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# PENAL ABOLITIONISM: AN ANARCHIST PERSPECTIVE FROM BRAZIL

Michel Foucault was very fond of Brazil and of what was most intense here, its youth. He went through delicate situations during the civil-military dictatorship and journeyed along the coast of the country, marking its ethical, aesthetic, and political presence.[1] *Discipline and Punish: The Birth of the Prison*, published in Brazil in 1977, is his most widely read, quoted, commented, and sold book to this day.[2] The book has become mandatory for any researcher grappling with prisons, incarcerations, disciplinary controls in general, illegalisms, rights, governments, subjections, and resistance. It has definitely exceeded the narrow boundary delimited by criminology and the sociology of interactions. *Discipline and Punish* also facilitates a confrontation with criminal law and incarcerations (as do penal abolitionists). But those who decide to *walk with* Foucault adopt above all his methodological suggestions, inhabit the crossroads he identified, and locate new junctions.

How can we confront the continuity of prisons? Foucault's precious onslaughts on penal and prison reforms intensively situate the ostensible efforts of disciplinary society in strengthening normative and repressive apparatuses in the same manner as they hammer at the ontology of crime, child pedagogy, the phantasmagoria that envelops the formation of each human being in the modern colonization of his soul, the establishment of an efficient pastorate, the government of factories over their

workers, the consolidation of the contract in relations, the techniques in the government of subjection, and, most importantly, the manner in which subjects govern themselves. All of this brings with it, at the same time, knowledges that organize themselves, surveillance that expands, and seizures of workers to compose the uniformed and civil police force, including informers, to work against workers. They establish the modern humanist prison and the system of normative rewards as new ways of punishing.

Torture of a different proportion was concentrated in the private sphere and gradually criminalized by penal law. But this transformation did not happen immediately, or rather, the criminalization of the conduct of parents who violate children appears only in the second half of the twentieth century when disciplines yield to controls, when the state finds measures to publicly preserve the body *and* the soul of the child even under the private power of their parents. The child as a family investment is conceived as potential human capital. Therefore, a child must not be tortured, though he must be punished even with mild violence, as recommended by psychoanalysis, to be educated as a future good citizen. Systemic theorists from the United States point to this imperative by emphasizing that politicization begins in the child through rewards and punishments. As the principal objects of the moral investment of the adults who govern them, children are expected to be profitable human capital and active bourgeois-democratic citizens. Despite all the so-called advances in criminal law in protecting and guaranteeing the rights of the child and so-called adolescents, criminal law remains directed at containing those children who disobey, transgress, defy, and infringe. It is intended especially

for poor young people, for their incarceration in prisons. Children and young people who are silent or who turn away and passively refuse are often referred to a medicalization (prescribed by pediatricians, psychologists, and psychiatrists) to remove them from the confinement caused by alleged disorders in order to make them fit and, finally, resilient. Young people in austere institutions are also medicalized with the purpose of containing inherent resistances to the prison and instituting resilient behavior consistent with neoliberal rationality.

Children have always been the main targets of criminal law in the society of disciplines and the society of controls. Previously, the tactics to make children docile prevailed through the introduction of religion, trades for work, basic schooling, and a variety of technical assessments so that, at the end of a given period, children would be able to socialize, which is to say, to work and to make up a family according to the bourgeois model. To all this today, an interest grows in building a resilient subject, a self-entrepreneur so that when he leaves prison he will participate in the life of his community of origin as a subject of law. Prison itself comes to be considered as one of the positive equivalents in the endless list of so-called adversities to be shouldered and surpassed by each incarcerated individual, as a proactive element inherent in the investment in resilience. Resilience amounts to nothing more than a prison enhancer and the actual veneer of punishment. It is an innovative task shared by the state with civil society organizations. However, if the state and civil society organizations are not unaware that life in prison produces a world apart (sometimes called "a world of crime") consisting of relations between prisoners, bureaucracy, and society, there is a difference today.

These relations occur not only by means of partnerships with organized civil society, but also by the undertakings of adult prisoners who share the government of prisons with the administration of the institution. Everything is organized in the form of an enterprise and its government invests in the containment of rebellions, which occur only during the violent clash between factions of corporate illegalisms aimed at controlling the government and prison market. This pattern has been increasingly evident in Brazil through bloody confrontations in adult prisons, such as those widely reported in the media in 2016 and 2017. Ultimately, by any angle, statistics prove that juvenile prisons are adult prison recruitment centers. But there is still life in these prisons: healthy escapes occur regularly there.

To face the modern prison is simply *not* to ignore that the relation reason-religion governs it: there is a sin, a guilt, an irreparable error, an exclusion, an education to live in conformity with morality, an individual to be adjusted, and, finally, the consecration of the just and the moral of the domain leading obedient and subjected citizens. The souls governed by the supernatural and the naturalized social mingle.

If in the communist illusion there will be a world without incarcerations only in the future, in the anarchist fringe it is in the present that we face the prison and criminal law. Militancy organized by a higher consciousness and anarchist militancy as the inventor of subjective and anti-hierarchical practices face each other in this field of resistance. The steamroller, as we know, is somewhere else. Criminal reformers (liberal and conservative) declare without shame to this day that prison is useless, that it is a school for delinquents, and a space for additional penalties with criminal and economic negotiations in continu-

ous illegalism, further penalizing the family, and spreading stigmas. *But they do not give up on the prison*. They find a new philanthropic figure in the application of alternative penalties and community service provisions for crimes considered "light," such as the ideal and real reduction of the prison building and the realization of zero tolerance. The effect was expected, even if criminological discourse claimed the opposite: more criminalizable conducts and new penalties to be carried out in the open, involving, in certain cases, the very ones condemned doing the monitoring of others. Critical criminology does not account for this effect. In fact, it responds to neoliberal rationality through its generic argument about class justice. More high security prisons, the shared management between the penitentiary administration and non-governmental organizations and, most surprisingly, prison management with political-business prisoner organizations have emerged. All these developments go through and often come from juvenile prisons governed by penalties euphemistically called socio-educational measures in Brazil.

Incarcerations expand, penalties increase, and private torments do not end. Nonetheless, free individuals, whether democrats or not, want *more* punishments in an incessant and overwhelming fight against offenders, harassers, delinquents, transgressors, disruptors, the inventive (*os inventivos*), and the anti-normative (*os anti-normativos*) by means of so-called moderate and monitored conduct against impunities. For the purpose of this argument, before prison and criminal law we are bound to morality. Prison in the Judeo-Christian cultural tradition is not external to us, and it is impossible to delimit one

inside and the other outside it. As Foucault put it, prison is the image of terror. In a nutshell: we're all stuck! Are we?

Penal abolitionism is not a utopia. It emerged from the 1968 event, which conservatives and moderates cry out to be forgotten. Penal abolitionism maintains that each infraction should be seen as a problem situation. From end to end, this claim directly confronts criminal law, its economy of penalties and supposed universal validity, to show that it is selective and that punishments only hinder the profusion of practices of liberty. Punishments hinder these practices by seeking to accommodate them in dominations based on representation, on the continuity of more or less violent exploitations in moral adjustments. A problem situation is one where two or more are confronted with an event between forces that are not equal and a loss occurs. It concerns what can be settled between those involved without being subjected to an inquiry, to the theater of a court, to a penalty, where wills are always abducted by those who speak for those involved (the lawyers and the technicians) and a higher authority (the judge), mediated or not by a jury that follows procedures regarding the evidence and the morality of conventional conduct (culpable or willful). Penal abolitionists have gone beyond the limits of criminology, and have taken it to an inventive place by listing possibilities.

In his brief work, the radical Dutch jurist Louk Hulsman avoided accommodating the rhetorical critique of criminology to criminal law, to morality, and to the vicissitudes in the conjuncture.[3] Hulsman sought to stop criminal language and its punitive power by suggesting the introduction of the principle of civil law conciliation to scale the solutions to each problematic situation. He elaborated possible models for resolutions of

a simple problem situation (conciliation between parties, compensation to a party injured by the State) or more complex ones (education and therapy such as youth education for freedom and not for liberation, circumstantial release, adjustments to the rules through rewards), thereby avoiding sentences and an economy of penalties. In considering each case as a singular case, which cancels out the ontology of crime and the economy of penalties, the resolution of a problem situation promotes a general follow-up of each case in common agreement between those involved and the authorities. Yes, to put an end to criminal law, abolitionists (who do not defend "socially accepted cells" and restorative justice) resort to civil law where there is no defendant and enforce the principle of conciliation. In a nutshell, penal abolitionism aims to stop the effects of surveillance and punishment derived from modern criminal law and from prison and other repressive institutions that make up the carceral archipelago.

For restorative justice, however, punishment remains normal and designed to punish more and better, in a style consistent with neoliberal rationality. For this very reason, restorative justice is connected with the most varied forms of punishment outside conventional incarcerations, characterizing what I call the elastification (*elastificação*) of prisons.

The penal abolitionism instituted by Hulsman does not want to be a school, but only to situate the possible, since there is already a society without penalties (and practices that precede, obviously, any philosophical statement), in which the effects of a problem situation are agreed upon between those involved without the need for the police or court. But if there is a lateral need for the equation between forces, there is noth-

ing better than counting on the horizontalization of these knowledge authorities dispensed from the aforementioned hierarchies. But that alone is not enough. It is necessary to simply introduce the principle of civil law, conciliation. With that done, there is no more place for criminal law. This is a struggle and not a dispute for rights, because struggling for rights in our society is always a struggle for life! We need to separate ourselves from the prison that governs our subjectivities. It is a question of considering penal abolitionism as a heterotopia of journey, and not as a utopia, to the extent that it also intercepts prison in morality and produces a twist in subjectivities. Otherwise, there will always be someone to ask: what to put in place of the prison? There is no place to be filled, but rather it is about how to produce and occupy the vacuum.

Dealing with a problem situation nowadays involves stopping police stations, speeding up procedures, and locating offenders, victims, prosecutors, lawyers, technicians, and judges in a horizontal relationship. It is trying to find a response path for each case without the use of prison or personal or electronic monitoring. Addressing a problem situation implies removing the violent sequestration of the bodies involved in this situation. It also seeks to compensate the victim and principally reduce the costs for the state of the penal system (which would be enviable to neoliberal rationality, but it prefers the continuation of the incarcerations because this is also its moral income). The problem situation is only about the special event that involved persons and their response path, which definitely entails the closure of prisons.

And what about problem situations that do not fit the models proposed by Hulsman? It was in the direction of this last question that the anarchist abolitionists of the Nu-Sol (Center of Anarchist Sociability) began to discuss the response path. For Nu-Sol, however, it is not a matter of applying models, but of finding answers in the course of the conversation that indicate the solution in progress to stop the infraction without resorting to any punitive measures. Accompanying Foucault, the construction of models, as Hulsman proposes, is worrisome in that it makes possible another dangerous form of power relations directed most likely by pedagogues, psychologists, psychopedagogues, and psychiatrists. It allows for the composition of a new productive ensemble of substitutive truth that does not at all guarantee the power of freedom among those involved. And all those who experience the solution of the problem situation are involved. A response path suggests follow-ups, comings and goings, revisions, surprises, a way of dealing with each case by each one involved in it. If for Hulsman the central question is criminal law and prisons, for Nu-Sol, with its anarchist penal abolitionism, the main issue is punishment. The problem situation and the response path are not restricted to the penal system but precede and succeed it. They are in relations. And it is in this way that anarchisms construct these heterotopias of journey.

For capitalism, its faith and fulfillment depend on the belief in utopias, on the government of thought that inhibits inventive practices, insurgent knowledges, and disturbing statements. The neoliberal utopia of capitalism is founded on merit, competence, and competition, making the subject human capital and a social agent of law, an innovator that governs through

the dissemination of the democratic practices of the political regime for mutual relations. Committed to increasing punishments through criminal law, reforms, and cooperation, this innovator governs others toward peace, or rather, toward a culture of peace as a resilient subject.

For anarchist penal abolitionists, as a potent minority, it is of interest to bring about the solution of the problem situation in any event. It is well known that we live in an era of neoliberal rationality based on the end-of-impunity slogan, which generates more selectivity in the system, the bureaucratization of punitive decisions with bodies of mediation and small-claims courts, calls for the active participation of communities in the management of penalties for minor crimes, the spectacularization of restorative justice, and the production of jobs for technicians in the follow-up of penalties in the open. Finally, in re-establishing the infraction as delinquency through the choice of the criminal, neoliberal rationality strengthens austere institutions and practices of punishing more and better. This rationality broadens the theory of broken windows that grounds zero tolerance, and cunningly maintains a strong relationship with the strand of minimal criminal law, since rather than reducing penalties, it works as a further derivation.

Even with the introduction of tolerance and new normalizations of conduct by the profusion of minority rights, punishment remains constant and untouchable. It is the terminal that guarantees the more or less violent flows of power relations. For neoliberal rationality and its democratic flows, to end punishment is something unbearable. Punishment is what guarantees rights, norms, and laws. Without being simplistic, exploitation and domination seem untouchable. To deal with

them is simple, as the penal abolitionists exposed. Or, as Foucault pointed out, after exhausting what we know about exploitation and domination, the question becomes ethical. It involves the ungovernable, practices of freedom, the confrontation with the unbearable, and simply the revolt.

I once heard during a talk that it is very easy to be a penal abolitionist. It is not. If it were, penal abolitionists of the first uprising from 1968 would not have accommodated minimal criminal law. The executors of restorative justice would not have used the penal abolitionist mask. Many would not see penal abolitionism as proselytizing, as a utopian discourse, as an anarchist provocation, or as so many other pejorative words and phrases that accompany its rejection. The penal abolitionist discourse invaded criminal law, boosted its current reforms, and will continue to push criminology to ruin its syntax. No, it is not easy to practice penal abolitionism in view of the constant rise of prison reformers and knowledges about the nature of punishment, its naturalness and its arrogance.

The joy of penal abolitionism is of Foucauldian interest. We are no longer in the time of the Prisons Information Group (GIP) and its interventions. Today, prisons, like the Brazilian ones, are under the shared government of the prison administration and illegalisms in their interiors. These illegalisms are tolerated and directed to contain the revolts against the prison, to stimulate the competition between organized factions, and to adjust the prison population to its moral entrepreneurial rationality, with its own rapid and brutal exercises in justice, with macabre connections to families and communities. We are in Rio de Janeiro! In other words, there was an adjustment to a new standard in which families of the incarcerated connect

the outside and inside of the prison. We are no longer in the time of conventional criminal law. It dismembered into minimum criminal law, which works as a constitutive part of punishing more and better counting on technicians, community, and even offenders (all cloaked in restorative justice practices). The obsession with the end of impunities, including the corruption of politicians, opened the space for a new selectivity in punishment through plea bargains to "criminals" who do not offend society, which is to say, entrepreneurs, managers, and politicians. It also produced a proliferation of alternative sentences and measures of community service, all of which revolve around the remote possibility of forgiveness by the penal system, penalty reduction programs resulting from partnerships at work, or education with organized civil society. The microfascism expressed in the motto "a good criminal is a dead criminal" stimulates the proliferation of militias and, consequently, its direct link with illegalisms. Rio de Janeiro! The prison serves to produce income for corporate illegalisms. Rio de Janeiro, São Paulo, Brazil!

NOTES

1 Heliana de Barros Conde Rodrigues. *Ensaios sobre Michel Foucault no Brasil: Presença, efeitos, resonâncias* (Rio de Janeiro: Lamparina, 2016).

2 Michel Foucault, *Vigiar e punir: Nascimento da prisão,* trans. Lígia M. Pondé Vassallo (Petrópolis: Vozes, 1977).

3 Louk Hulsman and Beradete de Celis, *Penas perdidas: O sistema penal em questão*, trans. Maria Lucia Kara (Niterói: Luam, 1993); Louk Hulsman, "Conversas com um abolicionista do system penal: Entrevista com Louk Hulsman," *Verve* 1 (2002): 106-121; Louk Hulsman, "Conversas com um abolicionista do system penal (parte 2): Entrevista com Louk Hulsman," *Verve* 2 (2002): 186-209, https://revistas.pucsp.

br/index.php/verve/article/viewFile/4619/3209; Louk Hulsman, "Temas e conceitos numa abordagem abolicionista criminal" *Verve* 3 (2003): 190-219, https://revistas.pucsp.br/index.php/verve/article/view/4942/3492; Louk Hulsman and Jacqueline Bernat de Celis, "Aposta por uma teoria da abolição do sistema penal," *Verve* 8 (2005): 246-275, https://revistas.pucsp.br/index.php/verve/article/view/5088/3616; Louk Hulsman, "Abolicionismo penal e deslegitimação do sistema carcerário: Uma conversação com Louk Hulsman," *Verve* 21 (2012): 134-153, https://revistas.pucsp.br/index.php/verve/article/view/30723/21250, Anamaria Aguiar e Sales, "Louk Hulsman e o abolicionismo penal," (PhD diss., Pontifical Catholic University of São Paulo, 2011), https://tede2.pucsp.br/bitstream/handle/3303/1/Anamaria%20Aguiar%20e%20Salles.pdf.