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The Inevitability of Rehabilitation

Edward L. Rubin*

Introduction

During the 1970s and 1980s, American legislators claimed that they were repudiating the principle of rehabilitating prisoners. Their stance was based primarily on moral, or conceptual, grounds. The purposes of prison, they declared, were just deserts and incapacitation—to punish prisoners for the crimes they committed and to keep them away from society so that they could not commit any further crimes.¹ This new attitude was partially inspired, and partially endorsed, by scholars who developed concepts such as the justice model of prisons² or humane containment,³ and by others who emphasized the moral evils of rehabilitative programs⁴ or the moral acceptability of retribution.⁵ Very quickly, rehabilitation became a dirty word in American corrections, an emblem of the ill-conceived romanticism of the 1960s, or the morally irresponsible, ultra-leftist idea that society is the wrongdoer and the criminal is the victim.

Another development often associated with this change in corrections policy was the social science finding that prison rehabilitation programs were ineffective. The most influential piece was the 1974 meta-analysis of 231 studies by Robert

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1. See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 7-9 (1981); Alfred Blumstein, *American Prisons in a Time of Crisis*, in *THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY* 13, 13-18 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989) [hereinafter *THE AMERICAN PRISON*].

2. See generally ANDREW VON HIRSCH, *DOING JUSTICE* (1979).

3. See generally ROY KING & ROD MORGAN, *THE FUTURE OF THE PRISON SYSTEM* (1980).

4. See ALLEN, *supra* note 1, at 32-60. See generally JESSICA MITFORD, *KIND AND USUAL PUNISHMENT* (1973); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

5. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 83-188 (1997).

Martinson, whose final conclusion was that "nothing works."⁶ This was preceded and followed by a succession of studies that came to similar conclusions.⁷ When so august an institution as the National Academy of Sciences concurred,⁸ the policy implications may have seemed irresistible.

This empirical basis for rejecting rehabilitation has been substantially eroded in recent years,⁹ and this has led to a counterattack against the critics of rehabilitation. This Essay joins that growing body of literature, but not on the same empirical grounds. Instead, it addresses the first and primary reason for the rejection of rehabilitation; that is, the attack on rehabilitation as a conceptual and moral basis for corrections. In essence, it argues that we are inevitably committed to the principle of rehabilitation, regardless of its empirical effectiveness. Rehabilitation is the central premise of the modern prison as an institution; we can no more repudiate it than we can repudiate national defense as the basis for our military forces, or education as the basis for our schools, or health care as the basis for our public hospitals. Consequently, the attack on rehabilitation is essentially incoherent. Rather than representing a conscientious approach to social policy, it is at best a petulant complaint about the complexity of modern government, and, at worst, cynical demagoguery or self-delusion.

Part I of this Essay briefly discusses the origin of the modern prison and explains that the principle of rehabilitation was an inherent feature of the institution's conception and design. Parts II and III discuss two possible alternatives to rehabilitation as a purpose for prisons—servitude and incapacitation. They conclude that servitude has been found morally unacceptable by modern Americans, and that incapacitation is an empty idea with respect to the design and operation of prisons. Part IV discusses the current concept of rehabilitation and responds to criticisms of it as a principle for imprisonment.

6. Robert Martinson, *What Works—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 48 (Spring 1974). For a more complete account of the research, see generally DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975).

7. See generally James Robinson & Gerald Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67 (1971). But see Seymour L. Halleck & Ann D. Witte, *Is Rehabilitation Dead?*, 23 CRIME & DELINQ. 373 (1977) (arguing against the criticisms of rehabilitation).

8. See generally PANEL ON RESEARCH ON REHABILITATIVE TECHNIQUES, NAT'L ACAD. OF SCIS., *THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS* (Lee Sechrest et al. eds., 1979) [hereinafter NAT'L ACAD. OF SCIS.].

9. See *infra* notes 67-69.

I. The Premise of Prisons

As everyone other than Clarence Thomas knows,¹⁰ prisons did not exist in colonial America.¹¹ There were prisons in England as early as the Reformation period,¹² but the institution was not a common mode of punishment until the very end of the eighteenth century.¹³ This was not because the concept of detention was absent, nor even because the administrative capacities to operate detention facilities were lacking. Jails were a well-established social institution; people were put in jail while they were awaiting trial, if they failed to pay their debts, or if the King regarded them as a security threat.¹⁴ After the ordeal¹⁵ was abolished in thirteenth century England, the only way to try most indictments was by jury, but the accused had to agree to this newly-established procedure; if he did not, the judge would leave him in jail until he changed his mind or starved to death.¹⁶ Despite its important role in the English judicial system, incarceration was rarely regarded as a mode of punishment.¹⁷ Once convicted, the serious felon was generally tortured or put to death.

10. See *Helling v. McKinney*, 509 U.S. 25, 39 (1993) (Thomas, J., dissenting) (stating that "when members of the founding generation wished to make prison conditions a matter of constitutional guarantee, they knew how to do so" and citing a provision regarding jails to support this proposition).

11. For accounts of the development of prisons in America, see BLAKE MCKELVEY, *AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS* 6-33 (1977); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 57-108 (rev. ed. 1990) [hereinafter *THE DISCOVERY OF THE ASYLUM*]; see generally David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON* 111 (Norval Morris & David J. Rothman eds., 1995). Colonial-era punishments, consisting of fines, shaming, branding, exile, and death, are described in LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 34-44 (1993).

12. See Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 11, at 49, 67.

13. For the development of prisons in England, see CHRISTOPHER HARDING ET AL., *IMPRISONMENT IN ENGLAND AND WALES: A CONCISE HISTORY* (1985); MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850* (1978); Randall McGowen, *The Well-Ordered Prison, England, 1780-1865*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 11, at 79.

14. See generally J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1600-1800* (1986); HARDING ET AL., *supra* note 13; see generally Sean McConville, *Local Justice: The Jail*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 11, at 297, 302; Edward Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 11, at 3, 33-36.

15. The ordeal is a means of determining guilt or innocence by submitting the accused to dangerous or painful tests the result being regarded as a divine judgment. See *AMERICAN HERITAGE DICTIONARY* 874 (2d ed. 1985).

16. See 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 326-27 (7th ed. 1956).

17. See John H. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crimes*, 5 J. LEGAL STUD. 35 (Jan. 1976); Peters, *supra*

As the eighteenth century progressed, both these penalties began to offend people's sensibilities. Torture seemed inappropriately savage for an era that saw itself as enlightened and humane.¹⁸ The death penalty remained acceptable, but only for the most serious offenses; for other crimes, it gradually acquired the same barbarous connotations as torture.¹⁹ The criminal justice crisis that resulted from these attitudes was resolved by transportation, first to Georgia, then to Australia.²⁰ But Georgia freed itself from British jurisdiction in 1776; subsequently, it received only unconvicted criminals. Australia remained within the British Empire, but by the early 1800s the transported criminals formed a civil society, together with other colonists, and were no longer willing to receive their quondam colleagues. At the same time, the British government became concerned that the development of a civil society in Australia had rendered transportation there more of an opportunity than a punishment.²¹ Confronted with a second breakdown in criminal justice, Britain turned to the penitentiary. The newly-formed

note 14. This is not as true for continental Europe, where imprisonment as a punishment for crime was more commonly employed. See PIETER SPIERENBURG, *THE PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE* (1991); Spierenburg, *supra* note 12, at 49.

18. See generally JOHN LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME* (1977); EDWARD PETERS, *TORTURE* (expanded ed. 1996); Mirjan Damaska, *The Death of Legal Torture*, 87 YALE L.J. 860, 864 (1978).

19. The causes of the death penalty's abolition in some jurisdictions, and its restriction to the most serious offenses in others are complex, but most writers agree that they had something to do with developing social attitudes and sensibilities. See, e.g., RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600-1987* (1996); V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868* (1994); LOUIS P. MASUR, *MITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE 1776-1865* (1989).

20. See generally BEATTIE, *supra* note 14; A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775* (1987); John Hirst, *The Australian Experience: The Convict Colony*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 11, at 263; A.G.L. SHAW, *CONVICTS AND THE COLONIES: A STUDY OF PENAL TRANSPORTATION FROM GREAT BRITAIN AND IRELAND TO AUSTRALIA AND OTHER PARTS OF THE BRITISH EMPIRE* (Melbourne Univ. Press 1977) (1966).

21. See ROBERT HUGHES, *THE FATAL SHORE 485-580* (1987); Hirst, *supra* note 20, at 276-79. Cf. CHARLES DICKENS, *GREAT EXPECTATIONS* (Oxford Univ. Press 1970) (1861) (in which Abel Magwitch makes his fortune in Australia after having been transported there as a convict). In response to these concerns, Britain did not immediately stop sending convicts to Australia, but it stopped using Australia itself as repository for felons and established a number of prisons and penal settlements within Australia, such as Port Arthur, Port Macquarie, Moreton Bay, and Norfolk Island (the last a South Pacific Island, but within Australia's jurisdiction). This practice was no longer considered transportation per se, but imprisonment at a remote location.

United States, seeking a mode of punishment that would conform with its revolutionary ideals, began developing penitentiaries as well.²²

From its outset, the penitentiary was conceived as a means of rehabilitation. This was the rationale for relying on confinement, instead of the more familiar sanctions of execution, torture or exile. The two dominant models in the United States were the Auburn system, developed by New York State, and the Pennsylvania system.²³ Both were designed, as David Rothman states, "to separate the offender from *all* contact with corruption, both within and without its walls."²⁴ In the Pennsylvania system, the prisoner was kept in solitary confinement, while in the Auburn system he worked and ate with other prisoners, but was forbidden to converse with them. Thus isolated from corrupting influences, the prisoner was supposed to reflect on the evil of his ways, to read the Bible, and to learn to avoid the sins of idleness by working.

As time went on, of course, ideas of rehabilitation changed. The Auburn system proved impossible to maintain, while the Pennsylvania system, when properly administered, had an unfortunate tendency to drive the prisoners insane.²⁵ As industrialism spread and public education became the norm, vocational and academic training came to replace remorse and discipline as the principle instrument for rehabilitation.²⁶ But the basic concept of the penitentiary or prison has remained unchanged since its conception. Convicted felons are separated from their former life, confined in a secure facility, and subjected

22. See *supra* note 11.

23. See ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 11, at 79-108. See generally W. DAVID LEWIS, *FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK* (1965); NEGLEY K. TEETERS, *THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA, 1773-1835* (1955); NEGLEY K. TEETERS & JOHN D. SHEARER, *THE PRISON AT PHILADELPHIA: CHERRY HILL, THE SEPARATE SYSTEM OF PRISON DISCIPLINE: 1829-1913* (1957).

24. ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 11, at 83. Rothman quotes a New York prison warden as telling the prisoners, upon their arrival at the institution, "You are to be literally buried from the world." *Id.* at 95.

25. See ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 11; Rothman, *Perfecting the Prison*, *supra* note 11, at 124-26; CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 120 (Fawcett Publ'ns, Inc. 1961) (1842) ("The system here is rigid, strict and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong. In its intention, I am well convinced that it is kind, humane and meant for reformation . . ."). On the deleterious effects of isolation, see MAX GRUNHUT, *PENAL REFORM* 60 (1948); IGNATIEFF, *supra* note 13, at 139-40; LEWIS, *supra* note 23, at 67-70.

26. See FRIEDMAN, *supra* note 11, at 159-63; PAUL W. KEVE, *PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS* 51-73 (1991); Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 11, at 169, 176-78.

to some regimen that will change their attitudes and enable them to be productive, law-abiding citizens once they are released.

It is important, in understanding the premise of imprisonment in modern society, to distinguish between punishment and the mode of punishment. Punishment is the intentional infliction of an evil for violation of some legal rule. The crucial consideration is to inflict some sort of unpleasantness, but the particular type of unpleasantness is not determined by the concept of punishment; any of the innumerable afflictions which common experience can suggest, or human ingenuity devise, will satisfy the basic purpose. Physical torture, exile, forced labor, or non-working incarceration are all perfectly adequate. It is true that the social consensus may regard some of these punishments as harsher than others, but, as micro-economic analysis suggests, they can be readily equalized by varying their amounts.²⁷ Thus, we might conclude that five years of forced labor equals ten years of exile or twelve hours of being hung on a meathook.

The distinction between punishment and the mode of punishment becomes clear when punishment is refracted into its component parts. According to the standard account, the purposes of punishment are special deterrence, general deterrence, just deserts, retribution, incapacitation, and rehabilitation.²⁸ Of these, the first three will be equally satisfied by any mode of punishment, that is, any infliction of pain on the offender as a result of his

27. See Gary Becker, *Crime and Punishment: An Economic Approach*, in FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 125 (Avery R. Katz ed., 1998). For a thoughtful discussion of this issue, see NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 37-110 (1990). Although Morris and Tonry take account of a number of deontological and cultural factors that Becker's utilitarian approach ignores, they come to the same conclusion regarding interchangeability. See *id.* In any event, the controversial aspect of this claim is the idea that a large enough fine is equivalent to serious punishment of another sort. See *id.* Some people might argue, on just deserts or retributive grounds, that no fine is severe enough for truly serious offenses. But no one argues, on these grounds or others, that torture or penal servitude cannot be made equivalent to incarceration; our objections to these methods certainly do not arise from their lack of severity.

28. See GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 30-33 (1998); Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1012-17 (1940) (discussing goals of punishment). These are conscious social policies. In addition, punishment serves a variety of structural purposes, such as maintaining social solidarity, controlling disadvantaged populations, and expressing prevailing sensibilities. See generally DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990). It is not inconceivable that some of these purposes would be explicitly acknowledged by official sources, or that they would be factored into public policy making. By and large, however, they remain interpretations by observers, rather than declared objectives of political participants. They thus cannot serve to justify prison or prison policies, and it is these justifications that are the focus of this Essay.

infraction. Any punishment will discourage the offender from committing further crimes, the only variable being the amount of punishment which, as stated, can be equalized among the different modes. Similarly, any punishment will discourage others from committing crimes; with the amounts equalized, the remaining variable would appear to be the extent to which the punishment is publicized. Finally, any punishment, that is, any infliction of pain, should satisfy society's need for just deserts and retribution.²⁹ Apart from considerations of incapacitation and rehabilitation, therefore, there appears to be no inherent basis for choosing among different modes of punishment.³⁰

Given the ability of any mode of punishment to satisfy these basic purposes, the most natural choice would be the simplest, in terms of both administrative capacity and resource expenditure. Those criteria are best met by physical torture. Administratively, it requires only some rudimentary restraints and a few unskilled employees; as for physical resources, it demands little more than a knife and a torch. As an incidental benefit, it appears to be the mode of punishment that provides the greatest enjoyment for the person inflicting the punishment. The pragmatic advantages of torture, or corporal punishment, to use the more polite expression, have led Graeme Newman to propose its reinstitution in contemporary society.³¹ While this seems inconceivable, it must be remembered that when penitentiaries were first developed, corporal punishment was quite conceivable—indeed, it was still widespread. The penitentiary was explicitly conceived as an alternative to this venerable, widely-accepted mode of punishment.

Justifications for the adoption of incarceration in general, or the penitentiary in particular, are often phrased in terms of the disadvantages of the alternatives. Capital punishment is regarded as too severe for most offenses and torture too barbaric,³² while

29. See GRAEME NEWMAN, *JUST AND PAINFUL: A CASE FOR CORPORAL PUNISHMENT OF CRIMINALS* 37-39 (2d ed. 1995). "There is no expectation at all, according to the retributive philosophy, that the offender should have learned not to repeat his crime. What he *has* learned is that his crime has a reciprocal cost to him in suffering." *Id.* at 180.

30. This Essay does not discuss the death penalty, since it has relatively little to do with the design and operation of prisons. *But see infra* note 93 and accompanying text (noting conditions on death row). Despite the current enthusiasm for this device, it will only affect a minute fraction of those convicted of a crime. In 1994, for example, some 2890 convicted persons were under sentence of death, *see* BUREAU OF JUSTICE STATISTICS, *THE DEATH PENALTY IN 1994* (1996), while more than one million were in prison or jail.

31. *See* NEWMAN, *supra* note 29.

32. The precise source of these attitudes is an interesting question. The most

exile requires the use of someone else's territory as a dumping ground for one's undesired citizens. These negative justifications have a certain historical validity. As described above, capital punishment, torture, and transportation had, for a variety of reasons, all become impractical in late eighteenth century England. Criminal justice officials were thus impelled by necessity to develop new alternatives.

Negative justifications and pragmatic necessity, however, may generate a search for alternatives, but they cannot by themselves provide the basis for designing such alternatives. To begin with, people have to conceive of the alternatives; once this work has been done, and a few hundred years have passed, the solution they devise may seem so obvious that it can be regarded as a purely practical response to problems with the prevailing approaches. At the time, however, the alternative was a new idea, and could not have been developed without some sort of affirmative rationale. Second, we should not be too quick to ascribe past people's behavior to cynical pragmatism. It is difficult to organize and institute a comprehensive change like the development of penitentiaries unless that change promises affirmative advantages, and unless it appeals to people's aspirations as well as their needs. This is not to deny the motivating force of practicality, or of self-interest. Rather, the point is that at all times—in the past as much as in the present—there is a close relationship among pragmatic, self-interested alternatives, and the motivating force of ideas and ideals.

The concept of rehabilitation decisively determined Western society's preference for incarceration as a mode of punishment. Whatever the aversion to torture, and whatever the impracticality of exile, it was the affirmative desire to reform the criminal that provided the essential argument for developing this expensive, administratively demanding means of punishment. To punishment itself, it adds the desire that a criminal who has completed the term of incarceration will go forth to lead a productive, law-abiding life.³³ Of the many conceptual bases for this political and social choice, three are particularly notable. The first is a concept of universal citizenship. The developing ideology of the modern nation state, most dramatically reflected in the

convincing explanation is offered by GARLAND, *supra* note 27, at 213-47, based on the analysis of modern sensibility that is developed in NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS* (Edmund Jephcott trans., Urizen Books 1978) (1939).

33. See *supra* note 11.

works of Fichte and Hegel,³⁴ led to the belief that every person was a citizen, a member of the state, and needed to understand and fulfill the responsibilities of that position. The criminal, of course, had forfeited his citizenship in some sense, but once his punishment is complete he will necessarily resume that role. Rehabilitation is the attempt to equip him to do so, curing him of the moral blindness that prevented him from perceiving his membership in the secular collectivity of the state.

Second, and closely related, was the idea that every human being has natural rights of a political nature.³⁵ The American Bill of Rights and the French Declaration of the Rights of Man are contemporaneous with the birth of the prison. This belief did not yield the idea that the criminal has a right to be rehabilitated, but it did produce the attitude that it was desirable to do so. Pre-Enlightenment society was prepared to regard people as existing for the benefit of others, and equally prepared to treat the criminal as an outcast, as someone who can be exiled or ignored. Modern society sees every person as a rights-bearer, as an equal member of its society. Consequently, it will seek a mode of punishment that will enable the wrongdoer to return to the community and live a productive life.

Finally, the rehabilitative prison was motivated by a new psychology, a belief in personality development as a secular phenomenon.³⁶ Life was no longer viewed as a prelude to eternal bliss or damnation, nor punishment as a means of obtaining a confession that would save the wrong-doer's soul. Rather, life was a self-contained set of experiences, with its own course of development. Punishment came to be viewed as an event in that development, an event that could alter its course and provide a happier continuation. As John Bender has observed, the contemporaneous development of the novel as the dominant form of fiction was not adventitious. The prison sentence, like the

34. See J.G. FICHTE, *FOUNDATIONS OF NATURAL RIGHT* (Frederick Neuhouser ed., Michael Baur trans., 2000); G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 155-223 (T.M. Knox trans., 1952). On Hegel's theory of the state, see FREDERICK NEUHOUSER, *FOUNDATIONS OF HEGEL'S SOCIAL THEORY: ACTUALIZING FREEDOM* (2000); CHARLES TAYLOR, *HEGEL* 428-61 (1975).

35. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 175-98 (1967); DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 45-79 (1987).

36. See 2 PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM* 3-12, 511-16 (1977); JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 1-50 (Frederick Lawrence trans., MIT Press 1987) (1985).

novel, was conceived as a moral progress, a transformation of the individual through a reflective consciousness.³⁷

In short, the prison was the product of new attitudes that clustered around the idea of rehabilitation. Rehabilitation was its essential purpose, its goal, and the basis for its design. At present, rehabilitation is so familiar that it appears inevitable, a fixture in our institutional landscape. But it did not possess this character when it was first devised; at that time, it was a real innovation and an alternative to the familiar punishment of torture or transportation. The reason it seemed like a superior alternative was because it promised to rehabilitate the criminal as well as punish him.

II. Rehabilitation Versus Servitude

Although rehabilitation is the historical premise of the modern prison, one might argue that it need not be regarded as its continuing objective. Other purposes for incarceration are conceivable. Perhaps one of these has displaced rehabilitation, and now serves as a substitute rationale that fully explains and justifies the institution. Such a substitution process would not be unprecedented; social institutions that began by serving one purpose sometimes owe their continued existence to their ability to serve another one, just as evolution adapts existing body parts to varied functions. Many nations use the military forces that they developed in eras of external threat as a means of education or a source of civil engineering services once the threat abates. The Salvation Army, the March of Dimes, the YMCA, and Harvard University have all changed their original mission.³⁸ The agency that regulates our national banks is still called the Comptroller of the Currency because its former function, now fully assumed by the Federal Reserve Board, involved monetary control.³⁹ Perhaps such a change has occurred in connection with prisons.

As stated at the outset, the two functions that prisons as a particular form of punishment might conceivably fulfill, apart from rehabilitation, are servitude and incapacitation. This assertion

37. See generally JOHN BENDER, *IMAGINING THE PENITENTIARY: FICTION AND THE ARCHITECTURE OF MIND IN EIGHTEENTH-CENTURY ENGLAND* (1987).

38. See generally SAMUEL ELIOT MORISON, *THREE CENTURIES OF HARVARD, 1636-1936* (1936); HARRY EDWARD NEAL, *THE HALLELUJAH ARMY* (1961); NINA SEAVEY ET AL., *A PARALYZING FEAR: THE TRIUMPH OVER POLIO IN AMERICA* (1998); Mayer N. Zald & Patricia Denton, *From Evangelism to General Services: The Transformation of the YMCA, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY* 143 (Mayer N. Zald & John D. McCarthy eds., 1987).

39. See 1 MICHAEL P. MALLOY, *THE CORPORATE LAW OF BANKS* 28-40 (1988).

can now be clarified in light of the discussion in the preceding section. Prisons clearly serve the purposes of general deterrence, special deterrence, just deserts and retribution, but any punishment, any government infliction of pain for proscribed behavior, must inevitably serve these purposes. Why should a society replace an administratively simple and intuitively appealing device like corporal punishment with something as elaborate and expensive as the modern prison? Rehabilitation was clearly such a justification when prisons were developed in the Anglo-American world, but perhaps there is a substitute justification that would work as well, or better, in the contemporary era.

This section will discuss servitude, reserving the question of incapacitation for the following section. The concept of servitude is that convicted felons are compelled to provide society with useful labor.⁴⁰ For such labor to be punishment, it must be labor that the convict is being compelled to perform against his will; because he is performing it against his will, he must be incarcerated in some fashion in order to compel him to perform it.

Involuntary servitude of this sort has two rationales. The first, and more obvious one, is simply to get something useful out of punishment. If society cuts off burglars' hands, it has gained nothing, apart from the functions of punishment itself, but a pile of severed hands. But if it compels the burglar to work as its mode of punishment, it then obtains the benefit of whatever labor he is required to perform. The second rationale is that the felon has a moral debt to society, and that compulsory labor is a means of repaying that debt.⁴¹ Punishment itself may constitute his just deserts or deter others from following in his evil footsteps, but punishment through useful labor enables the felon to provide a positive benefit for society in compensation for the harm caused by his crime.

One rationale that does not apply to servitude is that it enables the felon to learn a skill or develop orderly work habits.

40. See ALEX LICHTENSTEIN, *TWICE THE WORTH OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 1-36, 186-95 (1996); CHARLES ORR, *STALIN'S SLAVE CAMPS: AN INDICTMENT OF MODERN SLAVERY* (1951); RUTH PIKE, *PENAL SERVITUDE IN EARLY MODERN SPAIN* (1983); J. THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* (1976).

41. See SELLIN, *supra* note 40. For a general theory of punishment that adopts this rationale, see HERBERT MORRIS, *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY* 31-36 (1976). Cf. SUSAN KISS SARNOFF, *PAYING FOR CRIME: THE POLICIES AND POSSIBILITIES OF CRIME VICTIM REIMBURSEMENT* (1996) (proposing punishments that lead to reimbursement of victims).

That is rehabilitation, probably the dominant mode of rehabilitation in American prisons at the present time. Of course, there is no reason why the same mode of punishment cannot serve two different functions, and in fact, all do so.⁴² But the purpose of this discussion is to sort out justifications, to see if there is any conceivable basis for abandoning the concept of rehabilitation and grounding incarceration on some other rationale. Consequently, if one wants to argue that convict labor provides an alternative rationale to rehabilitation as the basis of the modern prison, that labor must be used for some purpose other than vocational training. Forcing prisoners to work in order to provide them with work habits or vocational skills cannot be regarded as an alternative to rehabilitation—it is rehabilitation.

There is certainly a historical basis for justifying imprisonment on grounds of servitude. While incarceration was not used to any significant extent as a mode of punishment in the pre-modern Anglo-American world, it was common on the European continent. Foucault asserts that prisons did not exist in Europe prior to the nineteenth century,⁴³ but as Pieter Spierenberg notes, he is wrong. The Dutch developed large penal institutes in the seventeenth century, using the prisoners to manufacture textiles.⁴⁴ In Foucault's own country, convicts were used extensively as galley slaves and kept in prison when they were not needed on the ships.⁴⁵ Thus, the work required in the pre-modern prisons was not conceived as educational, but as a way of obtaining inexpensive labor for undesirable but necessary tasks.

42. See MOORE, *supra* note 5, at 92-94.

43. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH 120-31 (Alan Sheridan trans., Vintage Books 1979) (1978). Foucault argues that the transition from corporal punishment to prison represented an effort by the modern state to assert direct, or disciplinary, control over people's bodies through the modality of regimented institutions. He thus argues that the rehabilitative goals of prisons were a sham, a façade intended to conceal the true, disciplinary nature of the institutions. This is really not very different from the Marxist claim that prisons are designed to suppress the lower classes. See GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1968). Such claims can be explanatory, but they cannot be justificatory. Consequently, they do not address the issue addressed in this Essay, which involves the social and political justifications for prison and prison practices. See *supra* note 27. Moreover, Foucault's assertion that rehabilitation was a sham is unconvincing, as it relies on a conspiracy theory of history that gives entirely too much weight to concepts. See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 290-96 (1998); GARLAND, *supra* note 27, at 162-75.

44. See Spierenberg, *supra* note 12, at 68-72; SPIERENBURG, *supra* note 17.

45. See MICHEL BOURDET-PLÉVILLE, JUSTICE IN CHAINS: FROM THE GALLEYS TO DEVIL'S ISLAND (Anthony Rippon trans., 1960); SELLIN, *supra* note 39, at 43-55; Spierenburg, *supra* note 12, at 66-67.

What was new in the nineteenth century was the concept of prison, and prison work, as a means of rehabilitation.

The line between servitude and rehabilitative work, however, would appear to be a rather fine one. After all, many American prison systems require all their able-bodied inmates to work; there is little evidence that such work is truly rehabilitative, and less still that corrections officials make any effort to determine whether this is the case. In fact, however, the distinction between these two approaches to work in prison is a dramatic one, and there is dramatic evidence that using prison work as a form of servitude, rather than as a mode of rehabilitation, is morally unacceptable in our society.

For about a century, one section of our country, namely the South, treated prison as a form of servitude rather than as a form of rehabilitation.⁴⁶ National authorities desisted from intervening on behalf of prisoners,⁴⁷ just as they desisted from taking action against Southern governments on behalf of African Americans. At about the same time that the policy toward African Americans changed, the policy toward prisoners changed as well. In a series of rulings that represent the high water mark of judicial intervention in public institutions, the federal courts declared, in effect, that prisons based on the principle of servitude violate the Constitution.⁴⁸ Although subsequent judicial doctrines regarding prison conditions have been somewhat modified, this basic conclusion has remained unchallenged, and now represents a clear moral consensus in our nation.

Malcolm Feeley and I have explored the extent to which the prison reform decisions represent a rejection of the South's distinctive, servitude-based approach to imprisonment in our book *Judicial Policy Making and the Modern State*.⁴⁹ During the antebellum period, many Southern states created penitentiaries on the

46. See MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* 8-11 (1971); BRADLEY STEWART CHILTON, *PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS* 15-19 (1991); BEN M. CROUCH & JAMES W. MARQUART, *AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS* 21-24, 69-74 (1989); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 135-55 (1996) (Mississippi); LARRY W. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* 9-10 (1989).

47. See, e.g., *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953 (7th Cir. 1956), *cert. denied*, 353 U.S. 964 (1957); *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105 (7th Cir. 1953); *Beyond the Ken of the Courts: A Critique of the Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

48. See FEELEY & RUBIN, *supra* note 43, at 150-71.

49. See generally FEELEY & RUBIN, *supra* note 42.

same rehabilitative model as New York and Pennsylvania.⁵⁰ The reason for this similarly progressive behavior was that the South's fatal distinction from the remainder of the nation did not affect its correctional policies. African Americans in the South were almost all enslaved, and slaves were generally not imprisoned. Instead, they were punished by their master as a private matter, usually by whipping, or, if convicted by a court, by precisely the same form of corporal punishment.⁵¹ As a result, most of the prisoners in the South's ante-bellum penitentiaries were White.

Following the Civil War, the situation changed dramatically. The freed slaves were now citizens, and their punishment for crimes became a public matter. Many of the penitentiaries, together with other parts of the South's infrastructure, had been destroyed during the War. The South's economy had been destroyed as well, and state governments had few resources to devote to any purpose, least of all to criminal offenders. In response, many Southern states turned to convict leasing as their predominant means of punishment. The leasing system was a contractual arrangement in which a private entrepreneur was given charge of the state's convicts in exchange for a fee. The entrepreneur then tried to earn back the amount of the fee, and produce a profit for himself, by making the convicts work on his own projects or by lending them to others.⁵²

The almost unimaginable cruelties that resulted can be at least partially explained by a lessee's motivations. Having paid his fee, his primary incentives were to get as much work out of the convicts as possible, and to spend as little as he possibly could on their food, clothing, and shelter. These were, of course, the same incentives that motivated the ante-bellum slave owners. The

50. See CARLETON, *supra* note 46, at 8-11; JAMES FERGUSON, A HISTORY OF THE ARKANSAS PENITENTIARY 9 (1965); SELLIN, *supra* note 39, at 138-41; WILLIAM BANKS TAYLOR, BROKERED JUSTICE: RACE, POLITICS, AND MISSISSIPPI PRISONS, 1798-1992, at 12-30 (1993).

51. See CARLETON, *supra* note 46, at 13; SELLIN, *supra* note 40, at 134-38; KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 209-10, 224-27 (1956).

52. See EDWARD L. AYRES, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 154-55 (1992); EDWARD L. AYRES, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 34-72 (1984) [hereinafter VENGEANCE AND JUSTICE]; CARLETON, *supra* note 46; MILFRED C. FIERCE, SLAVERY REVISITED: BLACKS AND THE SOUTHERN CONVICT LEASE SYSTEM, 1865-1933 (1994); PAUL W. KEVE, THE HISTORY OF CORRECTIONS IN VIRGINIA 72-87 (1986); LICHTENSTEIN, *supra* note 40; MATTHEW I. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 (1996); MCKELVEY, *supra* note 11, at 197-216; SELLIN, *supra* note 40, at 145-62; TAYLOR, *supra* note 50, at 31-54; YACKLE, *supra* note 46, at 9-10.

attitudes of the slave owners, however, were tempered by their desire to keep their slaves alive, since they had either paid significant amounts to purchase the slave or to cover the expenses of their childhood upbringing. This consideration was absent in the case of convict leasing, however, since the lessee paid one sum for the entire lease. As one Southerner explained: "Before the war we owned the negroes. If a man had a good negro, he could afford to take care of him: if he was sick, get a doctor But these convicts: we don't own 'em. One dies, get another."⁵³

Ultimately, the cruelties of the convict leasing system became so extreme that it had to be abandoned. It was replaced by prisons, that is, relatively large, state-run institutions that kept the convict incarcerated for the length of his sentence. These institutions bore a certain resemblance to the continuously-operated prisons of Northern states, but there was a crucial difference. Prisons in other parts of the country continued to use rehabilitation as an organizing principle, however poorly they might have achieved it. The Southern prisons ignored this principle, and were modeled instead on the culturally familiar pattern of the slave plantation.⁵⁴ Many Southern prisons actually consisted of former slave plantations that had been purchased by the state. They housed the prisoners in barracks reminiscent of the slave barracks on the old plantation, rather than in the closed cells characteristic of non-Southern prisons. The warden often lived in a large home on the prison property, and used tractable prisoners as household servants, just as the plantation owner lived on the plantation and staffed his home with tractable slaves. Prisoners were disciplined by means of corporal punishment, primarily the lash, just as the slaves had been. When prisoners escaped, they were pursued by dogs that were undoubtedly the canine descendants of those that had been used on the plantations to recapture runaway slaves.⁵⁵

Beyond these external features lay a more important and far-reaching difference. Southern prisons, like slave plantations, were designed to produce a profit for the state, or at least to run at cost.⁵⁶ They were not structured, and not intended, to rehabilitate

53. CARLETON, *supra* note 46, at 45. Part of this quote was used as the title of Matthew I. Mancini's study, *see supra* note 52.

54. *See* FEELEY & RUBIN, *supra* note 43, at 151-52.

55. For descriptions of Southern prisons, *see* CROUCH & MARQUART, *supra* note 46, at 15-16; FEELEY & RUBIN, *supra* note 43, at 152-56; STEVE J. MARTIN & SHELDON EKLAND-OLSON, *TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN* 5 (1987); OSHINSKY, *supra* note 46; TAYLOR, *supra* note 50, at xii, 77.

56. *See* CHILTON, *supra* note 46, at 17-19; CROUCH & MARQUART, *supra* note 46,

the prisoners at all. For Southern wardens, as for wardens in other parts of the nation, the most important goal was to prevent any of the prisoners from escaping—that is a basic premise of any mode of incarceration. Beyond this, however, their success was not measured by the order they kept, or the programs they provided, but by their ability to manage without receiving any monetary appropriation from the state.⁵⁷ This distinctive goal produced incentives similar to those of the contract lessees or the plantation owners. Food, clothing, and shelter were provided only in the amounts necessary for bare subsistence; medical care was often not provided at all. The prisoners were forced to work, generally as unskilled agricultural laborers, from sunup to sundown, and were beaten if they failed to perform. They worked in “long lines” as the slaves had, under the supervision of an unpaid fellow convict who had been designated a trustee, as the slaves had generally worked under the supervision of slave overseers. All of these barbarities were designed to produce cash crops, while minimizing monetary expenditures on maintenance of the prisoners.⁵⁸ Thus, the Southern prison was different in its basic conception from prisons in the remainder of the nation; it was conceived as a form of servitude, not as a means of rehabilitation.

The survival of this model for about a century may be attributed to the South’s divergent culture,⁵⁹ and to the reluctance of the national government to intervene in matters that were regarded as the proper subjects of state control.⁶⁰ It almost certainly did not reflect any general approbation, or even tolerance of the plantation model. Although the United States produced a massive scholarly literature addressed to punishment and prisons, none of it purported to justify the plantation model. The American Prison Association, one of the many Progressive-era organizations that promulgated standards of good practice in its field, articulated principles that were the antithesis of the plantation model, and embodied the rehabilitative approach.⁶¹ No Northern

at 137; MARTIN & EKLAND-OLSON, *supra* note 55, at 5-23; YACKLE, *supra* note 46, at 9-10.

57. This could be partially explained by the South’s economic prostration following the Civil War, *see* OSHINSKY, *supra* note 46, at 11-13, and the South’s continued poverty relative to the rest of the nation may have provided a continuing incentive. Nonetheless, the particular way in which Southern states chose to save money reflected a distinctive mentality.

58. *See supra* note 45.

59. *See* AYRES, VENGEANCE AND JUSTICE, *supra* note 52.

60. *See* FEELEY & RUBIN, *supra* note 42, at 30-34.

61. *See generally* AM. PRISON ASS’N, A MANUAL OF CORRECTIONAL STANDARDS

states adopted this model; while they were as anxious as their Southern counterparts to minimize the amount of taxpayer dollars spent on prisoners, the idea of creating servitude-based institutions that would run at no cost, or produce a profit, did not spread beyond the South.

This general rejection of the plantation model became dramatically apparent once changes in judicial attitudes and doctrine had eliminated the barriers to federal court review of state prison conditions. In the course of a single decade, from 1965 to 1975, the courts declared that virtually every aspect of the plantation model violated the Eighth Amendment's prohibition of cruel and unusual punishment.⁶² It was unconstitutional to house prisoners, at least dangerous ones, in open barracks, to discipline them with the lash, to deny them adequate food, clothing and medical services, to use convicts as guards, and to subject them to grueling, repetitive labor.⁶³ Taken together, these decisions effectively declared that servitude was an unconstitutional purpose of incarceration. Southern states could no longer run their prisons on the model of a slave plantation; they would be required to treat them as a funded government program. The idea of a prison based on servitude, long-rejected by the majority of people in this country, was extirpated from the one place where it had been deemed acceptable.

These rulings did not forbid prisons from encouraging, or even requiring, prisoners to work. Work in prisons serves a variety of functions that are quite distinct from servitude.⁶⁴ To begin with, many prisoners work voluntarily, for wages.⁶⁵ While the work provided is often repetitive, and the wages are low, prisoners often regard it as better than doing nothing and getting nothing. Second, prisons may require work to maintain the

(1954); MCKELVEY, *supra* note 11, at 172-89; Dale K. Sechrest & Ernest G. Reimer, *Adopting National Standards for Correctional Reform*, 46 FED. PROBATION 18 (1982).

62. See FEELEY & RUBIN, *supra* note 42, at 34-46, 162-71.

63. *Id.* at 30-50.

64. See Timothy J. Flanagan, *Prison Labor and Industry*, in *THE AMERICAN PRISON*, *supra* note 1, at 135. See generally Randall Guynes & Robert Greiser, *Contemporary Prison Industry Goals*, in *A STUDY OF PRISON INDUSTRY: HISTORY, COMPONENTS, GOALS* (Am. Corr. Ass'n ed., 1986).

65. This is generally described as prison industry. See JOHN J. DI IULIO, JR., *NO ESCAPE: THE FUTURE OF AMERICAN CORRECTIONS* 116-18 (1991). See generally GAIL S. FUNKE ET AL., *ASSETS AND LIABILITIES OF CORRECTIONAL INDUSTRIES* (1982); Gordon Hawkins, *Prison Labor and Prison Industries*, in 5 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 85 (Michael Tonry & Norval Morris eds., 1983) [hereinafter *CRIME AND JUSTICE*]; Richard Seiter, *Federal Prison Industries*, 1 *FED. PRISONS J.* 11 (1990).

institution—to prepare food, clean the facilities, and make repairs.⁶⁶ The amount of such work is inherently limited, and the general view is that it is reasonable to require a group of able-bodied people to maintain their own institution. Finally, and most important for present purposes, prisoners can be offered work, or even required to work, in order to learn a trade or skill.⁶⁷ This of course is not servitude, but rehabilitation; together with academic education, it is the most common form of rehabilitation offered in American prisons. The line between maintenance work, or even rehabilitative work, and servitude may seem a subtle one in the abstract, but it is relatively clear in practice. It is, in fact, clear enough to be articulated and enforced by the judiciary as a legal standard. Voluntary work, maintenance work, and rehabilitative work are all acceptable. Designing a prison around the principle of servitude violates the Constitution.

III. Rehabilitation Versus Incapacitation

While servitude has been definitively rejected as a mode of punishment, incapacitation is very much in vogue. In fact, it has been declared, in many state penal laws and by many academic commentators, to be the dominant purpose of imprisonment.⁶⁸ It is regarded as the successor to rehabilitation, the cold but just and necessary truth to which our society has awakened after its deluded dream that it could turn bad people good.

Despite its popularity, incapacitation suffers from a fatal defect as a theory of imprisonment, a defect that is analogous to the defect of regarding deterrence as a theory of imprisonment. As discussed above, prison cannot be justified on deterrence grounds alone because any punishment, any infliction of pain on the offender, will, at least in theory, provide both general and special deterrence. Incapacitation, to be sure, is a policy goal that clearly distinguishes prison from other modes of non-capital punishment. Corporal punishment, for example, does not incapacitate at all unless the offender is seriously maimed. Imprisonment, however, completely incapacitates the offender for the length of his sentence, except in the rare case when he escapes.⁶⁹ Thus, an

66. See Flanagan, *supra* note 63, at 146-47.

67. See ANN CHIH LIN, REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON 39-41, 103-08 (2000); STAN STOJKOVIC & RICK LOVELL, CORRECTIONS: AN INTRODUCTION 215-17 (2d ed. 1997).

68. See FRANKLIN ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 1, 10-12 (1995).

69. Of course, prisoners can commit crimes of various kinds in prison. These are often handled administratively, but it is certainly not unheard of for an inmate

incapacitation rationale appears to justify prison as a particular mode of punishment.

The defect in this account, however, is that prison necessarily incapacitates, no matter what regime prevails inside the prison walls. Just as a deterrence rationale fails to tell us anything about the mode of punishment, incapacitation, while it does identify prison as the preferred mode of punishment, is equally uninformative about the mode of imprisonment. Prison incapacitates by definition; therefore, to declare that the purpose of imprisonment is incapacitation is like saying that the purpose of a book is having people read it. The statement conveys no useful information. To put the matter in practical terms, consider the position of a prison warden who is charged with developing a strategy to deal with the prisoner who comes into his institution. The law tells him that the purpose of imprisonment is incapacitation. To this end, it tells him how long he is to keep the prisoner, as imprisonment statutes generally do, and it tells him not to allow the prisoner to escape, as such statutes inevitably do. Beyond that, it tells him nothing. It provides no guidance whatsoever about the way the prisoner should be treated in the institution.

As Franklin Zimring and Gordon Hawkins observe, the scholarly and practical literature regarding incapacitation is impoverished, despite the supposed popularity of the idea.⁷⁰ Perhaps one reason for this situation is that there is nothing much to say about incapacitation as a practice, apart from a discussion of prison security that, like all aspects of incapacitation, would be equally relevant to any use of an incarcerative policy. For example, William Spelman's *Criminal Incapacitation* is a thoughtful analysis, using economic theory, of incapacitative policy and sentencing practices,⁷¹ and even includes a discussion of intermediate sanctions.⁷² But Spelman has nothing to say about

to be tried and convicted of a crime he has committed behind bars. See, e.g., *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985); *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984). These crimes are not generally viewed as counting against the principle of incapacitation, since the purpose of that principle is to protect members of civil society from the offender. The protection of prisoners from other prisoners is a problem of prison administration. Thus, an incarcerated prisoner poses no threat to civil society unless he escapes (or, even more rarely, takes a visitor hostage).

70. See ZIMRING & HAWKINS, *supra* note 67, at 12-14.

71. See WILLIAM SPELMAN, *CRIMINAL INCAPACITATION* 312 (1994) (concluding that "incapacitation cannot, by itself, solve the crime problem. Under the most favorable conditions . . . no more than 22 percent of potential crimes can be prevented through incapacitation.").

72. See *id.* at 304-10.

the way prisons should be run, or the way prisoners should be treated when they are confined; such considerations are invisible from the perspective of a purely incapacitative policy.

It is sometimes said that the incapacitative prison functions as a warehouse for the prisoner.⁷³ This may seem to reflect commendable sincerity, but it does very little else. To describe a prison as a warehouse is nothing more than a metaphor, and it is not an apt one. The purpose of a warehouse is to store goods of some sort—automotive parts or library books, for example, so that they do not encumber high-use settings such as repair shops or open stacks, but are available when someone needs them. Prisoners are indeed being kept away from the high-use areas of general society, but they are not being held so that they are available when needed. The facilities that held unused galley slaves in Renaissance France may have fit this description, but at present, an army barracks is more aptly described as a human warehouse than is a prison. Moreover, a warehouse is supposed to receive items that are in good condition and to hold those items unchanged. The automotive parts and library books are supposed to come out of the warehouse looking just the way they looked when they went in; the warehouse's job is to avoid deterioration of useful parts or books. An army barracks is designed to satisfy this function; it receives trained soldiers—otherwise it would be described as a training facility—and it is supposed to hold these soldiers, without significant further training, until they are needed. A good barracks will simply provide the soldiers with sufficient physical and mental activity so that their skills do not deteriorate. It is difficult to imagine that this is truly what we envision for a prison. Prisons do not receive good items, but bad ones. If these people do come out the way they went in, even assuming no further deterioration occurs,⁷⁴ they will presumably be going back to prison again at some point in the future, which is not what anyone wants. The warehouse image does not even capture the special deterrent effect which everyone hopes prison will provide, quite apart from any possibility of rehabilitation.

Putting the warehouse idea aside, there are three interpretations of incapacitation, as an imprisonment strategy, that might confer some content on it. First, it might be seen as encouraging wardens to maintain an orderly prison; second, it

73. MICHAEL WELCH, PUNISHMENT IN AMERICA 51 (1999); Halleck & Witte, *supra* note 7, at 379.

74. Prisons often make the prisoner a good deal worse, although generally not by design. See generally LEE BOWKER, PRISON VICTIMIZATION (1980).

might be seen as discouraging them from providing rehabilitative programs; third, it might be seen as a directive to minimize costs. The idea of order is closely associated with the work of John DiIulio.⁷⁵ Malcolm Feeley and I have previously characterized DiIulio's emphasis on this issue as fetishistic,⁷⁶ and the present issue indicates the reason. What exactly is the purpose of maintaining an orderly prison? Order is generally regarded as an instrumentality, a means to an end, not an end in itself. One could argue that it helps prevent escapes or decreases violence in the prison. These are certainly commendable goals, but these are results every prison tries to achieve, and thus provides no particular content to the idea of incapacitation.⁷⁷ To champion order as a deontological value, without treating it as an instrumentality for achieving some other purpose, one must derive pleasure from the image of prisoners with clean uniforms, marching in lockstep through neatly maintained hallways. But this is something only a few people with unusual sensibilities would enjoy. In the final analysis, this vision cannot truly be derived from the idea of incapacitation. It is a separate goal as well as being an idiosyncratic one.

A second way to confer content on the idea of incapacitation is to treat it as opposing or discouraging rehabilitative efforts. This may satisfy the more savage sensibilities of certain crime victims and politicians, but it hardly solves the warden's problem. Telling him not to rehabilitate the prisoners fails to tell him what he should do with them. They can be woken in the morning, not rehabilitated until lunchtime, given lunch, not rehabilitated until dinner, not rehabilitated in the evening, and sent to bed. Of course, it is not difficult to envision what the prisoners might be doing when they are not being rehabilitated. They are watching television, exercising, pumping iron, socializing (or anti-socializing), and wandering aimlessly around. They might also be engaged in the acceptable types of servitude, that is, earning money by doing repetitive tasks or maintaining the prison itself. But these activities cannot be derived from the idea of

75. See, e.g., John J. DiIulio, Jr., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* (1987); DiIulio, *supra* note 64, at 11-59.

76. See Malcolm M. Feeley & Edward Rubin, *Prison Litigation and Bureaucratic Development*, 17 *LAW & SOC. INQUIRY* 125, 137-43 (1992).

77. See generally MOORE, *supra* note 5. A more common argument is that order contributes to the goal of rehabilitation, either because it is intrinsically rehabilitative, as the Auburn and Pennsylvania plans asserted, or because it allows more specific rehabilitative efforts, such as education and vocational training, to proceed without disruption. But this assumes that the prison has a rehabilitative goal, of course, and not a purely incapacitative one.

incapacitation, or even from the idea of avoiding rehabilitation. They have their own low-grade rationales, such as amusing the prisoners, avoiding boredom because it is regarded as unnecessarily cruel, or minimizing costs and providing service within acceptable limits.

Finally, it might be argued that incapacitation is justified by its ability to minimize incarceration costs. The difficulty with this argument is that cost is a constraint on governmental programs, but not an independent source of justification for those programs. One can speak of achieving the program's goals at a lower cost, and thus with a greater degree of efficiency, but those goals must be independently determined. The purpose of building a cannon, for example, is to defend a country by defeating its enemies. One could reasonably argue that making a cannon with cheaper metal would reduce costs, and thereby provide a preferable alternative to the original design. But one could not argue that making a cannon that does not fire a shell would be a preferable alternative, even though it would reduce costs to an even greater extent. Similarly, one cannot argue that incapacitation is justified because it is cheaper than rehabilitation, unless one can also argue that those cost savings are achieved without eliminating the basic purpose of prison. This is not the case.

The basic purpose of prison, as indicated in Part I, is rehabilitation; elimination of rehabilitative efforts would certainly save money, but it would negate the prison's purpose. To be sure, a purely incapacitative prison could still achieve the goals of general deterrence, special deterrence, and retribution, as well as incapacitation, but so would corporal punishment, which is clearly less expensive than even the most parsimonious human warehouse. Once one has saved money by building a cannon that does not shoot, there is no reason why one should not save all the money by building no cannon at all. In other words, the principle of cost minimization has no stopping point unless one recognizes the countervailing purpose for the item whose cost is being minimized. In the prison context, that countervailing purpose is to return the criminal to society in a condition that enables him to function within that society in an acceptable manner. The underlying incoherence of a purely incapacitative rationale for prisons, presumably justified by cost minimization, is revealed by the fact that, once again, it would not tell the warden what to do with the prisoners. It would only lead him to test the limits of constitutional acceptability by cutting every aspect of the prison's budget.

A related argument regarding costs has been advanced by Michael Moore. According to Moore, rehabilitation "allocates scarce societal resources away from other, more deserving groups that want them (such as retarded and autistic children or the poor) to a group that hardly can be said to deserve such favoured status."⁷⁸ One problem with this argument is that it applies equally to prisons in general, and thereby leads us back to corporal punishment again. A second problem is that it is artificial to argue against rehabilitation by trying to establish a direct opposition between prisoners and disabled children, just as it would be artificial to argue in favor of rehabilitation by asserting that it is a better use of funds than inefficient agricultural subsidies. Government authorities must allocate available funds among a wide range of programs. Once they have decided on a particular program for substantive reasons, the level of funding they provide for it is a pragmatic matter of distributing resources across the total range. The third argument against Moore's point is that the aspiration of rehabilitation is not merely to provide benefits for the prisoner, but to provide benefits for society in general by transforming criminals, most of whom will return to that society, into acceptable citizens.

The problem with declaring incapacitation as the goal of prison, therefore, is that the term has no content in this context. It simply restates the choice of prison as our socially accepted means of punishment. Unlike deterrence, it explains why we have chosen prison over rival approaches such as corporal punishment or shaming. But like deterrence, its force is exhausted once the basic choice that it implies is made. Deterrence tells us to inflict some pain on the offender during the long years of his imprisonment, but does not indicate what sort of pain. Incapacitation tells us that the pain is to be imprisonment, but does not answer the question about the content or character of such imprisonment. The idea of servitude in fact answers this question, but as a general strategy, we have concluded that it is as unacceptably barbaric as corporal punishment. That brings us back to rehabilitation.

78. *Id.* at 86. Moore identifies two forms of rehabilitation, one where the criminal is given such awful treatment that he decides never to commit another crime, and a second that tries to benefit the prisoner in some way, which Moore calls paternalistic. The first variant is a bit difficult to distinguish from special deterrence. In any event, this Essay discusses Moore's second form of rehabilitation, and I am even willing to accept the characterization of this approach as paternalistic.

IV. The Modern Concept of Rehabilitation

To summarize thus far, American prisons were conceived and created on the basis of a rehabilitative model. None of the alternative rationales for punishment can replace it. Servitude and incapacitation are the only rationales, aside from rehabilitation, that have anything to do with prisons as a mode of punishment. But servitude leads to a way of treating prisoners that is morally unacceptable, while incapacitation provides no guidance at all. It would appear that the only acceptable way to operate a prison in modern society is along rehabilitative lines.

Despite the condemnations of theorists, and the declarations of state legislatures, American prison officials have never wavered in their support of rehabilitation. Virtually all large prisons offer vocational and academic training of some sort.⁷⁹ Innovations such as day treatment programs, work release, halfway houses, and boot camps are only comprehensible as part of a rehabilitative model; they clearly offer no advantage from the perspective of incapacitation.⁸⁰ Studies of prison programs demonstrate this point and independently illustrate the continuing commitment to rehabilitation. To quote Zimring and Hawkins again, "patterns of academic attention to issues in criminology [show] both the unchallenged salience of rehabilitation as the principal topic over time and the relative paucity of academic publications relating to incapacitation."⁸¹ Examining the titles of articles and books listed in the Social Scisearch system during the 1980s, they found that 4199 referred to rehabilitation and recidivism, while only forty-five referred to incapacitation.⁸²

Why then has rehabilitation been so roundly condemned, and why have those condemnations seemed so persuasive? One reason is that genuine abuses were committed by sincere believers in rehabilitation, while other abuses were committed by those who

79. See LIN, *supra* note 67, at 6, 18-19. See generally Michael Welch, *Rehabilitation: Holding Its Ground in Corrections*, 59 FED. PROBATION 3 (1995).

80. See generally RICHARD A. BALL ET AL., HOUSE ARREST AND CORRECTIONAL POLICY (1988); CRIME & JUSTICE, *supra* note 64; SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS (James M. Byrne et al. eds., 1992); DiIULIO, *supra* note 64, at 60-102; BELINDA RODGERS MCCARTHY & BERNARD J. MCCARTHY, JR., COMMUNITY-BASED CORRECTIONS (3d ed. 1997); Joan Petersilia, *Alternative Sanctions: Diverting Nonviolent Prisoners to Intermediate Sanctions: The Impact of Prison Admissions and Corrections Costs*, in MINIMIZING HARM 115 (Edward L. Rubin ed., 1999); SPELMAN, *supra* note 70, at 304-11; STOJKOVIC & LOVELL, *supra* note 66, at 481-511; Doris Layton MacKenzie et al., *Boot Camp Prisons and Recidivism in Eight States*, 33 CRIMINOLOGY 327 (1995).

81. ZIMRING & HAWKINS, *supra* note 67, at 12.

82. See *id.* at 12-13.

used rehabilitation as a façade to hide their depredations.⁸³ But the most important reason is that the critics misunderstood the basic character of the rehabilitative model. Their enthusiasm for the attack on rehabilitation led them to be almost purposely obtuse about its real character. An analysis of the arguments that these critics advanced can thus be used to illuminate the character of the rehabilitative model.

Three principal arguments have been voiced against the validity of the rehabilitative idea. The first is the social science finding that "nothing works," that rehabilitative programs have had no success in achieving their intended goal.⁸⁴ Second, it is argued that rehabilitation authorizes an assault on the prisoner's personality. This criticism points to the use of intrusive methods such as brainwashing, behavior modification programs, drug therapy, and shock treatment.⁸⁵ In addition, it argues that the rehabilitative model implies that prisoners should be kept in prison until the authorities consider them cured, even if this greatly exceeds the punishment they merit on grounds of just deserts. Finally, critics argue that the entire concept of rehabilitation is inconsistent with the premises of our political system.⁸⁶ These arguments can be considered in turn.

The conclusion that rehabilitation is a failure is empirically false. Once the impact of the initial findings had abated, social scientists began to devote more detailed attention to rehabilitative programs and produced more refined, modulated results. Martinson himself withdrew his 1974 declaration that "nothing works" as early as 1979.⁸⁷ Meta-analyses and individual program evaluations in the 1980s and 1990s advanced the unsurprising, but previously unrecognized, idea that the effectiveness of rehabilitation programs varies depending on the nature of the intervention and the cooperation of the target group.⁸⁸ A recent

83. See generally STEPHEN SANSWEET, *THE PUNISHMENT CURE* (1975).

84. See Halleck & Witte, *supra* note 7; Martinson, *supra* note 6; NAT'L ACAD. OF SCIS., *supra* note 8; Robinson & Smith, *supra* note 7.

85. See *infra* note 97 and accompanying text.

86. See ALLEN, *supra* note 1, at 33-34.

87. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 250 (1979).

88. See EFFECTIVE CORRECTIONAL TREATMENT (Robert Ross & Paul Gendreau eds., 1980); Francis T. Cullen & Paul Gendreau, *The Effectiveness of Correctional Rehabilitation: Reconsidering the 'Nothing Works' Debate*, in *THE AMERICAN PRISON*, *supra* note 1, at 23. See generally Paul Gendreau, *The Principles of Effective Intervention with Offenders*, in *CHOOSING CORRECTIONAL OPTIONS THAT WORK* (Alan Harland ed., 1996); Ted Palmer, *Programmic and Nonprogrammic Aspects of Successful Intervention*, in *CHOOSING CORRECTIONAL OPTIONS THAT WORK*, *supra*; D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically*

study by Ann Chih Lin observes that the mode of implementation is a crucial factor: when the rehabilitation program meets the need and obtains the loyalty of the corrections staff, it will be implemented well, and promises to be effective. When it does not, the program will be implemented poorly, and will inevitably fail.⁸⁹

Even without these empirical results, however, the declaration that rehabilitation fails to achieve its declared objective is highly suspect. Such a conclusion necessarily depends upon a theory for evaluating social programs, but relatively little thought has been devoted to this topic. Studies of the success or failure of rehabilitation generally focus on the recidivism rate, that is, the extent to which the offender reduces, maintains, or increases his level of criminal activity upon his return to society.⁹⁰ The obvious difficulty with this criterion is that it fails to specify a standard for measuring success. If the standard is that any criminal activity constitutes a failure—the way any loss of telephone service to subscribers' homes constitutes a failure of the telephone system—then rehabilitation will inevitably be judged a failure. Moreover, by this standard, incapacitation will be judged a success. Prisoners rarely escape from prison and even more rarely commit crimes before they are recaptured. It does happen, but it is a relatively uncommon event, perhaps as uncommon as failures of telephone service. Surely, however, the level of favorable results that constitutes success or failure needs to be adjusted in accordance with the complexity of the task.

When we speak of rehabilitation, we are referring to an effort to remedy a vast array of personal and social problems experienced by some of society's most disadvantaged members. This is not to excuse the criminal—many people experience similar disadvantages and become productive citizens—but to recognize the magnitude of the task. Many prisoners are functionally illiterate or lack a high school degree, many lack training in any legal trade, many are addicted to drugs or alcohol, and many suffer severe psychological and social problems. Each of these problems is difficult to resolve, and all are important to resolve if the criminal is to be rehabilitated. An ex-convict who re-enters society without at least a high school degree, without any vocational skills, still suffering from addiction to illegal drugs or

Relevant and Psychologically Informed Meta-Analysis, 28 CRIMINOLOGY 369 (1990); Paul Gendreau & Robert R. Ross, *Revivification of Rehabilitation: Evidence from the 1980's*, 4 JUST. Q. 349 (1987); Ted Palmer, *The Effectiveness of Intervention: Recent Trends and Current Issues*, 37 CRIME & DELINQ. 330 (1991).

89. See *supra* note 67 and accompanying text.

90. See *supra* note 88.

even alcohol, and without some resolution to his psychological or social problems—in short, with any one of the many deficits that he may have had when he was imprisoned—has a poor prognosis. Prison rehabilitation programs attempt to address all these problems, and others. Lin's study of programs in five federal prisons revealed efforts to achieve sixth-grade literacy levels, to provide high school diplomas, community college degrees, and BA's. There were also efforts to teach a wide range of vocational skills that include restaurant management, auto repair, welding, horticulture, building trades, masonry, HVAC, and medical technology, to address drug and alcohol addiction, and to resolve psychological problems.⁹¹ That such efforts do not have one hundred percent success rates is not exactly surprising, nor is it surprising that they have lower success rates than such simple tasks as keeping prisoners confined or providing regular telephone service.

Beyond the accuracy of the empirical evidence for the success rates of rehabilitative programs, and beyond the question of the standard against which such rates are to be measured, lies a more basic question still: what is the purpose of gathering empirical evidence of this nature? When social scientists evaluate rehabilitative programs, they are not evaluating rehabilitation itself as a social goal, because they are not comparing it to the success rate of any other mode of punishment. Rather, they are trying to determine how to achieve an acknowledged social goal in an effective manner. The operative question in each study is not whether rehabilitation is a good idea, but how we best achieve it. This conceptual horizon exists because rehabilitation is the only approach to the treatment of criminals that is institutionally viable in our society. It is pointless to ask whether rehabilitation is more effective in stopping recidivism than torture, exile, servitude, or even shaming, because the choice among these approaches is not open to empirical assessment. We are not going to adopt them. There might be some point to asking whether rehabilitation is more effective than incapacitation, since incapacitation is clearly a morally acceptable strategy. But, as indicated above, incapacitation does not address the question being asked; it is too limited an idea to tell us anything about the treatment of prisoners. A more valuable question is whether prison is the best means of rehabilitation, or whether we would

91. See LIN, *supra* note 66, at 40. See generally THE AMERICAN PRISON, *supra* note 1; CHOOSING CORRECTIONAL OPTIONS THAT WORK, *supra* note 87; EFFECTIVE CORRECTIONAL TREATMENT, *supra* note 87.

achieve our accepted goal more effectively through boot camps, house arrest, or day treatment. In other words, it is useful to ask whether prison is the best means of rehabilitation, but not whether rehabilitation is the best goal for prison. The choice of rehabilitation for prisons cannot be addressed by empirical means because it is pre-empirical; it is a basic moral choice that has already been made. Empirical studies cannot demonstrate whether we want prisons to rehabilitate any more than they can demonstrate whether we want public schools to educate their pupils. The basic goal is the conceptual horizon of the institution; the operative question for research is how we achieve that goal.

This is not to suggest that rehabilitative programs are beyond criticism. The real question is how we evaluate rehabilitative programs and what conclusions we derive from those evaluations. Rehabilitative programs should not be evaluated against some fantasy-based standard that we can rehabilitate every criminal, but against each other. What we want to know is which strategies are the most effective, which ones achieve relatively greater rates of success. When such research is done, moreover, the answer will inevitably be the one that researchers in the 1980s and 1990s suggested. There is no one ideal rehabilitative strategy—that is another fantasy—but rather a range of approaches whose effectiveness will vary with the circumstances. These circumstances include the type of criminal, the attitudes that he has developed, the type of community to which he will return, the resources available in the prison, the staff's general morale and existing skills with particular rehabilitative programs, and the emergent features of the prison as an institution.

That is in fact the approach adopted by prison wardens and other correctional officials. Although far from being a collection of bleeding heart liberals, they are uniformly committed to rehabilitation as a goal for prisons. They recognize, however, that this goal will often be frustrated, that many prisoners will turn back to crime following their release. In their view, their job is to make rehabilitative opportunities available, and to do their best to alter the institutional variables to favor rehabilitation. The remaining, and generally determinative variables, involve the prisoners' own attitudes. This approach to rehabilitation, which was decisively articulated by Norval Morris,⁹² seems to be the dominant one among prison officials. As Norman Carlson, director of the Federal Bureau of Prisons stated: "All we can do is provide

92. See *supra* note 4 and accompanying text.

opportunities for inmates who want to change.”⁹³ But this realization does not deter these officials from continuing the effort, nor does it motivate them to search for different organizing principles for their institutions. For them, as for society in general, rehabilitation is the conceptual horizon.

There are a few exceptions, but their aberrance confirms the general pattern. The first of these exceptions is death row. Confinement there conforms fairly well to a pure model of incapacitation, since the inmates are not expected to return to any earthly society. These prisoners are given additional privileges, such as their own television sets, for the express purpose of keeping them quiet, and they are typically not provided with opportunities for vocational or academic training.⁹⁴ Second are jails, where the presumably innocent are being held until trial, or where the convicted are serving short sentences. Here, the inmates receive neither privileges nor opportunities, but the incapacitative character of the institution is based upon the premise that the inmates are there for relatively brief periods.⁹⁵ The third, and perhaps the most dramatic exception are supermaximum facilities, where the prisoners are kept in their cells twenty-two or twenty-three hours a day, exercise in a cage, and rarely interact with any other prisoner.⁹⁶ For the most part, there is one such facility in a correctional system. The most common justification for these institutions is to remove the most dangerous, disruptive, and incorrigible inmates from the general population so that an atmosphere conducive to rehabilitation can be maintained in the system's other facilities. But even in these severest of our modern institutions, the rehabilitative ideal sometimes reasserts itself. At Marion, the federal Level Six facility that has served as a model for most other super-maximum institutions, the Bureau of Prisons organized the institution along rehabilitative lines, with the stated goal being to re-socialize the

93. PETE EARLY, *THE HOT HOUSE: LIFE INSIDE LEAVENWORTH PRISON* 58 (1992); see LIN, *supra* note 66, at 144 (describing the expectations and opportunities of prisoners); GEORGE PLAYFAIR, *THE PUNITIVE OBSESSION* 212 (1971) (analyzing English prisons).

94. For descriptions of death row, see BRUCE JACKSON & DIANE CHRISTIAN, *DEATH ROW* (1980); ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 33-66 (1990). For journalistic accounts of death row, see generally KATY LEZIN, *FINDING LIFE ON DEATH ROW* (1999); DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD* (1995).

95. See generally LINDA L. ZUPAN, *JAILS: REFORM AND THE NEW GENERATION PHILOSOPHY* (1991).

96. FEELEY & RUBIN, *supra* note 42, at 128-43 (describing the Marion, Illinois supermaximum facility).

prisoners so that they could go back and lead a normal life in general population at a Level Five federal facility.⁹⁷

The second argument against rehabilitation is that it authorizes an assault on the prisoner's personality. Critics charge that the rehabilitative model is similar in concept, although not necessarily in practice, to morally unacceptable reformatory techniques such as brainwashing, severe behavior modification, drug therapy and shock treatment. It is also argued that the model, at least in theory, would authorize open-ended sentences that keep offenders incarcerated until prison authorities have judged them to be rehabilitated.⁹⁸ C.S. Lewis was particularly eloquent and exercised about this point.⁹⁹ In the third volume of his Christian science fiction trilogy, the head security officer of the literally satanic National Institute of Co-ordinated Experiments (N.I.C.E.), Miss "Fairy" Hardcastle, declares:

"You've got to get the ordinary man into the state in which he says 'Sadism' automatically when he hears the word Punishment." And then one would have *carte blanche*. Mark did not immediately follow this. But the Fairy pointed out that what had hampered every English police force up to date was precisely the idea of deserved punishment. For desert was always finite: you could do so much to the criminal and no more. Remedial treatment, on the other hand, need have no fixed limit; it could go on till it had effected a cure, and those who were carrying it out would decide when *that* was. And if cure were humane and desirable, how much more prevention? Soon anyone who had ever been in the hands of the police at all would come under the control of the N.I.C.E.; in the end, every citizen.¹⁰⁰

The novel's explicit claim is that rehabilitation theory is the tool of Satan. However, the more plausible conclusion that one can reach from the story is that, in a country such as Great Britain, it would require a takeover by Satan to turn rehabilitation into an instrument of oppression. The same could be said about Francis Allen's 1981 book, *The Decline of Rehabilitative Ideal*.

97. See *id.* at 141-42.

98. See ALLEN, *supra* note 1, at 41-57 (describing cultural differences in rehabilitation); AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 39-40, 146 (1971); Ira Glasser, *Prisoners of Benevolence: Power Versus Liberty in the Welfare State*, in *DOING GOOD: THE LIMITS OF BENEVOLENCE* 97, 117 (Willard Gaylin et al. eds., 1978) (stating the resistance of authorities to have limits placed upon their discretion); MOORE, *supra* note 5, at 87 (examining different theories of punishment); MORRIS, *supra* note 4, at 12-26 (describing different techniques of rehabilitation). See generally SANSWEET, *supra* note 82.

99. See C.S. Lewis, *The Humanitarian Theory of Punishment*, in *FOUNDATIONS OF CRIMINAL LAW* 97 (Leo Katz et al. eds., 1999).

100. C.S. LEWIS, *THAT HIDEOUS STRENGTH* 81-82 (1946).

Allen goes so far as to suggest that the most complete embodiment of the rehabilitative ideal is to be found in the correctional system of Communist China.¹⁰¹ The plausible conclusion from this observation is not that we should abandon rehabilitation, but that we should avoid a communist takeover because it would distort our current correctional practices.

Once again, the problem with this criticism is that it fails to state a theory for analysis or to establish an explicit metric. The implied metric seems to be that a social program should be condemned if any sort of government, no matter how different than our own, could use it as a rationale for practices that we find unacceptable. However, no program could withstand such a test. Communist China used public education to indoctrinate its children,¹⁰² the Soviet Union used mental health to suppress dissent,¹⁰³ and Nazi Germany used recreational programs to foment aggressive attitudes.¹⁰⁴ These lugubrious examples may be useful as a warning against potential abuses, but they cannot, by themselves, be taken as a criticism of an otherwise acceptable program. In one of his more considered moments, Allen states that "the rehabilitative ideal has revealed itself in practice to be particularly vulnerable to debasement and the serving of unintended and unexpressed social ends."¹⁰⁵ While this is more plausible than his comparison with Communist China, he has just as little basis for asserting it. What does it mean to say that a program is "particularly vulnerable to debasement"? Without stating some standard for vulnerability of this sort, the statement stands for nothing more than Allen's a priori decision to hold rehabilitation accountable for every abuse committed by someone who asserted a commitment to that principle. He has no evidence that the principle caused the abuse, or made it in any way more likely to occur.

In fact, the criticism of rehabilitation as an inducement to abusive practices is almost certainly false when considered in the context of American corrections. Rehabilitation has always been

101. See ALLEN, *supra* note 1, at 16-18.

102. See FOX BUTTERFIELD, CHINA: ALIVE IN THE BITTER SEA 194-201 (1982); JONATHAN SPENCE, THE SEARCH FOR MODERN CHINA 564-65 (1990). See generally RICHARD BAUM & FREDRICK C. TEIWES, SSU-CH'ING: THE SOCIALIST EDUCATION MOVEMENT OF 1962-1966 (1968).

103. See generally ZHOES A. MEDVEDEV & ROY A. MEDVEDEV, A QUESTION OF MADNESS (Ellen de Kadt trans., 1971).

104. See WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 252-55 (1959). See generally H.W. KOCH, THE HITLER YOUTH: ORIGINS AND DEVELOPMENTS, 1922-1945 (1975).

105. ALLEN, *supra* note 1, at 34.

the doctrine espoused by the most progressive elements in the correctional establishment. The rigors of the Auburn and Pennsylvania systems may seem excessive, but they were humane when compared to torture or the death penalty. The rehabilitative approaches that followed were generally more humane, and expressed a sincere concern for the felon as an individual. Pavlovian thought reform, although theoretically consistent with the concept of rehabilitation, was never instituted to any significant extent in American prisons, even when Pavlov's ideas were very much in vogue.¹⁰⁶ If one wanted to catalogue the worst abuses in American corrections, one would certainly choose the convict leasing system and the plantation model prisons that were the products of the servitude model. In contrast, when federal courts decided to reform the South's plantation-inspired prisons, they turned to the prevailing approaches to rehabilitation to supply them with standards for a morally acceptable prison.¹⁰⁷

The claim that rehabilitation would authorize indeterminately long sentences is equally a product of abstract academic alarmism. It comes from the failure, already discussed, to separate punishment itself from the mode of punishment, or more precisely, sentencing from treatment. Rehabilitation has rarely been used in this country as a principle for determining the convict's sentence. The same holds true for incapacitation. For the most part, sentences in this country are set without regard to the mode of punishment, and are based on the nature of the crime that the person has committed. American sentences use the principle of just deserts, or, perhaps more often, rough proportionality—the more serious the crime, in society's judgment, the longer the sentence.¹⁰⁸ In recent years, there has been some

106. See FEELEY & RUBIN, *supra* note 42, at 268-70. American prisons did experiment with some forms of behavioral conditioning. See, e.g., DIULIO, *supra* note 64, at 128-47; ROBERT HAWKINS & GEOFFREY P. ALPERT, AMERICAN PRISON SYSTEMS 413-16 (1989). See generally Willard Gaylin & Helen Blatte, *Behavior Modification in Prisons*, 13 AM. CRIM. L. REV. 11 (1975). But these efforts were relatively mild, and stopped far short of the kinds of abuses that the critics of rehabilitation envision. A typical example of behavioral conditioning in American prisons was the token economy, where the prisoners received tokens that they could exchange for privileges when they exhibited the desired behaviors. See generally Norman Carlson, *Behavior Modification in the Federal Bureau of Prisons*, 1 NEW ENG. J. PRISON L. 155 (1974); Michael A. Milan & John M. McKee, *The Cellblock Token Economy: Token Reinforcement Procedures in a Maximum Security Correctional Institution for Adult Male Felons*, 9 J. APPLIED BEHAV. ANALYSIS 253 (1976).

107. See FEELEY & RUBIN, *supra* note 42, at 252-63.

108. The classic statement of this principle is HEGEL, *supra* note 33, at 66-73. Kant subscribed to a similar view; the fact that these two adversaries agree on this point gives it an impressive pedigree. IMMANUEL KANT, THE METAPHYSICS OF

effort to consider rehabilitative possibilities when sentencing certain offenders. However, this has not taken the form of indeterminately long prison sentences, but of alternatives to prison such as drug treatment or house arrest. The theoretical possibility that a rehabilitative model might lead to long, open-ended sentences, or of the fact that such sentences were imposed in Communist China, has very little relevance to the actual practice of corrections in the United States.

Even at a more theoretical level, the assertion that rehabilitation ineluctably implies limitless and oppressive treatment is unconvincing. It is based on the assumption that the rehabilitative ideal is grounded in Pavlovian psychology and a totalitarian mentality that we associate with the Soviet Union, where Pavlov worked, and where his ideas were adopted with such enthusiasm. But as described in Part I, the rehabilitative ideal was the premise of the modern penitentiary, which means that it pre-dates Pavlov and the Soviet Union by at least one hundred years.¹⁰⁹ It was based on the ideas of universal citizenship, individual rights, and personal development. Every person, according to these ideas, has value, and even if they have committed crimes, they should not be either discarded or used purely as examples. Rather, an effort should be made to restore them to their place in society and provide them with a fulfilling, productive experience for the remainder of their lives. This view leads directly to the kinds of programs that can be found in most American prisons—to education, vocational training, drug and alcohol treatment, and group therapy. It does not lead to brainwashing, shock therapy, or open-ended sentences; these means are incompatible with ideas of citizenship, individual rights and personal development. The connection between such abuses and the idea of rehabilitation, as it exists in Western society, is a product of the overheated imaginations of the retributivists like C.S. Lewis. It is neither logically implied nor culturally accurate.

Finally, critics of rehabilitation have argued that the entire concept is inconsistent with our democratic principles, because it subjects people to social engineering rather than treating them as autonomous moral beings. A democratic regime, it is said, depends upon the view that each person is equally valuable, capable of decision making, and responsible for her actions. When

MORALS 104-09 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797). For a contemporary discussion, see generally Andrew Ashworth, *Sentencing Aims, Principles, and Politics*, in FOUNDATIONS IN CRIMINAL LAW, *supra* note 98, at 333.

109. See *supra* notes 10-36 and accompanying text.

such people commit crimes, they should not become subjects for manipulation by experts with supposedly superior knowledge. They should be punished as moral actors who have chosen to commit an offense against society. Rehabilitation is ultimately based on a therapeutic, or psychological view of human beings, rather than a moral and political view that is consistent with democratic principles.

The difficulty with this criticism is that the societal reliance on prisons as a mode of punishment and the societal commitment to rehabilitation are essentially concurrent with the development of English and American democracy. Historical evidence thus suggests that rehabilitation and democracy are not as inconsistent as the criticism claims. In fact, the view of individuals as autonomous moral actors is common to all social contract theories, including those positing that individuals must trade away all their liberties to establish an effective government. It is as congenial to an autocrat like Hobbes¹¹⁰ as it is to a democrat like Rawls.¹¹¹ Contemporary democracy, as we use the term, has nothing to do with this; it is a social practice that chooses public officials by election, and is based on the idea that the government's purpose is to serve the people.¹¹² Rehabilitation fits perfectly well into this democratic ethos. Its central purpose is that every human life is valuable, and that government has an affirmative obligation to help offenders return to society and live a normal and productive life.

Conclusion

If one examines American scholarly literature on the subject of selecting legislators and the chief executive, one will not find much discussion of hereditary monarchy, autocracy, theocracy, or aristocracy. All one will find is a discussion of the system of elections that we have in place—how it currently functions and how it can be improved. This is not the result of a lack of knowledge, a failure of imagination, or a governmental prohibition of debate. Rather, it results from the desire to say something relevant and meaningful, to locate one's analysis within the framework of politically possible and morally acceptable alternatives. For these same reasons, scholarly discussion of prison design should focus on

110. See generally THOMAS HOBBS, *LEVIATHAN* (Richard E. Flathman & David Johnston eds., W.W. Norton & Co. 1997) (1651).

111. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

112. See generally Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

the alternative means of rehabilitation. There are, of course, other acceptable goals for punishment—general deterrence, special deterrence, just deserts, and even retribution. None of these alternatives, however, provides a rationale for using prison as one's mode of punishment. There are also other punitive goals that provide a rationale for prison, such as obtaining free labor or inflicting continuous pain over prolonged periods of time, but these are not politically possible or morally acceptable. Incapacitation does fulfill these conditions and does provide a rationale for imprisonment, but it provides no information about the way the prison should be designed. It only tells us is that the prison should be a prison, that is, a facility that incarcerates the offender. The only rationale for the design of prison programs that is possible and acceptable in this society is rehabilitation. It is time to stop using attacks on this principle as a means of demonstrating that one is tough on crime, angry about liberalism, or hard-headed about prison management, and to focus on the difficult but necessary task of finding ways to implement this obviously desirable goal.

