.*, (1830).

[34] *Report of the Committee . . . to Visit the Penitentiaries and Prisons,* 24; Rothman, *Discovery*, chap. 4; Marvin Gettleman, "The Maryland Penitentiary in the Age of Tocqueville, 1828-1842," *Maryland Historical Magazine,* 56 (Sept. 1961), 269-90; *Report of the Directors* (1830), 6-8; Maryland Penitentiary, *Report of the Committee of Directors Appointed to Prepare Plans for the New Buildings to be Erected in the Yard of the Maryland Penitentiary* (Baltimore, 1835); Gettleman, "Maryland Penitentiary," 283.

remaining on their sentences. In response, the keepers and directors gravitated to ever more carefully defined groupings of convicts, and paid increasing attention to the ways in which the building's floor plan subverted prison discipline. After 1829 prison authorities separated youths from older and more hardened inmates, at least at night. Still, crowded cells and workshops prevented a further division between ordinary adult prisoners and incorrigible offenders.[35]

During the 1830s a major effort to graft elements of the renowned Auburn system onto the original program of solitary confinement and hard labor went far beyond minor tinkering with floor plans and sleeping arrangements. This effort also had its roots in the 1823 legislative investigation, which revealed that guards sometimes left convicts unsupervised in their workshops. In response, a legislative committee suggested a total ban on conversations at work. The committee also proposed giving particularly arduous jobs to the most dangerous and ill-behaved inmates—perhaps by forcing them to walk a treadmill powering the grain mill. Alternatively, the worst offenders could return to work on the roads or canals, leaving the sedentary jobs to the old, weak, and female prisoners.[36]

No immediate changes resulted from the 1823 hearings, but the penitentiary directors toured Pennsylvania and New York prisons in 1828 in search of a more comprehensive solution to Maryland's problems. This tour inspired a major new effort at tightening discipline within the prison and marked a renewed commitment to the moral reformation of inmates. Five features of New York's Auburn and Sing Sing penitentiaries especially impressed the Maryland delegation: aggressive religious instruction, a floor plan allowing close surveillance of the prisoners, near-total silence among inmates and even assistant keepers, isolation from outside information and personal contacts, and the "daily discipline" maintained at Auburn, particularly the tight schedule and the prisoners' lockstep movements throughout the penitentiary at appointed times. The commissioners enthusiastically recommended that Maryland adopt the Auburn plan, for Auburn and Sing Sing, they believed, had shown that a penitentiary might truly reform its inmates. "On a general view of these several regulations," they noted with considerable admiration, "it will be

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[35] Testimony of Dr. Walls, *Depositions Taken at the Penitentiary*; Pitt, *Report of the Committee*, 1-13; *Report of the Directors* (1830); Maryland Penitentiary, *Report of the Joint Committee Appointed to Visit and Inspect the Maryland Penitentiary* (Annapolis, 1832), 6.

[36] Testimony of John Fisher, *Depositions Taken at the Penitentiary*, 13-14; Pitt, *Report of the Committee*, 15, 23.

seen that indulgence forms no part of the plan. That the whole system is one of coercion, simple, energetic and decisive." In brief, they concluded, "every Incitement urges to the task of reformation."[37]

It took nine years to implement the Auburn plan. A new dormitory wing in 1829 made it easier to maintain discipline at night, but "daily discipline" proved more elusive; thus "cases of positive reformation or improvement of morals, must be admitted to be of rare occurrence, owing to the ill effects of the familiar intercourse which the present system cannot prevent."[38] In 1834 the board of directors finally managed to convince the legislature of the need to maintain "a more rigid and constant surveillance, and to alter the whole economy of the Institution, in a manner calculated to arrest the tendency of its inmates to further corruption"; financing now materialized and the penitentiary fully committed itself to the Auburn system. The directors commissioned several new buildings, settling almost immediately on a radiating floor plan that maximized the potential for surveillance over the inmates at work. A guard station at the juncture of the three wings provided a view of most of the prison, and secret passages down the center of two wings allowed guards to spy on inmates without being detected. In 1837 the revamped penitentiary finally implemented its version of the Auburn plan.[39]

From its inception to the reforms of the 1830s and beyond, supporters of the Maryland Penitentiary hoped to deter potential convicts and reform those who fell afoul of the criminal law. Solitary reflection leading to penitence and hard labor would create virtuous and productive citizens. Further reforms such as religious instruction, the physical separation of different types of offenders, and the adoption of the Auburn system of discipline refined the original plan for reformation through solitude and hard work. It was an attractive theory. But now, nearly two centuries after the creation of the Maryland Penitentiary, it is perfectly clear that neither the Auburn system nor the modern penitentiary has fulfilled its promise. When and why did things go wrong? Was there a golden age, a time when the penitentiary turned criminals into virtuous citizens?

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[37] *Report of the Committee . . . to Visit the Penitentiaries and Prisons*, 15-26.

[38] *Report of the Directors* (1829), 3-7; Maryland Governor, *Message of the Executive to the General Assembly of Maryland: December Session 1829* (Annapolis, 1829), 9.

[39] *Report of the Joint Committee,* 15; *Report of the Directors* (1833), 7-9; *ibid.* (1837), 4; *ibid.* (1838), 5; *Report of the Committee of Directors Appointed to Prepare Plans*, 4-11; Maryland Penitentiary, *Annual Report from the President and Directors of the Maryland Penitentiary to the Legislature* (Annapolis, 1836), 4-5; Maryland Penitentiary, *Report of the Select Committee on the Penitentiary* (Annapolis, 1836), 3; *Laws* (Dec. 1834), chap. 308; Gettleman, "Maryland Penitentiary," 284-86.

Despite all the thought, money, and reformist energy invested in the penitentiary experiment, several circumstances conspired from the beginning to prevent authorities from fully implementing the penitentiary experiment. Judges sentenced surprisingly few prisoners to the penitentiary. Authorities considered many inmates unredeemable because of their race. Convicts sent to the penitentiary never actually experienced the system of internal discipline laid down by statute, for in practice the penitentiary merely recreated the milieu of the wheelbarrow crews behind high walls. Above all, opposition to or incomprehension of the penitentiary ideal undermined its implementation at every turn.

Very few criminal defendants faced even the possibility of spending time in the penitentiary. The Penitentiary Act enumerated a long list of crimes that had been punished formerly by death or corporal punishment but would now lead to imprisonment, yet between eighty and ninety-three percent of all defendants were charged with crimes not included on that list (most notably moral offenses and breaches of the peace).[40] In addition to omitting most offenses, the Penitentiary Act and subsequent revisions partially excluded what legislators considered an important "criminal class": African Americans. A 1717 statute designed to promote prosecutions for theft remained in force so that slaves accused of simple larceny received summary justice before a single justice of the peace, who could impose up to forty lashes but no prison term. In addition, the Penitentiary Act allowed judges to replace imprisonment for any offense with up to one hundred lashes plus banishment for slave convicts. Black convicts nevertheless flooded into the penitentiary. Proceeding from the assumptions that African Americans' essential nature rendered them unreformable and that prison life too closely resembled everyday black life to hold any real terror, lawmakers responded to the influx of African-American inmates by discouraging courts from sentencing slaves and free blacks to the penitentiary. An 1817 statute ordained that no "colored person" would serve less than a one-year sentence, and subsequent laws prohibited courts from sentencing *any* black convicts to the penitentiary.[41] None of the statutes stemmed the flow of black inmates, however; only the continuing

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[40] Larceny was only the fourth most frequently-prosecuted offense behind bastardy, unlicensed liquor sales, and breaches of the peace (including assault, battery, and riot), none of which carried terms in the penitentiary. See the FCC database; Assize database; and Provincial Court database.

[41] *Laws* (1717), chap. 13; *ibid.*, (1809), chap. 138, s. 19; *ibid.*, (1817), chap. 72, s. 3; *ibid.*, (1818), chap. 197; *ibid.*, (1825), chap. 93; *ibid.*, (1835), chap. 200, s. 3.

practice of imposing whipping on black larcenists even began to have that effect.

For the relatively few convicts who entered the penitentiary, daily life and discipline more closely resembled life on the road crews than it did the industrious, self-reflective retreat from the criminal world of indolence and vice that reformers had envisioned. From the beginning, the penitentiary staff failed to carry out the solitary confinement portion of the convicts' sentences. This frustrating situation arose from both miscalculation and ignorance. The original building contained too few solitary cells to accommodate every new convict. Moreover, the penitentiary staff preferred to use the existing cells to maintain discipline: contrary to the intentions of those who framed the Penitentiary Act, time in the solitary cells became a punishment for misbehavior within the prison, not a preparatory stage for the reformation of new convicts.[42]

Hard labor also failed to fulfill its promise as an instrument of reform. Officials tailored work assignments to the fiscal requirements of the institution, not to the spiritual needs of the convicts. Citizens and politicians expected the penitentiary to pay for itself from the proceeds of its inmates' labor, a responsibility that the directors took very, very seriously. Long discussions about the business logic dictating work assignments dominated their annual reports. Did the weaving department become less profitable? Then hire out some convicts to break granite. Because fiscal needs dictated work conditions, officials assigned many prisoners to relatively mild yet profitable labor. Except for sawing and blacksmithing, asserted one legislative committee, "[t]heir employments are chiefly of a sedentary kind, requiring little of that hard bodily labor which is the punishment most dreaded and severe to a majority of the criminals." Thus, asserted the committee, "as a place of punishment it has no terrors. Indeed so lax is its discipline, so mild its punishments, and so comfortable its diet, that in severe and scarce seasons, it has become the winter quarters of the thieving, vagrant and gypsy population."[43] Although convicts surely disagreed with the committee members' assessment of their plight, it cannot be denied that very few inmates engaged in the kind of backbreaking labor that penal reformers had in mind. The relatively "sedentary" quality of employments such as weaving loosened the grip of penitentiary discipline on convicts. Nor did convicts perform the *quantity* of labor that reformers expected of them, for prisoners actually negotiated agreed-upon

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[42] Pitt, *Report of the Committee*, 7-12; *Annual Report from the President and Directors*, 4-5.

[43] *Report of the Directors*, (1832), 4-6; Pitt, *Report of the Committee*, 6.

levels of daily productivity, earning extra rewards for work performed after they fulfilled their stints. Moreover, judges meted out a large number of short sentences. Only one of the 113 convicts admitted in 1823 served over ten months, and in normal years the turnover rate exceeded thirty percent. Short sentences failed to inure convicts to labor, partly because they allowed little time for inculcating a work ethic and partly because short-term prisoners had to work at jobs requiring little training—which often landed them relatively soft jobs in the weaving room.[44]

Above all, the limitations imposed by the layout of the penitentiary buildings and lax policies regarding conversations between prisoners made the penitentiary an even more effective school for vice than the wheelbarrow crews. Had the legislature set out to erect "a school for vice where vice of every description should be systematically taught," concluded one commission, "no better system could have been devised than the Penitentiary." Short sentences prevented convicts from learning the reformer's work ethic, but they lasted long enough to "thoroughly initiate them in the arts of villainy, and to destroy all remaining sensibility to shame." During the day, crowded workshops exposed relatively innocent offenders to hardened convicts. The floor plans in the widely scattered workshops afforded "opportunities of association," which produced "most mischievous effects," for some convicts inevitably lacked supervision.[45] Yet day-time discipline seemed strict in comparison to what went on at night. The original cell block contained only twenty-two cells, into each of which the guards crammed a dozen convicts each night. Most prisoners shared beds with one or more fellow inmates. Only with the addition of a new wing in 1829 did convicts get small (8'6" by 3'7"), individual cells—at least until 1836, when the prison population again exceeded the number of cubicles. At night in these crowded rooms, convicts "instructed" each other "in all the gradations of crime." The practice of mixing pupils and teachers

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[44] Figures for Dec. 1, 1822 to Nov. 30, 1823. *Report of the Directors* (1830), 6; Gustave de Beaumont and Alexis de Tocqueville, *Du Système Pénitentiare aux États-Unis et de son Application en France* (Paris, 1833), 71; Pitt, *Report of the Committee*, 5-14; Maryland General Assembly, *Documents Respecting the Maryland Penitentiary. December Session, 1822* (Annapolis, 1822); *Report of the Directors* (1832), 6; *ibid.* (1825); *ibid.* (1826), 6; *ibid.* (1829); *ibid.* (1830); *ibid.* (1831), 6; *ibid.* (1834); *ibid.* (1836); *ibid.* (1837), 6; Maryland Governor, *Message of the Executive.*

[45] Pitt, *Report of the Committee*, 5, 13-14; Maryland Governor, *Message of the Executive*, 4; *Report of the Directors* (1833), 7-8; *ibid. (1837),* 3-5; *ibid. (1838), 5;* Maryland Penitentiary, *Report of the Committee of Directors Appointed to Prepare Plans*; *Annual Report from the President and Directors*, 4-5; *Laws* (Dec. sess. 1834), chap. 308; *Laws* (1836), chap. 320; *Depositions Taken at the Penitentiary*, 14.

together facilitated education: "the murderer, the robber, and the counterfeiter are locked up with prisoners, whose light offenses, by a ruinous policy, has consigned them to the same abode with the most infamous of mankind."[46] Even if relatively innocent convicts failed to learn from their criminal superiors, nighttime crowding rendered impossible the solitary reflection required to develop feelings of humiliation, contrition, and reform.

Perhaps a combination of initial solitary confinement followed by hard labor and tight discipline would have deterred potential criminals and reformed those who entered the penitentiary. We will never know, for as frustrated penitentiary advocates often pointed out, the experiment was never carried out. Critics blamed the failure of the penitentiary experiment on the lack of solitary confinement, nighttime crowding, and insufficiently supervised workshops. Yet something more was at work. Many people, including those charged with implementing the penitentiary ideal, never fully entered into the spirit of the experiment; they failed to grasp or did not value the basic precepts of the penitentiary movement. In theory, deterrence and reformation depended upon mild, proportional, and certain punishments. Prisoners found the penitentiary milder than hanging or even road work, but efforts to bring proportionality and certainty to the criminal law never got off the ground. The Penitentiary Act of 1809 began with a declaration that preventing crime and deterring criminals required proportional punishments, yet the statute left tremendous room for judicial discretion. Judges sentenced grand larcenists to as little as one year and as many as fifteen years in prison; manslaughter carried zero to ten years; rapists got one to twenty-one years or even hanging; and arsonists faced hanging or five to twenty years in the penitentiary. This wide latitude in sentencing perpetuated the eighteenth-century version of proportional punishments, in which the character of the criminal carried as much weight as the nature of the offense, for judges continued to impose differential sentences based on race, class, and gender.[47]

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[46] Pitt, *Report of the Committee*, 11, 14; Maryland Penitentiary (Prisoners' List), 1811-1837 [MSA S 275-1]. In November 1822, 320 prisoners shared 198 beds (a 1.6 to 1 ratio), and in 1825 and 1826 the ratio increased to 2.1 to 1. Maryland General Assembly, *Documents Respecting the Maryland Penitentiary*; *Report of the Directors* (1825); *ibid.* (1826); *ibid.* (1829); Maryland Governor, *Message of the Executive*, 7, 9; Maryland Governor, *Annual Report from the President and Directors*, 8. *Report of the Directors* (1829).

[47] *Laws* (1809), chap. 138, s. 3-6; Maryland Penitentiary (Prisoners List), 1811-1837 [MSA S 275-1]; Rice, "The Criminal Trail Before and After the Lawyers."

Certainty of punishments also eluded Maryland's penal reformers. Although the Wheelbarrow Act offered a milder punishment than the death penalty between 1790 and 1811, governors continued to grant about twenty pardons and *nolle prosequis* per year. Better attuned to the sentiments of voters than to the spirit of reform, governors responded to the opening of the penitentiary in 1811 by dramatically *increasing* their use of the pardon power, doubling the annual number of pardons between 1811 and 1819 and tripling it between 1811 and 1837 (figure 1). The raw numbers do not

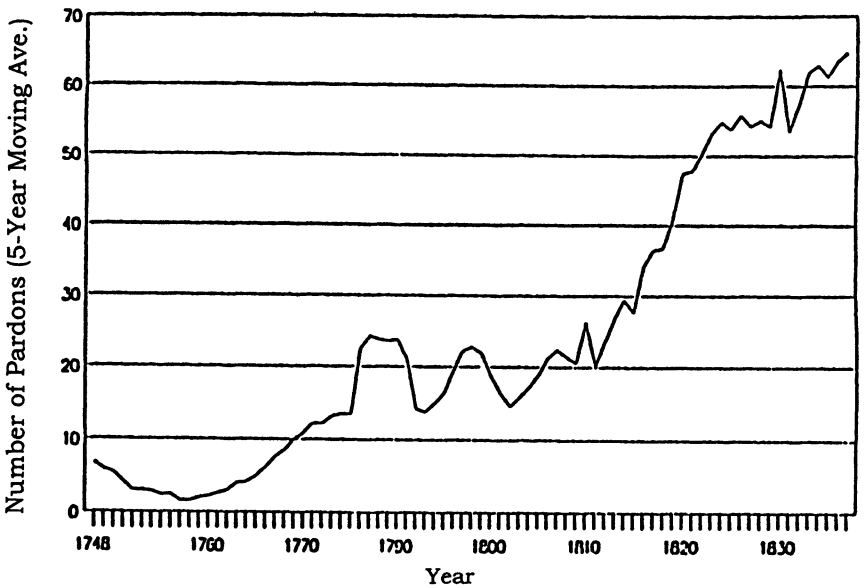

Figure 1: Pardons Granted by Maryland Governors, 1748-1837

exaggerate this trend: the proportion of convicts receiving pardons also increased after the penitentiary opened. Only 1.2 percent of all convicts won pardons before 1810, but 4.3 percent did so after that date, and by the 1830s fully 8.6 percent received pardons. Governors pardoned serious offenders at an even higher rate than run-of-the-mill disturbers of the peace: they pardoned fully 16 percent of all penitentiary inmates before the end of their terms.[48] In short, the steadily increasing number of pardons

[48] FCC database; Provincial Court Database; Assize database; Pardons database (derived from William Hand Browne *et al.*, eds., *Archives of Maryland* (72 vols., Baltimore, 1883-1972); Governor and Council (Appointment List), 1792-1837; *ibid.*, 1819-1824; Governor and Council (Commission Record), 1733-1837; Pardon Papers, 1777-1836;

meant that penal reformers never came close to achieving certainty of punishment in Maryland.

Table 1: Frequency of Reasons Given in Pardon Texts and in Successful Pardon Petitions, 1748-1837.

	Years					
	1748-1789		1789-1810		1811-1837	
Reasons	N	%	N	%	N	%
Equity	41	39%	76	35%	302	28%
Character /Connections	30	28%	68	31%	227	21%
Reformable/Youth	20	19%	22	10%	109	10%
Sanity/Health	15	14%	19	9%	63	6%
Penitence /Good conduct	N/A	N/A	6	3%	275	25%
Dependent family /Poverty	N/A	N/A	21	10%	101	9%
Informant	N/A	N/A	7	3%	12	1%

Source: Pardon Record, Pardon Papers (Maryland State Archives).

Reformers attacked the practice of imposing harsh punishments on some criminals and pardoning others who had been convicted of the same offense as "arbitrary." Nevertheless, postpenitentiary governors based their pardoning decisions on the same essential principles that had guided earlier governors. Fully two-thirds of all postpenitentiary pardons and successful petitions for pardons cited the very same concerns that had dominated pre-1789 pardons: inequitable verdicts, the good character or good connections of the defendant, youth and other indications of reformability, and insanity or ill health (table 1).

By continuing to pardon youths and other likely candidates for reformation, governors and councilors betrayed their lack of confidence in the penitentiary as an instrument of reform. Indeed, they cited youth and reformability in as many pardons after the penitentiary opened as they had under the Wheelbarrow Act, thus implying that reform took place

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Pardon Record, 1785-1865; Maryland Penitentiary (Prisoners' List), 1811-1829 [MSA S 275-1].

primarily *outside* of the penitentiary. Pardons based on the character, connections, youth, and reformability of the convict also demonstrated opposition to or incomprehension of the principle of certainty, which penal reformers complained "can but have a pernicious tendency. The convict . . . instead of reflecting that all intercourse between society and himself is cut off, as a penalty for his crimes . . . begins to plot and scheme how he can obtain a pardon or commutation of his term of confinement."[49]

Despite such protests, governors continued to think in terms of traditional penology, in which the executive functioned as an appellate court bound as much by the traditional notion of dual proportionality as by the standards of reformers. Governors, councilors, and petitioners never let go of the idea that punishments should be proportioned to both the crime *and* the criminal. Even after the penitentiary opened, over twenty percent of all successful pardons invoked the convict's good character or family connections. Even this figure fails to do justice to the prevalence of such concerns in deliberations over pardons, because it includes only explicit mentions of character or connections; prominent citizens often signed a pardon petition, which constituted an implicit commentary on the convict's social worth.

Maryland's peculiar political economy inspired a radical break from English penal practice in 1681, and the rise of slavery led to a gradual accretion of punishments tailored to the needs of a society based on unfree labor. Notwithstanding two major changes in Maryland penal practice—the Wheelbarrow Act of 1789 and the Penitentiary Act of 1809—deterrence and dual proportionality remained at the heart of criminal sanctions in each major phase of Maryland penology. The penitentiary ideal momentarily triumphed in 1809, for several reasons. First, penal experiments and the rhetoric of reform spreading throughout the North Atlantic world inspired an influential group of Maryland reformers. Second, these reformers' ideas coincided with a perceived crisis triggered by the failure of the Wheelbarrow Act and by the rise of Baltimore as a port city full of the transients, sailors, and young men who appeared to be the architects of a crime wave. Third, rapid population growth in Baltimore rendered a return to the ancien régime of punishments inappropriate because the character assessments that were so central to traditional modes of punishment became impossible in this large city. Fourth, earlier experiments in penal practice already had established the link between hard labor and punishment, and a form of proportionality, readily adaptable to the purposes of penitentiary advocates, had been

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[49] Pitt, *Report of the Committee*, 6-7.

central to Maryland penal practice since the seventeenth century. Finally, the lack of a suitable destination made transportation an unworkable alternative. At this moment of crisis, Maryland's lawmakers seized upon the alternative that reformers offered: the penitentiary. Thus the penitentiary carried the day only partly because Marylanders committed themselves to the new penal ideology originating from beyond the state's borders. To a much greater extent the penitentiary received support because the old system was unsatisfactory and because the penitentiary represented only a partial break from the previous twelve decades of penal practice. The failure to implement the penitentiary ideal made the new system even more similar to earlier forms in practice than it had been in theory—and this may have been its greatest attraction as well as its greatest failure.

This essay has explored three central questions. First, why did Maryland adopt the penitentiary at such an early date, especially when other slave states tended to lag behind the northern states in that respect? Maryland followed its own path to the penitentiary. This path was not unrelated to the ones taken by other states, for all had access to a common body of ideas, literature, and examples. But at the same time, Maryland's use of these ideas and examples was unique; other colonies found other solutions to other crises of penology, at other times, and thus arrived at the penitentiary via other routes. Second, was the penitentiary a "revolutionary" development? As we have seen, it was not. In an evolutionary process spanning well over a century, the key elements that would go into the invention of the penitentiary accumulated in several stages. Moreover, the reformers who drafted and pushed through the Penitentiary Act of 1809 did not control its implementation. Those charged with implementing it often failed to comprehend the logic of reforming prisoners, or simply disagreed with the reformers' agenda. Such people found ways to sustain older principles of penology. Consequently, the opening of the penitentiary did not completely revolutionize actual penal practices. Finally, did Maryland's unique path to the penitentiary result in a unique penitentiary? It did not. Although the penitentiary movement was fragmented into various schools of thought and practice, there was no "Maryland school" that outsiders could point to. When problems arose in the Maryland penitentiary, they closely resembled the problems experienced in other states. When Maryland sought answers to those problems, they did not create unique answers, but instead studied and borrowed reforms from other states. In its origins the Maryland penitentiary was unique, but once implemented it was fairly representative of penitentiaries nationwide; even in its failures it was generic.