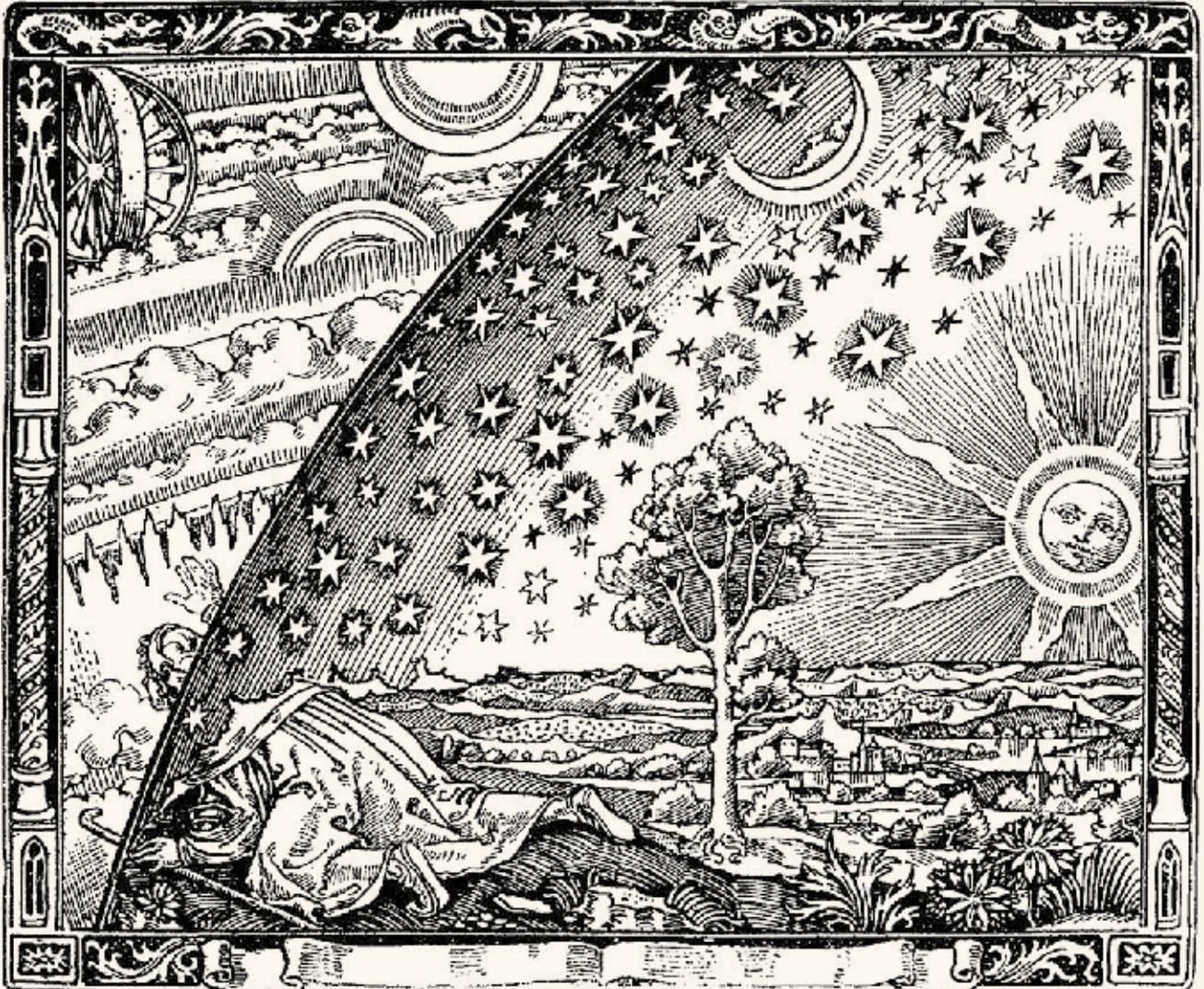


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REIMAGINING PUNISHMENT AND JUSTICE

HARDER THAN IT MIGHT SEEM

Jonathan Simon on Reimagining Justice in the Era of Mass Incarceration

FOR THOSE OF US who have charted the supersizing of America's carceral state, the last five years have witnessed shifts in penal discourse that none of us imagined (or at least weren't clever enough to predict in print). Perhaps the first bell was the Supreme Court's 2011 decision in *Brown v. Plata*, upholding a mass prison population reduction order against California and signaling an end to judicial tolerance of the inhumane conditions arising from chronic over-crowding and disease burdened prison populations that have become normal in the era of mass incarceration. Courts have intervened in moments of populist punitiveness in the past only to see the backlash feed the punitive turn. In 2014, California voters signalled their approval of the Court's action by approving a referendum that reduced sentences for specific drug and property crimes, resulting in further immediate reductions in the prison population.

Last year, 2015, saw a bipartisan bill to reduce drug sentences introduced in Congress with wide support (albeit uncertain immediate prospects in a Presidential election year). President Obama broke new ground, visiting a federal prison, decrying overcrowding and the futility of long sentences for non-violent drug crimes, and most recently taking steps to reduce the use of solitary confinement in federal prisons.

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So far the actual reductions in the scale of the carceral state have been extremely modest, and much of it has consisted of shifting populations. For example, the majority of people who avoided prison thanks to *Brown v. Plata*, served sentences of probation, or even incarceration in jail rather than a prison (the former in the US is mostly limited to people awaiting trial or serving short sentences for less serious crimes). It remains most uncertain how much this shift in tone and direction of penal discourse (and its considerable "cooling" to borrow Loader and Spark's notion of a heated penal climate) will ultimately produce significant reductions of the US carceral state. These shifts in discourse may have to be pushed much further before we can expect the political and policy shifts necessary to produce significant long-term reductions; and which will be resisted strongly by existing interest groups within the carceral state. This runs up against retail political calculations (which so far are encouraging for politicians willing to test the sentiments of voters) and those of our penal imaginary (Carlen 2008), the set of anchoring presumptions, assumptions, and associations, passed with little change from one generation to another or reconfigured for a rising generation by dramatic and structurally significant historical events.



Mule Creek State Prison
Aug. 1, 2008



California Institution for Men
Aug. 7, 2006

Photographs of conditions in Californian prisons were appended to the majority opinion in *Brown v. Plata*, US Supreme Court.

In my most recent book, *Mass Incarceration on Trial* (2014), I explored *Brown v. Plata* with an eye toward the transformative interruption of the penal imaginary that had set off the carceral boom in the late 1970s, and how it might be further transformed by the crisis of mass incarceration exemplified and accentuated by *Brown v. Plata*. In the photographs appended to the majority opinion (itself a highly unusual practice), Americans willing to look could see some startling social facts about the prison population. They could see older and disabled prisoners; visible symbols for the 40 percent of prisoners suffering from chronic illnesses like diabetes and hepatitis. They could see California's

efforts to address the severity of mental illness in the population through booth-sized cages designed to keep psychotic prisoners from suicide. Above all they could see hyper overcrowding, in irregular areas filled with three tiered bunks, like some kind of emergency refugee camp.

These images, and the social facts for which they speak, have real salience for the penal imaginary that was established by the transformative penal crisis of the 1970s that saw high crime rates, urban and prison riots, and other signs of social disorder, combined with the wrenching transformation produced by the beginnings of globalisation, shatter the post-war welfarist consensus (Hall et. al. 1979; Garland 2001). For many, the uprising at Attica prison in 1971, and the subsequent massacre of both people and the truth by the state exemplified the new way of seeing prisoners. Portrayed as savagely murdering the prison officers who were taken captive during the uprising and held as hostages (but actually killed mostly by the massive assault force of state police and correctional officers who retook the prison in a surprise attack accompanied by tear gas), the mostly black and Latino prisoners were seen afterwards as irremediable enemies of society, only contained by the most violent and stringent means (Thompson 2014).

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In contrast, the current penal crisis is entirely internal, produced by over-long sentences and parole revocation practices rather than crime, which remains at or near a generational low. Contrast the famous images of prisoners holding guards at knifepoint on the walls of the prison at Attica, with Plata's portraits of prisoners as vulnerable and suffering subjects. This may be a moment when, to answer a question that Bernard Harcourt asked some years ago (2008), it might be possible for the public to reimagine the convict. This might also be a point where the basic legitimacy of the extended and aggressive version of the carceral state (including prisons and police) evident since the 1970s, is questioned.

Since the book I have reflected further and think it requires more than revisiting the features of our penal imaginary laid down by the transformative crisis of the 1970s. We can already see some of the effects and limits of this partial recasting. The war on drugs, dependent on an image of people convicted of drug crimes as being potentially violent and incapable of being rehabilitated, is now widely discredited and drug admissions to prisons have gone down since the start of this century. The high cost of incarceration, once irrelevant to the seemingly inelastic demand for incapacitation through incarceration, is now becoming a crucial part of the political discussion (Aviram 2015). Yet even the success of alternatives to incarceration for low level drug and property crimes comes with substitution of community supervision sanctions like probation that impose high costs and often provide few services to people whose life in the community is typically already at the economic and social margins. Further, reform is absolutely stalled at low-level crimes. More serious drug and property crimes, and virtually all crimes definable as violent or against the person, are currently off the table for sentencing reform.

My current research concerns how far back we may need to go in our generationally transmitted penal imaginary to unlock ourselves from the extended version of the carceral state produced by the last transformative shock in the 1970s.

The closest transformative moment, associated with the Progressive movement in the US at the turn of the 20th century, and associated discursively with both eugenics and social work, has left us with an extended system of community based penal supervisions which seem likely to entrap those who might be decarcerated by current reforms. This era, with its strong embrace of scientific racism, has also left us a legacy of associating violent crime with African Americans (it used to be called "black crime" but today is framed in seemingly more neutral terms as "black on black crime"). A century earlier, the birth of the penitentiary (Foucault 1977; Melossi and Pavarini 1982) and the parallel construction of large urban police forces, transformed the carceral state from a small network of courts and jails (along with public execution sites) to a permanent and massive bureaucracy, unlikely to accept any permanent reduction in the scale of the supersized carceral state without serious challenge to its legitimacy. Finally, the birth of the modern nation state, beginning in England as early as the 16th century, sees the public seizure of penal justice as a crucial anchor to legitimacy. Drawing on the biblical casting of punishment as a holy enterprise (so long as directed at the guilty), this early re-moralization of the penal enterprise (the first of many to come) has left governance through crime as a powerful handle in each generation.

Today's crisis of mass incarceration in the US (and parallel developments in the UK and beyond) opens a crucial opportunity to reimagine what we want from penal justice in contemporary democracies. Indeed, unless that discussion becomes one committed to plumbing the deepest chambers of imagination, it is unlikely that this opportunity will see more than a light redressing of the narrative behind mass incarceration.

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