

Prisons at the Border

The Political Geography of the Mason-Dixon Line

When Leavenworth consolidated the post-Reconstruction political landscape by redesigning the terrain of civil death, it carried forward the race-making traditions of an earlier era. Leavenworth taught race not only through the arrangements of racialized bodies but also through the procedures of fugitive pursuit. In 1898, as prisoners marched from the military prison to the new construction site, fifteen prisoners ran into the woods. “Innumerable volunteers” scoured the landscape and “ransacked the woods” for fifteen “desperate characters” — “some of the worst criminals from the Indian Territory.”¹ In 1901, another mass escape of twenty-seven prisoners ended in a gunfight and “the most desperate prison mutiny which ever happened in this section of the country.”² Subsequent reports focused almost exclusively on the pursuit of Frank Thompson, the “desperate Negro ringleader,” and his unidentified companions, “Indian and white.”³ Their arrests were celebrated: “Twelve men are safe, two on pine tables in the dead house, two in the hospital, and eight in the dungeon.”⁴ According to the local paper, “Crowds of the morbidly curious viewed the dead bodies and visited the scene of the shooting.”⁵ It was agreed that “nothing like the present condition of affairs has been experienced by Kansas since the border ruffian times.”⁶

During the course of this community ritual, Frank Thompson was one of the last to be caught. Thompson, despite his five-foot-seven-inch frame, was described in the papers as “lurking near the Kaw” at Lawrence, a “bad southern negro, a giant in strength, cunning, brutal and with absolutely not a bit of good in him.”⁷ Among these men was J. N. O. P. Wood, “formerly of Leavenworth,” who had once kept the prisoners of Bleeding Kansas in his house.⁸ In the deputization of white citizens as legal agents, local farmers joined state forces, seeking the sixty-dollar reward for capture. Accompanied by a reporter from the *Leavenworth Times*,

the search parties “hung to the hunt like grim bull dogs. . . . Farmers, sheriffs, county and city officers are scouring all timber, watching all roads and holding all bridges.”⁹ The “talk heard on every side” was the bravery of the “six citizens” who “engaged” the prisoners in battle after responding to the call of the prison siren. The capture of Thompson was an act of bravery, according to the newspaper, because he once had to be “chained and shackled and secured to a stake in an open field” without a cap and “left broiling under a merciless sun” so that he could be “brought into subjection.”¹⁰ Thompson’s capture made news again when he was “shot in the head, without being severely injured.”¹¹ In this post-Reconstruction Kansas landscape, federal power and the practice of hunting for fugitives was represented as a matter of settled law and no longer an intrusion: “Uncle Sam often hangs murderers and there is a strong likelihood that the seven ringleaders, if they are caught, will stretch hemp.”¹²

For his role in this mass escape, Frank Thompson received a life sentence, which was later commuted. Despite his representation as a violent and notorious prisoner, he was sent to Leavenworth from Ardmore, Central District, Indian Territory, on a seven-year sentence for larceny. His prison file acknowledges that he had no part in the killing of Guard Waldrup but that prison officials believed that mass escape required mass punishment.¹³ Although he was sent to the solitary cells nearly twenty times at Leavenworth, his offenses included laughing, talking to other prisoners, leaving the worksite, cursing at guards, and otherwise resisting the prison’s structure of silence and labor. In the “stone cells,” solitary prisoners were required to break rock during the daytime hours on a restricted diet. In January of 1902, Thompson was placed in one of these cells and “clothed in stripes, to wear [the] ball and chain.”¹⁴ He was once placed in the dark cells, the triangular dungeons in the basement of Building 63. Thompson’s relationship to a nationalized prison system is indicated in the warden’s handwritten note at the bottom of the preprinted form that inventoried prison discipline. He had once been confined at the Arkansas State Penitentiary in Little Rock, and after his release from Leavenworth he appeared, according to fingerprint evidence, as Morris Dent in the Oklahoma State Penitentiary.¹⁵ His confinement illustrates the carceral state’s focus on Black prisoners from the Indian Territory, the post-Reconstruction ritual of hunting prisoners like slaves, and the residues of slavery that were carried over into state and federal prison systems, into dungeons built like triangles and solitary cells anchored in chains.

In the post-Reconstruction landscape, the prison’s relationship to the peculiar institution was embedded in the institution’s aural, in the sounds of search hounds, grim hunts, and deputized citizens. As an everyday racial regime, the prison was part of a culture that connected it to slavery in ways that exceeded targeted bodies, forms of labor, or methods of discipline. These aural connections, built into the social life of the region, are best understood historically through W.E.B. Du Bois’s representation of the congenital connections between slavery

and prisons in “Jesus Christ in Texas” (1920). In this short story, a “mulatto” Jesus (or perhaps Du Bois himself) interrupts the sale of convicts in the opening scene with questions about the harms of the practice and is invited to dinner by a man who hopes to build a railroad with prison labor. The dinner party’s participants—the colonel-capitalist, the white housewife, the criminal court judge, the military officer, and the preacher—represent racialized capitalism, white supremacy and white womanhood, military violence, and organized religion. Although their social engagement is continually interrupted by “howl after howl,” which “rose in the night, swelled, and died away,” the sound of the search for escaped prisoners is such a normalized aspect of their daily lives that they only comment in passing as they dine: “Another one of those convicts escaped, I suppose. Really, they need severer measures.”¹⁶ Using the allegorical figuration of the characters to critically observe—as both Du Bois the scholar and Jesus the absolver of social sin—the collective labors that make the prison an everyday institution, Du Bois had already discovered in 1920 the legacies of the prison’s appearance as common sense, as an institution that survives not just in the racial terrain of the border but in daily rituals as routine as the dinner table. What if prisons produce rather than reflect the larger order of race in society?

This chapter tries to recover, through an attention to the historical political geography of enslavement and punishment at the border, the connections between prisons and slavery that continue to anchor the practice of mass incarceration. It was no accident that prisons first emerged in the United States at the border between slavery and freedom, in “states with thriving commercial cities,” including Virginia, Maryland, Kentucky, Tennessee, and Missouri.¹⁷ As a line of prisons that emerged across the landscape, border prisons formed “a belt of states stretching from Virginia and the Carolinas to Missouri that scarcely fell in with the general penological trends of either the North or the Deep South.”¹⁸ Entrenched in the state-sponsored law of slavery, the border prisons served as the epicenter of a carceral complex that was both public and private and that structured a political geography of mass incarceration. Kansas, of course, stood at the end of this line.

When an emerging federal prison system looked to the states to house its prisoners in the post-Civil War era, it utilized mostly the institutions along the northern side of the border. The idea of the “southern prison” overtook the idea of the border prison, and the federal government looked to border prisons that had become “northern institutions” to house federal prisoners. In the context of these regional shifts, the meaning of the border prison was forgotten and the homogenization of the southern prison meant that its challenge to “penitentiary slavery” has been erased from the prison’s archive. The relationship between border prisons and southern prisons reveals a moment when citizens refused to consent to state violence against the body. While some Deep South states built prisons, they largely abandoned the institutions in the early part of the nineteenth century, and some southern states refused to build prisons altogether until after the Civil War. The

Carolinas and Florida were the last to admit citizens to the prison in the late 1860s. Southern reluctance to adopt the penitentiary form was eventually resolved only by the “blackening” of the institution. When Leavenworth withdrew federal prisoners from state prisons altogether, the border prison became a forgotten artifact in the institution of slavery and the codification of “Black crime.”

This chapter works to disentangle the history of the border prison from the larger story of American punishment in order to trace how the project of Black containment became a systematizing force in the history of state and federal prisons. The border prison explains the entrenched history of Black incarceration in the United States and the political geography of slavery as a form of mass incarceration. The chapter’s archival work reveals how the narrative of northern rehabilitation and southern retribution has obscured the history of slaves in prisons and shifted the focus to the later horrors of the convict lease system. While the regime of convict leasing affected the whole southern landscape of rights and racial status, it did so beginning mostly but not entirely in the aftermath of the Civil War.¹⁹ The Deep South states began experiments as early as the 1840s with a lease system that lasted for over one hundred years; in the border states, the penitentiaries were already gothic monuments by 1840. Because the history of the border prison has been overshadowed by a North-South regionalism, this chapter examines how border states used prisons to define the terms of freedom and bondage and how Leavenworth, as a nationalizing project, attached this conjoined legal status to the bodies of all prisoners in the post-Reconstruction era.

A GOTHIC HISTORY OF SLAVES IN PRISONS

The history of slavery and prisons in the border states is structured by two overlapping systems of punishment. In the southern states as a region, buildings called “slave jails” emerged to discipline and punish enslaved people. But prisons in the border states were also used to punish slaves, either because the state bought the body of the enslaved in order to inflict punishment or because slave owners brought slaves to the state for punishment. The mixed genealogy of public and private punishments during the time of slavery marks the history of the prison as a legal arrangement. The idea of mass incarceration was born in the relationship between slavery and prisons as congenital institutions, as practices connected from birth and organized by the same kind of legal status.

The emergence of state penitentiaries at the border was driven by a political economy specific to the border region. Because border cities and towns relied on a combination of free and unfree Black labor, the region had large concentrations of both kinds of workers. In Maryland, slaves made up one-third of the state population as early as 1790, and in the southern portion of the state 54 percent of Black people were free and 44 percent were enslaved by the start of the Civil War.²⁰ Likewise, in Virginia, 60,000 free Black people lived alongside 58,042 slaves

in 1860.²¹ Border states were some of the first to adopt the prison as a mechanism for managing a dual class of free and enslaved Black people as part of this political economy of the border. In this context, the prison became a “Black” institution in the border states as places for managing the legal condition of Black freedom.

Unlike in the Deep South, where there were few free Black people and almost no Black prisoners, the border prison stood at the center of slavery as a form of mass incarceration. When freed and self-emancipated persons gathered in the borderlands in unprecedented numbers, border states developed “crime control” methods to eliminate the “corrupting” influence of freedom on those bound by law to a “slave criminality.” In the “misty and elusive terrain” of the Middle Ground, slaves arrived at state penitentiaries in order to be executed, deported to other states, held for punishment upon public conviction for “slave crime,” or submitted for state punishment by private individuals.²² In these cross-currents of Black punishment, states sold prisoners who were already slaves for the profit of the public treasury but also sentenced free people to the condition of slavery upon conviction for crime. The border prisons created a legal apparatus in which a free person could be treated like a slave and a slave could be punished by the state as though he were free.

The routine presence of slaves in prisons has been obscured in the written history of the US prison.²³ The public punishment of slave-prisoners contradicted the principle in political thought that prisons and slaves were irreconcilable. This was an idea at the heart of liberal contract governance. The slave, as a subject who was not free, had no liberty to give to the state; only a free subject who failed to abide by the law brought on the loss of freedom. Although slaves were not supposed to be subject to *state* punishment, archival records in the border states, including prison ledgers, state laws, and first-person accounts, show slaves in prisons in Maryland, Virginia, Kentucky, Tennessee, and Missouri. While the practice was largely a border state project, in the Deep South states Arkansas briefly incarcerated slaves for second-degree murder before abandoning the practice in 1858, while the prison-friendly Louisiana sent more than two hundred slaves, including children, between 1835 and 1862 to a penitentiary where all prisoners were employed making shoes and clothes for slaves across the state.²⁴ Louisiana passed an 1848 law that made all children born to the thirty-three enslaved women incarcerated for life “the legal property of the state,” and the auction of eleven children brought proceeds to the state treasurer for the “free-school fund.”²⁵

The combined threats of death, incarceration, deportation, and re-enslavement formed the basis of American slave punishments in nineteenth-century state penitentiaries. In the border states, prisons were first used as part of the institution of slavery as sites for slave executions, which required the state’s seizure of slave “property” in cases of exceptional crime. Slave executions were rooted in the idea that states were obligated to punish slave crime in instances when, as Gustave de Beaumont described it, “outraged society demands reparation.”²⁶ Indemnification was required when the state took an enslaved person from the person claiming

ownership, and state sentencing courts determined the “market value” of enslaved persons in order to compensate owners for the loss of this “property.”²⁷ The role of southern courts in the regulation of slavery as an institution meant that southern states were “paying for the right to do justice.”²⁸ Compensation laws existed in Delaware (1787), Maryland (1788), South Carolina (1788), Virginia (1788), North Carolina (1789), D.C. (1790–1), Kentucky (1792), Louisiana (1812), and Alabama (1819).²⁹ Only Tennessee, Arkansas, and Florida allowed “slave property” to be seized without compensation. The whole regulatory structure of southern slave law, which governed the state’s right to take the life of a person without status, is part of the history of mass incarceration and the racialization of the penitentiary form.

The criminal jurisprudence of southern slavery shifted from executions to penitentiary punishment because slave executions in state institutions were frequent and therefore costly. Between 1785 and 1865, Virginia paid for the right to execute over 628 slaves.³⁰ Condemning a slave to death in Virginia required a unanimous decision of the courts of *oyer and terminer*, which heard cases of “slave crime” committed off the plantations and “issued orders for execution, loss of member, or other punishment.”³¹ In 1821, Kentucky paid \$2,110 for “slaves executed” as required by the 1898 Slave Code.³² Kentucky insisted that it could execute without compensation any slave brought into the state “for merchandise, or which shall be passing through.”³³

Federal law eventually ratified the right of states to seize slave property for execution and punishment but left the matter of compensation to the states. In *United States v. Amy* (1859), an enslaved woman named Amy was prosecuted in federal court on a new law requiring a ten-year prison sentence for stealing mail. Amy’s position was not actually represented in the case, and her owner’s lawyer argued that because the Fifth Amendment’s Just Compensation Clause applied to the states, the federal government had reached into the “private” institution of slavery and should therefore compensate her owner according to the terms of Virginia law. He argued that because she was property state law required proper compensation for her prison time. Chief Justice Taney ruled that “a person, whether free or slave, is not taken for public use when he is punished for an offence against the law. . . . Society has a right to punish for its own safety, although the punishment may render the property of the master of little or no value.”³⁴ Although the Supreme Court’s ratification of slave punishments in *United States v. Amy* involved a law under which anyone could be prosecuted, states began widening the range of offenses for which only slaves could be punished and therefore increased significantly the number of slaves in prisons.

The idea of indemnification for slaves sentenced to prison time was settled law in Maryland by the early 1800s. From 1812 to 1820, slaves were routinely held in the Maryland penitentiary, and owners were compensated for the loss of their property according to the terms of the 1809 Penitentiary Act.³⁵ The state’s very first prisoner in 1811 was the slave Bob Butler; he was accompanied by sixteen other enslaved

people in an institution where half of the prisoners were Black.³⁶ According to the 1809 law, should a slave-prisoner “survive his or her time in confinement,” he or she would be “sold by auction” upon the expiration of the sentence.³⁷ After 1817, prison sentences for slaves were increased, so that no “colored person” sent to the penitentiary could serve less than one year.³⁸ By 1818, fully 61 of Maryland’s 146 prisoners were Black, 46 of them men and 16 of them women.³⁹ According to William Crawford, who toured US prisons in the 1840s, Maryland’s compensation laws were revised in 1819 “as to require the sale of convict slaves out of the limits of the state,” while the “money arising from the sale was applied to the use of the county.”⁴⁰ Despite the laws on the books, which encouraged judges to sentence Black prisoners to whippings and county sales, Black prisoners “flooded into the penitentiary.”⁴¹ Maryland’s system of paying specifically for prison time made it unique among the border states, but it was part of a pattern: free and enslaved Black people represented 8 percent of Kentucky’s prisoners and 4 percent of Tennessee’s prisoners.⁴²

As prisons became deeply entwined with the business of slavery, border states shifted from incarcerating slaves to selling slaves through systems of transportation or deportation when punishing slave crime. The Missouri Revised Statutes of 1835 gave judges the option to sentence slaves to thirty-nine lashes and public sale out of the state rather than incarceration.⁴³ In Maryland, an 1836 law required that slaves released from prison, upon conviction for another crime, would be “sold out of the state.”⁴⁴ This led to such an overall decline in Maryland’s prison population that state reports in 1842 regretted the policy’s adoption because of the prison’s declining profitability.⁴⁵ Under Virginia’s 1800 transportation law, the governor would commute death sentences to imprisonment; then, when “public feeling would permit,” the slave could be released to a private trader for sale and deportation “beyond the limits of the United States.”⁴⁶ Slaves awaiting “transportation” were to be kept in dormitories of “idle, temporary storage” while arrangements were made with dealers to buy “slaves from the state in lots.”⁴⁷ Although state records show that nine hundred Virginia slaves were sentenced to deportation upon convictions for crime, they languished in the state prison.⁴⁸ In 1823, Virginia superintendent Edmund Pendleton wrote: “No sale of transports has been made . . . since I came into office, and the number now confined in the Penitentiary is an inconvenience of increasing magnitude. They occupy rooms which could, in the event of their removal, be appropriated to convicts, and they add to the expenses of the establishment without being either useful or profitable.”⁴⁹ By 1825, four rooms in the prison were still used for the purpose of holding slaves already sentenced to deportation, and by 1827, Governor William B. Giles lamented that transportation orders were “seldom or never complied with. . . . The whole number transported [since 1824] amount to only 44.”⁵⁰ Because of the structure of deportation, Black prisoners made up fully one-third of Virginia’s state prison population.

In addition to execution, incarceration, and deportation, slaves became prisoners in the border states when they were brought to the state for private punishment

or “safe-keeping.” In Missouri, where “the slaveholder’s prison” built in 1836 was used as the punitive arm of a proslavery state, the prison was used preemptively to detain slaves who might escape.⁵¹ George Thompson in his memoirs describes meeting an unnamed Black man imprisoned because of a “suspicion on the part of the master that he would run away.”⁵² While the Missouri Penitentiary was in this sense both a public and a private institution, Kentucky banned the state punishment of slaves in the Penal Code of 1802 but allowed local exceptions for safe-keeping, a “custom which had existed in the institution for years, and is still practiced under the provisions of the act.”⁵³ Kentucky regulated the practice of penitentiary slavery in 1844, with a law declaring, “It shall not be lawful for the keepers to receive into the penitentiary any slaves for safe-keeping, unless they shall keep the same confined in the cells at night, and at all times, either during the day or night, apart from the white convicts.”⁵⁴ According to Dr. William Sneed’s 1860 report on the “mode and management” of the Kentucky institution, the private use of the prison to confine slaves was “the shame of the State,” and the 1844 guidelines abandoned: “This section has been violated time and again, and is now forgotten, and slaves are received, worked, and fed with white convicts.”⁵⁵

In addition to the use of the public prison for private punishments, border states incarcerated slaves when they participated in the movement for abolition, which was often condemned as a movement of “scurf and scum, collected from the prisons, brothels, and sink-holes of iniquity.”⁵⁶ In Maryland, the enslaved abolitionist Samuel Green was sentenced to ten years in the Maryland prison for the possession of *Uncle Tom’s Cabin*, a map of Canada, and a railroad schedule.⁵⁷ In Missouri, slaves entered the penitentiary as a mass of forty-two Black and white abolitionists sent to the state prison between 1830 and 1860.⁵⁸ Missouri’s 1835 Criminal Code punished slave rebellions with death or a life sentence in the penitentiary, and “stealing slaves” with a prison sentence of “not less than seven years.”⁵⁹ Kentucky’s system of incarcerating abolitionists began in 1811, when the state imposed death for slave conspiracies and imprisonment for “stealing slaves.” In the first fifteen years of the institution, six people were incarcerated for “stealing slaves” and four for “helping slaves” run away.⁶⁰ Throughout the 1840s, Kentucky increased the range of offenses related to abolition; by 1844, six prisoners had been convicted of “assisting slaves to run away,” and by 1846, Kentucky required imprisonment for the new offenses of “concealing slaves” and “enticing slaves to run away.”⁶¹ By 1853, Kentucky had imprisoned twenty-nine people for “assisting” abolition and four for “stealing slaves.” In Virginia, the criminal offenses of “enticing slaves to freedom” and providing false freedom papers brought five prisoners to the penitentiary between 1800 and 1838.⁶² By 1848, ten of the eighty-one free Black people in the Virginia penitentiary had aided or abetted slave escapes in a place still haunted by the mass rebellion of the slave Gabriel in 1800 and his execution at the prison.⁶³

The racialization of the penitentiary form in the border states was entrenched not only through a public-private regulatory structure that put slaves in prisons

but also through the cultural artifacts of everyday life. Against the backdrop of slave rebellion, the punitive powers of the border prisons reached beyond the walls in places like Richmond, where the prison was present in the lives of free Black residents because it overlooked the James River from one of the city's seven hills in a poor but free Black neighborhood called Penitentiary Bottom. Prison hangings were carried out on the edges of the nearby Black burial ground.⁶⁴ The transmutation of the penitentiary form into the routine architectures of everyday life could also be seen in the design of slave quarters. In border southern cities, slave quarters were shaped like honeycombs and mimicked the structure of incarceration: "Not only were the bondsmen's quarters placed close to the main building, but the plot itself was enclosed by high brick walls. The rooms had no windows to the outside. . . . In this arrangement, the walls had an extraordinary significance. Sometimes more than a foot thick, almost always made of brick, generally very high, they transferred a residential complex into a compound."⁶⁵ Woven into the fabric of everyday life, the prison was also at work in the slave patrols that were sometimes a compulsory part of suffrage requirements. Virginia's Public Guard, for example, was established after Gabriel's rebellion to patrol the capitol, the armory, and the penitentiary, where "one sentinel [was kept] on duty" as part of a "paid militia" that, for sixty years, protected the penitentiary against slave insurrection.⁶⁶

When the prison ritualized Black punishment in the border states through slave executions, deportations, sales, "safe-keepings," and the terrains of the everyday, the blurred lines between slavery and freedom created a form of mass incarceration. Beginning in the 1820s, border states claimed the right to sell emancipated slaves back into bondage upon conviction for crime. In Virginia, an 1823 law required that free Black people who committed crimes punishable with more than two years of prison time be "whipped and sold as a slave."⁶⁷ Since the law disallowed Black prison sentences of less than five years, this meant that almost every crime could turn free people into slaves. While the law was partially repealed in 1828, by 1860 even those born free could be sold into perpetual slavery: "If any free negro commit an offense for which he is punishable by confinement in the penitentiary, he may, at the discretion of the court before whom he is tried, be punished, in lieu of such confinement in the penitentiary, by sale into absolute slavery."⁶⁸ Through these legal mechanisms, more than thirty-five free people were sold into slavery by the state of Virginia.⁶⁹ Between 1858 and 1860, eighty-nine Black prisoners from Maryland were "sold into slavery" by the state for terms of two to sixty-five years.⁷⁰ In 1861, seventeen free Black people were sold into slavery, while sixteen slaves languished in the penitentiary.⁷¹ Maryland's system also targeted "vagrants" and those who refused to labor according to contracts, who could be "bound or sold . . . at the direction of a magistrates' or orphans' court."⁷² Using the prison as a mechanism for returning free people to the legal condition of slavery, states at the border created a freedom defined by the possibility of slavery.

Border states blurred the lines between slavery and freedom not just by turning free people into slaves but by banishing free people from the state and enslaving them if they failed to leave within time constraints set by the state. This was part of a long colonial tradition that began in 1691, when Virginia slave owners who emancipated slaves were required to arrange for their paid transportation out of the state “within six months” or face a “penalty of ten pounds sterling to the church wardens . . . to the use of the poor of the parish.”⁷³ The state of Virginia consolidated its punitive manumission policies in 1806, when lawmakers established that all emancipated slaves were to leave the state within twelve months of manumission.⁷⁴ In the state constitution of 1850–51, Virginia reaffirmed that “slaves hereafter emancipated shall *forfeit their freedom* by remaining in the commonwealth more than twelve months after they become actually free, and *shall be reduced to slavery* under such regulations as may be prescribed by law.”⁷⁵ The reduction of the free population and regulation of manumission was widely depicted as a crime-prevention strategy, while the subsequent migrations out of Virginia led Maryland, Kentucky, Ohio, and Delaware to pass laws banning free Black people from entering their boundaries. Indiana, Illinois, Missouri, North Carolina, and Tennessee also developed restrictive policies. The interstate regulation and management of Black freedom across the border relied on the narrative of “slave crime” to transfer the status of the slave to the legally free Black subject.

As states became what Du Bois called “dealers in crime,” they wedded the business of slavery to the penitentiary, which took Black bodies for a cost and sold Black bodies for a profit.⁷⁶ The public and private nature of the prison in the border states reveals that slavery was foundational to mass incarceration as part of a regulatory structure deployed by the state to eliminate the threat of abolition, to manage the condition of Black freedom, and to create profitable prisons through the state sale of slaves. Border states codified the distinction between slave and free in the creation of specific slave punishments and then blurred the boundaries between them in governing the legal distinction between Black slavery and Black freedom. States used border prisons to manage slavery as part of a carceral state, while in the Deep South Black punishment was a private, administrative practice cautiously regulated by the state. In the postwar era, the regional constellation of border prisons was replaced in the political imaginary by a set of “southern prisons” that were understood as “Black institutions.” The next section of the chapter explores how southern reluctance to the adoption of the penitentiary form was reconciled in the context of regional debates about punishment, property, and the law.

SOUTHERN PENITENTIARIES AND THE CHALLENGE TO STATE VIOLENCE

In the 1840s, Louisiana, Arkansas, Mississippi, Alabama, and Texas joined the border states in building prison systems, while Florida and the Carolinas refused

to adopt the penitentiary form on the grounds that it violated the honor of the citizen's body. After protracted debates about the prison's relationship to republicanism, North and South Carolina chose not to construct a penitentiary because public punishment was reserved for Black residents. Building an elaborate and expensive castle would ornament in unnecessary ways a structure that was already about Black punishment. Because of the already existing relationship between punishment and slavery, the prison was widely regarded as a form of "penitentiary slavery." When the southern tradition of prison resistance finally ended in the late 1860s, the Carolinas, Florida, and West Virginia, which had by then been set apart from Virginia, became leaders in postwar prison reform. The intertwined history of southern prisons and border prisons illustrates that the prison was not a natural institution. It required the engineered consent of a mass of southern constituencies.

In debates about the penitentiary form, white southerners were concerned with the prison's relationship to republicanism, religion, and taxes. In the republicanism that anchored southern society, the state's right to the body of the southern gentleman was restricted: touching the body defiled its sovereignty and therefore dishonored a citizenry that served as the only authorized source of state power. While governors, legislatures, planters, and grand juries urged southern voters to approve state prisons on the grounds that they would republicanize the prison and dignify the body, evangelical ministers and their congregations opposed "prison reform" on the grounds that it was contrary to God's justice. Because of this insistence that the prison undermined the retributive rendering of an eye for an eye and usurped a form of authority reserved for God, southern voters, when offered the choice, rejected the prison on the grounds that it made men subject to the will of the state rather than the will of God. Southern white citizens rejected the prison in twenty-three failed legislative attempts in North Carolina and eighty-two grand jury petitions in South Carolina between 1846 and 1857.⁷⁷ Other southern states had rejected the prison in referendums in Alabama in 1834 and the Tennessee General Assembly before 1829, when representatives of the eastern Tennessee districts rejected "time in a penitentiary for most major crimes" because of local opposition to increased taxes for a state penitentiary.⁷⁸ Tennessee state senator Charles F. Keith suggested that taxes on slaves might generate prison funds with "6.75 cents levied per hundred acres of land *and per slave*."⁷⁹

The prison was also rejected on the grounds that, in subjecting the body to the state, it created a system of abject dependence through the assignment of infamous status. The prison was condemned as an antirepublican institution not just because it temporarily subjected the citizen to the will of a violent state but because it consigned the prisoner to the permanence of infamy. This gothic status was widely integrated into southern state constitutions in the decades before the Civil War, resulting either from the commission of a morally outrageous crime (infamy from fact) or from the infliction of degrading punishments (*infamia juris* or infamy from law). State laws in the early 1800s distinguished penalties for infamous and

noninfamous crimes and then disenfranchised the infamous, who could not give testimony or vote. In the North, infamous status was generally attached to crimes so horrifying or outrageous that they were preserved in the public memory. In the South, infamy was generally attributed to punishment or the status of having been punished.⁸⁰ As discussed in chapter 1, punishment brought such a loss to the status of persons that they ceased to have legal standing. This meant that in the South Black citizens were sometimes beaten on the streets during elections precisely because it removed them from eligibility for the franchise. In North Carolina, for example, white citizens “undertook mass whippings” of Black residents because state law excluded from the franchise anyone “whipped as punishment for petty crime.”⁸¹ In 1866, army officer Robert Avery documented the practice of former Confederates, who began to “seize negroes, procure convictions for petty offenses punishable at the whipping post, and thus disqualify them forever from voting in North Carolina.”⁸²

The prison was an infamous institution not just in its physical violence but in the rituals of domination designed to humiliate: the shaving of the head, the donning of the stripes, the withholding of food and touch and light. When law inscribed infamy on the body, it did so to shame that body, to render it subject to power, and to defile its political status. Missouri defined infamy as the loss of status resulting from a conviction, when one became “incompetent to be a witness or juror, or to vote at any election, or to hold any office of honor, profit or trust within this state.”⁸³ In Kentucky, infamous punishments carried such a stigma that white men injured in accidents registered their injuries with the county clerk to prevent future accusations that they had been tainted by the prison’s punishments.⁸⁴ The violence of degradation ruled the “twin towers” of Kentucky’s prison through what Beaumont and Tocqueville called the “indelible signs of infamy,” signs that served as evidence of ineligibility for the rights of citizenship. Beaumont and Tocqueville wondered about the reconcilability of the penitentiary idea and the state’s legal authorization of whippings and broken bones: “When the mutilation of his limbs reminds others incessantly of his crime . . . must we not ardently wish, that the last traces of such barbarism should disappear from all the US, and particularly those which have adopted the penitentiary system, with which they are irreconcilable, and whose existence renders them still more shocking.”⁸⁵ The status of the prison as a political question with an uncertain future was rooted in the racialization of the penitentiary form and the refusal of a degraded citizenship. The prison’s violence degraded the whole right of citizenship, lowering southern whites to the status of the infamous.

In this context, antiprison arguments about the state’s right to inflict punishment were grounded in an analysis of the prison as a form of slavery. Because the prison inscribed a state of dependence on an honored white body, “penitentiary slavery” was said to violate the proper domain of the state. In North Carolina debates published in newspapers, “Bertie” captured the perspective of southern republicans who saw prisons as slavery:



FIGURE 9. "Slave pen" operated by Price, Birch & Co., Alexandria, Virginia, 1860s. Courtesy of the Library of Congress, Prints and Photographs Division, Reproduction No. LC-DIG-cwpb-01470.

What are inalienable rights? . . . It was admitted that . . . taking away any part of our labor, without our consent, amounted to slavery, and that only such slavery was worse than death; but under the Penitentiary system the free-born citizen is made to labor directly under the lash as a slave, and is this not worse than death? . . . I think instead of adopting the Penitentiary system we should rather increase our Christian humanity and benevolence in the abolition of Penitentiary slavery in other states . . . for, in my opinion, a free-born American sovereign to be placed in this degrading institution is far worse than death by any torture.⁸⁶

Tennessee's Sampson David, who had once sponsored proprison legislation, likewise argued that "the refinements of civilization, the strength of moral conduct, and the stability of our Holy religion, all shudder and tremble for the prosperity of a state possessing within its limits a Penitentiary Wall."⁸⁷ The rejection of the penitentiary as a place of terror and torture illustrates not only its connection to slavery in nineteenth-century discourse but also the prison's subsequent naturalization as a just form of punishment.

The prison was already seen as punishment fit for a slave because of the matrix of "slave jails" that dotted the region. "Slave depositories" and "slave pens" functioned as sites of punishment that crossed the boundaries between public and private. Enslaved people were also punished in plantation jails, county jails, and city jails across the South. This matrix of carceral institutions was unified by a legal architecture in which the slave was simultaneously understood as public and private property. William Wells Brown recorded in his *Narrative* the experience of escaping from a "domestic jail" on a farm and from a "pen" for those awaiting sale, as well as his punishment at a public jail where he was sent with a note containing instructions for punishment: "It is true that in most of the slave-holding cities, when a gentleman wishes his servants whipped, he can send him to the jail and have it done."⁸⁸ Because "having it done" removed the stigma

of cruel reputation and the peering eyes of urban neighbors, the practice was popular in southern cities, where local jurisdictions developed public-private institutions for the punishment of slaves.⁸⁹ When Henry Bibb escaped from Kentucky to Ohio, he was transported to an “American slave prison” and incarcerated in a network of connected institutions: the Covington Jail, the Bedford Jail, the New Orleans Jail, and the Louisville Workhouse, “a very large brick building, built on the plan of a jail or State’s prison, with many apartments to it, divided off into cells . . . enclosed by a high stone wall, upon which stood watchmen with loaded guns.”⁹⁰ Bibb was astounded by the Louisville Workhouse because so many “slaves, there without crime . . . for safe keeping” were held there and because “so many whites as well as colored men [were] loaded down with irons, at hard labor, under the supervision of overseers.”⁹¹ Bibb wrote that in his capture he was “dragged back” across the border to “suffer the penalty of a tyrant’s law, to endure stripes and imprisonment . . . and linger out almost a living death.”⁹² Frederick Douglass’s *Narrative of the Life* also analyzed the “clanking of fetters and the rattling of chains” coming from slave prisons across the South. In these buildings, slaves could be submitted by owners for public punishment or merely detained for a fee in “safe keeping.”⁹³

While the border states embraced the prison as part of the law of slavery, Deep South states like South Carolina refused to design expensive institutions of state punishment because the unbuilt prisons were already imagined as Black institutions. In South Carolina, the penitentiary was seen as an unnecessary and distinctly northern imposition because of institutions like the Charleston Workhouse. As a “slave depository,” the Charleston Workhouse emerged in 1724 alongside the slave patrols, which captured any Black person “out” after nine at night to be “confined in the Cage of Charles Town till the next morning.”⁹⁴ Over 150 slaves were brought to the workhouse each month for whippings at the cost of twenty-five cents, with a limit of twenty-five lashes twice a week. Time on the treadmill could be substituted for whipping.⁹⁵ In a Black majority state, slave crimes were initially tried in Magistrate Courts, which imposed sentences of death or time in the jailhouse; major felonies were tried before panels of two justices and three citizens, and convicted slaves were sent to the Workhouse.⁹⁶ According to Benjamin Perry in 1839, penitentiary punishment was unnecessary because it would be “applied to 1/2 of our population and that is not the part from which crime usually proceeds.”⁹⁷ Slavery was therefore so tightly bound to the idea of public punishment that its infliction upon white southern gentlemen, for whom the duel was the “functional equivalent of litigation,” was unimaginable.⁹⁸

Antiprison southern states conceded to the penitentiary only after a war over slavery. The war recentered the prison in the American imagination. Because of the prison’s relationship to the state, northern armies burned southern prisons to the ground. Georgia and Alabama were forced to rebuild prisons that were already “in a neglected state.”⁹⁹ In a few instances, Union soldiers commandeered

the old slave jails and used them to detain captured Confederate soldiers.¹⁰⁰ The ensuing legal war over the treatment of prisoners impressed upon the nation a wartime “prison horror,” even as the Union victory was also a victory for the prison.¹⁰¹ When the war was over, prison construction became part of the customary requirements of reentering the Union. Confederate states sought readmission to the Union by building or rebuilding prisons as symbols of capable states.

It was in this context that southern states became leaders in postwar prison reform. When secessionist South Carolina became a Black majority democracy during the period of Reconstruction, the state legislature immediately abolished the Charleston Workhouse.¹⁰² In the development of a state apparatus for punishment, South Carolina voted to establish a prison in 1868, “in the lead of a southern surge in prison construction.”¹⁰³ When President Andrew Johnson appointed Benjamin Perry as head of South Carolina’s provisional government, South Carolina built an elaborate gothic structure so brutal in its violence that 279 prisoners died between 1867 and 1883.¹⁰⁴ Because the older structures of Black punishment were replaced by new institutions, the state prison was “overwhelmingly Black from the time it opened its doors.”¹⁰⁵ While in South Carolina the state coopted the abolition of the Charlestown Workhouse as a symbol of slavery and built a penitentiary in its place, in North Carolina the prison was built because the 1868 Reconstruction Constitution required it. In the view of people like Bertie, the prison remained a result of “carpetbagger misrule” because it was embedded in the southern constitutions that reunified the nation and entrenched federal power over state systems of punishment.¹⁰⁶

Because the prison was a symbol of national reunification and the spoils of war, the form of mass incarceration that followed the prison-building boom of the post-Civil War period consolidated ideas about the meaning of race and nation and depoliticized the prison as a project of state violence. In 1868, the West Virginia governor convinced a reluctant legislature to build an ornately gothic institution in Moundsville next to one of the largest indigenous burial grounds in the United States.¹⁰⁷ The institution’s cells were remarkably small for the period, at five feet by seven feet, and the prison was governed by new tools of infamy: the “kicking Jenny” and the “shoo-fly” were devices of restraint meant to intensify whippings with nine strands of cowhide and wire and with straps soaked in water and sand.¹⁰⁸ Following the example of West Virginia, Florida borrowed a military installation to use as a prison in 1868 but passed a Penitentiary Act in 1869 to build what the state envisioned as “the best prison in the south.”¹⁰⁹

Southern prisons became national models because they offered instructions for legalizing and liberalizing the already existing matrix of public and private Black punishments. This was exhibited in the postwar agreement of the Thirteenth Amendment, which excepted criminals from a nation that could no longer be enslaved. In an early version of the amendment, Charles Sumner proposed that “everywhere within the limits of the United States, and of each state or Territory

thereof, all persons are equal before the law, so that no person can hold another as a slave.”¹¹⁰ In shifting the agent claiming ownership from a person to the state, the ratified version suggested that slavery was a status that could be assigned only by the state. This idea of civil death preserved in the Thirteenth Amendment’s exception was further codified in *Ruffin v. Commonwealth* [of Virginia] (1871), which established the legal identity of the prisoner as a “slave of the state”—as one with no property, certainly not of the body. He was *civiliter mortuus*: “His estate, if he has any, is administered like that of a dead man.”¹¹¹ In this case, Woody Ruffin, a Virginia prisoner who was sent to work on the Chesapeake and Ohio Railroad, was accused of killing his privately employed overseer. Ruffin argued that because he was tried in the improper location of his imprisonment rather than his crime, he was denied his state constitutional right to a trial by an “impartial jury of his vicinage,” a trial in the place of the alleged crime. Virginia’s Reconstruction Constitution of 1871 established that “in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage.”¹¹² Ruffin was “brought back” for punishment to Richmond, the site of the penitentiary, a place where the prison superintendent spoke openly about the gothic nature of the institution: “Such characters, for a certain portion of their confinement, should be dead, as far as it respected the world; make it terror to be villains, and crimes will be less frequent.”¹¹³

In consolidating the power of civil death, the Virginia court also pressed Ruffin’s vicinage claim to establish the prison’s location—the question of the prison’s nearness in space and time to the body of the prisoner. Ruffin was said to have been “in” the penitentiary, even when the state moved him outside its walls. The prison therefore attached to the “person of the convict wherever he may be carried by authority of law, (or even when he makes his escape), as certainly and tenaciously as the ball and chain which he drags after him. And if when hired upon the public works, though hundreds of miles from the penitentiary, he kills a guard stationed over him by authority of law, he is as guilty of killing a guard in a penitentiary . . . as if he had killed an officer or regular guard of that institution within its very walls.”¹¹⁴ As *Ruffin* attached civil death to the signs of the building, state and federal courts in the post-Reconstruction era confirmed the meaning of the prison in relation to the body. In 1880, the federal court in Tennessee confirmed that “incarceration produced degradation” because the prison was infamous, it morally degraded the prisoner, and it removed him from a future of civic participation: “This notion of moral degradation by confinement in the penitentiary has grown into a general understanding that it constitutes any offence a felony.”¹¹⁵ The doubly disabling status of a slave-prisoner born at the border was attached to the bodies of all prisoners, and the normalizing influence of federal courts created a “general understanding” that prisons were institutions designed to degrade.

NATIONALIZING THE PRISON, RACIALIZING THE STATE

It was in this nationalizing moment that the prison could have been rejected in the context of the long history of the prison as a contested institution. That rejection could have crossed borders, joining the ideas of abolitionists to a southern antipenitentiary tradition turned back on itself. Instead, the gothic power of the penitentiary as a place of Black punishment was recorded in the gothic emblems of the border states and the southern institutions of the postwar period and became embedded in the course of the prison's history, in the taken-for-granted racial terrain of public punishment. The compromise of the prison's racialization could be seen in the regime of convict leasing that overtook the South as prison structures aged and state budgets fell short. Although border prisons and Deep South prisons had originally emerged as distinct regional formations, the new framework of the "southern prison" replaced those earlier architectures, so that in the postwar consensus the border prison was forgotten as a regional formation that helped design a legal framework for mass incarceration. This regional cluster of border prisons may have remained absent from the field of historical vision, but it was engrained in the racial culture of the twentieth-century institution. By 1911, when Warden Weylen of the Maryland State Penitentiary was publicly accused of "cuffing" three Black prisoners (using ropes and pulleys to suspend prisoners from cuffed hands behind the back), he insisted that "*two-thirds of the inmates here are Negroes, and many of these are the so-called Border State type, confessedly the most difficult to handle . . . [who] cannot be made to understand anything unless it is beaten into them.*"¹¹⁶

As the border prison's place in the history of mass incarceration became a forgotten artifact of the relationship between prisons and slavery, the history of southern punishment was reorganized around the more recent regime of convict leasing. The border prison remained present, however, in the songs and stories of popular culture. While John Henry is remembered as a working-class hero who famously defeated the steam engine, laying down his life and his hammer in the process, he was also a formerly enslaved prisoner in the Virginia State Penitentiary, who, like Woody Ruffin, was sent off to build tunnels for the C&O Railroad.¹¹⁷ According to the famous song that honors his life, "They took John Henry to the white house, and buried him in the sand." The song references the state penitentiary painted white and the lines of sand that were later discovered between boxes buried on the prison grounds. The song was passed down with the memory and the legacy of the border—a place where a former slave took one dollar from a grocery store and was sent to the penitentiary on a ten-year sentence of civil death, where he died famous and forgotten at the same time.

As border prisons became southern prisons, they were unified by the techniques of Black mass incarceration. The "southern prison" was an institution shaped by the structure of slavery as a legal and economic relation that was both public and

private. This was because the southern prison was built at the border, where slavery was public and prisons were private, where slaves were subjected to public punishments in state institutions, and prisons could be accessed by private citizens for slave punishments. This system of public and private punishments was a dual system of control. The border prison reconciled all of these seemingly irreconcilable forms of legal status into an idea about the management of Black freedom in America. It was an idea about the techniques of Black mass incarceration that was eventually nationalized in Leavenworth's border architecture.

When Leavenworth nationalized the power of the post-Reconstruction prison as a monument to the carceral state, it stood at the end of a chain of border prisons that stretched from east to west. By the middle of the nineteenth century, prisons at the border, whether north or south—Pennsylvania, Virginia, Maryland, Kentucky, Missouri—contained large populations of Black prisoners, whether enslaved or free. Leavenworth crowned this constellation and created its own modes of radial extension as the centerpiece of an emerging federal system. That system was structured not just to target the bodies of certain populations but also to include broad participation of free citizens in its workings. When Leavenworth arranged the fugitive hunt for Frank Thompson in 1898 and then condemned him to the “ball and chain,” the federal law-and-order project had already extended into the finer details of everyday life in the region in ways that continued the legacy of slavery. The prison's aural tradition of coded siren signals transmitted across the prairie—five one-minute-long blasts set ten minutes apart for a mass escape, and three shorter blasts for an all-clear—normalized support for a carceral capacity that crossed the boundaries of public and private, deputizing private citizens to assist in hunting down the fugitives.

The legacy of the border prison is therefore rooted not only in slavery's congenital connection to the institution but also in the transmission of prison culture to the masses in ways that undermine modes of resistance to the penitentiary form. As part of a carceral democracy that drew on long traditions, the rituals of the hunt for escaped prisoners increased public support for an institution that was failing, by virtue of the escape itself, before the public's very eyes. In these moments of institutional failure, the racialization of the penitentiary form and its connections in the realm of culture contributed to its institutional revivification; moments of mass escape and scandalous violence were opportunities for the state to resolidify the legitimacy of the prison as a symbol of racial democracy. Given that mass incarceration first developed in the space of the border, perhaps that border might be used as a lens for rethinking the logic of civil death and the racialized future of “democratic” punishment. By the mid-twentieth century, the majority of prisoners in the United States were white, and the prison's racialization was said to have resulted from the mass incarcerations of the late twentieth century. That legal time, however, was actually only the most recent instantiation of racialized mass incarceration. At the border, the prison was always a racial house.¹¹⁸