

## FOUNDATIONS ONCE DESTROYED: THE CATHOLIC CHURCH AND CRIMINAL JUSTICE

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*[On several occasions in recent years, the Catholic bishops of the United States have sought to present the Catholic position in matters pertaining to crime and punishment. While in many ways laudable, these statements pay insufficient attention to important historical and conceptual foundations of criminal justice in the Catholic tradition and reflect an inadequate understanding of current trends in present-day correctional policy.]*

**M**Y TASK HERE IS TWOFOLD. First, I present, by means of historical analysis, an understanding of the principal components of the Catholic position on criminal justice including the justification for the punishment of offenders, the end that punishment seeks to achieve, and the means to attain that end.<sup>1</sup> Secondly, I offer a critique of the way that the tradition is currently being presented especially by the Catholic Church in the United States.<sup>2</sup> After discussing the three principal elements in punishment theory—justification, ends, and means—my historical section places special emphasis on the practical methods that the Church devel-

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<sup>1</sup> As religious influence upon the penal system began to wane toward the end of the 19th century, partly due to the rise of the social sciences, criminology as a sub-discipline of sociology began to emerge. "Criminology" and "criminal justice" initially were largely synonymous terms comprising those scholars whose analytical studies were instrumental in shaping penal policy. Criminal justice now also expresses the entire field of strategies and practices relating to crime. It thus carries with it all of the ambiguity associated with those same strategies and practices. Despite the incongruity of the term to some, it has been used consistently by Catholic Church officials in their writing on this subject.

<sup>2</sup> The principal focus on the American Church is due to its laudable attempts to provide a Catholic response to crime and criminal justice. There have been no comprehensive attempts by the Vatican since Pius XII to present an overall Catholic position. The perspective of Pius XII was, in my opinion, extraordinary and is employed in part in order to critique the position of the American Church.

oped to implement its theory, namely, the novel reinvention of the prison as a disciplinary apparatus expressive of the desire to chastise its errant members, to provide the means for their betterment, and to reintegrate them into the social body.<sup>3</sup> The critical section of my article addresses what I perceive to be some interpretive problems in recent official documents regarding certain key concepts and normative principles, both within the tradition and in the contemporary correctional project.

I use the word “critique” to define my second task with some hesitation. I say this because the attempt by the U. S. Church to say *something* about the chaotic and destructive tendencies in current crime control strategies is itself commendable, if not always sufficiently informed about the beast it is attempting to tame. In addition, the historical and theoretical corpus is immense and requires a hermeneutic in order to be presented in a methodologically consistent manner. There is need for a process of classification and interpretation over which some disagreement is inevitable.

I guide my own analysis with the insight that the response to crime and the treatment of the criminal in each age are, at the deepest level, driven by metaphors or social portraits of the offender.<sup>4</sup> Those who critique the particular way a prisoner is “captured” are influenced by their own historical context. Therefore, the analytical undertaking of deciphering the substance of Catholic thinking on criminal justice is accompanied by a rhetorical one, essentially arguing that what should be drawn from the deep well of Catholic practice are those commitments, those particular interpretations of normative beliefs that are consistent with images of Christ as prisoner, with the Church as stern but loving parent, and with liberation. These images dictate how the data is worked because, frankly, there is much in Catholic practice, rhetoric aside, that is not worth recovering. There have been startling, brilliant developments that should be defended, and other innovations, practices in service to the images of lesser gods, that ought to be left in their historical tomb.

My dissatisfaction with contemporary Catholic analysis is not that the

<sup>3</sup> What is “novel” about the Catholic approach is that it gave new meaning to a social construct whose anterior significance was either simply to detain those awaiting trial or execution of sentence, to obtain debt or procure ransom, or as a means of punishment in itself, as when prisoners were left in dungeons or cells until death. See Jean Dunbabin, *Captivity and Imprisonment in Medieval Europe* (Houndmills: Palgrave MacMillan, 2002) 2–3; Norman Johnston, *Forms of Constraint: A History of Prison Architecture* (Urbana: University of Illinois, 2000) 1; Edward M. Peters, “Prison Before The Prison,” in *The Oxford History of the Prison*, ed. Norval Morris and David Rothman (New York: Oxford University, 1995) 3–47.

<sup>4</sup> See David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago, 1990) chap. 9; Richard Quinney, *The Social Reality of Crime* (Boston: Little, Brown, 1970) 15–25.

image of Christ as prisoner, or the goal of liberation are ignored, but that the images of prison and prisoner in ecclesial documents have been depicted, in part, from an improper perspective of the historical and penal landscape. Thus the rich conceptual treasury of Catholic social ethics has been mistakenly applied, in critical areas of practical implementation. Furthermore, the survey of historical and current data leads me to argue that Christ the prisoner, and the longed-for liberation of those imprisoned, are to a significant degree incongruous without sustaining the very concept of the prison. This assumption necessarily leaves my own interpretation open to a critique as well, one that will be welcomed in the attempt to reformulate a more historically and sociologically accurate Catholic theology relating to crime and criminal justice.

### RENEWED INTEREST IN PRISONS AND PRISONERS

The leaders of the Catholic Church, and especially the U.S. bishops, have recently been more and more involved in issues connected with crime and punishment. Their declarations have not always been able to keep up with fast developing insights.<sup>5</sup> Among the numerous papal addresses in the Holy Year 2000, with its theme of jubilee, was a message on July 9th of that year, declaring it a day of “Jubilee in Prisons.” The pope stated that it was “unthinkable” that so hopeful a message would not apply to the incarcerated who resemble those in the closed doors of the “Upper Room” to whom Christ appeared bringing “peace and serenity.”<sup>6</sup>

The concern of the Vatican was not ignored by the bishops of the United States who used the July pronouncement as an occasion to follow their earlier (1973) statement on the condition of the American correctional system with a renewed call for reform.<sup>7</sup> The bishops have been acutely

<sup>5</sup> For example, in the Catechism published in 1995, the Church introduced a profound change in its official teaching in regard to the death penalty, stating that, while still permissible “in cases of extreme gravity,” in virtually all other instances, “bloodless means” are available and sufficient for the protection of the public order. However, in his 1998 Christmas message, and in his subsequent visit to the United States, John Paul II called for an outright consensus to end the death penalty which he called “cruel and unnecessary.” See *Catechism of the Catholic Church* (New York: Doubleday, 1995) nos. 2266, 2267; John Paul II, “Homily in the Trans World Dome,” *Origins* 28 (February 11, 1999) 599–601, at 600–1; James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (New York: Paulist, 1997) 1.

<sup>6</sup> John Paul II, “Message of His Holiness John Paul II for the Jubilee in Prisons” (Vatican City: Libreria Editrice Vaticana, 2000) 3.

<sup>7</sup> Catholic Bishops of the United States, “Rebuilding Human Lives,” *Origins* 3 (November 22, 1973) 344–50; *Responsibility, Rehabilitation, and Restoration* (Washington: United States Catholic Conference, 2000).

aware of issues pertaining to crime and the social policies established to address crime for some time. They have published several important calls to halt use of the death penalty; and numerous state conferences of bishops have also presented statements on specific topics in this arena within their own jurisdictions.<sup>8</sup>

In general, the declarations are marked by pastoral sensitivity, an accurate interpretation of the Catholic justification and goal of criminal justice, and deploy many of the foundational concepts of the Church's social tradition (e.g., sanctity of life, common good, option for the poor), most of them emanating from the natural law which Pius XII, in his own writings on penal concerns, referred to as "the dead point" of the moral pendulum.<sup>9</sup> Among the valuable pastoral insights regularly underscored are the call for acceptance of the released offender,<sup>10</sup> an end to the cycle of violence,<sup>11</sup> the alarming preponderance of the poor in detention facilities,<sup>12</sup> and support for a united effort to confront the issue of crime involving multiple sectors of the society.<sup>13</sup>

### Theological Foundations of a Catholic Theory of Criminal Justice

The Catholic Church has understood the problem of crime primarily as a moral issue that emanates from an improper rendering of love and obedience to God.<sup>14</sup> This tendency is viewed as particularly acute in the United States where a "culture of death," to employ an image of John Paul II, has

<sup>8</sup> On the death penalty, see "Statement on Capital Punishment," *Origins* 10 (November 27, 1980) 373–77; "Renewing Our Call To End The Death Penalty," in *Responsibility, Rehabilitation, and Restoration* 32–35. Local responses on criminal justice are numerous. See, e.g., Louisiana Bishops' Conference, "Capital Punishment: Plunging into a Culture of Violence," *Origins* 24 (June 23, 1994) 95–96; New Mexico Bishops Conference, "An Opportune Time to Review the Correctional System," *Origins* 26 (February 27, 1997) 585–88.

<sup>9</sup> Pius XII, "International Penal Law," *Catholic Mind* 52 (1954) 107–18, at 115.

<sup>10</sup> See "Rebuilding Human Lives" 348; United States Catholic Conference (USCC), "A Community Response to Crime," *Origins* 7 (March 9, 1978) 593–604, at 598; Pius XII, "Crime and Punishment," *Catholic Mind* 53 (1955) 364–84, at 384; Paul VI, "Juridical Efforts for Human Progress," *The Pope Speaks* 14 (1969) 371–74, at 371.

<sup>11</sup> National Conference of Catholic Bishops, "Statement on Capital Punishment" 375.

<sup>12</sup> Catholic Bishops of the United States, *Responsibility, Rehabilitation, and Restoration* 8–10.

<sup>13</sup> USCC, "A Community Response to Crime" 595; *Responsibility, Rehabilitation, and Restoration* 50–53.

<sup>14</sup> Thomas Aquinas, *Summa theologiae* (ST), trans. Dominicans of the English Speaking Provinces (London: Blackfriars, 1963) 2–2, q. 57, a. 1; Pius XII, "Crime and Punishment" 364; Catholic Bishops of the United States, "Rebuilding Human Lives" 344.

led to “the denial of right and wrong, education that ignores fundamental values, an abandonment of personal responsibility, an excessive focus on our individual desires, a diminishing sense of obligation, and a misplaced emphasis on acquiring wealth and possessions.”<sup>15</sup> These remarks bring into focus the first fundamental question that any legal system, however constituted, must confront: the question of justification for punishment. The Catholic belief in retributive justice traces initially to the Bible wherein God punishes evil and rewards those who are good (Psalm 58:10–11; Exodus 23:7, Obadiah 1:5; Isaiah 13:11; Job 36:17; Matthew 25:31–46; Romans 2:8).<sup>16</sup> Furthermore, the Church has based its teaching on three interconnected theological concepts: order, justice, and atonement.

Order is deeply embedded in the Catholic understanding of both God and society. Its importance is underscored in Scripture and in the role that *ordo* played in Roman society, where different classes were organized hierarchically around particular social functions with clearly established regulatory guidelines.<sup>17</sup> Walter Ullmann has argued that the translation of the Bible into Latin served to inculcate into generations of Christians the fundamental concepts of Roman political and legal theory, among them the primary significance of order. He writes that “Roman law was so to speak transmitted under cover of the Bible.”<sup>18</sup>

Both Augustine and Aquinas placed order at the very root of the social project. In *The City of God* Augustine argued that the origin of the state was a fratricide,<sup>19</sup> the murder of Abel by Cain, and that the basic political requirement is the restraint of the human tendency to evil and the establishment of a relative peace. All are to obey the laws of the earthly city since the “mortal condition” of seeking peace is shared by all: “nothing is desired with greater longing, in fact, nothing better can be found.”<sup>20</sup> Justice

<sup>15</sup> Catholic Bishops of the United States, *Responsibility, Rehabilitation, and Restoration* 30.

<sup>16</sup> See Chana Kasachhko Poupko, “The Religious Basis of the Retributive Approach to Punishment,” *The Thomist* 39 (1975) 528–41.

<sup>17</sup> Concerning order in the Bible, see Roland de Vaux, *Ancient Israel: Its Life and Institutions*, trans. John McHugh (New York: McGraw-Hill, 1961) 149–50. On the role of order in Roman society, see Joseph A. Favazza, *The Order of Penitents: Historical Roots and Pastoral Future* (Collegeville: Liturgical, 1988) 234.

<sup>18</sup> Walter Ullmann, *Law and Politics in the Middle Ages* (Ithaca, N.Y.: Cornell University, 1975) 42–48, esp. 45. Timothy Gorringer argues in similar fashion in *God's Just Vengeance: Crime, Violence and the Rhetoric of Salvation* (New York: Cambridge University, 1996) 224.

<sup>19</sup> Augustine, *The City of God*, trans. Henry Bettenson (Harmondsworth: Penguin, 1984) Book XV, chaps. 1, 5.

<sup>20</sup> *Ibid.*, Book XIX, chaps. 11, 17.

for Augustine is thus largely understood in a retributive sense, reflecting a practical, utilitarian meaning rather than an abstract philosophical one. Civil life is contingent upon whatever level of peace is possible within the earthly city. Justice is reduced to minimizing violent interchange among citizens and punishing those who threaten the fragile social harmony: "For this reason, the commandment forbidding killing was not broken by those . . . who have imposed the death penalty on crimes when representing the authority of the State in accordance with the laws of the State, the justest and most reasonable source of power."<sup>21</sup>

If Augustine collapsed justice and order into a single demand of obedience, and provided a legitimation of retributive justice for the sake of earthly peace, Aquinas presented the two concepts in a dialectical tension. Justice is the cardinal virtue that embraces and directs the conduct of humans toward one another and to God in accord with the rational dictates of the natural law.<sup>22</sup> The duty of the sovereign to preserve the common good, so necessary to the full knowledge of that justice and its complementary virtues, demands that crimes be punished, sometimes severely.<sup>23</sup> For Aquinas, however, the punishment is "medicinal." Despite a clear retributive component for the sake of "order," he proceeded from an anthropology that allows for the virtues to be instilled even in the disobedient.<sup>24</sup> The two values can come into tension as in the case of a threat to order for the cause of justice, as when subjects defy a ruler who enacts legislation that is not consonant with the natural law. While Aquinas reserved the right of the populace to resist such deformations of law in theory, his own commitment to order was so profound that he urged citizens to accept a degree of injustice in cases where the pursuit of that good would have severe repercussions for social peace.<sup>25</sup> He stated: "the welfare and safety of a multitude formed into a society is the preservation of its unity, which is called peace, and which if taken away, the benefit of social life is lost."<sup>26</sup>

Despite their differences, both Augustine and Aquinas lend decisive foundational support to the Catholic justification for punishment: the violation of the responsibility owed to one another, to the social peace, and to God. This right is affirmed consistently across the spectrum of history. The

<sup>21</sup> *Ibid.*, Book I, chap. 21.

<sup>22</sup> *ST* 2-2, q. 57, a. 1; 2-2, q. 79, a. 1.

<sup>23</sup> *ST* 2-2, q. 64, a. 3; *On the Governance of Rulers*, trans. Gerald B. Phelan (New York: Sheed & Ward, 1938) Book I, chap. 15.

<sup>24</sup> *ST* 2-2, q. 66, a. 6.

<sup>25</sup> *ST* 1-2, q. 96, a. 4; *On the Governance of Rulers* Bk. I, chap. 6; see also, Gratian, "Decretum Gratiani" in *Corpus Iuris Canonici* (1616) C. 11, q. 3, c. 72.

<sup>26</sup> *On the Governance of Rulers* Bk. I, chap. 2.

bishops of the United States have written that it is “morally unsatisfactory and socially destructive for criminals to go unpunished.”<sup>27</sup>

The third vital concept in stabilizing a justification for punishment in Catholic theory and practice is Anselm’s doctrine of the atonement. It would be difficult to overestimate the impact of this theological rendering of the merits of the Passion of Christ, as well as its moral implications for the individual sinner.<sup>28</sup> Anselm’s formulation is echoed in virtually all attempts to summarize not only why punishment is required for the offender, but the doctrine has also provided the Church with a rational explanation for the interplay between divine justice and mercy. This was of particular consequence for the eleventh-century audience for whom Anselm wrote, as confession was becoming a more established practice within the structure of ecclesiastical rituals. The Catholic Church, after centuries of dispute over the meaning of penance and the frequency with which it could be experienced, was still lacking a coherent explanation as to why sin that is forgiven through the suffering of Christ requires further expiation. The atonement doctrine was the principal means by which this question was answered.<sup>29</sup>

Briefly, Anselm argued that the primal sin was one of willful disobedience against the honor due to God, an honor that is summoned from the creature as it is beheld in the order and beauty of the universe that God created.<sup>30</sup> The gravity of this transgression, essentially rejecting God and entering into an alliance with the devil, is one of cosmic magnitude and significance: “Man, created in paradise without sin, . . . permitted himself to

<sup>27</sup> “Statement on Capital Punishment” (1980) 375; see also Peter Abelard, *Peter Abelard’s Ethics*, trans. D. E. Luscombe (Oxford: Clarendon, 1971) 43; Paul VI, “Juridical Efforts for Human Progress” 373; Pius XII, “International Penal Law” 118; *Catechism of the Catholic Church* no. 2266.

<sup>28</sup> Timothy Gorrige believes that Anselm’s doctrine “provided one of the subtlest and most profound . . . justifications” for the development of the theory of retributive punishment (*God’s Just Vengeance* 12). See also Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University, 1983) 179–81.

<sup>29</sup> A “latent function” of the doctrine was also to help end the centuries-old practice of the ordeal. Clerics were the primary agents seeking to replace the ordeal which, they argued, not only lacked scriptural foundation but which also “tempted God.” Instead, they sought to elevate the importance of the private relationship between priest and penitent in the confessional. See Robert Bartlett, *Trial By Fire And Water: The Medieval Juridical Ordeal* (New York: Oxford University, 1986) 79–81.

<sup>30</sup> Anselm of Canterbury, *Why God Became Man*, trans. Joseph M. Colleran (Albany: Magi, 1969) Bk. I, chap 15; Peter Abelard, *Ethics* 89; Pius XII, “Crime and Punishment” 366.

be overcome, by urging alone, in accordance with the will of the devil and against the will and honor of God.”<sup>31</sup>

God’s honor, and the damage done to the order of creation, cannot be restored by a simple act of repayment; “merely to return what was taken away” would be insufficient, because humans must give back more than was taken: the rebellious act must also be accounted for.<sup>32</sup> Since humans committed the sin, they are required to make amends. Yet no one save God could ever hope to relieve such a debt. Thus God becomes human because only one who is both human and divine could pay so vast a sum.<sup>33</sup>

Anselm maintained that the sacrifice of Christ accomplished the necessary balancing of accounts for the damage done by the primal or original sin. This however does not free human beings from making satisfaction for actual sins committed against one another and against the order that God intended to reign in creation. Anselm stated: “Let us go back and see whether it is fitting for God to remit sin out of mercy alone . . . . To remit sin in such a way is the same as not to punish it. And since to deal justly with sin . . . is the same as to punish it, then, if it is not punished, something inordinate is allowed to pass.”<sup>34</sup> In this way Anselm is able to account for God’s mercy and justice, why sin is forgiven and yet why it must be punished: “Truly, if You are merciful because You are supremely good, and if You are supremely good only in so far as You are supremely just, truly then You are merciful precisely because You are supremely just.”<sup>35</sup>

Echoes of Anselm’s theory are heard still in Catholic justifications for the need to restore the balance in the order of creation through just punishment.<sup>36</sup> With a consistent set of concepts to justify retributive chastisement of those who sin, we now look to the meaning of the punishment process to understand what it is meant to accomplish beyond simple retribution.

The historical teaching is also remarkably consistent: the rehabilitation of the offender and his or her eventual reincorporation into the ecclesial and social body is the goal of punishment. Much of the rehabilitative emphasis can be traced to the parallels within the tradition between the treatment of criminals and that of sinners. In fact, the two terms, crime and sin, were virtually interchangeable throughout much of the first millennium.<sup>37</sup> Welcoming repentant sinners suggests the welcoming of repentant criminals. Augustine stated that punishment is “for the benefit of the of-

<sup>31</sup> *Why God Became Man* I.22.

<sup>32</sup> *Ibid.* I.11.

<sup>33</sup> *Ibid.* II.6.

<sup>34</sup> *Ibid.* I.12.

<sup>35</sup> Anselm, *Proslogion*, trans. M. J. Charlesworth (Oxford: Clarendon, 1965) Chap. IX.

<sup>36</sup> Pius XII, “Prisoners, Punishment, and Pardon,” *The Pope Speaks* 4 (1957) 167–76, at 171; “Crime and Punishment” 366; *Catechism of the Catholic Church* no. 2266.

<sup>37</sup> See Harold Berman, *Law and Revolution* 185–86.

fender, intended to readjust him to the domestic peace from which he has broken away.”<sup>38</sup> Pius XII echoed Aquinas in affirming that punishment must be both curative and vindictive, not only a reflection of “strict law and justice, but also equity, goodness and mercy.”<sup>39</sup> Recent statements of the Catholic bishops provide a complementary rationale.<sup>40</sup>

Questions of punishment and restoration suggest the third element in penal theory: the practical means with which to accomplish the desired end. In the Catholic tradition this has been a solution rooted in the mystery of ritual and prayer, and the moral power that they yield. Specifically, the means of mending errant hearts and effecting reconciliation is initially located in the penitential discipline of the early Church. This richly symbolic practice evolved naturally and rapidly into the widespread use of imprisonment, first within monasteries, later throughout the entire Church. It is precisely in this area that there is notable ambiguity in current attempts to portray the Catholic tradition.

### THE CHURCH AND THE PRISON

I now focus on the two areas of concern that I find in some contemporary attempts to portray the position of the Catholic Church regarding criminal justice. The first relates to the prison itself. My contention is that the principal vehicle for connecting the Church’s belief in the legitimacy of punishment with its desired end of reconciliation has been the prison, and that the predominant image of Christ as prisoner has shaped the unique and significant insights and practices that the Church has developed in its perspective on the correctional project. I present some historical data to support this hypothesis, and then I offer some contemporary evidence to show that this historical “foundation” has been forgotten or misinterpreted.

The second area of concern involves an analysis of the state of contemporary penal policy. I argue that there have been significant misconceptions in the way current correctional directives are understood in American ecclesial documents. This has led to inaccurate depictions of the crime control field and a consequent disregard for the Church’s own foundational belief regarding the most beneficial form of criminal justice: the isolation and conversion of the prisoner.

#### Developing a Catholic Form of Punishment

In an address to Italian jurists, Pius XII stated: “There, amid the shadows of silent prison cells, agonizing interior dramas are unfolding, and only the

<sup>38</sup> Augustine, *City of God*, Bk. XIX, chap. 16.

<sup>39</sup> Pius XII, “Crime and Punishment” 381; Thomas Aquinas, *ST* 2–2, q. 66, a. 6.

<sup>40</sup> “Rebuilding Human Lives” 346; *Responsibility, Rehabilitation, and Restoration* 39–41.

Christian light of resignation and trust, supported by the warmth of charity, can change them into a process of serene redemption.” He then urged his audience to recognize that inmates belong to society and to the Church and must be treated with the love of a mother “who never grows tired of giving herself.”<sup>41</sup>

These words present, of course, a parental image. They also are reminiscent of the ancient belief that Christ himself is the one who is imprisoned. This evocative metaphor traces to the New Testament where the incarcerated disciples (members of the “body of Christ”) are visited by angels and by Jesus himself (Acts 5:18–20; 12:6–9; 23:11), and where, in a paraphrase, Christ says at the Last Judgment, “if you visited the prisoner, you visited me” (Matthew 25:39–41). This Christology has been attested to in the early Church, in the various *caritas* movements in the Middle Ages, in the development of religious orders for the ransom of prisoners, and in contemporary Catholic social thought.<sup>42</sup>

The question that inevitably arises from this theological stance concerns how one should treat those who have fallen into error and sin, those with whom Christ identifies and is identified. This question remains in the foreground as I survey the development of the prison as the locus of punishment and conversion in Catholic thought and practice.

Early Christians wrestled with the dilemma of a redeemed people who still found themselves victims of their own sinful desires. This fall from innocence appears to have been a scandal that threatened the initial coherence of the community as it beheld its members violating the New Testament code of conduct which marked them as distinctive in the surrounding pagan world.<sup>43</sup> However, despite the clear dichotomy that the first Christians hoped to create between the life of the disciple and that of the “world,” evidence suggests, once again following the moral tenor of the New Testament, that the Church interpreted its divine mandate as providing the power to forgive any sin.<sup>44</sup>

Central to this moral perspective was the interpretation of the biblical

<sup>41</sup> Pius XII, “Prisoners, Punishment, and Pardon” 167, 172–74.

<sup>42</sup> See James William Broadman, *Ransoming Captives in Crusader Spain: The Order of Merced on the Christian-Islamic Frontier* (Philadelphia: University of Pennsylvania, 1986); U.S. Catholic Bishops, *Responsibility, Rehabilitation, and Resoration* 18. Lay confraternities to aid prisoners are discussed in Samuel Edgerton, *Pictures and Punishment* (Ithaca, N.Y.: Cornell University, 1985) 178–88. For a contemporary theological interpretation of Christ as prisoner, see Mark Lewis Taylor, *The Executed God* (Minneapolis: Fortress, 2001).

<sup>43</sup> See, e.g., 1 Corinthians 5; see also Wayne A. Meeks, *The Origins of Christian Morality: The First Two Centuries* (New Haven: Yale University, 1993) 18–36.

<sup>44</sup> Joseph Favazza writes: “Certainly, there are passages in the New Testament where sin appears irremissible: Mt 12:31–32; Mk 3:28–29; Lk. 12:10; Heb 6:4–6 . . . . While such texts may reveal intolerant elements in the primitive Church, the primary stress is to induce a Christological decision: The measure to which one accepts

texts on “binding and loosing” (Matthew 16:19; John 20:22–23), passages that have cast a long shadow in the development of Catholic penal thought. Power was given by Jesus to the Twelve Apostles to chasten and, if need be, to exclude from the eucharistic assembly anyone whose comportment was scandalous, especially when a member proved obstinate in wrongdoing. In the Gospel of Matthew (18:15–17), the community is directed to confront those who do evil and, if unsuccessful in convincing them to repent and seek reform, to shun them as they would “a gentile or tax collector.” This does not seem to be a repudiation of the willingness to forgive, but a reminder to the wayward that they must admit their fault, do penance, and seek to be reconciled to a community that desires their reincorporation.<sup>45</sup>

These practices which Wayne Meeks refers to as “sobering piece[s] of didactic theater,” were to be ritualized in a manner that prefigured the Western judicial and penal system.<sup>46</sup> Among the early Christians, penitents were recognized as a discrete group within the social structure of the Church. As members of the “body” in an organic sense, their disciplinary suspension was not accompanied by the stigma that attaches to the criminal class in our own day. On the contrary, the ritual whereby they were enrolled in the *ordo paenitentium* paralleled the clerical rite of ordination, involving oration, exhortation, and the imposition of hands. Members of the community were then enjoined to pray for the penitents and to maintain an engaged vigilance over their ascetic regimen.<sup>47</sup>

The meaning and shape of the monastic prison, and by extension our own contemporary prison, gained much from these early practices. Those undergoing penal correction were not only assigned to a geographic locale. They were also frequently clad in a special penitential clothing known as the *cilicium*.<sup>48</sup> One finds a class of excluded offenders, under communal supervision, in an assigned place, for a period of time, and bearing, as did scriptural penitents in sackcloth, a special corporeal symbol.

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or rejects Christ is the measure one shares in the salvation he offers. . . . The overwhelming evidence . . . confirms the willingness of the Church to offer the possibility of penance and reconciliation to all sinners” (*The Order of Penitents* 70–71). See also Karl Rahner, *Theological Investigations*, vol 15: *Penance in the Early Church*, trans. Lionel Swain (New York: Crossroad, 1982) 5–6.

<sup>45</sup> See Favazza, *The Order of Penitents* 74; Bernard Poschmann, *Penance and the Anointing of the Sick*, trans. Francis Courtney (New York: Herder & Herder, 1964) 146; Rahner, *Penance in the Early Church* 7.

<sup>46</sup> Meeks, *The Origins of Christian Morality* 69. Cyprian was intent on devising a method similar to the one mentioned in dealing with the problem of those who abandoned the faith during the Decian persecution. See *The Lapsed*, trans. Maurice Bévenot (Westminster, Md.: Newman, 1957) chap. 16.

<sup>47</sup> Poschmann, *Penance and the Anointing of the Sick* 86–87.

<sup>48</sup> *Ibid.* 88.

This ritual of “binding” through imposition of hands and wearing a symbolic garment was given legitimation in conciliar decrees.<sup>49</sup> At the same time, two other concepts that became part of the lexicon of present-day criminal jurisprudence originated in these early rites: a classification of offenders according to gravity of crime and the indeterminate sentence. Those undergoing penance were organized generally into four groups, each tailored to the gravity of the offense and to the level of culpability of the delinquent.<sup>50</sup>

The amount of time thought to be necessary for the accomplishment of reparation for sin and metanoia was determined by clerical authority. At the Council of Nicaea, for example, it was decreed that those whose apostasy during the tyranny of Emperor Licinius was not mitigated by physical or material threat, and who subsequently sought readmission to the Church, were to be “dealt with mercifully.” For those who previously had been communicants, Nicaea decreed that they “pass three years among the hearers; for seven years they shall be prostrators; and for two years they shall communicate with the people in prayers, but without oblation.”<sup>51</sup> This fitting of the sentence to the specific circumstances of the crime was common in disciplinary rulings and was to be a hallmark of the “penitentials,” developed by Celtic monks in the sixth century to aid clerics in determining the specific disciplinary burden appropriate for wrongdoers.<sup>52</sup>

In contrast to these early penal rituals, the ancient forms of blood feud still influenced legal and moral views of crime and its redress in the Medi-

<sup>49</sup> “Poenitentes tempore, quo poenitentiam petunt, impositionem manuum et cilicium super caput a sacerdote, sicut ubique constitutum est, consequantur.” See “Concilium Agathense” in Joannes Dominicus Mansi, *Sacrorum Conciliorum*, vol. VIII (Florence, 1764) c. xv. See also “Concilium Toletanum I,” vol. III, c. ii: “Poenitente vero dicimus de eo, qui post baptismum, aut pro homicidio, pro diversis criminibus, gravissimisque peccatis publicam poenitentiam gerens, sub cilicio, divino fuerit reconciliatus altario.”

<sup>50</sup> The four stations were “weepers,” the most severely chastised, who remained outside the door of the Church; “hearers,” who gathered in the vestibule; “kneelers” or “prostrators” who were placed in the rear of the congregation, usually near the ambo; and “co-standers” who prayed among the assembled faithful but were forbidden to receive the Eucharist. See John T. McNeill and Helena M. Gamer, *Medieval Handbooks of Penance: A Translation of the Principal Libri paenitentiales and Selections from Related Documents* (New York: Columbia University, 1938) 7–8. Examples of this ordering in the early Church are too numerous to mention. See, e.g., “Canones Ancyrensiensium” in Mansi, vol. VI, canon iv.

<sup>51</sup> Henry R. Percival, *The Seven Ecumenical Councils of the Undivided Church*, in *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, vol. XIV, ed. Philip Schaff and Henry Wace (New York: Charles Scribner’s Sons, 1900) 24, c. xi.

<sup>52</sup> “Episcopi autem habere potestatem, mores conversionis eorum probantes, humaniter, aut amplius addere tempus: obiens autem et vita que antecedent, et qui sequitur probatur.” See “Canones Ancyrensiensium” in Mansi, vol. VI, canon iv. See also McNeill and Gamer, *Medieval Handbooks of Penance*.

terranean world and among the Germanic tribes of Europe. In the Old Testament, matters of justice were often settled by sanguinary vengeance, exemplified in the vendetta. Those who commit crimes of violence are hunted down and punished by the kin of the victim. This “eye for eye” principle was at times interpreted in group-wide fashion: the sin of one brings a curse upon the entire group (Exodus 20:5; 2 Samuel 21:1), or individually. It was the law of the desert fiercely expressed in the Song of Lemek (Genesis 4:23–24) and witnessed in Joab’s killing of Abner to avenge the death of his brother (2 Samuel 2:22–23; 3:22–27, 30).<sup>53</sup> This tradition of “rough” justice did not give way until the prison established itself as the normative disciplinary vehicle through the example and influence of the Church.<sup>54</sup>

### The Monastic Prison

The shift from physical assault upon the delinquent to imprisonment is one of the significant revolutions in penal history. It occurred when the rituals associated with penance were transformed in primitive monastic communities into “incarceration,” placing the errant monk in his cell for a period of time to satisfy the “binding” demands of penance and to effect the necessary contrition and reformation necessary to regain full membership within the community. Thorsten Sellin, echoing the sentiments of Karl Kraus, writes that “the real sources of our entire penitentiary system . . . must be looked for in the Church and particularly in those bodies which regarded silence, isolation, and self-inflicted mental and physical pain as the true road to salvation.”<sup>55</sup>

Early monastic rules reveal the prototype of the prison as we have come to know it. Monasteries were often built with a cellular configuration. Even in periods and communal charters where this practice had not yet devel-

<sup>53</sup> Roland de Vaux, *Ancient Israel: Its Life and Institutions*, trans. John McHugh (New York: McGraw Hill, 1961) 10–11.

<sup>54</sup> George Ives writes concerning the Germanic tribes that “the placation of the injured party was the objective of the oldest laws.” He goes on to say that frequently the offense could be assuaged through the use of fines but, failing this obligation, blood vengeance was not only permissible but expected. See *A History of Penal Methods: Criminals, Witches, Lunatics* (Montclair, N.J.: Patterson Smith, 1970, orig. ed. 1914) 2–4. Concerning the influence of the Church in ending the reign of the vendetta, see Julius Goebel, *Felony and Misdemeanor: A Study in the History of Criminal Law* (Philadelphia: University of Pennsylvania, 1976, orig. ed. 1937) 88–89.

<sup>55</sup> Thorsten Sellin, “Dom Jean Mabillon—A Prison Reformer of the Seventeenth Century,” *Journal of the American Institute of Criminal Law and Criminology* 17 (1927) 581–602, at 600–1; Karl Kraus, *Im Kerker vor und nach Christus* (Freiburg: Mohr, 1895) 192. A similar outlook is held by Norman Johnston, *Forms of Constraint: A History of Prison Architecture* (Chicago: University of Illinois, 2000) 17.

oped, there was always an ascetic atmosphere emphasizing prayer, silence, and self-denial. The connection between these rudiments of monastic life and incarceration is significant. Without delving into the complex psychology of conversion, it is central to monastic culture that the means described effect significantly the end of increased union with the divine.<sup>56</sup> Add to this the progression of steps that developed in the early Church with regard to penance, and one sees that the only elements lacking in a refashioning of the prison were the place within the monastery to which the penitent was to be assigned, and the specific rules regulating the comportment of the offender during the period of exclusion.

This question of the means, of the practical manner in which to exact punishment and attain reconciliation, has been consistently problematic in penal history. Even allowing for the belief that the confined person is “an image of God,” and that the discipline of penance is an effective moral medicine for those who attest to their own guilt, one must still confront the reality that few voluntarily seek incarceration or, as is often heard nowadays, almost all prisoners see themselves as innocent. Clearly a new dimension was added to the *ordo paenitentium* by the creation of a place of confinement that would not have been freely chosen.

What quickened the movement to incarcerate was the contention that the cell, the means of punishment, assists in the attainment of the end of punishment, whether the offender wills it or not. This belief can be traced to the very first monastic rule, that of Pachomius (d. 346). Here one finds ordinances regarding penitential excommunication for a series of disciplinary infractions. Of special interest, Pachomius assigns a specific temporal duration for certain offenses and, for others, a specific dwelling for solitude and reparation. The slanderous monk, for example, “shall be separated from the assembly of the brothers seven days and shall receive only bread and water until he firmly promises to convert from that vice.”<sup>57</sup> Regarding one who “murmurs” against the abbot or members of the community, “he shall be considered as one of the sick and put in the infirmary where he shall be fed and left idle until he returns to the truth.”<sup>58</sup> Pachomius infers in these rulings that the confinement process itself, with its methodological elements of ritual shaming, temporal exclusion, isolation, prayer, and silence, is an effective catalyst for moral renewal.

Other monastic rules, that of Basil and Benedict, reveal similar processes and a similar understanding of incarceration as the means to effect the

<sup>56</sup> Saint Basil, *Letters*, vol. I, trans. Sister Agnes Clare Way (Washington: Catholic University of America, 1951) Letter 2.

<sup>57</sup> St. Pachomius. *Pachomian Koinonia*, vol. 2, trans. Armand Veilleux (Kalamazoo, Mich.: Cistercian Publications, 1981) 175–76.

<sup>58</sup> *Ibid.* 176.

desired end of punishment.<sup>59</sup> This practice gained momentum. Not only did monasteries utilize it for the chastisement of their own errant members, ecclesiastical and even royal officials saw in penal seclusion a form of punishment that offered an alternative to the cruel forms of justice that often marked life in secular polities.

While precise regulations governing the treatment of those detained would vary according to monastic rule and local practice in what were normally autonomous communities, there do exist rather detailed and complementary portraits of both the ideal, as exemplified in the Rule of Benedict, and the practical, as in the description St. John Climacus reveals concerning a sixth-century “house of penitents” in Egypt, the regulations governing imprisonment in the Rule of Cluny, and the descriptions Jean Mabillon provides in his work on monastic prisons.<sup>60</sup>

Monastic imprisonment received its initial papal endorsement in the fourth century when Pope Siricius (384–399), advising Bishop Himerus on a number of disciplinary questions, ordered “sacrilegious” and “lascivious” monks to be confined in a monastic cell (*ergastulum*) in “continual lamentation,” that they may achieve purification through “penitential fire.”<sup>61</sup>

Confinement for both monks and disobedient clergy is mentioned frequently in the correspondence of Gregory the Great.<sup>62</sup> In a letter to the subdeacon Anthemius, concerning monks who “depart from the rule of their own abbot out of desire for a worldly life,” he states that “if anyone whatever should so presume, let him be sent back with adequate constraint to the monastery in which he lived at first, to be under the rule of his own abbot from which he had escaped.”<sup>63</sup> St. John Climacus devotes considerable attention to the prison erected “a mile from the great monastery” to which were sent “those who fell into sin after entering the brotherhood.”<sup>64</sup>

Episcopal councils also reveal the elevated degree to which monastic confinement was sanctioned by the Church as a remedial discipline for its

<sup>59</sup> In the Rule of Basil, the penalty for “murmuring” was “segregation.” See Saint Basil, “The Long Rules,” in *Saint Basil: Ascetical Works*, trans. Sister M. Monica Wagner (New York: Fathers of the Church, 1950) q. 51; Saint Benedict, *Benedict’s Rule*, trans. Terrence G. Kardong (Collegeville: Liturgical, 1996) chaps. 23–28.

<sup>60</sup> “Carcer est talis in quem cum scala descenditur, nec ostenditur ostium, nec fenestram habet.” See “The Customs of Cluny” in Migne, PL 149.633–778, at 736. See also St. John Climacus, *The Ladder of Divine Ascent*, trans. Archimandrite Lazarus Moore (London: Faber and Faber, 1959) 81–82, 98–109.

<sup>61</sup> Pope Siricius, “Letter to Himerus” in PL 13.1131–47, at 1137.

<sup>62</sup> Gregory the Great, *Epistles*, in *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, ed. Philip Schaff and Henry Wade, vol. XII, trans. Rev. James Barmby (Grand Rapids: Eerdmans, 1956) Bk I, xli, xlii, xlv; Bk IV, ix; Bk V, iv.

<sup>63</sup> Gregory the Great, *Epistles* Bk I, xlii.

<sup>64</sup> St. John Climacus, *The Ladder of Divine Ascent* 82.

disobedient members. At the Council of Agde (A.D. 506) clerics wandering the countryside were ordered to be placed under monastic custody.<sup>65</sup> The Second Council of Seville (A.D. 619) determined that priests who desert their ecclesiastical posts without permission be deposed and placed in a monastery until it was deemed proper to recall them to office.<sup>66</sup> The First Council of Matison (A.D. 581) ruled that clerical indecency be punished by 30 days in prison with only bread and water for sustenance.<sup>67</sup>

Incarceration became part of the law of the Church with the inception of canon law. The *Corpus Iuris Canonici*, comprising the distillation of centuries of synodal, conciliar, and papal decrees under the principal authorship of Gratian, Gregory IX, and Boniface VIII, was the governing document of the Church from its first appearance in the 13th century until 1917. Here are found justifications for both monastic and ecclesiastical prisons. Gratian employs decrees from the Council of Toledo with regard to seditious clerics, and the already cited canon from the Council of Agde, to justify forcible detention.<sup>68</sup> Boniface VIII stated with regard to those convicted of crime: "Taking the nature of their crimes and their person and other circumstances into prudent consideration, such malefactors could either be confined for a time or for life as you may judge appropriate."<sup>69</sup>

### The Challenge to Contemporary Catholic Theory

As revealed in these brief notations, the challenge for the Church is not, at least initially, to question the "why" of the prison, as to provide the answer, given the ancient warrant for the prison, of how penal exclusion can continue to function as the link between justifiable punishment and the desired end of reforming and returning the delinquent to normal social interaction. It is precisely in this regard that images of the prison and the

<sup>65</sup> "Clericis sine comendatitiis episcopi sui licentia non pateat evagandi . . . quos si verborum increpatio non emandaverit, etiam verberibus statuimus coerceri." See "Concilium Agathense" in Mansi, vol. VIII, canon xxvii.

<sup>66</sup> "Desertorem autem clericum, cingulo honoris atque ordinationis sui exutum, aliquo tempore monasterio deligari convenit: sicque postea in ministerio ordinis revocari." See "Concilium Hispalense II" in Mansi, vol. X, canon iii.

<sup>67</sup> "Clericus, cum indecenti veste, aut cum armis inventus fuerit, a seniore ita coerceatur, ut triginta dierum inclusione detentus, aqua tantum et modico pane diebus singulis sustentur." See "Concilium Matisconense" in Mansi, vol. IX, canon v.

<sup>68</sup> See Gratian, "Decretum Gratiani" C. 20, q. 4, c.3 (Agde) and C. 23, q. 8, c. 5 (Toledo).

<sup>69</sup> "Nos tamen non improbamus, si subiectos tibi clericos confessos de criminibus, seu convictos . . . in perpetuu, vel ad tepus prout videris expedire, carceri mancipes ad poenitentiam peragendam." Boniface VIII *Liber Sextus* (Venice, 1605) Book V, Tit. IX, Chap. III.

prisoner become essential. In a Catholic anthropology, the nature of the person is to seek God and a harmonious social environment. Spiritual practices, especially contemplation and ritual activity, are essential to the fulfillment of those ends. The theological and moral virtues, habits emanating from the discipline of communal membership and supervision, provide the necessary incentive to keep one on the right path.<sup>70</sup> The growth of confinement reveals that the Church regarded this view of human development as the preferred means for offenders to reacquaint themselves with both the natural ends of human life, as well as the prayer and virtue necessary for their attainment.

Yet even the most “triumphal” Catholic must face the troubling evidence that cruelty and abuse have accompanied the salutary ends for which penance and its offspring, imprisonment, were established. Much has been written on this topic. Mabillon, so loyal to the official Church that he never published his reflections on the monastic prisons, still cried out in protest in the text against “the great lack of charity” that often accompanied this form of sanction. He wrote: “the harshness of some priors went to such an excess (it seems difficult to believe it) that they mutilated limbs and sometimes stuck out the eyes of those of their monks who had fallen into considerable errors.”<sup>71</sup> Perhaps it is enough to remind ourselves of Compagnoni’s observation that, despite examples to the contrary, torture was accepted, or at least not condemned, by the Church from approximately A.D. 400 until the Second Vatican Council and the subsequent approval by the Holy See of the United Nations “Declaration against Torture.”<sup>72</sup>

St. Benedict (480–540) was perhaps the most important influence on the development of the prison in the Catholic tradition. The Benedictines grew into the largest and most influential of the monastic orders, each abbey replicating the substance of the founder’s vision. This rule of life is notable not because it features a distinctive interpretation of the elements of punishment. Rather, it is set apart by Benedict’s deliberate and empathetic attention to Christological and parental images as he reflects on the mean-

<sup>70</sup> Aquinas states each person “has an innate bent toward virtue, yet to come to its fulness he needs to be educated.” In the case of those who are “headlong in vice” they have to be “held back from evil by fear and force, so that they at least stop doing mischief and leave others in peace. Becoming so habituated they may come to do of their own accord what earlier they did from fear, and grow virtuous” (*ST* 1–2, q. 95, a. 1).

<sup>71</sup> Quoted in Sellin, “Dom Jean Mabillon” 584. See also James B. Given, *Inquisition and Medieval Society: Power, Discipline, and Resistance in Languedoc* (Ithaca, N.Y.: Cornell University, 1997).

<sup>72</sup> Francesco Compagnoni, “Capital Punishment and Torture in the Tradition of the Catholic Church,” in *The Death Penalty and Torture*, ed. Franz Böckle and Jacques Pohier, *Concilium* 120 (New York: Seabury, 1979) 39–53, at 39–40. See also Edward Peters, *Torture* (Philadelphia: University of Pennsylvania, 1996) 44–69.

ing of the disciplinary process. One sees in his guidelines careful attention to the psychological effects of incarceration as he counsels the abbot to be solicitous of the errant and excluded brother. Benedict presented the insight that to be salutary, punishment must always be accompanied by restraint and care, lest the offender be “devoured by too much sorrow.” Indeed, the abbot is summoned to take the part of Christ himself in regard to the one confined for, as Benedict reminded his monks “It is not the healthy but the sick who need a physician.” The superior was to “imitate the good shepherd’s devoted example: He left the ninety nine sheep . . . looking for the one that had strayed . . . placed it on his sacred shoulders and carried it back to the flock.”<sup>73</sup>

Here then are conjoined the three images that best express what the Catholic Church hoped to accomplish through incarceration: Christ as prisoner, the Church as concerned parent, and liberation of the prisoner through the punishment process. Perhaps no one expressed better than Pius XII this constellation of images and the necessary role that the penal system might play in realizing them.

In short, Pius XII argued that the decision to commit crime is one that involves psychological, juridical, ethical, and religious dimensions. Therefore: “liberation must have a similar aspect.” Echoing Anselm, he argues that liberation must “reintegrate the relations disturbed by the culpable act.”<sup>74</sup> Essential in this process is the sort of maternal love spoken of by Pius in the opening quote of this section. Necessary also is the ingredient of time and the discretionary quality needed to determine whether reform has been accomplished. “A profound, extended, and lasting liberation from guilt is often a lengthy process which only gradually reaches maturity.”<sup>75</sup> John Paul II continued this theme when he stated: “Even time in prison is God’s time. As such it needs to be lived to the full; it is a time which needs to be offered to God as an occasion of truth, humility, expiation and even faith.”<sup>76</sup>

Having summarized how the prison developed in Catholic history as the primary expression of the manner in which to accomplish both the compensatory and restorative ends of punishment, I now relate how some of these foundations have been weakened in recent statements by the U. S. bishops.

<sup>73</sup> St. Benedict, *Benedict’s Rule* chap. 27.

<sup>74</sup> Pius XII, “Crime and Punishment” 365, 373.

<sup>75</sup> *Ibid.* 75.

<sup>76</sup> Pius XII, “Crime and Punishment” 375; John Paul II, “The Jubilee in Prisons” 3.

### THE BISHOPS AND CRIMINAL JUSTICE

The state of corrections in the United States is in desperate need of reform.<sup>77</sup> The bishops, with pastoral sensitivity and reliance on fundamental Catholic ethical commitments, have pledged themselves to participate in the effort to accomplish those reforms. It seems, however, that if Catholics are to participate in the reform of an institution that they themselves inaugurated, they should reveal familiarity with how the prison was *formed* in the first place. This is the substance of my first criticism. Statements by the Catholic bishops, particularly with regard to the development of the prison, have by and large not accurately reflected the tradition they represent.

As I stated initially, there is little ambiguity in recent episcopal statements concerning the justification for punishment nor with its desired end of reconciliation. In other words, the bishops frequently attest to the fact that punishment must have both retributive and rehabilitative elements.<sup>78</sup> Yet there is an insufficient appreciation for the foundational importance of the prison and the essential element of the “time” sentence as contributing factors in the dynamic of punishment and renewal. In point of fact, because an appreciation of the role that time plays in the punishment process is virtually lacking, and the understanding of the value of incarceration is so ambiguous, the bishops cannot help but adopt a shallow reading of the role of retribution. The best that seems to be done in recent documents is to avoid the Catholic understanding of the prison altogether, in favor of a recognition of the need for “order;” but this affirmation lacks the well developed notions of the importance of retribution found in Anselm and Pius XII. For example, despite stating in their pastoral letter of the year 2000 that a Catholic approach “will not tolerate behavior that threatens lives and violates the rights of others,” the bishops argue repeatedly that “punishment must have clear purposes: protecting society and rehabilitating those who violate the law.”<sup>79</sup> This shift from a language of retribution to one of incapacitation is due to a lack of historical sensitivity to the role that the prison has played in Catholic thought. The bishops also mention that contrition is a necessary element in the development of penance but offer no explanation of how one is to create contrition among those who do not feel contrite. Here would have been the ideal opportunity to revive the

<sup>77</sup> Patrick McCormick has underscored this need for reform in a compelling way through analysis of contemporary penal policy by means of the criteria for a just war. See “Just Punishment and America’s Prison Experiment,” *Theological Studies* 61 (2000) 508–32.

<sup>78</sup> Catholic Bishops of the United States, “Rebuilding Human Lives” 346; *Responsibility, Rehabilitation, and Restoration* 16, 39.

<sup>79</sup> *Responsibility, Rehabilitation, and Restoration* 16, 27–28.

role that time and spiritual discipline play in a Catholic understanding of spiritual and moral renewal. Instead, the statement stands as a door leading to an empty room.<sup>80</sup>

The bishops frequently find themselves in the rather ironic position of calling either for an outright end to the prison, or its radical curtailment as a disciplinary institution. In their most recent statement, for example, the prison was only explicitly sanctioned as a means of “removing dangerous people from society . . . to ensure public safety.”<sup>81</sup> While Catholic social thought does and should continue to develop, one would expect, in the current case, that a recasting of the function of the prison would be done with some regard for the role the Church played in creating its contemporary format, how it developed naturally out of the Catholic penitential and spiritual tradition, and how it provided a humane alternative to the violent solutions that inevitably marked justice in the secular arena. No such recognition is recorded.

Because the bishops’ statements reflect an inadequate understanding of the role of the prison, they misconstrue significant concepts. Nowhere is this more troubling than in their repeated allusions to incapacitation. It is not that societal protection for the sake of order is undervalued in Catholic thought.<sup>82</sup> Rather it is that the bishops need to interpret carefully the relative significance of this theory, and then to distinguish the difference between their own understanding and the emphasis on incapacitation in current criminal policy; one that is most assuredly not reflective of Catholic concerns, as I hope to demonstrate shortly.

Similar reservations arise in regard to the concept of deterrence. While not infrequently mentioned in the tradition,<sup>83</sup> the value of deterrence as a goal of punishment needs to be discussed in light of the preeminent and complementary importance of retribution and rehabilitation in Catholic theory. These twin principles are not negative notions aimed at instilling

<sup>80</sup> Ibid. 19–20. The bishops do emphasize in one document that “rehabilitation cannot be imposed” and that the “offender has to be convinced of its value and led freely to desire it,” yet the role of time in a Catholic spiritual framework is not addressed (“Rebuilding Human Lives” 346).

<sup>81</sup> Ibid. 27. Outright calls to limit or eliminate the prison are not uncommon. See “Rebuilding Human Lives” 345; United States Catholic Conference, “A Community Response to Crime,” *Origins* 7 (March 9, 1978) 593–604, at 598; New York State Bishops’ Conference “Reforming the Criminal Justice System,” *Origins* 12 (February 17, 1983) 569–73, at 572.

<sup>82</sup> See e.g., Thomas Aquinas, *ST* 1–2, q. 95, a. 1; *Catechism of the Catholic Church* no. 2266.

<sup>83</sup> For favorable remarks regarding deterrence, see Abelard, *Peter Abelard’s Ethics* 39, 45. Gratian writes: “aliquando in paucis est punienda, ut eorum exemplo ceteri terreantur, et ad penitentiam provocentur” (“Decretum Gratiani” C. 23, q. 4, c. 25).

fear in the hearts of prospective criminals. They are, echoing the understanding of the *ordo penitentium*, notions that call for the prayerful and material support of the faithful on behalf of their fellows who have fallen into error. Deterrence gained its force as a guiding logic of the penal system among the Utilitarians who sought to foster obedience, in true Enlightenment fashion, by appealing to either fear or self-interest—hardly Catholic values. Both Bentham and Beccaria in their penal reflections saw the purpose of imprisonment primarily in these terms.<sup>84</sup> To employ deterrence in a Catholic program of criminal justice, while not illegitimate, would require a far more nuanced reading than it has been given.<sup>85</sup>

There has been a hard-won synthesis in the development of the three foundations of Catholic thought on criminal justice; they form, in effect, a continuum proceeding from the warrant to punish, to the place and program of both penance and reform, and culminating in the ritual of return and reinstatement. One cannot limit the value of one of the three elements without significantly altering the meaning of the other two. In not adequately interpreting the role of the prison, the bishops fail to give a coherent Catholic account of the role of retribution. All that is left is a rather hollow endorsement of rehabilitation, a goal of the penal system that has all but faded from view.

### Lack of Analytical Depth Concerning Contemporary Criminology

In their justified revulsion in viewing the current criminal justice system, the Catholic bishops of the United States have found themselves in the rather strange position of advocating a number of policies that are hallowed by the very forces to which they have expressed opposition. The bishops rightly focus on the punitive current running through the justice process as well as the racial and class bias evident in arrest, conviction, and imprisonment rates in the United States.<sup>86</sup> In order to confront this struc-

<sup>84</sup> Beccaria wrote: “such punishments and such method of inflicting them ought to be chosen, therefore, which will make the strongest and most lasting impression on the minds of men, and inflict the least torment on the body of the criminal” (Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci [Indianapolis: Bobbs-Merrill, 1963; orig. ed. 1764] 42); Jeremy Bentham, *An Introduction to the Principles of Morals and Education*, ed. Wilfrid Harrison (Oxford: Basil Blackwell, 1967) 289–98.

<sup>85</sup> In their 1973 letter, the bishops mention the four ends of imprisonment: retribution, rehabilitation, deterrence, and incapacitation. They then write that the four are to be “kept in a balance.” Clearly, they have a humane vision of what the prison is to be; but they offer no guidelines as to how these four ends, often at odds with one another, are to be harmoniously integrated (“Rebuilding Human Lives” 345).

<sup>86</sup> See *Responsibility, Rehabilitation, and Restoration* 8–10. On structural factors

tural injustice, however, a Catholic perspective must unravel and analyze several competing ideological strands in criminology. The institutional skeleton of the justice system (the prison) still remains. So also, to a steadily diminishing degree, does the policy of “penal welfare”: the traditional focus on treatment of the offender. In its place, two new strategies, both concerned with social control and incapacitation, have come into prominence.<sup>87</sup>

The first is an unprecedented populist revolt in favor of the victim, featuring what has come to be termed the “penal harm movement.” Among other things, this trend reveals the belief that criminal and victim exist in a “zero-sum” relationship: anything done in favor of the offender’s well-being is interpreted as a loss for the victim.<sup>88</sup> The overwhelming sentiment among the public, as revealed repeatedly in polling data, is that it wants protection. This is the case in spite of the fact that all significant barometers of crime have been on a downward spiral for more than a decade.<sup>89</sup>

Public fears are so exacerbated that some have termed the current imaging of victim and offender as “governing through crime.” Politicians repeatedly seek to outdo one another in demonstrating who is “tougher on crime,” rather than puncture the credibility of the image of a seething criminal class currently filling popular culture in both the news media and the entertainment industry.<sup>90</sup> Ironically, such fears have led to the phenomenon termed “criminologies of everyday life.” Controls, reminiscent of Foucault’s “carceral,” are being built more and more into the very fabric of daily social interaction in an effort to deter the criminally minded. The underside of the movement seems to be an anthropology that undermines the very assumptions on which the notion of a criminal class is based: everyone is now a suspect.<sup>91</sup>

At the same time, the evolution of policy among penal administrators and in the courts has been taking a significantly different direction. Here

conditioning crime among the poor, see National Conference of Catholic Bishops, “The Pastoral Letter on Moral Values,” *Origins* 6 (November 25, 1976) 357–70, at 366; United States Catholic Conference, “A Community Response to Crime” 598.

<sup>87</sup> See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago, 2001) 14–15, 185.

<sup>88</sup> *Ibid.* 9, 11, 13. See also Todd R. Clear, *Harm in American Penology: Offenders, Victims and Their Communities* (Albany: State University of New York, 1994) 1–37.

<sup>89</sup> Garland, *The Culture of Control* 12, 14.

<sup>90</sup> Jonathan Simon, “Governing Through Crime,” in *The Crime Conundrum: Essays on Criminal Justice*, ed. Lawrence M. Friedman and George Fisher (Boulder, Colo.: Westview, 1997) 171–89.

<sup>91</sup> Simon, “Governing Through Crime” 178; Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1979) 293–308; Garland, *The Culture of Control* 15–16, 17–18, 182–83.

the concern has been with the fundamental question of how to address the punitive hunger of society within an economy of shrinking resources and decreasing commitment to former hallmarks of the penal welfare system such as treatment programs. The result has been the ascendance of a new “managerial” approach to crime control.<sup>92</sup> Using private industry as a model, one sees more and more discussion of “performance indicators” and “inmate management units” among criminal justice professionals. As David Garland writes: “The crime control field . . . has become saturated with technologies of audit, fiscal control, measured performance, and cost-benefit evaluation.”<sup>93</sup>

The actuarial approach of the insurance industry has been utilized to an increasing degree in this latter strategy. It features a systems management approach that “aggregates” the individual, understanding him or her solely as a member of a group, uncoupled from social history and subjective interpretations, and defined in terms of risk.<sup>94</sup> Once relegated to the deep-end of the “risk pool” due to factors such as educational background, social location, and economic forecast, perpetual membership in the correctional system is virtually assured the moment one runs afoul of the law. This “new penology” has been responsible for the continued harassment and control of “criminals” who in their racial and economic characteristics look more and more alike.<sup>95</sup>

These contradictory tendencies have several things in common. Both are driven by a commitment to increasing the level of social control. They tend to view the purpose of imprisonment as incapacitation. And, in an area where cost-efficiency is more and more valued, they have focused the brunt of their resources on the detecting, monitoring, and control of a permanent criminal class.<sup>96</sup>

In this forum greater detail cannot be provided, but these reflections must be taken into account when, for example, the bishops speak of the “protection of society,” a synonym for incapacitation, as one of the prin-

<sup>92</sup> Malcolm M. Feely and Jonathan Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and its Implications,” *Criminology* 30 (1992) 449–74.

<sup>93</sup> Garland, *The Culture of Control* 188–89.

<sup>94</sup> Feeley and Simon, “The New Penology” 457; Garland, *The Culture of Control* 171; Franklin Williams, *Imagining Criminology: An Alternate Paradigm* (New York: Garland, 1999) 112.

<sup>95</sup> Feely and Simon, “The New Penology” 468; Troy Duster, “Crime, Youth Unemployment, and the Black Urban Underclass,” *Crime and Delinquency* 33 (1987) 300–16; Norval Morris, “Race and Crime: What Evidence is There That Race Influences Results in the Criminal Justice System?” *Judicature* 72 (1988) 111–13.

<sup>96</sup> On the primary value of incapacitation in the new penology, see Feeley and Simon, “The New Penology” 455; Garland, *The Culture of Control* 192.

cial foundations of a Catholic approach to criminal justice. Not only is this, at best, marginally true. It plays into the hands of correctional innovations currently gaining ascendance in the United States that have exacerbated the already shocking incarceration rates among racial minorities and the poor.<sup>97</sup>

In a related matter, the risk management ideology is dedicated to the development of low cost forms of social control in lieu of the prison. While this policy shift is not to be confused with recent, and in many ways laudable, developments in the areas of restorative justice and community corrections,<sup>98</sup> the architects of social control have utilized many of the elements of the decarceration movement such as drug-testing, electronic monitoring, and intensive probation as surveillance mechanisms whereby a net of social confinement over the underclass can be consistently maintained.<sup>99</sup> These techniques are orchestrated in the rhetoric of reform as “alternatives to prison.” In other words, in calling for the abolition or drastic curtailment of confinement, the bishops need to distinguish between legitimate attempts to empower communities in the effort to discipline and reintegrate offenders, and those strategies which seek to “downsize” the traditional prison in favor of creating virtual penal colonies in many poor urban neighborhoods.

## CONCLUSION

Criminal justice in the Catholic tradition must first be given a more coherent historical and conceptual reformulation, and then it must be directed to the actual conditions of the present criminological landscape. Only then can the valuable, or perhaps invaluable, resources of the tradition be brought to bear on this most vital social problem.

I began my study by noting the rapid change in recent Catholic thought

<sup>97</sup> “Based on current rates of first incarceration, an estimated 32% of black males will enter State or Federal prison during their lifetime, compared to 17% of Hispanic males and 5.9% of white males.” See “Lifetime Likelihood of Going to State or Federal Prison,” [www.ojp.usdoj.gov/bjs/crimoff.htm](http://www.ojp.usdoj.gov/bjs/crimoff.htm) (accessed January 14, 2004).

<sup>98</sup> The literature on these topics is quite extensive. See, e.g., John Braithwaite, *Crime, Shame, and Reintegration* (New York: Cambridge University, 1989); Christopher D. Marshall, *Beyond Retribution: A New Testament Vision for Justice, Crime, and Punishment* (Grand Rapids: Eerdmans, 2001); Mark Umbreit, *Crime and Reconciliation: Creative Options for Victims and Offenders* (Nashville: Abingdon, 1985); Howard Zehr, *Changing Lenses* (Scottsdale, Penn.: Herald, 1990).

<sup>99</sup> One sees here not only the fruition of Bentham’s dream of the “panopticon” on a social scale; one also sees the fulfillment of Foucault’s dire prediction of turning the entire society into a “de facto” house of correction. See Bentham, *Panopticon or The Inspection House* (Dublin: T. Payne, 1791) Letters 5, 6; Foucault, *Discipline and Punish* 294–305.

in matters such as the death penalty. Foundations once destroyed can be repaired, or new ones established. The Church is not without allies within its own community, nor among some social scientists. Recently, several scholars have written that prisons must once again become places where virtue is inculcated through a symbolically coherent regimen that reinforces the process of metanoia. Protestant groups, notably "Prison Fellowship," have not only argued in similar terms but have taken steps to oversee correctional institutions organized according to Christian principles.<sup>100</sup> While these are welcome innovations, it is ironic, in the light of history, that secular criminologists and non-Catholics would have a greater appreciation for a Catholic approach to punishment than many members of the hierarchy.<sup>101</sup>

The Catholic Church is responsible for the prison as we know it in the West; that fact cannot be disputed. It has held firm, with few exceptions, to the justification and end of punishment. It has lost account of the means that it developed to bind the two principles together. John Noonan reminds us that moral change in the institutional sphere is as necessary as it is difficult. My intention in this article has not been to argue for putting people in prison; it has been to remind us that for the better part of 1600 years the Catholic Church has argued for putting people in prison. To speak more effectively in the present, the Church would need to take greater account of how it treated criminals in the past. This conclusion summarizes the analytical purpose of this article. The rhetorical purpose has been to argue, also echoing Noonan, that changes in the moral teaching of the Church in the area of crime and punishment must be undertaken not only by attention to history but in conscious witness to Christ. This was attested to by the bishops in their affirmation that Jesus himself "was a prisoner" and in the appeal by Pius XII that we must know and love the prisoners, and bring about their liberation.<sup>102</sup>

<sup>100</sup> Charles Colson, *Justice That Restores* (Wheaton, Ill.: Tyndale, 2001) 79, 136–37; Francis Cullen, Jody Sundt, and John Wozniac, "The Virtuous Prison: Toward a Restorative Rehabilitation," in *Contemporary Issues in Crime and Justice: Essays in Honor of Gilbert Geis*, ed. H. Pontell and D. Shichor (Upper Saddle River, N.J.: Prentice Hall, 2000).

<sup>101</sup> Charles Colson admits that his inspiration for a "Christian" prison came from a visit to the Humaita penal facility in Brazil run by two Catholics active in the "Cursillo Movement." The image of Christ as prisoner was central to their vision. Colson writes: "When inmates arrived at Humaita, their chains were removed, and they were told that in this prison they are constrained not by steel but by the love of Christ" (*Justice That Restores* 107).

<sup>102</sup> John T. Noonan, Jr., "Development In Moral Doctrine" *Theological Studies* 54 (1993) 662–77, at 674, 676; Pius XII, "Prisoners, Punishment, and Pardon" 174; U. S. Catholic Bishops, *Responsibility, Rehabilitation, and Restoration* 18.