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# 23

# Racialized Punishment and Prison Abolition

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Michel Foucault's *Discipline and Punish* is arguably the most influential text in contemporary studies of the prison system. Although its subtitle is *The Birth of the Prison System*, Foucault was not so much interested in the prison *per se* as in the disciplinary technologies perfected within this institution. He attempted to explain the production of manipulable bodies within the context of a panoptic carceral network that reaches far beyond the prison. While the category of class plays a pivotal role in his analysis – though his reconceptualization of power leads to critical revisions of class as a Marxist category – gender and race are virtually absent. Feminist critiques of Foucault have led to a proliferating body of Foucauldian literature on gender discipline, including an extended study on women in prison by Dobash, Dobash, and Gutteridge (1986). However, few scholars have seriously examined the racial implications of Foucault's theory of power and his history of the prison. Joy James's assertion that "Foucault's elision of racial bias in historical lynching and contemporary policing predicts his silence on the racialization of prisons" points to the need to move beyond a strictly Foucauldian genealogy in examining histories of punishment (James, 1996).

Foucault revises the penal historiography that privileges the development of the penitentiary in the United States, arguing that the oldest model of imprisonment as punishment rather than detention is the Raspuis of Amsterdam, which opened in 1596 and originally "was intended for beggars or young malefactors (Foucault, 1979)." The eighteenth-century *mason de force* in Ghent, in which idlers were imprisoned and subjected to "a universal pedagogy of work," and the penitentiary built in Gloucester to implement Blackstone and Howard's principles of imprisonment, served as the models for the Walnut Street Jail in Philadelphia, which opened its doors in 1790 (ibid., 121–2).

As interesting as it may be, however, to examine the influences of the earlier European models on the emergent US prison system, what may help us to understand the way in which this system would eventually incorporate, sustain and transform structures and ideologies of racism is an examination of the impact of the institution of slavery on US systems of punishment. Beyond slavery, which is the focus of this paper, a more expansive analysis of US historical specificities might serve as the basis

for a genealogy of imprisonment that would differ significantly from Foucault's. Such a genealogy would accentuate the links between confinement, punishment and race. At least four great systems of incarceration could be identified: the reservation system, slavery, the mission system, and the internment camps of World War II. Within the US incarceration has thus played a pivotal role in the histories of Native Americans and people of African, Mexican, and Asian descent. In all of these cases, people were involuntarily confined and punished for no reason other than their race or ethnicity.

As Foucault points out, soon after the establishment of imprisonment as the dominant mode of punishment, prison acquired a "self-evident character." "[O]ne cannot 'see' how to replace it. It is the detestable solution, which one seems unable to do without."

> This "self-evident" character of the prison, which we find so difficult to abandon, is based first of all on the simple form of "deprivation of liberty". How could prison not be the penalty *par excellence* in a society in which liberty is a good that belongs to all in the same way and to which each individually is attached, as Duport put it, by a "universal and constant" feeling? Its loss has therefore the same value for all; unlike the fine, it is an "egalitarian" punishment. The prison is the clearest, simplest, most equitable of penalties. Moreover, it makes possible to quantify the penalty exactly according to the variable of time. There is a wages-form of imprisonment that constitutes, in industrial societies, its economic "self-evidence" – and enables it to appear as a reparation. (ibid., 232)

The modes of punishment associated with the two dominant models of imprisonment developed at the beginning of the nineteenth century in the US – the Philadelphia and Auburn models – were based on a construction of the individual that did not apply to people excluded from citizenship by virtue of their race and thus from a recognition of their communities as composed of individuals possessing rights and liberties. These prisons were thus largely designed to punish and reform white wage-earning individuals who violated the social contract of the new industrial capitalist order by allegedly committing crimes. The gendering of these institutions as male reflected the marginalization of women within a domestic, rather than public, economy. In fact the history and specific architecture of women's prisons reveal a quite different penal function: that of restoring white women to their place as wives and mothers, rather than as right-bearing public individuals.

Within the US – and increasingly in postcolonial Europe – the disproportionate presence of people of color among incarcerated populations has also acquired a "self-evident" character. But this reification is not based on the reasoning proposed by Foucault in *Discipline and Punish*. In an analysis that predates the publication of *Discipline and Punish*, Foucault allows for the possibility that the prison's purpose is not so much to transform, but to concentrate and eliminate politically dissident and racialized populations. After an April 1972 visit to Attica – the very first visit Foucault made to a prison, which occurred just eight months after the Attica uprising and massacre – he commented in an interview:

> At the time of the creation of Auburn and the Philadelphia prison, which served as models (with very little change until now) for the great machines of incarceration, it was believed that something indeed was produced: "virtuous" men. Now we know, and the

> administration is perfectly aware, that no such thing is produced. That nothing at all is produced. That it is a question simply of a great sleight of hand, a curious mechanism of circular elimination: society eliminates by sending to prison people whom prison breaks up, crushes, physically eliminates; . . . the prison eliminates them by "freeing" them and sending them back to society; the state in which they come out insures that society will eliminate them once again, sending them to prison . . . Attica is a machine for elimination, a form of prodigious stomach, a kidney that consumes, destroys, breaks up and then rejects, and that consumes in order to eliminate what it has already eliminated. (Simon, 1991: 27)

Foucault was especially struck by the disproportionately large population of black men and commented that "in the United States, there must be one out of 30 or 40 Black men in prison: it is here that one can see the function of massive elimination in the American prison (ibid., 29). One wonders how Foucault might have responded in the 1990s to the fact that one of out three young black men was incarcerated or under the direct control of the criminal justice system (Mauer, 1995).

Historically, people of African descent consigned to slavery in the US were certainly not treated as rights-bearing individuals and therefore were not considered worthy of the moral reeducation that was the announced philosophical goal of the penitentiary. Indeed, the slave system had its own forms of punishment, which remained primarily corporal and of the sort that predated the emergence of incarceration as punishment. In her slave narrative, Harriet Jacobs described a neighboring planter whose plantation included six hundred slaves, a jail, and a whipping post. The jail, however, did not serve as a means of depriving the slave of his/her time and rights, but rather as a means of torture, for "[i]f a slave stole from him even a pound of meat or a peck of corn, if detection followed, he was put in chains and imprisoned, and so kept till his form was attenuated by hunger and suffering." One of the planter's favorite punishments "was to tie a rope round a man's body, and suspend him from the ground. A fire was kindled over him, from which was suspended a piece of fat pork. As this cooked, the scalding drops of fat continually fell on the bare flesh (Jacobs, 1987)."

If, as Foucault insists, the locus of the new European mode of punishment shifted from the body to the soul, black slaves in the US were largely perceived as lacking in the soul that might be shaped and transformed by punishment. Within the institution of slavery, itself a form of incarceration, racialized forms of punishment developed alongside the emergence of the prison system within and as a negative affirmation of the "free world," from which slavery was twice removed. Thus the deprivation of white freedom tended to affirm the whiteness of democratic rights and liberties. As white men acquired the privilege to be punished in ways that acknowledged their equality and the racialized universality of liberty, the punishment of black slaves was corporal, concrete, and particular.

It is also instructive to consider the role labor played in these different systems of incarceration. In the philosophical conception of the penitentiary, labor was a reforming activity. It was supposed to assist the imprisoned individual in his (and on occasion her) putative quest for religious penitence and moral reeducation. Labor was a means toward a moral end. In the case of slavery, labor was the only thing that mattered: the individual slaves were constructed essentially as labor units. Thus punishment was

designed to maximize labor. And in a larger sense, labor was punishment attached not to crime, but to race.

Even if the forms of punishment inherent in and associated with slavery had been entirely revoked with the abolition of slavery, the persistent second-class citizenship status to which former slaves were relegated would have had an implicit impact on punishment practices. However, an explicit linkage between slavery and punishment was written into the constitution precisely at the moment of the abolition of slavery. In fact, there was no reference to slavery in the US constitution until the passage of the Thirteenth Amendment declared chattel slavery unconstitutional: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The abolition of slavery thus corresponded to the authorization of slavery as punishment. In actual practice, both Emancipation and the authorization of penal servitude combined to create an immense black presence within southern prisons and to transform the character of punishment into a means of managing former slaves as opposed to addressing problems of serious crime.

The incarceration of former slaves served not so much to affirm the rights and liberties of the freed men and women (i.e., as rights and liberties of which they could be deprived), nor to discipline, in the Foucauldian sense, a potential labor force; rather it symbolically emphasized black people's social status continued to be that of slaves, even though the institution of slavery had been disestablished. In constructing prisoners as human beings who deserved subjection to slavery, the Constitution allowed for a further, more elusive linkage of prison and slavery, namely the criminalization of former slaves. This criminalization process became evident in the rapid transformation of prison populations in the southern state, where the majority of black Americans resided. Prior to Emancipation, prisoners were primarily white, but "[d]uring the post Civil War period, the percentages of Black convicts in relation to white was often higher than 90%. In Alabama, the prison population tripled between 1874 and 1877 – and the increase consisted almost entirely of Blacks" (Fierce, 1994).

The swift racial transformation of imprisoned southern populations was largely due to the passage of Black Codes which criminalized such behaviour as vagrancy, breech of job contracts, absence from work, the possession of firearms, insulting gestures or acts (Franklin, 1967). The Mississippi Black Codes, for example, defined a vagrant "as anyone/who was guilty of theft, had run away [from a job, apparently], was drunk, was wanton in conduct or speech, had neglected job or family, handled money carelessly, and . . . all other idle and disorderly persons." (Fierce, 1994: 85–6). In other words, white behavior that was tolerated and thus went unnoticed by the criminal justice system could lead to the conviction of black individuals and to the ideological criminalization of black communities. "Arguing or even questioning a white man could result in a criminal charge" (Mancini, 1996: 41–2). Moreover, as many slave narratives confirm, many of these acts – for example theft and escape – had been considered effective forms of resistance to slavery. Now they were defined as crimes and what during slavery had been the particular repressive power of the master, became the far more devastating universal power of the state. "Free" black people entered into a relationship with the state unmediated by a master, they were divested of their status as slaves in order to be accorded a new status as criminals. "Throughout the South, thou-

sands of ex-slaves were being arrested, and convicted for acts that in the past had been dealt with by the master alone. . . . An offense against [the master] had become an offense against the state" (Oshinsky, 1996: 28). Thus, the criminal justice system played a significant role in constructing the new social status of former slaves as human beings whose citizenship status was acknowledged precisely in order to be denied.

Southern prison populations not only became predominantly black in the aftermath of slavery, penitentiaries were either replaced by convict leasing or they were restricted to white convicts. According to Matthew Mancini,

> for a half-century after the Civil War, the Southern states had no prisons to speak of and those they did have played a peripheral role in those states' criminal justices system. Instead, persons convicted of criminal offenses were sent to sugar and cotton plantations, as well as to coal mines, turpentine farms, phosphate beds, brickyards [and] sawmills. (Mancini, 1996)

This racialization of punishment practices determined that black people were to be socially defined in large part by recreated conditions of slavery. In fact, as historian David Oshinsky has documented, convict leasing in institutions like Mississippi's Parchman Farm created conditions "worse than slavery" (Mancini, 1996: 37). When Arkansas governor George Donaghey called for the abolition of convict leasing in 1912, he argued that leasing was "a form of legalized murder that sentenced thousands of faceless victims to a 'death by oppression' for often trivial acts. Under no other system, he believed, did the punishment so poorly fit the crime" (ibid., 67). His list of abuses included:

> Instance No. 1. In Phillips County . . . two negroes jointly forged nine orders for one quart of whiskey each. For this offense one of them was convicted for eighteen years and the other for thirty-six years . . .
> Instance No. 10. In Miller County a negro convicted in a justice of the peace court was . . . sentenced [to] over three years for stealing a few articles of clothing off a clothes-line. (ibid., 69)

During the last three decades of the nineteenth century, southern criminal justice systems were profoundly transformed by their role as a totalitarian means of controlling black labor in the post-Emancipation era. Because so many of the particular crimes with which black people were charged served more as pretexts than as causal factors for arrest, these punishment strategies were explicitly directed at black communities, rather than at black individuals and they eventually informed the history of imprisonment outside the South as well. In the process, white prisoners, along with the black people this system specifically targeted, were affected by its cruelty as well.

> Southern Blacks were trapped in [a] penal quagmire in excessive numbers and percentages of the total prison population of each southern state. For the victims, many of whom were ex-slaves, this predicament represented nothing short of a revisit to slavery. Those Blacks who were former slaves, and became victims of the convict lease system – especially those convicted and incarcerated on trumped up charges, or otherwise innocent of crimes for which they were imprisoned – must have imagined themselves in a time warp. (Fierce, 1994: 88)

The widespread use of torture in connection with convict leasing consolidated forms of punishment that Foucault periodizes as pre-capitalist, inextricably linking them with incarceration itself. As Mancini has pointed out, Foucault's assumption that torture had become historically obsolete in the industrial capitalist countries "misses a fundamental aspect of convict leasing – namely the license it gave for the display not of a sovereign's but of a petty camp boss's power. Leasing allowed the accumulated reservoirs of human cruelty to overflow in the isolated camps and stockades" (Mancini, 1996: 75). As flogging was the primary mode of punishment during slavery, "the lash, along with the chain, became the very emblem of servitude for slaves and prisoners" (ibid.). Mancini points out that as late as 1941, the state of Texas still relied principally on the whip.

I have devoted a considerable portion of this article to an exploration of some of the ways slavery's underlying philosophy of punishment insinuated itself into the history of imprisonment. In this concluding section, I want to argue that the tendency to treat racism as a contingent element of the criminal justice system in research, advocacy and activism associated with the prison abolition movement results in part from its marginalization in histories and theories of punishment. If the category of race rarely appears in Foucault's analyses, so it is also generally absent in the leading contemporary abolitionist texts. Although racism has often been evoked in activist campaigns, the absence of race as an analytical category in the diverse literature associated with prison abolitionism points to problems of the same order as those Joy James detects in Foucault.

Like Foucault, the major theorists of prison abolition have worked within European contexts, and in a large measure in those European countries that can claim historically less repressive penal systems – the Scandinavian countries and the Netherlands. Academics in Norway and the Netherlands began to produce abolitionist theories during the 1960s (Bianchi and van Swaaningen, 1986: 9). Thomas Mathieson, author of *The Politics of Abolition* grounded his analysis in the work of the Norwegian prisoners movement, KROM, in which he actively participated during the sixties and seventies (Mathiesen, 1974). Mathieson's formal approach calls for abolitionist activism that attempts strategically to avoid demands for reform that might further strengthen the prison system, as prison reform has historically tended to do. The local and tactical emphasis of his analysis, first published in 1974 militates against a substantive engagement with issues of race. While Dutch criminologist Willem de Haan, author of a recent work entitled *The Politics of Redress: Crime, Punishment and Penal Abolition*, explores the implications of prison reform in North America and Cuba as well as in Western Europe, his interests do not include an analysis of the close links between punishment practices and structures of racism. It should be pointed out, however, that as postcolonial immigration has radically transformed the racial composition of European populations in general, the prison population in the Netherlands approaches the US in its disproportionate numbers of people of color.

Since an extensive review of the literature on abolitionism is beyond the scope of this article, I will simply point out that while the works of other leading European criminologists and philosophers associated with the international movement for penal abolition – such as René van Swaaningen, Herman Bianchi, Nils Christie, Stanley Cohen, Louk Hulsman and Rolf de Folter – contain many important insights, there is

no sustained analysis of the part antiracism might play in the theory and practice of abolitionism.

In the US, abolitionists can discover a historical relationship of prison activism and antiracism. During the late eighteenth and early nineteenth centuries, Quaker reformers played a pivotal role in developing the US penitentiary. Indeed, the penitentiary system emerged from an abolitionist movement of sorts – a campaign to abolish medieval corporal punishment. The campaign to replace corporal punishment with the penitentiary and the abolitionist movement against slavery invoked similar philosophical arguments based on the Enlightenment belief in a universal humanity and in the moral perfectibility of every human being. If the inherent humanity of African slaves required their release from bondage, then the humanity of "criminals," demanded that they be given the opportunity to repent and perfect their characters.

It is therefore understandable that in North America, the dominant abolitionist trend in scholarship and activism is peacemaking. Harold Pepinksy has observed that as he organized the Fifth International Conference on Penal Abolition,

> I discovered that by far the strongest contingent among the hundreds of correspondents are workers and activists with religious affiliations, notably the peace churches and ecumenical peace groups. Religiously self-identified people cross all eight intellectual traditions which have emerged: academicians and theorists, activists and reformers, feminists, lawmakers, mediators, native traditionalists, peoples of color, and prisoners. (Pepinsky and Quinney, 1991: 300)

Nevertheless, it seems that no sustained analysis has emerged of the role antiracism might play in effective abolitionist theories and practices.

One of the major critiques proposed by abolitionists in Europe and North America is directed at social scientific and popular discourses that assume a necessary conjunction between crime and punishment. Likewise, in the philosophical literature on imprisonment, the prevailing assumption is that individuals are punished because of the crimes they commit. The literature in the field of philosophy of punishment rarely goes further than exploring what Adrian Howe refers to as "relentless repetitions of the unholy trinity of retribution, deterrence and reform" (Howe, 1994: 3). The problems these literatures address largely have to do with the justification and function of punishment. Thus a major theoretical and practical challenge of penal abolitionism is to disarticulate crime and punishment. In fact, many abolitionists deploy statistics that demonstrate how few people who have broken a law are actually called upon by criminal justice systems to answer for their crimes. Sociologists Jim Thomas and Sharon Boehlefield, for example, who are both critics and advocates of abolitionism, use US Bureau of Justice statistics to demonstrate that "only three persons are incarcerated (in prisons or jails) for every 100 crimes committed (Thomas and Boehlefeld, 1991: 18)."

The Institute for Social Research published Rusche and Kirchheimer's groundbreaking study, *Punishment and Social Structure* in 1939, which would later have a significant influence on the critical sociology of punishment. Kirchheimer wrote in the introduction that it was

> necessary to strip from the social institution of punishment its ideological veils and juristic appearance and to describe it in its real relationships. The bond, transparent or not, that

> is supposed to exist between crime and punishment prevents any insight into the independent significance of the history of penal systems. It must be broken. Punishment is neither a simple consequence of crime, nor the reverse side of crime, nor a mere means which is determined by the end to be achieved. Punishment must be understood as a social phenomenon freed from both its juristic concept and its social ends. We do not deny that punishment has specific ends, but we do deny that it can be understood from its ends alone. (Rusche and Kirchheimer, 1939: 5)

Rusche and Kirchheimer, as well as others influenced by their attempt to develop a political economy of punishment, examine the influence of the capitalist market and bourgeois ideology in shaping punishment practices. According to legal scholar Adrian Howe,

> Ruschean-inspired studies . . . made a crucial break with the analytically restricting "legal syllogism" – the common-sense idea that punishment is simply the consequence of crime and that, if there is a need for sociological explanation, "social structure explains crime and crime explains punishment." (Howe, 1994: 37)

However, they, too, do not explore the extent to which the penitentiary system and its attendant forms of labor were heavily influenced by the prevailing ideologies and economic structures of racism, nor, as Howe points out, do they give serious consideration to gender. Nevertheless, their insistence on disarticulating punishment from crime can be seen as opening the way for a consideration of the relationship between race and punishment, a much-needed dimension in the scholarship and activism associated with the abolitionist movement today.

In the contemporary era, the tendency toward more prisons and harsher punishment leads to gross violations of prisoners' human rights and, within the US context, it summons up new perils of racism. The rising numbers of imprisoned black and Latino men and women tell a compelling story of an increasingly intimate link between race and criminalization. While academic and popular discourses assume a necessary conjunction between crime and punishment, it is the conjunction between race, class, and punishment that is most consistent.

In 1926, the first year in which there was a national recording, 21 percent of prison admissions were black. By 1970, black people constituted 39 percent of admissions and in 1992 54 percent (Irwin and Austin, 1997: 7). In 1995, almost one-third of young black men were either in prison or directly under the control of a correctional system. If we consider that "[m]ost people have been involved in delinquent behavior at some point of their lives, and only a small fraction of overall criminal activities are touched by the criminal justice system," against the backdrop of the increasing proportion of black people entering the ranks of the imprisoned, we are faced with a startling implication (Rotman, 1990: 115). One has a greater chance of going to jail or prison if one is a young black man than if one is actually a law-breaker. While most imprisoned young black men may have broken a law, it is the fact that they are young black men rather than the fact that they are law-breakers which brings them into contact with the criminal justice system.

In this paper, I am specially concerned with the way the prison system in the US took up and was bolstered by historical forms of racism and how it continues to play a

critical role in the racialization of punishment. An effective abolitionist campaign will have to directly address the role of race in the criminalization process. I emphasize the need to disarticulate notions of punishment from crime because I want to argue for a serious consideration of abolitionist strategies to dismantle the prison system in its present role as an institution which preserves existing structures of racism as well as creates more complicated modes of racism in US society. This strategy, I argue, is no more outlandish than is the fact that race and economic status play more prominent roles in shaping the practices of social punishment that does crime, which is always assumed to be the basis for punishment in this society.

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