Criminal Punishment in Antebellum Indiana: The Limits of Reform

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Over the past decade historians have exhibited considerable interest in early nineteenth-century attempts to reform criminal justice. Most of this research has detailed the post-Revolutionary shift from retributive to reformative justice and the corresponding development of the penitentiary, especially in eastern states. The prison, a symbol of reform experiments, had a dual purpose: to rehabilitate inmates and, by virtue of its success, to serve as a model of order for a disorderly society. But, as historian David J. Rothman has noted, the dreams of reformers contained the seeds of later nightmares. Faulty theories of crime and society and a naive reliance on the curative effect of the prison's internal structure plagued efforts at reform. Overwhelmed by the number of inmates, the penitentiary by the Civil War had taken on a custodial role.[1]

Scholarly focus on the penitentiary has obscured the extent to which reform efforts addressed all parts of the criminal justice system. Equally important were attempts to limit or abandon the use of corporal punishment, to abolish the death penalty, and to rewrite the criminal code to make it more comprehensive and a better deterrent to crime. In many states, including Indiana, each of these proposals stimulated wide-ranging public debate and significant reform of criminal law.

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[1] David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston, 1971), 240-57. Also see Walter David Lewis, *From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848* (New York, 1965); Negley K. Teeters and John D. Shearer, *The Prison at Philadelphia: Cherry Hill: The Separate System of Prison Development* (New York, 1957).

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But the course of reform was not smooth, nor were reform goals ever fully realized. As Indiana's experience demonstrates, there were limits to the reform impulse beyond those mentioned by Rothman and other historians of the penitentiary movement. A limited treasury, residual beliefs in retribution, and continuing use of criminal law to reinforce traditional moral order also slowed and diverted reform efforts. These circumstances not only affected the development of the penitentiary but also stymied efforts to eliminate capital punishment and to make statutory criminal law more rational and humane.

This essay traces the course of criminal justice reform in Indiana from 1816 to 1860, focusing primarily on statutory law, judicial opinion, and public debates as key indices to reform efforts. Although sometimes described as a "reform movement," it would be misleading to conclude that advocates of reform united under a single banner. Indeed, it is difficult to identify even a loose coterie of leaders or agreement among reformers upon a common agenda. Ideas to recast the criminal justice system were widespread in Indiana and attracted strong support from many obscure legislators and citizens representing all parts of the state. Participation in reform efforts, moreover, came from all demographic and political groups. While later research may discover some significant patterns of support, this essay will confine its focus to the context and manifestations of criminal justice reform in antebellum Indiana.

By the mideighteenth century, reformation had replaced retribution as the goal of an enlightened criminal law. This change in the theory of punishment owed much to the Italian scholar, Cesare Beccaria. His treatise *On Crime and Punishment* became the standard for many of the post-Revolutionary reforms of punition. In this "manifesto of the liberal approach to criminal law," Beccaria expressed an ardent faith in the power of human reason and the perfectability of social institutions.[2] He repeatedly urged that law should not restrict human freedom unnecessarily. To do otherwise increased crime by creating more opportunities for men to violate legal prohibitions. Beccaria offered other prescriptions for a fair and humane criminal process. Criminal law should be fixed in a written code, with presumption of innocence maintained at every stage of the prosecution. Severe punishment was to be avoided because it made criminals "commit additional crimes to avoid punishment for a single one."[3] To be

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[2] Leon Radzinowicz, *Ideology and Crime* (New York, 1966), 9.

[3] Cesare Beccaria, *On Crime and Punishment*, trans. Henry Paolucci (Indianapolis, 1963), 43.

effective punition had to be strictly limited, proportionate to the crime, and inflicted with speed and certainty.

For many Americans Beccaria offered a satisfactory solution to the problem of crime and criminal justice. Experience had taught them that severe codes did little to diminish deviant behavior. To the contrary, a correlation appeared to exist between barbarous punishments and increases in criminal activity. The Revolutionary generation took this lesson to heart and set out to rectify the mistakes of colonial codes. By replacing inhumane features of the legal system with rational laws and salutary punishments, reformers believed that crime could be controlled more effectively, if not actually decreased. This conviction, in turn, led to vigorous efforts in the early republic to limit or abolish the death penalty and to develop institutions which reformed offenders.[4]

Throughout the antebellum years Hoosiers publicly and privately declared that reformative principles must guide the criminal process. The state's first Constitution enjoined "cruel and unusual punishments" and required that all penalties "be proportioned to the nature of the offense."[5] Over thirty years later delegates to a second constitutional convention overwhelmingly endorsed, and voters ratified, a section which declared that the penal code would be "founded on the principles of reformation, and not vindictive justice."[6] The legislature decided the next year that juvenile offenders in particular must "be treated with humanity and in a manner calculated to promote their reformation."[7]

A number of private citizens also expressed support for a legal system which acted to redeem malefactors. It was in society's best interest, wrote a prominent resident of Marion County, to show a "spirit of forgiveness." When the community based laws on arbitrary and sanguinary principles, "then the same feeling of murder and revenge would rule in the breast of its lowest members."[8] This sentiment found voice in numerous essays and petitions, especially during the campaign to abolish the death penalty. Declaring that "we live in an age that may emphatically be styled an age of Reform," a group of Union County

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[4] Rothman, *Discovery of the Asylum*, 59-61.

[5] Indiana Constitution of 1816, Article 1, Sections 15 and 16.

[6] Indiana Constitution of 1851, Article 1, Section 18.

[7] Indiana, *Revised Statutes* (1852), I, 347.

[8] Samuel Merrill, "Ought the Executive of a State to Possess the Power of Pardoning Criminals?" undated manuscript, Samuel Merrill Papers (Indiana Historical Society Library, Indianapolis).

citizens petitioned for criminal laws that "shunned the Spirit of revenge and retaliation" and sought instead to restore offenders to society.[9]

Yet the law of criminal punishment in antebellum Indiana reflected this reformist impulse only in part. The state entered the Union with a repressive code which mandated severe penalties for most offenses. A good example of this was the first law code in the territory, the Marietta Statutes of 1788. That body of law defined nine crimes, three of which—treason, murder, and arson—were capital offenses. Robbery and burglary carried penalties of fines, whippings, and imprisonment for up to thirty years. Individuals convicted of perjury or theft could be given thirty-nine lashes, pilloried, and disfranchised.[10] Later territorial statutes continued to mandate harsh punishments, although one change allowed courts to jail offenders rather than administer whippings.[11]

Admission to statehood had little immediate impact on criminal law despite the state Constitution's ban on cruel punishments and its requirement for proportionate sentencing. The first state criminal code made no pretense of reforming the offender. Punishment was intended to inflict pain. The code listed fifty-nine crimes and mandated death for four of them—treason, murder, rape, and carnal knowledge of a female under ten years of age.[12] Many crimes were punishable by whipping. Fifteen of the fifty-nine offenses, or 25 percent, could receive this penalty in addition to fines and imprisonment.[13] It is difficult to distinguish offenses for which whipping was allowed from those for which it was forbidden. For example, conviction for forgery of

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[9] "Resolution of Citizens of Union County to Hon. James A. Whitcomb," James A. Whitcomb, Governor's Correspondence (Archives Division, Indiana Commission on Public Records, Indiana State Library and Historical Building, Indianapolis).

[10] Daniel Waite Howe, *The Laws and Courts of the Northwest and Indiana Territories* (*Indiana Historical Society Publications*, Vol. II, no. 1; Indianapolis, 1886), 21-22; David B. Banta, "The Criminal Code of the Northwest Territory," *Indiana Magazine of History*, IX (December, 1913), 241-42.

[11] Francis S. Philbrick, eds., *The Laws of Indiana Territory, 1801-1809* (Springfield, Ill., 1930), cxxiv-cxxix, cxlvi, clxxix.

[12] Indiana, *Laws* (1817-1819), 65-76, 92, 96. The number of capital crimes in Indiana seems typical for the period. The leader was probably South Carolina with 165 capital crimes in 1813 and 22 crimes punishable by death as late as 1850; but a student of South Carolina's criminal law admits that the state had an unusually high number of such offenses. Jack K. Williams, *Vogues in Villainy: Crime and Retribution in Ante-Bellum South Carolina* (Columbia, S.C., 1959), 100.

[13] The list included manslaughter, burglary, robbery, perjury, knowingly passing counterfeit bank notes, larceny, sodomy, arson, horse-stealing, stealing hogs or altering their marks, incest, obtaining goods through false pretenses,

bank notes could bring thirty-nine lashes, while forgery of state notes or securities could only be punished by a fine three times the amount defrauded. Also, courts could inflict thirty-nine stripes for those convicted of stealing hogs or altering their marks but could only impose a monetary penalty on those caught altering the marks on domestic cattle. Furthermore, whenever stripes constituted the appropriate punishment, the allowable number varied without apparent reason. Sodomites could suffer one hundred lashes, while fifty stripes was the legal limit for the crime of incest.[14]

Although whipping criminals had fallen into disfavor in the more settled East, its use in pioneer Indiana at least ensured that offenders would be punished. After all, the administration of justice in frontier areas was a tenuous thing. It was difficult to catch and convict lawbreakers, and there was no guarantee that once convicted they could be held in insecure county jails. Even so, local courts and juries hesitated to exact the whipping allowed by law. County officials often avoided the punishment by adopting the colonial practice of "warning out," or forcing offenders to move on. On at least one occasion, for instance, residents of Marion County allowed defendants to escape rather than whip them.[15] Whippings were carried out on occasion, but they were usually accompanied by a public outcry so strong that legislators were ultimately persuaded to abandon the practice. A case in point was the demand of a Vincennes newspaper that whipping be abolished after a local court ordered a "fellow citizen tied to sign post and flogged like a dog."[16]

Whipping did not long remain a part of the state's criminal code. In 1821 the General Assembly ordered that a state prison be built at Jeffersonville for persons convicted of felonies. At least one scholar contends that public distaste with harsh corporal

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and assault and battery with intent to murder, rape, or commit sodomy. Indiana, *Laws* (1817-1819), 76-78, 80, 82, 92-96. Indiana was not alone in the use of corporal punishment. The Illinois Code of 1827 also mandated whipping as the punishment of rape, arson, burglary, robbery, larceny, buying or receiving stolen goods, altering brands, forgery, and counterfeiting. *The Revised Code of Illinois, Enacted by the Fifth General Assembly* (Vandalia, Ill., 1827), 132-35. Contemporary Ohio law, however, did not permit whipping. Ohio, *General Acts* (1823), 158-66, 181-92.

[14] Indiana, *Laws* (1817-1818), 80-81, 92, 94-95. David D. Banta, a late nineteenth-century Indiana lawyer and judge, believed that the lack of similar punishments for like crimes was the result of the "patchwork character of the laws." Banta, *Criminal Code of Northwest Territory*, 241.

[15] William R. Holloway, *Indianapolis: A Historical and Statistical Sketch of the Railroad City . . .* (Indianapolis, 1870), 34; Berry R. Sulgrove, *History of Indianapolis and Marion County* (Philadelphia, 1884), 34.

[16] Vincennes *Indiana Centinel*, May 6, 1820.

punishments was the primary reason for its construction.[17] His conclusion is supported by the fact that the legislature abolished whipping as the prison neared completion and substituted equivalent terms of confinement for all offenses previously liable for punishment by stripes.[18]

Reform of the methods of punishment did not end with the decision to outlaw whipping. Throughout the nation men and women campaigned to make prisons into correctional institutions that would rehabilitate the criminal and allow his return to society. Two types of prison organization—the Auburn system from New York and the Pennsylvania plan—competed for dominance as the ideal penitentiary. Advocates of both systems thought that the criminal was "the victim of an upbringing that had failed to provide protection against the vices at loose in society" and that a well-regulated institution would counterbalance societal shortcomings.[19] They differed only on how best to organize the penitentiary. Supporters of the Auburn plan believed in a congregate organization of prison routine where inmates worked together by day but separated into single cells at night. Defenders of the Pennsylvania plan felt that an unbroken period of solitary confinement was necessary for proper reformation because isolation allowed the convict more time to consider his misdeeds.[20]

At the beginning the prison at Jeffersonville more nearly followed the outline of the Auburn system. Inmates worked together during daylight hours but went to individual cells at night. Within a short time, however, an increase in the number of prisoners beyond the number of cells forced abandonment of plans for a nocturnal separation. By 1835, for example, fifty-five inmates crowded into cells designed to hold less than half that

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[17] Helen Wilson, *Treatment of the Misdemeanant in Indiana, 1816-1936* (Chicago, 1938), 8, 24.

[18] Indiana, *Laws* (1822-1823), 40-41. The statute stipulated that where the law allowed one hundred stripes, prison confinement of one to seven years would be substituted; where not exceeding fifty stripes, confinement of one to five years; where not exceeding thirty-nine lashes, confinement of one to three years. *Ibid.*

[19] Rothman, *Discovery of the Asylum*, 82. Environmentalism was not considered the sole cause of crime; biological factors were also thought important. For more on the latter, see Arthur E. Fink, *Causes of Crime: Biological Theories in the United States, 1800-1915* (Philadelphia, 1938), 1-47, 151-78.

[20] Lewis, *From Newgate to Dannemora*, 81-109; Teeters and Shearer, *The Prison at Philadelphia*, 10-32; Rothman, *Discovery of the Asylum*, 79-108; Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* (Indianapolis, 1927), 118-21.

number.[21] An even more serious obstacle to successful imitation of the Auburn plan arose early in 1824 when the General Assembly abolished the Board of Managers appointed to supervise the prison. Legislators then authorized the governor either to appoint a state superintendent to run the facility or to let a three-year contract for oversight of the convicts in return for the use of their labor.[22] The choice of the second alternative established the precedent for state practice until 1855.[23]

The decision to authorize private management of the state prison suggests that fiscal restraints could override the goal of reformation. A House committee on the state prison confirmed this in 1829 when it reported that "the farming out of the prisoners is salutary and calculated to relieve the state of the burthen of annual draughts from the Treasury."[24] Still, some lawmakers worried about the value of a prison managed more for profit than rehabilitation. The same legislative report reflected this concern when it concluded that the state should more precisely regulate the governance of prisoners. This feeling grew despite assurances from Governor Noah Noble and other state officers that the privately operated facility well comported "with the spirit of our laws."[25]

By the early 1840s the contract system of prison management was coming increasingly under attack. The state visitor warned that the existing system was fatal to the goal of redemption. It would profit society more, he asserted, to free criminals than to allow them to work outside the walls where they were "cut off . . . from *all* moral and religious instruction."[26] After a well-publicized examination of the Jeffersonville plant in 1841,

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[21] Despite an overcrowding that obviously destroyed the rationale of an Auburn-like system, the official state visitor evidently continued to believe that the prison was meeting its goal. In his annual evaluation he noted that "solitary confinement in cells during those hours in which labor is not required . . . is calculated to produce reflection and reformation in the minds of the convicts." "Report of Visitor to State Prison," reprinted in Indianapolis *Indiana Journal*, February 3, 1835.

[22] Indiana, *Revised Laws* (1823-1824), 395-98.

[23] The lease was terminated by the legislature. Indiana, *Laws* (1855), 197-98.

[24] Indianapolis *Indiana State Journal*, January 27, 1829. For more on the finances of the early state prison, see Donald F. Carmony, "Indiana Public Finance, 1800-1826" (Ph.D. dissertation, Department of History, Indiana University, 1940), 352-64.

[25] Indiana, *House Journal* (1832-1833), 14. One state visitor praised the prison as "the most satisfactory proof of the wisdom of our laws in providing for a penitentiary system founded upon the principle of reformation." "Report of Visitor to State Prison," reprinted in Indianapolis *Indiana Journal*, February 3, 1835.

[26] "Report of the Visitor to the State Prison," Indiana, *Documentary Journal* (1840), 139-40.

Governor Samuel Bigger concluded "that the Prison itself, and the entire policy of its discipline . . . cannot be too soon abandoned for the character of the State."[27] But the governor's message revealed little concern for either the alleged mistreatment of prisoners or the failure of the system to reform criminals. He advocated change because he believed that "The Prison itself, is entirely too small. . . . [It is] impossible to employ the convicts in the limits of the Prison, with advantage to the Superintendents, or the State." Even after acknowledging reports of overcrowding, inhumane treatment of prisoners, and lack of proper supervision, Bigger only recommended that a new and larger building be built, not that the state seek a termination of the contract system.[28] Evidently, the patronage and tax savings that flowed from private control were not easy to relinquish. A pledge that convict labor would be used to construct the new facility persuaded the fiscally conservative legislators to support Bigger's proposal.[29]

The late 1840s and 1850s witnessed redoubled efforts to bring Indiana's prison organization within patterns advanced elsewhere. Stories of brutal punishments inflicted by prison officials on inmates circulated in state newspapers and added to the pressure for reform. The New Albany *Gazette*, in a story that epitomized the rumors, reported that convicts received routine whippings when they failed to complete even the most difficult tasks on schedule. The paper alleged that the superintendent administered ninety-five lashes to a young boy for "failing to keep fires in a brick kiln of eight arches, during a hot day."[30] At the time of the convening of the General Assembly in December, 1845, the influential Indianapolis *Indiana State Journal* called for a prison controlled solely by the state. Giving the keeper "an interest in the proceeds of the labor of convicts," the *Journal* claimed, "leads to overworking and to treatment abhorrent to humane feelings."[31] A delegate to the constitutional convention of 1850-1851 went even further in his denunciation of the system when he labeled the prison the "worst of all prisons in the

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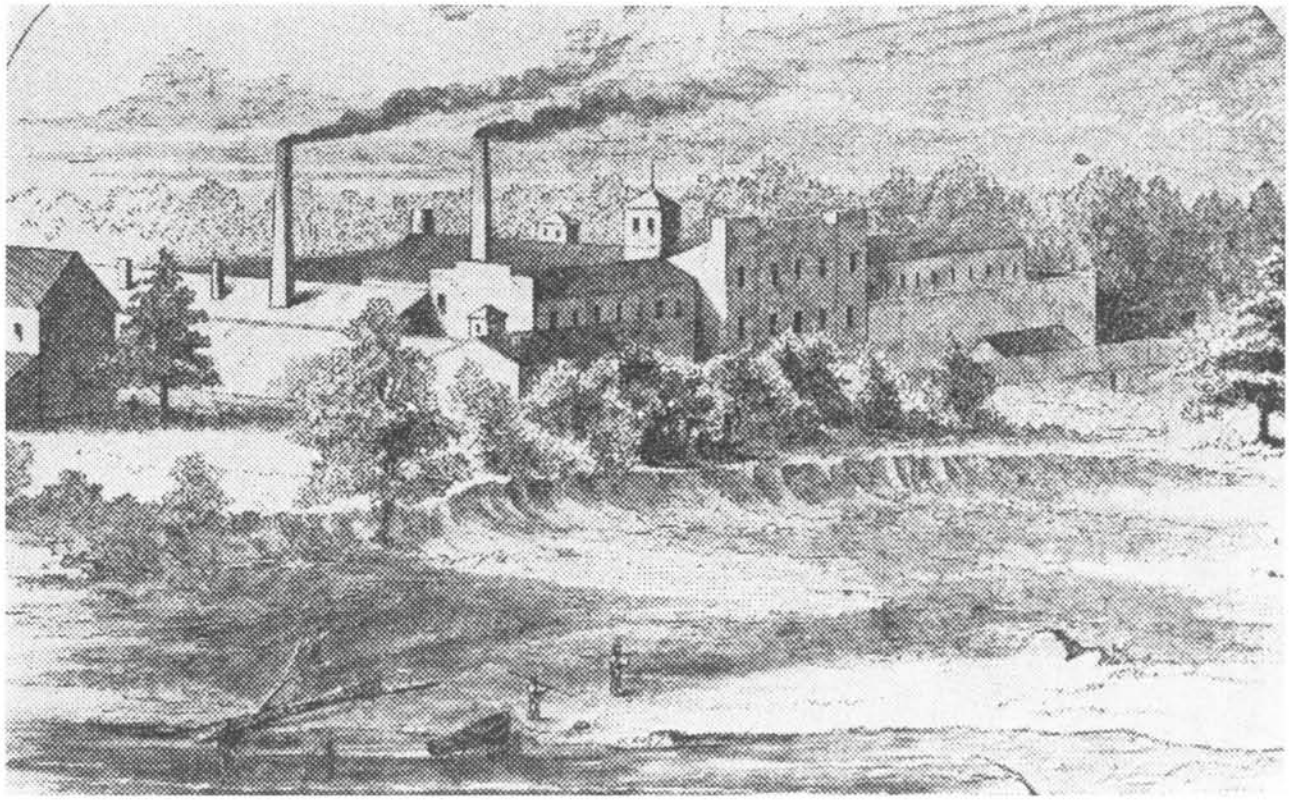
[27] Indiana, *Senate Journal* (1841-1842), 25-26.

[28] *Ibid.*

[29] Indiana, *General Laws* (1841-1842), 98-101. One reason the legislature voted to move the facility to another site was to assuage the concerns of residents of the city who disliked the competition of convict labor and who feared the possibility of mass prison breaks. Bigger's message of 1841, a similar communication from the next governor, James Whitcomb, and a supreme court decision all allude to this. Indiana, *Senate Journal* (1841-1842), 25-26; Indiana, *Senate Journal* (1844-1845), 22-23; *Helton* v. *Miller*, 14 Indiana Reports 557-89 (1860).

[30] Reprinted in Indianapolis *Indiana State Journal*, September 10, 1845.

[31] *Ibid.*, December 3, 1845.



THE INDIANA STATE PRISON AT JEFFERSONVILLE, C. 1850

Reproduced from: Lucien V. Rule, *The City of Deal Souls and How It Was Made Alive Again: A Hundred Years Within the Walls* (Louisville, [1920]).

United States."[32] These reform efforts ultimately led to a constitutional mandate in 1851 that the penal code "be founded on the principles of reformation, and not of vindictive justice."[33]

Not until the mid-1850s, however, did the state assume direct control of the Jeffersonville prison.[34] The change came only after repeated warnings by a popular governor, Joseph A. Wright, that farming out prisoners was "radically wrong" and "highly objectionable."[35] Wright wanted the prison to be a true penitentiary with the reform and reintroduction of the criminal into society its constant goal. To this end he proposed that any profits from convict labor be divided among the inmates and their families instead of reverting to either the state or a private contractor.[36] The failure of this suggestion to receive legislative consideration illustrates the fact that even direct state control did not assure meaningful reform. Guards and other prison officials might be on the state payroll, but the contracting of prison labor had to be continued because legislators failed to provide adequate funds for the prison's operation.[37]

State reluctance to commit the resources necessary to staff an adequate, much less an exemplary, penitentiary also hampered efforts to provide separate facilities for juvenile and female prisoners. An act of 1840 had given juries discretion to sentence a juvenile felon to the county jail instead of the state prison.[38] But the act provided only a surface remedy because conditions in the jails were no better than those in Jefferson-

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[32] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana. 1850* (2 vols., Indianapolis, 1850-1851), II, 1903. A late nineteenth-century historian of Indiana agreed with this delegate's conclusion. The prison, he claimed, "for many years . . . was about the worst managed and conducted prison on the continent, a disgrace to the State and an outrage on humanity." William Henry Smith, *The History of the State of Indiana; From the Earliest Explorations by the French to the Present Time* (2 vols., Indianapolis, 1897), II, 634.

[33] Indiana Constitution of 1851, Article I, Section 18.

[34] See note 23 above.

[35] Indiana, *Senate Journal* (1853), 23.

[36] Indiana, *Senate Journal* (1855), 33. Wright's commitment to prison reform was apparently genuine. He reportedly spent hundreds of dollars of his own money on behalf of efforts to upgrade the penal system. Indianapolis *Indiana State Sentinel*, January 1, 1857. For more on Wright's efforts to reform the state prison, see Philip M. Crane, "Onus with Honor: A Political History of Joseph A. Wright, 1809-1857" (Ph.D. dissertation, Department of History, Indiana University, 1961), 214-18.

[37] In 1858 the legislature finally approved a plan for a second facility at Michigan City. For more on the further development of the state prisons, see Emma Lou Thornbrough, *Indiana in the Civil War Era* (Indianapolis, 1965), 584-88.

[38] Indiana, *General Laws* (1839-1840), 184. This provision remained in effect throughout the period. See Indiana, *Revised Statutes* (1852), II, 424.

ville. Calling them a "poor school for morals," one reform-minded legislator considered them a training ground for crime where "the ingenious and innocent youth is . . . thrown into the society of the dissipated and the depraved."[39] In the 1840s Dorothea Dix had visited a number of Indiana jails and had portrayed many of them as unhealthful and unsavory institutions.[40] Fear that an indiscriminate mixing of adult and youthful offenders would result in a training school for crime prompted Governor James Whitcomb to call for state-run "houses of Refuge" where females and juveniles "will be beyond the contagion of confirmed vice and hoary crime."[41]

The problem had not been invented by hysterical reformers or crusading politicians. In 1851 the warden of the state prison reported to the constitutional convention that of 1,131 inmates housed at Jeffersonville from 1822 to 1850, 157, or more than one-eighth of all prisoners, had been minors. The youngest was only eleven years old; another was fourteen.[42] The report made an impression on the delegates. When the new Constitution was presented for ratification, it contained a clause requiring the General Assembly to "provide Houses of Refuge . . . for . . . juvenile offenders."[43]

This victory was more apparent than real, however, because subsequent legislatures refused to appropriate funds to build juvenile homes. Legislators disagreed on the number of facilities the Constitution required or the state needed. Some representatives argued that each judicial district should have one because the framers had intended to promote the creation of "neighborhood institutions" where offenders could be sent for short periods of time. Other legislators maintained that the state could not adequately support more than one such establishment and that

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[39] Indianapolis *Indiana Journal*, February 6, 1835.

[40] Wilson, *Treatment of the Misdemeanant*, 25, 85-87.

[41] Indiana, *Senate Journal* (1847-1848), 110. Governor Joseph A. Wright sounded similar themes in 1850 when he called for special juvenile buildings to be built as part of county jails. "It is idle," the governor said, "to talk of reforming the young man, who, for his first offense, has been convicted for stealing property of the value of five dollars, and sentenced to two years' imprisonment in the State Prison, thus placing him by the side of the murderer. We must place the young and juvenile offender where his associations and intercourse are with those who will exercise an influence for good, and not with the old and hardened in crime." Indiana, *Senate Journal* (1850-1851), 24.

[42] *Convention Debates*, II, 1903. The problem was not unique to Indiana, however, but had its counterparts in other states. See, in general, Robert A. Mennel, *Thorns and Thistles: Juvenile Delinquents in the United States, 1825-1940* (Hanover, N.H., 1973).

[43] Indiana Constitution of 1851, Article IX, Section 2.

it should be centrally located.[44] The debate produced only an ineffectual requirement that juveniles housed in county jails "be treated with humanity and in a manner calculated to promote their reformation."[45]

The deadlock continued throughout the 1850s despite the strong support of Indiana governors for separate juvenile facilities. Joseph A. Wright, Democratic governor from 1849 to 1857, was especially concerned by the large numbers of youths in the state prison. In 1855 he reported to an unresponsive legislature that more than one-half of all inmates were under twenty-five years of age and that 36 of 267 inmates were under twenty.[46] A warning by the editor of an influential state paper that legislative disregard of the constitutional mandate would result in "making and hardening criminals by state action" was also futile.[47] Failure to establish separate facilities did not escape the notice of local courts. A newspaper report in 1860 indicated that judges were releasing large numbers of youthful offenders rather than sending them to the state prison.[48] Still, the General Assembly did not provide construction funds for a new prison until 1867, even though it had authorized the purchase of land twelve years earlier. The reform impulse so evident in the constitutional convention was unable to overcome the fiscal conservatism of Indiana legislators.[49]

While a limited treasury blunted efforts to bring Indiana's prison organization within patterns advanced elsewhere, a fear of disorder and a residual belief in retribution also kept the state from fully satisfying the constitutional goal of reformation in its penal policies. These other limits to reform are best illustrated by the unsuccessful effort to abolish the death penalty and by the revisions of statute law that incorporated new crimes and mandated stiffer punishments.

Since the Revolution, men had argued that executions violated the dictates of natural justice. An early Indiana governor, James B. Ray, echoed this sentiment in 1830 when he denounced capital punishment as a "primitive practice." Like Beccaria sixty years earlier Ray objected to the punishment because it made a burlesque of society's proclaimed goal of reforming the

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[44] See the House debate on June 14, 1852, reported in Indianapolis *Daily Indiana State Journal*, June 15, 1852.

[45] Indiana, *Revised Statutes* (1852), I, 347.

[46] Indiana, *Senate Journal* (1855), 33.

[47] Indianapolis *Daily Indiana Journal*, January 29, 1855.

[48] *Ibid.*, December 21, 1860.

[49] Indiana, *Laws* (1855), 191; Indiana, *Laws* (1867), 139-45.

criminal. Equally disturbing were the intrinsic uncertainty of a guilty verdict and society's inability to redress its mistakes. The only sure remedy for such problems, Ray concluded, was the abolition of the penalty.[50]

The General Assembly ignored Ray's proposal, and the next year he called only for an end to public executions.[51] This goal appeared more attainable because even many advocates of capital punishment abhorred the carnival atmosphere that too often accompanied an exercise on the gallows. Typical of this carnival atmosphere was the execution of two men in Columbus in 1833. Although the hanging was scheduled for noon, a large and festive crowd estimated at five thousand had gathered much earlier in the day. At the appointed time the prisoners ascended the scaffold in the company of the sheriff and several clergymen. Drama then turned to tragicomedy as, one by one, the ministers offered prayers and sermons that lasted more than three hours. After waiting what must have seemed an interminable period, the condemned men were finally executed.[52]

Reports of the spectacle at Columbus sparked a statewide debate on the moral propriety and legal efficacy of capital punishment. The president of the so-called "Indianapolis Legislature," a local debating society, denounced the practice for "exciting brutal passion and lawless violence." He contended that publicity attending the event transformed the "unfortunate convict [into] a brave, generous and daring hero." This defeated the law's purpose of deterring others by example; and when that deterrence was removed, all that remained was the "electric horror" of the hanging.[53] A state representative from Parke County had a similar scene in mind when he sponsored a bill to end public executions because of their "pernicious and demoralizing tendencies."[54]

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[50] Dorothy Riker and Gayle Thornbrough, eds., *Messages and Papers Relating to the Administration of James Brown Ray, Governor of Indiana, 1825-1831* (*Indiana Historical Collections*, Vol. XXXIV; Indianapolis, 1954), 576.

[51] *Ibid.*, 686.

[52] From Columbus, Indiana, *Chronicle*, as reprinted by Indianapolis *Indiana Journal*, October 26, 1833.

[53] Indianapolis *Indiana Journal*, January 18, 1834. Although the president, William B. Slaughter, advocated solitary lifetime confinement as a substitute for the death penalty, his description of what that entailed makes death seem attractive by comparison: "The low, the damp, the dreary cell, the glorious light of sun without, the dreary solitude within . . . the slow, dull march of time extending moments into years, and hours to centuries within, each moment bringing new pain and each hour additional horror." One of Slaughter's predecessors had also advocated that solitary confinement replace the death penalty. See speech of Samuel Merrill to the Indianapolis Legislature, printed in Indianapolis *Indiana Journal*, May 21, 1829.

[54] Indianapolis *Indiana Journal*, January 8, 1834.

Throughout the nation the mid-1840s marked the zenith of the antebellum movement to abolish capital punishment.[55] In Indiana major legislative debates occurred in 1843 and 1846, with arguments pro and con paralleling positions advanced elsewhere. Opponents of execution thought the practice was barbarous and contrary to principles of reformative justice. For others, true justice demanded retribution measured by the standard of "an eye for an eye." Fears that the penalty might be imposed on innocent persons met the rebuttal that failure to exact death where evidence of guilt was strong would invite mob action and scorn for the law.[56] The debates changed few minds. Like the rest of the nation Indiana had drastically reduced the number of capital crimes and had softened penal laws even more by giving courts and juries discretion to impose life imprisonment rather than death.[57] This action may have induced self-satisfaction, as it did in other states, and hence made further reform more difficult.[58]

There was noticeable slippage in reform sentiment after the 1840s. A proposal at the constitutional convention in 1851 to abolish the death penalty except for willful and deliberate murder suffered defeat by a large margin.[59] During the session of the General Assembly following the convention, legislators passed a bill decreeing private executions, but a majority of the lawmakers left no doubt that they favored capital punishment.[60] A substantial number of representatives even wanted to extend the penalty to additional crimes. Nowhere was this better illustrated than in the defeat, by a margin of thirty-four to forty-four, of a bill to execute any man convicted of seducing an unmarried female of good reputation.[61]

The failure of reformers to capitalize on earlier efforts to change the prison structure or to abolish capital punishment testifies to the legislature's reluctance to go further in satisfying the constitutional goal of reformation in its penal policies. At a minimum, the refusal to abolish capital punishment implies that the state conceded the impossibility of reforming all offenders. Here Indiana was no different than most antebellum states.

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[55] David Brion Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," *American Historical Review*, LXIII (October, 1957), 42.

[56] Indianapolis *Indiana Journal*, January 30, 1843, January 3, 1846.

[57] Indiana, *General Laws* (1845-1846), 40. By the time this law was passed only treason and first-degree murder were capital crimes.

[58] Davis, "Movement to Abolish Capital Punishment," 28.

[59] *Convention Debates*, II, 1390, 1640.

[60] Indiana, *Revised Statutes* (1852), II, 379.

[61] Indiana, *House Journal* (1851-1852), II, 1133.

Hoosiers evidently believed that the special deterrent of death was necessary to protect society from particularly depraved individuals, even if the penalty embodied a major principle of retributive justice.

The limits of antebellum reform can also be seen in the several revisions of the criminal law, revisions which sharply increased the number of possible offenses and the severity of punishment. The state's first code defined fifty-nine crimes; by 1852 this number had doubled to 120. Misdemeanors represented the largest part of this increase, rising from twenty-five in 1816 to almost eighty by the Civil War. Felonies grew at a somewhat lesser pace.[62] The creation of new crimes was significant. It signaled a departure from an earlier belief that the goal of freedom justified few restrictions on human conduct. This retreat bothered at least one Indiana jurist who, in 1858, cautioned legislators: "Where there is no law, there is not transgression. Where there are many laws, there is much. Hence, criminal laws should not be unnecessarily multiplied."[63]

Not surprisingly, most of the expansion of the criminal code occurred in the two decades preceding the Civil War. By the late 1830s much of Indiana was no longer a frontier state. It was experiencing a rapid economic growth and widespread demographic change marked by incipient urbanization and an influx of new immigrant groups, especially Germans and Irish. Social unrest, including small-scale riots, accompanied these developments.[64] It is small wonder that lawmakers with roots in an earlier, more simple Indiana saw in the criminal law a way to protect a traditional economic and social order.

In large measure the addition of new crimes and stiffer punishments represented an attempt to keep pace with an infinitely more complex economy. Nowhere was this tendency more pronounced than in the multiplication of crimes against property. These statutes were obviously a response to a commercial development that made new and different demands on the law as the forms of property and the means to endanger them became more numerous. In the first codes, for example, counterfeiting was defined simply and punished lightly. By the 1850s the law detailed

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[62] Indiana, *Revised Laws* (1823-1824), 139-53; Indiana, *Revised Statutes* (1852), II, 388-424. Felonies rose from twenty in 1824 to forty-three in 1852.

[63] Samuel E. Perkins, *Pleading and Practice, Under the Code of 1852, in Civil and Criminal Actions, in the Courts of Indiana; with References to the Latest Statutory Amendments and Judicial Decisions* (Indianapolis, 1859), 21.

[64] See David J. Bodenhamer, "Crime and Criminal Justice in Antebellum Indiana: Marion County as a Case Study" (Ph.D. dissertation, Department of History, Indiana University, 1977).

five separate acts of counterfeiting and prescribed severe punishments for each of them.[65]

The increased emphasis on economic crime in late antebellum Indiana corresponded to legal developments in other states. Criminal law was moving from its late eighteenth-century concern with moral order to an emphasis in the Jacksonian Era on the protection of private property.[66] This is not to say that punishment of immorality became unimportant. Indiana's experience suggests that an opposite conclusion is more nearly correct. The number of moral-order crimes advanced steadily throughout the period, with a similar inflation occurring in the penalties applied to these misdeeds.[67]

Laws against miscegenation—a gross immorality to most antebellum Hoosiers—offer a spectacular example of this expansion of moral-order crimes. In 1818 the penalties for miscegenation were mild, with a fine of one hundred dollars if the white offender was male and ten days in jail if the guilty white was female. Twenty years later punishment included a fine of from one thousand to five thousand dollars and a prison term of ten to twenty years.[68] In sexual misdeeds where race was not a factor, there were similar, though less harsh, developments. Confinement of up to ten years replaced a maximum one thousand dollar fine for incest. By the mid-1840s seduction had undergone a dramatic metamorphosis from tort to felony.[69] Of course, not all sexual misconduct was liable for such severe punishment. Open and notorious adultery and fornication, for instance, remained mildly punishable misdemeanors, even though the early 1850s witnessed a serious, if unsuccessful, effort to make them punishable by prison terms.[70]

Not all moral-order crimes involved copulative sins, nor were sexual crimes the most controversial. Hoosier lawmakers also devoted considerable energy to regulating gambling and liquor, with new laws and stiffer penalties accompanying each revision of the criminal code. Scholars have adequately chronicled the

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[65] Indiana, *Revised Statutes*, II, 416-17.

[66] See William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass., 1975), 109-14, 117, 120-21.

[67] The earliest criminal code defined eleven crimes against public morality; by 1843 there were twenty-six such crimes. See Indiana, *Laws* (1817-1818), 88, 92, 96; Indiana, *Revised Laws* (1842-1843), 962.

[68] Indiana, *Laws* (1817-1818), 94; Indiana, *General Laws* (1839-1840), 32-33.

[69] Indiana, *Laws* (1817-1818), 95; Indiana, *General Laws* (1846-1847), 120.

[70] See the report of the debate in Indianapolis *Daily Indiana State Journal*, March 3, 1852.

persistent attempts to prohibit consumption of liquor in Indiana and elsewhere, but strictures against gambling have remained unstudied.[71] This is ironic because more than one-seventh, or nine of fifty-nine, of the substantive sections of the state's first criminal code dealt with this problem. Various statutes made gaming contracts illegal and fined persons convicted of gaming, keeping gaming equipment, permitting gaming in their house, or bringing cards into the state. Several sections required that the accused post a recognizance that was forfeited if a second conviction for the same offense occurred within twelve months.[72] An unusual preamble to this early act explained the reason for concern: gambling was "often attended with quarrels, disputes and controversies, to the improverishment of many people and their families, and the ruin of the health and corruption of the manners of youth."[73]

The moral tone of Indiana law suggests a modification of the notion that antebellum legislatures paid diminishing attention to crimes against morality. Crime as theft may have replaced crime as sin at the heart of criminal law, but it is evident that the latter offenses still concerned Hoosier lawmakers. This does not mean that these laws represented a consensus on moral values. Pressure to establish legal norms is often greatest where consensus is least attainable.[74] The renewed scrutiny of immorality coincided with the arrival of German and Irish immigrants, groups which many original settlers considered incapable of meeting their standards of sobriety and industriousness.[75] The expansion of the list of punishable sins, therefore, was partly an attempt to protect native, middle-class values against a perceived challenge by newly arrived immigrant groups.

The development of the criminal law suggests that by the late 1840s and 1850s the model of reformative justice envisioned in Indiana's constitutions was, at best, a curious mixture of reformation and retribution that symbolized the ambivalence of Hoosiers about the social purpose of punishment. Many believed

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[71] For liquor regulation in Indiana, see Thornbrough, *Indiana in the Civil War Era*, 28-35, 57-69; Logan Esarey, *History of Indiana from Its Exploration to 1922* (3 vols., Indianapolis, 1922-1923), II, 613-19.

[72] Indiana, *Laws* (1817-1818), 89-92.

[73] *Ibid.*, 89.

[74] Joseph R. Gusfield, "Moral Passage: The Symbolic Process in Public Designations of Deviance," *Social Problems*, XV (Fall, 1967), 188.

[75] For an account of one Indiana county's attempt to use criminal law to enforce morality, see David J. Bodenhamer, "Law and Disorder on the Early Frontier: Marion County, Indiana, 1823-1850," *Western Historical Quarterly*, X (July, 1979), 323-36.

that criminals were capable of rejoining the community upon the receipt of proper and humane instruction. Yet crime threatened the good order of society, so punishment had to be sufficiently stringent to discourage recidivism and to inhibit others from criminal activity. A delegate to the midcentury constitutional convention summed up the dual function of Indiana's criminal law when he rhetorically asked: "Sir, what is the object of all punishment? It is two-fold: the prevention of crime and the reformation of the offender."[76] At times these goals were in conflict, and the ambivalence about which was dominant made the course of reform uncertain. When new institutions or milder laws appeared incapable of effecting any large measure of stability, there was a shift away from reform and toward a reliance upon more stringent punishment to ensure order. Perhaps more than anything else, the law of crime and punishment in antebellum Indiana represented the hesitant, fearful, often contradictory, and sometimes symbolic response of lawmakers uncertain of the consequences of rapid social and economic transformation.

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[76] *Convention Debates*, II, 1903. An earlier visitor to the state prison also reflected this belief. He noted that "the penitentiary deprives them [criminals] of the opportunity of annoying the community whilst the punishment deters others." "Report of State Visitor," reprinted in Indianapolis *Indiana Journal*, February 3, 1835.