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# **The Origins and Role of the Penitentiary in Brazil, Scandinavia, and the United States**

BY NITIN SAPRA

The founders of a new colony, whatever Utopia of human virtue and happiness they might originally project, have invariably recognized it among their earliest practical necessities to allot a portion of the virgin soil as a cemetery, and another portion as the site of a prison.

-Nathaniel Hawthorn

## **Introduction**

Modern penitentiaries offer valuable insight on the core of society's sensibilities, perceptions, and values. They shed light on the relation between the State and the citizenry, particularly the lower classes. Beyond its explicit reformatory goals to the criminal justice system, the penitentiary functions to affect social policy through norms of decency and respect for human rights. From the unique architectural choices to the minute logistical details, a government makes choices that intimately speak on how it views its most vulnerable groups of individuals. The origins of the penitentiary offer insight into the circumstances that interweave to organize the social fabric of modern society.

This paper seeks to compare the roles and uses of the penitentiary in shaping the citizens of Brazil, Scandinavian countries, and the U.S. Part I of this paper will review the historical origins of the penitentiary in Brazil as well as in the U.S. and Europe. It will explain what early reformers sought to achieve with the modernization of the penitentiary and explore the movements and actions undertaken to meet these demands. Part II posits that Brazil deviated from the U.S. and Europe in its efforts at criminal reform due to the interplay of three issues—Brazil's severe lack of resources to realize its motivations, resistance from Brazilian elites to liberal reform, and the implications of Brazil's legacy of slavery. Part III will analyze modern criminal justice dynamics at play in Scandinavia, Brazil, and the U.S. and will attempt to organize the implications of each

nation's historic roots in its modern policies.

## I. The Birth of the Penitentiary

### A. *The Roots of the European and United States Penitentiaries*

The role of prisons in the U.S. and European society largely developed during the period between American independence and the Franco-Prussian War.<sup>1</sup> Early penitentiaries in the late 1770s developed out of European "houses of correction."<sup>2</sup> During the enlightenment, penitentiaries were envisioned by its founders as places of reformation through silence, solitude, and suppression.<sup>3</sup> The idea was that a prisoner in isolation coupled with the routine of work would inevitably lead the prisoner to a state of remorse.<sup>4</sup> The prison cell became the isolating vessel by which wardens could contain and segregate the prisoners' population.<sup>5</sup> Indeed, cellular confinement was obligated under the English Act of 1779 and implemented in the U.S. in the Auburn, Sing-Sing, and Philadelphia penitentiaries.<sup>6</sup>

Between the 1820s and the 1840s, Americans found themselves at odds with and debated the merits of the Auburn and Philadelphia systems with respect to inmate work habits. The older Auburn model isolated prisoners and "congregated" them during the day, forbidding them to communicate with other inmates for any reason.<sup>7</sup> The Pennsylvania model, on the other hand, isolated each individual prisoner through permanent cellular

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1. Ricardo D. Salvatore & Carlos Aguirre, *The Birth of the Penitentiary in Latin America: Toward an Interpretive Social History of Prisons*, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940*, 1, 5-6 (Ricardo D. Salvatore et al. eds., 1st ed. 1996).

2. See ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 3 (New Haven, Conn: Yale Univ. Press 1992).

3. JOHN B. BENDER, *IMAGINING THE PENITENTIARY: FICTION AND THE ARCHITECTURE OF MIND IN EIGHTEENTH-CENTURY ENGLAND* 14 (Chicago: Univ of Chicago Press 1987).

4. *Id.*

5. William Forsythe, *Penal Discipline, Reformatory Projects, and the English Prison Commission, 1895-1939*, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940*, 1, 5-6 (Ricardo D. Salvatore et al. eds., 1st ed. 1996); Robin Evans, *The Fabrication of Virtue: English Prison Architecture*, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940*, 1, 5-6 (Ricardo D. Salvatore et al. eds., 1st ed. 1996).

6. S. Bender, *supra* note 4, at 14.

7. Salvatore, *supra* note 1, at 1, 5-6.

confinement to make prisoner communication impossible. This model left the prisoner to work, eat, and sleep alone.<sup>8</sup> American penitentiaries experienced permitted variations in work-life habits but maintained a strict prohibition against communication between prisoners.<sup>9</sup> The same values guided European penitentiaries across the Atlantic, banning conversations among prisoners.<sup>10</sup>

The mid-19th century saw innovations in penitentiary discipline: Penologists distanced themselves from isolation and began to consider the incorporation of group work, moral and religious teaching, as well as the inmate's perspective when they critiqued the reformatory model. In short, the moral, religious, and philanthropic underpinnings of the penitentiary era were replaced by a "reformatory ideal."<sup>11</sup> Emphasis garnered around individualized treatment for successful reform.<sup>12</sup> The Cincinnati Conference, arranged by Enoch Wines and Zebulon Brockway in 1870, became the discussion grounds for the study of criminal behavior.<sup>13</sup> This was formalized in the adoption of the Elmira Reformatory model as the best available system towards reform. This system synthesized proven techniques with long debates over the future of reform. Techniques included cellular isolation, individual follow-up and treatment, economic rewards for good conduct, advisory councils recommending parole or probation, and religious and elementary education.<sup>14</sup>

This "criminal anthropology" system lost steam in the next few decades as interest in the penitentiary faded. This was due to a mixed response from critics of early penitentiary reformers who argued against the odds of successful reform.<sup>15</sup>

In the late 1800s and early 1900s, interest in prison reform resumed in the fields of psychology and psychiatry, with both fields looking into the

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8. *Id.*

9. DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC*, 81-83 (Little, Brown, & Co., 1971).

10. See Micael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850*, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940* 1, 5-6.

11. ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY*, 59 (Chicago and London: University of Chicago Press 2nd ed. 1969).

12. Solvatore, *supra* note 1, at 1, 5-6.

13. *Id.*

14. *Id.*

15. Solvatore, *supra* note 1, at 6.

primary role of “deviance.”<sup>16</sup> Positivist criminology came to the forefront of the penitentiary movement with a larger purpose of segregating, correcting, and reintegrating a subordinate working class under the shroud of the State.<sup>17</sup> The role of the penitentiary expanded into a larger role of intervention in the early assessment and distinction of potential delinquents.<sup>18</sup> This period witnessed the shift from the science of reformation to the discipline of criminology.<sup>19</sup> This move also emphasized the shifting of delinquent-state relations that was pervasive throughout all areas of governing structure.<sup>20</sup>

*Brazil's Broken Politics and the Need for Modernization*

The Regency Era (1831-1840) represents a period of political shift and reorganization of Brazilian class relations that laid the foundation for future progressive reform.<sup>21</sup> To understand its impact, we must first consider the origins of the Conservative Party.

In the 1820s through the early 1830s, Brazil was largely occupied and ruled by three governing oligarchies collectively referred to as *partido de ordem*, or the Conservative Party.<sup>22</sup> This Conservative Party's ruling structure created a new socioeconomic and political order in which the Party dominated<sup>23</sup> Brazil's economy and society.<sup>24</sup> These oligarchies capitalized their success by importing slaves to raise livestock and cultivate coffee,

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16. *Id.*

17. JACQUES DONZELOT ET AL., *THE POLICING OF FAMILIES*, 1, 1-10 (Pantheon Books, 1979).

18. Donzelot, *supra* note 1, at 59.

19. *Id.*

20. *Id.*

21. *Id.* at 9.

22. Jeffrey D. Needhell, *Provincial origins of the Brazilian state: Rio de Janeiro, the monarchy, and national political organization*, 36 *LATIN AM. RESEARCH REV.* 132-153 (2001).

23. One of the oligarchies controlling the Rio de Janeiro region originated in the sugarcane planting areas of the *Baixada* which surrounds Guanabara Bay. Members of this oligarchy flourished off slaving, sugar exports, and interior domestic trade. Their hold over the region was solidified through their relationships with powerful Portugese during this time period. See Joaquim Ribeiro Fragoso, *Homens de grossa aventura: Acumulaqdo e hierdrchia na praqa mercantil do Rio de Janeiro (1790-1830)* (Rio de Janeiro: Arquivo Nacional, 1992), chaps. 2-4 cited in Needell, J. D., *Provincial origins of the Brazilian state: Rio de Janeiro, the monarchy, and national political organization, 1808-1853*, *LATIN AM. RESEARCH REV.* 36(3), 132-153, 135 (2001).

24. *Id.* at 133.

sugar, and other crops necessary to feed Rio's growing urban population.<sup>25</sup> Towards the end of the 1820s, the oligarchies experienced a strain on their relationships in the struggle to maintain centralized authoritarianism in native control as Portuguese influence increased.<sup>26</sup>

By 1834, however, liberal reformists of the last five years and their ideologies started to spread across Brazil, reuniting the Party against the threats to the socioeconomic order they set in place for the last several decades.<sup>27</sup> The oligarchies characterized the reformist movement as an anarchistic upheaval of state authority and legislative might.<sup>28</sup>

By the mid-1830s, the rapid economic, political, and social development of Latin America and its integration into the world market outpaced the grasp of local monarchs, and instead, power was suddenly consolidated in centralized nation-states.<sup>29</sup> As opposed to those values that drove the U.S. and European penitentiaries, the early Latin American penitentiary movement was based on non-democratic principles of social modernity, differentiation and control.<sup>30</sup> This was due to the immense recharacterization of the Latin American people with mass immigration of slaves and exodus on a regional basis.<sup>31</sup>

#### *Brazil and the Penitentiary Movement*

Latin American Brazilian reformers of the early 1830s pushed to incorporate Western methodologies in the new legal system<sup>32</sup> and its prisons, thereby embracing Jeremy Bentham's Panopticon model.<sup>33</sup> However, reformers were much more interested in Bentham's emphasis on solitary confinement and work than his Panopticon.<sup>34</sup> This was the start of a larger Latin American dream: to break its mold and build a facility that would

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25. Needhell, *supra* note 13, at 134.

26. *Id.* at 135.

27. *Id.*

28. *Id.*

29. Needhell, *supra* note 1, at 132.

30. *Id.*

31. *Id.*

32. The new legal system included penal and civil codes, trial by jury, and locally elected justices. See ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA*, 3 (Yale Univ. Press 1992).

33. *Id.* at 9.

34. *Id.* at 15.

symbolize modern Latin American class relations. This movement would follow a similar cycle of enthusiasm, disbelief, and renewed interest as it did in Europe and the U.S. However, the penitentiary influenced Latin American society in profoundly different ways.

In 1834, Brazil led Latin America in its voyage into the penitentiary movement with the building of the Casa de Correção in Rio de Janeiro.<sup>35</sup> However, this site was far from complete as lack of resources made it such that it took another sixteen years to construct portions of the prison to the degree it was envisioned, behaving instead as the first “laboratory” from which to view the “scientific” view of social problems and social reorganization.<sup>36</sup> Latin American countries soon followed suit but quickly ran out of resources in their rush to construct similar offerings.<sup>37</sup> They turned from leading reform to shifting the purpose of their penitentiaries to fulfilling other state interests such as the “correction” of disorderly slaves.<sup>38</sup>

Brazil’s Casa de Correção met a similar fate as it became a place of death and disease. Between 1850 and 1869, 245 out of 1099 inmates died while in prison; furthermore, the numbers illustrate the longer inmates stayed in prison the higher risk of their dying—twenty-seven of the thirty-two inmates sentenced to more than twenty years died.<sup>39</sup> By the late 1870s, however, Brazil faced a similar pessimism<sup>40</sup> to that of Europe and the U.S. reform movements; this pessimism centered around the growing dissatisfaction with crime rates and prisoner reformed statistics.<sup>41</sup> Prison administrators across the nation felt a general lack of faith in the ability of prisons to reform criminals.<sup>42</sup>

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35. Martine Jean, “A storehouse of prisoners”: *Rio de Janeiro’s Correction House (Casa de Correção) and the birth of the penitentiary in Brazil, 1830–1906*, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940* 1, 5-6 (Ricardo D. Solvatore et al. eds., 1st ed. 1996).

36. Solvatore, *supra* note 1, at 9.

37. *Id.*

38. *Id.*

39. Bretas ML, *What the eyes can’t see: Stories from Rio de Janeiro’s prisons*, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940* 1, 5-6, (Ricardo D. Solvatore et al. eds., 1st ed. 1996).

40. Solvatore, *supra* note 1, at 1, 5-6.

41. Consider São Paulo’s Casa de Correção, originally built in 1852. By the 1870s, it was found to be unhealthful, overcrowded and inferior to other prisons. JOHN B. BENDER, *IMAGINING THE PENITENTIARY: FICTION AND THE ARCHITECTURE OF MIND IN EIGHTEENTH-CENTURY ENGLAND*, 14 (Univ. of Chicago Press 1987).

42. *Id.* at 9.

## II. Why Brazil's Penitentiaries Failed

### *Barriers to Entry as a New Player*

The scarce revenues afforded to prison reform, coupled with individualized treatment for prolonged periods of confinement increased the strain on state resources to the extent that early Latin American prisons failed to meet early reformers' expectations for a new social order and modernization into Western culture. Further, the financial strain of building and maintaining these facilities was exacerbated by the fact that Latin American countries were only just getting their economies on track as new, independent, members of the world market.<sup>43</sup>

The largest barrier to the spread of penitentiary reform was the dynamic of servitude and slavery that embodied social and class relations in most parts of Latin America, despite the liberal reformers' shifting the national spotlights away from oligarchical control.<sup>44</sup> Classism played hand-in-hand with the social elites' custom of indigent abuse: law enforcement officers were accustomed to arbitrary arrest and landowners were comfortable with the use of corporal punishment.<sup>45</sup> The military and landowners resisted the modernization of punishment insofar it challenged their social and political positions.<sup>46</sup>

Another instance that casts doubt on prison reform stemmed from the Brazilian military as they forced enlistment in the army to punish criminals and create fear for those at the bottom of the social hierarchy.<sup>47</sup>

The death penalty also survived several attempts at abolition, as opposed to the case in Europe where the abolition movement was conversely quite brisk. The death penalty was employed by elites to deal with low class insubordination as a quick form of discipline.<sup>48</sup>

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43. *Id.* at 16.

44. *Id.* at 16.

45. *Id.*

46. *Id.*

47. Peter Beattie, *Discipline and Progress: Brazilian Army Reform and Changing Strategies of Social Control, 1870-1916*, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM, AND SOCIAL CONTROL, 1830-1940* 16 (Ricardo D. Solvatore et al. eds., 1st ed. 1996).

48. *Id.*

*Brazil's Deviation from the West*

In 1890, Latin America experienced a resurgence in the modernization of the penitentiary with the enactment of a new criminal code and spread of positivist criminology.<sup>49</sup> Intimate to this shift was an unconditional acceptance of science above philanthropy or morals to understand the world.<sup>50</sup> Under positivism, society functions by universal laws that can only be understood through the experimental method.<sup>51</sup> Crime, specifically, would be best studied in the individual in isolation since an offender was deemed already to be a “degenerate,” belonging to an inferior species that commits crime.<sup>52</sup>

The spread of positivism in Brazil took form in the adoption of the *Crofton* method composed of the Irish “progressive system,” the cellular prison, and long term confinement mandated under the 1890 criminal code.<sup>53</sup> This system was absorbed quickly into the Brazilian system and manipulated to solve its social problems. Early positivism centered around the teachings of Cesare Lombroso among others who found the propensity to commit crime an atavistic trait among discernable (physical) human beings.<sup>54</sup> However, since Lombroso’s theory left little room for national variation among people, his theory was quickly made obsolete by thinkers, such as Tobias Barreto who fixated more on the social psychology behind behavior and classified criminals as a class with a “disease.”<sup>55</sup> During the period of 1900-1920, Brazilian penitentiaries evolved into medical laboratories where treatment became diverse to the individual.<sup>56</sup> The problem with the Crofton model in practice was that the State did not have enough resources such that people could go through the separate stages of confinement.<sup>57</sup>

For instance, consider the 1914 conversion of São Paulo (renamed

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49. *Id.* at 9.

50. Rosa del Olmo, *The Development of Criminology in Latin America*, 20 JSTOR JOURNALS, 19-45 (1999).

51. *Id.*

52. *Id.*

53. Ricardo D. Salvatore, ‘*Penitentiaries, Visions of Class, and Export Economies: Brazil and Argentina Compared*’, in Salvatore R.D., Aguirre C. (eds) *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA*, 202, 194-223 (Austin, TX: University of Texas Press 1996).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Supra*, note 1.

*instituto de regeneracao* or “Regeneration institute”).<sup>58</sup> Among the changes to the prison included “its vast silent pavilions, its school, its active workshops, its anthropometrical institute, its gymnasium, and its internal regime geared to individualized treatment” and the like.<sup>59</sup>

### III. Criminal Justice Today

#### Scandinavia: A Beacon for Reform in an Era of Punishment

##### *Origins of Scandinavian egalitarianism*

Pre-19th century Scandinavia was a sparsely populated, largely unproductive land, this inhibited the development of large-scale agriculture. Instead, economic life revolved around smaller units defined by its self-governance and autonomy. In short, no group held any superior economic or political rights over the others.<sup>60</sup> These social conditions created a space to foster a culture of trust, cooperation, and attention towards collective goals. These flat class relations were reinforced with population and religious uniformity, particularly in Sweden.<sup>61</sup> Due to the climate, poverty, and geography of Scandinavia, there emerged little to no minority groups immigrating to the country and introducing class resistance, as was the reality in many other European countries.<sup>62</sup> With regards to their population as a whole, the highest and lowest strata of society are no more removed from one another—that is, there is constant reciprocal action between them, and transition from one to the other.<sup>63</sup>

Opportunity across social barriers at many levels of society was prominent in Scandinavia at this time. One way this idea surfaced is observed in rules that allowed individuals to behave a certain way, rather than forbidding and punishing them for doing so. This created a society built

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58. *Id.* at 11.

59. *Id.* at 12.

60. John Pratt, “Scandinavian Exceptionalism In an Era of Penal Excess Part I: The Nature and Roots of Scandinavian Exceptionalism”, 124 *BRITISH JOURNAL OF CRIMINOLOGY* 119-137 (2008).

61. *Id.* at 125.

62. ALVA MYRDAL, “NATION AND FAMILY: THE SWEDISH EXPERIMENT IN DEMOCRATIC FAMILY AND POPULATION POLICY”, 11 (MIT Press 1968).

63. KARL KRISTIAN EMIL FISCHER, *NORWAY: OFFICIAL PUBLICATION FOR THE PARIS EXHIBITION 1900*, 202 (Kristiania: Aktie-Bogtrykkeriet 1900).

around trust, as exemplified by Norwegian metro stations in Oslo where passengers were trusted to pay their bus fare charges without supervision.<sup>64</sup> As 19th century Norway and Finland struggled for their freedom, the egalitarian social value system began to emphasize education and schooling as important elements of Scandinavian national identity.<sup>65</sup> In fact, educational merit became a means of achieving higher status.<sup>66</sup> In crime reporting, the tone in the Finnish media is less emotional and reports are usually accompanied with commented research-based data.<sup>67</sup> Coupled with the fact that public education functions drew higher numbers than in other Western countries, it is understandable that the way crime news was reported in Scandinavian media did not instill fear of crime.

*Scandinavian egalitarianism and progressive criminal policy*

Scandinavian criminal justice seeks to address recidivism directly by rehabilitation of inmates as the top priority. The leading ideology is that of normalization: conditions within prison loosely approximate those of the outside world.<sup>68</sup> Consequently, Scandinavian ideology supposes that being in prison is in and of itself punishment.<sup>69</sup> For example, Scandinavian countries have many small prisons, usually housing 100 or fewer inmates.<sup>70</sup> The smaller penitentiaries allow more prisoners to be located close to home and their family. Further, Scandinavian prisons are operated by the State, which allows local communities to proffer healthcare or other necessary social services to state prisoners.<sup>71</sup>

Scandinavian cultural values translate into criminal policy in significant ways that serve to reinforce inmates' dignity and ability to effectuate positive

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64. *Id.* at 125.

65. Tapio Lappi-Seppälä, "The Fall of the Finnish Prison Population", *JOURNAL OF SCANDINAVIAN STUDIES IN CRIMINOLOGY AND CRIME PREVENTION* no. 1, 27-40 (2000).

66. Incidentally, the increased role of education in everyday culture led Sweden to have the highest circulation of newspapers in the world as well as share the highest readership along with Norway and Finland. See Pratt, John, "Scandinavian exceptionalism in an era of penal excess part I: The nature and roots of Scandinavian exceptionalism", 126 *BRITISH JOURNAL OF CRIMINOLOGY* (2008).

67. Lappi-Seppälä, Tapio, "Penal policy in Scandinavia", 227 *CRIME AND JUSTICE* (2007).

68. *Supra*, note 57, at 120.

69. *Id.*

70. *Id.*

71. *Id.*

change in society. With respect to prison policy, inmates have paths toward directly impacting policy reforms. For instance, Norwegian prisoners attend an annual “meeting in the mountains” in which prison policy is debated and reformed by all parties involved.<sup>72</sup> Prisoners’ groups have successfully exercised this right to oppose and stop the construction of a proposed 1,000-bed prison in Oslo, Norway.<sup>73</sup>

*Social acceptance of prisons and prison work*

The level of solidarity and “sameness” between prisoners and people in the outside world is prevalent in Scandinavian societies outside of prisons as well. For instance, Swedish male prisons are operated by officers of whom 28% are under the age of 35, 33% are women, and 20% have university degrees.—In Finland, 80 officers are selected among 300 applicants to become correctional officers. Further, local communities in Sweden compete for the location of new prisons, recognizing apparent economic and social benefits of prison work. Instead of shame or disgust, society treats prison work as an attractive career option even for students who sometimes participate as Norwegian prison officers.<sup>74</sup>

*Scandinavian prisons and incentivizing rehabilitative behavior*

Scandinavian prisons are divided into two types: closed and open. Open prisons hold only 20 to 30 % of the prison population and stand to encourage positive behavior as most prisoners must stay in a closed prison for a period of time before they can enter open prison (for harsher crimes than typical “small claims cases”).<sup>75</sup> Open prisons are designed with a minimum of barriers such as walls or barred windows, which allows for mobility.<sup>76</sup> Even in closed prisons, the amount of personal space and material comfort is exceptional, with inmates having their own bed and a television. Here, too, movement is permitted except for maximum-security cases. Closed prison inmates oftentimes receive a full-time education while incarcerated and are

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72. NILS CHRISTIE, CRIME CONTROL AS INDUSTRY (ROUTLEDGE 2013).

73. *Supra*, note 57.

74. *Supra*, note 57, at 121.

75. *Id.*

76. *Id.*

encouraged to pursue a degree.<sup>77</sup> In open prisons, prisoners are very productive and are allowed to work during the day to achieve a skillset and build an allowance.<sup>78</sup> Some prisons in Finland pay their inmates wages to allow them to save money, buy food, pay taxes, or send money to family or restitution to their victims. Many prisoners in open prisons are even allowed to continue to work at their previous employment.<sup>79</sup> With regards to social interaction, inmates of closed prisons in particular are provided free accommodation for family and children to stay with the inmate unsupervised.<sup>80</sup>

It is evident that Scandinavian prison institutions are designed with the intent of ensuring inmates' social and psychological wellbeing. The system also works to simultaneously develop a sense of responsibility for one's actions. However, it would be wrong to call this system "lenient" or "soft on crime." Inmates are still prisoners and their freedoms are only granted under strict circumstances. One downside to the institution is the restriction of children in Norwegian prisons, which directly separates mothers from their infants.<sup>81</sup> Privileges can be granted just as easily as they can be lost.<sup>82</sup> However, the incentive-oriented framework that organizes Scandinavian may work to insulate its criminal population from recidivism and offer them education and a sense of self-righteousness.

#### A. *Effectiveness of Scandinavian system*

Incarceration rates in Scandinavian countries tend to be exceptionally low. An important exception was Finland, which before the 1960s had the highest incarceration rates in Western Europe.<sup>83</sup> As discussed earlier, European ideology towards crime and criminal justice shifted towards the end of the 19th century in the post-war era.<sup>84</sup> At this time, Finland was starting to distance itself from its restrained and disruptive past—a product of the Finnish Civil War following independence from the Russian empire.

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77. *Id.*

78. *Id.*

79. *Id.* at 122.

80. *Id.*

81. *Id.* at 123.

82. *Id.*

83. *Id.* at 132.

84. Roger Hood. "Capital Punishment A Global Perspective", 430 PUNISHMENT & SOCIETY (2001).

Finland began to identify once again with its Scandinavian identity, both politically and culturally. The resurgence of central state power and national identity fostered solidarity and a shift towards a rights-based approach to punishment.<sup>85</sup> Similar attitudes towards punishment spread throughout Sweden and Norway. In 1997, The Swedish National Council for Crime Prevention declared that punishments ought to be imposed on a “least restrictive basis.”<sup>86</sup> These views were mirrored by Finland who sought to advocate for policies of “humane neo-classicism” in the late 1960s with “the goal of less repressive measures in general.”<sup>87</sup>

## **The United States and the Punishment Perspective**

### *A. U.S. Homicide Rate as the driving force behind punishment support*

The U.S. homicide rate in 1998 was two to four times higher than most Western countries. Despite the increased rate of homicide, some research suggests that the separate evolution of the American system is unrelated to crime rates. Instead, research supposes that differences in imprisonment rates and behavior are attributed instead to crime policy.<sup>88</sup> Michael Tonry’s study on crime policy compares crime rates from the 1960s to the 1990s in the U.S., Germany, and Finland. While finding very similar changes in violent crime, he observed stark differences in crime policy. While the U.S. imprisons more and more individuals, Finland responds by imprisoning fewer people. Germany, on the other hand, both lowers and raises imprisonment rates multiple times.<sup>89</sup> Tonry concludes that crime rates cannot be attributed to a country’s “punitiveness,” but rather cultural and historical factors attribute more directly to a country’s crime policy.<sup>90</sup>

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85. MAX ENGMAN & DAVID KIRBY, *FINLAND: PEOPLE, NATION, STATE* (Indiana Univ. Press 1989).

86. *Supra*, note 57 at 133.

87. Tapio, Lappi-Seppälä, “*Penal policy in Scandinavia*”, 36 *CRIME AND JUSTICE* 211 (2007).

88. RICHARD BERGER, *SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* 7 (Oxford U. Press 2001).

89. *Id.* at 192.

90. *Id.* at 265.

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*Criminal Justice as a Political Instrument of Accession*

American populism exists in two spheres: political culture and political institutions. For instance, our institutional form of primaries in elections fosters more debate over 'hot' issues. Further, American politics feature more opportunities for direct democracy, which tends to produce more single-issue voters.<sup>91</sup> European parliamentary systems institutionally feature norms where the ruling political party is to adhere to strict standards by the government and candidates are appointed and not elected which further insulates them from single-issue voting.<sup>92</sup>

U.S. politicians almost instinctually commonly convey a sense of distrust of government that is unprogressive in nature. American political culture allows for personal anecdotes to influence audiences to a higher degree than would a policy analysis. On the other hand, European culture dictates greater importance and respect for the government. Politicians achieve their status by special education in professional administrations. Overall, European politicians feel that experience should *lead* the public rather than follow it.<sup>93</sup>

In *Death by Design*, Craig Haney uncovers the mechanisms of American society that function to misinform the public about crime and punishment thereby dissuading meaningful debate over criminal policy. As Haney explains, the functions of the death penalty come at a significant moral cost to its targets.<sup>94</sup> Its realities veiled by the legal system and its cause perpetuated by the media, American capital punishment is an inherently unjust and biased system.

*Where the U.S. Learns about Criminal Justice*

The influence of media created a cultural phenomenon based upon the notion that, essentially, "crime sells" in the media and only does better with the increased controversy of the news. Craig Haney and Hiroshi Fukurai conducted a study where they discovered that respondents' knowledge of case-specific details was proportional to the exposure they had to media

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91. Jonathan Haber, "*The Single-Issue Voter*", [http://www.huffingtonpost.com/jonathan-haber/the-single-issue-voter\\_b\\_11284700.html](http://www.huffingtonpost.com/jonathan-haber/the-single-issue-voter_b_11284700.html).

92. *Id.*

93. *Id.*

94. CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM*, 7, 1-352 (Oxford Univ. Press 2005).

(television, radio, newspapers). In some areas, Haney and Fukurai discovered that 50% of respondents prejudged defendants as guilty prior to trial while this figure reached upwards of 90% in other areas.<sup>95</sup>

The media also heavily influences individual thoughts, behaviors, and the decision-making process. Contemporary American society has observed crime no longer to be about degree of harm done to society but a measure of societal response, namely, fear. In this way, it is in the media's interest to increase the population of its subscribers by attesting to high levels of gruesome, violent crime. Indeed, the media presents crime in a way to encourage viewers to assign the 'problem' to the individual rather than their social surroundings; this dynamically demonizes criminals and creates a class of underprivileged, over-punished individuals. Haney points out that media rarely, if ever, mention personal history, human relationships, or other features of a criminal's social context. Haney conducted a study on 300 newspaper articles, which included about twenty-six capital cases, and found that 90% of articles focused on a phase of trial other than the penalty phase. The penalty phase is where clients can present any mitigating evidence and re-humanize themselves. With respect to the sources cited for their research on a case, input from law enforcement and prosecutors was drawn significantly more than from defense attorneys or the clients themselves (36% and 25% versus 14% and 5%, respectively). Even the little information provided on a defendant's social history was stigmatized by information on prior gang affiliations, drug use, or mental illness.<sup>96</sup>

The media opts to interview police officers and law enforcement for information about crime leaves society to define crime the same way as law enforcement. Law enforcement, in turn, perpetuates notions of criminal evil and blame in their discussions. Haney explains that taking life is so much easier if "increasing numbers of people become convinced that violent crime is the product of monstrously defective criminals."<sup>97</sup>

The U.S. struggles with numerous social problems that we have had trouble correcting and therefore, in many ways, our system is as punitive as it is. This issue has become one involving heavy politics and thus self-perpetuated as it has set a "hard on crime" ideology as a stepping-stone to success in our political system. Unfortunately, however, the American system no longer addresses deterrence, rehabilitation, or treatment of its inmate population. These groups are still treated, in response, as burdens on a society where class distinction is already widespread. Comparatively, the

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95. *Id.* at 57-62

96. *Supra*, note 94, at 47-57.

97. *Id.* at 38.

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Scandinavian system adheres to one's social inadequacies while in the institution, prisoners in the American system are forced into an isolation which cannot simply be cured upon release.

### **Brazil and the Latin American Divergence from Western Origins**

#### *Unequal Access to Law*

Brazilian citizens, like those of any other liberal democracy, are subject to the disparities between themselves and the socioeconomic elites. The reality of classism is a strong presence for the majority Brazil's working class, and it continually colors their perceptions as to the weight of their word before the law. However, Brazil is particularly vulnerable to corruption in their legal system as a world leader in inequality of wealth and income.<sup>98</sup>

In fact, Brazilians have little faith in the rule of law adequately or fairly protecting them. The Institute for the Study of Religion (ISER) and the Center for the Research and Documentation of Brazilian Contemporary History (CPDOC) conducted an opinion survey questioning 1574 metropolitan individuals in Rio, and found that as many as 93.8% of the population hold that "the wealthy are more immune to the rigors of the law."<sup>99</sup>

#### *Race: A Barrier to Equality*

The significance of race as a driving factor in the criminal justice system has traditionally been a large focus of literature and discussion. However, the significance of race in the Brazilian criminal justice system is grossly understudied. In fact, Sérgio Adorno is the only researcher to have conducted a holistic consideration of race in Brazil's criminal justice system. Referencing records from the 1990s, Adorno found that Blacks are severely handicapped in every step of the system.<sup>100</sup> There was almost double the

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98. The average income of the 10 percent most wealthy in Brazil is about 29 times greater than 40 percent of Brazil's poorest population while the world average is closer to 3 times higher. R. P. Barros, *Diferencas entre Discriminacao Racial e por Genero e o Desenho de Politicas Anti-discriminatorias*, 4 ESTUDOS FEMINISTAS 183, 189 (1996), in Peter Fry, *Color and the Rule of Law in Brazil*, in THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA 186, 188 (Juan E. Méndez et al. 1999).

99. *Id.*

100. Sergio Adorno, *Discriminacao Racial e Justica Criminal em Sao Paulo*, NOVOS

proportion of whites awaiting trial on bail than Blacks. With regards to the need for public defense attorneys, 62% of Blacks required public defenders while 39.5% of whites had the same need.<sup>101</sup> This leads only 25% of Blacks as opposed to 42.3% of whites calling witnesses to their cases.<sup>102</sup>

Further, Adorno's research indicates no special inclination for crime on behalf of Black defendants.<sup>103</sup> Indeed, Adorno finds Blacks to be a preferred target of abusive police policies. Adorno concludes that race is a powerful determinant in the distribution of justice in Brazil.<sup>104</sup>

#### IV. Conclusion

The origins of the Brazilian penitentiary are best understood in the context of criminology as it relates to the modernization of Latin America in the 19th century. Brazil shares many features of its heritage with the U.S. in that they are both colonial, racially diverse countries with a history of slavery. While early Latin American reformists tried their best to model their penitentiaries after European and U.S. systems, Brazil nevertheless deviated from its roots in the Western system. The lack of resources, resistance from elites, and the legacy of slavery act in tandem to produce the socio-political climate we observe from Brazil today.

Brazil's early history during its Regency period immediately sets it apart from the U.S. and Scandinavia in that, during the 1820s-1830s, Brazil was under oligarchy rule giving very little political power to the working class. Scandinavia experienced much more homogenous roots in its early populations while the U.S. had a more decentralized government with power spread throughout. Furthermore, the U.S. underwent its early penitentiary history following its independence over 40 years prior to Latin American countries. These early roots differentiate Brazil as being predisposed to military and land-owning elites whose norm was to rule the poor masses.

While early Brazilian reformers were very much influenced by progressive Western thoughts on the penitentiary movement, Brazil's economic resources and resistance from the elite was overly oppressive that their attempt at prison reform could not hold water. This was evident in

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ESTUDOS CEBRAP 45, 53 (1995), in Peter Fry, *Color and the Rule of Law in Brazil*, in THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA 186, 188 (Juan E. Méndez et al. 1999).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

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Brazil's Casa de Correção which envisioned great reform, but lacked the financial backing to properly execute it, leading to complete disaster.

The mid-19th century was particularly damaging to Brazil's reformist movement, despite the fall of enthusiasm for the penitentiary reformation movement declined globally. This is because the elites that administered the failed attempts at prison reform were particularly susceptible toward the creation of a social 'underclass' and towards inflicting retributive punishment on a racially-motivated basis. The U.S. was experiencing its industrial revolution while Scandinavia was also in a period of economic growth, able to 'take the hit' of early penitentiary failure.

The resurgence of the penitentiary reform project impacted Brazil's underclass the hardest as Brazil was facing the legacy of slavery as opposed to the "pauperism" and trade unions experienced by European and U.S. underclass.<sup>105</sup> Brazil's racial underclass and its working class suffered the worst abuse during this time as the bitterness of Blacks and other slaves toward penitentiary administrators would only have exacerbated the abuse of the working class.

Finally, we can still measurably see the implications of Brazil's penitentiary project in its society today. People openly believe themselves unequal before the law and that race is the most significant factor of discrimination in the work place and police-citizen interactions.

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105. *Supra*, note 39, at 203.