

Dear Participants in the NYU Colloquium in Legal, Political, and Social Philosophy: I'm writing a book tentatively titled "The Idea of Prison Abolition." This selection is drawn from the manuscript. The main reading for the colloquium is chapter 3 (which starts on page 17). But for context, I'm also including a draft of the book's introduction. If pressed for time (aren't we all?), feel free to skip to chapter 3. I believe it can be understood without reading the introduction.

The Idea of Prison Abolition: Angela Davis and Black Critical Theory

Tommie Shelby

Introduction

It is a hopeful sign of moral progress that many now think that prison systems, around the globe but especially in the United States, are urgently in need of fundamental reform. There is broad news coverage about the problem of mass incarceration and the dreadful lives of prisoners. There is persistent activism directed at reforming prisons, jails, and immigration detention centers. The belief that major reforms are needed in our prisons and in our criminal justice systems more broadly cuts across the political spectrum.

However, a growing number of people believe that we should not seek to "reform" prisons but to stop using them altogether. This politico-philosophical outlook is generally called "prison abolition." Although prison abolition is radical, counterintuitive, and strikes some as absurd, it merits serious consideration rather than dismissal. Prisons do tremendous and lasting harm, and this damage is not restricted to prisoners. If a society is to rely on prisons, this use demands compelling defense.

At the heart of the vocation of philosophy, particularly in the Socratic tradition, is an inclination to consider such radical ideas, to entertain the heretical thought, to not dismiss the "crazy" proposal. Philosophers should to be open, even

disposed, to questioning common sense and the status quo, even when this is highly unpopular and poses some personal risk. Once we've fully considered the radical thesis, we may of course find that we still cannot accept it, that there aren't strong enough reasons to endorse it. We may nonetheless learn something important through this serious engagement. Our view of the matter may, to our benefit, be dramatically altered.

For centuries, philosophers have written extensively about punishment and its justification. They've proposed and attacked theories based on retribution, deterrence, consent, forfeiture, fairness, reconciliation, rehabilitation, moral education, and other things. These theories typically abstract away from the concrete and grim realities of imprisonment. They also usually assume that the society within which imprisonment occurs is basically just and the governing authority is legitimate. But what has to be shown—if it can be—is that imprisonment is a justified practice in our own unjust society and world, or at least that it would be justified in a world not too distant from our own.

This book takes up abolitionist ideas as philosophy. I have approached the question "should prisons be abolished?" somewhat skeptically but with, I believe, an open mind. I had no prior moral or political convictions that would stand in the way of accepting it. These reflections, sometimes critical, are my way of thinking through whether to adopt abolition as my own philosophical and political stance. I here share them with others in case they might help them decide whether to be a reformer or an abolitionist. I have not (yet) become a prison abolitionist, at least not in the most robust or radical sense of that designation. But I have learned much from thinking about prison abolitionist philosophies, and my view of the place of prisons under current conditions and in our possible futures has fundamentally changed.

Angela Davis and Black Critical Theory

Anti-prison theory and practice is remarkably varied. There are Marxist, liberal, pacifist, and anarchist strands of abolitionist thought and activism. I don't attempt to survey or engage all the arguments prison abolitionists have put forward. I focus on the immensely influential theoretical contributions of Angela Y. Davis. Davis is the preeminent scholar-activist in the abolitionist movement, a prolific writer and defender of radical ideas, and a distinguished social and political philosopher. In numerous books, essays, speeches, documentaries, and interviews, she has defended a world without prisons as a morally required and realistic political goal. Her work operates within a distinctive philosophical framework and asks intriguing philosophical questions, such as: "How do we imagine a better world and raise the questions that permit us to see beyond the given?"¹ Thinking about and resisting the practice of imprisonment has occupied Davis for more than fifty years. As she says, "a protracted engagement with the prison system has literally defined my life."²

Davis believes that prisons are obsolete.³ Talk of "obsolescence" suggests that although prisons may have had some legitimate uses in the past, they are currently unnecessary, either because these legitimate functions can now be served in better and less costly ways or because we no longer need these functions served at all. Davis also views prison abolition as a necessary component of resistance to neoliberalism (the ideology and practice of contemporary welfare-state capitalism) and as a key demand in a democratic socialist movement.⁴

For Davis, talk of "abolition" rather than "reform" is not merely provocative rhetoric or the hyperbole characteristic of some radical consciousness-raising discourse. Davis believes that a reform framework actually gives prisons

¹ Angela Y. Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (New York: Seven Stories Press, 2005), 23.

² Davis, *Abolition Democracy*, 34.

³ Angela Y. Davis, *Are Prisons Obsolete?* [Kindle edition] (New York: Seven Stories Press, 2003).

⁴ Angela Y. Davis, *Freedom Is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement* (Chicago: Haymarket Books, 2016), 7.

unwarranted legitimacy, when what is needed is helping people to see that states are not justified in using prisons and that we should work together to eliminate them. Moreover, the language of “abolition” should not be interpreted as vanguardist propaganda of an elite cadre of revolutionaries. That is, Davis is not concealing her true revolutionary aims from “the masses” in an attempt to mobilize them for purposes they don’t understand or endorse. Her praxis and organizing efforts are democratic, not demagogic. She seeks to work with others as equals, not to use them as unwitting instruments to the fulfillment of esoteric ideals. And in her writings and public speaking, she proclaims her radical objectives openly and without apology.

Yet Davis does sometimes say things like the following:

When we are told that we simply need better police and better prisons, we counter with what we really need. We need to reimagine security, which will involve the abolition of policing and imprisonment *as we know them*. We will say demilitarize the police, disarm the police, abolish the institution of the police *as we know it*, and abolish imprisonment as the *dominant* mode of punishment (my emphasis).⁵

This kind of phrasing (“as we know it” and “as the dominant mode”) qualifies prison and police abolition. It effectively erases the distinction between abolition and reform, as many reformers also demand that policing and imprisonment be radically changed. These qualifying phrases suggest that we might rely on police, provided they are not armed with military-grade weapons or that we might use prisons, provided they are not the *primary* form of crime control. Perhaps that’s all some

⁵ Davis, *Freedom Is a Constant Struggle*, 90.

mean by “abolition,” a radical-sounding and evocative phrase that, when stripped of rhetorical flourish, means no more than a call for fundamental change in law enforcement practice. Yet I will explore prison abolition in its boldest and most philosophically radical form: (1) as a rejection of prison reform, even fundamental reform, as the ultimate goal; and (2) as a practical vision for a society and world that does not use prisons at all.

Importantly, Davis’s critique of prisons is situated within a broader critique of racism, imperialism, and capitalism. She draws heavily on the traditions of Marxism, critical theory, and black radicalism. I too have been deeply influenced by these traditions of thought, and my discussion of Davis’s ideas will largely operate within them.

Much contemporary black radical thought has been shaped by currents in Marxism, particularly by strains in critical theory. As a radical approach to studying and critiquing modern Western civilization, critical theory was forged in the 1930’s at the Frankfurt-based Institute for Social Research (Institute für Sozialforschung), which was founded in 1923 and now generally referred to as “the Frankfurt School.” Herbert Marcuse, an early and prominent Frankfurt School theoretician, was Angela Davis’s undergraduate teacher (at Brandeis University) and dissertation advisor (at UC San Diego) and influenced her thought substantially. With Marcuse’s encouragement, Davis studied Kant, Hegel, and Marx at the Institute in Frankfurt for two years, where she attended lectures and participated in seminars conducted by Theodor Adorno, Jürgen Habermas, and other leading critical theorists.

Black critical theorists like Davis rely primarily on historical analysis, social theory, cultural criticism, and experimental art to critique existing social arrangements. True to their Frankfurt School roots, they generally avoid and are often suspicious of mainstream “positivist” empirical social science of the sort one

generally encounters in U.S. departments of political science, sociology, and economics. Black critical theory is decidedly and self-consciously interdisciplinary, methodologically unconventional, and transgressive with respect to established academic norms.

Black critical theorists, like all critical theorists, are fundamentally concerned with liberating human beings from oppression. Though they theorize, “freedom” is what they ultimately seek and struggle to realize, and they believe that radical structural transformation is needed to secure full liberation. Their writings, often closely tied to their activism, are tethered to the goal of human emancipation, not primarily to advancing scholarly debate or achieving academic recognition. Rejecting any sharp distinction between scholarship and political advocacy, their studies are not designed to be value-free, disinterested inquiry but forthrightly crafted to expose injustices and to highlight feasible paths to a better world. But they also, like earlier Marxists, tend not to engage in systematic moral theory or normative political philosophy of the sort that is typical in mainstream “analytic” U.S. philosophy departments.

Black critical theorists, unlike the early figures of the Frankfurt School, are deeply influenced by black thinkers whom they deem part of what Cedric Robinson calls “the Black Radical tradition.”⁶ Canonical thinkers in this tradition include W.E.B. Du Bois, C.L.R. James, Claudia Jones, Frantz Fanon, and Angela Davis. This is a strand of the wider black political tradition that draws insights, not only from Marxism, but from revolutionary Black Nationalism, Afro-Caribbean radicalism, and Pan-African socialist thought. It is sharply critical of class stratification and labor exploitation under capitalism but also equally concerned to resist racism and colonial subjugation. Black radicals do not pin their hopes for liberation on the leadership of

⁶ Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Univ of North Carolina Press, 2000).

the white working class but rather insist that those subjugated by white supremacy and imperialism, including those relegated to slums and ghettos around the world, are vital to any realistic hope for a truly free and democratic future.

The critical inquiry this book takes up is, to some extent, at odds with the philosophical and political orientation of Davis and other black critical theorists. Some of what I write may strike some as dissonant, as strangely at cross purposes with those I am engaging. To reduce this dissonance and thereby invite more people into the conversation I seek to initiate, I want to be explicit about how my approach to thinking about prison abolition differs from some trends in black critical theory.

I consider myself part of the Black Radical tradition. But unlike some black critical theorists, I do not regard that tradition as diametrically opposed to all forms of liberalism. I believe that core ideas drawn from liberal-egalitarian thought in particular merit defense and that “liberal socialism” is not a contradiction in terms. Indeed, a philosophical approach that combines elements drawn from liberal egalitarianism, Marxism, and left-wing black nationalism is, I contend, exactly the approach that Du Bois takes in *Black Reconstruction in America* (1935). I will not, however, defend the continued use of prisons mainly on liberal grounds. Davis is a sharp critic of liberalism, and I prefer to take up her arguments largely on terms she and I can both accept.

While I too have been influenced by Marxism and critical theory, methodologically speaking I’m closer to G.A. Cohen’s analytical Marxism and Habermas’s approach to critical theory than are many black radicals, including Davis. Accordingly, I believe it can be valuable to make use of the tools of analytical philosophy and mainstream social science when developing a radical critique of existing social conditions and defending a vision of a just world, as I have tried to show in previous work. One shouldn’t rely on these (or any) methods uncritically of

course. But one ought not reject these methods out of hand either. I also believe that it is not enough to be moved by ethical convictions and moral courage, as important as these are. Black critical theorists should also make serious attempts to develop systematic moral arguments, not only against the status quo, but also for the radical social vision they favor.

I should also acknowledge that, unlike many black critical theorists, I philosophize at some remove from political activism and social movements. My principal aim is not to clarify the ambitions or to sharpen the tactics of an existing political struggle, and some of what I say conflicts with ongoing anti-prison campaigns. Unlike Davis, I'm not a scholar-activist. It would not be unfair to describe me as an Ivy League, "ivory tower" intellectual, as part of the very establishment that many black radicals oppose. This may lead some to dismiss or ignore my more critical analyses. However, those with a strong preference for "the unity of theory and practice" may still find value in thinking with me through these challenging questions. I may consider or present arguments they have yet to confront, arguments that may make a difference to their confidence in abolition or their skepticism toward it. No book is for everyone. This one is primarily for those who, like me, are still thinking through whether to insist that the practice of imprisonment can and should be reformed or to commit to an abolitionist vision.

There is, I believe, additional value in this kind of critical interchange across philosophical and political traditions apart from how it bears on prison abolition. I'm a pluralist about philosophical method. I think different approaches—phenomenology, critical theory, conceptual analysis, pragmatism, reflective equilibrium, and so on—often yield complementary insights. And this book is an

attempt at philosophical engagement across the traditional continental-analytic divide—an “afro-analytic critical theory,” as I call it.⁷

It is also valuable--though all too rare--to have open debate among those working in different political traditions of Afro-Modern political thought. In recent years, one can't help but notice a general reluctance among black progressives and radicals to openly disagree with each other in print. To be sure, black conservatives and “black neoliberals” are relentlessly attacked, mocked, and dismissed. But debate within the broader black Left is more muted, indirect, and infrequent. Yet this is how we make progress—by directly testing our ideas against those who are not already inclined to accept them but who are open to reconsidering their own political views. It is also good democratic practice, maintaining a healthy sense of our own fallibility and prefiguring the kind of social relations we hope to bring about. Indeed, black critical theory is already an amalgam of sometimes contending traditions, an approach forged through constructive debate and the exchange of ideas drawn from different philosophical frameworks. And I am convinced, and hope to persuade readers, that black critical theory, while vibrant and useful, needs to change in ways that would be to its benefit.

Lastly, there is, we must admit, a general reticence to openly disagree with our heroes. Angela Davis is an iconic, revered, and courageous figure on the Left and in the black political tradition more broadly. As a result, her work is seldom subjected to close critical scrutiny by those who are inspired by or admire her. But criticism, when honest and constructive, is not an insult. In fact, it can be a sign of tremendous respect, a way of showing that one takes the target of criticism seriously. Too often, Davis is treated as a mere symbol of black radicalism and

⁷ My first attempt at this kind of synthesis is “Ideology, Racism, and Critical Social Theory,” *Philosophical Forum* 34 (Summer 2003): 153-188.

militancy, like a raised fist or an Afro, as she herself laments.⁸ However, she is one of our greatest philosophers and deserves the same kind of critical but respectful engagement that distinguished male or white philosophers regularly receive. I ask that this book be received in that spirit.

Incarceration and Punishment

For reasons I will explain, prison abolitionist philosophy is utopian in ways that are both good and bad. But my primary reason for not accepting prison abolition is not that it is utopian. Nor will my disagreements depend on rejecting socialism or on defending capitalism. Rather, I think that incarceration has legitimate and socially necessary uses, including as punishment, and so prisons are not inherently unjust, and that the use of incarceration is often worth its attendant risks and costs. I also believe that Davis's most trenchant criticisms are properly directed, not at incarceration as such, but at background structural injustices in society, at correctable failures of due process and prison administration, and at inadequate public efforts to enable former prisoners to rejoin society on equal terms.

In saying that incarceration has legitimate uses, I am *not* defending U.S. federal, state, or municipal prison systems. These facilities are generally grossly unjust and inhumane, and they contain far too many people who should never have been confined. Indeed, elsewhere I have questioned the very legitimacy of the American criminal justice system.⁹

Yet because some prison systems are better than others, to decide whether to be a reformer or an abolitionist, we need to know what a "prison" is and not just what some existing prisons are like. We need to grasp which features are

⁸ Angela Y. Davis, "Afro Images: Politics, Fashion, and Nostalgia," in *The Angela Y. Davis Reader*, ed. Joy James (Malden: Blackwell, 1998), 273-278.

⁹ See my *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge: Belknap Press, 2016), chaps. 7-8.

constitutive of prisons and which can be discarded or altered without doing away with prisons entirely. I won't pretend that there is some ideologically neutral conception of a prison or that there is a Platonic form PRISON that I have somehow grasped. But I do hope to offer a conception that reformers and abolitionists can accept, so that the disagreement turns, not on contentious definitions, but on whether the familiar practice of imprisonment is one that, on moral or political grounds, should be abandoned.

I treat "incarceration" as my general notion and regard "imprisonment" (and thus "prisons") as a type of incarceration. Incarceration, broadly conceived, has at least five elements. It entails *involuntary confinement*—restriction to a limited space with no right to leave without permission from authorities. This socio-spatial site of confinement is an *enclosed space* with a physically secure perimeter—walls, fences, guards, and locks—to prevent escape and unauthorized entry. Incarceration is a *hierarchical institutional practice* defined by a set of rules, roles, and goals. It's not just a building with people locked inside. These rules and roles vary with the overall justificatory aims of the institution (and sometimes with the covert purposes of its officials). Those confined to carceral spaces ("inmates") are *isolated from the general public*—separated from others in the outside world (and sometimes from one another) and with highly restricted (if any) rights to visitation and to communicate with those outside (and sometimes within) the facility.

Importantly, inmates are in the *custody* of carceral authorities. Custody is a form of guardianship, which includes providing shelter, care, and protection from harm (including self-harm). If inmates are a known danger to others or to themselves, then they must sometimes be deprived of weapons or anything that could inflict serious bodily harm. Providing adequate protection will sometimes

require surveillance, searches, and the enforcement of rules of order.¹⁰

Incarceration, so understood, can be used for a variety of purposes. Some are legitimate: For instance, incarceration can be used to quarantine those with highly infectious and deadly diseases or to hold enemy combatants in times of war. Some uses of incarceration are clearly illegitimate: to keep a population available for exploitation, to repress political dissent, to torture inmates, or to use them for medical experiments.

Even within the context of crime control, incarceration can have a number of purposes. For example, there is pre-trial detention. Such detention raises a number of issues for the reform-versus-abolition question. But I'll leave these aside until **Chapter 4**. My main focus will be incarceration when its official purpose is *punishment*—a penalty for committing a crime. Indeed, Davis uses the phrase “punitive incarceration” to differentiate it from incarceration as detention while the prisoner awaits trial.¹¹

We can call an incarceration facility whose primary purpose is *rehabilitation* of criminal offenders a *penitentiary*. An incarceration facility that aims to treat and house those who suffer from serious psychological disorders is a *psychiatric hospital*. An incarceration facility that functions to impose punishment is a *prison*. These aims can be, and often are, combined within the same facility. Davis opposes both the penitentiary and the prison. I'll accordingly refer to both practices as “imprisonment” or simply “prison.”

According to Davis, in the pre-modern era, before the emergence of capitalism and the nation-state, punishment was almost entirely *corporal*, from

¹⁰ The small-occupancy cell (1-2 persons) is not essential to incarceration. The cell does, however, lessen the need for supervisory personnel and so may save money. It can also reduce the need for constant surveillance (to prevent harm or escape) and so could also provide some privacy for inmates.

¹¹ Davis, *Are Prisons Obsolete*, location 467, 491.

beatings to execution.¹² It is only with the rise of the bourgeois state that we get punishment through incarceration: “Before the acceptance of the sanctity of individual rights, imprisonment could not have been understood as punishment. If the individual was not perceived as possessing inalienable rights and liberties, then the alienation of those rights and liberties by removal from society to a space tyrannically governed by the state would not have made sense.”¹³ Yet if the debate between reformers and abolitionists is to be a meaningful one, then this way of thinking about punishment and its relation to incarceration has limitations.

I suggest that we think of criminal punishment as unwelcome and unpleasant treatment. Such “hard treatment,” as it is sometimes called, includes deprivation (whether of liberty, money, property, privileges, human contact, or life itself) as well as coerced labor, public censure, humiliation, and so on. This definition is neutral between a range of justifications of punishment, including retribution and deterrence. The hard-treatment conception of punishment is both narrower and broader than Davis’s. It is narrower in that imprisonment as penalty needn’t imply that prisoners have forfeited all of their rights and liberties thus permitting tyrannical treatment. If imprisonment entails that prisoners are rightless subjects under despotic rule, then prisons, at least in the US, have already been abolished, as prisoners have many recognized rights—though not all to which they are entitled.

The conception of punishment I’m suggesting is broader in that the forms of penalty needn’t be conceived as the deprivation of rights. Contrary to what Davis suggests, a conception of individuals as rights-bearers isn’t necessary for incarceration as punishment to make sense. Being held in a prison and subject to its rules would be regarded by almost anyone as deeply unpleasant and something to be avoided and so can serve as a deterrent or as retribution even in the absence of

¹² Angela Y. Davis, *The Meaning of Freedom* (San Francisco: City Lights Books, 2012), 59.

¹³ Davis, *Are Prisons Obsolete*, location 508.

public recognition of individual rights. Prison also separates prisoners (if only temporarily) from their community and so functions similarly to banishment, which certainly existed in pre-modern eras. So I will operate with this broader conception of punishment—unwelcome and unpleasant treatment as penalty for a criminal offence.

A word about *incapacitation* through incarceration. It is sometimes necessary to rely on incarceration to incapacitate highly dangerous individuals. There is an analytical and a moral difference between incarcerating persons to prevent them from harming others (by restricting their movement to a highly limited and enclosed space) and incarcerating persons to punish them. Yet when carceral incapacitation is imposed in response to a criminal offense, it is practically indistinguishable from punishment. The same can be said when carceral incapacitation of a criminal offender is combined with rehabilitation or psychiatric treatment. These are all ways of using incarceration to respond to crime, where the hard treatment is triggered by a criminal offense. The same cannot be said of carceral incapacitation when it is used for the quarantine of those with deadly communicable diseases, the involuntary commitment of mentally ill patients who haven't perpetrated crimes, or the confinement of enemy combatants in wartime. These inmates are regarded as dangerous enough to justify incarceration, but their confinement isn't punishment or even akin to punishment.

It's not possible to settle the reform-versus-abolition question without getting into the debate over the justification of punishment as such. What, if anything, justifies penalizing someone for breaking the law? I won't pursue this question in depth. But a few preliminaries are in order.

Davis does not regard *retribution* as a sound justification for punishment, and I agree with her. She does not believe that those who do wrong, even serious

wrongs, “deserve” to suffer or that a criminal offender’s misery has intrinsic value or is in itself justice. The idea that bad people deserve prison is, she maintains, an ideological or sectarian notion.¹⁴ As such, it is unsuitable as a public justification in a democratic society. However, while this objection may apply to retributive defenses of punishment, it does not apply to punishment as deterrence or incapacitation. What the abolitionist asserts, then, is this: the need to control crime—to provide a reasonable level of security for our person, liberty, and possessions—is an inadequate justification for the use of prisons.

I take it that prison is justified only if less harsh penalties are insufficient to control crime. As with self-defense measures, we should cause no more suffering than is absolutely necessary to protect people from harmful wrongdoing. Moreover, prisons should not be used if they won’t help to prevent crime. Prisons would indeed be obsolete—and immoral—if there are no reforms that would enable them to meet these two minimal conditions.

I agree with Davis that incarceration should not be the primary method for preventing crime. The first or default response to criminal wrongdoing should not be to impose a prison term. We should consider less harmful alternatives, relying on prisons as a last resort. Thus, I also agree with Davis that many societies—and especially the United States—greatly *overuse* incarceration as a form of punishment. Even under more just circumstances than prevail in the U.S., I would favor using fines, community service and other work assignments, restitution and reparation, electronic monitoring, home confinement, and the loss of certain privileges (e.g., suspension of driver’s license) for minor offenses. Incarceration is a drastic crime control measure, best reserved for serious offenses—such as homicide, rape, and aggravated assault. By “serious crimes,” I mean offenses that do great or irreparable

¹⁴ Davis, *Freedom Is a Constant Struggle*, 22.

harm or crimes that cause lasting trauma. Perhaps imprisonment can be justifiably used to penalize other offenses. But if it can be shown that imprisonment is legitimately used to prevent serious crimes, then that would be sufficient to establish that prison reform, rather than abolition, is the appropriate goal.

CHAPTER 3

FUNCTIONAL CRITIQUES OF PRISONS

Tommie Shelby

Angela Davis's case against the practice of imprisonment is complex and has many dimensions. In the previous chapter, I focused mainly on the charges that prisons are dehumanizing, a form of slavery, and a legacy of slavery. In this chapter, I focus on the following form claims:

1. The function of the prison is (to facilitate) economic exploitation.
2. The function of the prison is racial subjugation (or to perpetuate racism).
3. The function of the prison is to repress political resistance.
4. The function of the prison is to conceal intractable social problems.

These claims are best understood as conclusions of a type of social analysis, familiar from critical theory, that I call *functional critique*.

I briefly elaborate on each of these claims and then offer a more precise formulation of the structure of functional critique. Much of the focus will be on the claim that prisons serve a racist function. I use the case of racism to illustrate the power of this form of critique but also to highlight its limits. I argue that the functional critique of prisons does not show that prisons should be abolished rather than reformed. But, understand a certain way, it can establish that, in the United States at least, we should radically reduce our use of prisons.

As a reminder, by "the prison" I don't mean merely the facilities in which prisoners are contained. I mean the institutionalized *practice* of incarceration, which forcibly confines prisoners within an enclosed space, isolates them from the general public, claims custodial guardianship over them, subjects them to the directives of

prison officials, and treats them in these ways as a penalty for criminal offenses. The prison is an institutional apparatus of social control, captivity, and surveillance, an institution that cannot operate without coercion and severe constraints on prisoners' freedom.

Davis on the Functions of Prisons

The form of functional critique that Davis favors draws heavily on Marxist theory. She believes that capitalism (like slavery and serfdom) is a degrading and despotic system of involuntary servitude. The function of capitalism, she maintains, is not to meet human needs and desires through free exchange and efficient production but to maximize profit for the benefit of a small ruling elite. These financial gains are garnered at the expense of those outside the ruling class (primarily wage laborers) and are not the product of "free" exchange but extracted through force, theft, and fraud. This wrongful extraction of profit takes many forms. For instance, there are institutions that ostensibly serve the public good but, in fact, serve only (or mainly) to maximize corporate profit. Davis believes this is true of prison systems.¹⁵

Davis is not a class reductionist or an orthodox Marxist. She does not believe that all oppression is ultimately or primarily a form of economic exploitation and class-based subjugation. She maintains, like others in the Black Radical tradition, that *racism* is also a form of oppression. Although often intimately related to economic subordination, racism is a distinct injustice. Davis holds that the prison is itself racist, perpetuates racism, and creates new modes of racism.¹⁶

According to Davis, the prison also serves as an instrument for political repression (see Chapter 1).¹⁷ It should not be surprising that those subject to

¹⁵ Angela Y. Davis, *The Meaning of Freedom* (San Francisco: City Lights Books, 2012), 47-49.

¹⁶ Angela Y. Davis, "Racialized Punishment and Prison Abolition," in *The Angela Y. Davis Reader*, ed. Joy James (Malden: Blackwell, 1998), 105.

¹⁷ Davis, *The Meaning of Freedom*, 37.

economic exploitation and racial domination often resent and resist the people and institutions that oppress them. Despite the risks involved, some will naturally refuse to submit to subordination and servitude. When people do rise up to oppose an unjust social system—whether collectively or individually, in a coordinated fashion or spontaneously—it is a function of the penal arm of the state to put down or contain this resistance and to deter others from engaging in similar defiance.

Prison, Davis argues, “serves as a place to warehouse people who represent major social problems.”¹⁸ Capitalist predation creates and exacerbates social problems—poverty, homelessness, violence, disorder, mental illness, and drug abuse. These problems cannot be solved within the existing social framework. Those who cannot be integrated into the current market economy in a way that is consistent with maximizing corporate profit are often incarcerated in order to remove them from public view. This circumstance obscures deep dysfunction in the social system or presents it as an “ordinary” problem of crime.

I turn now to the point and structure of functional critique. Not all function *statements* (“the function of *X* is *Y*”) are offered as explanatory or critical. Sometimes the ascription of a function to an institution is simply a matter of identifying one of its purported beneficial consequences, suggesting an answer to the question “what good does *X* do?” Or one might be identifying the institution’s official purpose, that is, the justifying aim generally offered for why the institution should continue to exist.

Davis isn’t doing either of these. She is not talking about the penal system’s “beneficial” consequences but its more destructive ones. The fact that some group (capitalists or the ruling class) benefits from imprisonment is, for Davis, part of what

¹⁸ Angela Y. Davis, *Freedom Is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement* (Chicago: Haymarket Books, 2016), 24-25.

makes prisons objectionable. She doesn't think prisons serve to prevent crime, to rehabilitate offenders, or to impose the suffering that offenders "deserve." For her, to identify the "real" function of the prison is to explain why the prison continues to exist despite the fact that it doesn't actually serve its official purpose and, on this basis, to morally condemn it.

The explanatory and the critical dimensions of functional critique are closely related but can be examined separately. So we could set aside whether the consequence is good or bad and ask "when is the citation of a consequence genuinely explanatory?" However, to arrive at abolitionist conclusions using functional analysis, the explanatory claim must *ground* the critical claim. That is to say, prisons must persist *because* they serve an oppressive function. As I will attempt to make clear, it is not enough to show (assuming it can be shown) that prisons came into existence to serve these functions. Nor is it sufficient to show that prisons take the typically horrid form that they do because they serve oppressive functions. If prisons can be reformed so that they are humane, fair to prisoners, and only perform legitimate functions, then functional critique cannot yield abolitionist conclusions. (Prison abolition might, however, be justified in some other way.)

In critically examining functional critiques of prisons, I am not challenging the validity of functional explanation as such. Nor do I say that no functional explanations of social phenomena are sound. Instead, I offer an interpretation of Davis's functional claims about prisons and ask whether, if true, these claims would justify the abolition of prisons.

The General Form of Functional Critique

Radical functional critiques can sometimes seem compelling because they are offered in vague, esoteric, or metaphorical language. One often hears social criticism that takes the form, "The system isn't broken; it's operating the way supposed to." Or

some will say, "These oppressive consequences are to be expected, given the logic of the system." Such functionalist claims suggest that "the system" cannot be reformed or fixed, only done away with. However, to fully assess such functional critiques, greater precision is needed here.

To say "a or the function of X is Y ," where this is meant as a critique of X , the critical theorist is essentially making three related claims:

- I. X causes (or is a causal contributor to) Y (in social system S).
- II. The fact that X causes Y explains X (or some important feature of X).
- III. Y is unjust or oppressive (or facilitates an oppressive S).

The target of a functional critique can be an institution or a belief system. Let's say X is an institution. We can think of institutions as constituted by a *set of public rules and social roles*. This system of rules and roles enables and regulates sustained cooperation for some explicit purpose. These rules specify procedures, lines of authority, prohibitions, prerogatives, and standards. Participants in the practice generally understand these rules and their institutional roles but might not fully comply with the rules or carry out their role obligations conscientiously.

We can call the *goal* that core participants publicly avow the institution's *official purpose*. (And an institution can have more than one official purpose. So, for instance, a prison might aim at retribution, crime prevention, prisoner rehabilitation, and psychiatric treatment.) The institution may or may not achieve its official purpose (at least not fully). Officials may, and often do, revise rules and redefine roles or create new rules and roles so that the institution better achieves its aims or so that it continues to achieve its aims despite a changing environment.

Now, the participants in an institution (or some powerful subset) may privately share an aim that diverges from or even conflicts with the institution's official purpose. Let's call this concealed or unacknowledged aim a *covert purpose*.

The *operative aim(s)* of participants in an institution—that is, the goal(s) they *actually* attempt to achieve—can be an official purpose, a covert purpose, or both.

Following Robert Merton, I call something a function of *X* only if it is an *actual effect* of *X*. When an observable causal consequence of an institution is generally aligned with the official purpose of that institution, we can refer to this effect as the institution's *manifest function*. The institution is functioning as it purports to (though not necessarily as well as it could). An institution can be malformed or broken such that it fails to perform its official purpose or such that it performs the purpose poorly. Here we say that the institution is *malfunctioning* or *dysfunctional*.

A causal consequence of an institution that helps to explain the institution but is *not* the institution's official purpose is a *latent function* of the institution. This latent function may be attributable to the covert purposes of the institution's participants (or some powerful subset thereof). Here, a concealed, unacknowledged, or maybe even disavowed goal is the real operative aim, notwithstanding any official purposes the institution is said to serve.

However, the function—that is, the consequences—may be unintended or unrecognized by participants in the institution. Or—and this point is underappreciated—even if *some* participants do seek these consequences, they may lack the collective efficacy to bring them about. The welcome consequences are, with respect to the participants' self-conscious agency, merely fortuitous. Yet to be the "function" of the institution, these consequences cannot be mere happenstance. They must, in some way, explain the institution itself. I'll return in a moment to how an institution's unintended consequences could have this kind of explanatory significance.

But, first, what facts about an institution is a functional critique meant to explain? Since the causal consequences of an existing institution are the relevant explanatory facts, functional critiques are not generally invoked to explain why an

institution came to exist to begin with. A functional analysis may, however, explain why the institution *persists* despite changes elsewhere in the society. Or it may help us understand why the institution is so *resilient* in the face of robust attempts to do away with it. The function of an institution might explain its *structure*--its specific rules and its social roles. Or, finally, it might explain why the institution operates the way it does—why its participants take the individual and collective actions that they do.

One explanatory value of the manifest/latent distinction is to make sense of an institution that doesn't appear to achieve its official purpose. Davis does this when she suggests that prisons persist (indeed have even expanded) despite the fact that they don't actually prevent crime (their ostensible aim). She then argues that their covert purpose or unintended or unrecognized consequence is something else—economic exploitation, racial domination, political repression, and disguising social problems. In other words, the *latent* function of prisons is creating or maintaining various forms of oppression.

Now let's suppose the target of functional critique is a widely held set of beliefs where these shared beliefs constitute (or approximate) a system of thought. These beliefs may not be fully conscious and might be merely implicit in the dispositions and utterances of those who share them. There can also be shifts over time in the content of the belief system without it losing its basic integrity. (Think of the belief system some call "liberalism.") When such a belief system shapes identities, encourages habits, or otherwise influences action, it can have significant social effects. Many who are unfamiliar with or openly reject the belief system can nonetheless be greatly impacted (for good or ill) by the fact that *others* embrace and act on these beliefs.

Sometimes the beliefs in question have been intentionally propagated to effect certain social consequences. When demagogues or propagandists are successful, we can say that the function of these ideas is to bring about these actors' conscious (though perhaps covert) purposes. At other times, the beliefs are developed and spread more spontaneously. Either no one (or almost no one) seeks to give them the social impact they have; or, though some seek this outcome, they lack the capacity to bring it about. Yet the wide acceptance of the belief system is explained by its social consequences.

A functional critique of a belief system is based, in part, on the practical consequences the beliefs are said to have for society or some social group. These consequences generally include fostering or reinforcing an unjust social arrangement. However, despite these unwelcome social consequences, the belief system cannot be rationally rejected if the beliefs in question are true, normatively valid, or otherwise epistemically well grounded. So, functional critique typically includes attributing some distortion, moral error, or misrepresentation to the belief system. Indeed, on some accounts, the oppressive social consequences are brought about through the cognitive or moral failings of the belief system.

These *social illusions*, as we might call them, lead people to fail to recognize or fully appreciate that they are situated within (and might be unwittingly perpetuating) oppressive social relations. This misperception of reality or faulty moral reasoning affects the subjects' cognitive, emotional, and volitional relations to the social world they inhabit and, consequently, influences their conduct and structures their social practices. Belief systems that play this distinctive role in society are, in Marxist parlance, *ideologies*.

Racism and Prisons

Davis has long held that antiracism should play a central role in abolitionist theory and practice.¹⁹ She argues, "If we are already persuaded that racism should not be allowed to define the planet's future and if we can successfully argue that prisons are racist institutions, this may lead us to take seriously the prospect of declaring prisons obsolete."²⁰

Notice the form of argument. Racism (like slavery) is a grave wrong and widely known to be so. The practice of imprisonment, despite appearances to the contrary, is a form of racism. Given the principle, "If *X* is a grave wrong, then *X* should be stopped," we can conclude that the practice of imprisonment should be ended. And, accordingly, Davis holds that antiracist activism should include advocating for the abolition of prisons. (Some activists in the Black Lives Matter movement have taken up the call.)²¹ The key burden of her argument is to show that (and perhaps how) prisons are racist.

In calling prisons "racist," Davis is actually making a number of related claims about the relationship between racism and imprisonment. She says, for example, "Law-and-order discourse is racist, the existing system of punishment has been deeply defined by historical racism. Police, courts, and prisons are dramatic examples of institutional racism."²² The first and third of these claims are, I believe, properly understood as conclusions of functional critique.

The claim about law-and-order rhetoric centers on the role of *ideologies* in unjust societies. For instance, racist belief systems can serve to legitimize incarcerating masses of people. Widespread racial prejudice, which often underlies or exacerbates fear of crime, leads people to take aggressive and sometimes drastic

¹⁹ Davis, "Racialized Punishment and Prison Abolition," 102-105.

²⁰ Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003), 25.

²¹ Patrisse Cullors, "Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability," *Harvard Law Review* 132 (2019): 1684-1694.

²² Davis, *The Meaning of Freedom*, 30.

measures to protect themselves from perceived threats to their liberty, person, or property. Davis argues that the idea that there is a “black crime problem” is an ideological distortion with deep roots in slavery and convict leasing and is now fostered by mass media depictions of black life.²³ Ideological racism represents blacks as disposed to criminality, which in turn seems to license violent tactics by law enforcement and even by private citizens (such as George Zimmerman killing of Trayvon Martin in Florida or Gregory and Travis McMichael killing Ahmaud Arbery in Georgia).

Moreover, there are belief systems that, ostensibly, are not about race at all yet nonetheless serve to legitimate the subordination of racially stigmatized groups. “Law-and-order” and “tough on crime” rhetoric is often said to function as ideological legitimation for white supremacy. What appears to be a race-neutral justification for aggressive law enforcement to “fight crime” or to ensure “public safety” serves as a rationalization for race-based domination, humiliation, brutality, and cruelty.

Now if the *sole* reason that imprisonment is accepted as legitimate is due to racism or some other ideology, then a functional critique would no doubt be sufficient to establish the need for prisons to be abolished. If, however, there is a plausible public justification for the practice—say, that it is a fair and effective way to control serious crime—then the justification must be shown to fail if the functional critique is to justify abolition. The existence of a bad justification for a practice does not preclude there being a good one. And the fact that some act on a bad justification doesn’t mean that none act, or could be brought to act, on a good one.

²³ Davis, *The Meaning of Freedom*, 38-40; Angela Y. Davis, “From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System,” in *The Angela Y. Davis Reader*, ed. Joy James (Malden: Blackwell, 1998), 74-95.

When Davis asserts that prisons are an instance of institutional racism, she is not suggesting that their *manifest* function is racial domination. Officials of the U.S. criminal justice system do not proclaim publicly that a goal of law enforcement is, say, to maintain white supremacy. Rather, Davis believes that racial domination is a *latent* function of contemporary prisons.

Whatever its manifest function, an institution's goals are racist when the covert aims of its officials (particularly those with the power to make and revise the institution's rules) are to oppress or otherwise harm members of a racial group. The institution's rules may be race-neutral in their explicit content yet be designed to bring about or maintain the subjugation of a racially stigmatized group. It would be appropriate to strongly condemn such an institution even if its constitutive rules fail to secure its reprehensible goals. Ineffectiveness does not let an institution off the hook. But it would not be correct to attribute a latent *function* to the institution unless its covert purposes are actually achieved.

Even if an institution's officials don't have racist goals, the institution would still be racist if its rules, however subtly, are racially biased or discriminatory. These rules might have been fashioned, perhaps in the distant past, with racist intent but are now applied without awareness of their origins. Or the rules, despite not having been designed with this end in view, may nonetheless unfairly advantage one racial group over another without officials noticing the inequity. Racism might be present in how rules are applied and also in whether rules are complied with. The institution's goals and rules could be legitimate, but administrators may fail to impartially apply and consistently comply with these rules due to their (perhaps unconscious) racial prejudice. No matter the manifest function of the institution, when this distorting racist influence is pervasive yet goes uncorrected by officials, we are dealing with a case of institutional racism.

This framework, which I call *intrinsic* institutional racism, captures much of

what Davis says when she insists that prisons are a case of institutional racism. For instance, she claims, "There are persisting structures of racism, economic and political structures that *do not openly display their discriminatory strategies*, but nonetheless serve to keep communities of color in a state of inferiority and oppression" (emphasis added).²⁴ She also says, "When we consider the disproportionate number of people of color among those who are arrested and imprisoned, and the ideological role that imprisonment plays in our lives, I want to suggest that the prison population in [the United States] provides visible evidence of who is not allowed to participate in this democracy."²⁵

Given longstanding stereotypes about so-called black criminality, prisons are an especially fertile site for the reproduction of racist ideology and the operation of institutional racism.²⁶ Indeed, Davis has suggested that because of the workings of the racialized prison system in the U.S. since the fall of formal slavery, blackness and criminality have come to be effectively equated, stigmatizing all black people and making them vulnerable to police abuse and incarceration regardless of whether they are actually guilty of any wrongdoing.²⁷ One might conclude then, on antiracist grounds, that prisons should be abolished rather than reformed.

This line of argument has much truth in it, but its implications for the debate over reform-versus-abolition are unclear. On one reading, Davis is claiming that the ideological link between black identity and criminality can be broken only by abolishing the prison system itself (at least within the United States). If no one goes to prison, then no one, including black people, can be regarded as a "criminal." But

²⁴ Davis, *The Meaning of Freedom*, 117.

²⁵ Davis, *The Meaning of Freedom*, 124.

²⁶ Angela Y. Davis, "Race and Criminalization: Black Americans and the Punishment Industry," in *The Angela Y. Davis Reader*, 66-67. Also see Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge: Harvard University Press, 2010).

²⁷ Davis, "From the Prison of Slavery to the Slavery of Prison," 91-92.

this can't be right. One could be thought to be a criminal even if one never goes to prison or is never even arrested, as was true of most victims of lynching and as the tragic recent examples of Trayvon Martin and Ahmaud Arbery show. The racist stereotype is that blacks are *disposed* to commit crimes, which doesn't depend on their being caught, charged, or caged. If the link between blackness and criminality is as strong as Davis suggests, then for blacks to be fully free of racism, not only would the criminal justice system have to be abolished altogether but the very idea of "crime"—that is, serious law breaking—would have to be delegitimized or made obsolete.

There is no doubt that racially disparate imprisonment rates *reinforce* the ideological construct of the "black criminal" and nourish the irrational fear of black people. We should keep in mind, though, that racism operates in a number of institutional contexts, not just in the criminal justice system. And stereotypes about blacks being unintelligent and lazy have existed as long as (if not longer than) stereotypes about blacks being violent and criminal.²⁸ Schools, for example, are pervaded by stereotypes about blacks' cognitive deficiencies, and there is a stubborn racially marked academic achievement gap.²⁹ Yet there is no call to abolish schools, only to improve and make them more equitable. Nor do we call for the abolition of workplaces because of the stereotype about blacks being lazy or the longstanding racial disparities in employment that might seem to lend credence to the stereotype. Nor would we seek to abolish the institution of the family on the grounds that there are stigmatizing stereotypes about black reproductive and parental irresponsibility and that black families are disproportionately fragile and broken.

²⁸ George M. Fredrickson, *Racism: A Short History* (Princeton: Princeton University Press, 2002); Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (New York: Random House, 2017).

²⁹ Derrick Darby and John L. Rury, *The Color of Mind: Why the Origins of the Achievement Gap Matter for Justice* (Chicago: University of Chicago Press, 2018).

What this suggests is that charges of ideological and institutional racism can yield abolitionists conclusions only if the institution in question is either already irredeemably unjust (that is, apart from being racist) or performs no socially necessary function. These reflections also suggest that, at least sometimes, we should devise ways to block or limit the influence of racial ideology and discriminatory practices within an institution rather than giving up on the institution itself.

Ideological and institutional racism are powerful forces in prison systems in the U.S. and elsewhere. Yet there are many who are capable of sincerely rejecting racist beliefs and refraining from acting on racial biases. Racially prejudiced personnel—from the top of an organization down to the bottom ranks—can be identified and replaced. Racially discriminatory rules can be discovered, exposed, and discarded. Thus, uncovering the racism within existing prison systems, even when such racism has a long history or is pervasive, is not sufficient to establish that prisons should be abolished rather than reformed.

Whether we should be reformers or abolitionists will depend on at least the following: (1) whether imprisonment has a legitimate goal that would justify its inherent costs and risks; (2) whether criminal justice rules can be devised to fairly and effectively achieve this goal; (3) whether sufficient personnel can be recruited, trained, and relied upon to impartially and consistently follow these rules; and (4) whether there is a practically achievable alternative set of practices that could secure the same goal but with fewer harmful or costly consequences.

Functional Explanation and Unjust Social Systems

So far, I have discussed some ways that the consequences of imprisonment can be oppressive. I have also considered how latent functions of prisons can be oppressive when these functions depend on either covert goals or discriminatory institutional

practices. Yet, the truly radical dimensions of Davis's functional critique can't be fully captured in these terms. For Davis, the racial disparity in imprisonment is not a "contingent" feature of capitalist society (say, the result of law enforcement officials' correctable racial prejudice) but a *necessary* consequence of a capitalist system with roots in race-based slavery and colonialism. To see the full implications of this idea, we must rely on a richer, but also a more controversial, conception of functional explanation.

The U.S. prison system is a vast network of carceral institutions, which includes federal and state prisons, municipal and county jails, and juvenile and immigrant detention centers. This network can operate only in conjunction with other institutions—primarily legislative bodies, law enforcement agencies, courts, and parole/probation agencies. This complex system of institutions is not one super-agent with cohesive plans and aims. It does not, nor can it, act with one mind.

Within any given subsystem, there will be officials and participants with conflicting goals and motives. Politicians, police officers, prosecutors, defense attorneys, judges, jurors, parole officers, prison administrators, and correctional officers often have divergent interests and ambitions. And they carry out their duties (whether conscientiously or poorly) in interaction not only with each other but also with persons suspected of crimes, persons accused of crimes, victims of crimes, witnesses, prisoners, and the formerly incarcerated. There is good reason to doubt that these diverse officials strategically coordinate their actions (or that they *could* coordinate their actions) to defend the interests of the ruling classes or white people. After all, many of these officials are not themselves members of these groups, and which individuals come to occupy these institutional roles often depends on the outcome of competitive elections. So, a functional critique of U.S. prisons in terms of criminal justice officials' conscious but covert aims will be of limited value.

It might be more promising to attribute a *master function* to prisons: namely,

that prisons serve to stabilize unjust social systems. The other functions attributed to prisons—racial domination, economic exploitation, political repression, obscuring social problems—are subsidiary or are to be understood in relation to this master function. Prisons perform this stabilizing function through, say, fostering racial division, incapacitating the most rebellious elements in society, deterring people from developing a revolutionary posture, protecting property claims from militant challenge, and so on.

The basic social-theoretic premise is that unjust modern societies are, by their nature, *unstable*. Thus, those that persist over time tend to develop and maintain prisons, which enable the survival of these oppressive social systems. To be sure, unjust social orders are not stabilized by penal regimes alone. Brute force is never sufficient. Ideologies also function to secure hierarchical and inegalitarian social systems. They do so by encouraging people not to question the system's legitimacy and by inducing the oppressed to believe that their obedience to law is, not just prudent, but morally required.

I think this framework fits much of what Davis says about the relation between prisons and unjust societies. For instance, she argues that the penal system functions as a weapon to preserve the status quo when resistance movements emerge to challenge the legitimacy of the social order.³⁰ She also argues that the "overriding" function of the prison is not crime control but social control and political containment—the repression of "proclivities" to challenge legal regulations and the extraction of total obedience to the law, particularly property laws, which protect the assets of the ruling class.³¹

³⁰ Angela Y. Davis, "Political Prisoners, Prisons, and Black Liberation," in *The Angela Y. Davis Reader*, 44.

³¹ Davis, "Political Prisoners, Prisons, and Black Liberation," 45.

Now the mere fact that prisons are functional for unjust societies doesn't show that prisons exist *because* (let alone *only* because) they are functional for unjust societies. (Pencils are functional for scratching backs, but that's not why pencils exist or continue to be produced.) The beneficial consequences for a ruling class could be a mere accident, an unintended byproduct of a practice with other purposes. So what more has to be established for Davis's master-function claim to be truly explanatory?

One way of making good on a functional explanation is to identify a *feedback loop*, say, from an ideology or institution to a pattern of causal consequences and from these consequences back to the ideology or institution itself. The ideology or institution persists *because* it has consequences that reinforce or preserve it. In other words, the ideology or institution's persistence is explained (at least in part) *by* its functional consequences.

Along these lines, Davis identifies a process she calls a "self-reproducing cycle."³² The prison, though not a belief system, can perform essentially the same function that ideologies do. An institution or social practice can serve an ideological function in that it can mislead us about or conceal important social facts. It can encourage or reinforce false beliefs about social reality, a misperception that can buttress an unjust status quo. In a society where racial ideology has currency, racially biased law enforcement practices obscure the oppressive workings of capitalism. Capitalism creates joblessness, poverty, and desperation, which gives the oppressed an economic incentive to turn to the underground economy—the drug trade, prostitution, theft, robbery, illegal gambling, trafficking in stolen goods, and so on—and thus puts them at high risk for imprisonment. The longstanding stereotypes about blacks as lazy and violent lead people to explain racial disparities

³² Davis, "Race and Criminalization," 67.

in employment and imprisonment in terms of black moral failings, and the disparities themselves seem to “confirm” the stereotypes. Fear of the “black criminal” seems to warrant strong retributive sentiments and to license practices of containment.³³ In this way, an ideology (racism) and an institution (the prison) can have social consequences that explain why the ideology and the institution persist.

The Limits of Functional Critique

Let’s suppose prisons serve all the functions Davis attributes to them, including the master function of stabilizing unjust social orders. Still, I don’t think we can conclude from this that we should end the practice of imprisonment. Why not? Well, we’d first have to see whether prisons also serve any legitimate and vital functions. If they do and there is no functional equivalent within reach, we may need to reform the prison (or other related features of the society) so that prisons have fewer of the pernicious consequences Davis identifies. Or we may, if feasible, effect social changes that eventually eliminate the *need* for prisons. (For example, if there is very little serious crime, then drastic law enforcement efforts aren’t necessary.) Put more tersely, abolition would follow from this functional critique alone only if there is a viable functional equivalent with fewer bad consequences or there is no legitimate function that prisons serve.

Recall that prisons, like many other institutions, are capable of performing more than one function, even under the same social conditions. In fact, functional critique does not rule out an institution serving both a latent function and its manifest function. Indeed, an institution could serve its oppressive functions *better* if it also achieves, to some extent, its official purpose. In that way, the institution’s unjust structure wouldn’t be readily apparent and so would be less likely to engender

³³ Davis, “Race and Criminalization,” 64-66.

militant resistance. (Capitalism, for example, does produce many desirable consumer goods and services and enables some members of the working class to become wealthy.)

So the fact that imprisonment serves a racist, repressive, or exploitive function is compatible with it also serving to protect people from unjust aggression against their liberty, person, or possessions. Of course, the prison cannot serve these oppressive functions and still be *just*, even if it does manage to prevent crime. And this is one reason why radical reform efforts, within the criminal justice system and elsewhere, are so urgently needed.

The abolitionist could concede that prisons serve multiple functions yet insist that we cannot have the legitimate manifest function of the prison (securing public safety) without its oppressive latent functions. What reason might we have to think this? Sometimes proponents of functional critique regard institutions (or at least some of them) as having an "ineradicable logic" or "essence" that is present whenever and wherever the institution in question exists. Let's consider this possibility with respect to prisons.

There's a weak sense in which an institution could have an essence: namely, its official purpose is one of its constitutive features. Incarceration is "imprisonment," strictly speaking, only if it is imposed as a crime control measure. Otherwise the practice is something else, say, kidnapping. However, if the idea is that latent functions of an institution always remain intact regardless of changes in the institution's rules, procedures, social roles, or personnel and regardless of alterations in the surrounding social context, then the notion is not very plausible.

It is undeniable that an institution could have one set of consequences in circumstances C_1 but an entirely different, even incompatible, set of consequences in circumstances C_2 . Imagine, for instance, that C_1 is marked by severe racial and economic inequality but C_2 is not. An institution could be functional for more than

one type of system, including just and unjust social systems. Schools—depending on what, whom, and how they teach and who does the teaching—are presumably functional both for capitalism and for socialism, for a highly unequal society and for an egalitarian one. A similar thing can be said about families and workplaces. So, as far as I can tell, we can't decide whether abolition is preferable to reform if all we know is that the relevant institution is functional for an oppressive system. Something more must be established.

Sticking with the idea that prisons have a master function, Davis could argue that racist, capitalist societies are actually *homeostatic systems*: their characteristic injustices endure because changes in one part of the system are adjusted for elsewhere such that oppression is maintained. Similar to the way that the human body adjusts to maintain body temperature and blood pressure, there are mechanisms that keep some groups stigmatized, exploited, and subordinated despite even dramatic shifts in the institutions of the society. The prison (like banishment, execution, and public torture in previous eras) might be thought to be one of these key mechanisms. Some unjust societies, on this account, are not just self-reproducing systems but *self-adjusting* systems.

The homeostatic thesis is a radical claim, one that is difficult to prove and to falsify. I'm not certain that Davis would endorse it. But some who emphasize the continuity between slavery, Jim Crow, and mass incarceration seem attracted to it. So, for the sake of argument, let's suppose the homeostatic thesis is true. What implications would it have for the reform-versus-abolition debate? I can think of two.

First, if an unjust society is really a homeostatic system, meaningful social change from *within* the system looks hopeless and prison abolition as a politics would appear to be pointless, too. Homeostatic systems are composed of many interdependent and shifting parts and, despite their dynamism, have a tendency toward a relatively stable equilibrium. So, we have no reason to believe that the

abolition of prisons would stop a functional equivalent from emerging or prevent an adjustment elsewhere in the system that brings it back to the status quo.

Second, suppose the prison is not just one of many elements in the social system but a *linchpin*—a key piece that holds the system together. It is, let us say, equivalent to a vital organ in the human body. In that case, anti-prison theory is most at home in a revolutionary political framework, and the point of anti-prison practice would be to destabilize the social system as a whole. On this way of thinking, the prison stands in the way of meaningful social change and must be brought down or made inoperative if structural transformation is to occur. Indeed, some black radicals regard prison inmates (or some subset of them) as indispensable members of the revolutionary force who, as political prisoners, must be liberated if the emancipatory effort is to succeed (see Chapter 1).

However, this political vision shifts the focus away from the prison as such to a debate over whether the society as a whole can be reformed or must be taken apart (perhaps forcibly) and reconstituted on a fundamentally different basis. This is undeniably a question worth asking, one that raises the theoretical and practical stakes considerably. But, on such a vision, prison abolition is essentially *tactical* and must then be assessed on grounds of practicality and likelihood of success versus alternative tactics. My primary concern is with the radical political philosophy that treats a prison-free society, not as merely a strategic political aim, but as a fundamental moral objective.

A Moratorium on Imprisonment?

Let's set aside the homeostatic model of functional critique and its associated revolutionary tactics. Davis could still argue that prisons have a strong "tendency" or "propensity" to be used for bad ends, at least within certain environments. Just as salt has the dispositional property to dissolve in water, prisons are disposed to

contribute to oppression. On this account, prison reformers are like those who say, "guns don't kill people; people kill people." Reformers contend that prisons can be used for good or bad purposes, depending on who controls them and whether they are used responsibly. This contention on the part of reformers, we must concede, is a half-truth.

Consider the current social environment in many rich capitalist societies, including the United States. Here, Davis would contend, we find political power and wealth concentrated in the hands of a small elite who benefit at the expense of the great majority. Poverty is deep and engenders despair and shame. Many are frustrated and angry about their lack of economic security and limited access to quality education. Racial and other visible minorities are feared, despised, and routinely scapegoated. The general ethos is one of unbridled ambition, ruthless competition, and indifference to the suffering of the most vulnerable. Unsurprisingly, depression and drug abuse are widespread. So is interpersonal violence and fraud.

In such an environment, prisons, like guns, are a menace. The people who would wield them (or, anyway, far too many of them) are likely to do so irresponsibly or even maliciously. It is not that prisons are *inherently* dangerous or prone to abuse no matter the social environment. The social context matters enormously. In a racist, capitalist regime with immense inequality, low wages, and meager welfare entitlements, we should *expect* incarceration to be widely abused. The latent functions of imprisonment in the current unjust environment are, indeed, exploitation, political repression, and racial subjugation. Until we dramatically alter the social environment within which prisons operate, we should, it could be argued, put a *moratorium* on the use of prisons.

Such a moratorium is not tantamount to abolition, as it wouldn't rule out prisons for all time and in all places. It would, however, entail regarding their current use in places like the United States as illegitimate and intolerable. This moratorium

could be based on a condemnation of background structural conditions and existing prison conditions. There could be a global (society-wide) moratorium justified by systemic injustice and a local moratorium on the use of particular prisons until they are suitably reformed and renovated.

The call for a moratorium on prisons has serious merit. If the only legitimate purpose prisons served was rehabilitation, then prison's great dangers and its burdens on the oppressed would probably be sufficient to justify such a moratorium. The tragic truth, though, is that in this same social environment (and largely for the same reasons), the oppressed are vulnerable to violent aggression, not just from the police and correctional officers, but also at the hands of ordinary citizens, many of whom are oppressed themselves. It is the unjustly disadvantaged who are most vulnerable to being beaten, raped, or killed, sometimes by co-ethnics, neighbors, friends, intimate partners, and even family. As we attempt to transform our societies and world into something more just, we must take due care to protect the vital interests of the oppressed. We may invite greater dangers by removing the limited means of protection—police and prisons—that are available, as troubling and racist as they typically are.

This problem—how best to reduce the burdens on the oppressed—makes me hesitant to embrace a radical moratorium position. The proponent of a radical moratorium holds that until we transform our society into something considerably more just, the state should admit no new persons to prison and release those now incarcerated, regardless of the crimes for which these persons have been convicted and regardless of whether there is reason to think they committed these crimes. We must rely exclusively on non-carceral alternatives to control crime, even when dealing with serious crimes.

To reject a radical prison moratorium would put me in the uncomfortable

position of having to endorse the judgment that the benefits of the legitimate functions of prisons (crime prevention and rehabilitation) are worth the prison system's oppressive costs, including its contribution to reinforcing racism. A less radical prison moratorium may be defensible, however; and, if instituted, it might mitigate ideological and institutional racism.

Suppose we reserved prison primarily for those who commit the most serious and egregious crimes—murder, rape, and aggravated assault. These acts cannot be justified or excused even under deeply unjust circumstances, and they cause lasting trauma and irreparable harm. When feasible, these wrongs must be prevented to protect the vital interests of the vulnerable. Other offenses should either be decriminalized or, where criminalization is warranted, carry lesser and non-carceral penalties (for example, fines, home confinement, restitution, temporary loss of privileges, community service, and electronic monitoring). Where incarceration is used, it should be joined with rehabilitative services, educational opportunities, job training, treatment, and preparation for re-entry into society.

It is best to distinguish what to do about potential future crime from what to do in response to crimes that have already happened. The moderate moratorium position just described concerns preventing offenses yet to occur, either using prison (in limited cases) or non-carceral penalties. This is a call for radical sentencing reform and for a (temporary) halt to the use of punitive incarceration for minor crimes. An obvious corollary would be moderate *decarceration*. If a moratorium is warranted, then it would also make sense to release prisoners who haven't committed serious crimes (for example, those convicted of property or drug offenses). They could be treated as if they had fully served their time or, where necessary for public safety, alternative penalties could be imposed. And these newly released persons should be eligible for rehabilitative and reentry services. Many

prison reformers believe that the prison population in places like the United States should be dramatically reduced and that the prison system should not be expanded.

So, although I am skeptical that the functional critique of prisons can justify abolitionist conclusions, it can, I think, help us see the urgency, not only for fundamental prison and sentencing reform, but also for broader structural reform of society itself.

Extrinsic Institutional Racism and Penal Policy

Davis's analysis of imprisonment as institutional racism offers wisdom and insight. Yet, as I've argued, this analysis, when cast as a functional critique, cannot establish that the eradication of prisons is morally required. A *modified* form of this critique might however help establish the need for a moderate moratorium on prison use in the U.S. and elsewhere. It can do so, I think, without relying on controversial functional explanations and without insisting that the covert purpose of incarceration is racist.

Within antiracist theory, the concept of *institutional racism* was developed to account for the fact that racism can exert influence in institutional contexts where officials do not consciously hold or openly express racist beliefs and intentions. Earlier, I discussed *intrinsic* institutional racism, with a focus on covert goals and discriminatory practices. However, institutional racism can also be *extrinsic*. An institution's policies can be racist, not only in virtue of the racist attitudes or goals of those who make and implement policy, but also in virtue of the *consequences* of an institution's policies, even when these consequences are unintended and unforeseen.

Extrinsic institutional racism occurs when officials use a policy that is race-neutral in content and public justification but nevertheless has a significant or disproportionate negative impact on an unfairly disadvantaged racial group. Those who make and apply the policies need not intend this result and may not themselves

harbor racist attitudes. The institution's practices are nonetheless wrong, because they perpetuate the negative effects of ongoing or past racist actions and because they thereby encourage racist attitudes and stereotypes.

The underlying idea is that some social groups are already disadvantaged by racism, and an institution that is not intrinsically racist may nevertheless play a role in oppressing these groups. And these detrimental effects can lead some to conclude that the disadvantaged occupy their low social station because of their own moral failings or inherent inferiority. The institution may not itself be responsible for the group's prior disadvantages, and the racism the institution is complicit with may be *extrinsic* to the institution itself.

Nevertheless, *corrective justice*—the principles that govern how we should respond to and rectify injustice—may demand that we actively seek to reverse or mitigate these oppressive institutional effects. This reduction in the weight of oppression could be achieved through the implementation of policies that would have a less adverse effect on disadvantaged racial groups.

Davis thinks that the destructive power of the "black criminal" notion—an ideological idea—cannot be defused unless we abolish prisons. In the United States, blacks are disproportionately locked up, and this might continue to be the case even if intrinsic institutional racism within the criminal justice system were eradicated. After all, joblessness, poverty, and educational disadvantage are strongly correlated with criminal offending, and blacks are disproportionately unemployed, poor, and educationally disadvantaged. If part of Davis's worry is that racial disparities in imprisonment seem to confirm stereotypes about black criminality, thus reinforcing antiblack ideology, then eliminating or reducing the disparities would seem like a logical response. The question is whether the criminal justice system should play a role in this.

If, as Davis maintains, the practice of imprisonment further marginalizes

racially stigmatized and unjustly disadvantaged social groups, this can be a reason to change penal policy even if incarcerating blacks who commit crimes is not inherently racist and prisons actually prevent crime. If we could secure a reasonable level of public safety without increasing the burdens on the oppressed or reinforcing negative racial stereotypes, then we should opt for these less harmful policies. In particular, if it could be shown that a set of non-carceral policies would adequately control crime but with less adverse impact on racially stigmatized groups, then a prison moratorium might be justified or even morally required.

The idea would be that we should correct the structural injustices that engender crime *and* lighten the penalties on oppressed offenders where possible even if this would cost more than simply relying on incarceration alone and even if this would mean, at least in the short term, that the privileged have to live with higher levels of public disorder and nonviolent crime.