

THE PRISON BEFORE THE PANOPTICON

In this book, a pioneering history of incarceration in
Western political thought.

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The
PRISON
before the
PANOPTICON

*Incarceration in Ancient and Modern
Political Philosophy*

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For Ima and Abba

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THE PRISON BEFORE THE PANOPTICON

INTRODUCTION

BEFORE THERE WERE prisons, there was the idea of the prison. Incarceration as a penal practice, and certainly as a widespread penal practice, is relatively new—only a bit older than the United States.¹ The prison has been a topic of interest to political philosophers, however, for much longer than that. In the case of the prison, the idea precedes the institution.

Some of these early ideas were entirely detached from any prison in the real world, while others were intimately linked to emerging practices of penal incarceration. But taken together, they make up a long and largely unnoticed history of thinking about the prison. Theoretical traditions that begin with Demosthenes's *Against Timocrates* and Plato's *Laws* pass through some of the touchstones of modern political thought, including Thomas More's *Utopia*, Thomas Hobbes's *Leviathan*, and Jeremy Bentham's *Panopticon Letters*. Early philosophical accounts of incarceration can help us to understand and contextualize the practice of incarceration today, when it has become hard to imagine a time before “doing time.” We can

even see the transformed traces of their ideas and arguments in some of the ways we still talk about prisons and penal confinement.

The early history of prison thinking is especially valuable at a time when prisons are not only ubiquitous but also profoundly broken. As many political scientists and activists have observed, the scale, cruelty, and discriminatory character of mass incarceration in the United States poses a threat to the very legitimacy of democratic government.² While a philosophical history of the prison's beginning cannot save us from our present failure to punish our fellow citizens well or justly, it can help us to better understand how and why a democratic society might use the terrible power of penal confinement. This history also offers a basis for assessing the extent to which our own justifications for imprisonment stand up to scrutiny.

This book tells the story of two philosophical approaches to incarceration and, secondarily, of their assimilation into the more familiar theories of the prison that characterize the modern era of incarceration. The first of these approaches emerges from the contentious relationship between imprisonment and popularly authorized forms of government. Democratically minded thinkers have long been drawn to the egalitarian possibilities of the prison as a single form of punishment for rich and poor, weak and powerful alike. But they have also recognized the potential challenge to the equal status of citizen rulers posed by penal confinement: a citizen in prison is deprived of their right and ability to rule.

The second theoretical approach is that of the prison as the site of penal rehabilitation or reform, especially as formulated by Plato and his followers. Throughout much of the early history of thinking about the prison, the idea of incarceration as a method of improvement—for both the prisoner and the community at large—was inseparable from the idea of the prison itself. On the page, at least, theories of incarceration frequently expressed an aspiration for social cohesion by affirming the civic membership of criminals and reintegrating them into the social whole. In this vein, the prison was distinctly associated with reform and deterrence and thought to be incompatible with, or at least orthogonal to, other theories of punishment, such as retribution. In this respect, the long history of thinking about the prison is at odds with recent trends in the theory and practice of penal incarceration toward retributivism, incapacitation, and segregation.³

These unnoticed origins of prison thinking are significant because, like electoral democracy and market capitalism, prisons have emerged over the past two centuries as one of the signature features of modern liberal societies. No longer merely one form of punishment among many, imprisonment has gained an effective monopoly as the only civilized way to carry out the demands of justice in cases of serious crime, displacing expulsion and corporal and capital punishment. The almost unquestioned legitimacy of the prison since the Enlightenment has rested largely on its claim (however transparently false) to be a product of scientific progress, a sign of the humanity of contemporary society, and a socially beneficial means of rehabilitation. To speak about the modern prison is to speak euphemistically of “correctional systems,” “penitentiaries,” and “reformatories.”

To be sure, there is good reason to consider the prison distinctly modern. The jails and dungeons mentioned in the Bible, Greek histories, and other ancient and early modern texts were almost always intended only to hold prisoners, often before their sentencing or until a sentence was carried out—never primarily to punish them.⁴ But what sort of modern institution is the prison? Is it, to return to our initial comparison, a phenomenon like market capitalism—a concept that has no real parallel from before the modern period? Or is incarceration more like electoral democracy, an institution with deep roots in the European tradition, an idea that has appeared, disappeared, and reappeared in many various guises since its inception in ancient Athens?

The answer is that the prison is both thoroughly modern and deeply rooted in European political thought. This duality arises from a slipperiness in how we define the term *prison*. The term *prison* most precisely refers to *punitive incarceration*—the use of confinement as a penalty rather than as a form of pre- or posttrial custody, torture, coercion, or temporary detention. Given this definition, it is generally true that concrete evidence of punitive incarceration, what we might call “the prison in the strict sense,” is exceedingly rare in the premodern historical record, making the brief moments of theoretical invention that I aim to trace in this book all the more exceptional.⁵ But prisons in the broad sense—defined as sites of confinement, dungeons, keeps, and stockades—played roles across the history of human civilization. The idea of the prison as an institution without premodern precedent, then, turns on what I will

call the prison/jail distinction—the idea that incarceration as a punishment differs essentially from the mere act of chaining someone up.

Some version of this prison/jail distinction is fundamental to the self-understanding of prison theorists since the eighteenth century, who generally aimed to inaugurate a new era of “reformatories” and “penitentiaries” different from the prisons and workhouses that had characterized early modern Europe.⁶ The contemporary reality of American jails—where those convicted of crimes languish together with those awaiting trial, where pretrial custody can be every bit as painful as punishment, and where a supposedly limited period of confinement can stretch on indefinitely—has led some to point out that today, at least, the prison/jail distinction has become merely ideological.⁷ Confinement, this view purports, is confinement, no matter what the purported reason for it. To make punitive incarceration a special or privileged form of imprisonment, then, is to operate within an ideological world constructed by prison theorists that only obscures how real incarceration functions.

To this critique, we can only respond that the analysis of ideologies is one of the chief tasks of social and political philosophy. No matter the social reality under which they wrote, the philosophers and theorists this book will examine all relied on some version of the prison/jail distinction in making a case for punitive incarceration. Demosthenes struggled to walk a rhetorical line between a practice his audience agreed with, custodial incarceration, and a controversial one, punitive incarceration. Plato distinguished between the custody of the body and the reform of the soul. Thomas More differentiated his version of penal servitude from the slave camps and work dungeons of Roman history on which it was based. And Bentham helped to construct the penitentiary/jail distinction in its modern form with one hand while slyly erasing it with the other. Each of these theorists of incarceration introduced some version of the division that would become a central ideological hallmark of modern punishment.

This focus on the conceptual construction rather than the material reality of incarceration is also a function of the method of this book. I treat punitive incarceration as a discursive site rather than an archaeological site.⁸ In other words, I approach the prison as a thing that was imagined, taken up, and talked and written about—even if the object of discussion itself, the actual spaces or legal practices of confinement,

remained elusive or ambiguous. This orientation toward moments of discursive interest in incarceration has also guided the selection of the texts at hand. The readings that form the backbone of this book constitute a series of interlocking moments in the history of political philosophy, moments where perennial concerns about autonomy, community, and punishment temporarily crystalized around the idea of incarceration. These are not the only points when prisons, in the broad sense, have served as discursive sites. They are, however, some of the clearest examples of the prison in the strict sense as an object of philosophical analysis.⁹

This study is motivated by the conviction that the history of the philosophy of incarceration is connected to the political ideas that structure our world today. The crisis of mass incarceration makes the passages in Plato, Hobbes, and others of pressing interest to a contemporary reader. And it is my hope that a deeper understanding of early ideas about imprisonment may help us to understand why the conceptual foundations of the modern prison have reached their own moment of extreme crisis. In the wake of mass incarceration, the idea of the prison itself has come under increasing critical and philosophical pressure.¹⁰

THINKING ABOUT IMPRISONMENT BEFORE THE PRISON

If the prison as a penal institution did not find much political purchase before the social, cultural, and economic conditions of the late eighteenth century, the *idea* of punitive incarceration—and especially of reformatory incarceration—nevertheless has a rich and largely unnoticed legacy in the history of political philosophy. Discussions of the prison can be found amid the heady intellectual foment of the Athenian democracy of the fifth and fourth centuries BCE. These ideas reappear, both independently and in conversation with one another, across a variety of texts and contexts, including Jewish and Christian Hellenism, Renaissance Platonism, and some of the foundational thinkers of early modern liberalism.

Philosophy is not written in a vacuum. Just as the changing conditions of modern society over the past fifty years have had a clear impact on the possibilities of thinking about the prison, so too every earlier theory of incarceration has rested on the changeable nature of a particular social

world. Different theories of incarceration therefore rely on varied and even contradictory assumptions about the importance of citizenship, the seat of human behavior in the body or the soul, the form of the state, the relationship between masses and elites, and the foundations of political association in reason, passion, or interest. These different social and moral theories also interacted with the radically different material conditions under which different philosophers wrote and, equally importantly, under which their understandings of crime and punishment were formed. The prison emerges as a discursive site again and again, but the form the discourse takes and the nature of its themes are deeply historically contingent.

To track the various theories of incarceration as they emerge, each chapter will focus on specific arguments for imprisonment: those made by Athenian democrats, Plato, Thomas More, Thomas Hobbes, and Jeremy Bentham respectively. While the chapters are arranged chronologically, the organizing principle of this book is the conceptual distinction between what I will call the popular authorization approach and the Platonic correctional (or reformatory) approach. These two approaches are conceptually independent, meaning that neither relies on the other for its plausibility. While the two theories interacted in Athens and again in early modernity, it was not until the modern era of the “Birth of the Prison,” to use Michel Foucault’s felicitous phrase, that these two ways of explaining why it is right to punish by confinement were ultimately assimilated into modern prison theory.

The bulk of this study characterizes these two competing ways of justifying incarceration on their own terms and in their historical contexts. The first theoretical family, the popular authorization theory of incarceration, begins in the Athenian democracy of the fourth and fifth centuries BCE and reappears—albeit transformed—in the work of Thomas Hobbes. Despite their different political environments, material conditions, and theoretical assumptions, both Hobbes and the Athenian democrats place a premium on the formal equality between citizens. Both also envision the involvement of citizens in punishment, whether through direct participation in Athens, or by means of Hobbes’s “social contract.” Consequently, their theories each confront the possibility of citizens being asked to punish their political equals, thereby authorizing their own possible future punishment. In popularly authorized regimes,

whether the small-scale direct democracy of Athens or the centralized states of modernity, locking up our fellow citizens poses considerable ideological and practical contradictions. The content of these tensions may vary, but their paradoxical form is strikingly similar—citizens *can* imprison one another, but to do so might undermine the formal relationships that underlie the foundation of the regime. I call this problem *the paradox of popularly authorized punishment*. As we will see, the violation of physical liberty required by incarceration proves to be a special case of this paradox.¹¹

The second family of thinking about incarceration emerges first in the philosophy of Plato and was adapted from him (directly or indirectly) by later authors including Thomas More and Jeremy Bentham. The key tenet for both Plato himself and for subsequent theories in the Platonic tradition is that incarceration can change the minds of criminals, returning them to the political community in a better state than when they were removed from it. This second family of theories is more closely interested in the technique of incarceration. It justifies the confinement of criminals by means of a set of assumptions about the psychological foundations of human behavior. These Platonic theories try to explain how the human mind works, how physical confinement affects psychic function, and how confining criminals will make them better citizens.

The Paradox of Popularly Authorized Imprisonment

Arguments over incarceration in Athens must be understood in relation to democracy and its limits. On the one side of the debate, imprisonment, with its constraints on the body of the imprisoned (in the jail at Athens, prisoners remained chained up, even inside), was clearly in tension with democratic norms around bodily integrity. Yet there was also a democratic case to be made for the egalitarian nature of imprisonment—the wealthy are as pained by prison as the poor are. And incarceration—unlike exile, ostracism, or execution—keeps citizens within the boundaries of the state, preserving a sense of civic unity, even within the context of punishment. But the strongest case for imprisonment in the face of its uncomfortable associations with the treatment of slaves comes from the very power of the jury to impose it. The speechwriter and politician

Demosthenes, for instance, advocated for incarceration by urging citizens to imprison a powerful political figure as a demonstration of democratic power. By enacting a punishment that skirts the boundaries of what is democratically viable, the citizen jury reminds itself and its potential enemies of what democratic bodies might be willing to do to defend their authority.¹²

The prison, in this Athenian-democratic context, is just another tool in the democratic arsenal. But, given its conflict with other democratic values, the prison is a relatively ineffective tool, especially compared with other juridical practices like the “suit against illegal legislation” (*graphē paranomōn*). The Athenian justification of penal incarceration grapples with the contradiction between democracy as a set of ideological commitments (to the inviolable bodies of citizens or to a principle of gentleness) and democracy as a set of power relations. Ultimately, Demosthenes argues, this is a knot that only the members of the demos, in their capacity as officeholders (in this case, specifically as jurors) can untangle. Democratic punishment is whatever is best for popular rule, even if that punishment seems, on its face, to be undemocratic. This is the first instance of a paradox around the popular authorization of imprisonment.

The second main example of the tendency toward a paradox in popularly authorized incarceration can be found in the philosophy of Thomas Hobbes. Hobbes, an accomplished classical scholar, was keenly aware of Athenian practices of punishment.¹³ But Hobbes’s theory of punishment (and thus, his theory of incarceration) was grounded in an intellectual framework far removed from that of ancient direct democracy. Against the Greeks and Romans who, according to Hobbes, were concerned with the freedom of states to act as collective bodies, Hobbes insisted that both the source and the limits of liberty lie in the contract between individual subjects and a sovereign. This contract forms the conceptual foundations of a state or commonwealth. Given that the fundamental point of the contract is to preserve the security of one’s life, “a man cannot lay down the right of resisting them that assault him by force to take away his life. . . . The same may be said of wounds, and chains, and imprisonment.”¹⁴ Incarceration appears at the very center of Hobbes’s theory. On his account, prisons, and indeed almost every form of corporal or capital punishment, immediately sever the social contract between the citizen and the state.

This power of the prison to sever the covenant between a subject and a sovereign, while keeping the subject quite literally *bound* to the will of the sovereign, also presents a special opportunity for returning the subject to the body of the commonwealth. A prisoner will only leave prison if one has consented to the sovereign's laws of one's own so-called free will, though while in prison, one is under no obligation to the sovereign at all. Hobbesian incarceration can consequently be thought of as the suspension of freedom with the aim of forcing the prisoner to make the same choice one would to exit the state of nature—by once again accepting the sovereign's will in return for one's physical liberty. By producing the conditions for a new contract between sovereign and citizens, the prison is ideally situated to serve the goal of punishment, which is, according to Hobbes, to “form” the criminal's will and to serve as an example to others.¹⁵

Despite many important differences between their wider political theories, in both democratic Athens and Hobbes incarceration exists in a paradoxical tension with the structure of the regime. The prison, moreover, brushes up against an essential boundary condition—that of the status of free citizens in Athens and that of the conditions under which it is rational to consent to the authority of a sovereign, according to Hobbes. In calling this shared contradiction a paradox of “popularly authorized” incarceration, this book identifies a recurring tension between the freedoms promised by political theories grounded in popular consent and the punishments that ensure the necessary conditions for those freedoms.¹⁶

The Athenian and the Hobbesian cases also share a certain negative feature, one that helps to distinguish them from the other family of prison theories examined by this book: the two “popular” theories decline to posit an explicit theory of *how* or *why* the prison works. This unanswered question of the technical requirements of confinement, what goes on in the prison and why, is taken up by the second major tendency in early prison theory: the tradition of thinking about the prison as a means of reforming the soul (or mind) of the criminal.

The Platonic Tradition

The tendency to view prisons as a place to correct errant souls has its origin, like the paradox of popularly authorized imprisonment, in ancient

Athens. Unlike the democratic discussions of the prison however, this theory emerged not from the exigencies of political life but rather from a philosophical problem recognized by Plato. Given that they believed that punishment is only justified if it improves its recipient, Plato and other Athenian intellectuals were left to question what sort of punishment might really change a criminal for the better. Plato offered incarceration as a possible solution to this problem, using the prison both as a dramatic setting and as a literary or mythical image of correct punishment. In his dialogue the *Laws*, Plato even went as far as to detail how a reformatory prison would work in practice.

Plato identified two guiding questions that structure this imagined prison. The first of these is about the moral psychology of crime: What goes wrong in the mind of a criminal (and how might it be fixed)? The second is about a socially situated theory of practical reason: How do the actions of individuals relate to a broader set of communal norms and practices (and what is the concordant relationship between psychology and law)? In the *Laws*, Plato presents a version of incarceration that considers both how criminals think and how these thoughts fit into the complicated social fabric of an ancient city-state. The *Laws*' moral psychology of crime leans heavily on the metaphor of punishment as education and healing. Plato suggests that, just as in learning, punishment is accomplished by changing the soul of the criminal; and, as in medicine, crime is a sort of mental disease, and punishment is a cure. In support of this psychological, reformatory theory of punishment, Plato advances an extensive theory of how the soul works and how punishment can regulate psychic functions: the prison, with its closed environment for learning and convalescence, is Plato's ideal institution for punishing crimes that are caused by a disorder in the rational soul.

The prison in Plato's *Laws* may not be the most memorable or influential political institution to have emerged from Plato's political thought, but it did have a long and surprisingly successful afterlife. The story of the reformatory tendency in prison thinking, then, is also a story about Plato's reception by later thinkers. Jewish and Christian Platonists found a model for their own communal aspirations in Plato's description of an enclosed, therapeutic house for damaged souls. They also took the language of temperance and reason that had characterized Plato's social and moral psychology of incarceration and adapted it to the

ascetic spiritual practices of monastic communities, which aspired to serve as sites of reform and recuperation for those fleeing the temptations of the wider world.¹⁷ This modified Platonic project of reformatory confinement survived and indeed thrived for some thousand years, until Plato's own texts were once again taken up directly during the European Renaissance.

The best example of prison thinking in the New Learning of the Renaissance can be found in the work of Thomas More. In his *Utopia*, More explicitly appealed to arguments and ideas from Plato's *Laws* in constructing a fictional island polity, which practices a platonically inflected form of future-directed incarceration and penal labor. More's role in reinstating incarceration as a secular political practice is also a return to a particularly Platonic way of thinking about the moral psychology of crime and the connection between criminals and society. But More's attention to the laboring masses rather than to philosophical and political elites points to a somewhat different social theory than that of the Platonic model. For More, the prison is to be used to ward off the widespread ills of poverty and laziness rather than to dialectically instruct wayward intellectuals and politicians.

It was not until the work of More's countryman Jeremy Bentham that labor finally took its place as the central reformatory agent of punishment and incarceration. It might seem strange to identify Bentham, a famous materialist and the founder of utilitarianism, with the idealist Plato, but Bentham saw himself in continuity (and in competition) with More's *Utopia*—and, by extension, with its Platonic model. Bentham thought that More's use of labor to punish and reform did not sufficiently explain how hard work could improve criminals and society. Bentham himself, on the other hand, was confident that the moral psychology of pleasure and pain and the normative principle of the “greatest happiness of the greatest number” could help design institutions that accomplished what earlier theorists had only ever fantasized about: the efficient and reliable inculcation of prosocial behavior.

Part of what makes Bentham's prison so attractive as an analytic device is his clear-eyed explanation of the rationale (and the rationality) of incarceration. Bentham calculated that it would be possible to use a precise knowledge of human interests and motivations—based on pleasures and pains—to both control the behavior of inmates and to make that

behavior profitable. The Panopticon was to be a prison built on the principle of “inspection”—the actions of every inmate would be visible to a central authority, which would itself remain unseen. Bentham’s prison is not only a place for hard labor; it is also a factory, and the central watchman who observes the prisoners also oversees their efficiency as workers. The business structure of the Panopticon is as important as its circular architecture. Each Panopticon could be funded by a joint stock company, whose investors would ensure that it operated with the utmost efficiency.¹⁸ But the Panopticon was conceived as both a penal institution and a more general institutional scheme, which Bentham hoped to apply to social welfare (a “Pauper Panopticon”) and even to schooling.

With Bentham, the Platonic, Utopian theory of a rationalized form of punishment reaches both an end and an apex. Bentham’s idea of the prison is no less rationalized than Plato’s or More’s, and his ideal of a society ordered by the same principles that determine correctional punishment is no less total. Bentham viewed the Panopticon as a tool for inculcating a set of rational behaviors like cost-benefit analysis and delayed gratification, behaviors that characterize the middle class, the class that is most adept in producing utility for society as a whole. While Bentham is known for professing that individuals are the best judges of their own interest, his prison theory shows that he was not averse to using penal institutions for interest formation, aiming to inculcate the lower classes with the values of the idealized industrious middle class. Bentham marks the Platonic tradition’s arrival to a social and political world much like our own.

I have chosen Bentham and his Panopticon as the endpoint of this study because he was, in many ways, the final philosopher of prisons to precede widespread real-world incarceration. By the time Bentham wrote, prisons had definitively begun to move off the page and into the cities and suburbs of the industrializing world. Thinking about the prison against the background of incarceration as practiced is an entirely separate project from an abstract examination of the early history of prison thinking. In fact, mapping the growth and development of ideologies of incarceration in the nineteenth and twentieth centuries has become a major research agenda in history, sociology, and political science.¹⁹ We cannot do justice to the story of the modern prison in its

entirety, but I will try to show, if only briefly, how the early history of prison thinking can be an illuminating complement to discussions of modern incarceration.

FROM EARLY PRISON THINKING TO THE MODERN THEORY OF INCARCERATION

It is only a slight oversimplification to say that the two early traditions of thinking about the prison—popular authorization and the Platonic theory of reform—were recombined by the penal theories of the Enlightenment into a new general theory of incarceration. For the theorists of the modern penitentiary, the legitimacy of penal incarceration as a liberal or democratic institution (something akin to the theory of popular authorization) was now dependent on its ability to change wayward (“delinquent”) souls through psychic reform. The two early theories of incarceration thus ceased to function independently at more or less the same moment that modern reformatories and penitentiaries achieved their hegemonic position in modern societies.

For much of the nineteenth and twentieth centuries, the prison was widely understood to be a distinctly enlightened and democratic form of punishment.²⁰ Part of the penitentiary’s strongest claim to legitimacy was its apparent compatibility with modern theories of self-rule. Alexis de Tocqueville traveled to America to study its newfangled ways of punishing and found instead the subject of modern democracy writ large.²¹ Benjamin Rush, signatory to the Declaration of Independence, made an influential case for the prison in republican terms, describing the United States as “an infant commonwealth” rejecting “the manners of ancient and corrupted monarchies” through the use of incarceration.²² One hundred years later, Zebulon Brockway, another leading voice of American prison reform, introduced his plan for an ideal prison system with the axiom that “not only should there be unity of spirit in the general government and the prison system of the state, but *identity of aim*.”²³ Brockway went as far as to identify “executive” and “legislative” aspects to prison administration.²⁴ The prison was the republic writ small. But as Rush, Brockway, and many others made clear, it was precisely the power of the penitentiary to *reform*, to restore the convict to the community, that made incarceration indispensable to democracy.²⁵ They solved

the paradox of popularly authorized punishment by treating the reform of fellow citizens an expression of civic equality. Self-rule and soul craft were both elements of the modern idea of the penitentiary.

This psychic-political doublet at the heart of modern prison thinking was taken up and expanded upon by scholars in the 1970s. Michel Foucault's analysis of the birth of the prison takes as one of its main themes the intertwining of psychological science and the political legitimacy of punishment. In Foucault's words, the history of the prison is the history of "the scientifico-legal complex from which the power to punish derives its bases, justifications, and rules."²⁶ According to Foucault, the justifications for punishment—justifications that, in the era of the modern liberal-democratic state, are assumed to come from the ideological wellsprings of popular self-rule—are really grounded in the efficacious technique of punishment. Incarceration is democratic (or republican) *because* it works to reform and rehabilitate. The form of modern penal justification is the popular authorization theory, but the content is that of the Platonic tradition, with its emphasis on the psychological conditions for soul craft. Even Foucault's ironical claim that modern prisons are the reverse of Platonism because they use the knowledge of the soul to control the criminal body suggests the way in which Platonic ideas about punishment were taken up and transformed by modern theories of punishment.²⁷ As with incarceration in democratic Athens, arguments for the legitimacy of the prison emerged in tandem with liberal societies' concerns over their own legitimacy.²⁸ But unlike in Athens, in modern prison theory political legitimacy and the power to change minds became interdependent.²⁹

But at the very time Foucault and others were painstakingly uncovering the ideological matrixes of "penal modernism" (to use David Garland's phrase), the justificatory framework for incarceration in the United States was undergoing a seismic shift. American prison populations, rather than decreasing as predicted by the "decarceration" movements of the 1960s and 1970s, instead doubled, tripled, quadrupled, and then some. Prison construction boomed across the continent, with private prisons and "super-maxes" springing up alongside superannuated reformatories and penitentiaries. America was plunging headlong into the age of mass incarceration.³⁰

The rapid and unexpected transformation of the American prison system did not accord with the theories of disciplinary control and the industrializing liberal social order that had emerged from the first generation of revisionist scholarship on the prison. The new, “postmodern” justifications for prisons in the age of mass incarceration, and penal practices themselves, were different in kind from the modern theory of incarceration described by Foucault and his contemporaries.³¹

Even before the demographic shifts that characterized American prison growth in the late twentieth century, an intellectual shift had started to take place in discussions of punishment. In the wake of the critical scholarship of the 1960s and 1970s, reform and rehabilitation began to be seen as dehumanizing, paternalistic, and undemocratic.³² In place of reform, philosophers offered a new account of retribution and responsibility. By treating punishment as recompense for the crime, the thinking went, the criminal would be fully respected as a moral agent rather than “treated” by an all-knowing scientific-legal authority.³³ The turn to retribution dovetailed with a shift in focus across the criminological disciplines, from the reformatory power of confinement to the deterrent power of sentencing.³⁴ Penal sentences, it was thought, should be guided not by how long it might take for the soul to be crafted; rather, they should reflect both the dictates of moral proportionality and the supposed science of criminal deterrence.³⁵

The social and political conditions that encouraged the American prison boom were not, of course, caused by abstract considerations about retribution and moral autonomy. Changes like mandatory sentencing guidelines, three-strikes laws, and racialized patterns in policing and prosecution all had more to do with the electoral winds of “penal populism” and politically motivated “wars on crime” than with political philosophy.³⁶ But the theory and the practice of contemporary incarceration did ultimately converge on a sort of new justification for the prison, one very different from both the classic modernist account of Foucault and the early history chronicled here.

The contemporary American prison has become first and foremost a warehouse, a site of incapacitation and segregation. Penal confinement is carried out with an eye to removing the offender from society for as long as possible rather than with any pretense to “reform” or “correct.”

This justification for imprisonment may be considered popularly authorized, insofar as many of the recent innovations in American imprisonment have come with an electoral mandate. But there is no longer even an ideological pretense that incarceration is rehabilitative, let alone that it is intrinsically democratic.³⁷ Proponents of the prison support such punishment not because of its unique virtues but because it fits within a broader strategy of being “tough on crime” that has its own distinct historical and political roots.³⁸ The loudest critics of the prison, for their part, no longer aim to reform it or return it to a healthy function. Rather, they increasingly call for abolishing incarceration entirely.³⁹

This introduction has traced the transformation of two ancient families of prison theory—the popular authorization approach and the Platonic theory of reform and rehabilitation—into the modern era of the prison as a hegemonic penal form. For a time, these early theoretical tendencies comingled in the reform-minded justifications of the prison that flourished in liberal democracies throughout the nineteenth century. At some point, however, both these arguments lost their hold on the penal imagination.⁴⁰ The sorts of reasons given for the prison at the very moment of its greatest expansion in the late twentieth century—from fear of “super-predators” to “wars” on drugs and crime—grew increasingly distant from the communal-republican ideas coinciding with the birth of the modern prison. The final pages of this introduction will take up the contemporary legitimization crisis of the prison, primarily in the United States, to illustrate what prison thinking from before the Panopticon might be able to tell us about the legitimacy of the prison today.

BEFORE THE PANOPTICON AND AFTER MASS INCARCERATION

The legitimacy of the modern practice of punitive incarceration (after Bentham but before the intellectual and political upheavals of the 1970s) was built on a double foundation—scientific theories of reform combined with civic-republican commitments to the return of the criminal to the community. Each part of this doublet was a necessary part of modern polities’ justifications of incarceration, and together, they were sufficient to render punitive imprisonment an almost unquestioned form of punishment in developed democracies.

With this conceptual framework in mind, we can see the fate of theories of the prison since the 1970s in a new light. Independently of the shifting social conditions that caused the population-level expansion of mass incarceration, intellectuals across the political spectrum came to criticize one or both constituent parts of the argument for the prison's legitimacy. On the left, the pronouncements of the French Groupe d'information sur les prisons (of which Foucault was a member) and an influential report by the American Friends Service Committee, *Struggle for Justice*, both denounced incarceration as a paternalistic and discriminatory system of punishment. According to these and other radical voices, the language of reform only served to mask a penal reality of racist and classist oppression.⁴¹ In addition to radical arguments that reform was inherently paternalistic, voices from the center and the right attacked reform for the purely pragmatic reason that “nothing works” to rehabilitate criminals.⁴² For the first time in its two-hundred-year history, criminology began to lose faith in the technical possibility of the sort of soul craft that the concept of the penitentiary had taken as its major premise.⁴³

The collapse of reform, one necessary premise in the argument for punitive incarceration, would probably have been enough to occasion some sort of legitimization crisis for the modern prison. But as it turned out, the second necessary premise—that reformed citizens are important parts of the civic community—also came under assault, at least in the United States. The story of mass incarceration is fundamentally a story about the redrawing of citizen boundaries around criminals and criminality in America. Part of this story concerns racial backlash, as Black people in the process of winning their formal civil rights were subjected to increasing criminalization and ghettoization by drug policy, redlining, zoning, and housing exclusion.⁴⁴ At the same time, the victims' rights movements and even civil rights movements focused political and public attention on the pain and identity of victims, often to the exclusion of the humanity of criminals—or those who were perceived to be criminals.⁴⁵ As intensive policing and high incarceration rates led to an increasing sense of political exclusion and anomie in marginalized communities, mass incarceration silently redefined who counted as a full member of the political community.⁴⁶ The idea that the criminal was someone of value to the democratic community or

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