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THE MAKING OF THE PENITENTIARY ACT, 1775–1779*

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ABSTRACT. *This article examines the series of legislative measures, beginning in 1776, which culminated in the passage of the Penitentiary Act of 1779. It argues that, although the Penitentiary Act is of considerable long-term significance in the history of English criminal justice and penal practices, the act passed in 1779 was in fact a somewhat modest affair by comparison with the scheme originally envisioned by its principal architects. The act embodied a decisive retreat from an original ambition to replace transportation with imprisonment at hard labour as the principal punishment next to death in late eighteenth-century England. This modification arose from a pragmatic appreciation of the limitations imposed, first, by a persistent preference amongst most legislators for transportation of the worst classes of offenders not actually put to death and, secondly, by the reluctance of local authorities to have such a preference imposed upon them to the detriment of local control of punishment and of the finances which paid for it. Attention is also drawn to how the course of events was shaped by the interaction of the act's main architects, William Eden and Sir William Blackstone, with both government and non-ministerial MPs such as Sir Charles Bunbury.*

The Penitentiary Act of 1779 was the most forward-looking English penal measure of its time. In proposing to erect two large institutions in which convicted felons would be imprisoned at hard labour, it anticipated a system of punishment that would not come to dominate English penal practice until well into the nineteenth century. Until relatively recently, historians have tended to view it in two basic ways: either as a sensible reform that was subsequently lost or abandoned because of governmental parsimony, managerial incompetence, and a short-sighted adherence to unenlightened penal practices; or as a diversion from an established norm of transporting convicts which was resumed after the end of the war whose outbreak in 1775 had interrupted it.

Neither perspective is wholly unjustified. An emphasis on the modernizing character of the Penitentiary Act derives strength from a study of the intellectual milieu in which it arose. By the 1760s, reservations about England's notoriously extensive capital code were an established feature of public discussion, and it is surely significant that two of the most highly regarded

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critics of prevailing penal practices – Sir William Blackstone and, especially, William Eden – were leading figures in the legislative efforts that culminated in the Penitentiary Act.[1] At the same time, historians who would give primacy to transportation can invoke some powerful facts for their case: the institutions proposed under the Penitentiary Act were never built; and the delayed resumption of transportation following the end of the American Revolutionary War led directly to a crisis of overcrowding in English jails which had no equal either before or since, and which was not resolved until after the settling of New South Wales in 1788.[2] No government-funded 'penitentiary' of a scale commensurate with the scheme of 1779 came into being until Millbank was opened in 1816, and that institution soon proved a failure in almost every respect.[3]

However, an overly exclusive emphasis on either position is fundamentally flawed because it promotes an understanding of English penal practice in which transportation and imprisonment are viewed largely as separate and opposing penal strategies. That these mutually exclusive pictures have given way to a more complicated one is due largely to the work of John Beattie. Through a close analysis of sentencing practices in Surrey, Beattie determined that imprisonment had already gained wide favour as a mode of punishing lesser categories of offenders several years before the suspension of transportation to America. At the same time, he notes, it is also clear that many authorities never completely surrendered their desire to continue to transport the most serious classes of offenders and actively sought the renewal of the practice after 1782.[4]

This article seeks to expand and refine our understanding of the Penitentiary Act and its place in English penal and administrative history through a detailed consideration of its initial conception, subsequent refinements, and final passage. The act of 1779 did not come about as a fully conceived measure in its own right; it was the culmination of a series of legislative proposals which had the common aim of fundamentally altering the balance between transportation and imprisonment. By a happy coincidence, this most striking of

[1] Sidney and Beatrice Webb, *English prisons under local government* (London, 1922), pp. 38–40, 43–5; Leon Radzinowicz, *A history of English criminal law and its administration from 1750* (5 vols., London, 1948–86; 5th volume co-authored with Roger Hood), I, ch. 10; Michael Ignatieff, *A just measure of pain: the penitentiary in the Industrial Revolution, 1750–1850* (New York, 1978), pp. 80–2; Seán McConville, *A history of English prison administration*, I: *1750–1877* (London, 1981), pp. 105–9; Christopher Harding et al., *Imprisonment in England and Wales: a concise history* (London, 1985), pp. 111, 116–22.

[2] Eris O'Brien, *The foundation of Australia (1786–1800): a study in English criminal practice and penal colonization in the eighteenth century* (2nd edn, Sydney, 1950), ch. 4; A. G. L. Shaw, *Convicts and the colonies: a study of penal transportation from Great Britain and Ireland to Australia and other parts of the British empire* (London, 1966), ch. 2; David Mackay, *A place of exile: the European settlement of New South Wales* (Melbourne, 1985), ch. 2; Wilfrid Oldham, *Britain's convicts to the colonies* (Sydney, 1990), pp. 33–53.

[3] Ignatieff, *A just measure of pain*, pp. 170–3, 175–6; McConville, *English prison administration*, ch. 6.

[4] J. M. Beattie, *Crime and the courts in England, 1660–1800* (Princeton, NJ, 1986), ch. 10.

eighteenth-century penal measures is also perhaps the best-documented, and we are in an excellent position to identify and evaluate the pressures of circumstance and personality that came to bear on matters. The twists and turns of the story tell us much about the nature, not only of penal practices, but ultimately of state authority in late eighteenth-century England.

It also affords a uniquely detailed case-study of the legislative process at this time. Recent work by Joanna Innes, Julian Hoppit, and John Styles has both reflected and intensified a renewed interest in the history of parliament in general.[5] Of particular concern to Hoppit and his colleagues has been the explosion in legislative activity that followed the transformation of parliament after 1688 from (in their words) 'an event' to 'an institution'. Their work reveals this activity to have been far more extensive, vigorous, and complex than has previously been appreciated. Source material for the close study of individual measures is limited, however, and the substantive results have so far been largely confined to broadly conceived statistical analyses.[6] By comparison, the Penitentiary Act and its associated measures are unique for the volume of surviving correspondence which can be drawn upon to analyse the motives of the principal actors involved, the shifting directions which particular initiatives took, and the reasons why the culminative measure assumed the form that it did. It also differs in another intriguing fashion. For most of the eighteenth century, the vast body of legislative initiatives in social policy emanated not from government, but from backbench MPs and the interests they represented.[7] In this instance, however, although vigorous activity by non-ministerial MPs is crucial to explaining much of the course of events and the shape of the final act, the leading role was played by men who had the ear of government – although, as we will see, the active support which government gave them declined over the period in question.

The story that follows, therefore, has much to tell us about both the character of penal reform in late eighteenth-century England and the practical limits imposed upon it by conflicts between individuals and groups and by prevailing structures of administrative authority. Although the long-term implication of the Penitentiary Act was the substitution of imprisonment at hard labour for transportation, the achievement of that aim in the foreseeable

[5] John Brewer, *The sinews of power: war, money and the English state, 1688–1783* (London, 1988), ch. 8; Joanna Innes, 'Parliament and the shaping of eighteenth-century English social policy', *Transactions of the Royal Historical Society*, 5th ser., 40 (1990), pp. 63–92; Paul Langford, *Public life and the propertied Englishman, 1689–1798* (Oxford, 1991), ch. 3; Lee Davison et al., eds., *Stilling the grumbling hive: the response to social and economic problems in England, 1689–1750* (Stroud and New York, 1992), pp. xxviii–xxxv. An earlier revival in interest in parliamentary history was indicated by the near-simultaneous appearance of two new scholarly journals: *Parliaments, Estates, and Representations* in 1981; and *Parliamentary History* in 1982.

[6] Julian Hoppit, Joanna Innes, and John Styles, 'Towards a history of parliamentary legislation, 1660–1800', *Parliamentary History*, 13 (1994), pp. 312–21 (quotes at p. 313); Hoppit, 'Patterns of parliamentary legislation, 1660–1800', *Historical Journal*, 39 (1996), pp. 109–31; idem, ed., *Failed legislation, 1660–1800: extracted from the Commons and Lords Journals* (London, 1997).

[7] Innes, 'Parliament and social policy', pp. 76–84.

future was the ambition only of a small number of those legislators who were actively involved in its passage between 1776 and 1779. Indeed, by the end, it was the overt aim only of a minority of them, and the efforts of that minority to implement a more decisive departure from prevailing penal practices actually jeopardized the achievement even of the modest measure that was finally passed in 1779. And this may be the greatest surprise in the story that follows. In the end, the Penitentiary Act was far more limited in scale and conception than its retrospective significance has led us to suspect.

I

During the third quarter of the eighteenth century, English penal practices were undergoing changes of lasting importance. By the strict letter of the law, many serious criminal offences were still punishable by death.[8] Few contemporary observers doubted that, if such a code were enforced according to its strict letter, the legitimacy of the law would soon be called into serious question. In practice, however, most such difficulties had long since been averted through the widespread use of secondary punishments, far and away the most important of these being transportation to the American colonies.[9] Outside London and (to a lesser extent) the Home Counties, the absolute number of executions in any county or other jurisdiction was generally quite small at any given time.[10] Even in Surrey, one of the more heavily populated English counties, the annual average ranged (in the aggregate) between only 1·4 and 6·25 from 1749 to 1775.[11] At the same time, the number of those transported from any one jurisdiction, the cost of which was borne by the individual locality, was also generally small outside the south-east.[12] In both ideological and fiscal terms, then, the costs of maintaining a system dominated by capital punishment and transportation were fairly easy to bear. No precisely defined, nation-wide consensus as to the appropriate means of punishing certain types of offences and offenders existed, at least in part because there was seldom sufficient numerical pressure upon the system to provoke sustained and critical scrutiny.

[8] The best introduction to the late eighteenth-century English criminal law is still the first volume of Radzinowicz, *History of English criminal law*.

[9] Beattie, *Crime and the courts*, ch. 9; A. Roger Ekirch, *Bound for America: the transportation of British convicts to the colonies, 1718–1775* (Oxford, 1987), ch. 1; Joanna Innes, 'The role of transportation in seventeenth- and eighteenth-century English penal practice', in Carl Bridge, ed., *New perspectives in Australian history* (London, 1990), pp. 1–16.

[10] J. S. Cockburn, 'Punishment and brutalization in the English enlightenment', *Law and History Review*, 12 (1994), p. 159.

[11] Beattie, *Crime and the courts*, pp. 532–3, table 10.1.

[12] Until 1772 the costs of transporting convicts for London and the Home Circuit were paid by the central government. The decision to discontinue this practice may simply have reflected the high profitability of indentured convict labour rather than any reservations about the penal efficacy of transportation; see Kenneth Morgan, 'The organization of the convict trade to Maryland: Stevenson, Randolph, and Cheston, 1768–1775', *William and Mary Quarterly*, 3rd ser., 42 (1985), pp. 201–27; Ekirch, *Bound for America*, p. 228.

By the early 1770s this situation was changing in significant ways. Most strikingly, John Beattie has identified a decisive shift after 1771 towards the use of imprisonment rather than transportation, particularly in punishing those convicted of non-capital offences against property.[13] The jails, prisons, and houses of correction in which these offenders were confined, however, were not yet subjected to uniformly prescribed and enforced standards. Some moves in that direction were attempted in an act of 1773 and two others of 1774. The first obliged magistrates to provide clergymen to officiate in county gaols; the second relieved prisoners who had been acquitted or discharged without trial from having to pay jailers' fees before their release; and the third required local officials regularly to clean and ventilate their jails and to make basic provisions for the personal cleanliness of their charges.[14] However, none of these measures had direct support from the central government, which was always careful to avoid antagonizing those local landed elites who had a monopoly of moral and social power in the provinces and whose representatives held the balance of political power at Westminster.[15] The political difficulty of imposing legislation that would have expensive consequences for local authorities is a fundamental consideration in explaining the course and character of the legislative measures of 1776–9.

Equally important, although there had been an undeniable narrowing in the application of transportation, many contemporaries continued to regard it as the most appropriate means of punishing serious offenders short of death. Variation amongst officials on such matters helps to explain the central government's reluctance to legislate specifically defined changes, and that reluctance in turn may help to account for the persistent appeal of transportation – with its unique capacity to embrace the full spectrum of penal purposes: retribution, deterrence, and reform.[16] As late as 1768, parliament passed an act requiring that capital convicts whose sentences of transportation had been given as a condition of pardon – in other words, the most serious class of offenders who were subject to it – were to be transported immediately rather than allowed to linger in jails.[17] Any delay in the dispatch of such convicts would severely reduce the impression that their punishment was meant to have on the public mind. It would also tend to corrupt the morals of those with

[13] Beattie, *Crime and the courts*, pp. 538–40, 546–8. Peter King's work suggests a similar shift in Essex; see 'Punishing assault: the transformation of attitudes in the English courts', *Journal of Interdisciplinary History*, 27 (1996), p. 62. Prisoners convicted of non-capital forms of larceny had constituted the majority of those transported until the 1760s; see Beattie, *Crime and the courts*, pp. 506–13; Ekirch, *Bound for America*, pp. 28–35, 43–5.

[14] 13 Geo.III, c. 58; 14 Geo.III, c. 20; 14 Geo.III, c. 59.

[15] David Eastwood, *Governing rural England: tradition and transformation in local government, 1780–1840* (Oxford, 1994), esp. ch. 1; Simon P. R. Devereaux, 'Convicts and the state: the administration of criminal justice in Great Britain during the reign of George III' (Ph.D. thesis, University of Toronto, 1997), pp. 134–6.

[16] Simon Devereaux, 'In place of death: transportation, penal practices, and the English state, 1770–1830', in Carolyn Strange, ed., *Qualities of mercy: justice, punishment, and discretion* (Vancouver, BC, 1996), pp. 52–76.

[17] 8 Geo.III, c. 15.

whom they were imprisoned who might yet be susceptible of reformation – a consideration which reveals an interdependence between transportation and imprisonment in the array of English penal practices which complemented that between transportation and capital punishment. Many contemporaries believed that a new, more suitably intimidating destination for transports should be found and, between 1769 and 1773, the government considered new sites in Africa or the East Indies.[18] But serious attention would not be given to the problem of finding a more effective destination until after the events of 1775 and the ensuing legislative proposals made the matter imperative.

Nor were these changes in penal practice proceeding within an intellectual vacuum. New arguments about the purposes and effects of punishment were gaining ground: against capital punishment on both humanitarian and practical grounds; and in general for the idea that punishments should be both more closely proportioned to the seriousness of the offence and more certain in their application.[19] Debate about the purposes and effectiveness of England's extraordinarily comprehensive capital code, sometimes unflatteringly compared to the more humane codes of many continental countries, was a regular feature of periodical literature after the mid-eighteenth century, and a survey of English literary reviews indicates an efflorescence of pamphlets and books addressing the subject. The argument for more moderate but certain punishments, proportioned to the offence committed, received its most forceful and influential expression in Cesare Beccaria's *Dei delitti e delle pene* (1764), a work which attracted notice in England even before it appeared in translation (*Of crimes and punishments*) in 1767.[20] Similar arguments were made by Sir William Blackstone in the fourth and final volume of his immensely influential *Commentaries on the laws of England*, published in 1769.[21] A member of parliament since 1761, Blackstone resigned his seat when he became a high court judge in 1770, but he would subsequently play a central role in the legislation leading to the Penitentiary Act.[22]

Clearly, then, many English observers felt a need for change. At the same time, however, no clear and precise consensus existed as to what its form or

[18] Ekirch, *Bound for America*, pp. 228–9; William Cobbett, ed., *The parliamentary history of England, from the earliest period to the year 1803* (36 vols., London, 1806–20), xvi, cols. 941–3.

[19] Beattie, *Crime and the courts*, pp. 538–59; Randall McGowen, 'The body and punishment in eighteenth-century England', *Journal of Modern History*, 59 (1987), pp. 651–79; idem, 'The changing face of God's justice: the debates over divine and human punishment in eighteenth-century England', *Criminal Justice History*, 9 (1988), pp. 63–98.

[20] *Monthly Review*, 32 (1765), pp. 532–5; Coleman Phillipson, *Three criminal law reformers: Beccaria, Bentham, Romilly* (Montclair, NJ, 1975; reprint of 1923 edn), pp. 56–74; Radzinowicz, *History of English criminal law*, i, pp. 277–86; James Heath, *Eighteenth century penal theory* (Oxford, 1963), pp. 109–40; David Lieberman, *The province of legislation determined: legal theory in eighteenth-century Britain* (Cambridge, 1989), pp. 205–8.

[21] Phillipson, *Three criminal law reformers*, p. 90; Radzinowicz, *History of English criminal law*, i, pp. 345–7; Heath, *Eighteenth century penal theory*, pp. 178–94; Lieberman, *Province of legislation determined*, pp. 208–9.

[22] Sir Lewis Namier and John Brooke, eds., *The history of parliament: the House of Commons, 1754–1790* (3 vols., London, 1964), ii, pp. 96–7.

extent should be. It is therefore unsurprising that the man who was to be the most important figure in the legislative efforts of 1776–9, William Eden, in fact had a decidedly equivocal status as an advocate of penal reform. As the author of the most renowned English work on penal reform of its day, *Principles of penal law* (1771), Eden has generally been assumed to have been on the side of the angels in the debates on the issue. With its emphasis on the more certain and proportionate punishment of offenders and its rejection of capital punishment for all but the worst offences and most incorrigible offenders, the *Principles* clearly reflected the influence of writers like Beccaria and Blackstone. Like them, Eden did not dispute the fundamentally deterrent purposes of criminal punishments, but he cast doubt on the belief that either capital punishment or transportation achieved it.[23]

It did not follow, however, that Eden endorsed imprisonment as a complete alternative. Eden voiced the belief of many of his contemporaries when he argued that transportation to America was no longer sufficiently arduous to serve as a deterrent or as retributive punishment. Less commonly shared perhaps was his contention that 'a limited number of convicted felons' might instead be set to work at a variety of hard labour projects. At any rate, he expressed no doubt that a more terrible destination ought to be found for the 'more enormous offenders' to whom transportation was presently applied.[24] The chapter devoted to imprisonment does not touch on its use as a punishment per se at all, and the substitution of it in place of prevailing practices is explicitly advocated only for pickpockets.[25]

The immediate success of the book seems to have emboldened Eden somewhat. A second edition issued the same year contained a new conclusion which more directly addressed the need for reform of the English criminal law. But even then, it did so only in terms that were vague and imprecise. Reform of the law is described only as 'an important and *almost* necessary work', and imprisonment still is not explicitly advanced as a complete substitute for transportation.[26] Nor had Eden's caution and evasiveness gone unnoticed by the *Monthly Review*, one of the two foremost literary organs of the day, which, though ultimately applauding the work's 'benevolence and humanity', noted also that its author preferred a collection 'of detached observations' and examples to any 'regular chain of causes and effects' in presenting his arguments.[27] Clearly Eden was hedging his bets with his audience, acquiring the aura of respectability that attaches to the advocate of necessary reforms without risking the objections that more specific and closely reasoned proposals might provoke.

[23] [William Eden], *Principles of penal law* (1st London edn, 1771), chs. 1–4. See also the discussions in Phillipson, *Three criminal law reformers*, p. 91; Radzinowicz, *History of English criminal law*, 1, pp. 301–13; Heath, *Eighteenth century penal theory*, pp. 195–200; G. C. Bolton, 'William Eden and the convicts, 1771–1787', *Australian Journal of Politics and History*, 26 (1980), pp. 32–5.

[24] *Principles of penal law*, pp. 28–9.

[25] Ibid., ch. 6, p. 264.

[26] *Principles of penal law* (2nd London edn, 1771), p. 328 (my emphasis).

[27] *Monthly Review*, 44 (1771), pp. 444–8 (quotes at pp. 448, 444).

No historian has closely examined the extent to which Eden's book was linked to his subsequent efforts to replace transportation with imprisonment at hard labour.[28] In fact, to assert that the connection was direct and non-problematic would be neither strictly accurate, nor would it do justice to Eden's subtlety. The book's success may indeed have stemmed precisely from its ambiguity. Its main achievement was, on the one hand, to domesticate and more fully to popularize the Beccarian proposition that certainty and proportion in punishment were the unquestioned aims of penal reform. (So closely were Eden and Beccaria associated, in fact, that at least one English reader believed that the former had been the English translator of the latter.[29]) Second and somewhat paradoxically, however, Eden's book seems also to have implied that the achievement of those aims was not as far off in the English case as it was amongst the continental despots whose regimes provided most of the book's examples of bad penal practices. The consequent effect of the *Principles* was to make reform sentiments something that could as happily be the prerogative of those who had no great desire to see fundamental changes in the character of the punishments already being imposed in England as of those who did.

It certainly did not hinder Eden's rapid advancement in the political world. The book received an approving notice in the *London Magazine*, and its fame may well have played a role in securing his appointment as under secretary of state to the earl of Suffolk in June 1772.[30] By April 1775, when war broke out in America and threw the transportation of British convicts into abeyance, Eden had risen to a position of considerable influence in governing circles. Upon entering parliament in 1774, he immediately gravitated toward the core of all power within the ministry, Lord North and John Robinson. Although nominally North's junior secretary at the Treasury, Robinson was more generally his factotum, famous in particular for his often extraordinarily accurate projections of the government's strength in the Commons at a given time.[31] In early 1775 Robinson fell gravely ill and Eden (who had already moved to a house close by North's) quickly stepped into the breach, fulfilling

[28] Sir William Holdsworth, *A History of English Law* (17 vols., London, 1903–72), XII, pp. 364–5; Radzinowicz, *History of English criminal law*, I, pp. 301–13 (esp. p. 303). The closest study of Eden and his influence on the legislation, Bolton's 'Eden and the convicts', spends more time analysing the *Principles* then it does considering the extent of its presumed connection to the legislation of 1776–9.

[29] 'Time-Table for Lord Herbert, at Strasbourg', and William Coxe to Lady Herbert, 15 Jan. 1777, in Lord Herbert, ed., *Henry, Elizabeth, and George (1734–80): letters and diaries of Henry, tenth earl of Pembroke and his circle* (London, 1939), pp. 54, 96.

[30] *London Magazine*, 40 (1771), pp. 271–2; *The last journals of Horace Walpole during the reign of George III from 1771–1783*, ed. A. Francis Stewart (2 vols., London, 1910), I, p. 423; 'William Eden', 1 June 1779, Historical Manuscripts Commission (HMC), *Manuscripts of Captain H. V. Knox* (London, 1909), p. 265. Other reactions to the book are described in Bolton, 'Eden and the convicts', p. 36.

[31] Namier and Brooke, eds., *House of Commons, 1754–1790*, II, pp. 375–9; III, pp. 364–6; Ian R. Christie, 'John Robinson, MP, 1727–1802', in his *Myth and reality in late-eighteenth-century British politics and other papers* (London, 1970), pp. 150–6.

Robinson's Treasury and parliamentary duties and acting in effect as North's personal secretary.[32] For a time it even seemed that Robinson might die and Eden succeed to his position, but by May Robinson had recovered and resumed his duties.[33]

In the meantime, Eden had acquired wide experience of both the highest levels of administration and of the supremely important issue of Commons management. He was also on intimate terms with the first minister and leader of the House. In a bureaucratic world in which the execution of government policy was a largely personal affair – dependent on face-to-face interactions, personal initiative, and individual mastery of materials – Eden's industry and political connections helped him to achieve a central role in government in general and perhaps in criminal justice matters in particular.[34] He was therefore in an excellent position to attempt major change in penal policy and practice. Publication of a third London edition of the *Principles* in 1775 may have been intended as a signal that such an attempt was about to be made. Moreover, to those who continued to favour transportation, Eden could (and did) argue that force of circumstances made a resort to imprisonment at hard labour the only option. In the event, however, the Penitentiary Act of 1779 would prove to be a far more cautious and limited measure than Eden and its other authors had intended. How and why did this come to be the case?

II

No one in England appears to have viewed the outbreak of hostilities in America as a source for immediate alarm insofar as penal practices were concerned. The initial belief was that the 'rebellion' would soon be put down;[35] there must also have been a concurrent expectation that transportation would thereupon be resumed. It was not until November 1775 that the ministry finally decided that some intervention in the interrupted process of transporting convicts might be required. Circular letters were dispatched to the high sheriffs of all counties, requesting information on all convicts under sentence of transportation who were still in their care. These data – name, age, gender, date of committal, the offence of which they had been convicted, the term of years (seven, fourteen, or life) of their sentence, and '(so far as it can be

[32] He was, Walpole noted, 'the new confidential agent of Lord North in the House of Commons'; see *Last journals of Walpole*, i, p. 435.

[33] Peter Brown, *The Chathamites: a study in the relationship between personalities and ideas in the second half of the eighteenth century* (London, 1967), p. 357; Eden to [North], 15 May [1775], British Library (BL), Auckland papers, Additional Manuscript (Add MS) 34460, fo. 166.

[34] Leslie Scott, 'Under secretaries of state, 1755–1775' (M.A. thesis, Manchester University, 1950), pp. 84–6; Franklin B. Wickwire, *British subministers and colonial America, 1763–1783* (Princeton, NJ, 1966), ch. 2. See also John Pownall to William Knox, 10 Oct. 1775, and 'William Eden', 1 June 1779, HMC, *Knox Manuscripts*, pp. 122, 266–7.

[35] Robert W. Tucker and David C. Hendrickson, *The fall of the first British Empire: origins of the war of American independence* (Baltimore, MD, 1982), ch. 14; Peter D. G. Thomas, *Tea party to independence: the third phase of the American Revolution, 1773–1776* (Oxford, 1991), ch. 11.

learnt) the several Trades and Occupations followed by the said convicts previous to their imprisonment' – were clearly intended to provide the government with the information necessary to settle alternative conditions of pardon on those convicts still awaiting execution of their transportation sentences.[36]

Only about half of the resultant figures appear to have survived, but they were small enough (only sixty men and six women) that it might reasonably have been concluded that only metropolitan London and the Home Counties – which had always accounted for more than half of all convicts transported – presented an immediately pressing problem.[37] About the same time that the circular was dispatched, the government ordered that approximately 140 transports still confined in London's Newgate prison be removed on board a ship in the Thames, 'as if in due course for transportation', after the lord mayor expressed fears that they posed a threat to the health of the other inmates.[38] This group alone may in fact have been larger than the total number of transports remaining in all other British jails, and the relatively easy terms on which many of them were released over the ensuing year suggests that the circumstances of these particular convicts were viewed as being extraordinary.[39]

This met the pressures of immediate necessity. As the winter of 1775–6 progressed, however, it became clear that there was to be no quick victory in America. A memorandum of this time indicates Eden's belief that a long-term solution was necessary with respect to that class of offenders who were normally subject to transportation: a need for some 'new Law in the Place of that which is now become inconvenient'. He himself had already drafted 'the Heads of the Act of Parlt' which he believed would be required, secured the approval of both Lord North and Lord Chief Justice Mansfield to them, and been told to 'send

[36] Weymouth to high sheriffs of… (circular), 21 Nov. 1775, Public Record Office (PRO), Secretary of State Papers (SP) 44/141, p.406; Suffolk to High Sheriffs of… (circular), 21 Nov. 1775, PRO, SP 44/143, pp. 37–9. For the criteria on which pardon decisions were made see Peter King, 'Decision-makers and decision-making in the English criminal law, 1750–1800', *Historical Journal*, 28 (1984), pp. 42–58; Beattie, *Crime and the courts*, pp. 430–49.

[37] Ekirch, *Bound for America*, pp. 47–9; 'Report of the Sheriffs &c. of the following Counties, in answer to a Circular Letter sent by Lord Viscount Weymouth', n.d., PRO, SP 44/92, pp. 520–6. Only the results of the southern department's circular appear in the tabulation; of these, only ten counties of twenty-three reported transports still in custody.

[38] Eden to the recorder of London, 29 Nov. 1775, PRO, SP 44/91, p. 437. Many of these convicts were from the Home Counties; Newgate was the staging jail for the combined transportation of London and Home County convicts; see Beattie, *Crime and the courts*, p. 565.

[39] Their subsequent disposition was largely directed by Eden himself after several had died from a combination of cold weather and illness contracted while in Newgate; see Eden to [Weymouth], 16 Jan. [1776], BL, Auckland papers, Add MS 34413, fos. 11–12; [Suffolk] to the king, n.d.[c. Jan. 1776], BL, Auckland papers, Add MS 34460, fo. 503. Sixty men were pardoned between January and March 1776 on various conditions of military service and ten women on no condition whatsoever. The remaining forty-three men and fourteen women received free pardons between May and December, having been deemed to have been confined long enough under extremely unpleasant conditions to have atoned for their crimes; see the pardons entered at PRO, SP 44/93 passim.

it to Mr Justice Blackstone to be put into form'.[40] This new mode of punishment was to consist of confinement on board prison hulks moored in the Thames and of hard labour in the form of dredging sand from the river bottom. Eden anticipated that the measure would arouse opposition and therefore took steps to ensure that the bill receive as much support as possible. The various tactics that he used in securing passage of the Hulks Act[41] are worth close consideration, first, because they established the pattern that he would seek to follow in his subsequent attempts more extensively and permanently to substitute imprisonment at hard labour for transportation, and secondly because they reveal early symptoms of the difficulties that he would have to overcome in attempting to do so.

In the first place, Eden had Lord North himself lead the measure in the Commons, thereby throwing all the force which the government could muster behind it. Government control was enhanced by introducing the bill late enough in the session that members would be forced to accept it, partly under the pressure of time and a lack of practical alternatives to transportation before the next session, and partly because the attendance of MPs was invariably low near the end of the session, leaving the Commons vulnerable to determined action on the part of the ministry.[42] This same tactic was adopted with the other penal measures of the late 1770s and did not escape critical comment. One MP, who actually supported the Hulks Bill, nevertheless objected to its introduction so late in the session and recommended putting it off until the next, 'as a notion prevailed without doors, that everything transacted in that House was hurried through without consideration or enquiry; and that the whole tenor of our recent acts of legislation have a tendency to abridge the liberties of the people'.[43] This remark suggests that not everyone in the country perceived the inability to transport convicts as an emergency requiring immediate redress, at least where there was some question of basic liberties being overridden in the process. Indeed, with their overtones of the prison galleys employed in absolutist states on the continent, the hulks were peculiarly liable to offend the libertarian sensibilities of both the opposition and the public out of doors.[44] A motion to put the bill off until the next session was defeated

[40] BL, Auckland papers, Add MS 34413, fos. 11–12.

[41] 16 Geo.III, c.43. The actual title was the 'Hard Labour Act'; I refer to it as the 'Hulks Act' in order to distinguish it from the more substantial 'Hard Labour' Bill of 1778.

[42] *Commons Journals*, 35 (1774–6), p. 694; Peter D. G. Thomas, *The House of Commons in the eighteenth century* (Oxford, 1971), pp. 112–13, 123–4. Thomas notes that attendance invariably fell after March; the Hulks Bill was introduced on 1 April.

[43] John Stockdale, ed., *The parliamentary register; or, history of the proceedings and debates of the House of Commons, 1774–1780* (17 vols., London, 1775–80), III, p. 390.

[44] Walpole attributed the paucity of such arguments at the time to the general muting of opposition at the outbreak of the Revolutionary War; see *Last journals of Walpole*, I, pp. 544–5. For this subject, see Paul Langford, 'Old Whigs, old Tories, and the American Revolution', *Journal of Imperial and Commonwealth History*, 8 (1980), pp. 106–30; Tucker and Hendrickson, *Fall of the first British empire*, pp. 398–410; Peter D. G. Thomas, *Lord North* (London, 1976), pp. 114–15; idem, *Tea party to independence*, pp. 229–30.

on a division of 18 to 97 (an indication of how low attendance was by that point), as was a subsequent motion to kill it by delaying further consideration for two months.[45] Such concerns for procedural regularity and libertarian sensibilities must qualify somewhat any assumption that the hulks were implemented as an emergency measure: clearly not all MPs felt that such an emergency existed. But ministerial determination and low attendance carried the day.[46]

Secondly, Eden was careful to ensure that the government's measure was drafted in consultation with the circuit judges, the officials who had the principal role in sentencing serious offenders in England. The Hulks Bill had been reviewed by Sir William Blackstone, generally acknowledged by his contemporaries to be the greatest living authority on English law. It was also submitted to Sir William Ashhurst and several of the other circuit judges.[47] At best, the judges might possess sufficient sensitivity to local desires that their support of the measure would reassure those members of parliament who were less well informed on such matters. At worst, they might at least be relied upon to reinforce arguments for the necessity of the measure in the prolonged absence of the transportation option.

Eden also sought to minimize the anticipated opposition of particular MPs to the legislation by assuring them of its limited aims before introducing it. His correspondence with Edmund Burke reveals the sort of continuing desire for transportation that would have to be assuaged by any successful measure of hard labour. Burke confessed himself to be somewhat dubious about 'penal Labour' as a mode of punishment:

> Transportation always seemed to me to be a good expedient for preventing the cruelty of capital Punishments, the danger of letting wicked people loose upon the publick, or the infinite charge and difficulty of making those useful, whose disposition it is to be mischievous. If *Nova Scotia*, the *Floridas*, or *Newfoundland* are not to be adapted to the reception of these unhappy wretches, to be sure, some contrivance of this kind [i.e., the hulks] will become necessary at whatever cost or trouble.[48]

Noting the reluctance of Burke and others to concede the permanent loss of transportation, Eden hastened to assure him that the measure was only a temporary expedient made under the pressure of circumstances:

> [W]e shall not introduce an eternal establishment to palliate the inconvenience of the day. The fact is, that our prisons are full, and we have no way at present to dispose of

[45] *Commons Journals*, 35 (1774–6), pp. 776–7, 791–2. For the correspondence between division lists and actual attendance, see Thomas, *House of Commons*, pp. 120–2.

[46] Later on, not everyone remembered it that way. '[T]he plan was rather a popular one', Henry Dundas recalled a dozen years after, 'and any objections to it were not listened to'; see Dundas to William Grenville, 17 Dec. 1789, HMC, *Manuscripts of J. B. Fortescue preserved at Dropmore* (10 vols., London, 1892–1927), I, p. 556.

[47] Eden to Burke, 17 Mar. [1776], *The correspondence of Edmund Burke*, gen. ed. T. W. Copeland (10 vols., Cambridge and Chicago, 1958–78), III, p. 251.

[48] Burke to Eden, 17 [Mar.] 1776, *Correspondence of Burke*, III, pp. 252–3 (emphases in original).

the convicts, but what would be execrably bad; for all the proposals of Africa, desert islands, mines, etc., mean nothing more than a more lingering method of inflicting capital punishment.[49]

The same reassurance was subsequently deployed in the House of Commons, where the first reaction of one MP was facetiously to wonder if the real reason that the ministry would not designate a new destination for transports in the West Indies or the Falklands was that it had already given away such islands to the Spanish.[50]

The desire simply to find a new destination for transports, a practical impossibility in time of war and a political one during a war of colonial protest, was not the only potential objection to be answered. The hulks were not to receive either female transports or male transports who were too unhealthy to endure their labour regimen. Such prisoners must continue to be confined in local jails, where they would inevitably become a substantial burden upon local authorities and ratepayers. To both of these concerns the solicitor general repeated the argument that Eden had made to Burke:

> [The measure] was intended as a bill of experiment, more particularly to answer the spur of the occasion. When tranquillity was restored to America, the usual mode of transportation might be again adopted. The nation would at the end of a year or two be enabled to judge of its propriety.

Eden, too, again held out the future prospect of continuing transportation by other means, insofar as some offenders 'might be sent to garrison places situated in unwholesome climates', and later reiterated the purely temporary nature of the hulks measure which would be reviewed after two years.[51]

Such arguments might easily be carried while the war continued. If those who were committed to transportation were to be won over to a more permanent and extensive substitution of imprisonment at hard labour for transportation, however, they must ultimately be persuaded to view the one not simply as an emergency substitute for the other but as something that ought in fact to be preferred to it. Eden hoped that the hulks might prove the virtues of hard labour to the sceptical during the next two years.

Others were unwilling to wait so long, and this brings us to a fourth and final factor that must be considered in explaining future developments. In seeking Burke's support for the Hulks Bill, Eden had claimed (quite disingenuously) to

[49] Eden to Burke, 18 Mar. 1776, *Correspondence of the right honourable Edmund Burke*, ed. Earl Fitzwilliam and Sir Richard Bourke (4 vols., London, 1844), II, p. 95. Burke's sympathies were sufficiently enlisted that he acted as one of the bill's sponsors, but he subsequently opposed it, both 'in general' and in particular for the powers which it granted the Middlesex justices; see *Commons Journals*, 35 (1774–6), p. 694; Stockdale, ed., *Parliamentary register*, III, pp. 401–2.

[50] Stockdale, ed., *Parliamentary register*, III, p. 219.

[51] Ibid., III, pp. 388–90, 401 (quotes at pp. 390, 389). A quarter-century later, Eden still maintained that the hulks had been introduced 'only as an expedient to lessen a temporary pressure'; see Auckland to Bentham, 26 Dec. 1802, *The collected works of Jeremy Bentham: the correspondence of Jeremy Bentham*, gen. eds. J. H. Burns et al. (10 vols. to date, London and Oxford, 1968–), VII, p. 174.

'have as little predilection for introducing a system of penal labour into this country as you can have', but added that

> Such a system would, however, have many advocates in the House of Commons, and would, I believe, have been proposed by some gentlemen in the course of the session, if they had not been informed that a plan of a limited and temporary kind, in the nature merely of an experiment, would be brought forward.[52]

The most active figure in this group of 'gentlemen' was Sir Charles Bunbury, a whig and county MP for Suffolk since 1761. Bunbury had played an active part in the notable but failed attempts, led by Sir William Meredith, to restrict the capital code in 1770–2. The principled and energetic opposition of the two of them seems subsequently to have been the main factor in the defeat of a 1777 bill to punish by death arson in dockyards.[53] From 1776 until 1784, and again after 1790, Bunbury was repeatedly in the front lines of penal reform activity in parliament.[54]

Raising the threat of a more radical sentiment for reform was an easy tactic for securing an initial concession in the first instance, but the need also to maintain the support of this more radical, non-ministerial wing became a lasting problem for Eden. It almost certainly explains an oddity of his legislative activity in 1776. With the session ten days from its end and the Hulks Bill through committee, the government suddenly introduced a bill directing local authorities to establish houses of correction to receive transportable offenders and to punish them by hard labour regimes.[55] Since the Hulks Bill already contained a provision for imprisoning such offenders at hard labour within existing institutions, the addition of this measure – and so late in the session – seems odd. So too does the fact that it was allowed to die with the session, despite having been introduced by a ministry that might have changed the date of prorogation had it wished to press the bill forward.[56] At least one MP knew of some such bill's existence and of the ministry's intention to circulate it amongst local authorities. Why, he wondered, had it not been presented at the same time as the Hulks Bill?[57]

The answer was that Eden and North knew enough to wait until the circumstances were more propitious for a more truly comprehensive substitution of hard labour for transportation. The Hulks Bill already required that those prisoners who could not be confined on board the hulks must be imprisoned at hard labour in any place of confinement in the country and

[52] Eden to Burke, 18 Mar. 1776, *Correspondence of the right honourable Edmund Burke*, II, pp. 94–5.

[53] Radzinowicz, *History of English criminal law*, I, pp. 427–46, 473–6; Cobbett, ed., *Parliamentary history*, XIX, cols. 234–41.

[54] Namier and Brooke, eds, *House of Commons, 1754–1790*, II, pp. 136–40; R. G. Thorne, ed., *The history of parliament: the House of Commons, 1790–1820* (5 vols., London, 1986), III, pp. 300–1; Devereaux, 'Convicts and the state', pp. 294, 339–43.

[55] *Commons Journals*, 35 (1774–6), pp. 796, 809; *House of Commons sessional papers of the eighteenth century*, ed. Sheila Lambert (145 vols., Wilmington, DL, 1975), XXVII, pp. 311–42.

[56] Thomas, *House of commons*, pp. 89–90.

[57] Stockdale, ed., *Parliamentary register*, III, p. 389.

instructed local officials to prepare their houses of correction for the reception of such convicts.[58] Until this time, the use of houses of correction had been limited to petty offenders, and they continued to be seen as essentially separate in character and purpose from jails and prisons.[59] However, the new provision may not have been expected to impose an especially onerous burden. The number of female convicts liable to so serious a degree of punishment as transportation had always been sufficiently small that local officials should have had few difficulties accommodating them.[60] And any surfeit of healthy male convicts who would otherwise have been subject to transportation could either be taken on board the hulks or pardoned (as 250 were that year) on condition of military service.[61]

By comparison, the Houses of Correction Bill embodied a more substantial commitment to hard labour as a full-fledged substitute for transportation and sought to impose a greater burden on local officials than either Eden or North believed could yet succeed. Indeed, the text of the bill – prefaced by the observation that houses of correction 'are at present n[ot] of sufficient Extent to contain so many Offenders as may hereafter be convicted of the Crimes at present liable to the Punishment of Transportation' and containing no reference at all to the hulks – can be read as a direct substitute for, rather than a complement to, the Hulks Act.[62] Eden's correspondence with Burke reveals that, as the MP noted above had suspected, there already existed in draft form 'a Sketch for a more permanent Establishment at some future Period, if it is found that we can employ our Criminals at Home with Humanity towards them, and with security to the Public'.[63] But Eden had also indicated his doubts that such a measure would be accepted while the sentiment for transportation still ran so high. Burke in turn warned him that, in an era in which justice remained essentially local in orientation and in which parochial authority in general was fiercely defended, local officials would not accept the imposition of so heavy a fiscal burden from the centre. Penal labour, he observed, fundamentally involved 'the execution of municipal justice and provincial economy'.[64] On both counts, a measure like the Houses of Correction Bill was not to be proceeded with lightly. It seems likely that, as Eden later claimed, it had never been intended for anything other than circulation to local officials in order to sound out their reactions to such a project.[65]

[58] 16 Geo.III, c. 43, preamble, ss. 10, 12–13.

[59] Joanna Innes, 'Prisons for the poor: English bridewells, 1555–1800', in Francis Snyder and Douglas Hay, eds, *Labour, law, and crime: an historical perspective* (London, 1987), pp. 92–101.

[60] At most females made up only 20 per cent of all those who had actually been transported to America since 1718, and they figured even less significantly amongst the capital convicts to whom transportation was increasingly being confined during the years before 1775; see Ekirch, *Bound for America*, pp. 48–50.

[61] See table 1, below.

[62] *Commons sessional papers*, XXVII, pp. 311–42 (quote at p. 312).

[63] Eden to Burke, 17 Mar. [1776], *Correspondence of Burke*, III, p. 252.

[64] Ibid.; Eastwood, *Governing rural England*, chs. 1, 8–9.

[65] 'Observations on the bill to punish by imprisonment and hard labour certain offenders; and to provide proper places for their reception', in *Commons sessional papers*, XXVIII, pp. 334–5.

Bunbury is listed as one of the MPs charged with bringing in the Hulks Bill, but his absence from the list of those bringing in the Houses of Correction Bill six weeks later suggests that tensions may have opened up between him and the ministry. This supposition is reinforced by the evident controversy which had prevailed the day before the Houses of Correction Bill was introduced, when the Hulks Bill was in committee.[66] The outcome was an amendment to the latter (s.18) which required that those convicts who were sent to houses of correction should actually be confined separately from those confined only for petty offences. This reconfirmed the broad distinction which continued to exist in the minds of many officials between convicts who still ought to be transported and those lesser offenders who were deemed to be more susceptible of reclamation. But it also forced Eden's hand by establishing a legal obligation on local authorities to alter substantially and perhaps even to rebuild their houses of correction where that was necessary to conform with the terms of the act.

It therefore seems likely that the introduction of the House of Corrections Bill was necessary not simply for purposes of circulation and discussion during the recess, but also to ensure that Bunbury and others of like mind would not oppose the Hulks Bill in a Commons whose numbers, in the dying days of the session, were rapidly shrinking. Eden and North went along with the immediate presentation of the Houses of Correction Bill, then drove it forward by providing its first and second readings on the same day and bringing it to committee, only to end the session the day that the Hulks Bill became law.[67]

Whether or not Eden believed the Houses of Correction Bill to be the model on which to proceed, he knew that he had to steer a course between those who opposed hard labour for transportable convicts in any form and those who supported it as a complete substitute for transportation – so much so that their support might actually jeopardize the attainment of any measure of hard labour at all.[68] Thus, the Hulks Act was not only a striking innovation in itself: it was also a deliberate attempt to forestall the more extensive innovation that Eden knew could not yet succeed. Eden was biding his time and establishing his credentials with those more radical penal reformers whose support would become more necessary when the time came for the truly ambitious measure of hard labour which, almost certainly, he was already contemplating.

III

Eden hoped that this moment had arrived two years later when the Hulks Act came up for renewal. At the opening of the 1777 session the year before, Bunbury had immediately secured an order for 'a Bill for better regulating the Gaols and Houses of Correction' in England – some version, presumably, of

[66] *Commons Journals*, 35 (1774–6), pp. 694, 791–2. [67] Ibid., pp. 796, 809, 810.

[68] Some sense of the divisiveness the act aroused can be had from *London Magazine*, 45 (1776), pp. 369, 424–7, 477–9.

the Jails and Houses of Correction Bill from the previous session – but then subsequently failed even to introduce it.[69] This may suggest that Eden had taken him into his confidence as to the plans that he and Blackstone had in contemplation, the existence of which was announced by Justice Ashhurst at the Cambridge assizes the following summer.[70] At any rate, by 1778 Eden was clearly working in tandem with Bunbury and others of like mind. The groundwork for the Hard Labour Bill of that year was laid by a parliamentary committee of 1778 which reviewed the success to date of the hulks establishment. Its report, delivered by Bunbury himself, noted that there had initially been a high rate of mortality on board the hulks owing to crowded and insanitary conditions and a poor dietary regimen. But it also observed that circumstances had substantially improved since then. The committee endorsed a one-year extension of the Hulks Act which was passed into law under Bunbury's supervision and with no apparent controversy.[71]

It was soon after the committee stage of this bill was completed that its sponsors introduced their remarkable new measure. The Hard Labour Bill proposed the division of England and Wales into nine districts, in each of which would be erected two or more buildings to be designated '"The Houses of Hard Labour," and [which would] be wholly distinct and separate from the Common Gaol or Gaols, and from all Work Houses, or Houses of Correction'.[72] The bill was calculated to steer a middle course on two issues which might prove objectionable. First, it still did not attempt altogether to replace transportation with hard labour. For the very worst of those 'atrocious and daring Offenders' who had still been transported as late as 1775 – that is, those convicted of grand larceny or 'Robbery or other Felony' – the bill explicitly preserved the option of the hulks, some of which might even be established on any 'River navigable for Ships of Burthen, or any Port, Harbour, or Haven' in England rather than just the Thames (pp. 22–3). However, such cases were clearly intended to be the exception rather than the rule. Officials were not obliged to sentence transportable offenders to the new houses of labour, but each district was required to provide sufficient space in its house (or houses) to accommodate three times as many offenders as it had on average transported each year (pp. 301, 310–11), so there could be no mistaking the long-term intention of the legislation.

The second potential area of controversy which the bill sought to address was the expense that so decisive a shift from transportation to penal labour would impose on local officials. Both the Houses of Correction Bill and s.18 of the Hulks Act, by requiring the separation of transportable from petty offenders, had potentially obliged them either to alter substantially or even to rebuild

[69] *Commons Journals*, 36 (1776–8), p. 36. [70] *Gentleman's Magazine*, 47 (1777), p. [3]50.

[71] 18 Geo.III, c. 62. See also *Commons Journals*, 36 (1776–8), pp. 926–32, 949, 963, 967.

[72] The text of the bill is in *Commons sessional papers*, xxviii, pp. 291–330 (quote at p. 293); bracketed references in this and the following three paragraphs follow this pagination. See also the commentary provided in the 'Observations on the bill to punish by imprisonment and hard labour', in ibid., xxviii, pp. 331–42 (esp. pp. 336–8).

their houses of correction. The Hard Labour Bill sought to minimize such difficulties by creating an aggregative system that treated each English circuit as a separate district, London and Middlesex as one each, and the two Welsh circuits as a ninth (pp. 340–1). The costs of the construction and administration of each district house were to be borne by the constituent counties in proportion to the number of offenders each county confined there (pp. 293–6). The principle of local authority would further be upheld by placing each district under the supervision of an association of magistrates from the relevant counties, representation being apportioned according to a fixed rule (p. 297). The conduct of each house was to be supervised and enforced by a system of visitors who would be empowered to discipline the officers of the houses for any misconduct, as well as to recommend reduced sentence or pardon for those prisoners whose behaviour might seem 'so meritorious as to deserve to be rewarded' (pp. 319–20, 329–33).

Nevertheless, although the architects of the Hard Labour Bill sought to maintain a structure of local authority in principle, there was no disguising the extent to which it was a centralizing measure in effect. No matter how reasonably it sought to apportion the costs and responsibilities involved in building and administering the new houses, it still imposed on local authorities both the initial cost of building and the subsequent costs of running them. Moreover, the internal regimen which it prescribed vastly exceeded the absolutely minimal standards of conduct required by the three prison reform acts of 1773 and 1774. From the point of view of physical structure, it required that the houses be built in a healthy location, that they be provided with airing yards in which the prisoners might take exercise, and that they include a sufficient number of cells to enable both the separation of prisoners at night and a minimum level of associated labour during the day (pp. 299–300, 315, 319). The prisoners were to be kept 'to Labour of the hardest and most servile Kind', fed on 'inferior food, and Water, or Small Beer', and clothed in a manner 'as well to humiliate the Wearers as to facilitate Discovery in case of Escapes' (pp. 314–16). They were also to be classified according to a three-tiered system in which they would be subjected to declining gradations of harshness of both the labour they engaged in and the conditions under which they did so. Particularly well-adjusted members of the third class might be given duties as overseers or assistants (pp. 317–18). Offenders against the internal regime of the house of labour were 'to be moderately whipped, in Proportion to the Nature of the offence', or confined to the dungeon on a diet of bread and water for a maximum of ten days. Harsher penalties could be prescribed only by visitors and district supervisors (pp. 321–2). First attempts at escape were to be punished by an addition of three years to the prisoner's sentence; a second attempt was to be deemed a capital offence (pp. 326–7).

Such extensive and precise specifications would have imposed substantial and regular costs on the localities which they served. The day-to-day running of each house was to be in the care of a number of salaried officials, the costs of

whose employment would arise (the bill noted hopefully) 'totally, if possible, or at least in great Measure, from the Profits of the Work' done by the prisoners (pp. 306–7). Finally, having imposed such potentially large costs on the localities, the bill reserved the final apportionment of each county, town, or division's share of them to the circuit judges (p. 308), a means of proceeding which might well have been highly objectionable to local officials striving to control the levels of their own rates. Many localities had transported relatively few offenders to begin with. Some may already have been able either to send such offenders to the hulks or to confine them in their own local penal institutions without substantial difficulty. Local officials in such a position must have viewed the extensive obligations imposed by the Hard Labour Bill with particular scepticism, if not outright hostility.

They might also have suspected that it was being thrust on them in an indirect and conniving fashion. The Commons' report that sanctioned the renewal of the Hulks Act seems also to have been intended to pave the way for the Hard Labour Bill, even though no mention of the latter is made in the committee's recommendations. In his testimony to this committee, the famous prison-reform advocate John Howard had noted that, in a full tour of the kingdom during the last two years, he had not found a single place where houses of correction were being prepared to receive transportable offenders as the Hulks Act of 1776 had required – a clear indication of local reluctance to engage in expensive institutional ventures.[73]

The committee also maintained that the hulks were only taking on about half the number of male offenders as would have been expected given the number of offenders that had been annually transported from England between 1769 and 1776.[74] It is significant that the committee did not invoke, or even seek to obtain, the surely more pertinent information as to how many healthy, transportable men there were *now* in the kingdom who had not been taken on board the hulks. The committee's use of pre-war figures was almost certainly a dissembling tactic, for there were good reasons why an informed observer might have expected there to have been a significant decline from the pre-war levels of transportable convicts. In the first place, the experience of four major wars since 1688 had rendered axiomatic the connection between major war-efforts and reduced levels of criminality at home.[75] And in fact, by June 1777, at least one major London newspaper had indeed reported 'that of late robberies in general are something less frequent' than they had been since the outbreak of the war.[76] Moreover, other events were in train which would further undermine the relevance of the pre-war figures. The British defeat at Saratoga in October 1777, followed a few months later by the entry of France

[73] *Commons Journals*, 36 (1776–8), pp. 15, 322, 930. [74] Ibid., p. 932.

[75] Beattie, *Crime and the courts*, pp. 225–34; Douglas Hay, 'War, dearth and theft in the eighteenth century: the record of the English courts', *Past and Present*, 95 (1982), pp. 156–8; John Childs, 'War, crime waves and the English army in the late seventeenth century', *War and Society*, 15 (1997), pp. 1–17. [76] *The Morning Chronicle, and London Advertiser*, 27 June 1777, 3a.

Table 1 *Military service vs the hulks as a condition of pardon 1776–82*

Year	Military service	Hulks
1776	251	63
1777	38	140
1778	136	128
1779	156	77
1780	91	56
1781	129	79
1782	152	24

Source: PRO, SP 44/92–6.

into the war against Britain, signalled the beginning of a more extensive diversion of pardoned felons into the military services (see table 1), reducing further still the number of convicts for whom resort to the hulks might be imperative.[77] Thus, by the spring of 1778, those MPs who had always preferred transportation to any hard labour scheme might have good reason to suspect that the urgent necessity which had seemed a credible excuse two years before now lacked the force it had then possessed. Finally, it is striking that the committee did not suggest the most obvious solution: simply extending the hulks establishment from two ships to three or four in order to make up any difference. On the whole, it seems likely that the committee was treading a delicate balance, deploying figures which exaggerated the scale of numerical necessity underpinning the hulks establishment – whose numbers, in fact, would begin steadily to decline from about 500 in 1779 to only 200 by 1783[78] – in order to sustain the sense of urgency which had formed the original basis of the hard labour experiment, while at the same time seeking to direct attention away from the hulks per se as the form which hard labour should assume. In expressing approval of the hulks, the committee was expressing its approval of the penal principal which they had originally been intended to exemplify rather than the particular system itself. Having vindicated the underlying principle of hard labour, the committee was now striving to bring a new institutional form of it to the centre stage.

None the less, having been read twice and committed within three days of its introduction, the Hard Labour Bill – like its forebear, the Houses of Correction Bill – died with the session.[79] In accounting for this failure to proceed, we can detect significant differences from the legislative pattern of 1776. Eden seems

[77] Piers Mackesy, *The war for America, 1775–1783* (London, 1964), pt 2; Stephen R. Conway, 'The recruitment of criminals into the British army, 1775–81', *Bulletin of the Institute of Historical Research*, 58 (1985), pp. 48–50; idem, *The war of American independence, 1775–1783* (London, 1995), pp. 35–6, 98–9, 103, 141–4, 157–8.

[78] Devereaux, 'Convicts and the state', p. 183, table 3.3.

[79] *Commons Journals*, 36 (1776–8), pp. 970, 972, 977.

never to have intended that the Houses of Correction Bill should pass into law, but it is clear that he meant the Hard Labour Bill to do so. Although he was not there to oversee its passage, having left England in April as a member of the abortive Carlisle peace commission, he had not neglected it. Once again he had drafted the measure in close consultation with Blackstone and Ashhurst.[80] He had also produced a long list of MPs who he thought should sponsor the bill, including not only Bunbury and his associates but also Burke, Sir William Meredith, and the recorder of London.[81] And again, he had urged Lord North himself personally to lead the measure in the Commons:

> I beg that you will bestow a serious perusal on my Preface to the draught of the Convict Bill, for I am proud of it, and am at least sure that the subject on which it treats deserves & indeed *must* engage your Ldps best and most serious attention…
>
> There should surely be a private meeting upon the Bills with the Attorney and Solicitor General on Sunday evening, that we might settle what to admit and what to refuse.[82]

Clearly, then, Eden had put at least as much effort and thought into both the form of the Hard Labour Bill and the means of securing its passage as he had into the Hulks Act two years before.

This time, however, North stood aloof from any personal involvement beyond the renewal of the Hulks Act, and even here the active lead was left to Bunbury. This may have reflected both the king's growing distaste for Eden, whose increasingly transparent and aggressive desire for place and status offended him, and North's reluctance to antagonize his royal master by too close an association with any potentially controversial project of Eden's.[83] On the ministerial side, only Sir Richard Sutton and Eden's brother-in-law Gilbert Elliot, inconstant ministry-supporters at best, were explicitly involved in attempts to pass the Hard Labour Bill.[84] North must further have been dissuaded by the temper of the initial debates over the renewal of the Hulks Act. These indicated that hard labour remained deeply objectionable in principle to many MPs and that the expectation of an ultimate renewal of transportation, far from dissipating after two years' experience of the hulks,

[80] Eden to North, 7 Feb. [1778], and W. Ashhurst to Eden, 11 Mar. 1778, *B. F. Stevens's facsimiles of manuscripts in European archives relating to America, 1773–1783* (25 vols., London, 1889–98), IV, docs. 369, 398. See also Bentham to Samuel Bentham, 3 June 1778, *Correspondence of Bentham*, II, pp. 123–4; and Bentham to Pole Carew, 3 Oct. 1783, ibid., III, p. 211.

[81] BL, Auckland papers, Add MS 34416, fo. 194. This note (whose placement in the Auckland papers incorrectly implies that it dates from December 1778) indicates that Eden wanted the bill to be moved by North and seconded by the solicitor general. As chief sentencing officer at the Old Bailey, the recorder of London was a pivotal figure in the administration of criminal justice at the felony level for the nation's busiest juridical division.

[82] Eden to North, n.d. [Feb./Mar. 1778], BL, Sheffield Park papers, Add MS 61863, fo. 59 (emphasis in original).

[83] The king to North, 3 Mar. 1778, *The correspondence of King George III*, ed. John Fortescue (6 vols., London, 1927–8), IV, p. 44; the king to Charles Jenkinson, 6 Mar. 1778, BL, Liverpool papers, Add MS 38564, fo. 1; HMC, *Knox manuscripts*, pp. 266–7.

[84] Namier and Brooke, eds., *House of Commons, 1754–1790*, II, pp. 394–6; III, pp. 512–13.

had continued unabated. Many of those now objecting to the hulks, including Burke and Meredith, were amongst those whose sponsorship Eden had hoped to have for his more ambitious Hard Labour Bill.[85]

It was only on the eve of his departure for America that Eden learned that North was pulling the plug on the bill. In a letter to Jeremy Bentham written four days after the preliminary debate in the Commons, Eden stated that it was no longer

> proposed to carry it … in the present Session unless it should be found absolutely necessary; but the public Observation will be drawn to it by some essential Enquiries that will be made in the House of Commons; and the Result of the whole with the Bill will be printed and circulated for consideration during the Recess.[86]

No such 'absolute necessity' emerged (a telling point in itself so far as any penal 'crisis' is concerned) and, in the end, the bill made it no further than a committee stage, chaired, not by North, but by Alexander Popham, an ally of Bunbury's who had been a leading figure in the prison legislation of 1773–4. Like the Houses of Correction Bill, the Hard Labour Bill was introduced only in order to be printed for purposes of circulation and discussion.[87] The danger in which the whole project of hard labour now stood was made clear in a letter to Popham from its co-author, Sir William Blackstone, which explicitly noted North's failure to move the new bill following the committee's report on 15 April. '[I]ndeed', Blackstone added, 'I have seen so much Tergiversation in the professed Patron of this Measure [i.e., Lord North], that I am quite sick of it; and should not be surprised if it be made a Excuse for … at length … intirely dropping it.'[88]

IV

Eden probably hoped that the ultimate result of the activity of 1778 would be a shift in emphasis from the hulks to a more general acceptance and a broader institutionalization of hard labour in place of transportation. To promote this end, the 'Observations' describing the aims and contents of the Hard Labour Bill of 1778 were not only printed and distributed for the use of MPs, but were also published in the *Morning Chronicle* at the end of the session.[89] But Eden was to be disappointed by the events of 1779. Once again he sought to bring the same tactics to bear as had been used in 1776 and attempted in 1778. The committee report which was to set the new legislation in motion was not made until 1 April, by which time it could be hoped that a declining Commons population, combined with the absolute necessity of replacing a Hulks Act that

[85] Cobbett, ed., *Parliamentary history*, xix, cols. 970–1; BL, Auckland papers, Add MS 34416, fo. 194. [86] Eden to Bentham, 27 Mar. 1778, *Correspondence of Bentham*, ii, pp. 91–2.
[87] *Commons Journals*, 36 (1776–8), p. 977.
[88] Blackstone to Popham, 19 Apr. 1778, BL, Reproductions of Exported Manuscripts (RP) 2070.
[89] 'Observations', in *Commons sessional papers*, xxviii, pp. 333–41; *Morning Chronicle*, 19 June 1778, 4a–b; 20 June 1778, 4a–b; 23 June 1778, 4a–b.

expired on 1 June, might ease the passage of potentially controversial legislation.

A letter to Eden from Gilbert Elliot indicates that they initially meant to introduce an only slightly amended version of the Hard Labour Bill. It also reveals continuing concern about the objection to costs which the measure was sure to arouse amongst local authorities. Elliot recommended that they should perhaps restrict themselves to only one house of labour for each district, which would be enough to relieve any immediate pressure of numbers on existent houses of correction without arousing undue opposition to a full-blown establishment: '*One* is certainly enough for an Experiment, and an experiment should certainly be made before any general plan of such expense and importance ought to be adopted.'[90] Letters to Eden from Sir William Blackstone indicate that the latter had been at work on a revision of the Hard Labour Bill during Eden's absence in America. They also indicate that Lord North continued to withhold his active participation from the measure and Blackstone's growing despair of the project's ultimate success. 'I know your own promptitude on [this] subject', said Blackstone; 'I also know the *Vis Inertia* of Him who is the *primum Mobile*, or rather *Immobile*, in these matters.'[91]

North, whose enthusiasm had clearly been waning the year before, was now beset by his longest crisis of self-confidence. The death of the earl of Suffolk in March 1779 was followed by an eight-month period during which North failed to summon up the nerve to choose his successor as secretary of state, a choice which had the potential to alienate large blocks of opinion within the Commons after the psychological downturn following Saratoga, the entry of France into the war, and the revival of full-blown political opposition in parliament. Worse still, Eden himself figured largely in his difficulties. The distaste which Eden aroused in the king was now compounded by his open association with opposition in the particularly offensive form of the Shelburne circle and by his various manoeuvres to secure the vacant northern secretaryship for either himself or his long-time ally in the ministry, Alexander Wedderburn.[92] From a political perspective, the circumstances of the 1779

[90] Elliot to Eden, 28 Mar. 1779, BL, Auckland papers, Add MS 34416, fos. 301–3 (emphasis in original). This letter is extremely informative on many counts. It indicates that Elliot and Eden intended to emphasize the large numbers of convicts, but only in order to secure a small concession for purposes of experiment. It is also interesting for Elliot's extended comments on – and reservations about – the nature and purposes of hard labour as the bill intended to apply it.

[91] Blackstone to Eden, 1 Feb. 1779, BL, Auckland papers, Add MS 34416, fo. 256 (emphases in original); see also Blackstone to Eden, 28 Dec. 1778, and 31 Dec. 1778, BL, Auckland papers, Add MS 34416, fos. 147, 27, the latter of which pessimistically noted that 'The corrected Draught of the Hard Labour Bill' was now available 'for the Inspection of such Members as might chuse to interest themselves in the Fate of it'.

[92] The king to North, 22 Feb. 1779, *Correspondence of George III*, IV, p. 286; Herbert Butterfield, *George III, Lord North, and the people, 1779–80* (New York, 1968; original edn, 1949), pp. 26–41; Andrew S. Brown, 'William Eden and the American Revolution' (Ph.D. thesis, University of Michigan, 1953), ch. 6; Namier and Brooke, eds., *House of Commons, 1754–1790*, II, p. 377; III, p. 620; Alan Valentine, *Lord North* (Norman, OK, 1967), II, pp. 74–155 passim; Thomas, *Lord North*,

session were extremely inauspicious for introducing a highly controversial measure.

In fact, even before it could be introduced, the Hard Labour Bill was dealt a severe blow by the Commons committee's report of 1 April. The committee's condemnation of the system of hard labour prevailing under the acts of 1776 and 1778 might have been expected, and even hoped for by supporters of the Hard Labour Bill. But the committee went on to advocate the resumed transportation 'of certain Convicts… to any other Part of the Globe [than America] that may be found expedient'. This committee had been struck in order to consider returns of convicted felons imprisoned in the jails and houses of correction of the metropolis and the Home Circuit that had been demanded by the Commons during the 1778 and 1779 sessions. In February 1779 its terms of reference had been expanded to consider the 1778 Commons report on the hulks and imprisonment, the renewed Hulks Act of that same year, and the laws relating to transportation in general.[93] The debates which accompanied this expansion strongly suggest that its conclusions were pretty much foregone in the mind of its chairman, Sir Charles Bunbury.[94] The long-standing ideas of the West Indies or Africa as destinations were reiterated in the committee's investigations, supplemented now by both Gibraltar and by Sir Joseph Banks's suggestion of an obscure antipodean destination called Botany Bay.[95]

Few historians of the subsequent Penitentiary Act have emphasized (or even noted) that it actually had three purposes, the first of which was to reassert the place of transportation in the English array of penal practices. This fundamental shift in attitude – from an exclusive orientation toward hard labour to the reintegration of transportation – can be followed in changes to the preamble in the three successive versions of the bill. In the first, as in the Hard Labour Bill of 1778, transportation was described as having 'become inconvenient, and frequently impracticable' and having 'at all Times been found insufficient, both for the Reformation of Criminals, and also for the deterring others by Their Example'. The second bill noted more moderately that it had 'now become impracticable'; the third merely asserted that it was 'attended with many Difficulties'.[96] Each alteration reflected an enhanced optimism about and determination upon the ultimate resumption of transportation, moving from outright condemnation of it as a penal practice to implicit acknowledgement of its inherent desirability. The very first provision of the Penitentiary Act was that, henceforth, those offenders formerly sentenced to be transported to America could be sentenced to 'be transported to any parts

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pp. 115–17, 120–1; Peter Whiteley, *Lord North: the prime minister who lost America* (London, 1996), pp. 180–2.

[93] *Commons Journals*, 36 (1776–8), p. 986; *Commons Journals*, 37 (1778–80), pp. 53, 71, 97, 125, 306–14 (quote at p. 314).

[94] Stockdale, ed., *Parliamentary register*, x, pp. 233–4.

[95] *Commons Journals*, 37 (1778–80), pp. 311–14.

[96] The three versions of the bill are in *Commons sessional papers*, xxix, pp. 171–204, 205–40, 241–82 (quotes at pp. 171, 205, 241).

beyond the seas, whether the same shall be situated in *America*, or elsewhere' in the same manner and for the same term.[97]

The substance of the Penitentiary Act was largely the work of Sir William Blackstone who, after hearing of the committee's resolutions, set about transforming the Hard Labour Bill into the 'Penitentiaries' Bill over the course of the two weeks between 19 April and Bunbury's presentation of it to the Commons on 5 May. In a letter written on the former date, Blackstone sketched out for Eden the three principles of revision that he would follow. The first was the resumption of transportation. The second was the establishment of two houses of hard labour to be erected somewhere in Middlesex, Surrey, Kent, or Essex, one to hold 600 men and the other 300 women. Blackstone emphasized that these were to be national institutions, the spaces in them to be allotted to convicts of the English circuits according to a fixed proportion. His third aim was to retain the hulks option for the worst classes of offenders, as the Hard Labour Bill had originally contemplated and which might be necessitated both by delays in finding a new destination for transports and the perhaps more limited numbers of them who could be sent there. Most importantly for future developments, Blackstone also noted that, in the absence of the full-scale hard labour establishment that he and Eden had originally contemplated, many lesser offenders 'must be sent to the Houses of Correction in each County, which Houses the Justices must be compelled to enlarge and render commodious'.[98]

Most of the new act was given over to describing the internal regime of the two 'Penitentiary Houses' that would be built. These provisions were lifted largely intact from the Hard Labour Bill. Yet we should not allow the extensive detail of the Penitentiary Act to obscure the fact that it specifically contemplated only two institutions to house only a small proportion of English convicts. Moreover, the scrupulousness with which it allocated a set number of places to all English and Welsh circuits ensured that it would indeed have been an experiment only, rather than a substantial application of an elaborate philosophy of hard labour even to that number of capital convicts who were already subject to sentences of imprisonment, much less the vastly increased number that could be anticipated after the end of the war.[99]

[97] 19 Geo.III, c. 74, s. 1 (emphasis in original).

[98] Blackstone to Eden, 19 Apr. 1779, BL, Auckland papers, Add MS 34416, fos. 322–3. The timing of Blackstone's re-draft and the critical role of 'an ingenious Report … made by a select Committee', is confirmed in his last letter to Eden on the subject (11 May 1779, BL, Auckland papers, Add MS 34416, fos. 341–2). It was in another letter to Eden that Blackstone coined the term 'Penitentiary', describing the houses he contemplated as '[experi]mental Houses of Confinement & Labour; which I would [wish] to call *Penitentiary Houses*, as well to intimate the [hope] of Reformation which may be indulged from their Establish[ment] as to distinguish them more effectually in common Speech [from the] provincial Houses of Correction' (25 Apr. 1779, BL, Add MS 34416, Auckland papers, fo. 328; emphases in original; the margin of this letter is damaged).

[99] The act specified a yearly maximum of 32 convicts from London, 72 from Middlesex, 32 from the Home Circuits, 24 each from the Oxford and Western Circuits, 20 each from the Midland and Norfolk Circuits, 16 from the Northern Circuits, and 4 from the combined Welsh and Chester

The third significant departure in Blackstone's new bill was that government, rather than the localities, would bear the initial expense of erecting the buildings and that any costs which could not be recouped by the labour conducted within the penitentiary houses must be covered by parliament.[100] This was clearly a concession to continuing reservations amongst local authorities about the potential costs of the project. Blackstone now conceded that the institutions contemplated in the new version of the Hard Labour Bill could never be brought into being unless the central government shouldered their entire cost: 'this Experiment, being national, must be carried into Execution (if at all) under the immediate Direction of Government'. He also took it for granted that it would be some time before so detailed a regime could be expected to be applied in all English prisons. But he also believed that the same parsimony which made local officials unwilling to build houses of labour in accordance with centrally determined standards might ultimately motivate them to find some useful fashion in which to employ those convicts who must inevitably be imprisoned in their houses of correction. 'As for the *Employment* of the convicts [in houses of correction], it must be left to the Direction of the County Magistrates. If they do no Work, their expenses will fall the heavier on such Counties as neglect to employ them.'[101] So Blackstone expected that the example of the Penitentiary Act would ultimately compel local officials to adopt the essentials of the Hard Labour Bill without the central government overtly (and offensively) requiring them to do so. For this reason, too, government must ensure the success of this experimental venture.

So subtle a strategy was not sufficient for Sir Charles Bunbury, who now became a principal instigator of events. Eden had always appreciated the strength of sentiment behind a resumption of transportation and proceeded cautiously in his ultimate ambition of substituting hard labour for it in the case of the worst classes of convicts. 'The Matter', he had told Jeremy Bentham in 1778, 'is too complex to be brought to any degree of Perfection except by continued Attention and repeated Alterations.'[102] Confronted with objections to both the principle and the costs of a penal regime exclusively focused on hard labour, Eden and Blackstone had chosen to preserve the ideal of their hard labour regime at the cost of severely reducing the scale on which it would immediately be applied.

In contrast, although he had chaired the Commons committee which demanded a return to transportation for the most serious offenders, Bunbury

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sessions (s. 25). These were the figures originally contemplated by Blackstone, except that he had not included any from the Welsh and Chester sessions; those were added to the bill at the committee stage; see Blackstone to Eden, 19 Apr. 1779, BL, Auckland papers, Add MS 34416, fos. 322–3; *Commons sessional papers*, xxix, pp. 218–9, 258.

[100] 19 Geo.III, c. 74, ss. 14, 64.

[101] Blackstone to Eden, 19 Apr. 1779, BL, Auckland papers, Add MS 34416, fos. 322–3 (emphasis in original).

[102] Eden to Bentham, 27 Mar. 1778, *Correspondence of Bentham*, ii, p. 91.

also sought measures that would maximize the scale on which a hard labour regime could be imposed. In March 1779, even before his committee reaffirmed transportation and prompted Blackstone's redraft of the Hard Labour Bill, Bunbury and his associates had introduced and brought to committee stage their own bill to achieve general measures of reform and hard labour in all places of criminal confinement throughout England and Wales.[103] Its centralizing intentions were made clear in its preamble, which declared that 'the Health, Cleanliness, and proper Separation and Regulation of Prisoners confined in the public Gaols and Houses of Correction are great Objects of National Humanity, as well as of sound general Policy'.[104] It sought to achieve these aims by requiring local magistrates to ensure that the standards of health and cleanliness required by the acts of 1773–4, as well as the physical requirements of separating classes of offenders which had been implicit in the Hulks Acts, were now actively enforced by a system of quarterly inspections by local magistrates and fines for delinquencies. Its tactics were reminiscent of those which Eden and Blackstone had attempted in the Hard Labour Bill: uniform penal standards in locally controlled institutions were to be maintained through a local structure of authority. Yet it also persisted in that bill's critical failing: the impossibility of doing this without imposing heavy burdens of both duty and cost on those local officials.

Unlike Eden and Blackstone, however, Bunbury and his allies refused to be deterred. Indeed their bill sought even further to intrude a measure of direct central supervision in all English prisons by requiring the submission to the House of Commons of annual returns of the prisoners kept there and the cost of their upkeep. Moreover, once the vast scale of Blackstone's reduction of the hard labour scheme into the Penitentiary Bill had become apparent to them at the end of April, Bunbury's group actually sought to enhance the standards to which local jail regimes would be held by further requiring that these annual reports specify the sort of labour to which prisoners were being put.[105] Finally, and most cunningly, they eliminated from the third and final draft of Blackstone's Penitentiary Bill the phrase which explicitly stated that the new penitentiary houses 'shall be wholly distinct and separate from the Common Gaol or Gaols, and from all Workhouses, or Houses of Correction, … and from all Houses of Industry, Hospitals, Workhouses, and Almshouses'.[106] The effect of this, if their Prisons Regulation Bill had also become law, would have been to imply that the regime detailed in the Penitentiary Act was the standard by which all other jail and prison regimes were to be judged. They also inserted into the Penitentiary Bill a clause requiring the regular inspection of the penitentiary houses by county magistrates, further enhancing the congruence between the two measures.[107]

[103] *Commons Journals*, 37 (1778–80), pp. 199, 214, 257–8.

[104] The three draft versions of this bill are in *Commons sessional papers*, xxix, pp. 75–82, 83–94, 95–108 (preambles at pp. 75, 83, 95).

[105] *Commons sessional papers*, xxix, pp. 88–90, 100–2.

[106] Ibid., xxix, p. 245.

[107] Ibid., xxix, p. 267.

Such tactics could only have antagonized local interests. Indeed, they jeopardized the realization of any measure of hard labour at all. Blackstone himself was so offended and alarmed – such alterations, he told Eden, were so 'totally repugnant to all the Ideas which I have so long been forming on the Subject' – that he declared that he was now 'totally abandoning [the Penitentiary Bill] at present, and perhaps forever'.[108] The indirect tactics employed by Bunbury and his allies in charging far beyond the carefully circumscribed intentions of hard labour's principal architects probably account for the concerns demonstrated by the House of Lords, first by calling for all of its members so late in the session and then by debating and putting off the Penitentiary Bill until the Commons had quelled the Bunbury group's national measure. The Lords appear to have let the former go forward only after it was clear that the latter was only to be printed for circulation during the recess.[109]

These manoeuvres were dangerous on both sides. By insisting on the fullest measure of prison reform, Bunbury and his allies risked losing even Eden and Blackstone's less extensive version of it. The Lords, too, found their hands were tied. The Penitentiary Act was designed to take over from the expired Hulks Act on 1 July. In the event, both the final one-month extension of the Hulks Act and the Penitentiary Act which replaced it received the royal assent only on the respective last days before they took effect.[110] Blackstone's years of effort had nearly come to grief at the hands of Bunbury's impetuousness, and he attributed the near-disaster in part to the danger of leaving complex and controversial legislation to the last minute. He vowed 'never again [to] concern myself in a Measure of this Kind, unless it be taken up before Christmas; when Gentleman's Heads are cool & nothing else interferes with the Business'.[111] For now, he might have consoled himself with the knowledge that his carefully circumscribed measure of imprisonment at hard labour was now safely passed into law. He could look forward to a time, surely not far off, when his penitentiary houses would be built and their example might serve as a model to encourage the spread of their system throughout the country.

V

Blackstone's hopes were only partially to be realized. For reasons that I have explored elsewhere, the specific institutions proposed in the Penitentiary Act were never built.[112] In the end, however, all was not lost. The 1780s proved to be a period of intensive prison reconstruction amongst local authorities, and many of these efforts were undertaken in self-conscious emulation of the system outlined in the Penitentiary Act. As a recent study has concluded, the

[108] Blackstone to Eden, 11 May 1779, BL, Auckland papers, Add MS 34416, fos. 341–2.
[109] *Commons Journals*, 37 (1778–80), pp. 413, 423–4, 432, 437, 443, 445–6; *Lords Journals*, 35 (1776–9), pp. 750–1, 766, 769, 773, 779, 783, 787, 790, 791–2, 794, 795.
[110] 19 Geo.III, c. 54; *Commons Journals*, 37 (1778–80), pp. 428, 458.
[111] Blackstone to Eden, 11 May 1779, BL, Auckland papers, Add MS 34416, fos. 341–2.
[112] Devereaux, 'Convicts and the state', pp. 192–217.

Penitentiary Act 'influenced penal practice not through the construction of a national penitentiary as envisaged by the Act, but through a series of local reforms some of which embodied its theoretical premisses'.[113] To the extent that this was so, the failure to realize the institutions it outlined was a failure of form rather than substance. Prison reform was not a lost cause, but the achievement of it by means of any heavy-handed centralizing measure was. Indeed, full oversight of the nation's prisons by the central government still lay almost a century in the future.[114]

What needs to be recognized is that this defeat had already been anticipated, and to some degree adjusted for, by the framers of the Penitentiary Act even before it was passed. If in 1776 Eden and Blackstone had hoped to exploit the opportunity that war in America had provided for largely substituting imprisonment at hard labour for transportation, by 1779 they had resigned themselves to a much more limited project. They did so because they had understood from the outset the two problems such an effort must face: the persistence of a broad commitment to transportation as the preferred secondary punishment for the worst classes of capital offenders; and the political difficulty of imposing so large and expensive a scheme as a national network of hard labour institutions on the time of local officials and the pockets of the ratepayers whom they served. The pattern of development of the following two decades need not have been altogether unsatisfactory to them.

Yet Jeremy Bentham, who was never one to compromise a principle in order to satisfy political realities, viewed Eden's tactics with contempt: 'I write from system: and it is the fashion to hate systems. I labour to learn and to instruct: [Eden] writes secure of pleasing. He swims with the current: my struggle is to turn it.'[115] This was not entirely fair. Eden's personal ambition was obvious, but Bentham's remark could only have been made by someone with little experience of the limitations and complexities involved in any attempt to institute massive and controversial administrative reform during the late eighteenth century. His own later efforts to implement the Penitentiary Act on a grandiose scale of conception left him a broken and embittered man.[116] He might have thought twice about doing so had he truly understood the lessons learned in its making.

[113] Eastwood, *Governing rural England*, pp. 247–8. See also Ignatieff, *A just measure of pain*, pp. 96–109; Robin Evans, *The fabrication of virtue: English prison architecture, 1750–1840* (Cambridge, 1982), ch. 4; Margaret DeLacy, *Prison reform in Lancashire, 1700–1850: a study in local administration* (Stanford, CA, 1986), pp. 79–115.

[114] McConville, *English prison administration*, pp. 468–82; Jill Pellew, *The home office, 1848–1914: from clerks to bureaucrats* (London, 1982), pp. 42–7, 132–8.

[115] Quoted in Janet Semple, *Bentham's prison: a study of the Panopticon penitentiary* (Oxford, 1993), p. 59.

[116] For a brilliant account of those efforts, see ibid.