



Territories of Incarceration: Architecture and Judicial Procedure Across the English Channel

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Territories of Incarceration: Architecture and Judicial Procedure Across the English Channel

A dissertation presented
by
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to

The Department of Architecture, Landscape Architecture, and Urban Planning
in partial fulfillment of the requirements
for the degree of
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Territories of Incarceration: Architecture and Judicial Procedure Across the English Channel

Abstract

This dissertation focuses on the agency of architecture in producing material geographies of law, and shows that carceral spaces across the British Empire played a wide role in the development of English Common Law—well beyond their functional use as places of punishment. By tracing the material manifestations of judicial procedure, I map out a “legal geography” that was literally constructed through prison buildings across Crown territories. Throughout the years encompassed by the study (the *longue durée* between the 17th and 20th centuries), changing ideology regarding what constituted the proper architectural form of the prison building, alongside changing ideas regarding the rights of prisoners, reconfigured relationships between architecture, territory, and law. I posit that the legibility of the prison as an architectural object contributed to the way that justice operated not only in England but also across expanding colonial borders of the British Empire, and that architectural knowledge of the prison extended beyond the well-known panoptic geometries of the late 18th century. I show that those practicing law had a deeply considered understanding of architectural form, and that this understanding was crucial in articulating notions of personal rights. In opening up a long view of the prison building, I argue that incarceration was a multivalent tool in the drawing of political boundaries, in making claims on the bodies of citizens and subjects, and for reinforcing or contesting local authority.

The materials of prison history include of course doctrinal accounts of legal punishment. Alongside these, however, are records of jail-breaks and administrative mishaps; of fictional custodies and the occasional ghost; of Gothic castles and never-built utopic penitentiaries. Prisons and jails, it would seem, are leakier than a historical focus on penal strategies has allowed. Likewise in the history of architecture, carceral spaces have fallen between the cracks all the others jails and prisons have constituted legal personhood. This dissertation reframes the parameters by which architectural history understands the carceral by close attention to the legal instruments that were used to authorize, justify, or contest imprisonment across the British Empire.

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Introduction

I Incarceration as an architectural problem

Architectural ethics and prison design: carceral space in contemporary architectural thought

In 2014, the organization Architects / Designers / Planners for Social Responsibility (ADPSR) petitioned the American Institute of Architects (AIA) to amend their Code of Ethics to explicitly prohibit the “design of spaces intended for execution or for torture or other cruel, inhuman, or degrading treatment or punishment, including prolonged solitary confinement.”¹ In a letter to its president, ADPSR argued that the AIA, as the primary professional body of architects in the United States tasked with (among other things) outlining the architect’s code of ethics for professional practice, had a responsibility to uphold international standards in preventing human rights abuses.² “As people of conscience and as a profession dedicated to improving the built environment for all people,” the letter continued, “we cannot participate in the design of spaces that violate human life and dignity. Participating in the development of buildings designed for killing, torture, or cruel, inhuman or degrading is fundamentally incompatible with professional practice that respects standards of decency and human rights.”³ The petition has yet to result in a rewriting of the AIA code of ethics to incorporate these amendments. However, the widespread attention the movement has gathered, from both architects and the national press, points to a renewed attention to the architecture of the prison.⁴ In subsequent years, a Frank Gehry-led

¹ Letter to AIA, and American Ethics Council <https://dk-media.s3.amazonaws.com/AA/AP/adpsr->

² Jay Wickersham has outlined changes in the codes of ethics in the architectural profession (focusing on the US and the UK) from the late to the 1970’s, and shown that the profession’s ethical stance has been shaped most profoundly in the direction of mediating the fiduciary responsibility of the architect/client relationship. Jay Wickersham, “From disinterested expert to marketplace competitor: how anti-monopoly law transformed the ethics and economics of American architecture in the 1970s” *Architectural Theory Review*, 2015, Vol. 20, No. 2, pp. 138–158

³ http://adpsr-org.doodlekit.com/home/ethics_reform

⁴ For example, see Michael Kimmelman, “Prison architecture and the question of ethics” in *The New York Times*, Feb. 16 2015 http://www.nytimes.com/2015/02/17/arts/design/prison-architecture-and-the-question-of-ethics.html?_r=0

studio at the Yale School of Architecture has asked students to “envision a future architecture of incarceration.” That this studio introduced a prison project in the curriculum of a major architectural program is perhaps one small sign that the discipline might be ready to take on the ethical challenges of our carceral state.⁵ As the project brief rightly notes, “For centuries... people have done little more than tinker with the design of prisons,” and challenges students “to design a new typology, exploring the unimagined.”⁶

Architecture, as a profession, has arrived relatively late to a renewed interest in addressing problems within the carceral systems of the United States and England. The normative stance that the prison sentence is a proper and efficacious punishment for serious crime has been challenged on multiple fronts in recent years—in terms of its ability to rehabilitate convicted criminals, in its ability to provide an adequate response to a desire for retribution, and in terms of how it operates as a deterrence to crime. Beyond assessing these direct objectives, other critiques of the criminal justice system have brought to light further disparities between the values outwardly declared by the legal system and the values that it produces in practice. High rates of recidivism, and cycles of poverty exacerbated by the difficulties in obtaining employment after a prison sentence is served, raises questions regarding efficacy of the prison as rehabilitation; systemic racism shows that the criminal justice system does not treat all populations equally. The prison system does not appear to be working in line

⁵ See the listing for Gehry’s studio here: <https://architecture.yale.edu/courses/advanced-design-studio-gehry-1>; a similar studio (also led by Gehry) was offered at SCI-Arc in the spring of 2017. An article about the Yale studio’s results was published in the *New Yorker* Bill Keller, “Reimagining Prison with Frank Gehry,” Dec. 21 2017.

⁶ Frank Gehry Vertical Studio, Fall 2017 Sci-Arc.

with the stated objectives of modern criminal law, and incarceration as the default response to criminal justice is thus being widely questioned.⁷

While legal scholars and activists continue to shed light on the criminal justice system (many with hopes of paving the way for widespread reforms), prison buildings themselves remain largely unexamined with the same level of rigor. The curious omission of buildings from these discussions can perhaps be accounted for, in part, by the fact that the prison *sentence* is a legal concept. Like all legal sanctions, it belongs to a necessary extent within the abstracted realm of legal thought. And especially when there is no direct physical object at stake, lawyers are particularly adept at framing legal relations in the abstract. Questions such as: What is the proper and most effective method to address wrongdoing? How should sanctions be assigned or apportioned with respect to the severity of the wrongdoing?—continue to be asked by those thinking about and practicing the law. As several legal historians have shown, their answers are deeply dependent upon the historical moment in which they are asked, and on changing ideologies surrounding how a given society approaches questions of morality, retribution, and fairness.⁸ Similarly, the role of the jail in domestic pre-trial detention, and under what political circumstances one can justify holding another without formal charges, can equally be framed as abstract legal issues.

However, these legal instruments are effective as such only when implemented in the real world, and imprisonment requires, by necessity, the technological apparatus of the prison building. If legal scholars have perhaps rightly focused on the more abstract principles of the

⁷ Many of these criticisms are echoed in critiques of jails—spaces ostensibly used for temporary detainment prior to trial rather than for punishment. The jail system reproduces many of the same problems as the prison, and shows a similarly disturbing trend of bias against already marginalized communities. For a thorough analysis of these issues see the annotated bibliography and (works cited): *Prison Abolition Syllabus* published by the African American Intellectual History Society (AAIHS), <https://www.aaihs.org/prison-abolition-syllabus/>.

⁸ See, for example, David Garland, *Punishment and welfare: A history of penal strategies* (1985).

law, architectural scholars have not taken up their side of the problem.⁹ As Mable Wilson has recently argued, this lack of attention is in no small part due to the doubled otherness of the modern prison's captured bodies. In the United States today, a disproportionate percentage of the prison population is African-American and other minorities; these people are held in structures whose underlying design principles are coded with Enlightenment colonial ideologies, which sought explicitly to mark out distinctions between (white) European bodies and all others.¹⁰ For Wilson, the professions' disinterest in prisons is thus scarcely a surprise, given that architecture continues to be an overwhelmingly white, and majority male, profession, whose contemporary theoretical roots were laid down in those same Enlightenment grounds.

While the Gehry studio is certainly an indication of a step in the right direction, still missing is the conversation that can begin to reexamine architecture's role in producing both the material and the discursive frameworks for incarceration. This conversation needs to interrogate and re-frame the enlightenment principles that allowed architecture to lay claim on this particular form of punishment, and then allowed architectural discourse to distance itself from the repercussions of its own invention. As such, required is not simply an expanded roster of jail and prison buildings to be added to the architectural cannon. Rather, we need an entirely new theoretical and historical framework with which to examine buildings that are used to imprison.

⁹ The lack of interest in jails and prisons by architectural historians and theorists is echoed by lack of attention by practicing architects to these projects.

¹⁰ In noting the separate cells marked for "Blacks" (no further distinction) and "White debtors" and "White criminals" in Thomas Jefferson's plan for a prison in Piedmont Virginia, Wilson provides a vivid example of the ways in which forms of bondage were already racialized in the early American republic. Mabel O. Wilson, "Carceral Architectures" *Superhumanity*. <http://www.e-flux.com/architecture/superhumanity/68676/carceral-architectures/>

The carceral

Before outlining the methodological and historical frame of the project, I clarify a few frequently used terms. I am concerned here specifically with incarceration, or, with the practice of using buildings to keep people captive within the parameters of an authoritative legal framework. As such, I address both the physical system, comprising the built space of the jail; as well as the discursive system, comprising the ways in which the physical captivity of bodies is given political meaning. Throughout, my objective is to resist the tendency to see, on the one hand, law as primarily discourse (supported by a material apparatus) and on the other, architecture as primarily material (supported by a discursive apparatus). As well, throughout the examples that I examine here, the architectural discourse does not always align with legal discourse. Rather, architectural practice and legal practice co-produce meaning that would not be possible without the other.

The immediate subject here is incarceration, defined as the legal holding of a prisoner. This can happen in multiple ways, as buildings are used as the technological apparatus to hold bodies under several different kinds of legal frameworks. Importantly, I separate the notion of legal punishment as being a defining factor in incarceration. Prisons (used for punishment) are distinct from jails (used to detain). These are both legally distinct from prisons of special jurisdictions (martial courts or overseas jurisdictions) and from special forms of detention (ICE detainment). All of these—prisons, jails, extraterritorial/extrajudicial sites of detainment—are what I call here carceral spaces. While all are supported by a different (though related, as we will see) set of legal justifications, all require buildings that have come to share similar characteristics. The primary characteristics these buildings share include 1) the ability to hold prisoners captive and 2) the ability to be marked explicitly as a particular kind of legal space.

These “prison-building-like” characteristics—the holding of a prisoner’s body, and providing an explicit marker of legal space—have an institutional history that was formed at the intersection of developing ideas in both law and in architecture. Outlined below are the historical, methodological, and theoretical frames through which I tackle this subject.

II Historical and geographical frame

Why a longue durée? (Historiographical review)

This project is an attempt to formulate a new approach to thinking about the architectural space of the prison. In doing so I hope to contribute to a conversation that is ongoing in other fields, but is in urgent need to be taken seriously within the field of contemporary architectural thought. One of the reasons that the prison is not taken seriously as an architectural object has been the ways in which it has been framed within architectural history. I therefore address the topic through a long historic lens, and aim to reframe the terms by which we have understood the prison as an architectural object.

According to the dominant narrative in our field, the prison building is seen primarily in the context of evolving penal sanctions. The prison as a legible architectural type, built for a specific penal sanction, emerged at the turn of the nineteenth century out of heterogeneous practices of medieval detention. Legal and architectural order arose from legal and architectural chaos, as newly developing governmental apparati sought to classify, name, and thereby control the bodies of deviant and errant citizens.¹¹ In most historical accounts of this transition, the prison building standardized both the legal and architectural form of this particular legal

¹¹ This is, of course, the way that Michel Foucault famously saw this transition. Michel Foucault, *Discipline and punish: The birth of the prison* (1977)

sanction, as the prison sentence was newly seen to be the most efficacious form of punishment. The medieval jail, which had served primarily as a place to hold suspects prior to trial, was transformed into what we still recognize as the modern prison: a building that provides the necessary infrastructure for the implementation of the prison sentence as the punishment itself. This relatively short history encompasses about seventy-five years, beginning in the last decades of the eighteenth century when advocates for reforms in the criminal law, and for more robust mechanisms to ensure legal oversight, drew attention to deteriorating physical conditions within jails and prisons throughout England, France, and Italy. Beccaria, Montesquieu, and Bentham were among the philosophers whose writings contributed to a changing view of the role of punishment in society—namely, that punishment could serve a reformative as well as retributive function—while ‘practical’ reformers, such as Elizabeth Fry and John Howard, published detailed accounts of life inside the medieval jail.¹² These works, collectively, not only influenced legislation (especially in England), but also contributed to a widespread lay interest in jails and prisons.

Not coincidentally, in these decades well-known architects and artists produced significant projects that contended with prisons and prison-like spaces. This interest was relatively unprecedented: Piranesi’s *Carceri* drawings (first published in 1750; 2nd edition in 1761) and George Dance’s Newgate Gaol (completed 1782), to name two of the most influential, are notable as much for their surprising choice of subject as for the way they approached it. After all, jails and prisons were intended for a very different occupant and audience than other

¹² See, for examples of these writings: John Howard, *The State of the Prisons in England and Wales: With Preliminary Observations, and an Account of Some Foreign Prisons* (1777); Cesare Beccaria, *An Essay on Crimes and Punishments* (1777); Elizabeth Fry, *Observations on the Visiting, Superintendence, and Government of Female Prisoners* (1827); Jeremy Bentham, *The Rationale of Punishment* (1830).

buildings types—from private buildings such as villas and palazzos to public churches, courts, and city gates—normally commissioned from architects to exhibit power and influence, or otherwise reflect positive images of the building’s patronage. If the work of architects such as Dance (along with the Adams brothers and John Soane, among others) produced an image of what a proper architectural style of the prison should look like, legislative initiatives in these same decades helped to define the proper arrangement of interior spaces that would correspond to prevailing notions of punishment which could serve as rehabilitation. By the middle of the nineteenth century, the prison sentence had become the predominant form of legal sanction in the Common Law world, and new architectural standards for the design and construction of corresponding buildings had been put into place.¹³

This understanding of the emergence of the prison sentence in Europe as the dominant form of legal sanction (as I have briefly rehearsed it here) was, by no means, seen as self-evident until the early twentieth century. Criminal law, especially in the Common Law, was not very well studied until the publication of two groundbreaking works on the history of criminal law and penal practices: Beatrice Webb and Sidney Webb’s *English prisons under local government* (1922) and Leon Radzinowicz’s five-volume opus *A history of English criminal law and its administration from 1750* (1948-1986).¹⁴ While Radzinowicz and the Webbs had inaugurated the serious study of English criminal law and its administration, their positions with regards to the modern reforms were uncritically celebratory. These works largely attributed changes in penal practice to the humanitarian and spiritual work of a handful of enlightened reformers, and

¹³ This is, very briefly, the outline of Robin Evan’s argument in this work on the topic. See Evans, Robin. *The fabrication of virtue: English prison architecture, 1750-1840* (1982).

¹⁴ Leon Radzinowicz, *A history of English criminal law and its administration from 1750* (1986); Sidney and Beatrice Webb, *English prisons under local government* (1922).

accepted the resulting changes as evidence of a more humane and just system of punishment.

This position had been further reinforced by dominance of Enlightenment philosophies regarding the individual and his role in society, more generally.¹⁵

In the late 1970's and early 1980's, however, a new generation of scholars began to question the approach of Radzinowicz and the Webbs, especially in their assumptions that change in penal regimes could be attributed primarily to the magnanimity and humanitarian impulses of individual reformers. Dissatisfied with these narratives—of the benevolent monarch, who, inspired by the writings of great philosophers, supported legislative reforms in criminal procedure—this new generation of scholars sought alternative explanations for how and why shifts in penal practice came about.¹⁶ While the changes themselves were not questioned in their broad strokes, these scholars were far more skeptical of the underlying motivations behind criminal law reform. For them, the new prison building was exemplary of an object that, while positioned by the state as unquestionably good for society, nonetheless carried sinister undertones of governmental machinations.¹⁷

This influential body of scholarly literature also articulated the connections between prison buildings and the power structures that they implied. Specifically, the “invention” of the

¹⁵ Gendered pronoun used on purpose here: generic individual in this period was male (of course).

¹⁶ Among these, Robin Evans (architectural history), Michel Foucault and Michael Ignatieff (sociology) and David Garland (history) are most prominent. The ideological position of these revisionist histories is often equally quite explicit: Douglas Hay, for example, argued that the simultaneous increase in capital offences and decrease in the number of these sentences actually commuted (a trend that was first noted by Radzinowicz) had less to do with increasing benevolence toward the working class, but rather was a function of needing to protect private property and maintaining the status of the ruling (and propertied) class. Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, Cal Winslow. *Albion's fatal tree: crime and society in eighteenth-century England* (2011).

¹⁷ For example, Michel Foucault's theories of bio-politics famously showed how examining the changing attitudes held by the state (or more generally, by those with political power) towards the bodies of the accused and condemned could reveal deeper structures of embedded authority.

prison sentence itself as the most fitting form of punishment was tied directly to architectural invention that could be seen clearly in orthographic drawings. These ideas were most directly developed by Michel Foucault in his attention to Jeremy Bentham's panoptic project, and by the architectural historian Robin Evans, whose work encompassed a slighter broader study of the prison projects of this period.¹⁸

For Robin Evans, the expertise specific to the architect—in particular, as expressed in orthographic drawings—allowed the prison building to become widely recognizable as this distinct type. Evans saw the architectural plan as the primary device with which to read the connection between ideas of human psychology and the discovery of architecture as a tool for social reform. More, these prison drawings gave an exemplary object with which to demonstrate architecture's power to reveal human behavior. The mirror of the architectural plan in the legal sanction (prison building to prison sentence), that continues to have currency today, provides the necessary validation for this mode of understanding: bodies held in cells, representable in orthographic drawing, thus are made legible as criminals to sovereign legal authority. In this tautological account, the prison sentence is literally unthinkable without the architect's work.¹⁹

¹⁸ See especially Michel Foucault, *Discipline and punish: The birth of the prison* (1977); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (1978); Robin Evans, *The fabrication of virtue: English prison architecture, 1750-1840* (1982)

¹⁹ For architectural historians, the invention at this moment of the prison sentence as legal sanction required the specific expertise of the professional architect. Robin Evans, whose work on the subject remains relatively unchallenged, saw the architectural drawing in particular as the primary mechanism that allowed the prison's legible form to be broadly disseminated. More, these prison drawings gave Evans an exemplary object with which to demonstrate architecture's power to shape human behavior. What better object could be found? The mirror of this architectural plan in the legal sanction (prison building to prison sentence), that continues to have currency even today, provides the necessary validation for Evans's own approach. On the one side, a judge could sentence a convict to six months at Pentonville, because, thanks to architectural drawings, everyone knew what that punishment would have entailed; on the other, we know that architectural drawings provide clues to human behavior because judges continue to sentence convicts to six months at Pentonville. In this mutually reinforcing account, the prison sentence is literally unthinkable without the architect's work. Architecture gave to the law a definitive method of reproducing an abstracted account of legal space.

But strikingly, this alternative narrative of the prison's history, as told by Evans and Foucault among others, while critical of the intent of the state's power, nevertheless retained the same basic historical outline. The reform prison building was (still) introduced as a brand-new architectural type, and was positioned in a distinct historical contrast to earlier carceral spaces that were not designed along principles of spatial organization that could be well-described by orthographic representations. In fact, earlier spaces of detention do not figure much at all in architectural history, except to show the architectural vacuum that these designed prisons came to fill. The un-designed, and un-representable (in the traditional methods of architectural representation) carceral space of the pre-modern world was figured as a blank: unknown and unknowable to architectural history.²⁰

But, as I argue, the prison building was not developed in an architectural void. An immediate repercussion of asking the question—how, and why, was architecture mobilized in the service of providing the proper space for legal punishment?—is that seems to require us to confront the other ways in which physical detainment has been used in legal proceedings apart from punishment. While imprisonment as a sanction is a relatively recent innovation in Western legal systems, there have always been other ways that the law finds buildings useful by detaining bodies. I thus begin this study a century before the rise of imprisonment as a legal sanction in the West. In the seventeenth and early eighteenth centuries, imprisonment was not used to punish. Fines and bodily punishments—including whipping, branding, hanging or banishment—were the primary methods of legal sanction. However, jails and prison-like spaces did exist. I argue that

²⁰ One of the problems with this narrative in particular is that architecture thinks it already has dealt with it. Architecture thinks it already understands its relationship with the carceral, and in some ways this makes it least capable of knowing it.

these jails played more than an ancillary role in legal practice, as has been argued. The way they were used in legal practice was a crucial part of understanding how buildings could be used to mobilize political relationships.

This is not to say that the goal is to discover an earlier historical origin point for the prison building. The diversity of spaces that legal instruments consider as “carceral” continues well after the historical shift that has been the focus of the many studies of the prison reform movement. In other words, the implementation of the prison sentence as sanction did not mean that the prison building after the reforms of the nineteenth century was no longer a site for contesting legal and political relationships.

The dominance of the panoptic form in the discourse, in addition to the univocal attention on the role of prisons in criminal procedure and punishment, has eclipsed other methods of understanding the architecture of carceral space. This is a problem, because by registering criminal punishment as the primary way (or even the only way) that buildings contributed to the development of legal practice, we lose alternative ways of looking at carceral spaces that were, indeed, crucial in the evolving relationships between law and architectural space. In opening up a long view of the prison building, we are able to see how incarceration was a multivalent tool in the drawing of political boundaries, in making claims on citizens and subjects, and for reinforcing or contesting local authority.

Why England (and the Common Law)?/ Methods

The project tackles the substantive changes in practices of incarceration from the seventeenth century to the twentieth. While these changes can be observed, in some form, around the Western world, I focus primarily on England and the Common Law practice.

The Common Law is notable among Western legal systems for being uncodified. That is, legal authority rests in the interpretation of past decisions (precedent) rather than on a set table of rules; it is descriptive rather than prescriptive. Historical change takes place primarily through practice, rather than through declaratory statements. This distinction is further reinforced by the fact that the Common Law has not been intellectualized or taught in the same ways that the continental civil legal systems have been. How the law plays out on the ground, as it were, is thus particularly important in understanding Common Law principles. It is here that I think architecture can play a crucial role in framing an understanding of incarceration that might not otherwise be available.

In an essay entitled “History and lost assumptions,” the late historian of English law S.F.C. Milsom reminds us of a fundamental difficulty that historians encounter in their attempts to track changes in the law. To understand how legal institutions and precepts developed, it is necessary to see history’s evidence in the light of contemporaneous assumptions about the way the law worked at that time. These assumptions are not necessarily our own. This potential trap, writes Milsom, is especially difficult to avoid when the main body of evidence used by the legal historian—comprising of words on a page or parchment—almost never exist in a way that may be interpreted directly, without an understanding of the contextual frame that the historian is attempting to draw in the first place. Milsom writes,

People do not formulate their assumptions for themselves, let alone spell them out for the benefit of future historians, and in the case of the law there is never occasion to write down what everybody knows. And when everybody has forgotten what everybody once knew, when the assumptions are beyond recall, there is nothing to put the historian on his guard. Not knowing (or even missing) the assumptions of the time, he will read the materials in the light of his own assumptions or those of his predecessors in the field; and, when he or his predecessors have established a framework for one period, that framework will almost inevitably be assumed to be valid for earlier times.²¹

²¹ S.F.C. Milsom, *A Natural History of the Common Law*, p. 76

Milsom reminds us that this missing evidence—the assumptions that no one bothers to write down because they are commonly assumed by everyone—should not be mistaken for proof that something was not happening. Just because something is written down suddenly does not necessarily mean it was invented, whole cloth, at that moment. Milsom is referring here directly to words, written on a page. And words are still seen as the primary medium through which the law is known, transmitted and enforced. Apart from a small body of scholarly literature devoted to legal emblems and seals, for the most part legal history is known through interpreting the written records of the court and its ancillaries.²² This is especially true of the Common Law, which developed outside of continuous iteration of direct declaration of the law's intent. In the Common Law, principles are rarely declared. It is averse to theory.

Throughout the following chapters, I propose that buildings are equally a medium of the law. These buildings were not just mute objects used in the enactment of law, but rather were necessary for the production of legal ideas themselves. If this hypothesis is correct, looking closely at the spaces in which the law was enacted might very well shed light on lost assumptions that are missing in the written record. This is my tentative claim towards a contribution to legal history.²³

But this dissertation is about and for architectural history, directly. As such, I also question assumptions made about the types of evidence deemed appropriate for architectural history. By giving greater agency to the architectural object in the production of legal concepts, I

²² See Peter Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance* (2014). See also Baker on evidential problems in legal history, more generally. John Baker, *The law's two bodies: some evidential problems in English legal history* (2001)

²³ Generally legal principles abstract without taking into account space, but people are starting to pay more attention. (For example, see Lisa Pruitt's work on the Whole Women's Health decision; Lisa R. Pruitt, and Marta R. Vanegas. "Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law." *Berkeley Journal of Gender, Law & Justice* 30 (2015): 76-340.).

posit that we might also produce alternative frameworks for understanding architectural history. I argue here that certain buildings were necessary in the development of fundamental principles of the Common Law. This, to me, makes them good candidates for being taken seriously as subjects of architectural history; even if what we know about them comes primarily from legal texts.

Even when these questions are framed in terms of architecture, the evidence needed does not always exist within the parameters of “typical” architectural history (visual representation, patronage, the hand of the architect, materiality, style, craft etc.). Using specific legal instruments that were used to contest, justify, or authorize imprisonment as our guide to carceral space allows us to examine a wider range—both historically and typologically—of buildings that are used to detain. Specifically, it allows us to shift focus away from the panopticon as an inevitable culmination of a very specific trend in architectural thought. The types of spaces we will examine all have very different configurations with regards to how they actually contain the body of the prisoner, as well as how they produced an image of what custodial space should be.

Finally, while the direct focus of this project is on the architectural space of the prison itself, a long view of the prison divorced from notions of punishment allows us to see these buildings more broadly as ones that begin to articulate connections between bodies, buildings, and territories. By expanding the types of buildings that can be considered in this history of carceral spaces, we are more able to see how territory itself is inscribed (along with populations) through the use of incarcerated bodies. Jails and prisons bring together, quite literally, issues of sovereign law, the personal rights one might be secured under that law, and the procedures that are necessary to lay claim to both. In that sense this project is about bounded-ness; it is about the spatial articulation of legal limits; it is about islands in general. But it is also about these specific

islands: England, the Channel Island Bailiwicks of Guernsey and Jersey; St. Helena; Cuba. These islands provide the loci for the case studies that I examine here.

A brief note on Bio-power

My aim is to reveal architecture's complicity in convening power in such a way that produces political subjects out of bodies; in other words, to show how architecture operates as a crucial mediator between body and territory. This, of course, is resonant with the philosophical projects of *biopolitics*, which have served a useful frame for focusing scholarly attention on the carceral.²⁴ One of the most useful things that we have learned from this work is that in the law, "the body" can never be taken as a given; there is no self-understood category of biological being that is not also (re)-constituted through legal instruments. In the law, there is no such thing as a "natural" person; legal theory recognizes that personhood is always constructed and always an artifice. In many ways, of course, this is a departure from scientific discussions of the human, which have dominated our secular understanding of the body in the modern world.

However, recent work has begun expose important omissions allowed by taking the approach of more traditional biopolitical thought. First, for the most part Agamben, Esposito, and to a large extent, Foucault rely on the juridical frames of the classical world to stage their theories.²⁵ This is most explicit in the work of Esposito, who, while clearly distilling the artifice of legal personhood that is constituted through the Roman distinction between persons / things / actions, necessarily frames the *dispositive* (a term he borrows from Foucault) of the body in

²⁴ In fact, within architectural history, the topic of imprisonment is very often seen in the context of Michel Foucault's philosophical project concerning governmentality. Foucault's major arguments in his work on biopolitics rested on describing the changing way the state treated the human body. His work does not constitute the theoretical frame here; my argument is neither in support of, nor against, his propositions. A discussion of his work, along with that of his comrades, will be found in Chapters 3 and 4.

²⁵ To name the most prominent scholars in this sub-field. Greece (Agamben) and Rome (Esposito).

terms of property relations.²⁶ As has been pointed out by Butler and Drakopoulou (among other feminist scholars), this necessarily leaves out extralegal spaces that are difficult to see in terms of the *bios / zoe* distinction (as Agamben defined it).²⁷ By focusing on the legal spaces that are already inscribed fully in law, these more traditional biopolitical theories leave out all other legal and quasi-legal spaces that are being explicitly excluded a priori; yet still have political standing in the community at large.

Second, while these theories of biopolitics reveal the artifice of legal personhood, they rarely question that the default subject of full legal personhood will constitute a property-owning (white) man, as the classical juridical model would have necessarily defined it. As has been recently pointed out by Alexander Weheliye (following the work of Hortense Spiller), this leaves out important ways in which what they call “racializing assemblages” must also be seen as part of how the biological body is inscribed with political meaning.²⁸ These difficulties, together with a belief that the materials given by the Common Law (resisting theory) should not necessarily be made to fit a theoretical model based in an alien legal world, suggests that this project does not fit entirely in the mode of “biopolitics” as described by Foucault and Agamben.

So to return to the initial questions, why is incarceration an architectural problem instead of a legal problem? What do we get by looking at prison buildings, beyond a better picture of

²⁶As Esposito notes, the distinction in Roman law between persons, things, and actions produces a way to define persons in terms of what they may or may not own (it is explicitly a property claim)—as the only ones able to claim full juridical personhood in Rome were those able to own (ie, free men). This makes non-owners “thing like;” it defines relationships among people by what objects (including other people) they might own. Roberto Esposito, *Persons and Things: From the Body's Point of View* (2015).

²⁷ In particular, the space of the *domus*, in which woman was not granted full legal personhood; but nor can she be seen as a “purely biological” being (as *zoe*). Maria Drakopoulou, *Feminist Encounters with Legal Philosophy*, 2013.

²⁸ Weheliye specifically notes that both Foucault and Agamben leave out questions of race, notable because of the undeniable ways in which race figures into many of their examples of biopolitical control (for Agamben, the Nazi concentration camp; for Foucault, the prison). Alexander Weheliye, *Habeas Viscus :Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (2014).

how the law developed ideas of sanction? That the legal sanction of incarceration still very much requires the bodily presence of the condemned is evidence that we must take the space of the prison seriously; and, with it, legal sanction as an embodied practice.²⁹ It is this idea—of imprisonment as an embodied practice—that forms the base for this work.

The chapters are arranged roughly according to the chronological order of major events in English legal history. Below is an overview of the material covered in each.

III Chapter outline

Chapter 1. How to get out of jail: the Common Law writ of Habeas corpus

The first chapter examines carceral spaces of the seventeenth century, and introduces a theoretical frame for the project as a whole. I use the prerogative writ of habeas corpus—a legal instrument used in Common Law jurisdictions to contest the legality of a detention—to show how buildings that might not otherwise be considered “architecture,” properly speaking, nonetheless were necessary to produce certain political and legal relationships between people. While these buildings do not easily fall into familiar categories of architectural history (be it style, genre, or even geographic location), they nonetheless share an important characteristic: they were all used to detain. These early carceral spaces have been difficult to understand within the established frames of architectural history for a number of reasons. The stylistic and typological diversity of buildings that were used as jails in the Early Modern period makes the contours of their study difficult were we to follow standard (art-historical) methods in

²⁹ An increasing separation, perhaps, between the dematerialization of our approached to incarceration—literally, as new technologies allow access via electronic messaging rather than in-person visits. See, ie, the Seminole County Jail, which has replaced in-person visits with video calls, and no longer allows inmates to hold physical pieces of mail sent from loved ones (messages are scanned and then read via proprietary communications devices).

architectural history writing. In addition, the architectural diagram of the *modern* prison—which we know today as being a direct corollary to the legal sanction it supports—does not provide a good way to read these early jails; understanding the pre-modern jail solely in terms of legal punishment would be at best, flattening, and at worst anachronistic and distorted. Rather than abandon an architectural reading of early modern carceral space altogether, a new approach is suggested by the widespread use of habeas writs in the seventeenth century. An architectural history of habeas corpus situates the jail within the development of legal procedure and judicial oversight, rather than within a history of penal sanctions, and thus allows us to expand our understanding of how the space of confinement was used historically in legal practice.

The writ of habeas corpus produced a particular kind of political space in the 17th century. Most directly, it made the jail visible to sovereignty legal authority. While properly speaking the writ was addressed to a person (the keeper of the jail), it nonetheless always referred to a *space* of confinement. The writ also speaks more generally to the pervasive influence of law beyond the magisterial spectacle of the law court. The little gesture of a single writ of *habeas corpus*, especially when seen against the overtly theatrical gestures of the assize circuit courts, shows how architecture and its legal discourse quietly established a framework for understanding the proper use of imprisonment.

The chapter also explicitly raises questions regarding the use of historical material when thinking about architecture. In many cases, the writ and its return consist of the primary evidence that certain early modern jails existed. We do not have drawings of the buildings, nor any other kind of image of what the spaces would have looked like. Occasionally, written descriptions of the space of imprisonment accompany the prayer for the writ, but not always. Many times the writs were issued to keepers of buildings that we know were considered jails, which, while

helpful in the sense that we can identify the specific structure, raises a different set of issues. If we have a picture of what those spaces would have been like it is largely thanks to the prison reformers of the 18th century, who had a very specific political agenda in mind when researching and publishing their findings. My aim in this regard is to suggest that the writ of *habeas corpus* might provide a method of thinking about early carceral spaces that are otherwise obscured behind the lack of any other historical evidence.

Chapter 2. How to picture a jail: giving form to jurisdictional claims

In the second chapter I turn to the visual language of the “architectural” prison. In the mid-eighteenth century, the prison as an architectural project was, for perhaps the first time, being given serious consideration. This new form of architectural space needed to fulfill two functions. On the one hand, the prison needed to operate as a real space capable of containing prisoners, as well as the other institutions necessary in the mundane operations of criminal procedure. At the same time, this architectural space also would also need to be capable of being represented abstractly, in drawings and other images.

I frame this chapter through the lens of jurisdiction—or the enunciation of the law. Jurisdiction is how we understand the limits of legal authority, and the chapter begins with a brief outline of the historical shift that allowed political power to lay legal claim on geographic territory. Understanding the historical shift from legal relationships being defined primarily through personal status, to being defined primary through geographic territory, allows us to see how space is delineated and used in the practice of law. Over the course of this shift, we will see how the prison building would be called upon to make its own claim on a certain kind of legal authority. This authority was distinctly bounded: quite literally so, as the prison would now be

understood as a fully enclosed, and fully autonomous, legal space, whose primary function was to create a physical separation between the criminal and non-criminal.³⁰

I look at two specific jail buildings that were at the center of jurisdictional negotiations: one famous, the other in minor outlying territory. Newgate Gaol—one of the most infamous spaces in England—literally intersected the complicated jurisdictional relationship between the City of London and the Crown.³¹ By contrast, the jail in Castle Cornet on the Island of Guernsey served to mark the edge of Crown territory overseas. Disputes over the control over these spaces demonstrates how authority over prisoner's bodies was seen as an important mark of sovereign control. As well, new Georgian buildings commissioned to replace the medieval jails demonstrated a technological shift in how prison spaces were understood. The space of incarceration, formerly defined through furniture such as shackles, would now be defined by the very walls of the prison itself.

These examples show how the enunciation of the law—jurisdiction—required architecture itself to speak. These jail buildings helped to define the limits of legal authority, and made these limits visible. But architecture's discursive work continued beyond the immediate negotiation and subsequent resolution of the dispute. Once jurisdictional limits were defined, the building was necessary to stand in for, and declare, the results of that negotiation. This chapter is thus as much about architecture operating as a material technology of law which served to mark a specific place, as it is about an image that the jail building produced—an image of legal authority—that could be circulated beyond its immediate context. By operating in its capacity as

³⁰ Similar to the way we now think about territorial jurisdiction: the prison building consisted of a defined space whose only function was to outline legal relationships—in this case, by the designation of a particular space for those understood to be criminal.

³¹ A medieval jail in former city gate, Newgate was infamous primarily through personal narratives. The jail was rebuilt according to the designs of George Dance II, and the new Newgate became dislocated from the historical significance of the gate.

a legible marker that was both grounded in a particular site, as well as in its ability to be widely transportable through images, architecture gave the concept of jurisdictional limits an important ability to perform a scalar transposition of legal space. Architecture was required to negotiate the shift from the local to the territorial. This quality was important for the way that legal relationships would be produced within geographically determined boundaries.

Chapter 3. How to construct a fiction: architecture as legal metaphor

Until now, we have taken for granted the truth of a building—the necessary factuality of materiality. But how much can we trust what people (especially lawyers) say, even on the official record? And how does looking at material practice help us understand the usefulness of legal fiction? In this third chapter, I look at the practice of using “legal fiction” in the Common Law, and argue that this is an important consideration when looking at the prison projects of the late eighteenth century. A legal fiction described a procedure that could be played out quickly on paper, even though it described events that appear, on the face of the record, to have been lengthy in time and uncomfortable in space. But rather than an entirely virtual, we will see that legal fiction creates its own form of geographic knowledge. In fact, a major figure in English law—William Blackstone— not only argued for the importance of legal fiction, but relied on architectural metaphor to stake his claims.

Chapter 4. How to calculate a jail: the measured space of punishment

The fourth chapter examines the Penitentiary Act of 1779, which has been understood as an important mark dividing one era of judicial sanction from another. In many ways, the legislative inventiveness of the act, as well as of the corresponding architectural projects, have made it a logical marker of the origins of penal incarceration. However, the idea of using buildings to punish did not arise from a vacuum. As the legal historian John Langbein (among

others) has argued, the stage was already set for this transition to prison sentence.³² Most importantly, perhaps, corporeal punishment was already very much out of favor, and workable alternatives were actively being sought. Moreover, as we will have seen, prisons and jails already existed across England.

Here, I look closely at how existing buildings played a crucial role in reformulating the idea of the prison. Rather than a total invention of brand-new building type for this new penal sanction, legal reformers looked at these existing jails. These buildings, already at work throughout England in the process of apprehending and trying criminals, debtors, and others, needed to be reimagined as the key to producing certainty in legal outcome. In this sense, this time period can be seen less as the “invention” of the prison building, as the refinement of a relationship between the legal and architectural profession.

Our understanding of how these jails operated are colored by the writings of legal reformers—most notably, John Howard—which were intended to convince their contemporaries that jails needed to be regulated and supervised in order to serve their proper function within the law.³³ However, at that time not only these regulations were up for debate. So too were the very functions that prisons should serve within legal procedure. For these reformers, especially those convinced that the prison sentence was an ideal form of punishment, it was strategic to cast the prison as an already extant, though deeply flawed, building type. Also strategic was to cast the prison sentence against alternative forms of punishment that were already generally out of favor and on the decline. These reformers, in arguing for legal reforms, painted a specific picture of the medieval jail that cannot be discounted when understanding their proposals.

³² John Langbein, "The Historical Origins of the Sanction of Imprisonment for Serious Crime" (1976)

³³ John Beattie, *Crime and the Courts in England 1660-1800*. See especially ch 6, “coming to trial.”

Chapter 5. Habeas corpus overseas

In the final chapter, I expand the framework of carceral space as seen through the lens of *habeas corpus* to introduce several different types of territorial relationships. The space of law is typically understood in terms of containers assumed to be self-evident, and which are more or less easily mapped onto corresponding architectural form: the space of the crime; the space of the courtroom; the space of punishment. Habeas corpus, I suggest here, provides a new opportunity for thinking about how architecture is used in legal practice. In particular, I argue that habeas provides a useful framework for understanding the relational geography of the prison building. The sequence of events enacted through habeas corpus positions the jail building within the unrolling of legal procedure and subsequent judicial oversight, rather than as the necessary end point of a judgment. Broadly, an architectural reading of habeas corpus situates the prison building within the process of legal oversight, and requires us to understand the space of sovereign law as including not only the crime scene, the court, and the jail, but also the spaces between them.

Recent historical projects looking at law in the context British imperial expansion argue that legal practice has always been an integral part of the colonial enterprise. The transportability of law was critical for allowing the British Empire to be constituted across the world, as it afforded an established framework within which to settle disputes while maintaining flexibility in response to local conditions.³⁴ This work calls attention to the ways in which the law of the British Empire was, by necessity, made mobile. Most directly, this mobility was produced

³⁴ In particular, see the work of Lauren Benton, who takes issue with Agamben's quite literal reading of Schmitt's one-to-one correspondence between sovereignty-law-territory. She argues that the legal space of empire is always plural—overlapping jurisdictions not only happens, but is a critical part in maintaining control in overseas colonies. In her reading, legal pluralism is an integral part of imperial expansion. Lauren Benton, *A search for sovereignty: law and geography in European Empires, 1400-1900* (2010) And see Giorgio Agamben, *State of exception* (2005)

through British subjects who would transport legal practice with them to Crown Territories. These people were not only judges and lawyers trained in Common Law practice, but also those who expected to be able to resort to the English law to settle disputes, even when they were located overseas. While these accounts helpfully focus our attention on the legal relationships between people (and newly-constituted populations), what remains less clear is how ties between sovereign authority and subject were established physically across contingent colonial geographies.

I argue in this final chapter that the buildings supervised by writ of habeas corpus helped to make these geographies legible. The procedural remedy was an apparatus that created a relationship between the sovereign and subject, as that subject petitioned for release from an unlawful captivity. As such, the writ helped form critical legal relationships that would be necessary for maintaining sovereign connections when that subject left home. But the maintenance of this relationship still required that the subject's body be confirmable through its location within fixed and locatable buildings. If the Common Law was constituted through the mobile bodies of subjects engaged in legal practice, the space of sovereign territory would likewise need to be established through knowledge of the precise location of the subject's body held captive. The writ thus made visible an architectural geography of prisons across Crown dominions.

This chapter thus looks at the implications of habeas practice for the British Empire and its territories. In this context, the geographic reach of habeas, while relying on the precedent set by early modern cases, tested a different set of jurisdictional relationships than ones we will have encountered earlier. Specifically, habeas was no longer about confirming existing ancient privileges but rather about confirming or even producing new relationships between Westminster

and British colonial territories. As such, habeas was as much about the space of territory as the space of the prison itself.³⁵ The assignment of a particular status to a geographic territory—for example, as a protectorate or dominion—gave specific political and legal designation to that territory with respect to the organization of the British Empire. While the writ of habeas corpus demonstrates the importance of the legal space of the prison building, it also draws attention to the ways in which these territorial distinctions would be formulated and practiced in law.³⁶

In this way habeas provides a good place to demonstrate the usefulness of interdisciplinarity in writing architectural history. On the one hand, making visible the architectural space implicit in habeas practice allows legal history to take seriously the role of buildings in producing—and also in contesting—doctrinal attitudes towards punishment and judicial oversight. On the other hand, using the writ of habeas corpus itself—rather than the architectural drawing—as a form of primary evidence in architectural history produces a new reading of the jail outside our standard narrative that might appear to have been closed. As well, habeas corpus allows us to see carceral space as space leveraged by the prisoner questioning her captivity, in order to assert personal rights.³⁷

³⁵ This is especially apparent in this period because the prison space was already known: the writ did not need to define the space of incarceration in the same way as we saw in the first chapter.

³⁶ The paradigmatic case presented in the first chapter, which traced the body of a prisoner from the Poultry Street Compter to the King's Bench at Westminster, showed how the writ defined a diagrammatic arrangement of certain characters (the jailer, the prisoner, and the sovereign) as well as certain spaces (the jail and the courtroom). This is not the kind of case that sets a new precedent, as it showed how habeas worked as expected: a prisoner, wrongfully held prisoner, was able to petition for his own release. In the two cases that follow, we see a less-than-clear relationship between the particular case and historical precedent.

³⁷ In some sense, the power structures that Foucault and others revealed is reversed, since the building is made visible by those without power, rather than by those with power. This is quite unlike many other building types studied in architectural history.

*Ad Lectorem,
Sufficit scire locum esse in Carcere:*

It is enough to know, too much to see
That in the *Compter* there is roome for thee.³⁸

Chapter 1

How to get out of jail: the Common Law writ of *habeas corpus*

³⁸ William Fennor, *The Compters Common-wealth* (1617), p. 1

I Introduction: how to get out of jail.

How does one get out of jail? In early modern England, if you were one of the unlucky few to find yourself locked up, you could simply orchestrate an escape. “Any reader of the eyre rolls will be inclined to define a gaol as a place that is made to be broken,” write Maitland and Pollock, “so numerous are the entries that tell of escape.”³⁹ In any case, it was not common to keep people in jail. “This apparent leniency of our law was not due to any love of an abstract liberty,” Maitland and Pollock continue, “imprisonment was costly and troublesome.” And this is about all that they have to say regarding jails in their *History of English Law*.⁴⁰ But Maitland and Pollock, writing at the end of the nineteenth century, reveal several key assumptions about the modern jail in this brief passage about the lack of them in England’s early history.⁴¹ First, a jail is a place—a building—that is enclosed and ought to be impenetrable; second, that keeping people in jail is oppositional to an ‘abstract’ concept of liberty; and finally, that the administrative organization and cost required to maintain jails is substantial. How we understand these three things together—the jail (and, later, the prison) as a building, imprisonment and liberty as abstract legal concepts, and the state apparatus that makes them both possible—are the subjects framed in this chapter.

A means of escape had evidently not been forthcoming for Richard Bourn. Bourn, who had been discovered taking an anchor and cable as wreckage from the shores of Hastings

³⁹ Frederick Pollock and Frederic William Maitland, *The history of English law before the time of Edward I* (1899, 2nd ed.) pg. 584

⁴⁰ This is not surprising, since the subject of their study is early medieval law. It would be several centuries following the death of Edward I before the prison sentence would be considered a normative legal sanction, and the medieval jail bore little resemblance to the modern penal institution as we know it today. The distinction between the jail (used primary for detention while awaiting further legal action) and the modern prison (used primary as an instrument of penal sanction) will be more fully elaborated throughout this dissertation.

⁴¹ This brief dissuasion of jails is an illustration of Milsom’s point that Maitland had a tendency to view historical change in the law as predominantly state-led. S.F.C. Milsom, *A Natural History of the Common Law* (2003).

sometime in the year 1619, had been summarily imprisoned in Dover by the Lord Warden of the Cinque-Ports. We do not know where, precisely, Bourn was imprisoned. But the judges of the King's Bench certainly did. They had issued an order to the Warden concerning the matter, as Bourn had petitioned the Bench for a writ of *habeas corpus*, claiming that he was being held prisoner without a proper cause.⁴² For prisoners throughout England who believed they were wrongfully held captive, this legal recourse would likewise have been available. The writ of *habeas corpus* offered a remedy for any who could make a convincing claim that they had been imprisoned illegally. This remedy took the form of a written order sent in the king's name to the keeper of the jail, requesting that the warden bring the body of the prisoner along with the cause of his detention to the court of the King's Bench at Westminster. The goal of this process was to ensure that imprisonment in that jail was occurring according to the law of the land, and it was in wide use in England by the end of the sixteenth century.⁴³

The writ of *habeas corpus ad subjiciendum et recipiendum* [(we command) that you have the body, to undergo and receive...] is a remedy for unlawful imprisonment that continues to operate throughout the Anglo-American legal world. Today we might colloquially understand *habeas corpus* as a demand of immediate release from imprisonment. This is not quite so. While the writ is set in motion by a prisoner whose objective is her own release, its immediate aim is to verify the integrity of the judicial system itself, and in particular, the way that prisons and jails

⁴² Cro. Jac. 543, 79 ER 466 (Bourn 1619)

⁴³ This legal mechanism continues, with certain modifications, to be available today in Anglo-American jurisdictions as a remedy for wrongful imprisonment. Recent historical work has shown that precursors to the writ in its modern form can be found as early as the fourteenth century. By the sixteenth century, however, the writ was in wide use and its still-current form had stabilized. See, in particular, Paul Halliday, *Habeas Corpus: from England to Empire* (2010); and William Duker, *A Constitutional History of Habeas Corpus* (1980).

are used in law.⁴⁴ Habeas corpus secures nothing more or less than oversight to verify the lawfulness of a detention. More broadly, we can say that the writ operates as a procedural remedy, concerned with the workings of the justice system. Habeas is very much an inwards-facing instrument, specifically focused on the lawfulness of the processes required to uphold the law itself.

The writ is directed towards someone or some agency holding a prisoner, and commands that this prisoner, along with the cause of her detention, be brought at a specified time to a specified court. There, that court will decide whether or not the prisoner has been lawfully detained. The prisoner is either released or bailed, if the reasons for her detention are insufficient, or remanded, if they are sufficient. While the prisoner gains the benefit of judicial oversight if she has been wrongfully detained, the immediate purview of habeas corpus is the wrongs of the jailer, not the rights of the prisoner. This is crucial to remember, because it means that whatever potential benefit gained by a wrongfully detained prisoner, the writ is always concerned primarily with the jailer and jail in which she has been detained. In early modern England as today, habeas corpus thus establishes a supervisory process in which the immediate object of inquiry is the lawfulness of how the jail building itself is used. When Richard Bourn petitioned the King's Bench for a habeas writ in hopes of securing his own release, he also—though perhaps inadvertently—provided reason for the King's Bench to interrogate the use of jail buildings in the town of Dover.⁴⁵

⁴⁴ In this way we can clearly see how the writ operates as part of a remedial procedure. For a concise description of the writ in these terms see Duker (1980) p. 3. For a thorough account of the writ's contemporary usage (especially in the United States), see the standard textbook on the subject, Hertz, Randy, and James S. Liebman. *Federal Habeas Corpus Practice and Procedure*, 6th ed (2011).

⁴⁵ Although Dover Castle itself was certainly used for imprisonment, it seems there was at least one other building in Dover designated as such, as evidenced by maps and plans of the area drawn in this period. For example, we can clearly see one marked on a survey drawing from the late sixteenth century drafted by William Borough (British Library, Cotton Augustus I.i f.7)

II Why look at habeas corpus as an architectural historian?

The writ's necessary (architectural) space

Our examination of habeas will begin with a quite literal reading of the writ. The formula (explicitly textual, as it is by its nature as a written order that characterized this particular genre of English legal object) has maintained a remarkable consistency over the last four hundred years or so.⁴⁶ It is a command from one party to another, as it concerns a third: *Rex vicecomiti salutem. Habeas corpus...* [King to the sheriff, greeting. (We command) that you have the body]... begins the writ in its generic form.⁴⁷ Issued in the name of a sovereign legal authority, directed towards a lesser authority holding a prisoner in custody, the writ commands that the body of this prisoner be brought to court in order that reasons for her detention are verified as being in accordance with the law. The writ thus outlines a cast of characters and defines certain relationships among them: an authority who is sovereign yet lacks insight into local practice; an authority who is subordinate in the overall scheme of the law yet who maintains a local power to detain; the prisoner herself who is helpless in the face of her physical detention yet has the ability to petition for release.

It is in these terms that lawyers, and legal historians, continue to see the writ. This diagrammatic arrangement of characters has allowed historians to ask important questions with regards to how the writ has been shaped over time, and how it has been used to adjust the scope

⁴⁶ “Or so” is as precise as we can be with regards to dates here. As the proper form itself was not established by statute (typical of many Common Law instruments), there is no definitive date that we can place on its origin. For general discussion on the difficulties of establishing historical specificity in the Common Law, see S.F.C. Milsom, *A Natural History of the Common Law* (2003).

⁴⁷ By the early nineteenth century Latin was no longer the default language for writs, though certain (habeas among them) remain known by the shorthand from their original language. Very little deviation from the standard form is found, even in the United States today (which simply replaces “rex” with “supreme court of the United States,” ie.).

of sovereign legal authority.⁴⁸ Most notably, in its proven capacity to challenge an imprisonment ordered by the king himself (or in the United States today, by an order of a state or federal court), the writ has been presented as an object that reveals the Common Law to be a system that abides by the rule of law and not of tyranny. Judges have tended to see the writ as an important marker of the English law's own foundational principles in this regard.⁴⁹ The right to petition for habeas review, as guaranteed by the Suspension Clause of the United States Constitution as well as the English Habeas Corpus Acts (of 1640 and 1679, in particular), is often interpreted as encapsulating a more general duty on the part of the sovereign government to maintain proper procedures in the administration of its own law.⁵⁰ By guaranteeing an avenue for judicial review, the writ confirms legal relationships between sovereign, subject, and the law's administrators.

But if the writ evokes this constellation of characters, it also necessarily implicates a particular spatial configuration of rooms and their relationships to one another. Particularly, the jail cell and the courtroom. It is how we might understand these rooms in architectural terms that concerns us here. This will not be so straightforward, since the rooms do not belong to the same building; but in any case, it is not the buildings as they stand alone that are of primary interest. These rooms (or rather, this set of rooms)—one that allows for detention and the other that allows for legal verification—separately are merely interior spaces that provide a specific and

⁴⁸ “Diagrammatic” here in the sense that each writ always defined these three characters in this way with respect to one another. This will be described in full later in this chapter. The most prominent legal historians who have written about habeas include Jenks (1902); Duker (1980); Halliday (2010); Freeman (2011, 2017).

⁴⁹ This association was, in many ways, of their own making. Coke, for example, writing in the wake of the Five Knight's Case, argued, “by the common law and statutes it appears that no free man ought to be committed by command of the King, etc., and if any free man be so committed, and the same returned upon a *habeas corpus*, he ought to be delivered or bailed.” Edward Coke, *Debates on the Petition of Right*, 29 April 1628.

⁵⁰ We will return to the Suspension Clause, and to the focus on the exceptional nature of habeas with regards to its ability to be suspended, in the final chapter. In the United States, 28 USC 2241. In England, respectively: 16 Car 1 c 10 established that the command of the King would not constitute a proper answer to a writ of habeas corpus; 31 Cha. 2 c.2 established that habeas would be returnable from jurisdictions across the seas.

immediate function. Together, however, as called out by the habeas writ, these rooms form a disaggregated system of legal supervision that will be able to mark geographic territory.

As we will see, this legal-architectural geography quietly provided the necessary backdrop for the implementation of each writ. And this geography is important, because every instance of the writ, if it was to be returned correctly, had to follow a script, tightly defined. This script provides clues to the legal status of the individuals involved, of course. But it also provides clues to this architectural geography, as the script was not simply a nominal description of procedures discontinued in practice. Unlike other Common Law instruments, which function through the power of the written order alone, habeas needs to be enacted. The body of the prisoner must be brought to the courthouse; it was most certainly detained.⁵¹ As historians, then, we are able to interpret the writs not only insofar as they reveal or define relationships between the people involved in each dispute. The writ also reveals that certain kinds of legal rituals in early modern English law relied on a spatialized understanding of incarcerated bodies.

In other words, while in technical terms habeas corpus was always addressed to a person—to the keeper of a jail, rather than to the space of the jail or to a particular building—it nonetheless necessarily referred back to the fact that one person was being held in confinement.⁵² More, the writ implied that this detention needed to be demonstrably lawful to an authority located at a geographic distance. The ability of the writ to define, in this sense, the legal space of the jail suggests a fundamental question regarding the use of buildings within the practice of the law. How did buildings structure the early modern understanding of how law could make legal

⁵¹ This point is important, because the Common Law does *not* always require written documents to match what is known to be true outside the law. I will return to this idea in the following chapters. Suffice to say here that habeas always serves to question an imprisonment that was extant in fact; habeas is not used to contest a fictional custody (why or if this is necessarily the case, I'm not sure). For an excellent brief overview of legal fictions see John H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (2001).

⁵² With thanks to Paul Halliday for clarifying this distinction (personal correspondence 5/2017).

claims on a subject's body? And, more specifically, how did the material operation of the law in space effect the development of personal legal rights? A close look at the writ, and the buildings and spaces it necessarily interrogates, helps us understand how the idea of imprisonment as lawfully defined containment developed through the entanglements of law, building, and state power.

Jails in early modern legal procedure

So how to begin our architectural history of habeas corpus, and how will it differ from existing histories of jails? For one, we will have to look at early modern carceral space outside the terms of punishment, retribution, or rehabilitation—which are primarily the ways by which we understand the jail or prison in architectural history today. Punishment was not the main function of jails in the early years of habeas. In early modern England, judicial sanctions had certainly evolved since the *wergilds*, or man-prices, of Æthelberht, Ine and Offa.⁵³ But they still involved blood if a serious enough injury had been committed—one that could not be compensated for by the payment of a fine. While our contemporary term “crime” would not have made much sense to these early modern litigants, nonetheless categorizations of offences were made legible based on the legal sanction that would have been deemed appropriate. In addition to the gravest wrongs—such as murder, rape, and housebreaking—a capital transgression was any property offence involving a sum of more than forty shillings, or any injury considered a breach of the King's Peace.⁵⁴ Maiming, banishment, or a combination of these was dealt to those who

⁵³ These are three of the early legal codes promulgated in Kent, Wessex, and Mercia, respectively, and which were referenced by Alfred the Great in his own. These “codes” essentially consisted of lists of prices and blood penalties to compensate for varying levels of bodily injury done to people of varying status. See Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (1999); especially Part I, “Preliminaries.”

⁵⁴ This 40-shilling price was never adjusted for inflation, so the death penalty was sentenced for progressively minor infractions. Breaking the peace could involve more minor offences if they occurred within certain places—the highway, for example—thus providing one more example of the spatiality of Early Modern law. A comprehensive

were able to plead a lesser offence. Even outside England, these punishments were common throughout pre-modern Europe, as they were relatively easy to inflict without the apparatus of a strong state. Penal imprisonment, or prison as a punishment, was not common until the early nineteenth century.⁵⁵

This is not to say that imprisonment did not exist in medieval Europe. However, incarceration played a much different role from the one it does today. A medieval jail was used primarily for custodial purposes, and was more properly seen as an integral part of legal procedure rather than as a sanction in its own right.⁵⁶ Within the established framework of English legal practice until around the mid-eighteenth century, jails were understood as an auxiliary technology within the rituals of the assize court circuits (more on this later), and as general-purpose detention facilities in the practice of the law of debts and wrongs.⁵⁷ Most of those in jail were held as surety for payment of debt, or to compel further action such as paying a fine. Imprisonment was also common to detain someone accused of a more serious infraction as a temporary measure while awaiting trial. Men and women thus imprisoned could get out of jail by paying their debts, by going to trial, or by posting bail. These options were often impossible. Debts were not paid because (unsurprisingly) the debtor had no money, and his obligations would be compounded by payments the jail keeper would expect in exchange for providing

overview of developments in criminal procedure and sanction in England is given in J.M. Beattie, *Crime and the courts in England, 1660-1800* (1986)

⁵⁵ For a concise argument of how a strong state apparatus was a necessary condition for the development of the prison sentence, see John Langbein, “The historical origins of the sanction of imprisonment for serious crime” *The Journal of Legal Studies*, 5 (1), 35-60 (1976).

⁵⁶ There are a few exceptions to this general principle. Short sentences (between one and three months) of confinement were regularly handed down to those found in violation of infrastructural upkeep—see, for example, the listings in *The Office of the Clerk of Assize: Containing the Form and Method of the Proceedings at the Assizes and General Gaol-delivery as Also on the Crown and Nisi Prius Side* (1682).

⁵⁷ A discussion of the assize court circuits will follow shortly. We will return to the ways in which medieval jails were framed by Enlightenment reformers in Chapter 4.

accommodation and food (these fees a primary source of income for a jailer).⁵⁸ Trials occurred regularly but infrequently, as the assize circuit courts (which tried each county's most serious cases) were held only two times per year, and thus meant that an accused person could be held in jail for up to eight months depending on when the arrest occurred with respect to the circuit schedule.⁵⁹ Bail was difficult to obtain for those accused of a serious offence, and impossible for those without friends powerful or rich enough to pledge surety. So while the prison sentence would not have been common as sanction, jails certainly played an integral role in early modern proto-criminal legal procedure: in the apprehension of suspects, in bringing them to trial, and in holding those eventually convicted while they awaited their punishment.

I mention early forms of legal sanction, and the divergent use of jails in Early Modern Common Law procedure, to call attention to the fact that the writ of habeas corpus was already widely in use to interrogate the legality of detention several centuries before imprisonment itself was seen as a proper punishment. It is the fact of this historical delay—between the establishment of the authoritative form of the writ and the so-called “invention” of the prison sentence at the end of the eighteenth century—that provides a new possibility for reading the space of the early modern jail. Well before the prison sentence and its architectural correlate, the writ of habeas corpus had already produced a robust framework for understanding (or perhaps

⁵⁸ Pugh gives a good, though dated, account of the administration of medieval jails. Note that most of his information, however, comes from the reformers of the 18th century and thus comes already burdened with certain assumptions about the conditions of medieval jails. R.B. Pugh, *Imprisonment in Medieval England* (1968).

⁵⁹ In addition, certain methods associated with trial were not particularly pleasant, especially for serious infractions, even if they were not considered legal punishment. This could be further reason for wanting to get out of jail before the assizes rode into town. For example, *peine forte et dure*, a practice which today would be considered a form of bodily torture, was used to elicit a plea when a defendant refused, and continued through the seventeenth century in England. For a case to be considered closed, a defendant had to plead either guilty or not guilty. *Peine forte et dure* would compel a plea one way or the other, and prevent him from remaining mute. Jury trial is a consensual proceeding, that can't occur without the consent of the defendant—without a plea, the court couldn't convict a man. Avoiding trial was one way to assure that property would go to the defendant's heirs. See John H. Langbein, *Torture and the Law of Proof: Europe and England in the ancien régime* (2006).

we can even say theorizing) carceral space. As I will argue, jails—buildings that detained bodies—were important not only in the day-to-day administration of local law, but also in securing sovereign oversight across English territory.

Accounting for this historical gap between the emergence of the writ, which was used to investigate the legality of detentions that for the most part were not, properly speaking, intended as legal punishment, and the emergence of the prison sentence as a penal sanction, will require us to view the space of the jail beyond terms of punishment alone; as well, the wide geographic range of the writ requires us to view the jail building outside the parameters of local vernacular or style. But perhaps most importantly, the sequence of events enacted through habeas corpus positions the jail building within the unrolling of legal procedure and subsequent judicial oversight across sovereign territory, rather than as the necessary end point of a judgment. The early history of habeas corpus thus properly situates the jail within the development of these legal procedures, rather than within a history of penal sanctions.

My hypothesis is that the spatial understanding of legal detention produced by the writ of habeas corpus (as part of legal procedure more generally) reveals what we might call a proto-biopolitics at work in seventeenth-century England.⁶⁰ An architectural history of habeas corpus positions the jail building as an important mediator between the body of the prisoner, and the body politic of the English state.

⁶⁰ I use the word “biopolitics” tentatively here. One of the reasons that habeas provides such a compelling framework is that it constructs, simultaneously, both the person (the body) and the space (the jail) as the proper objects of the law. Taking seriously the legal construction of the body as that which comes before the political construction would be a departure from other theories of biopolitics, which assume an existing understanding of what constitutes “the body.”

III Legal histories of *Habeas Corpus*

Historical contexts of early habeas practice

Before mapping the space of *habeas corpus*, it might be useful to briefly outline the historical context in which it originated. While its status as an important guarantor of judicial review was confirmed by the Habeas Corpus Acts of 1640 and 1679, the writ was widely in use well before.⁶¹ It is difficult to pinpoint an exact moment of origin, but generally the early history of habeas ought to be understood in the context of the legal apparatus that were adopted in Medieval England after the Conquest. When the Normans landed in the mid-eleventh century, they had found in place robust working legal practices.⁶² A recently unified England was subdivided into regions known as shires, and the most powerful men of each met twice yearly to settle disputes and take care of local administrative matters. The new rulers who encountered this system saw no need to replace it. This was good political strategy for a number of reasons. Most importantly, it allowed for little disruption of the day-to-day affairs of local governing bodies, whose tasks included, among others, settling legal disputes. However, direct contact with the hinterlands by agents of the king would be necessary to maintain authority.⁶³ In order to cover a large territory, this personal involvement was made possible by two novel instruments that

⁶¹ Respectively: 16 Car 1 c 10 established that the command of the King would not constitute a proper answer to a writ of habeas corpus; 31 Cha. 2 c.2 established that habeas would be returnable from jurisdictions across the seas.

⁶² For two excellent histories of the development of early English law see J. H. Baker, *An Introduction to English Legal History* (1990) and Wormald (1999).

⁶³ The bodily presence of the king was crucial in medieval conceptions of sovereignty. As well, this maintained the feudal order already in place; as in other feudal arrangements, authority was vested in the lord, and the king was the highest lord. For classic legal definition of feudalism, see François Louis Ganshof, *Qu'est-ce que la féodalité?* (1952). On the body of the king, see especially Marc Bloch, *Les rois thaumaturges: étude sur le caractère surnaturel attribué à la puissance royale, particulièrement en France et en Angleterre* (1924) and Ernst Kantorowicz, *The King's Two Bodies: a Study in Mediaeval Political Theology* (1997 [c. 1957]).

developed over the course of the centuries following the Norman landings: the assize court circuits, and the writ system itself.

The assize courts were certainly the more spectacular of these. These courts consisted of a rotating cast of itinerant justices, appointed from the King's Bench, and who, on a defined timetable, literally rode out on six circuits that together covered all of England.⁶⁴ These courts had authority to try the most serious criminal cases in each county. They were also charged with certain administrative matters of interest to the crown, such as making sure that infrastructure—bridges, roads, and hedges—were maintained in good condition. The circuit judges rode out twice yearly, in early spring and late summer, which meant that trials for serious offences would often have to wait several months or more before being heard. This resulted in a regular seasonal ebb and flow of jail populations, as there were only two occasions each year to try serious cases. But this was considered an improvement over the alternative. Previously important cases would have to either be brought to Westminster, or else wait an undetermined length of time for the irregular eyre courts to be convened in the provinces.

These circuits produced a certain amount of legal centralization, as well as oversight of local administration, in a number of ways. The judges themselves were from the ranks of the King's Bench, and were officially barred from riding to their home counties. Having no local roots where the assize courts convened was meant to guarantee the impartiality of sovereign law. This impartiality was deemed important not only in settling disputes, but also because the judges were understood to be bringing information to and from the central courts. These circuit judges would convene in the Star Chamber at Westminster prior to the start of each term—an opportunity to understand what were the current priorities of the king—before riding out on their

⁶⁴ For a comprehensive historical account of the assize courts, see J. S. Cockburn, *A History of English Assizes, 1558-1714* (1972).

respective circuits.⁶⁵ Upon the close of the assize season, the judges would return to Westminster, bringing with them a picture of how things were going in the provinces. “You must remember,” Francis Bacon wrote in his manual explaining the duties to the assize judges, “that besides your ordinary administration of justice, you do carry the two glasses or mirrors of the state; for it is your duty in these your visitations to represent to the people the graces and care of the king; and again, upon your return, to present to the king the distastes and griefs of the people.”⁶⁶

The assize courts were also an important opportunity for demonstrations of wealth and power. These twice-yearly conventions, which included not only the judges of the King’s Bench but also all the most important men in the counties, produced a regularly occurring spectacle of royal judicial power. This spectacle would begin the moment the judges approached the county line, and process to the town in which the court would be held that year.⁶⁷ As described by a seventeenth-century pamphlet on the topic,

When the Judges set forth for that County, the Sheriff send his Bailiff to the edge of the County, to bring them the best way to that place where the Assize for that County is to be held; and before they come thither, the Sheriff attended with his Under-Sheriff, and Bailiffs, with their white Staves and his Livery-men with their Holberds in their hands, and accompanied with the chief of the Gentry of the County ...⁶⁸

At the same time, the county’s jails would be delivered: a caravan of men and women who had been arrested since the last term would make its way to the assize town, to be transferred to a

⁶⁵ According to John Stowe, the Star Chamber, so named after the gilded stars on the ceiling, was built in 1347 at Westminster. The court therein was abolished in 1640; as it had become become synonymous with corruption. (Stow *Survey* p. 391).

⁶⁶ Francis Bacon, *The Duties of the Judges of the Assize* (1618)

⁶⁷ The town in which the court was held itself could change—the location was not fixed—but it was usually was held in the same place. See Cockburn (1972) for a comprehensive listing of assize towns in the 16th-18th centuries.

⁶⁸ *The Office of the Clerk of Assize* (1682), p. 23

temporary holding room in or near the building in which the courts would be held. The trials themselves—usually lasting a few days—would conclude with sentencing, and the meting out of punishments before the judges would ride out with equal fanfare. The assize courts were an explicit show of power, and they were seen as such. Compared to the wandering of planets, the benevolence of itinerant bishops, or streams of paradise, they were also understood to be crucial in cohering sovereign territory to Westminster. As Bacon would write, “the six circuits of England are like the four rives of Paradise, they go to water the whole kingdom.”⁶⁹

(Figure 1.1 Agas Map, detail showing location of the Star Chamber.)

The second, and quieter, Norman innovation of legal centralization was the writ system. At first not so much a regularized system, writs were essentially ad-hoc written orders issued in the name of the king. These written orders soon became one of the basic ways of commencing an action directly in the King’s Court. This writ system was not an explicit attempt to create a new legal system. Rather, it operated as method of secondary oversight, as writs were seen as an exceptional recourse when local legal practice (including the assizes) was deemed insufficient in some way. Originally writs could be written for any number of matters in which the king could personally intervene, and did not follow fixed norms. By the sixteenth century, however, the basic writs had been solidified into about 1200 unique forms, and followed fixed formulae to be used for fixed actions.⁷⁰

⁶⁹ Bacon (1618)

⁷⁰ While their forms become more regularized over time, the writs did not follow a rigorous timetable as did the assize circuits; writs could be issued at any time outside vacation. The temporal quality of the writs was thus much more diffused than that of the assize courts. The “system” of writs developed as such beginning in the twelfth century. See “The Forms of Action” in Baker (1990) for a general overview; and Badshah K. Mian *English Habeas Corpus: Law, History, and Politics* (1984), pg. 3, for habeas in particular.

It is to this system of written orders that habeas belongs. The modern form of habeas corpus came into circulation fairly late in the formalization of the writ system.⁷¹ The familiar *habeas corpus ad subjiciendum et recipiendum* [(we command) that you have the body, to undergo and receive...] arose as a synthesis of several types of twelfth-century writs that either compelled the appearance of the accused, or the charges levied against him, to appear before a court of law.⁷² Early forms of writs that required the physical presence of an accused person to appear at a given time in court were necessary when the defendant did not have land to pledge as surety. Scholars continue to trace the lineage of habeas corpus from these writs that compelled appearance. However, a defining characteristic of *habeas corpus ad subjiciendum* was that more was required than simply the presence of a body.⁷³ The cause of detention—a description of the charges levied against the prisoner—was also necessary for a proper return of the writ. This is quite important, because it implies that a formal reason for incarceration was already a requirement for lawful detention. These charges were taken at face value, and provided an

⁷¹ Writs very close to its modern form, dating from the late fourteenth century, have been found by Duker (1980) and Halliday (2010). The form of habeas (as a means of judicial review) in question here is one of several that began to be distinguished in this period. By the time the writ solidified into its (still current) form in the early sixteenth century, a proper return to the writ of *habeas corpus ad subjiciendum* required the presence of both the body of the prisoner along with a reason for detention. A full return placed everything the judge would need to decide the lawfulness of a detention before him at Westminster.

⁷² These sometimes came in the form of a *capias* summons rather than a habeas writ, but essentially amounted to the same thing. Three other related writs with related ideas include: 1) *De Homine Repligiando*, which took its final form 1227, and whose purpose was to restore liberty to anyone who had been detained. This writ was often used by persons whose status was disputed (ie, free men or villeins). 2) *Mainprize (de Mancaptione)*, which was used to release an accused person who has been refused bail by the sheriff, and was mostly used in cases of felony. And 3) *De Odio et atia*, which assured that no one could be denied an inquest (as it was impossible under English law to pass judgment on someone not present). See Duker (1980) ch. 1, for the idea that this was a combination writ; and Mian (1984), for other related writs.

⁷³ Jenks' classic essay on the topic, and his "most embarrassing discovery" that "the writ *Habeas Corpus* was originally intended not to get people out of prison, but to *put them in it*," has been shown to be not quite right. Edward Jenks, "The story of Habeas Corpus," (1902), p.532 (emphasis original). This argument was immediately controversial; see John C. Fox, "Process of Imprisonment at Common Law," (1923). For a concise account of the consensus on overturning Jenks' argument, see Robert S. Walker, *The constitutional and legal development of habeas corpus as the writ of liberty* (2006) pp 17-18.

account that the king's judges used to determine whether or not a prisoner had been lawfully imprisoned.

The writ always issued directly out of the King's (or Queen's) Bench, and addressed lesser or subordinate jurisdictions throughout England.⁷⁴ The writ's required combination of body and cause is important in this context, because it gave the Bench the ability to verify both the presence of a subject's body as well as the parameters under which local judicial authorities asserted power over that body. Most directly, habeas framed a contestation of the prison guard's jurisdiction over the prisoner's body—a dispute between prison guard and prisoner—as matter of interest to sovereign power. Indirectly, but, as I will argue, just as importantly, habeas likewise framed the jail as a space properly belonging under the king's authority. A plea for the writ on behalf of the prisoner confirmed that her body and liberty were under the protection of the king, while simultaneously placing the space of the prison under the law's supervision. While perhaps not an overt and spectacular display of judicial power, as were the assize courts, the writ was nonetheless an important tool in marking the reach of sovereign law.

(Figure 1.1 A writ of *habeas corpus*.)

Personal relationships, made legal

The remedy of habeas corpus acted as a retroactive supervisory mechanism of the English legal system. As we have seen, the purpose of the writ was to ensure that certain processes used to uphold the law—namely, those involving detainment—were conducted properly. But the words of the writ itself described its own process, enacted by specific characters in specific places. A close reading of these words allow us to understand these actors

⁷⁴ We will return to the broader geographic scope of the writ. As such, the writ would become a useful tool of the central royal courts in asserting its authority over local jurisdictions. This is one of the major arguments of Halliday's book, as well as in Judith Farbey, Robert Sharpe, and Simon Atrill, *The Law of Habeas Corpus* (2011).

involved, as well as the places that they occupied over the course of the writ's procedure. The following gloss is of one writ of habeas corpus, issued from the King's Bench to the Wood Street Compter in the year 1605. I use this one particular example from the writ's early modern history as an archetype with which to diagram the core relationships that the writ maps out.⁷⁵ The formulaic text of the writ runs as follows:

We command you that you have the body of Nicholas Lowe, who is detained in our prison under your custody, as it is said, together with the cause of his detention, by whatever name the aforesaid Nicholas is charged, before us at Westminster on Saturday next after eight days of Saint Michael, to undergo and receive whatever our court should then and there happen to order concerning him in this behalf, and this in no wise omit, upon the peril that befall, and have there this writ. Witness, Sir John Popham, at Westminster, the eleventh day of October in the third year of our reign in England, France, and Ireland, and in Scotland, the thirty-ninth.⁷⁶

Recall that properly speaking, habeas was always addressed to people and concerned their actions as they pertained to others. It makes sense, then, to begin by understanding the characters named here. The writ begins with the first-person plural pronoun, a clear indication that these words are written in the voice of the King (1). It is addressed directly to a jailer (2), concerning the status of one of his prisoners (3). Finally, the King speaks not directly but rather through his proxy, a judge of the Bench (4). We can also reasonably assume the involvement of several additional unnamed characters: the actual words on the page would have been recorded by a clerk of the King's Bench; carriers would have been needed to transport the writ and its

⁷⁵ An Actor-Network framework is useful for this task; since we are attempting to parse the factors involved in this process, and should begin by trying to understand what is at stake for each. This methodological framework requires that we see both human and non-human actors on somewhat equal footing, in order to better understand how certain processes play out in the physical world—and allow us to ask questions regarding how materiality affects the construction of human knowledge (in this case, of the law). A major actor should not be forgotten: namely, the physical writs themselves. These bits of parchment, and later, paper are the actors that summon or gather up all the other actors.

⁷⁶ I borrow this particular example and its translation from the legal historian Paul Halliday's extensive work on the subject. In his survey of the use of habeas over the course of its formative years, Halliday examined the records of hundreds of writs that remain in archives across England. As quoted in Halliday (2010), p. 39 – 40

return to and from the jail, and so on.⁷⁷ With this in mind, those named here allow us to outline the generic cast of characters that was always implicated in each writ: *we*, the king, as mediated through the judges and clerks of the court, commanded *you*, the jailer, who had detained a prisoner. The jailer, who had detained the body of this prisoner, was thereby under investigation by the judge for the legality of his actions under the king's law.

(Figure 1.2 *Habeas Corpus* text, diagram 1)

This particular example directly concerned these four primary characters, which we can now name with some specificity: King James I; the jailer of the Wood Street Compter; prisoner Nicholas Lowe; and judge John Popham. With the writ, James I claimed his right to verify that the warden of the Wood Street Compter was acting in accordance with his law. Through this process of verification, the King's protective relationship with the prisoner was confirmed, and the Jailer's actions would be deemed legal or not according to the law of the land as adjudicated by the Bench. In other words, the writ placed these specific people in relation to one another other as King, Jailer, Subject, and Judge. These relationships were already assumed in theory, of course. But the writ was a mechanism by which these relationships could be tested and explicitly laid out. To understand how it did, we have to look at how the writ actually worked, by either activating or calling into question certain capacities for action belonging to each actor.⁷⁸

Most immediately, the primary act under question—the imprisonment itself—referred to the power that had been asserted by the jailer over the prisoner (a). In one sense, by having

⁷⁷ Halliday has also written about the clerks as the invisible actors that are an integral part of the production of law. See Halliday, "Authority in the Archives," (2014), pp. 110-42.

⁷⁸ Or in other words, each of these actors had certain capacities for action, which were either activated or called into question by the writ. What I mean by capacity, or "power," here, is the ability to effect change on the circumstances at hand in a deliberate manner. These "powers," activated by each actor, are what moves the story ahead. The powers are both chosen (the actor has the *choice* to act) and capable (the actor has the *ability* to act) of moving the plot forward.

control of the jail and the keys to the cells, the jailer's power was purely physical: he controlled an enclosed space that could hold a body. This was the jailer's only power relevant to the writ, since it was not concerned with what happened before or during the moment of arrest. The jailer controlled the physical containment of the prisoner's body, which was contingent on the brute strength of prison walls, or whatever other technological apparatus was used to detain. The writ assumed this absolute condition of containment. The proper use of this power of containment was what was to be examined by the writ, after it had been set in motion by a story.

This story (sometimes called the "prayer") came in the form of a petition to the King's Bench and recounted, by either the prisoner or someone on his behalf, the circumstances of the detention and the ways in which it was deemed by the prisoner to have been unjust (b). The writ needed to be requested, and, as it would only be issued upon proper cause, this story of improper imprisonment needed to be convincing. The petition for the writ, which did not follow any fixed form, would have been reviewed by the judges of the Bench, and thus initiated the process of legal review. This petition was the subject's primary capacity: the ability to express why he had been wrongfully detained, and to have his words heard by the King's Bench. From the point of view of the Bench, the petition embodied the ability of any subject to appeal directly to his King for relief from wrongful imprisonment. However, this capacity was contingent on the prisoner's ability to get his story heard at the King's Bench. In other words, there needed to be in place avenues of communication that could accommodate the transmission of the prisoner's words to the judge. As well, since the prisoner was held in confinement, we can reasonably assume that this petition was transmitted by someone other than the prisoner himself; the prisoner's ability to have his story heard at Westminster was also contingent on others who would have physically

delivered the message. (It is impossible to know how many prayers for the writ—in whatever form—were requested and subsequently lost.)⁷⁹

But even the fact of the prayer's receipt by the court did not guarantee habeas review, since the writ was not automatically issued to everyone who asked for it. When Chief Justice Sir John Eardly Wilmot claimed that the writ of *habeas corpus* was a birthright of the people, by definition born with the Subject's body, he added the caveat that this birthright could only be claimed under the direction of the judge. As he put it, the writ was "*subject to such provision as the law has established for granting it...those provisions are not a check upon justice, but a wise and provident direction of it.*"⁸⁰ This "wise and provident direction" was to be provided by the justices of the King's or Queen's Bench. A third power thus belonged to the judge himself, who decided whether or not the case should indeed be brought before the King's Bench. This judge made the decision to set in motion the official start of the habeas procedure, by issuing the writ in the first place. The judge was witness to the prisoner's story, as told in his petition, and had agreed that a reasonable case could be made against the jailer (c). (How do we know this particular petition was convincing? The evidence lies in Popham having, in fact, issued the writ.) The judge was also witness to the king's power; as well, by sitting on the King's Bench, he had the ability to set that power in motion.⁸¹

⁷⁹ On legal history and its lost assumptions, and questions about historical sources, written records, and etc., see Milsom (2003).

⁸⁰ Wilmot 1758. In this regard, we can see how choices made by these judges could directly influence how the writ would be used. In certain cases, these decisions to issue the writ had profound repercussions regarding its scope. When the King's Bench issued writs that allowed Dutch sailors impressed by the Navy to contest their service, or when it issued the writ to the Canadian court holding an escaped slave to prevent his return to the US, the judges of the Bench were claiming authority over issues that mattered to them. See Halliday (2010) for these specific examples, and how they were used to expand the jurisdictional reach of the King's Bench.

⁸¹ The King's power was called forth through the judge. While the judge was the witness to the power of the King as he signs the paper, it was the King's voice that issued the command. A true belief in the King's prerogative—at play here—might be difficult to access from our contemporary position.

If deemed a case worth pursuing, the Bench would issue the writ to the jailer in the name of the king. Therein, the sovereign's power was voiced in the form of a command, and a threat (d, e). The jailer was given a specific date on which to appear before the King's Bench at Westminster, along with the body of the prisoner and the initial reasons for his detention. When the prisoner was thus brought before the court, the correctness of this detention would be determined, usually by the same judge who had issued the writ.⁸² If it was determined that the jailer had had insufficient cause to imprison, the prisoner was either released outright or (more often) released on bail. This verdict given at the Bench could not be further contested. Failure to return the writ in the time indicated would have been met by the jailer with alias and pluries—additional copies of the original writ—followed by fines, and, after continued avoidance, ultimately the imprisonment of the jailer himself.

When habeas operated according to this model outline (as it most often did), the King's Bench was able to use the writ to call into question local judicial practice, to assert authority over the jailer by reviewing the prisoner's detention. Here can we most explicitly see the ways in which habeas produced legal relationships between our characters. The jailer's original power—the physical ability to imprison someone—was now specifically authorized by the word of the King. The broader implication of the writ, beyond any individual case, would not have been lost on any warden: while his hand may still have turned the keys to the cell, it would be done under the authority of the King's prerogative. In a similar way, when the prisoner himself, who had called upon this same sovereign's authority to effectuate his release, a power that might have

⁸² Importantly, recall that this was not a contestation of a prison sentence as we know it today, since the use of imprisonment as a legal sanction did not yet exist.

previously been understood indirectly was now immediately felt in concrete form as his body was brought from the Wood Street Compter to the King's Bench at Westminster.⁸³

(Figure 1.3 *Habeas Corpus* text, diagram 2)

IV The architectural geography of *habeas corpus*

The Wood Street Compter

Outlined thus far are the ways in which the writ confirmed relationships between people: between the king and his subjects; between the judge and the jailer. While one could say that this was its primary function, none of these relationships would have been possible without a precise understanding of the spatial constraints of the habeas process itself. Note that all of our character's capacities, above, required rooms within buildings, and the ways in which they were connected: from the jail cell, to the court of the King's Bench at Westminster. In parallel with the interpersonal relationships that the writ confirmed, these (at first) interior spaces now also have confirmed relationships to one another, as habeas transforms these interior spaces into outwards-facing ones. I argue that this is usefully understood as a kind of architectural space, produced by the writ as it connected these two rooms in this specific way.⁸⁴ Without habeas, the jail cell would be simply a mute technology, used to detain a body, but without additional political or legal significance. With habeas, that technology is now understood as a supervised, legal space. These two rooms, and the physical infrastructure that connects them, have constituted a legible legal geography.

⁸³ The body of the king is not present; his power is expressed through the judge.

⁸⁴ I say "rooms" here (rather than buildings) because before the writ was issued these spaces were merely interiors, perhaps interiors without any particular significance (architectural or otherwise). The jail was a space that held the prisoner captive; the court was the space in which the petition would be reviewed. Here, I define *architecture* as building + codified formula (in this case, legal formula).

We can better understand this geography by following along the characters as they enacted the habeas procedure. A petition for this particular writ on behalf of Nicholas Lowe had been sent from the Wood Street Compter. This petition would have been reviewed by the judges at Westminster; the writ subsequently issued back to the jail directed that the prisoner's body be brought by the warden to the court of the King's Bench. That place of confinement was now thus doubly marked, as a specific building (the Wood Street Compter) had been given a more general designation. As the writ clearly stated, the prisoner was "detained in *our prison*," and this phrase signified a franchise of the king.⁸⁵ By sending the writ to this particular building, the King's court was not only able to verify that the actions of the jailer were proper according to sovereign law. The writ, and the court that issued it, now also made a claim on the jail building. By explicitly attributing the designation of franchise, the Bench claimed a special relationship with the building as one that needed to abide within certain rules.

What were these rules; and what kind of space was this? The compter was located on the eastern side of Wood Street, one building to the north of Cheapside in the Cripplegate ward of the City of London.⁸⁶ It was established in 1555 (so the poet John Taylor tells us) when prisoners from the old Bread Street Compter were transferred to this location, and remained in operation until it was replaced by the Giltspur Street Compter in 1791 (it was rebuilt on the same spot in 1670 after the fire).⁸⁷ The Wood Street Compter was one of two within the City (the other being

⁸⁵ "Franchise" was the right granted by the king to perform some public function; in this case, keeping the jail.

⁸⁶ Early descriptions of the Compter can be found in Stow's *Survey*; and with this information can be located on the Agas Map of Early Modern London (see figure).

⁸⁷ John Taylor, *The Praise and Virtue of a Jayle and Jaylers* (1623):

The Counter in the Powltry is fo old,
That it in Hifstory is not enrold.
And Woodftreet Counters age we may deriue,
Since Anno fifteene hundred fifty fiue.

located on Poultry Street), each under the authority of one of London's two Sheriffs. This authority was further delegated: the Sheriff's secondary; a clerk of the papers; four clerk sitters; eighteen sergeants-at-mace (and each with his yeomen); a master keeper; and two turnkeys.⁸⁸ Each of these lesser authorities would have been subsequently encountered by a new inmate as he progressed through the jail towards his temporary lodging, each demanding of him a fee (or "garnish," in local parlance) in exchange for (obligatory) passage. Three levels of accommodation were available dependent on how willing or able the new prisoner was able to pay: the master's side; the Knight's ward; the hole. As this account by the poet William Fennor vividly illuminates, the sequence of spaces within the jail were thus given order by the price of admission:

... there was one call'd to shew me the way to my lodging.... This lumpe of mans flesh conuayed me vp a paire of staires, and so to a doore, where another *Fury* like himselfe sate, telling me, that if I meant to haue entrance there, I must pay my fees, or else I could haue no farther passage that way, a shilling was his demand... my corpulent conductour brought mee through a little Gallery, which led vs to a spacious Roome, and then into a Hall hung round about with the story of the Prodigall childe (a very edifying peece of worke-man-ship for the guests of that place) being come into this vncouth and strange place...⁸⁹

These fees would be extorted weekly; as the prisoner ran out of funds he would be removed to the lesser accommodations—that is, if he had not yet managed to secure his release.⁹⁰

(Figure 1.4 Wood Street Compter, elevation)

For me the one's too old, and one's too new,
And as they bake, a Gods name let them brew.

⁸⁸ For a lengthy description of the Compter, as well as a general account of Wood Street see also Walter Thornbury. "Cheapside: Northern tributaries, Wood Street," in *Old and New London: Volume 1* (1878), pp 364-374.

⁸⁹ Fennor (1616), pp 5-6.

⁹⁰ As Thornburym describes "...there was generally some knavish attorney in a threadbare black suit, who, for forty shillings, would offer to move for a habeas corpus, and have him out presently, much to the amusement of the villainous looking men who filled the room." But it is not clear who are his sources other than Fennor. Thornburym (1878), p. 370.

The interior organization of the Wood Street Compter—based on how much a prisoner would be willing or able to pay, rather than by the severity of crime committed—would not have been unusual for this time.⁹¹ Common, too, was the description of such places as being like “a little city in a commonwealth,” a self-enclosed microcosm that mirrored the city in which it stood.⁹² But as much as jails such as the Wood Street Compter operated as self-enclosed microcosms of the wider world, they were never really totally contained. As Fennor tells us,

In the same chamber lay an Attourney: who... demanded of me where I were in upon action or execution, I answered.... To which he replied he would have me out presently, and with an *Habeas Corpus* remove my cause to the Kings Bench to so farewell.⁹³

Habeas was one of the ways in which these interiorized spaces would be regularly connected to Westminster. While Fennor does not seem to have made use of this recourse, Nicholas Lowe, the subject of our example writ, was among the many who did.

A territory of jails

The particular writ that we have been examining named the Wood Street Compter as a jail under the King’s franchise. Given the compter’s explicit establishment under the given structure of authority in the City, as well as its physical proximity to Westminster, it is not surprising that writs of habeas corpus were regularly sent there. But habeas was not limited in its oversight to such clearly delineated jails. In fact, any person detaining someone else could be considered a prison keeper—in part because, as I have mentioned, the writ was technically

⁹¹ Again see Pugh (1968) for the administration of medieval jails.

⁹² This was most often described in terms of the variety of people found inside. As Fennor writes: “This little Hole is as a little city in a commonwealth, for as in a city there are all kinds of officers, trades, and vocations, so there is in this place, as we may make a pretty resemblance between them. In steede of a Lord Maior, we have a master steward to over-see and correct all misdemeanours as shall arise. . . . And lastly, as in a city there is all kinds of trades, so is there here...” (Fennor p. 6-7)

⁹³ Fennor p. 7

addressed to the person detaining rather than the space used to detain. But crucially, because that warden would be addressed, in the writ, *by* that carceral space, the writ implicitly made a claim on the building. The writ applied to any place that could be physically enclosed; any building could thereby be considered a jail under the king's franchise. In other words, the franchise designation was not limited to jails that were explicitly known prior as such.⁹⁴ Here we can begin to see how the writ could be used as part of a system of territorial control, as any building in England that was reachable by habeas writs issuing from the King's Bench could thus be supervised. The writ's wide territorial reach was related to one of its special characteristics, one that made it an especially useful tool of judicial oversight. It was a high prerogative writ, which meant that it was a suit of the sovereign himself.⁹⁵ Because the writ belonged to the King (or Queen), it would be applicable not only to any building within England that was used to imprison. It also, in theory, ran to otherwise exempt jurisdictions. This theory had been put to test in the early seventeenth century.

Recall Richard Bourn, whom we met at the start of this chapter, imprisoned in Dover by the Lord Warden of the Cinque-Ports. The Lord Warden (Edward Zouche, 11th Baron Zouche of Haryngworth, at that time four years in this office) might well have had good reason to believe he had jurisdiction to detain Bourn. The Cinque-Ports—a confederation of port towns, located on the coast of the narrowest section of the English Channel—had long been considered important

⁹⁴ The theory proves true: habeas writ were successfully returned from not only prisons and jails, but also from private houses and even ships. See Halliday (2010) and Kevin Costello, "Habeas Corpus and military and naval imprisonment, 1756-1816" (2008) for examples.

⁹⁵ This means that habeas was, in effect, the king suing the prison guard for misconduct. In England, it was sound politics to associate this writ, which had a beneficent effect on the king's subjects, with the king's integrity. This would become one of its more ambiguous qualities, since habeas was directly associated with sovereign power even as it provided a means to check it. For more on prerogative writs in general see S.A. DeSmith, "The Prerogative Writs," 11 *Cambridge L.J.* 40; and Edward Jenks, "The Prerogative Writs in English Law." *The Yale Law Journal* 32, no. 6 (1923): 523-34.

because they controlled England's major harbors. In exchange for service to the crown (most crucially, by providing ships for overseas travel, as well as regulating the important herring trade) the royal charters of the Cinque-Ports explicitly granted the towns liberties over wreckage found on the shores, as well as over the apprehension of criminal suspects.⁹⁶

So when Zouche received the order to appear at Westminster with the body of his detainee, he refused, for twenty-three weeks. His failure to return the writ provoked a debate regarding whether or not habeas should be returnable from such seemingly exempt jurisdictions, and ultimately, the King's Bench argued definitively that habeas should, in fact, supersede any other special jurisdictional considerations. "*Habeas corpus*," wrote the presiding Chief Justice William Montague, is "a prerogative writ, which concerns the King's justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned: and it is agreeable to all persons and places."⁹⁷ For Montague, the prerogative nature of habeas corpus thus overruled the special jurisdiction of the Cinque-Ports. He further argued that "to dispute it [that the writ would run there] is not to dispute the jurisdiction, but the power of the King and his Court."⁹⁸ I will return to this point in the final chapter, when we look at the repercussions of this decision, and to the territorial scope of the writ in practice. Important to note here, however, is Montague's clear articulation of the relationship between sovereign and subject with regards to habeas. While the writ was addressed to the prison keeper, its reach

⁹⁶ Artic. Super Car. Cap. 2.2 anno 28 E.1. 1155. The first confederate charter was granted by Henry III in 1260, though the ancient towns had earlier individual agreements in place. F.W. Maitland, *Domesday Book and beyond: Three Essays in the Early History of England* (1987). See also Ford Madox Ford, *The Cinque Ports: A Historical and Descriptive Record* (1900)

⁹⁷ *Richard Bourn's Case*. Michaelmas term, 117 Jac. 1.

⁹⁸ *The English Reports: King's Bench division*. Wilmot, "Opinion on the Writ of Habeas Corpus" (1758), Pg. 466.

followed the king's subjects, wherever were located.⁹⁹ But the writ required more than the king's subject; it needed a *body detained*. To produce this, habeas needed the necessary technology of the jail building itself.

By looking at habeas corpus through this lens, and seeing the jail building as an integral part of a technological system that extended throughout English territory, we can begin to articulate certain characteristics of jails that were particularly important in the process of sending and receiving the writ.¹⁰⁰ Two primary characteristics were *security* and *connection*. These two characteristics, though fundamentally contradictory, necessarily coexisted within the buildings that were reached by the writ. As we will see in the following chapters, this fundamental paradox would be echoed in questions raised by the architects of the prison reform movement towards the end of the eighteenth century, as they grappled with defining the proper internal arrangement of the newly defined prison building type.¹⁰¹ But through the habeas cases we have seen, we can already begin to attribute these characteristics to buildings not specifically designed as prisons by architects. Imprisonment required a condition of secure enclosure; legal recourse required conditions of connection with the outside world.

On the one hand is the extent to which the buildings were enclosed and secure. The writ implied that one could be physically held captive within; or more generally, a space that prevented those inside from leaving at will. Thinking in these terms means expanding our

⁹⁹ Since the writ's reach followed the body of the prisoner, rather than the space of confinement, the writ had the capacity to claim any number of different spatial configurations as subject to the King's law. Not only that, but the mobility of the subject's body—beyond the immediate shores of England—set the stage for the expansion of sovereign oversight overseas. We will return to this in Chapter 5.

¹⁰⁰ Rather than take these characteristics for granted, we need to ask questions of them. As I hoped I have shown in this chapter, these questions are all implicit in the successful return of the writ. But how are they answered? In each case, we need to ask *how* architecture enables a positive response.

¹⁰¹ For a full account of this transition, see Robin Evans, *The fabrication of virtue: English prison architecture, 1750-1840* (1982)

definitions of enclosure beyond the building itself. While security certainly required technologies of enclosure, these were not always at the same scale, and were not necessarily at the scale of the building. Furniture, such as shackles, was used in some cases (for example, the London City jails and compters), while at the opposite end of the spectrum, entire islands would also be considered self-evident containers (for example, the island of Guernsey, as we will see in chapter 5). In common, and despite this wide range of spaces, the writ assumes incapacity on the part of the prisoner to leave. A space of confinement, defined broadly in these terms, is one that prohibits or limits the comings and goings of those confined.

On the other hand, this security did not mean a space completely isolated from broader connections to a political community (in these cases, to the central authority of the King's Bench). The writ required that the prisoner be able to have her story heard by local and sovereign authorities. In other words, for the writ to be issued, it needed to be known that a man or woman was imprisoned, and perhaps wrongfully so. This involved technologies of communication and transportation. Given that the prisoner was incapable of leaving herself, would she still be capable of sending a petition for the writ that would be received by the Bench? Answering requires taking into account the relative geographic position of the jail with respect to Westminster. Were there established avenues for communication between the prison and the King's or Queen's Bench? How long would it take to send and receive a message? Could the prisoner reasonably assume that a message sent from the prison would, in fact, be received by Westminster?

All of these questions were implicitly answered by a successful return of the writ.¹⁰² A prisoner, held captive in an enclosed space that still allowed for her voice to be heard through her petition for the writ, called attention to the jail as a space that required sovereign oversight. Through these writs, this jail became a legally legible space even though the prison sentence (in modern terms) was yet to be developed as the normative legal sanction. Despite the lack of geometric organization that would come to characterize the architectural type of the modern prison, these carceral spaces can nonetheless be seen as a coherent set, as the habeas writ—an officially recognized formula—confirmed associations between an imprisoned subject and his king through the space of the prison.

Habeas corpus thus defines containment in a way that has little to do with the prison as understood by the architects that would play a crucial role in the prison reform movement of the eighteenth century. The Wood Street Compter, from the perspective of an architectural history that prioritizes reading prisons as places of punishment, would not yet be able to be seen as an ordered space. Ad hoc, filled with a mixture of debtors (and sometimes their families), petty thieves, prostitutes, and vagrants, along with those who were accused of selling goods outside their proper market (as our prisoner Nicholas Lowe was)—the compter was, like most medieval jails, notable for the lack of correspondence between the building's typological spatial organization and the legal and social delineation between types of prisoners. This space was, in a sense, the perfect antithesis to Bentham's Panopticon and the architectural projects that followed:

¹⁰² A successful return would then allow the case to be used as part of construction of a certain ideology, in which *habeas corpus* is equated with the idea of personal liberty. Note: Was this contestation a regular practice, or was it a unique instance that could then be used to set a precedent?

buildings that separated and made visible classes of people in order for them to be normalized by a central authority.¹⁰³

Yet the writ of habeas corpus made the disordered space of the jail visible in its own way. This space was not arranged according to the characteristics that we have become familiar with from understanding the development of crime and punishment. Rather, they were arranged on the basis of the prison keeper's wrongs, and also on the geographic contingencies, or relative position, of the prison and the courthouse. Although not yet legible in architectural terms, the jail was legible as a particular type of space that played its particular role in the processes of judicial oversight. Even without extant architectural drawings, we know, for example, that a jail at Dover was perfectly legible as a carceral space to the King's Bench when it sent the writ for Richard Bourn's body, just as was the Wood Street Compter in the nearby City of London.

The immovable court

Understanding the legal geography of the jails reached by habeas calls attention to the importance place as an important factor in thinking about the procedures of law. The jail, as a legally supervised space, was not abstract; rather, it was understood by the judges of the King's Bench as a literal place that sovereign law could reach, through the strips of paper or parchments on which the words of the writ were recorded. We have spent some time discussing the architectural geography of jails in England, and how this geography was made legible by the reach of habeas corpus. We have yet to examine the other necessary place invoked by the writ: the King's Bench at Westminster Hall. While the writ called into question detentions produced in

¹⁰³ In these typological prison buildings, architectural form mirrored social and legal form. We will return to this idea in the following chapters. I.e., see Foucault's (1977) principles of normalization; and specifically as related to designs of prisons, see Ignatieff, M. *A just measure of pain: The penitentiary in the industrial revolution, 1750-1850* (1978), and Evans (1982)

a wide array of buildings, the writ's return—along with the body of the prisoner—always needed to be sent back to the same place. The flexibility of the jail's space was thus, in some sense, given anchor in the King's Bench at Westminster Hall.

When place matters to jurists, buildings are a good way to be certain about its literal instantiation. The ability to use a building's measurable certainly as a vehicle to carry legal meaning has a long history in English law. One clue that this might be the case is that many of the early institutions of centralized justice in England became known by how and where specific tribunals met. For example, the court of the Exchequer (which handled matters pertaining to the Crown's coffers), owes its name to the room furnished with checkered tables that allowed for easy accounting.¹⁰⁴ Even more telling than the titular conflation of buildings with the men who gathered there, however, is the way the details of those buildings were discussed by jurists. For them, the court building's significance was not solely expressed in its aesthetics. Westminster Hall, the physical site of King's Bench, gives a prime early example of jurists applying a literal interpretation to the space of law.¹⁰⁵ The King's Court at Westminster marked a physical location, and one that needed to be certain.

That there would necessarily be such a place should by no means be considered a given. The centrality of early medieval royal administration did not correspond with a static physical location, since the *curia regis* (the king's court) by definition followed the king, and he did not

¹⁰⁴ Mark Jarzombek makes a related point about the corridor having its origin in the activity of people running from place to place. However, the significant difference here is that the physical place of the court precedes the people who occupy it: in the century after the conquest the word *curia* always referred to the physical place (literally, a court), and only later come to signify the institution that we associate with the legal "court." See Mark Jarzombek, "Corridor Spaces," in *Critical Inquiry* vol. 36 #4. (Summer, 2010). For the origin of the idea of courts as institution, see chapter 10, "The changing concept of a court" in J.H. Baker, *The legal profession and the Common Law: historical essays* (1986).

¹⁰⁵ Westminster was the place whence all writs were issued, and where they needed to be returned. It makes sense that courtrooms and courthouses have this significance; the courtroom is the most visible site of justice.

stay in one place for long (it would have been politically unwise to do so).¹⁰⁶ However, the advantages of having a predetermined location in which to settle certain types of administrative matters must have been apparent, and by the late twelfth century, a royal court began to meet regularly in Westminster even when the king was not present.¹⁰⁷ While itinerant justices twice yearly completed their assize circuits, travelling to each county to hold criminal trials and settle civil disputes, judges while sitting on the King's Bench tended to hear pleas in Westminster Hall. What perhaps began as a practice of convenience was later understood to have been guaranteed by an interpretation of Magna Carta, which read in its seventeenth clause: "Common pleas are not to follow our court but are to be held in some fixed place."¹⁰⁸ At the time of Magna Carta this fixed place was not expressly understood to be Westminster, nor any other specific geographic location. By the late fifteenth century, however, the clause was taken quite literally to mean that the physical location of the King's Bench could not be moved. Chief Justice of the Common Pleas Francis North wrote in the early seventeenth century of the debate, settled once and for all by his predecessor Sir John Bridgeman:

The Court (answering the Title *Common Pleas*) was placed next the Hall Door, that Suitors and their Train might readily pass in and out. But the Air of the great Door, when the Wind is in the North, is very cold, and, if it might have been done, the Court had been moved a little to a warmer Place. It was once proposed to let it in through the Wall (to be carried upon Arches) into a Back Room which they call the Treasury. But the Lord Chief Justice *Bridgeman* would not agree to it, as against *Magna Charta*, which says that the *Common Pleas* shall be held *in certo Loco*, or in a certain Place, with which the Distance

¹⁰⁶ For medieval monarchs, maintaining power necessitated a personal (and visible) connection between king and subject. On the subject in general, see, for example, Marc Bloch (1924). For a brief account of the early history of the royal courts in England, see Baker (1990), pg. 17-18, and J.H. Baker (1986) pg. 153-169.

¹⁰⁷ The first court to remain in Westminster permanently was the Exchequer, which was in charge of the king's finances and named after the room in which it met. Since that court literally held the king's wealth, it was logical that this institution would remain in one place. Baker (1990) pg 18.

¹⁰⁸ "Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo." "The 1215 Magna Carta: Clause 17", *The Magna Carta Project*, trans. H. Summerson et al http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_17 accessed 20 July 2017

of an Inch, from that Place, if inconsistent; and all the Pleas would be *coram non Judice*.¹⁰⁹

Bridgeman held that if the Bench were to move even an inch from the place in which it was known, the pleas would be seen as taking place “not before a judge” (*coram non Judice*), and could not be considered within proper jurisdiction. Here the literal location of the King’s Bench was a crucial factor in maintaining its legitimacy, and this location was guaranteed by the building in which it stood.¹¹⁰

As the central royal court, it may seem be logical for the site to have gained particular importance. But the story reveals something more general about the common law: that certainty of place and legitimacy in law go hand in hand. Regardless of whether or not North’s account of the importance of the King’s Bench as fixed locus exaggerates Bridgeman’s view, the anecdote indicates that a notion of spatial specificity that could be confirmed through a building was already deeply at play in the legal imagination as early as the seventeenth century. An exact account of a building, in its arrangements of entrances, walls, benches, arches, was necessary to articulate the legal point regarding the tribunal’s jurisdiction. That the building fails in certain basic functional parameters—here, letting in the cold northern wind—further emphasizes the distance between what would be seen as the proper architectural arrangement and proper legal arrangement of its parts.

This physical place of the King’s Bench—immovable, stable—was a crucial link that provided, in a sense, a fixed point against which to see the jails in the provinces. Petitions for habeas writs would make visible certain buildings across English territory that were used to

¹⁰⁹ And North was particularly interested in architecture, as he was involved in the rebuilding after the Temple Fire. Roger North, *The life of the Right Honourable Francis North....* London, MDCCXLII. [1742]. Pg. 97.

¹¹⁰ But then the old court is demolished and rebuilt in 1741. What do we do with that?

incarcerate; the writs and their returns would provide a regular method by which to interrogate the use of those buildings. Reciprocally, the necessary display of sovereign authority, as embodied in the structure of the King's Bench, could be perceived from any number of enclosed spaces, as prisoners held within petitioned the Bench—in hopes that they might get out of jail.

V Conclusion: a diagram of lawful detention

In this chapter, I have presented several related arguments regarding carceral space in early modern English legal practice. First, I have argued that the prerogative writ of habeas corpus is a useful framework through which to re-define the architectural qualities of the jail building. While we cannot assume that seventeenth-century jails shared typological similarities (in the way that later ones would), the formal stability of the writ's text produced a legible legal and political claim with regards to those buildings. In this sense, habeas corpus is a code that orders our understanding of built space, even though the writ did not dictate the specific boundaries of that space, nor its physical construction. In fact, in early modern England the procedural remedy of habeas corpus would have been applicable to jail buildings that already existed. But the writ gave these spaces signification they might not have had before. Throughout England, a jail could be any technological apparatus holding a prisoner, whose exterior locks were opened under the local authority of the jail's warden. The investigation of a (potentially) unlawful imprisonment in that jail, through the prerogative writ of habeas corpus, designated that space as a sovereign franchise. This jail could now be understood explicitly as part of a networked system, linked, ultimately, to the King's Bench at Westminster hall.

I have called this networked system an “architectural geography,” as interior rooms (the jail cell and the court of the King's Bench) became outwardly associated through the process of sending and receiving the writ. In other words, these rooms, merely functional interiorities on

their own, became exteriorized when defined legally via habeas. Furthermore, each of these spaces marked a specific place—the jail, located anywhere a subject of the king was held captive in a building; the court, a fixed place at Westminster. Habeas thus produced relational affinities between the space of the jail and the space of the courtroom. It is these affinities that provoke a new architectural definition of the carceral: a locatable space, which detains a body, under the supervision of sovereign legal authority.

Second, I have argued that thinking about the space of habeas is useful beyond architectural history. While the importance of habeas within legal discourse is well established, there is little discussion of the role that space played in its historical development. By looking at jails as they were situated within a specific physical and political territory, we saw how buildings constituted a technological system that was as important as doctrine in securing judicial oversight—even though this physical infrastructure was rarely mentioned explicitly by practitioners of law. In other words, although they did not factor in the legal discourse of habeas, buildings were required in order to use the writ as a method of judicial oversight. As a precondition to its issuance, the writ required the presence of the accused (the prisoner) within a specific building (the jail). In appealing to the royal prerogative, prisoners using the writ of habeas corpus called attention to the physical space in which they were held. The writs provided a reason for—and justification of—sovereign control over these spaces.¹¹¹

¹¹¹ Producing a system, in other words, that helped to establish sovereign territory. The success or failure of this practice in securing sovereign control depended upon the specific geographic and technological, as well as institutional, relationships between local authorities and Westminster. Variations within the space of the prison, and in the way prisons were situated with regards to Westminster, accounted for variation in legal outcomes and legal arguments. Like many aspects of Common Law, change in practice (as opposed to in statute)—in this case as necessitated by a diversity of physical spaces and the ways in which they were accessible by agents of the Crown—contributed to the development of British Common Law procedure. We will return to these ideas in the final chapter. See S.F.C. Milsom, *A Natural History of the Common Law* (2003) for a brief analysis of the debates surrounding how change manifested in the Common Law.

In contrast to the large visible gestures of legal and political control—and as a prime example, recall the grand spectacle of the assize courts—the writ of *habeas corpus* is a little gesture. It only becomes grand in the aggregate. Each instance of habeas does not amount to much. But taken together, the diagram that the writ maps—between prisoner, guard, and king, and between jail and courtroom—produces a robust spatial understanding of sovereign law. *Habeas corpus*, a specific legal procedure that, in our Anglo-American context, has come to evoke the very foundation of personal liberty, would not be possible without a concept of the jail building as a geographically determined architecture. Our understanding of this legal principle, then, requires us to understand how buildings make contained bodies legible in law.

Venio sicut fur
*[I come as a thief]*¹¹²

Chapter 2

How to picture a jail: giving form to jurisdictional claims

¹¹² Medieval Newgate, inscribed above entrance (anon.)

I Introduction

The previous chapter foregrounded the ways in which a spatial distribution of jails enabled oversight of local legal practices in early modern England. Jails were activated as legally legible spaces by the writ of *habeas corpus*. These writs not only allowed us to understand early modern jails as material manifestations of political and legal relationships between individuals, but also—perhaps more importantly—to understand how carceral spaces negotiated the relationships between sovereign and local authorities. This lens of habeas corpus, however, does not produce legibility in formal architectural terms, as the buildings supervised by the writ do not easily fit into historical narratives based on style or typology. Habeas focuses on jails as a technological apparatus which facilitates judicial oversight, but leaves out the architectural production of meaning as it is commonly understood: that is, architecture’s capacity to function as a tool of communication that is visual as well as embodied.

In this chapter, we turn to this visual language of architecture as it articulates legal claims. Specifically I address the first declarative act of law: jurisdiction. Jurisdiction is the method by which we understand the limits of legal authority; and in drawing these limits, we will see how jurisdiction requires both the functional and the symbolic apparatus of built space. Here, I will examine jurisdiction in the context of newly-developing ideas regarding the architecture of the prison building. The new architectural prison of the late eighteenth century was intended to declare limits: of legal authority, as well as of the prisoner’s body.¹¹³

Today our understanding of jurisdiction is closely associated with our understanding of geopolitical territory. I begin by unpacking the legal concept of jurisdiction, and outline the ways

¹¹³ Functionally, the bounded nature of the prison building—in its ability to contain prisoner’s bodies—would be interpreted insofar as this function could be used to claim political power. As well, new prison projects of the mid-eighteenth century showed that the prison as architectural style had the capacity to deliver a specific message.

in which contemporary ideas of territorial jurisdiction differ from historical predecessors. This history reveals a shift from jurisdiction as a discourse that articulated relationships between people or groups of people, to one that acted as a territorializing agent. While existing accounts of this shift call attention to the political usefulness of expressing legal relationships in spatial terms, as well as to certain technologies that made this expression possible, none specifically address architecture as such a technology.

To examine architecture's role in producing this historical shift, I consider the way that jail buildings were used in jurisdictional disputes, and show how these buildings allowed jurisdiction to be marked out in geographic space. These disputes provide insight into both the *what* and the *who* of jurisdictional claims: what law is being claimed, and in whose authority? Perhaps more importantly, however, these examples also reveal that *where* these claims are made is not so easily separated from these initial questions. Further, the physical space of these jurisdictional disputes allows us to see how distinctions between legal categories are rarely as simple as they might at first appear. Defining jurisdiction is a messy process, and in the examples that follow, a physical site became a useful tool in determining the limits of legal authority.

I take a close look at two specific spaces of imprisonment—jails in Guernsey and London—at the moment just before the modern reform penitentiaries of the early nineteenth century were designed and built. We will see how the medieval spaces of the jail in Castle Cornet on the island of Guernsey, and of Newgate Gaol in the City of London, were positioned by local stakeholders as crucial for asserting their own jurisdictional authority with respect to the Crown. These two medieval jails would both be replaced by purpose-built prisons, and understanding local struggles for legal authority is important in contextualizing the discursive work that the new Georgian buildings would be called upon to do. Through these examples, this

chapter thus also encounters the work of a particular architect. Our protagonist here is George Dance II, whose reconstruction of Newgate (completed in 1782) signaled a shift in thinking surrounding the architecture of the prison and jail: these buildings were beginning to be seen as an architectural type that required the specific expertise of an architect. Dance did not go on to design many other jails, as did architects such as William Blackburn who were becoming known especially for their work on prisons and penitentiaries. The one other project for a prison designed by Dance was to be located on the island of Guernsey.

But I begin, briefly, with Newgate, and with a set of images that span the transition in question.

II Juris / diction

The jail-breaker

The street, deserted. In the picture's middle ground a gatehouse frames the exit to the city; though by now, in the mid-eighteenth century, London had well outgrown its walls—a visible reminder of its Roman legacy. In any case, this particular gatehouse had been several times rebuilt, most recently, after the Great Fire of 1666, “with greater magnificence than any of the other gates,” (or so proclaimed the *Gentleman's Magazine*, in 1750).¹¹⁴ A deep shadow cast by what must be the early-morning sun darkens a passageway beneath the gate; above, pairs of statues in their niches flank heavily grated openings. Just to the right, a fifth figure. Of similar scale to the statues of Justice and Liberty that adorn the building's eastern face, this one appears to have been dislodged. He hangs, not by the neck (that would happen later) but rather by his hands from a length of fabric; he hangs, as this picture captures, in a momentary stasis between

¹¹⁴ Of the GATES of LONDON. The Gentleman's Magazine: and historical chronicle, Dec 1750; 20, British Periodicals pg. 591

inside and out. This has evidently required some effort on his part, as the accompanying text describes:

Early in the morning, on Whitson-Monday, the 25th of May, having filed off his fetters, he made a breach in the wall, took an iron bar and a large wooden one out of the window; then having twenty five feet to descend, he tied a blanket and sheet together...¹¹⁵

(Figure 2.1 Jack Sheppard, escaping)

This would be the first time of several that Jack Sheppard, notorious house-breaker and jail-breaker, would escape from Newgate Gaol. Memorialized in verse, biography, and even paintings, Sheppard's name was known throughout England as much for his ingenious flights as for his robberies.¹¹⁶ Carpenter turned thief, Sheppard had nearly completed his apprenticeship when he turned to robbing—a second career begun so skillfully that the removal and replacement of bars from the cellar window of a local weaver's shop had gone unnoticed; the 24 yards of cloth subsequently missing thought to have been pilfered by the household servant until Jack was ratted out by a fellow apprentice.¹¹⁷

A second image shows Sheppard confined, once again, this time in the same jail's Castle-room from which he would make his subsequent—even more daring—escape. He sits, leaning

¹¹⁵ Fairly thorough descriptions of Newgate come from accounts of Sheppard escaping, including this one. The Tyburn Chronicle: or, Villainy Display'd in all its Branches. London, 1768. 'The Making of Modern Law: Trials, 1600-1926' . p. 90

¹¹⁶ Linebaugh gives an account of his life as compiled from eighteenth-century biographies (three of which were published within Sheppard's lifetime). For Linebaugh, Sheppard is particularly useful as a prime example of an "other history"—of working class life, etc. Sheppard was born in 1702, and was placed by his widowed mother in the Bishopsgate workhouse where he worked for a few years before being apprenticed to a carpenter in 1717. As Linebaugh reminds us, the workhouse itself was a form of incarceration. Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (1992), pp 8-23. Three early biographies of Sheppard: Anon., *A Narrative of all the Robberies, Escapes, & etc. of John Sheppard* (1724); Anon., *The History of the Remarkable Life of John Sheppard* (1724); G.E., *Authentick Memories of the life and Surprising Adventures of John Sheppard...* (1724).

¹¹⁷ Linebaugh (1992) p. 16

forward, eyes averted from the grated window. A large padlock secures fetters to the floor; his wrists, likewise, are in irons. Here the temporal sequence has been collapsed rather than frozen; the wall behind him already bears the marks of his eminent escape. We know from an anonymous account, recorded after an interview with Sheppard during his final imprisonment a year after this, that he will soon remove his shackles by means of a nail found on the floor. He will find an iron bar, and use it to make a hole in the chimney; he will ascend through the walls to the room above; a room whose door will lie unlocked.¹¹⁸ He would be caught once again, of course, bragging about his exploits in the tavern near Spitalfields. While his final attempt at escape would be unsuccessful, Jack Sheppard's public hanging at Tyburn, on the 16th November 1724, only secured his fame as jail-breaker and thus his status as folk-hero.¹¹⁹

(Figure 2.2 Jack Sheppard, confined)

A second pair of images. These ones photographs, taken sometime at the end of the nineteenth century, which show the same jail as that from which Jack Sheppard had several times escaped some one hundred and fifty years prior. In fact—it is clear—this is a new building. But although they have been displaced within the scene, we are able to recognize some familiar elements: a city street; bodies, crossing a threshold; furniture of constraint.

The street is again empty. This time, however, the building does not frame a view leading outwards from the city. Rather, we are confronted with a corner; an oblique which drives our

¹¹⁸ Anon, *A Narrative of all the Robberies, Escapes, & etc. of John Sheppard* (1724), p. 18-20

¹¹⁹ Several biographies were written of Sheppard, as well as plays, that confirmed his status as a benevolent thief. I.e. this one, an imagined dialogue between Julius Caesar and Jack Sheppard:

C. Now, friend, I have caught thee: wert not thou made a publick spectacle of infamy for breach of thy country's laws?

S. I was, and 'tis there (if any where) I have an advantage over thee: I only infringed the laws, not overturned them. (*British Journal* December 4 1725. reprinted in *Tyburn Chronicle*, p. 106)

bifurcated gaze southwards down Old Bailey street and (had the image been cropped a little less tightly) east down Newgate Street towards the old City center. This building, too, has niches for statues, though they are not presently occupied; the only figure in this image a man, standing, who is rooted at the street's corner, leaning a little towards a lamppost, and who appears to be looking back at us.

(Figure 2.3 Newgate Jail, street view, c. 1890)

The second image brings us closer to the building. And now we are able see a passageway, darkened (as our very first image) in shadow. This gate, however, not framing the threshold of a city but rather framing the threshold of the jail itself. The figures in this image have been caught in the act of crossing that threshold. Two women wearing hats and voluminous skirts, one, in a black coat, poised to leave; the other, her mirror (in white), to enter. Perhaps we can take them as abstractions, as the missing statues of Liberty and Justice, since these women are otherwise anonymous. Here we see shackles, too. In this image, however, they no longer anchor flesh to ground, but rather have been arranged, almost delicately, as if a garland beneath the barred window.¹²⁰

(Figure 2.4 Newgate Jail, detail view of entrance, c. 1890; Figure 2.5 2 maps of London, showing location of Newgate)

It is the deliberate displacement of these elements—of bodies and thresholds; of ornament and furniture—that will concern us in this chapter. What was the new Newgate declaring? What can this building tell us about the ways in which law made claims regarding the space of the city, and the space of the body?

¹²⁰ Newgate was no longer ornamented by tales of men like Jack, but rather through the furniture that would have failed to contain them.

Speaking law: claiming authority

Jurisdiction is the enunciation of the law. As is often pointed out, the word comes from the Latin, *ius dicere*: to speak the law.¹²¹ This ability to speak law is to claim authority; an authority to pronounce on a specific matter under dispute in such a way that its settlement will be considered final.¹²² In this way jurisdiction is a declaration of power. For Sir Edward Coke, writing in the early seventeenth century, jurisdiction described explicitly the power required to impose law, which was necessary for the public good. As he wrote, “*jurisdictio est potestas de publico introducta cum necessitate juris dicendi*” [jurisdiction is a power introduced for the public good, through the necessity of administering the law].¹²³ Since the late Middle Ages much ink had been spilled in service of understanding how law could be properly authorized. Serious questions regarding how to define the limits of a Prince’s legal authority, as well as his ability to delegate the power to judge, were being asked by a new generation of scholars who were reckoning with a plurality of legal authorities, both secular and divine. By the late sixteenth century the theme of jurisdiction was firmly established amongst the most well-known writers on jurisprudence, from Jean Gerson to Jean Bodin to Hugo Grotius, though few other English jurists

¹²¹“Latin *jūrisdictiōn-em*, < *jūris*, genitive of *jūs* law + *dictiō*, noun of action < *dīcere* to say, declare.” “jurisdiction, n.” OED Online. June 2017. Oxford University Press. <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/102156?redirectedFrom=jurisdiction&> (accessed March 09, 2017). And specifically, from *ius* (tends towards the general) not *lex* (tends towards the specific, the written, the enacted). See Peter Goodrich, “Visive Powers: Colours, Trees and Genres of Jurisdiction.” *Law and Humanities* 2, no. 2 (2008): 213-31; and Peter Rush. “An Altered Jurisdiction: Corporeal spaces of law” in *Griffith Law Review* 6:144 (1997)

¹²² Dorsett and McVeigh lean heavily on Hannah Arendt’s work regarding authorship and its relation to authority, and posit the idea that jurisdiction’s claim is primarily a one of authority. To have jurisdiction over a point of law is to have the authority to pass judgment on a particular dispute; it is a claim of authorship. See Ch. 3, “Authority and authorization: sovereignty, territory, jurisdiction” in Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (2012).

¹²³ Translation from Ballentine’s Law Dictionary. Or “*Jurisdictio est autoritas judicandi sive jus dicendi int’ partes de actionibus personarum et rerum secundum quod deducta fuerunt in iudicium per auctoritatem ordinariam seu delegatam.*” Coke attributes this definition to Bracton. Sir Edward Coke, *The fourth part of the Institutes of the laws of England: concerning the jurisdiction of courts.* (c.1644) (Thereafter *Institutes*)

apart from Coke had much to say on the topic.¹²⁴ Jurisdiction is derived, Coke tells us, of “*Jus*, and *ditio*, i. *potestas juris*.”¹²⁵ Combine the law (*jus*), and “to speak,” and we get the power to judge. “To declare the Law,” agreed Thomas Hobbes, “is not Judgment, but Jurisdiction.”¹²⁶ Jurisdiction is not only distinct from judgment, but necessarily prior to it in time. In its declaration of it, jurisdiction can be seen as the first act of law.

The assignment of jurisdiction thus implies a double question: Who is speaking? About what? In Coke’s England, these questions were inseparable. Jurisdiction was defined according to the court which held it; each court was defined by the legal questions it was capable of answering.¹²⁷ In order to define your jurisdiction you must be able to articulate the types of legal disputes over which you may pronounce judgment; by doing so, you lay out the parameters by which you are understood as a legal tribunal. In Early Modern England, no one court had proper authorization over all legal matters, and the first question asked of any given dispute was to determine the tribunal to which it would belong. To give an example, marriage would be considered within the jurisdiction of the Church, while matters pertaining to trade or commerce might be within the jurisdiction of a trade court.¹²⁸ This type of jurisdictional “shopping,” in

¹²⁴ This is the era of the so-called school of “natural law.” For three good introductions to this period in general, see Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (1993); John Neville Figgis, *Studies of Political Thought from Gerson to Grotius, 1414-1625* (1956); Donald R. Kelley *History, Law, and the Human Sciences: Medieval and Renaissance Perspectives* (1984).

¹²⁵ *Institutes*, preface p. 1

¹²⁶ Thomas Hobbes, *Dial. Com. Laws* (1677)

¹²⁷ For contemporary theories of sovereignty that touch on these questions, see especially Giorgio Agamben, *State of Exception* (2005). Agamben examines the nature of the sovereign as the one who decides the limits of the law. We set aside this question for now, since in all the cases I look at the authoritative bodies are more or less defined. The questions begin here not with whether there *is* authority, but rather what questions are established within a given physical site. While Agamben’s work frequently evokes an idea interiority to define the sovereign; never is this interiority explicitly spatial.

¹²⁸ A man getting married would go to the Church so that it was done in a legally binding way; that same man might approach a trade board to resolve a dispute over tariffs levied on imports of marmalade. Tariffs on marmalade was complicated since the product was not taxed in the same way that a raw import, such as sugar, would be. This

which one would go to the court most relevant to the dispute in question, would have been common throughout early modern Europe.¹²⁹

To understand jurisdiction is thus to know how to categorize law. By practical necessity most legal disputes could be placed into categories such as those above. The varied institutions of courts and tribunals maintained specific expertise in order to allow for speedy resolutions of diverse arguments, and in this sense jurisdiction might seem rather a matter of expediency than of political philosophy. But while initial categories of law might at first seem simple, any given dispute can never be entirely reducible to one domain. For example, while marriage was nominally the exclusive purview of the Church, it could become the object of a civil dispute in the event of a contested inheritance or title. Jurisdiction is useful because it allows disputes to be settled within courts that maintain specific expertise, and whose institutional processes allow litigants to understand how to bring a claim to court. However, the repercussions of that court's decisions do not always correspond to the initial categorical divisions with which the dispute was named. At times, the implied simplicity of jurisdictional categories can hide the political repercussions of legal decisions. Other times, a dispute over a jurisdictional limit itself forces a direct confrontation between competing legal authorities. And so almost immediately the question of legal categorization becomes political once again.

We return to jurisdiction's claim of authority, and thus to law as a tool of governance. In early modern England, who could claim this power to speak? Though ultimately derived from the sovereign king, the power to judge was expressly delegated to lower authorities. It was

example comes, of course, from the Channel Islands, where tax code loopholes allowed tax-free imports of raw materials (sugar), which could be transformed to finished products (marmalade) that would be sold in England. This particular marmalade example was given to me by Jon Torode, H.M. Greffier, Guernsey, in May 2015.

¹²⁹ For an excellent outline of early modern jurisdictional arrangements, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983)

usually assigned not to a single person, but rather to an assembly of men—a court, or *curia*—whose power derived from the offices they held rather than their persons.¹³⁰ In the context of law, the *curia*, Coke tells us, is a term “severally derived.” It indicates the household of the king, or the place where a lord resides. It is also “a tribunal, a court of justice... derived *à cura, quia est locus, ubi publicas curas gerebant.*”¹³¹ The *curia* is thus the place where the sovereign dwells; it is a gathering of men, or a place where men gather (we will return to these distinctions).

Coke took up the subject of jurisdiction because in England, as everywhere else, there were many courts of law. The task of his fourth and final volume on the *Institutes of the laws of England* was to outline the limits of each.¹³² This was not a minor subject, as upholding these limits, Coke believed, was of utmost importance to maintain order in England. “So in the common wealth (justice being the main preserver thereof),” Coke writes, “if one court should usurp, or encroach upon, another, it would introduce uncertainty, subvert justice, and bring all things in the end to confusion.”¹³³ Not enough to know what the law was; one needed to know who had the authority to declare it. To mistake the edges of this authority would risk the stability of the commonwealth itself.

I’ve been careful not to use the word “boundary” just yet, although we can begin to think of jurisdiction as a boundary claim. Legal categorization necessarily produces boundaries

¹³⁰ Unlike the king himself, whose sovereign power most definitely resided in the person. See (of course) Kantorowicz (1997. [c. 1957])

¹³¹ This is to be distinguished, for Coke, from the other meaning of *curia* which indicated the King and his place of residence; the chamber where the King’s body resides. Coke was citing Festus here; this is the same citation used by Vitruvius in his description of *Curia*.

¹³² Coke’s *Institutes*, widely influential not least because of the limited number of treatises on the Common Law, was first printed in London (in five volumes) between 1628-1644.

¹³³ *Institutes*, preface p. 1

between one legal domain and another. Importantly, however, while we can describe jurisdiction as a boundary claim, we are not yet speaking of boundaries in geographic space the way we might understand them today. As the examples given above make clear, legal categories are not by necessity organized by space or by physical proximity of disputants to a legal authority. In fact, until fairly recently, jurisdictional categories were arranged primarily by legal subject, or by the personal status of those involved in the dispute. Jurisdictional boundaries are not by necessity spatial boundaries.

Yet while strictly speaking these early modern categories of legal thought were understood as boundaries as between modes of legal dispute rather than anything taking physical form, Coke himself described his volume on jurisdiction as a work that allowed for the visualization of these boundaries. It was written

...that all the high, honorable, venerable, and necessary tribunal, and courts of justice within his majesties realms and dominions... might be drawn together, as it were, in one map, or table, (which hitherto was never yet done) that the admirable benefit, beauty, and delectable clarity thereof, might be, as it were, uno intuitu beholden, and that the manifold jurisdictions of the same might be distinctly understood and observed.”¹³⁴

Coke’s map is metaphor, but a telling one. Jurisdiction needs to be made visible; it needs to be observable. The organization of law requires representation, and visual form. More, this visible form seems to have been already map-like before it could be imagined in geographic space.

Speaking law: claiming ground

I clarify the distinction between geographic boundaries and categorical boundaries because today it is often assumed that legal authority by necessity follows geographic limits. In many ways our modern global system of territorial nation-states has made the connection

¹³⁴ *Institutes*, introduction p. 4

between territory and jurisdiction appear natural. However, a very particular set of historical circumstances convened to produce our contemporary idea of *territorial* jurisdiction, in which legal authority is understood to reside in political bodies whose authority is bounded by geographically determined borders.¹³⁵

This convergence has been outlined by the legal historian Richard Ford, who, in drawing focus to its historical development, has shown how territorial jurisdiction was actively produced as a political tool.¹³⁶ Ford unpacks the modern conception of territorial jurisdictions, or, as he defines them, the “rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions,” and shows that the practice of governmental regulation through territorially defined jurisdictions is a relatively new phenomenon.¹³⁷ Our contemporary understanding of spatial jurisdiction supplanted a former understanding of legal authority, in which priority was placed on the legal relationships formed between individuals and their status within a given society. In other words, the development of territorial jurisdictions saw a new priority placed on relationships of *space* rather than on

¹³⁵ Today, jurisdiction is strongly associated with national territory, as the sovereign nation-state has become the predominant form of legal authority in the modern world. The modern global system of territorial nation-states gives to states the primary legal authority over a defined geography, means that jurisdiction—or the limits of that legal authority—is now inexorably tied to territorial boundaries. An important body of scholarship ties this development directly to the Treaty of Westphalia (1648) though Ford’s work (among others) provides a useful framework for understanding the limitations of this analysis. See, for example Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2006); and Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (1994).

¹³⁶ Ford further argues that jurisdiction continues to be a tool of government, which, if not properly understood as an active agent, can be used in service of normalizing discriminatory practices, in addition to naturalizing its own claim over specific geographic territory “Government,” here, is the both the apparatus of the state, but also can refer more generally to structures of power (outside these official apparati). Ford posits the phenomenon of “white flight” as an example of how jurisdictional boundaries—in this case, municipal ones—can result in social consequences. Richard Ford, “Law’s territory (a history of jurisdiction),” *97 Michigan Law Review* 843, 1999

¹³⁷ Ford 1999, pg. 843

relationships of *status*.¹³⁸ This shift also allowed for the possibility of drawing jurisdictional boundaries without necessarily taking into account existing legal relationships between individuals. Defining jurisdiction through categories of geography, rather than categories of personal status, requires understanding how legal space was defined, policed, and controlled.

Giving attention to this historical transformation, and on the new ways in which space mattered in forming legal relationships, allows us to question the seemingly natural claim that jurisdiction makes on geographic territory. Following Ford's lead in examining the idea of territorial jurisdiction through the lens of technology is useful. For him, the concept is historically specific because it required the technological apparatus of the modern cartographic map, alongside humanist ideologies of rationalist thought. As shown by the work of sociologists such as Benedict Anderson and Thongchai Winichakul, among others, techniques of cartographic mapping produced the ability to see space as bounded, abstract, and homogenous.¹³⁹ A given territory, defined by geographic coordinates, could be represented independently of any number of concrete variables that existed on the ground—variables which included climate, built (and unbuilt) environment, and, of course, individual people and populations. By having the capacity to represent a given geographic area as homogenous and empty, the cartographic map allowed formal governmental organizations to make claims on land that previously would have been possible only through personal knowledge of that land and the people who occupied it. Concurrently, developments in humanist ideologies allowed political authorities to see

¹³⁸ Jurisdiction based on personal relationships was replaced by a system in which priority was placed on legal relationships formed by an individual's location within a given physical territory. This development parallels Maine's concept of the historical shift from status to contract. Henry Sumner Maine, *Ancient Law* (1861).

¹³⁹ For architectural history, this will allow us to call into question Panofsky's perspective as the defining moment of modernity—"infinite, unchanging, and homogeneous"—and rather claim that architecture's power to mark *bounded*, and differentiated, space is what produced the modern geographic imaginary. Erwin Panofsky, *Perspective as Symbolic Form* (1991), pp. 27-45; Thongchai Winichakul, *Siam mapped: a history of the geo-body of a nation* (1994); Benedict Anderson, *Imagined communities: reflections on the origin and spread of nationalism* (1983).

populations as quantifiable and made up of equally weighted individuals. These authorities used new mapping techniques to give visible form to the societies that they would aim to govern.¹⁴⁰

The technique of cartographic mapmaking produced a capacity for constructing legal relationships that were abstract and calculated, replacing those that were intimate and personal. By thinking of jurisdiction as something that could be drawn on a map, and by prioritizing this form of representation, territorial jurisdiction produced an alternative to former methods of creating personal legal relationships. The concept of territorial jurisdiction staked legal authority to geographic ground, since it required specifying mappable Cartesian coordinates. These geographic boundaries, filled now with an abstract and homogenous population, became the new way of affirming final legal authority. By tying legal authority to geography, territorial jurisdiction could define new communities of people, while at the same time inscribing their geographic location (as verifiable by these very mapping technologies) with new political meaning. Jurisdictional boundaries, as drawn on a map, became useful tools for those claiming a broader political power than would otherwise be given through interpersonal relationships. Coke's metaphorical map of legal categories thus could become grafted onto one depicting the geographic world.

Of course, even if the cartographic map can be seen as a primary technological requirement of this spatial concept of jurisdiction, the repercussions of the shift from status to locus did not remain confined to the imagined space drawn on the cartographer's drafting board. Nor was the cartographic map the only method by which legal space could be represented. One of my primary arguments here is that architecture itself would be mobilized in service of

¹⁴⁰ See James Scott, *Seeing like a state: how certain schemes to improve the human condition have failed* (1998), for further examples of how cadastral mapping techniques allowed centralized governments to keep track of populations across territory.

producing a new kind of jurisdictional marker, thereby becoming a useful tool in the process of naturalizing the connection between space and law.¹⁴¹ By organizing concrete particulars—in this case, by producing the prison as a legible architectural type—architecture gave legal practice a defined space within which to operate, as well as a new method of projecting an image of legal authority. I argue that architecture was thus crucial in translating a non-spatial system of categorization—matters of law—to a physical system of bounded legal space. Architecture, in this sense, marked the ground that law would claim.

Looking at architecture as a necessary marker of territorial jurisdiction will also be useful in clarifying certain ambiguities that continue to exist in contemporary descriptions of the concept. It is alternatively described as an act of speaking and as a site of enunciation, often with no important distinction made between the two. Coke’s ambiguity in the origins of the concept—as a gathering of men, or a place where men gather—continues to echo in contemporary scholarship. For example, the legal historian Peter Rush writes, “jurisdiction is not so much a discourse, not so much a statement of the law, but *a site or space* of enunciation. It refers us first and foremost to the *power and authority to speak* in the name of law and only subsequently to the fact that the law is stated—and stated to be something or someone” (my emphasis).¹⁴² While Rush lucidly unpacks the temporal priority of jurisdiction’s claim—that to claim authority to pronounce judgment necessarily precedes the judgment itself—a site of enunciation is here conflated with the authority to speak. This slippage between jurisdiction *as site* and jurisdiction *as authority*—found not only in Rush’s work, but in other contemporary scholars as well—reveals that the physicality of the site of law continues to be discounted in explanations of how

¹⁴¹ By “naturalizing” here I mean that territorial jurisdiction needed to appear as though it was natural, even though it was constructed. This chapter’s aim is to see architecture as a lens that reveals this construction.

¹⁴² Peter Rush, “An Altered Jurisdiction: Corporeal spaces of law” in 6 *Griffith Law Review* 144 (1997), pg. 150

law constructs its own authority.¹⁴³ The site of law, as these scholars describe it, is not so much rooted in a physical place as in a conceptual framework that confers authority to speak, disembodied and dislocated. How (and why) do discussions of jurisdiction seem to elide the distinction between site and authority? Looking at the building as important marker of jurisdictional claims might help to answer. In the examples that follow, we will see how architecture's discourse allowed the site itself to speak.

III Island Fortification

Problems at Castle Cornet

25th August 1756—Isabel Steward, convicted by the Royal Court of Guernsey of armed robbery on the Public Market in the town of Saint Peter Port, was conveyed to the prison at Castle Cornet by Josiah le Marchant, Deputy Provost. But on arrival, she was turned away. Nicholas Henry, Porter (or jailer) of the Castle, claimed that le Marchant did not have the proper authorization to transfer a prisoner. The prisoner was brought back to Saint Peter Port and detained in a private home. Shortly after, she escaped.

10th September 1756—A Sworn Constable of Guernsey reported that Francis Wheeler was found having beaten Mr. Wiltstead (within an inch of his life, so the surgeon of the island had declared) the evening before, and was immediately conveyed to Castle Cornet. Again, the jailer refused to accept the prisoner. The Deputy Provost left the prisoner at the Castle to receive further authorizations; but in the meantime, without having been secured in the jail, the prisoner managed to escape.

¹⁴³ See, for examples, Shaunnagh Dorsett, "'Since time immemorial': a story of common law jurisdiction, native title, and the case of tanistry" 26 *Melb. U.L. Rev.* 32 (2002); and Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (2012).

20th December 1756—Thomas Allez confessed that he had stolen corn, in the night, out of the house of John Batiste, Castle Parish. Once again, a prisoner was conveyed to the jail on Castle Cornet. Once again, the jailer refused the prisoner. Thomas Allez was taken back to Saint Peter Port, where he, too, was held in a private home under guard. He also escaped.¹⁴⁴

These three escapees should have been secured within the castle’s jail. All three had been ordered to be held prisoner by the civil court of the Bailiwick of Guernsey, and this necessarily should have meant confinement at Castle Cornet. The fortification had been first built sometime after the division of the Norman Duchy, in 1204, and had been regularly maintained since the time of Edward III.¹⁴⁵ Perched on a small islet about a half-mile offshore from the town of Saint Peter Port, the castle had been the site of the general lockup for the Bailiwick since Tudor times, as Guernsey did not have a separate civil jail on the mainland.¹⁴⁶ Various buildings on in the castle yard had been used as the jail until the sixteenth century, when it was firmly established in “a small edifice which as for a long period, and, as late as 1811, made use of as a common gaol for the island, both for debtors and criminals, and which is reached by an external flight of stone steps.”¹⁴⁷ For three centuries, the Royal Court (Guernsey’s highest civil court) had made regular

¹⁴⁴ Summaries of all three cases are found in IA (Guernsey) AQ 0134/04 AQ134/03-6. These were short-form descriptions of the events that transpired, written as part of the complaint against John Myle (see below).

¹⁴⁵ The *Précepte d’Assize*, 5 Edward III (1331), ordered regular inspection of the castle. (see also Tupper 1851 p. 8)

¹⁴⁶ John le Patourel, *Feudal Empires Norman and Plantagenet* (1984). See Chapter 1 for early history of Guernsey and Jersey’s fortifications, and John le Patourel (ed.), *The building of Castle Cornet* (1958), which provides a thorough account of the building of Castle Cornet, and especially its Tudor reconstruction. Before this, keeping a prison was a manorial duty, and Castle Cornet was reserved for the worst infractions. See *Notes on Guernsey’s Georgian Prison and its Antecedents*, Island Archive Service Guernsey (1999) IA AMIAS 001-013).

¹⁴⁷ So reads the lengthiest description of the jail from Tupper’s *Chronicles*, itself the lone historical account published regarding the castle. Ferdinand Brock Tupper, *The Chronicles of Castle Cornet, Guernsey, with Details of Its Nine Years’ Siege during the Civil War, and Frequent Notices of the Channel Islands* (1851), pg. 299

use of this jail to secure prisoners of all types, ranging from debtors to adulterers to murder suspects.¹⁴⁸

(Figure 2.6 Herman Moll, *The Isle Garnsey*, c. late 17th century; Figure 2.7 W. Romer, Castle Cornet, section; Figure 2.8 The jail at Castle Cornet)

So what was going on at the jail in Castle Cornet, and why was Guernsey's Royal Court unable to secure prisoners there? Why all the escapes—escapes, it should be noted, due not to ingenious lock-picking but rather due to what appears to be administrative negligence?

Similar to county jails and lockups across England, Guernsey's was not built for the purpose.¹⁴⁹ But unlike other county jails installed in mostly disused fortifications, the one in Castle Cornet shared the islet. In fact, jailing was not the primary function of the Castle Cornet, as it was still an active military outpost. As the primary fortification of Guernsey (and at about 60 kilometers off the coast of France, one of the most easterly fortifications of the British Isles), upkeep of Castle Cornet was of great interest to the English crown, which funded construction and repairs, and maintained its garrison.¹⁵⁰ While the castle fulfilled the role of lock-up for the day-to-day civil disputes on Guernsey, it was simultaneously an important military site for England. In the mid-eighteenth century, these two functions came into conflict. It was this conflict that had resulted in the escaped prisoners.

¹⁴⁸ Acts of Court pertaining to Free Use of Prison, 16th-17th century. (Guernsey) Island Archives AQ 0134/03 – 6. For an outline of the Bailiwick's institutional arrangements, and a brief history of the jail in Castle Cornet, See Darryl Ogier, *The Government and Law of Guernsey* (2005). Importantly, these castles were not used for French prisoners, since that was seen as a compromise of security.

¹⁴⁹ See Pugh (1968); esp. chapter XVII “The structure and contents of prison buildings.”

¹⁵⁰ In fact, the castle was so much associated with the Crown that it continued to be a stronghold of Royalist supporters throughout the Civil War, even as the rest of Guernsey supported the parliamentary cause. See Tupper's account (1851) of the castle's relationship with Guernsey and England during the Civil War.

The resulting *Case of the Inhabitants and of the Royal Court of the Island of Guernsey* brought the dispute to the attention of the King in Council. A petition sent to Westminster on behalf of the States of Guernsey, dated September 1858, presented the three instances of procedural mishap—three persons accused of crime but allowed to escape—as evidence in a jurisdictional dispute between civil and military authority. The States levied their complaint against a Mr. John Myle, Lieutenant Governor of the Island of Guernsey. According to his testimony given to the Royal Court, the jailer of Castle Cornet had been ordered to turn away any prisoner conveyed without the Lt. Governor’s personal permission. This order had come in the form of a threat. If the jailer were to constitute any prisoner without this permission granted, all prisoners held in the Castle would be turned out, and the jailer would take their place. This, according to Guernsey, constituted a direct affront to the ancient liberties given to the Island:

The constant method of the Civil Courts ordering any Person to Prison, & the making him Prisoner, has always been, thus; The court makes an Act, to imprison such a person; the Sheriff or his Deputy takes the Act, & the Prisoner, carries them to the Castle Gate; there produces, both the Act of Court, & the Body of the Prisoner; & delivers the Prisoner to the Porter of the Castle... & constitutes him Prisoner; and, upon sight of the Act, the porter receives, & confines the Prisoner, until the Sheriff, or his Dep’ty, brings another Act of the Court, for taking him out, again.

Of late, the Porter has refused to receive, from the Sheriff, Persons so committed, & has given his Reason for the same, to the Court, upon Oath; for that the Lieut. Gov. has forbid him to receive any Prisoner, so committed, unless his, the Lieut. Gov. Permission, be previously obtained; and has declared him, that in case he does receive a Prisoner committed by the court, without such a previous Permission, He, the Lieut. Gov., will have such Prisoner out, & make the Porter Prisoner, in his stead.¹⁵¹

¹⁵¹ 2 December 1757, Royal Court Registers in support of the States. IA (Guernsey) AQ 0134/04-01, pg. 47

By refusing to allow the jailer to secure prisoners at the castle without his direct authorization, Lieutenant Governor John Myle was in effect overriding the authority of Guernsey's civil court, and, instead, claiming that he was the final authority on who would be secured in the jail.

Myle believed he had reasonable grounds on which to make this claim. As Lieutenant Governor of Guernsey, he held the office by appointment of King George II. He served as a primary point of contact between Guernsey and England, and his main task was to oversee military matters on the Island.¹⁵² This included the maintenance of Island defenses, comprising, of course, of Castle Cornet among other minor fortifications. Since he held authority over military matters on Guernsey, the Lieutenant Governor claimed power to supervise the space of the Castle, which, in his view, included the jail therein. Anyone wishing to commit a prisoner ought therefore to be responsible for securing his permission before doing so. Appealing directly to the power vested in him by the Crown, the Lieutenant Governor claimed supervisory privileges over the space of the jail.

But according to the islanders, that same Crown had granted Guernsey's Royal Court authority to settle civil disputes directly, without interference from the Lieutenant Governor or any other military personnel. As their complaint laid out in detail, the Royal Court—headed by the island's Bailiff, who, like the Lieutenant Governor, was a direct appointee of the King—had used the jail on Castle Cornet to secure prisoners since “time immemorial.”¹⁵³ In their view, the Lieutenant Governor's claim to supervise the jail was in direct violation of this tradition. Worse, the refusal by the Lieutenant Governor to immediately secure prisoners conveyed by the Court

¹⁵² The Lieutenant Governor reported directly to the Governor, who was the Crown's primary representative of Guernsey but who did not reside on the island. For an outline of the Bailiwick's political arrangement, see Arthur Eagleston, *The Channel Islands under Tudor government, 1485-1642: a study* (1949)

¹⁵³ Or at least since the early sixteenth century. IA (Guernsey) AQ 0134/04 AQ134/03-6. This Act reproduced a list of notable cases in which the Royal Court used the castle to secure prisoners. The Bailiff was officially appointed by the king, but was in practice chosen by the governor from a local leading family. (Eagleton, pg. 13)

had led, in their minds, to a degradation of the very ability of the Court to fulfill its duties. As their complaint stated,

During this contest, the whole civil administration of justice, in the Island, is stoped... All breaker of the Peace, even Persons accused of murder, & all civil Debtors, sett the Court at Defyance, & laugh at them, as a Court that has no Prison, or means to coerce or compel the Execution of their Sentences, or to punish or imprison Offenders or Debtors, & his Magy's Royal Court is reduced, to an abject state, & to be the scorn of all persons there; which occasion a stop to Justice...¹⁵⁴

For the Royal Court of Guernsey, securing prisoners prior to trial or sentencing was an integral part of its civil procedure.¹⁵⁵ Without free use of the jail, the ability of the civil court to conduct its affairs was severely impaired. This was not simply a matter of procedure delayed. The Court was plainly worried that without the ability to secure malfeasants, no one on Guernsey would take their role as administrators of justice seriously. At stake, for the Royal Court, was upholding an image of jurisdictional authority. This necessitated the use of a specific space—the jail on Castle Cornet. The three escaped prisoners constituted a clear illustration of this authority being wrongly disrupted.

A Norman Legacy in the English Channel

The argument in *The case of the Inhabitants and of the Royal Court of the Island of Guernsey* was between two jurisdictional authorities on the island: one civil, the other military. No one disputed this jurisdictional division per say. While the Bailiwick was an English crown territory, it maintained certain privileges of legal autonomy. First granted in explicit terms by a charter from Edward III in 1341, eighteen successive royal charters had further confirmed these

¹⁵⁴ IA (Guernsey) AQ 0134/04

¹⁵⁵ Here it is important to keep in mind that we are still in the period before the prison sentence was a common legal sanction, and thus we have to be careful to distinguish the use of the jail as procedure rather than sanction. As other jails in this period, the one on Castle Cornet was not often explicitly used to punish; rather, it was a holding place for those who were awaiting trial.

privileges, which were based on an acknowledgment of the peculiar legal heritage of the Channel Island Bailiwicks.¹⁵⁶ The distinctiveness of these islands—with regards to both their geographic and political position vis-à-vis England—had long been acknowledged.

The Bailiwick of Guernsey lies about 60 kilometers off the coast of France in the bay of St.-Malo, and is still considered a special territory with respect to the broader political and administrative organization of the United Kingdom.¹⁵⁷ This is in no small part due to the importance of the Channel itself—and the exchanges across it—in English history. The earliest known settlements on Guernsey were Roman, but these were most likely abandoned by the time the islands were established as Viking and Saxon raiding outposts. When they were ceded to Rollo in 911 by Charles the Simple, Guernsey officially became a Norman territory, and thus, in 1066 when William II claimed the throne of England, the Channel Islands likewise became attached to England. Some 140 years later, when King John (Lackland) lost the Angevin lands on the continent, he maintained control of the islands; the Treaty of Paris (1259) officially granted the Channel Islands to his successor Henry III in exchange for relinquishing claims to the Duchy of Normandy.¹⁵⁸ While the Channel Islands were thus very much part of England, Norman customary law (and language) had been well established for about a century before the

¹⁵⁶ This division was further confirmed when an action of trespass from the neighboring Bailiwick of Jersey was rejected by the King's Bench later in that century. An action of trespass sent out from the Bailiwick of Jersey was refused, on the opinion that actions arising on the islands (Guernsey was included in the judgment) needed to be resolved by judges learned in their customary law. This determined that the Royal Court would hear all legal matters pertaining to Island residents, and there was therefore no assize court to be held. See Coke *Institutes*, pg. 286. Tim Thornton, *The Charters of Guernsey* (2004), for transcriptions and interpretations of these charters.

¹⁵⁷ The Bailiwick of Guernsey consists of the large island of the same name, as well as the smaller inhabited islands of Alderney, Sark, Herm, Lihou and Jethou; the separate Bailiwick of Jersey, larger and more populous, is about 50 kilometers south-east of Guernsey.

¹⁵⁸ For brief outline of English history in this period, see Bryce Lyon. *A Constitutional and Legal History of Medieval England*. 2d ed. New York: Norton, 1980. For early Channel Island History see "History" by John Uttley in Coysh. *The Channel Islands: a new study*; Tim Thornton, *The Channel Islands, 1370-1640: Between England and Normandy* (2012). See also Darryl Ogier (2008)

Conquest, and these customary practices continued throughout the early years of the Common Law's development.¹⁵⁹

The legal distinctiveness of the Channel Islands in this regard was noted by Edward Coke, who had devoted a short chapter to the islands in his volume concerning the jurisdiction of courts. As we might expect, Coke's *Institutes* presented a schema of jurisdictional divisions that was organized primarily by legal subject. However, several chapters outlined the jurisdictional particularities of exceptional places, among these the Channel Island Bailiwicks.¹⁶⁰ Importantly, while Coke's chapter heading indicated a geographic place—"the Islands of Jersey and Garnsey,"—this jurisdictional division was not, properly speaking, territorial. Coke's account of the islands' legal distinctiveness referred rather to the island's inhabitants and to their historical relationship with England. In other words, for Coke and his contemporaries, the place name signified a group of people, and their legal status with respect to the Crown.¹⁶¹

This emphasis on status is evident throughout Coke's account. Echoing the preceding four centuries of royal charters, Coke's stated reasons for the juridical separation of the Channel Islands focused on their unique legal heritage—a legal heritage, in particular, that reflected the islands' status as the remaining remnants of the lost Norman Duchy. Recognizing that the Bailiwicks maintained a distinct set of practices directly descended from their Norman ancestors who had chosen to remain part of the English Kingdom, the charters had affirmed a principle of judicial non-interference, granted in exchange for this loyalty. This meant, in effect, that while

¹⁵⁹ The strategic importance of the islands, both as a bulwark against French incursions and pirate activity in the Channel, were additional reasons to appease Guernsey's desire for local autonomy.

¹⁶⁰ Coke *Institutes* cap. 70, pp 286-287.

¹⁶¹ Basically, this is a claim of status, rather than locus, even though it is named by the place. This conflation of place name with communities of peoples and their legal traditions echoes the earliest legal codes of the British Isles; for example, see Alfred's codes (and how they claim authority by naming peoples and their place). For more on early English legal codes see Lisi Oliver, *The Beginnings of English Law* (2002).

the Crown would administer the islands' fortifications and certain other public works, civil suits would be settled exclusively on the islands, by Guernsey's and Jersey's own authorities, who had the necessary expertise in their customary practices.¹⁶² Law suits could not be removed from the islands, and the assize circuits would not run across the Channel, because the Common Law judges of the King's Bench could not be expected to be familiar with Guernsey's particular variant of Norman law. As Coke wrote of the final (failed) attempt, in the early fourteenth century, to bring an action of trespass from the Bailiwicks to the King's Bench at Westminster, "the matter aforesaid could not be determined in this Court, because the Jurats of the said Island cannot come here before the Justices, nor are they bound to do so by law, nor may any matter arising in the said Island be determined otherwise than by custom of the said Island."¹⁶³ The only exceptions to this principle of non-interference were to be matters that directly concerned the monarch: treason, false coinage, or the imprisonment of a Royal emissary, as well as, of course, the maintenance of the island's English garrisons.

Guernsey's legal exceptions were thus based on the juridical expertise of their inhabitants, and not tied to geographic boundary. To early-modern jurists such as Coke the limits of Guernsey's special jurisdiction extended to the limits of the island itself simply because that is where the people of Guernsey, who practiced that special form of Norman law, lived. This assumed limit—both of territory and population—was easy to picture, quite literally: Guernsey was an island, after all. It had been depicted as a separate landmass in maps at least as early as

¹⁶² The Channel Island Bailiwicks had a double case to be made for maintaining their legal practices: the fact of the continuous lineage of Norman law paralleled the frequent description of the Common Law as that which had been practiced for "time immemorial."

¹⁶³ Coke *Institutes* cap. 70, pp 286-287.

the eleventh century, and by the sixteenth century the islands were routinely subjects for the cartographers charged with representing the Crown's territories.

But now, a little over a century after Coke, the *Case of the Inhabitants of the Island of Guernsey* (1759) would begin challenge this assumption, as both civil authority and military authority claimed the space of Castle Cornet. Where were, in fact, the physical limits of Guernsey's special privileges? This question was the crux of the problem. A strictly legal outline of the affairs properly under the purview of Guernsey's Royal Court, and those properly under the purview of the Lieutenant Governor, could not alone resolve the conflict over the jail building, as physical space had not previously been understood as an important factor in the delimitation between civil and military jurisdictions.¹⁶⁴

(Jurisdictional) function precedes (jurisdictional) form

To restate the primary legal question at stake in this dispute: if two competing jurisdictions—and in this case, jurisdictions that both derive from the same Crown—claim authority over a single space, which one takes priority? Let's unpack the arguments for each side. "Can it be thought, my lords," the States of Guernsey had written in reply to Lt. Governor Myle's affidavits, which had aimed to provide proof of his own proper authority, "that such an application [of the Lt. Governor's exclusive authority over the castle]... is consistent with the Liberty of any Civil Jurisdiction? His Majesty's Royal Predecessors have established a Civil and Military Power on the Island, and distinguished the Function of both."¹⁶⁵ As the State's telling

¹⁶⁴ The spatial repercussions of Guernsey's legal limits was evoked by the dispute in part because (as in other pre-modern jurisdictional divisions) the existing legal paradigm did not indicate whether civil or military authority would override the others' within any particular defined space. The formerly undisputed jurisdictional division between civil and military authority became problematic when a single space was claimed to be under the authority of each.

¹⁶⁵ 23 July 1759, Reply of States to Sir John Mylne. (Guernsey) Island Archives AQ 134/04-09

description reveals, civil and military jurisdictions on Guernsey were clearly (and undisputedly) distinguished by *function*. As such, each side needed to be able to tie its functional jurisdictional claim to the space of the jail. Further, they then needed to make an argument for priority of this function over the others.’

From the vantage of the Lieutenant Governor, the primary function of Castle Cornet was as an English military outpost. A fortification located at the fringe of Crown territory, the castle and its garrison was part of the first line of defense against potential incursions from the east. The site was also a geographic marker of England’s seafaring strength: an outpost in the sea for an island nation, whose military strength depended on seafaring prowess.¹⁶⁶ In this narrative, the castle belonged easily under the authority of English military jurisdiction. The Lieutenant Governor, as the commander of the castle, saw his role in those terms. His control over the space was necessary not just because his job was to manage that particular site, though this was his immediate concern. He framed the proper management of the castle as integral to England’s national defense system; and more importantly, perhaps, to England’s image as an island nation with a strong naval presence.¹⁶⁷ Moreover, Castle Cornet was not the only building in Guernsey that had been used to secure prisoners. French prisoners of war had, in the past, been held on the mainland, presumably to prevent any information regarding Guernsey’s primary fortification from reaching the enemy. For Mylne, the inconvenient fact of Guernsey’s civil jail within the

¹⁶⁶ This is the narrative that Tupper (1851) draws upon in his account of the castle. We can also track interest in the castle alongside periods of increased tensions with France or Spain, when repairs to the castle would be authorized by the Crown. The Castle can be seen within a history of fortifications on the Channel Islands that perhaps might begin more seriously with the Tudor improvements to their fortifications. From today’s vantage, this history would extend through the Martello towers built for the Napoleonic Wars, to the internment camps that marked the one German incursion on British soil during the Second World War.

¹⁶⁷ Or at least this is how Mylne framed the argument in his affidavits. The narrative that is left behind here—the one not visible in these documents—is the very probable factor of this man’s personal interest in power and authority over the Islanders.

castle walls meant that he ought to have some say in defining who should be considered a civil prisoner.¹⁶⁸

(Figure 2.9 John Hamilton Moore, *A new chart...* 1793)

How could Guernsey compete with this? The use of a provincial lock-up for a minor outlying community was surely not a good enough counterargument to regain control over the jail, and the Royal Court seems to have known that. As they foregrounded in their own argument, the castle played a distinct role in articulating the jurisdictional relationship between England and the Bailiwick of Guernsey. This very relationship was itself an important symbolic marker of the way that the Common Law produced national identity.

Crucially, the argument levied by Guernsey also put to the fore the island's strategic location for England's military. The Islanders were well aware that the Castle was seen by England as playing an important role in securing the frontier against France, and used this to their advantage. Their complaint made frequent references to the Island's geographic position at the edge of Crown territory: a peripheral condition that Guernsey occupied both physically and culturally. Guernsey was an island located off the coast of France, but which, while maintaining a separate system of laws, had retained an unyielding allegiance to the English Crown. As their argument began: "That island lyes in the Entrance into the British Channel, & so near to the Coast of France, as within sight of the same, with the naked eye."¹⁶⁹ This proximity to France, the complaint continued,

"exposed them, to many Hazard & Dangers...; Notwithstanding all which, they have, at all times, with unshaken Loyalty & Fidelity, preserved the Island (which has a fine road,

¹⁶⁸ In this way, Mylne was in effect defining what constituted a civil prisoner, and how that prisoner should be classified with respect to the Crown. Mylne's Reply, IA (Guernsey) AQ 0134/04-05.

¹⁶⁹ *The case of the Inhabitants and of the Royal Court of the Island of Guernsey.* (Guernsey) Island Archives AQ 0134/04 – 8

off it, suffice for the whole Royal Navy of England) for the British Crown; and have rendered the upmost services by very greatly annoying the French, when at War with them.”

It was in exchange for this fidelity that, according to the Island’s narrative, the Crown had promised to uphold certain liberties; and in particular, the ability to conduct legal affairs in accordance with the Island’s customs. This ability was now hampered by the Court’s lack of access to Castle Cornet.

The Royal Court thus claimed use of the jail not simply because it was expedient to lock people up there, but because the jail played an important role in maintaining the Court’s legal identity on the island. This legal identity was itself an affirmation of England’s own historical narrative of national identity, as the Islanders did not hesitate to point out. The Channel Islands were the last remaining vestiges of the Norman possessions, the ones that had chosen to remain loyal to the Crown. This narrative, of course, also played into a flattering conception of benevolent sovereignty—a sovereignty that inspired loyalty not by coercion but by affirming the independence of those who paid homage.

The jail building on Castle Cornet was thus levied by the States to construct their successful petition to the King in Council. Their argument, against a competing military authority on the island, used the space of the jail to (re)-articulate a political relationship between England and Guernsey. This was possible because Guernsey’s special jurisdiction was not yet explicitly spatial in the terms that we are familiar with today. Because the *locus* of the jail did not take priority in determining jurisdictional claims, the States could use the jail to frame their argument about their *status vis-à-vis* England. Reminding Westminster of their promise to allow Guernsey to operate under its particular variation of Norman law, the Islanders claimed that control over the jail was critical to maintaining this difference. More, by simultaneously

asserting that their claim of legal difference was born out of *loyalty* to the English Crown rather than out of subordination, they were able to claim that this legal difference was a necessary factor in understanding how Great Britain laid claim on territory. The highly localized space of the jail, described as functionally necessary to maintain the status of Guernsey's jurisdictional independence (and thus political relationship with England), could now be used to reinforce Guernsey's peripheral geographic location as key to understanding the Crown's global reach.¹⁷⁰ In this way Guernsey made a convincing argument for maintaining control over the jail building.

In an important way, understanding this jurisdictional dispute necessitates an amendment to the familiar shift regarding jurisdiction's territory. Rather than locus simply replacing status, here we can see how the locus itself was required to enable (or rather, to reinforce) the claim of status. The example also shows how a particular building was itself necessary for providing definition to that locus.¹⁷¹ Here, the space of the castle was important because each side claimed that full use of the building was a necessary and logical extension of their functional jurisdiction. Both sides argued that control over the castle—for one, a prison; for the other, a garrison—was critical for their fulfillment of the duties vested in them by the Crown. The Lieutenant Governor was concerned with unauthorized persons on what was, for him, a military base; the Royal Court was concerned with maintaining law and order on Guernsey, which for them meant free use of the jail. These duties came into direct conflict in one very specific space. Military stratagem and civil legal procedure collided in control over a single Norman fort, and together began to produce a new spatial understanding of jurisdictional relationships that were nominally non-spatial.

¹⁷⁰ We will return to the global reach of the Common Law in the final chapter.

¹⁷¹ The locus is not the island itself, but rather a specific building on it, and the specific functionality of its architectural space.

The image of Guernsey's jurisdictional limit

As we have seen, the *Case of the Inhabitants* was explicitly about jurisdictional limits, in which military authority was cast as an interloper attempting to override rightfully authorized civil power. As a primary site of civil law enforcement, the jail on Castle Cornet was a visible symbol of Guernsey's jurisdictional independence. The Islanders saw free use of that jail as crucial to maintaining legal authority over the island. When that authority was threatened, Guernsey made it known to Westminster that control over this site would not be relinquished. In Guernsey's argument, the space of the castle jail was understood as a necessary technology required by the Royal Court to fulfill judicial procedure, and thus crucial for their jurisdictional function.

As I have noted, the immediate dispute precipitated because of this functional requirement. While neither side directly presented their judicial function as involving an *image* per se, nonetheless it was clear that maintaining a perception of authority was important. This was very much an explicit concern of the States of Guernsey, who worried that a diminished reputation of a Royal Court unable to secure suspects and criminals would lead to a degradation of their own legal authority. In many ways, the jail's distinct location on Castle Rock allowed the procedure of committing prisoners to play a visible role in maintaining this authority. Marching prisoners from the castle to the courthouse and back produced disruptive spectacles in the town of St. Peter Port, but these spectacles surely only reinforced the idea that the Royal Court was the final authority on the island. The stories of the three escaped prisoners would have been an unacceptable affront to that authority. In addition, in being prevented from fulfilling its proper civil function in containing prisoner's bodies, Castle Cornet could only be seen as English—a visible symbol not of Guernsey's law, but of English sovereign rule.

(Figure 2.10 Martin Beckman, Prospect of the Town of St. Peters... 1694)

The King's Bench at Westminster ultimately ruled in Guernsey's favor. Restoring a balance between civil and military jurisdiction required defining, in much more specific terms than had been previously necessary, the physical limits of Guernsey's civil jurisdiction. More, this physical limit was highly visible from the town of St. Peter Port and its steep coastal cliffs: the castle's prominent position in the harbor would have been a daily reminder that, despite the English garrison, the jail inside belonged within Guernsey's jurisdiction.

While this might seem to be the end of our discussion here, the dispute needs to be read in one additional register. This was not the first time that the jail on Castle Rock had been the subject of argument. In fact, since the early years of the seventeenth century, Royal Commissioners had been petitioning for the construction of a new debtor's jail on the mainland, in the town of St. Peter Port. The earliest of these petitions, from 1607, declared a desire for a jail to "be appointed in the town, especially for debts; seeing that in ancient times, the castle was but for felons, and there is not at all times free access to the castle."¹⁷² Royal authorization was considered necessary prior to the construction of a new jail, and this authorization was not forthcoming. The States applied to the Crown for permission to erect a prison in St. Peter Port three more times, unsuccessfully—in 1718, again in 1749, and 1765.¹⁷³

Guernsey finally secured authorization to build a jail in St. Peter Port, not solely for debtors, but as a general jail for the island. In May of 1803, about fifty years after reaffirming the Royal Court's rights to freely use the jail on Castle Cornet, the Privy Council at Westminster granted "the liberty of erecting a New Prison in the Town of St. Peter's-Port, at such place as

¹⁷² Because of the changing tides, that made access only possible at certain times.

¹⁷³ National Archives (Kew) PC 1/7/138; PC 1/45/162; PRO 30/42/5/1

shall be found fit and convenient for securing the persons of Criminals, Debtors and Others...”¹⁷⁴

The Royal Court of Guernsey spent the next few years raising moneys and securing land for the new prison. Plans were drawn by William Pilkington and by George Dance, but the structure was finally built, in 1815, according to the drawings of a Lieutenant William B. Hulme, out of local granite.¹⁷⁵

The *Case of the Inhabitants* was a pretense for articulating jurisdictional limits, and in these terms its resolution was successful for the Royal Court. But the case is usefully situated as well within the context of the newly constructed Georgian jail, which shows that both parties held a nuanced understanding of the usefulness of these limits. In the *Case of the Inhabitants*, the jail in Castle Cornet was presented as a technological necessity for the proper functioning of the Royal Court when they perceived jurisdictional overreach on the part of the military commander. However, this same building could be presented as inadequate when the Court desired a new, more convenient and modern prison. When that new prison was finally built in the town of St. Peter Port, it was built under the franchise of the Crown, with crown funds, and according to the designs of a military engineer. What kind of image did this new jail need to project, if it was going to replace Castle Cornet? We will return in detail to these projects at the end of the chapter. But first we return to London, where, in the intervening years, the reconstruction of Newgate jail would set a new precedent for the design of carceral space.

¹⁷⁴ Noting not only the difficulties and cost of transporting prisoners to the castle, but also appealing to contemporaneous discourse surrounding the health of prisoners (as we will see in the following chapters. *Actes des États de l'Île de Guernsey*

¹⁷⁵ (Guernsey) Island Archives, 6800/13

IV City ≠ island

The architectural jail

The dispute over Guernsey's jail in the second half of the eighteenth century coincided with a nascent interest in the architectural design of prisons across Britain. A confluence of factors—including, most prominently, increased attention by legal reformers on the physical and social environment inside jails—produced new conditions of possibilities for architects to think about carceral spaces. No doubt in part because of the efforts of these reformers, much historical work has focused on the ideology behind the prison reform movement.¹⁷⁶ However, this focus on sanitation, rehabilitation, and fairness—the primary concerns of the reform movement—has left out an important consideration of the modern jail: the image that it projected of an autonomous, bounded carceral space.

The best-known jail to be designed by an architect during this period was in fact the reconstruction of Newgate Gaol, already London's most notorious, by George Dance the Younger (completed in 1782). The project was designed and built at the cusp of a transition in thinking regarding the jail: from one occupying un-designed and ad hoc space, to one requiring a fully articulated architectural type. Dance's Newgate was halfway there. It exemplified the prison building as an architecturally designable object. However, it did not yet fully embody newly emerging penal ideologies regarding the health, classification and separation of groups of prisoners.¹⁷⁷ The projects that defined the modern prison in these terms were yet to come. And while reformers such as John Howard would criticize the building for not providing adequate

¹⁷⁶ See, of course Evans's work, as well as David Garland, *Punishment and welfare: A history of penal strategies* (1985) and Leon Radzinowicz, *A history of English criminal law and its administration from 1750* (1986).

¹⁷⁷ This understanding of the prison building as a technology to separate and classify individual prisoners would come shortly after, and be exemplified by the Pentonville and Millbank penitentiaries. We will return to these projects in chapter 4.

improvements to the interior quarters, for our purposes here Dance's Newgate is less interesting as a failed precursor to later works than as an exemplar of a new kind of relationship between architecture and the space of law. This relationship was one of visual representation, specifically as it related to the jail's position within the City of London. As we will see, two related ideas needed to be made outwardly visible: the jail's technological capabilities to hold prisoners; as well as its status within the city as an authorized and bounded space of law.

The fact alone of a jail being purpose-built under the supervision of a known architect was itself relatively novel. While jails had been included in several architectural treatises from the sixteenth century onwards, none of note had yet been built in the terms that these treatises laid out.¹⁷⁸ As we saw previously, the semiotic [discursive] mark of carceral space in the seventeenth and eighteenth centuries was produced primarily through legal claims, not architectural ones: a jail was defined as a space used to legally detain, by whatever building available. With no consistent physical form, images of the physical prison or jail before the late eighteenth century were provided primarily through written descriptions by those who had been imprisoned, or by functionaries petitioning for funds to repair or rebuild existing structures.¹⁷⁹

In this context Piranesi's celebrated *Carceri d'Invenzione* (first edition published in 1745) were a rare attempt at a visual depiction of carceral space.¹⁸⁰ While, as has often been

¹⁷⁸ For example, Joseph Furtenbach's "Large Prison" in *Architectura Universalis* (1635) shows individualized cells; and Filarete's *Trattato di Architettura* includes both a small and large prison. The problem of what a prison or jail should look like could be posed at this moment precisely because the prison as building type did not yet exist as such, and there were no suitable precedents for such a project.

¹⁷⁹ See, for example, Humphry Gyffard's publication (1617), which aimed to draw attention to need for funds for the rebuilding of the Poultry Street Compter in London. As many such documents, the written descriptions of the physical spaces aimed to show necessities for additional funding; the majority of the text is devoted to who has already agreed to provide money.

¹⁸⁰ First published in 1745 as a set of 14 images (though Piranesi tells us they were produced in 1742), the etchings were republished in 1761 and included two additional images. (A recent edition includes a useful introduction to their contexts. Giovanni Battista Piranesi, John Howe, and Philip Hofer. *The Prisons / Le Carceri* (2013).)

noted, the prisons were fully inventions (as Piranesi's title itself made clear), in some respects the etchings reveal more about the realities of prison spaces at that time than the more rational drawings of Furttenbach or Filarete (for example).¹⁸¹ While the etchings did not follow the organizational logics of real buildings, they nonetheless reveal a spatial understanding of imprisonment that reflects contemporaneous descriptions. Piranesi's *Carceri* depicted spaces that could be known only as interiorities, and where enclosed space allowed expected relationships between architectural form and proportion to be upended. Consider these images in relation to Daniel Defoe's only slightly earlier (1717) descriptions of Newgate jail. This space is similarly claustrophobic, an interiorized world in which laws of nature were reversed and nothing was as expected:

The Condemn'd-Hold, falsely suppos'd to be a noisome Vault under-ground, lies between the Top and Bottom of the Arch under Newgate, from whence there darts in some glimmerings of Light, tho' very imperfect, by which you may know that you are in a dark, Opaque, wild Room. By the help of a Candle... your Eyes will lead you to boarded Places, like those that are raised in Barracks, whereon you may repose your self if you Nose will suffer you to rest... If you look up, you see the Order of Nature inverted, by having the Common-side Cellar over you, or if you cast your Eyes downward all Things are equally surprising and unnatural: Here lie chains affix'd to Hooks, and there Iron Staples are driven into the Ground to bring those to Submission that are Stubborn and Unruly.¹⁸²

(Figure 2.11 Piranesi, *Carceri*, Plate VI, 1761)

This context helps to explain the attention given to the façade of Dance's Newgate, remarkable precisely for its exteriorization of incarceration—an architectural idea that had been

¹⁸¹ Evans dismisses the drawings as being too easily translated to a theatrical stage set: "...As such [the *Carceri* drawings] laid no claim to realism and had little to do with the realities of incarceration." But this misses the mark a little—rather, the drawings had little to do with the realities of incarceration as it would *later* be imagined. The *Carceri* drawings do in fact seem to reflect prevailing (literary) images of jails. (Evans 1982 p. 76) For Yourcenar, the drawings are notable for "consisting of real architectural elements skillfully juxtaposed with dream-like perspectives." (p. 95)

¹⁸² Daniel Defoe, *The History of the Press-Yard, or, a brief account of the customs and occurrences that are put in practice ... in that ancient repository of living bodies called ... Newgate, etc* (1717)

largely defined by its very interiority. Indeed, the new Newgate presented a face clearly legible. Seen in the mimetic tradition of an *architecture parlante*, with its entrance adorned with ornamental shackles and windowless walls, Newgate certainly announced it was a place of imprisonment.¹⁸³ In this capacity, it was deemed immediately successful. Less than two decades after its completion, Humphry Repton would offer Dance's Newgate as a prime example of what he called *characteristic architecture*: a building that was not only suited to its environment and scenery, but also had the ability to "tell its own tale." For Repton, it was obviously desirable that buildings should be capable of declaring, through their appearance, the purposes for which they were intended. The principle that a building "ought... not look like anything else" was too often violated; hospitals were built to look like palaces, or churches like theatres. On the contrary, Newgate was in the admirable category of buildings that "announce their purposes by their appropriate appearance;" and for which "no stranger has occasion to inquire for what uses they are intended."¹⁸⁴ The new Newgate's "proper" representation of what a prison building should look like was, no doubt, one of the reasons it garnered the attention it did.

But was not Newgate already known as such, well before Dance's reconstruction? One might even say that of all the jails in England Newgate's purpose so defined was the least in need of clarification. Everyone in London, and indeed, around the country knew Newgate, or at least of that "most terrible stinking, dark and dismal Place."¹⁸⁵ Even if one had no occasion to experience the jail first-hand, there was no shortage of descriptions of the place similarly

¹⁸³ This remains the case today; if the new jail at Newgate is mentioned at all in architectural history, it is primarily on account of its façade. Emil Kaufmann, *Architecture in the Age of Reason: Baroque and Post-Baroque in England, Italy, and France* (1968)

¹⁸⁴ Humphry Repton, *The Art of landscape gardening*. (1907) [c.1803] pg. 303

¹⁸⁵ So begins Batty Langley's 1724 work *An Accurate Description of Newgate*, which was one of the earliest descriptions of the physical building. (Langley 1724, pp. 1–2)

colored. Newgate narratives written by and for upper classes, as well as a more populist Newgate discourse circulated through broadsheets and hanging schedules, ensured that everyone understood that inside that “magnificent Edifice...is a most Terrible Wicked and Dreadful Place,” as verified by stories told by “poor unfortunate Wretches: who instead of Humbling Themselves to Almighty God... and beseeching Him to pardon their horrid Sins, continually augment the same, and in the most Sinful and Wicked Manner they possibly can contrive, accelerate their own Destruction.”¹⁸⁶ The renown of many these “unfortunate wretches”—including, of course, Jack Sheppard, whom we met escaping Newgate at the start of this chapter—only further reinforced the notoriety of the site.

In other words, the place did not need an architect to render it legible as a jail. Indeed, medieval Newgate was so much known as a jail that its very name was synonymous with the concept. “If he bee a judge or a justice,” wrote the seventeenth century satirist and pamphleteer Thomas Nashe, “then he swears by nothing but by Saint Tyborne, and makes Newgate a nounce substantive, whereto all his other words are but adjectives.” Marginalia clarifies Nashe’s intentional use of the specific to stand in for the general: “Newgate, a common name for all prisons, as homo is a common name for a man or a woman.”¹⁸⁷

So if Newgate was in no danger of being mistaken for anything other than a jail, what representational work, precisely, would the new Newgate be called upon to do? This question was being asked at this moment precisely because there was no existing precedent for such a project; in the broadest sense, the “proper” image of a prison was yet to be defined in

¹⁸⁶ Langley *An Accurate Description of Newgate* (1724), p. 42. See also Linebaugh, Peter. *The London Hanged: Crime and Civil Society in the Eighteenth Century* (1992), and the collected volume ed. Kelly, Gary, Gaspey, Thomas, Lytton, Edward Bulwer Lytton, and Whitehead, Charles. *Newgate Narratives* (2008) for further examples of contemporaneous descriptions of the jail.

¹⁸⁷ Thomas Nash, *Pierce Penniless's Supplication to the Devil* 1842 [1592], pg. 35.

architectural terms. Specifically at Newgate, several related issues were at stake. First, the building needed to project, on its surface, an image of a condition formerly defined solely by its interiority. Second—with important consequences for the development of subsequent prison projects around England—this image needed to be separated from its specific context. Newgate’s legibility as a modern jail (in architectural terms) needed to be defined independently from its legibility as London’s most notorious medieval gatehouse. In other words, if Dance’s Newgate was successful in demonstrating the possibilities for a new architectural typology for a newly defined program—a program now deemed suitable for architectural expression—it was because this architectural expression was able to make a claim on a noun (“jail”) already made general by Newgate itself. An architectural abstraction of type had to replace the specificity of this particular place.

London’s liberties

So before closely examining Dance’s project let us look for a moment at that place. As a reconstruction of an existing building, the project came with significant historical weight that cannot be discounted. In fact, Dance’s Newgate would be the fourth iteration on a particular site: New Gate. London’s notorious jail was located within the city gate, itself marking an important jurisdictional boundary. Dance (and his father before) understood this significance. Considering this boundary both as a factor in the architect’s work, as well as in how the building was viewed by its contemporaries, is helpful in understanding how Newgate worked as a new form of architectural jail that could operate both as a marker of a specific place, as well as point to more general legal ideas regarding the detainment of suspects, convicts, and debtors. In addition, the reconstruction of Newgate gestures towards a new understanding of how London saw its own jurisdictional limits.

The City of London had a complicated legal relationship with Westminster. Financial engine to the crown's expanding ambitions, the City was the economic counterpoint to Westminster's political center. This ambiguous status of the city is encapsulated by Coke's own introduction to the thirteen courts of the City of London: "That ancient city... most famous for its vast numbers of merchants... is the chamber of the King, the heart of the republic, the sum of all the kingdom."¹⁸⁸ This ancient city, Coke tells us, had been granted its original special legal status by William the Conqueror. Maintaining good relations with its powerful merchant class required a delicate balance of power, and subsequent royal charters served to further outline dispensations the City would be granted.¹⁸⁹ Matters relating to trade were outlined in detail, along with other judicial mechanisms that would be left to the city to run.

Officially, of course, as in Guernsey, London's charters defined their terms according to matters of law, not according to geographic boundary. Coke's work neatly outlines these affairs, categorized according to their respective City courts.¹⁹⁰ In this respect the charters do not diverge from an early modern understanding of jurisdictional boundaries, which followed person or legal subject, rather than geographic territory. Even so, the City's charters hints that a spatial boundary was already an important part of understanding how these jurisdictional subjects were to be defined. Most directly, the Crown's justices would have no power within the City of London.

¹⁸⁸ ...vetustum oppidum...fuit copia negotiatorum et commeatu maxime celebre. ... it is camera regis, reipublicae cor, et totius regni epitome. Coke Institutes, p. 247 [my translation]

¹⁸⁹ London, of course, was not the only city with such a charter. Urban charters were frequently used to outline the relationship between civil and royal authority—their jurisdictions, in other words. Often charters are given to cities that had a particular importance to the Crown—and therefore had a certain amount of negotiating power. Important centers of trade and defense were often issued charters, or in some way had special privileges outlined for them. The Bailiwicks of Guernsey and Jersey each have their own charter: in these cases, the entire island is treated as an urban center. See Robert Batchelor, *London: The Selden Map and the Making of a Global City, 1549-1689* (2014).

¹⁹⁰ For example, trade regulations would be overseen by the Court of the Common Council, while orphans and their properties were the purview of the Court of Orphans.

Rather, what happened within its bounds would be left to be adjudicated by the City's own authorities. This liberty was granted explicitly in Edward III's charter of 1327, which stated that

the marshal, steward or clerk of the market of our household, may not fit from henceforth within the liberty of the aforesaid city, nor exercise any office there, nor any way draw any citizen of the said city to plead without the liberties of the said city, of any thing that happen within the liberties of the same...¹⁹¹

This passage is remarkable in that it indicates a spatial interiority without explicitly defining its limits. Where were the bounds of the city's liberty? Was there, in fact, an important spatial distinction between within and without?¹⁹²

We might begin with the assumption that these bounds were understood to lie alongside the City wall itself. London was, in fact, a Roman city, and an important legacy of this settlement was its encompassing wall, with its characteristic kink towards the northwest where an existing fort had been incorporated.¹⁹³ This wall had played a prominent role in descriptions of the physical City of London at least since John Stow, who begins his *Survey of London* (first published in 1603) with an account of the city's walls and their subsequent destructions and reconstructions. For Stow, these walls were the lasting material legacy of the civilizing influence of the Romans: the people who had first taught the barbaric Britons the principles of masonry.¹⁹⁴

¹⁹¹ First Charter of Edward III granted by Consent of Parliament. March 6, 1327. Reprinted in John Noorthouck. "Appendix: Charter (Edward I to Edward IV)," in *A New History of London Including Westminster and Southwark* (1773), 784-799.

¹⁹² In many ways London's charters were quite similar to the ones granted to the Bailiwicks of Jersey and Guernsey, but it is important to note a crucial difference. In Guernsey, the Royal Charter gave privileges to all inhabitants, not simply those in primary townships. As we have seen, there was no necessary distinction between town and island, as the nature of the island itself made its jurisdictional bounds self-evident. For London this was not the case. If the island of Guernsey could be treated as town-like in its charter, London needed to be seen as island-like.

¹⁹³ This wall (and, of course, the city itself) was planned with respect to the defensiveness of the terrain. Francis Sheppard, *London: a history*, (1998) pg. 37.

¹⁹⁴ ("yet the Briton, (I know) had no skill of building with stone..." John Stow. "The wall about the Citie of London," in *A Survey of London. Reprinted From the Text of 1603*, (1908), p. 5

The importance of these walls in Stow's work, as well as in subsequent accounts of the city, allows us to read them as a physical marker that pointed to the limit of London's liberties. How did that symbolic space project back onto the city itself?¹⁹⁵ If, as I've suggested, the law needs to be understood as a system that can be practiced as well as represented symbolically, we should be able to find moments in which an idea of jurisdictional interiority was more than a symbolic marker. One such a moment can indeed be found in the city's gates, and the jails within.

According to Stow, a jail within Newgate had been in use as such since the time of John (r.1199-1217).¹⁹⁶ Early records indicate that the jail was at first in partial control of the crown: as early as 1218, Henry III had ordered repairs of the structure for "the safe keeping of his prisoners" from his own exchequer.¹⁹⁷ Further evidence of sovereign control from this period is found in 1253, when, once again, a dispute was precipitated by an escape. Henry III, so displeased was he with the escape of a man named John Offrem (who was being held prisoner in Newgate while awaiting trial for having killed a prior who held alliance to the King) that he had the Sheriffs of London themselves imprisoned in the Tower.¹⁹⁸

But over the subsequent decades, the City gained greater control of the jail. Edward III's charter—the same which had reconfirmed London's ancient privilege that citizens would not be forced to plead outside the city—added several new privileges including one that granted the

Mayor the role of jail-delivery:

¹⁹⁵ But even without disputing that the trace of the old city wall could be imagined as marking the symbolic space in which the jurisdiction of the City of London began, it seems as though we need to understand how this affected the way that space was understood in practice. For iconography of London's gates see Christine Stevenson, *The City and the King: Architecture and Politics in Restoration London* (2013).

¹⁹⁶ Also according to Arthur Griffiths, *The chronicles of Newgate*. London, 1884 (introduction), though his source(s) seem to be limited to Stow's own *Survey*; Stow himself cites "the records" and "Close roll." A more recent account in Margery Bassett, "Newgate Prison in the Middle Ages." *Speculum* 18, no. 2 (1943): 233-46.

¹⁹⁷ Stow, pg. 14

¹⁹⁸ *ibid* pp. 14 & 19

We have further granted... that the mayor of the aforesaid city, which for a time shall be one of the justices to be assigned of the gaol-delivery of Newgate, and be named in every commission thereof to be made; and that the said citizens may have infangtheft and outfangtheft, and chattels of felons, of all those which shall be adjudged before them within the liberties of the same city, and of all being of the liberty aforesaid, at the aforesaid gaol to be adjudged.¹⁹⁹

In other words, citizens of London were not to be removed from the city for judgment. Rather, they were to be held at Newgate until delivered for trial by the Mayor himself.²⁰⁰

This clause suggests one way in which the liberties afforded to the city were tied to the physical boundary of that city, as marked by the jail in the gate itself. While the legal designation of people (as citizens of London, specifically) is, once again, not explicitly defined by territory, the restriction against the *removal* of these citizens from the City tells us that nonetheless the spatial extent of the city's legal bounds had repercussions on legal practice.²⁰¹ The space of the jail made the (bounded) space of the city legible. Bodies held at Newgate indexed the edge of the City's legal liberties, as prisoners were held both literally and legally at the boundary of London's jurisdiction.

The new Newgate—George Dance the Elder

This context is important to understand the ways in which the reconstruction of Newgate would be understood by Dance's contemporaries. Four centuries had passed since Edward III's charter affirmed the mayoral privilege of gaol-delivery, and Newgate was now firmly under

¹⁹⁹ First Charter of Edward III granted by Consent of Parliament. March 6, 1327. Reprinted in John Noorthouck. "Appendix: Charter (Edward I to Edward IV)," in *A New History of London Including Westminster and Southwark* (1773), 784-799.

²⁰⁰ The privilege of bringing forth the prisoners held at Newgate to the Sessions house for trial and judgment is important, because not only did this allow the Mayor to oversee the process of jail delivery, but it also cast him in a highly visible role in a display of judicial authority. This can be seen as a parallel to the spectacle of the assize circuit courts, as we saw in the last chapter.

²⁰¹ In this way, the process of gaol-delivery necessitated an assertion of interiority and exteriority. I don't know enough about this, but I think we can assume that these personal designations would have been readily known.

control of the City. But this did not lessen the symbolic weight of the building as City gate.

"[medieval] Newgate, considered as a prison, is a structure of more cost and beauty than was necessary," wrote John Noorthouck in his *New History of London* (1773), "but as a gate to such a city as London...erected rather for ornament than use, ought to be in the style of the ancient triumphal arches; and it must be allowed, that hardly any kind of building admits of more beauty or perfection."²⁰² As this passage indicates, the former gate to London still served to represent the City itself.

In the public eye, Newgate's function as architectural signifier of the City's limits still very much coincided with its architectural function as a jail. The project for Newgate would thus need to somehow address these competing ideas. On the one hand, the city gate was seen as a monumental entrance. This entrance, perhaps no longer necessary to serve as a fortified gate, was still required to display the proper dignities of the City's boundaries and her liberties. On the other hand, the actual brief for the project was strictly concerned with the reconstruction of the jail itself. Unlike the city gate, a building for criminals was not meant to contain the signifiers of proper architecture. How could an architecture appropriate to mark the boundary of the city simultaneously fulfill the symbolic requirements of the jail? At stake was not only the invention of a style that would declare the building's function as a place to hold prisoners captive. That same building would simultaneously need to properly acknowledge its historical associations with the city's limits.²⁰³

²⁰² John Noorthouck. "Book 2, Ch. 21: Farringdon Ward Within," in *A New History of London Including Westminster and Southwark*, (1773), 614-639.

²⁰³ Or rather, defining the limits of the city would no longer be the priority; while limits of the prisoner's contained body would be. Both gate and prison are fortified structures (though for different ends—preventing escapes / v. preventing invasions).

Newgate had suffered extensive damage during the Great Fire of 1666. Already occupied for over five hundred years by a jail for city and county felons, Newgate, as we have seen, had been rebuilt with particular attention to its ornamented façade. But this most immediate precursor to Dance's Newgate did not adequately serve in its role as a jail. Problems of overcrowding, and the resulting unhealthy environment, became impossible to ignore by the middle of the eighteenth century. "The builders of Old Newgate," wrote John Howard of the structure (rebuilt in 1672 or 1673), "seem to have regarded in their plan, nothing but the single article of keeping prisoners in safe custody. The room and cells were so close, as to be almost the constant seats of disease, and sources of infection; to the destruction of multitudes, not only in the prison, but abroad."²⁰⁴ Howard was, in fact, writing in the wake of a well-known instance of contamination escaping from Newgate. During the Criminal Quarter Sessions of April 1750, two diseased prisoners unleashed an outbreak of typhus while standing trial at the Old Bailey. Sixty-four people died as a result, including judges, members of the jury, legal council, and under-sheriffs.²⁰⁵ Evidently, more than infamous jail-breakers such as Jack Sheppard were escaping from Newgate.²⁰⁶

²⁰⁴ John Howard, *The state of the prisons* pg. 173

²⁰⁵ An account of this event is given in the *Gentleman's Magazine* fourteen years later, in order to spur further interest in the project of rebuilding the jail. This was not the only such incident, though perhaps the most known in London at the time. The Black Assize of Oxford (1577) also was notable because prominent members of society were taken ill, and was also cited by those concerned with disease in the jails. Here, the difference between urban prison (with continuous adjacencies to large population) and the county assize (in which groups of prisoners are brought in contact with upstanding members of the community in a single event) could be a reason Newgate did eventually get rebuilt. For an account of the Old Bailey infections, see *To the Citizens of LONDON*. The *Gentleman's Magazine*, Jan 1764; 34, *British Periodicals* pg. 16, and *Historical Chronicle*. The *Gentleman's Magazine*: and historical chronicle, May 1750, pg. 235.

²⁰⁶ This more general idea of contagion—of disease, but also of prisoners and their supposed moral failings—was an ongoing theme in discussions of the prison building's security. See David Rothman, *The Discovery of the Asylum; Social Order and Disorder in the New Republic* (1971) for more on the connection between the penitentiary and medical buildings in this regard.

The incident prompted the formation of a committee tasked with investigating the conditions inside Newgate. On December 11th 1750, the committee appointed George Dance the Elder, then Clerk of the City Works, to propose a plan for improving the jail.²⁰⁷ A debate arose over the course of the committee's work: was the primary culprit of jail fever the filth and noxious stench inside the jail itself, or was it rather the particularly packed sessions that April (in which the notorious trial of Captain Clark, who had killed another in a duel, had drawn large crowds)? The former hypothesis seems to have prevailed, as the Sherriff commissioned a plan of the jail of York to be drawn and presented to the public, to serve as a model for the new jail.²⁰⁸ Concretely, however, nothing more seems to have come of that first committee save an order to scrub Newgate and its prisoners with vinegar, and the installation of new ventilators by the clergyman Stephen Hales, who had devised and promoted his system to circulate air within the building.²⁰⁹

(Figure 2.12 The gates of London, *The Gentleman's Magazine*)

(Figure 2.13 York County Gaol, c. 1701)

²⁰⁷ Kalman mentions the committee that was formed at this time, and indicates that Dance was engaged to address the problem, but not explicitly what Dance suggested at this time. Harold D Kalman, "Newgate Prison," *Architectural History*, Vol. 12 (1969), pp. 50-61+108-112 [Kalman ref.: CLRO, Gaol Committee I, Minutes, 16 Nov. 1755]

²⁰⁸ So was the castle of York considered: "The jail of York is reckoned to be the finest in *England*, by far; it is elegant, secure, spacious, and built upon a *healthy* spot, and is esteemed the best *model*, especially where there is sufficient room, for building a jail by." (*To the Citizens of LONDON*. The Gentleman's Magazine: and historical chronicle, Jan 1764, pg. 18). The debtor's jail at York was built in 1701.

²⁰⁹ Hale's ventilation system is one place where the scholars of the 1970's and 80's (Foucault, Evans, et al) are interested in Newgate, as it shows a precursor to ideas of cleanliness that would become a defining feature of the modern prison. Ventilation systems such as these were at the forefront of jail technology, and were thought to be the solution to problems of disease. In addition to having them built and installed, Mr. Hale published several accounts of his ventilators. See, for example, "A Description of Dr. Hales's Ventilators fixed in Newgate," *The Gentleman's Magazine*, Apr 1752, pg. 179

This solution was not enough. In June of 1755, the Court of the Common Council of the City of London ordered a new committee to be formed regarding improvements at Newgate.²¹⁰ This time, the committee was divided on a question of site. Should a new plot be procured, one that might better suit prevailing attitudes towards situating a jail? Or should the original site of the old Newgate be retained, and merely enlarged by demolishing the neighboring tenements whose leases had expired and not been renewed?²¹¹ Further questions were raised regarding expenses as they pertained to the character of the building itself, as it would be necessary to determine if “it to be built of stone or brick, or with a mixture of both together, what were to be the height and thickness of the walls; and whether the building was to be ornamented or plain, and if the former, to what degree?”²¹² With these questions on the table, George Dance was once again asked to submit a proposal. Arguing that it would be cheaper to demolish the old structure yet retain the site, and purchase adjacent lands that would encompass the tenements as well as the neighboring compters (a jail for petty debtors), Dance submitted drawings for an entirely new building. An order was placed for 200 copies of an engraving of the proposed structure, to be circulated among various officials and judges.²¹³ After six months of deliberation, two additional architects (Isaac Ware and William Jones) were asked to produce schemes.

²¹⁰ “To the Citizens of LONDON,” *The Gentleman's Magazine*, Jan 1764, pg. 16

²¹¹ *ibid.*

²¹² “The expense of this undertaking was the next point considered of, but too difficult to be ascertained,” ran an account of the committee’s proceedings, published a few years later. Before the expenses could be calculated, more details regarding the architectural character of the building needed to be determined. “To the Citizens of LONDON,” *The Gentleman's Magazine*, Jan 1764, pg. 19

²¹³ These drawings were subsequently published in *Gentleman's Magazine*. “ELEVATION of an intended new building for the reception of felons and debtors, in the room of NEWGATE, shewing the external part from north to south,” *The Gentleman's Magazine*, Sep 1762, pg. 402. The drawings were also mentioned by Dorothy Stroud in her account of the project. (Dorothy Stroud, *George Dance, Architect 1741-1825*, 1971, pg. 54)

At the end of January 1757, the Common Council viewed the three schemes and applied to Parliament for moneys to rebuild the jail. Their request was declined. Was it the expense that proved prohibitive, which would have drawn funds away from the war? Or did the release of pressure from overcrowding in the jail reduce the political motivation to rebuild Newgate—as war was always a good way to occupy idle youth?²¹⁴ Either way, it is perhaps not a coincidence that it was only after the war’s end that Parliament finally passed an act providing 50,000 pounds for the new jail, with funds to be raised by a tax on coal.²¹⁵ On the 4th of August 1767, a committee was formed to begin work on the newly funded project. George Dance I was elected Surveyor to the jail, his son serving as Assistant Surveyor.²¹⁶

Dance’s schemes were not built, and his son was to take over the project after failing health led to his father’s resignation. But the elder Dance set the stage for the younger, especially with regards to interior arrangements in plan. His project also reveals important departures from the original structure that began to address the problem of reconciling the symbolic function of the city gate with the programmatic function of the jail itself. Most predominantly, the general massing of the prison blocks, and their elevations, differed significantly from the medieval structure in the ways in which they encountered the city’s streets.

The old Newgate—even though rebuilt after centuries of use as a jail—was not designed as such in modern terms. In fact, ideas behind the modern prison (as a carceral space designed

²¹⁴ The Seven Years war, between 1756-1763, overlaps with the push to rebuild Newgate. Peacetime inevitably came with an increase, or at least a perceived increase, in urban crime (and thus overcrowded jails), so it is likely that the war reduced political motivation to rebuild the jail. For more on patterns of arrest, See Beattie, J. M. *Crime and the courts in England, 1660-1800* (1986), and esp chapters 6-7.

²¹⁵ John Beattie notes the statistical correlation between increases in urban crime and arrests in the years following conflict. (Beattie 1986)

²¹⁶ See Kalman for a brief account of the project’s narrative (though he spends more time on a formal analysis of the final work). Harold D Kalman, “Newgate Prison,” *Architectural History*, Vol. 12 (1969), pp. 50-61+108-112. See also Dorothy Stroud, *George Dance, Architect 1741-1825*, pgs. 53-55.

for the punishment or rehabilitation of prisoners) would have been quite unfamiliar in the seventeenth century. In medieval Newgate, prisoner's halls, which were simply large interconnected rooms, faced out to the street on both sides of the building. Quarters were assigned according to how much prisoners could pay, rather than by the severity of crime. The most well-off prisoners were lodged in the upper floors in private quarters, while the destitute were crowded together in the lower and interior spaces. Nor was the medieval jail isolated from the city around it, and prisoners could freely receive visitors. As they needed to provide for their own sustenance, an entire micro-economy was organized around selling and bartering amongst prisoners and with their frequent visitors.²¹⁷ While the (literary) image of the old Newgate jail had been one of claustrophobic interiority, the medieval structure was actually quite porous with respect to the city around it.

(Figure 2.14 Medieval Newgate, plan diagrams)

In contrast, Dance I's design incorporated some organizational tactics that would soon become commonly accepted features of jails and, later, prisons. Most characteristically, the building would now be closed off, as far as possible, from the outside world. There were to be no openings within the street-facing façades. Light and air would have come only from the inner quadrangles, and a section drawing shows simple rectangular grated windows along the courtyards.²¹⁸ Heavily rusticated aediculae (three on the debtor's side and nine on the felon's), along with a simple pediment and cornice, were to be the only articulations of the exterior surface.

²¹⁷ For enough money, prisoners could even come and go at will; [the richest of prisoners could even charge the gaoler with trespass if he entered quarters without permission]. As has been noted by Robin Evans, among others, none of this activity was determined by any particular architectural arrangement of interior spaces. See, in particular, Evans's account of medieval Newgate in ch 1 "Another world, yet the same," in *Fabrication of Virtue* (1982); and for a general account of medieval jails, see Pugh, R. B. *Imprisonment in medieval England* (1968).

²¹⁸ The felon's quadrangle ended abruptly at a second gate, which led to the sessions house yard.

Likewise in plan are further departures from the original structure that reinforce an inwards-facing orientation. Many of these organizing principles would later become key features promoted by Howard and other advocates for prison reform. The new jail would provide individual cells for prisoner accommodation, arranged in separate zones for debtors, male felons, and female felons.²¹⁹ These rooms would not be interconnected as before, but rather would be accessed from the colonnaded courtyards. These courtyards, open to above, would have provided necessary air and light. While not yet thoroughly confronting the problem of reconciling the competing interests of salubrity and impenetrability, which would become a focus of the prison reformers, each three-story block and its central courtyard contained fountains “to keep the Prison sweet & wholesome which shall be continually running off,” and each had blocks of “necessaries for the use of prisoners.”²²⁰ Not surprisingly given the outbreak of typhus that had precipitated the work, preventing the spread of disease, in addition to the separation of prisoners within cells and arranged by type, was already a major consideration.

(Figure 2.15 George Dance 1, project for Newgate Gaol, section and ground floor plan.)

More notable than these moves, however, was Dance I’s treatment of the gate itself, and the corresponding orientation of the jail within the given site. Dance I’s scheme incorporated a design for a new city gate alongside the jail. But unlike the medieval Newgate, which housed the jail within the thickened structure of a gatehouse itself, the city gate was now conceived as a quite separate element. An elevation shows a triumphal arch wedged between the two massive blocks of the jail building, creating a distinct break from the repetition of blind niches adorning

²¹⁹ Each of the felon’s blocks contained individual cells along a single-loaded corridor—16 for the women’s block and 26 for the men’s block. How many men and women were to be locked up in each at night is unclear from the drawings—these are presumably not yet solitary cells.

²²⁰ Dance had the proper credentials: as clerk of the City Works, water works were in general his prevue George Dance the Elder, Collected drawings and Prints. Soane Museum drawing cat. # 154.86

the adjacent cellblocks. The gate's setback from Giltspur Street by about thirty feet (or half the depth of the building) further emphasizes this distinction, as the gate appears to withdraw behind the doubled mass of the jail. While still functioning in the same spot as the structure it replaced, now, in conjunction with the prison blocks, the gate is a leftover signifier. Rather than a true reconciliation of the two functions—gate and prison—they have become firmly separated in the architect's imagination.

Another important departure from medieval Newgate was the relationship between the jail and the Old Bailey—the courtroom in which inmates would be removed for trial. While the massing of the jail appears to maintain a similar relationship to the site as had medieval Newgate—the two blocks of the prison still straddle Newgate Street—the expansion of the site towards the Old Bailey (made possible by the acquisition of the plots of land formerly occupied by tenements) meant a very different relationship between the courtroom and the jail. In Dance I's scheme, a prisoner arriving from the west would have first had to be led under the new gate before proceeding to the left (for debtors) or right (for felons). Inside, they would not have been confined to the cells except at night. But even though they were not restrained to their quarters, they were now sealed inside the judicial machinery. An enclosed passageway, leading directly from the jail to the Old Bailey Sessions house, meant that jail delivery could take place out of the public eye. Not only was the interior space of the jail now closed to the city, this enclosure encompassed more than just the jail. Imprisonment, arraignment, trial, judgment, and sentencing now could all occur within a closed circuit behind the high wall along the Old Bailey.

(Fig. 2.16 Dance 1 elevation drawing showing detail of gate)

George Dance the Elder died before the project broke ground. In any case, it had already been taken over by his son, who had been serving as assistant surveyor. While the general

interior organization—with its three blocks of prisoner’s cells each surrounding a courtyard—was retained by George Dance II when he took over the project, Dance II’s schemes departed from his father’s in significant ways. In large part, these departures were made possible because the available site had been greatly expanded. It was decided to rebuild the Sessions house as well, in addition to the prison. Now, the entire prison would fit on the enlarged site entirely to the south of Newgate Street, and the Sessions house (the Old Bailey) would also be rebuilt according to Dance’s designs. This additional departure from the medieval Newgate produced a radical reorientation with regards to the overall siting and approach to the new building. As the jail would no longer be required to straddle Newgate Street, a different set of relationships was engendered between the entrance to the jail and the threshold of the city.

Compare, in this regard, the new building to its medieval predecessor as well as to Dance I’s scheme. The entrance to the medieval jail had been perpendicular to the gate of the city. The medieval structure had two major axes: a traveler arriving from the west would enter the City of London through the building as gate, passing directly underneath the jail. A prisoner, on the other hand, would enter the building perpendicular to Newgate street. (These dual axis were present in the Elder Dance’s scheme as well, though the proportion of gate to prison was much reduced.) Now, with room for the entire jail to the south of Newgate Street, the primary façade of the building (on Old Bailey Street) would serve as the entrance to the prison rather than entrance to the city. The ‘gate’ to the city now would bypass the jail building entirely. The jail was now an autonomous structure, built for a single function. No longer any need for ambiguity in its representational force, the building was freed from a jurisdictional indexing of the city’s liberties.

A new autonomy for the prison building

Dance II worked through several iterations of the project, in a progression moving further away from the gatehouse type. His earlier façade drawings emphasize a tripartite structure. The Keeper's House, flanked by the two lodges (one for debtors, and one for felons), is given primary visual weight, with three stories of unadorned rectangular windows; this house, in its central, prominent position, thus retains a similar status as the former city gate. The two wings were left almost entirely blank, excepting the entrances that were articulated with three steps and a pediment. In the final designs, this tripartite division is flattened, and the structure begins to approach a single solid mass. An elevation that was exhibited on June 9th 1769, quite close to the project as built, shows a heavily rusticated façade. The formerly blank wings are now pushed forward in line with the Keeper's House; each contains an aedicule meant for the statues that had previously adorned the former gate. The two flanking entrances are shown with grated doors; now ornamented with garlands of shackles suspended beneath grated lunettes.

(Figure 2.17 George Dance II, Newgate Gaol, west elevation)

These shackles are important. Most directly, they clearly indicate a different approach to technologies of imprisonment. Shackles—essentially a piece of furniture, detachable from the building itself—had previously been the primary technological object of carceral space. Shackles allowed any building to become a prison. As we saw in the last chapter, the widespread adaptation of existing buildings into ones suitable for imprisonment had previously been accomplished primarily through secondary elements such as shackles, grates, and guards.²²¹ Now, the building itself would be required to perform the full function of holding bodies captive.

²²¹ This meant that the building itself was not necessarily required to display its function. Because of cost / also thinking about the temporal cycles of prisons (ie, in the assize court towns). This is why habeas was important to us there, as it produced a consistent rhetorical framework to think about carceral spaces.

Windowless cells, arrayed along inwards-facing courtyards, made the space of the prisoner enclosed in a way that the medieval jail had not. If medieval Newgate had required irons to keep prisoners captive, in the new Newgate rigid aperture-less enclosure would serve that purpose. Here, the transposition of shackles from functional technology to ornament marked this shift explicitly. The shackles on Dance's façade—exteriorized, ornamental—operated as a sign pointing to the technological function that was now performed by the building itself.

More than this, it would perform *better*. Newgate, as we know, had already for centuries been well known as a site of incarceration. This infamy had developed primarily through written narratives, including, of course, those of Jack Sheppard—narratives that not infrequently involved the escape of a charismatic character. While the number of prisoners who were successfully delivered to their executioner at Tyburn far outnumbered the number who escaped, nonetheless the literary trope of the bandit skilled in removing bars and bribing his way past guards played an important part in Newgate narratives.²²² The new Newgate's outward display of enclosure was, at least in part, a response to this unacceptable porosity (and unacceptable fame acquired by those who escaped). The ornamental shackles at Newgate served as a declaratory mark: anyone who entered here would not leave of their own volition. The shackles-as-ornament displaced the mode of constraint from the bodies of individual prisoners, to the space of the building itself.²²³

²²² Many of the so-called "Newgate Narratives" are of those who, like Jack Sheppard, either escaped or otherwise managed to improperly leave Newgate on their own. As Arthur Griffiths wrote, "The ordinary methods of attempting escape were common enough in Newgate. Quarrying into the walls, breaking up floors, sawing through bars, and picking locks ... No part of the prison was safe from attack, provided only the prisoners had leisure and were unobserved, both of which were almost a matter of course.... Extraordinary perseverance is displayed in dealing with uncompromising material. The meanest and seemingly most insufficient weapons served. Bars are sawn through like butter; prisoners rid themselves of their irons as though they were old rags; one man takes a bar out of the chapel window and gets away over the house-tops..." Griffiths, *The Chronicles of Newgate* (1884), p. 286

²²³ Imprisonment is less personal; it can now be anonymous.

And perhaps equally important, the shackles now fully replaced the symbolic markers of the former gate. The building's slight shift southwards meant that it no longer framed the City's threshold, and thus the building was released from the symbolic weight of marking London's boundaries. In this way the new Newgate fundamentally shifted the positionality of the prison with regards to its urban site. Despite the fact that the new building would occupy more or less the same site as had the medieval gatehouse, Dance's final project had a very different relationship with its urban context than had its predecessor. A comparison of medieval Newgate with its reconstruction by Dance shows how the prison was reconceived as an isolated, free-standing structure that had shed its former bearing to the city wall as jurisdictional boundary. Rather than being tied to a very specific moment in the urban fabric—one that necessitated bearing the representational weight of the City's jurisdictional limits—the new Newgate produced autonomy for the jail as a building that claimed a different kind of juridical function. This juridical function was no longer one of making visible the specific (one could also say personal) relationship between the officials of the City of London and the officials of the crown, but rather one of manifesting a new idea of carceral space—one quarantined within the building itself. The jail had gained a certain kind of legal autonomy through its architectural autonomy.

It is in this respect that Dance's Newgate is most radical. By severing jail from gate—in other words, severing jail from the symbolic marker of the *city's* limits—the building became an autonomous marker of its own legal space.²²⁴ The building's doubled signs—building and shackles; ornament and technology; *a common name for all gaols* and also this particular mass of stone—served to remove all ambiguities about the symbolic function of Newgate. This building

²²⁴ By dislodging the prison from the gate itself, and its indications of London's boundary. More broadly, in the reconstruction of Newgate jail we can begin to make out a shift in thinking regarding the way law could be tied to architectural space.

was a jail, not a gate; and the (spatial) threshold that it marked was one between the criminal and non-criminal, rather than between the citizens of London and those who belonged beyond the City's edge.

The elevations, and a plan, of George Dance II's final designs were among the few drawings that the reformer John Howard would publish in his text *The State of the Prisons* (first edition 1779). Howard was not entirely pleased with the new building. His published plan included the caveat: "I give the plan, rather to satisfy the curiosity of my readers, than as a model to be followed. Many inconveniences of the old gaol are avoided in this new one: but it has some manifest errors.... All I will say, is, that without more than ordinary care, the prisoners in it will be in great danger of gaol-fever."²²⁵ While Dance had successfully negotiated the architectural problem of finding an image that would be appropriate for a building (a prison) that formerly did not warrant an architect's attention, his innovations in strictly architectural terms remained, quite literally for Howard, on the surface. More would be needed to define the prison as an architectural type, and John Howard and Jeremy Bentham, along with other reformers, would articulate those needs in the subsequent decades. These requirements would be given formal expression by Dance's successors, including John Soane and Joshua Jebb.

Despite these criticisms from the social reformers, and the fact that it was built a little too soon to take full advantage of the administrative reforms that would be passed in the succeeding decades, architects applauded Dance's realization. What it lacked in innovation in plan, the building made up by virtue of its façade. The building's character was immediately apparent, as Repton had remarked. If a building needed to exhibit its purpose, Newgate certainly *looked* like a prison. This attention to the façade continued with new generations of architectural historians.

²²⁵ Howard, p. 213

According to Summerson, “Dance’s plan was out of date within a decade of its execution. It had, in any case, little architectural interest and need not detain us. But the composition as a whole was magnificent. ... what makes the design remarkable is the way that Dance has taken a painful, even rather squalid, theme and made out of it a sort of architectural poetry.”²²⁶ The innovation, for Summerson, had been in the translation of an imaginary image of carceral space onto the façade of an actual building: “Piranesi, in his *Carceri* series, had, indeed, expressed the horror of captivity in sensational terms, but Dance, with Piranesi as his inspiration, built it into the cold, calculated prose of an actual gaol.”²²⁷

But because the architectural innovations of Newgate were located at its surface, it has been more or less discounted from serious studies of the modern prison (apart from as a brief digression).²²⁸ In some ways this is logical, since Newgate certainly did not fully exhibit the internal organization in plan that would come to characterize subsequent developments in prison typology. However, as I hope I have demonstrated through the contextualization of Dance’s project (both in terms of previous depictions of medieval Newgate, as well as in terms of its position as an index of London’s Liberties), the building reveals that an architectural *image* of the prison was equally an important factor in the development of the new typology. Newgate demonstrates that the modern prison building would be not only defined by its internal organization; but also defined by its ability to declare its architectural intent within the urban

²²⁶ John Summerson, *Georgian London* (1988) [1945], pg. 154

²²⁷ John Summerson, *Georgian London* (1988) pg. 155. Summerson assumes that Piranesi is Dance’s inspiration, though subsequent scholars have questioned Dance’s reliance on Piranesi’s images, attributing ideas expressed in the façade rather to Dance’s understanding of Burke’s descriptions of the sublime. See Jill Lever’s remarks on the entry for Newgate, in the *Catalogue of the drawings of George Dance the Younger (1741-1825) and of George Dance the Elder (1695-1768): from the collection of Sir John Soane’s Museum* (2003) and Harold D Kalman, “Newgate Prison,” *Architectural History*, Vol. 12 (1969)

²²⁸ As examples, Foucault does not mention the project at all; while Ignatieff and Evans both position medieval Newgate as a counterpoint to the modern prison; Dance’s project is mentioned only in passing.

sphere. This has important consequences for the perception of carceral space. The prison building, if it was going to be usefully understood as an architectural type, needed to be able to make its own claims to legal space beyond local associations with medieval jails. If medieval Newgate marked a specificity of place, the new Newgate would mark the specificity of a legal idea, as embodied by its legibility as a defined building type. The prison building could now be seen as an autonomous legal space, designable by architects. This new autonomy meant that the prison building, now thinkable as such, would subsequently have the ability to be located anywhere. “*A common name for all prisons,*” Nashe had written in 1592. No less true, though now translated into “the *cold calculated prose* of an actual gaol”—a jail that had been given formal legibility through architecture.²²⁹

Before concluding, let us return, very briefly, to the new Georgian jail on the island of Guernsey. Recall that at around the same time that an architectural project for Newgate was being discussed, the Bailiwick of Guernsey was engaged in a dispute with an English military commander about the jurisdictional parameters of the inland’s civil jail, located in Castle Cornet. The dispute was resolved in Guernsey’s favor, and the space of the castle jail was restored under proper civil authority. As we saw, the dispute made visible a spatial understanding of legal limits—limits that had, in the past, been seen as predominantly non-spatial. Curiously, however, less than fifty years after Guernsey’s insistence on the importance of Castle Cornet for fulfilling own jurisdictional functions, a new purpose-built jail was erected in the town of St. Peter Port.

We are now in a better position to understand why this project came to be at this moment, and how the building—not a particularly spectacular structure—might have been seen as an acceptable, or even preferable, replacement for the jail in Castle Cornet. The new prison was

²²⁹ Thomas Nash, *Pierce Penniless's Supplication to the Devil* 1842 [1592], pg. 35; John Summerson, *Georgian London* (1988) pg. 155.

purpose-built, with one function in mind: to hold prisoners. This building, with separate guardhouse within an enclosed courtyard, was built on a vacant lot just to the west of the existing Royal Court. The former jail on Castle Cornet had necessitated a regular staging of the jail-delivery process, as prisoners were marched to and from the courthouse. With this new jail building, Guernsey's judiciary would no longer need to continuously assert its authority in this way, as the building itself could serve to declare the limits of civil jurisdiction over the bodies of its prisoners. This new jail did not require the processional theatrics of legal authority. Instead, together with the courthouse the jail now formed a small complex of judicial buildings. Within this tightly circumscribed site, there was no room for mistaking who was the final authority.

(Figure 2.18 St. Peter Port, 1848; and site plan showing prison)

(Figure 2.19 William B. Hulme, States Prison, St. Peter Port, 1808)

The new jail on Guernsey was completed in 1810, almost two decades after Jeremy Bentham's proposal for his famous panoptic penitentiary project; three decades after the Penitentiary Act of 1779 dictated the spatial requirements that would come to be seen as the logical organization of the modern prison. I will discuss these developments in subsequent chapters. Suffice to note here, however, that while the new jail at Guernsey—as Newgate—did not abide by the parameters required of the so-called reform prison building, the project indicates nonetheless that an idea had taken hold: that a proper prison building was one built according to drawings commissioned by an architect. Further, while the parameters of an ideal prison building, for legal reformers such as Bentham, might be best exhibited in plan drawings—for local authorities such as at Guernsey's Royal Court, the ideal prison building would be judged by its capacity to declare (through its façade), its legal autonomy.

While the construction and funding for the new jail came from England, it was under the auspices of providing a technological apparatus for the enforcement of Guernsey law. Each party's role was clearly articulated, made possible by the necessary negotiations involved in construction. The building of the new "town prison" in St. Peter Port gave the Royal Court a symbolic marker of its legal authority. More than this, the precedent set by Newgate, which allowed the jail building to be read as supporting a single juridical function, removed any ambiguity in the use of that space. Guernsey's new jail provided a clearly delineated jurisdictional space: a space within which the authority of the Royal Court could not be challenged. With a building able to declare its own purpose (jail for Guernsey's Royal Court), there would be no further need for Guernsey to assert its authority over that space.

V Conclusion: islands, gates, and other containers

In this chapter, I have looked at how architecture marks legal ground, and, in doing so, allows us to see jurisdiction as an abstract legal concept that has always required material presence. Jurisdiction is both a technology and a discourse; a site of authority and a declaration of that authority. Rather than collapsing this distinction, I've tried to show how both are necessary. Architecture itself simultaneously requires a combination of material presence and an abstract logic; in other words, a technology and a discourse. It is this capacity to operate as both mode of discourse and as a material technology that made architecture a necessary instrument in producing a spatial understanding of jurisdiction, even before the modern notion of territorial jurisdiction became fully actualized.²³⁰

²³⁰ In order for law to work, legal principles require the translation of abstract systems (however defined) to actionable processes. In general these procedures often require the material technologies of building. But as we have seen, this is more complicated than simply understanding material history of jurisdictional boundaries.

Through the examination of jail buildings in Guernsey and London, which demonstrated architecture's role in making legible jurisdictional claims, I have made two distinct propositions. First, a pre-modern (and nominally non-spatial) idea of jurisdiction revealed itself to be inherently spatial. In looking at Guernsey's dispute over the space of its jail, and in close attention to the naming, in Crown charters, of Newgate as a specific site of London's jurisdictional authority, I showed how the use of these buildings allowed legal limits to become apparent. In the medieval jails on Guernsey's Castle Cornet and in London's Newgate, legal limits of the Crown's reach became legible through the dissemination of an image of the building as a functional requirement of jurisdictional authority. This image was produced not through drawings, but rather through disputes over particular spaces. In these disputes, we saw hints of how architecture was thus implicated in the familiar jurisdictional shift from status to locus. But more than this, the disputes showed how jurisdictional claims of status nonetheless required buildings in order to be made legible. In this sense, jurisdictional authority as defined by status was always somewhat grounded in a place.

These places were marked by buildings. The jail buildings discussed here were specific. In fact, it was by calling attention to their precise forms, histories, and locations that these buildings could be used to make claims on jurisdictional authority. If the writ of *habeas corpus* was powerful inasmuch as it gave the King's Bench the ability to lay claim on any space that was enclosable, the buildings here are remarkable for how much they claimed an authority that was specifically *not* transferable to any other. By tying local legal authority to a particular enclosed space that was not mobile, architecture marked the ground of its jurisdictional claim.

However, because of the simultaneous ability for an architectural image—now in the form of architectural drawings—to be separated from its specific context (as we saw most clearly

in Dance's project for Newgate), the idea that the jail building produced a specific kind of autonomous legal space cannot be discounted. So my second proposition was that the image of the jail created a self-evident space of authority. The Georgian reconstruction of Newgate and of Guernsey's Jail in St Peter Port showed clearly how the jail's new autonomy produced a distinct form of legal space. This new form of carceral space, specifically designed by architects, could be understood as a distinct building type and thus transposable beyond its original site.²³¹ In the following chapters, we will pursue the implications of this transposition.

Architecture's work in these regards was covert. It needed to be, if the legal authority that was being claimed would resonate beyond the walls of the structure itself. I conclude finally by returning to Coke, who had already planted a clue to the links between jurisdiction and the work of architecture, long before the construction of London's and Guernsey's jails. We saw how Coke had described his volume on jurisdiction as akin to a map: the finished product, he believed, would thus allow the varied jurisdictions of the realm to be "distinctly understood and observed." But in describing his own labor required to produce the book he turned to a different metaphor:

We having (as else where we have said) collected some materials towards the raising of this great and honourable building, and fearing that they should be of little use of after my decease, being very short, and not easily of others to be understood...

...I confess it is a labour [completing the volume] of as great pains, as difficulty: for as in an high and large building, he that beholds the same after it is finished, and furnished, seeth not the carriages, scaffolding, and other invisible works of labour, industry, and skill in architecture: so he that looketh on a book full of variety of important matter, especially concerning sacred laws, after it is printed and fairly bound and polished, cannot see therein the carriage of the materials, the searching, finding out, perusing, and

²³¹ On type, mean things like: iterability, loose relation to function, a degree of independence from site, etc.

digesting of authorities in law, rols of parliament, judicial records, warrants in law, and other invisible works...²³²

This metaphor is revealing in Coke's own understanding of how the law's knowledge is transmitted. It shows that Coke had an understanding that jurisdiction is something that is explicitly constructed, yet also needed to hides its artifice. While Coke's map is a metaphor for the outline of jurisdiction (again, abstractly spatial before it is materially spatial), the building is a metaphor for the process itself that allows that map to be understood as a legible image. The materials Coke himself gathers—the rolls, warrants, records, and other “invisible” texts—are akin to the raw matter that becomes building under the skilled hand of the architect. Importantly, that skill and those raw materials are now eclipsed by the finished product, and the building/map of jurisdiction is able to do the work of making visible legal claims only through obscuring its constituent elements. In other words, the constructed relationship between legal authority and place was always there, but always somewhat hidden.

²³² “...Out of the duty that I owe to his most excellent Majesty, and my zeal, and affection to the whole common wealth, I have adventured to break the ice herein, and to publish more at large those things which in our reading we had observed concerning jurisdiction of courts...” (Coke *Institutes*, preface)

Chapter 3

How to construct a fiction: architecture as legal metaphor

I Introduction

In the previous two chapters, we have seen how architecture and law in their own ways made claims on the prisoner's body. Chapter 1 (*How to get out of jail: the Common Law writ of habeas corpus*) examined the legal procedure dictated by the writ of habeas corpus, and showed how this procedure defined certain parameters required for a space of confinement to be understood as such by early modern English law. These parameters were 1) an ability to keep a prisoner securely confined, but also 2) a connection within a wider legal network that made it possible for the prisoner to make her plight known to the court of the King's Bench at Westminster. The carceral spaces in this first chapter would have been approached quite differently from the perspectives of more traditional legal and architectural histories, because even if we narrowly define early-modern carceral spaces as "those which the writ of *habeas corpus* may reach," the parameters of the writ broadly construed the physical requirements of its architectural space as any building that provided physical restraint. No general claims can be made as to their formal typology, appearance or style.²³³ The spaces invoked by the writ had legal specificity, but not necessarily architectural specificity in formal terms.

In the early modern habeas cases examined in this first chapter, the rhetorical space of the jail was thus defined entirely by the law.²³⁴ Rather than examining in detail any one particular

²³³ It is difficult to assign a framework for understanding these spaces within the conventions of architectural history (typology, style, etc.), because the writ broadly interpreted any enclosed space to be carceral. The primary characteristic that these spaces had in common was that they were used to detain; and, in fact, the writ was used to contest the imprisonment of women and men held in all sorts of spaces (a private home; a ship; a county jail). In this way, we could think of the carceral spaces supervised by habeas as understandable through their use; habeas, however, adds an additional dimension that use alone, since the writ provides an exterior discursive framework that makes the spaces legible as belonging to the same category. For more on buildings and use, see, for example, the Introduction (and collected essays) in Kenny Cuppers, *Use Matters: An Alternative History of Architecture* (2013).

²³⁴ In general throughout this project, I take the space of the prison or jail to be defined by both material enclosure together with a system that creates meaning. In the case of the early *habeas* writs, this meaning is given entirely by the law (not architecture).

space, the chapter introduced a method for how one might use legal evidence to understand how buildings are crucial in producing certain political relationships.²³⁵ The chapter further argued that calling attention to the architectural framework of the writ could be a useful approach to legal history. Since, technically speaking, the writ is always addressed to a person rather than to a building, the actual spaces in which prisoners were held have been elided from the writ's history. However, despite this lack of explicit discussion of space by jurists (and hence their historians), understanding how legal practice already made claims on the prisoner's body requires understanding the agency of buildings within legal practice.²³⁶ In this way, an architectural approach to habeas corpus makes early modern carceral spaces visible to both legal and architectural history.

In Chapter 2 (*How to picture a jail: giving form to jurisdictional claims*), I introduced the legal concept of jurisdiction, and showed how buildings were important in territorializing the law. I began by looking at how particular buildings could be mobilized in service of making legal claims (Guernsey's Castle Cornet), and ended by looking at how particular legal principles could be mobilized in service of making architectural claims (Newgate Jail). In these examples, architectural and legal principles were both needed in order to define a concept of jurisdiction that was spatial rather than categorical. The carceral spaces examined in that chapter were specific buildings, whose material form provided both the staging-ground for, and also the rhetorical expression of, the law. The chapter also introduced a few examples from within the

²³⁵ In these early *habeas* cases, the evidence for the existence of a building, and its role in legal oversight, often comprises solely of the writ and its return, now kept in bundles in the National Archives at Kew. For more on legal archives and history, see Paul Halliday, "Authority in the Archives," *Critical Analysis of Law*, 1 (2014), 110-42. and J.H. Baker, "Why the History of English Law has not been Finished," *The Cambridge Law Journal* (2000) Vol.59(1), pp.62-84

²³⁶ But this also requires work on my part, since the legal historians don't place much weight on the importance of the buildings themselves.

established profession, as architects were beginning to take on the challenge of designing the jail. In particular, the drawings of the new Newgate Gaol by George Dance I (and George Dance II) showed how establishing the legal significance of a building required the particular rhetorical work of architecture.

The jail buildings in this second chapter thus carried both legal and architectural meaning. However, how this meaning was produced is still understood quite differently from the perspectives of architecture and law. Legal significance of the structures was determined primarily by who maintained control over the spaces. That control was manifested through contestations of jurisdictions, in which the proper use of a building was settled by suit or charter. In contrast, architectural meaning was produced through representations and translations of that proper use to signs and symbols. In Dance's Newgate, shackles—furniture that was previously used to contain the prisoner's body—became ornament on the façade, and announced the functionality of a new building type.

Broadly, then, both previous chapters considered when and how jail buildings acquired legal significance, even if this did not necessarily correspond with architectural significance.²³⁷ Nor did this legal significance necessarily correspond with ideas of criminality or punishment—which is how we have typically understood the prison in architectural history. In fact, the coincidence of legal and architectural claims on carceral space has revolved around seeing the prison as a technology necessary for punishment.²³⁸ The remaining chapters place at the center

²³⁷ By examining the distance between the ways that law and architecture produce meaning, we can see how these gaps have blinded us to certain ways of looking at buildings. Because architectural history doesn't care about the space of *habeas corpus*, we don't have a way to approach these buildings that might be useful to legal historians.

²³⁸ Given that penal incarceration has become the predominant legal sanction in the modern world, it is important to remember, once again, that until the eighteenth century jail buildings were primarily used to detain rather than punish.

imprisonment as a penal strategy, as the second half of this dissertation now turns to the idea of punishment specifically. In the decades between the construction of Dance's Newgate (1782) and the completion of the HM Prison Pentonville (1842, designed by Joshua Jebb), the prison sentence had emerged in English legal thought as the most suitable form of punishment. How did imprisonment become positioned as an ideal legal sanction at this time? How, and why, has architectural history specifically been focused on this particular moment—a moment when carceral space would become associated solely with legal punishment?

The remaining chapters re-position this particular historical moment in which the legal definition and architectural definition of the prison as a space specifically designed for punishment appear to coincide precisely—at least in theory. At the turn of the nineteenth century in England, the architectural space of the prison was designed to be an exact reflection of the legal principles that animated reforms in penal practices. The reform prisons and penitentiaries designed and built in this period aimed to be a perfect reflection of legal principles written in statute; these statutes, in turn, were written with precise architectural qualities in mind. In these buildings, what appeared to be a seamless translation between legal principles and architectural principles defined the space of the prison. This space begins to share familial relations with the modern penal institution as we know it today.

In the two chapters that follow, I look more closely at the principles behind the projects of this period. To do so, I (re)-introduce a few well-known characters in the history of penal law: William Blackstone, Jeremy Bentham and John Howard. Much has already been written about these men, and on the changes in penal practice that occurred over the long eighteenth century in general. This moment is still regarded as the time when a convergence of numerous factors resulted in the “invention” of the modern prison sentence: the development of humanist ideology

regarding the status of the criminal in society; changes in the cultural and material practices of legal punishment; increased capabilities of organized state-funded institutions.²³⁹ Even given this general consensus among historians, it is useful to revisit this material. To start, I ask a basic question. Was the translation of prison sentence to building as direct as it appears? I will argue that it was not, and that much work was needed to create the appearance of a perfect translation between penal imprisonment and the architectural form it required. I further argue that creating this very appearance of a lossless translation between penal codes and prison building was itself seen as a necessary step for eighteenth and nineteenth century penal reform.

Before looking closely at the prison reform movement and the buildings that resulted (which we will do in the following chapter, on “measurement”), we take a detour through one of the peculiarities of English legal practice: the widespread use of fiction. An important, though unexplored, factor in driving towards the supposed convergence between architectural and legal approaches to holding the prisoner’s body was, in fact, an ongoing debate between Blackstone, Bentham and their contemporaries regarding the codification of English law and the use of “legal fiction” in Common Law practice.²⁴⁰ I therefore approach the topic by first addressing this broader concern of late-eighteenth century legal thought in England. Legal fictions—or the contrived use of details in a legal argument that contradicted the actions that led to the suit—were both widespread in use and commonly accepted in practice. Importantly, while legal fictions referred to events that did not take place as stated on the record, their use was not arbitrary. Rather, a precisely defined narrative was required for the fiction to work. These

²³⁹ See, for example, the essays collected in the volume edited by Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson and Cal Winslow, *Albion’s fatal tree: crime and society in eighteenth-century England* (2011) as well as, in general, the works of Robin Evans, Joanna Innes, John Langbein, Michel Foucault, and John Beattie.

²⁴⁰ I will define this term precisely in the following section.

narratives often involved elaborate spatial descriptions in order to make a claim fall under a particular jurisdiction.

In the eighteenth century, the debate regarding the usefulness of these legal fictions, and their importance in allowing the law to accommodate historical change, revolved around a particular fiction of custody. In certain circumstances, a court did not need to actually have the prisoner's body present in order to claim custody of it. For the legal reformers of the late-eighteenth century who were concerned that fictional constructions such as these obstructed justice, architecture appeared at first to be a perfect accomplice in correcting the disparity between fictional and material geography. A building, after all, was a good way to secure real custody of a prisoner's body. However, the prospect of replacing immaterial legal geography created through fiction with the material geography created by architecture was not so straightforward. If architecture was to be seen as a stand-in for certainty in penal practice during this period, it needed to be explicitly described as such. Work needed to be done to make sure that architecture itself would be the proper way to ensure the certainty of imprisonment as fact. This was not a given, as we will see. Jeremy Bentham has been introduced in the story as producing a diagrammatic understanding of architectural ... but this image of architecture was not the only one at the time. William Blackstone, a proponent of maintaining current practice, actually grounded his own arguments in a series of very specific architectural images. Bentham's panopticon thus had a competing architectural image in current circulation.

Blackstone and Bentham will be presented here in terms of how they understood the relationship between material space and its legal representation, and how they used images of buildings to construct these relationships. Sir William Blackstone's use of architectural metaphors in defending the Common Law from what he saw as the dangers of codification

reveal an entrenched connection between architectural image and legal structure. By contrast, Jeremy Bentham's approach to legal reform in general was one that argued for codification and certainty, and for him, the rampant use of legal fictions was exemplary of the inefficiency of the Common Law. Taking account of Bentham's arguments against the use of legal fictions re-contextualizes his plan for the panoptic prison, which sought to mobilize exacting material specifications to produce an image of legal sanction that would be effective only through an abstract understanding of pain and retribution. Bentham promoted the use of a new architectural idea that would create certainty in law, whereas Blackstone's image of the Gothic architectural past was used in support of his argument in favor of maintaining a fluid and flexible legal practice.

The debate between Bentham and Blackstone is preceded here by a general discussion of the role of legal fiction in Common Law practice. I show how these legal fictions relied on a particular understanding of geography, and, through this geographic understanding, were used to adapt past law to present circumstance.

II Fictions in law

What is a legal fiction?

We will return to the specific use of architectural logic in legal fiction, but first I will clarify what is meant by the term, especially as it pertains to legal practice in the eighteenth century. As the name implies, a legal fiction is a falsehood of a particular kind.²⁴¹ Most

²⁴¹ The definition supplied by the Oxford English Dictionary is a useful start: Fiction: "5. A supposition known to be at variance with fact, but conventionally accepted for some reason of practical convenience, conformity with traditional usage, decorum, or the like. a. In law chiefly applied to those feigned statements of fact which the practice of the courts authorized to be alleged by a plaintiff in order to bring his case within the scope of the law or the jurisdiction of the court, and which the defendant was not allowed to disprove. Fictions of this kind are now almost obsolete in England, the objects which they

importantly these falsehoods were deliberately entered on the record and taken as legal fact. Generally legal fictions were not used in an explicit attempt to be duplicitous, and, broadly speaking, no one was deceived apart from the occasional unwitting historian.²⁴² Rather, until the practice was officially abolished in 1852, fictions were used by convention and out of convenience, most often to bring a case within the scope of a particular jurisdiction.²⁴³ A classic fiction involved an intentional misstatement, on the official court record, of the basic facts of the dispute in question. In a stolen property case, for example, a charge might be downgraded from felony to misdemeanor by a deliberate misevaluation of the value of stolen goods.²⁴⁴ While this would not have been a trivial distinction for the thief potentially facing an executioner, the “fiction,” as it were, which would be required to re-classify the type of offence, was quite

were designed to serve having been for the most part attained by the amendment of the law.” “fiction, n.”. OED Online. January 2018. Oxford University Press. <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/69828?> (accessed February 09, 2018).

²⁴² As J.H. Baker puts it, “Thus the main objection to the fiction, from the point of view of jurisprudence, is not so much that it is untrue—after all, it deceives nobody and has no dishonest purpose—but that it works off the record, without overt legal reasoning, and therefore suppresses principle.” Baker gives a usefully succinct account of the types of legal fiction, and the way they worked in practice. He distinguishes between several types of fiction: “deeming” fictions (a man and wife deemed by law to be one person for the sake of certain transitions); “evidence” fictions (fictionalized evidence, ie, the literacy test required of clergy pleading, or the proof of adultery required of divorce proceedings); and “factual” fictions (ie, the ones discussed here). All involved “a deliberate separation” between the outward forms of law—primarily as it was stated in books, rules, judgments—and the way the law worked in reality. This separation was still encompassed within the scope of formal law, however, since it had judicial approval (this is in contrast to extra-legal resolution of conflicts, which occurred entirely outside the scope of the courts). Baker, J.H. *The law’s two bodies: some evidential problems in English legal history* (2001), p. 55

²⁴³ The Common Law Procedure Acts of 1852 abolished many procedural fictions simply by rendering them unnecessary: thus, in a sense, acknowledging their importance. Of course, while these acts abolished specific forms of fiction, the idea that one can separate legal thinking from ‘factual’ thinking remains (as we saw above in the Nyack case). Finlason, W. F. 1818-1895. *The Common Law Procedure Acts of 1852, 1854, and 1860: with notes and the forms and rules, to which are prefixed, or appended, all the acts (or portions of acts) relating to common law procedure, or the trial of issues of fact, in the Courts of Common Law Chancery, or Probate, with the rules of each court respectively. Adapted to the use of practitioners in all the courts; and also to the use of students* (1860).

²⁴⁴ John Beattie gives many examples of such downgraded charges, which can be made visible in the records in several ways: the indictment could be at odds with affidavits, or the value of varying lengths of stolen cloth all mysteriously amount to same value in a given assize session. Beattie (along with Douglas Hay, among others) argues that these types of fictions gave discretionary powers to juries who might not be persuaded that a capital punishment was fitting for a particular crime, yet nonetheless did find enough evidence to convict. See Beattie, J. M. *Crime and the courts in England, 1660-1800* (1986) and Douglas Hay’s “Property, Authority, and the Criminal Law” in *Albion’s fatal tree: crime and society in eighteenth-century England* (2011).

simple: a 60-shilling bolt of cloth stolen from a shop might be recorded on the indictment as being worth only 39 shillings.²⁴⁵ But fictions could also involve more complex circuitries, as Sir William Blackstone would say, understandable only through a working knowledge of the various courts of England and their jurisdictions. In some examples, entire fictional suits would be invented for the purpose of bringing a completely different dispute to court.

It is this genre of fiction that is particularly relevant in understanding the importance of buildings in the legal imagination. A complex fiction, used to transfer suits from one court's jurisdiction to another, required a specific understanding of legal geography, and the buildings that marked this geography. An example might be the best way to demonstrate how such a complex fiction would have worked. One frequently used fiction was known (in shorthand) as the Middlesex Bill (or the Middlesex fiction). By the fifteenth century, the Middlesex Bill had become a popular mechanism used to bring an action in the King's Bench even if the case technically should have been heard by a different court.²⁴⁶ At that time the Bench was ordinarily only concerned with claims of breaking the King's peace. However, since the Bench was physically located in Middlesex County, the court was also authorized to hear civil disputes, initiated by bill, between residents of the Middlesex County, or against a defendant already in custody of the court (in other words, a defendant being held in the King's Bench jail).

²⁴⁵ As this example makes clear, a fiction was an easy way to re-classify legal claims without resorting to the more difficult process of legislation.

²⁴⁶ In general a bill, similar to a writ, was a legal instrument used to commence an action in court. A bill was both more convenient and cheaper than securing a writ, because it consisted of a petition made by the litigant directly to the court (as opposed to the writ, which required the additional step of filing a complaint to the Chancery, which would then issue the writ). But while more convenient than a writ, the bill was an instrument specific to the court of the King's Bench. A bill could thus only be secured in Middlesex (the county in which the court was located), or against defendants who were already considered in the custody of that court. This distinction between bill and writ is itself a historical contingency: originally a bill was available only when the sheriff of any given county was personally present at the King's Bench. After the Bench settled permanently in Middlesex, initiating a procedure by bill would become available to anyone in that county. This example is given by Baker in *An Introduction to English Legal History* (1990), pg 41-43, and is a classic example of legal fiction used to explain the concept. See also Chapter II, "Changing Law" in Milsom, S. F. C. *A Natural History of the Common Law*. (2003).

Technically speaking, it would seem as though commencing a minor civil action in the King's Bench would only be possible for those who were physically located in Middlesex County itself, or against those who were already in custody of the court. But the Middlesex Bill procedure was deemed useful for the plaintiff—perhaps because he wished to avoid the more cumbersome writ process that would otherwise be required in his local court, or because he believed he might receive a more favorable outcome if the case was heard at the King's Bench. The bill also provided a good revenue stream to the Bench, which charged a fee for each bill that was issued. In order to accommodate these desires, a fiction would thus be needed as a workaround for inconvenient geography. The jail itself became a necessary proxy for constructing this fiction.

Imagine a plaintiff who is owed some minor sum of money. This plaintiff would like the case to be heard in the King's Bench, which technically would not be concerned with private debt. How might this minor civil action be smuggled into a jurisdiction in which it had no right to be? The plaintiff could begin by suing by an original writ for a trespass, which would be enough to have the accused arrested.²⁴⁷ (The accusation of trespass, by definition an accusation of breaking the King's peace, would automatically be heard by the King's Bench.) By consequence of this accusation and subsequent arrest, the defendant would thereby be considered in custody of the court. Since anyone in the custody of the court was considered properly in Middlesex County, the plaintiff could then quietly discontinue the original trespass matter, and

²⁴⁷ Trespass here was usually against the person, not chattels or property (which is how we typically think of the term today).

sue instead for the debt that was actually owed. Plaintiff now had successfully brought a minor private dispute to the King’s Bench.²⁴⁸

(Figure 3.1 The Middlesex Bill: a fictitious chain of events (diagram))

Importantly, this fiction could be extended beyond the original claim of trespass. As it turns out, the defendant would not actually need to be physically kept in jail, nor even ever have ever placed a foot in the county, to be considered lawfully in the custody of the court. This was due to a simple extension of the logic of the fiction: at that time, securing an immediate bail would have been commonplace enough after an arrest for minor trespass. It would therefore not have been a stretch to imagine that, while the defendant might legally be in custody of the court, he was currently out on bail. As Blackstone himself put it,

Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the marshal’s prisoner; for, as soon as he appears, or puts in bail, to the process, he is deemed by so doing to be in such custody of the marshal as will give the court a jurisdiction to proceed.²⁴⁹

A plaint of trespass that never happened produced an equally fictitious arrest and subsequent bail; this, in turn, allowed the King’s Bench to claim legal custody of a defendant that was at large. While the documents stated that the defendant was in the custody of the King’s Bench jail, all the while both plaintiff and defendant would have remained comfortably in their home counties—where, in fact, everyone had been all along, until the day their minor civil suit would

²⁴⁸ A few further assumptions made this process even more convenient for the plaintiff. Since, after all, the original trespass would be discontinued after the bill for debt had been issued, there was no reason for the details of this original trespass suit to be “correct” in any of its details. It thus became common practice to issue a *bill* of trespass (rather than the writ) in Middlesex, essentially claiming that the defendant had committed an offence against the plaintiff while in the county. This would have been both cheaper and faster than securing an original writ.

²⁴⁹ Because of this fictitious bail, the defendant was therefore naturally understood to not be physically in the custody of the court, and when the defendant was inevitably not found (*non est inventus*) in Middlesex, the court would issue a writ of *latitat et discurrit* (the writ of “lurks and roams about”) to the sheriff of the county where the defendant actually lived to bring him, finally, to court. William Blackstone, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803). Vol. 4 pg. 284-285

be called to the Bench. And while this might seem unduly complicated, the entire process would lawfully appear simply by completing the proper paperwork.²⁵⁰ In sum, a fairly elaborate fictional sequence of events would unfold not in space but on the jurists' forms, in order to bring about an expeditious outcome for the disputants, and additional revenue for the court as it expanded its jurisdiction.

Fiction and legal change

The contemporary view of such legal fictions is that they allowed the Common Law to accommodate evolving circumstances without resorting to legislation. The legal historian John Baker has made the convincing argument that such fictions arose over time as lawmen noticed certain useful shortcuts in their work, especially when the officially sanctioned procedure did not easily allow for speedy remedies of more modern disputes. In this Middlesex Bill procedure, for example, there was most likely a real instance of a plaintiff who wished to sue for both trespass and debt; either he or his enterprising council realized that he only needed to secure one writ (for the trespass), and the debt could then be subsequently sued more cheaply by bill.²⁵¹ The original enterprising lawyer or plaintiff in the Middlesex fiction is lost to history, though the shortcuts he may have accidentally discovered became standard practice through repeated use by others. This

²⁵⁰ As Milsom put it (not referring to fictions specifically but more generally to the way the Common Law worked): "For most situations there were at least two actions available: a natural one which was intelligible but did not work, and an artificial and unintelligible one which did." As we will see in the preceding sections, one of Blackstone's tasks would be to make these "artificial and unintelligible" actions make sense to the layperson. (Milsom "The Nature of Blackstone's Achievement," 1981, p. 7)

²⁵¹ We can only say "most likely" with regards to this first case, because the exact origin of a fictional construction is, by definition, impossible to pinpoint. As convenient they might have been for the lawyer using them, legal fictions pose a thorny problem to the historian: the written records that are used to establish patterns of law are the very records that are here falsified. In fact, it is only quite recently that historians have begun to understand the practice of using fiction as a useful lens with which to view changes in legal practice. Constructions such as these, once properly understood as fiction, can clarify historic parameters of certain courts, and how those parameters changed over time. Looking at the Middlesex bill procedure, above, confirms that the jurisdiction of the King's Bench was not originally meant to encompass civil disputes, except for those that were located in Middlesex County, but that other complaints might be valid in that court despite geographic location of the litigants. The fiction also reveals how the scope of these courts would change over time.

example shows that in certain circumstances, events might be entirely fabricated by lawyers out of a desire for expediency, but only once a pattern to structure these events had been put in place. These patterns of practice eventually produced substantive changes in the law, even if those changes were never recorded as such. As Baker put it, “the object of fictions is that they allow the operation of the law to change while avoiding any outward alteration in the rules.”²⁵² In this example of the Middlesex Bill, the substantive (though unwritten) change in the law was that the King’s Bench now had, *de facto*, the jurisdiction to hear claims of petty debt.²⁵³

Practicing lawyers did not see it this way, of course. For them, fiction was simply an efficacious way to produce a positive outcome for their clients. They were not thinking in terms of historical change, nor in terms of circumventing a legislative process in order to secure certain personal rights. For them, a fictitious claim simply was a useful legal procedure, effectuated by means of a little extra paperwork. However, the ability of fiction to produce legal change without legislation was beginning to be understood explicitly as a unique feature of the Common Law in the late eighteenth century. Therein lay the problem for Jeremy Bentham, but the advantage of English law for William Blackstone. As we will see, for Bentham these fictions were an affront to the very idea of a logical and just system of law. For him, a vocal proponent of legal codification, the disparities between law as it was practiced and the law as it was written threatened to produce an unacceptable and dangerous kind of tyranny. This was especially dire as it pertained to the fictional custody of prisoners, since Bentham would, of course, go on to advocate for imprisonment as the most just form of legal punishment. For a system of prison

²⁵² Baker (2001) pg 35

²⁵³ This change, until the abolishment of fictions, was true only in practice, as all the while the Bench was technically authorized only to hear matters pertaining to breaking the peace.

sentence as punishment to work, the imprisonment itself—the custody of the prisoner’s body—needed to be produced in fact, rather than through a fictional account on paper.

We will return to Bentham’s concerns. First, however, it is important to situate his arguments against those of his teacher, William Blackstone.²⁵⁴ Blackstone had inaugurated a renewed interest in a comprehensive approach to understanding the Common Law, and in contrast to Bentham’s views he saw the un-codified nature of English law as one its primary strengths. But Blackstone himself is interesting not just as a foil for Bentham and other proponents of codification. His *Commentaries on the laws of England* (published, in 5 volumes, between 1765-1769), which remains one of the most influential texts on the English law, was an attempt to produce an overarching account of the Common Law—many of whose principles, as we have seen, relied on an understanding of practice rather than statute.²⁵⁵ Blackstone needed to provide an explanation for how legal fiction worked if he wanted to make a convincing argument against codification. He needed to show that fictions—while seemingly nonsensical when addressed directly—were at least benign, and at best helpful in allowing for the law to adapt to present circumstances.

Despite how it would be later framed by Bentham and other critics, Blackstone’s portrayal of legal fiction was not as a whimsical vestige of an illogical system. Rather, for Blackstone the practice of legal fiction formed an important part of how the Common Law evolved over time, and depended on a precise geographic understanding of jurisdiction. Blackstone’s spatial claims here were not just focused on the wider political geography of England: he relied on a particular architectural metaphor in order to make his claims. I now turn

²⁵⁴ As, in fact, he himself did—much of his work was produced as a direct retort to Blackstone’s claims.

²⁵⁵ For the widespread and lasting influence of Blackstone’s works, see Wilfrid Prest, *Re-interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts*. (2014)

to the fictitious spaces as described in the practicing lawyer's documents, and to how these spaces were mobilized by Blackstone and Bentham as they argued for what they each saw as the proper direction the Common Law should take. Their work provides clues that understanding fictitious space—made possible through architectural images—was an important factor in making sense of legal change in the late eighteenth century.

III Legal fictions, geographic facts

Blackstone's Commentaries: organizing an un-codified law

Fictions such as these described above were still in widespread use in the mid-eighteenth century, when William Blackstone abandoned his work as barrister to devote himself fully to writing his lectures on the English law.²⁵⁶ These lectures were without precedent. When, in 1758, Blackstone took up the newly established Vinerian Chair at All Souls College, Oxford, he became the first to teach English Law at university.²⁵⁷ Lectures in law had previously dealt only with the Roman variety, even across England. Although the defining distinction of the Common Law was that it was *not* based on Roman Law (as were most of the civil law systems of continental Europe), nevertheless English universities, until Blackstone, only taught Roman law. This reflected the prevailing attitude across Europe. The Roman Civil Law, with its clearly defined categories and legible structure, was seen as suitable for academic study, while the English law, learned through practice, was not. Previously, English law had been taught

²⁵⁶ For biographical work on Blackstone see the collected volume edited by Wilfrid Prest, *Blackstone and His Commentaries: Biography, Law, History*. (2009); and Prest, *William Blackstone: law and Letters in the Eighteenth Century* (2008).

²⁵⁷ The lectures themselves were first given in 1753; and the syllabus published in 1756. Milsome sees the lectures as unprecedented in part because the intended audience was the layman; that Blackstone was attempting to write a "view from the outside." (Milsom "The Nature of Blackstone's Achievement," 1981)

exclusively at the Inns of Court, an education which was aimed solely at training practicing barristers.²⁵⁸

Nor was there much in the way of written work on the subject of English Law that was not influenced, directly or indirectly, by nearly seven continuous centuries of commentaries on Justinian's *Institutes*—the primary text that, through centuries of interpretation, had allowed the laws of Imperial Rome to be usefully translated to workable systems of law for Medieval and Early Modern (continental) Europe.²⁵⁹ For example, Blackstone's avowed precedents for his own work—among others, the treatises known by Glanville and Bracton (themselves already centuries old) were structured on Roman categories that had little to do with the English forms of actions. And while a work like Littleton's *Tenures* was more faithful to substantive problems as addressed by English law, it only considered laws of real property.²⁶⁰ Blackstone thus faced the task of writing a comprehensive treatise for a system of law that was not really seen to have its own system as such.

It was this context in which Blackstone had tasked himself with producing a legible account of the entirety of English law. Rather than an introduction for practicing lawyers, the lectures would be an attempt to make the Common Law legible as a system, intended generally

²⁵⁸ See John Baker, *The legal profession and the common law* (1986) for a discussion of the Inns at Court and the development of the legal profession in England.

²⁵⁹ On the “reception” of Roman law in Europe, see Paul Vinogradoff, *Roman Law in Medieval Europe* (1929; 1961); Alan Watson, *The Making of the Civil Law* (1981).

²⁶⁰ Blackstone's most famous achievement was in fact his 4-part *Commentaries on the laws of England*, (published, in 5 volumes, between 1765-1769), which was based directly on the lectures he delivered at Oxford. The history of English law is distinguished, in part, by its relative lack of treatises and compilations; though Blackstone is not the first to have made an attempt. To name the most influential, Blackstone's is preceded by Glanville *Tractatus de legibus et consuetudinibus regni Anglie* (c. 1180), Bracton *De Legibus et Consuetudinibus Angliae* (c. 1230), Littleton's *Tenures* (c. 1480), H. Finch's *Law, or a Discourse thereof* (1613), Coke's *Institutes of the laws of England* (1628-1640), Wood's *An Institute of the Law of England* (1720), and Hale's *An Analysis of the Civil Part of the Law* (1713). As Milsom notes, we should consider one of Blackstone's major achievement that he did, in fact, complete a task that these (especially the later) authors only began. (Milsom 1981)

for the “Gentlemen of England” that they might better understand the laws which preserved their own liberties.²⁶¹ The novelty of the course presented both a challenge and an opportunity. The structure, as much as its content, would need to be considered.²⁶² One might say, broadly speaking, that the pervasive influence of the Roman model had made it relatively commonplace to address the organization of substantive rules. But law that was rather based on cases and precedent, as was English law, was difficult to systematize in the same way. The Roman model had next to nothing to say with regards to procedure—inseparable, in the Common Law, from its substance. Alan Watson has suggested that Blackstone’s solution was to discuss procedure as “a matter of remedies for wrongs,” thus in a sense treating procedure itself in a similar manner as legal rights.²⁶³ This is a helpful way to look at the overall structure of the four-volume treatise that was produced from his Vinerian lectures. The first volume on persons (having to do with relationships between people, ie, marriage) and the second on things (having to do with property) were able to address substantive rules directly; while the third volume on private wrongs (tort, or delict in civil terms) and the fourth on public wrongs (crime) outlined many legal categories by describing their remedies, rather than defining the actual terms of the fault. This was, in a sense,

²⁶¹ Blackstone *Commentaries* (bk 1 intro p 10)

²⁶² The depth of influence from a Roman structure on Blackstone’s work remains the subject of debate. Watson, for example, challenges Kennedy’s assertion that Blackstone remained entirely uninfluenced by the Roman structure, and highlights commonalities between the structure of Blackstone’s *Commentaries* and the *Institutes*, especially as structured by the French jurist Dionysius Gothofredus’s 1568 edition. Alan Watson, “The Structure of Blackstone’s *Commentaries*.” *Yale Law Journal* 97 (1988): 795-1827; Duncan Kennedy, “The structure of Blackstone’s commentaries.” *Buffalo Law Review* 28, no. 2 (1979): 205. See also Carol Matthews, “A Model of an Old House” in *Prest Blackstone and His Commentaries: Biography, Law, History*. (2009). According to Matthews, “the most important thing about the structure of the *Commentaries* is that it actually has one,” and she directly attributes this structure to Blackstone’s attention to the genre of the architectural treatise. And see also Lieberman, David. “Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence”, in Norma Landau (ed.), *Law, Crime and English Society, 1660-1840* (2002).

²⁶³ Watson (1988) p. 810

translating procedure—in other words, how one secured a remedy for a wrong, either private or public—into something that could be seen as having substantive rules.

This system worked well, as evidenced by the longevity of Blackstone's influence across Common Law jurisdictions. But even given this solution, how to explain the use of fictional devices? Fiction would not appear to fit easily into any rational structure, whether borrowed from Rome or fabricated from an account of Common Law procedure. As we have seen, fictions worked precisely because the divergence of a written account from what actually might have happened could not be questioned. Explaining the use of fiction, in a treatise that was intended to be both comprehensive and systematic, would require some amount of ingenuity. A fiction, after all, only worked when the written accounts of an event differed from the ones that occurred in reality.

A road Blackstone might have taken was to ignore the problem of fiction altogether. One certainly could have given an account of the proper procedure for the recovery of debts, for example, and assume that the practice of using the Middlesex fiction would continue as before: widespread in practice, yet unspoken. But Blackstone did not ignore fiction. In fact, his defense of them was one of the reasons that Jeremy Bentham would be so exercised by his former teacher's views. Bentham (among others) saw Blackstone as an apologist for the status quo, and found his arguments in favor of a tradition that appeared, in Bentham's view, perfectly arbitrary, unacceptable.²⁶⁴ But it is worthwhile to take a more detailed look at what Blackstone actually said about the matter, as his comments on fiction are more than a defense of them. They reveal that he understood the usefulness of the practice in allowing the Common Law to adapt without

²⁶⁴ On criticism aimed at Blackstone (from Bentham and Austin, primarily) and their lingering effects, see Cairns, John W. "Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State." *Oxford Journal of Legal Studies* 4, no. 3 (1984): 318-60.

legislation. Notably, for us, Blackstone's defense of legal fiction relied on a well-developed set of architectural metaphors.

History, fiction, and the Gothic Castle

For Blackstone, fiction was a primary mechanism that allowed English law to accommodate change without an accidental alteration of its unwritten principles. Unwritten, because for the most part the Common Law was guided by practice rather than legislation. Blackstone, like many others, believed that the great advantage of the Common Law lay precisely in its refinement achieved through practice rather than through statute. The English laws, he wrote, "refined by the practice of over a century... in general are able to answer the purpose of doing speedy and substantial justice, much better than could be effected by any great fundamental alterations."²⁶⁵ This was an acknowledgement of both the importance of practice in refining legal principles, and also of the way the law necessarily needed to accommodate changing circumstances. Therein, for Blackstone, lay the fundamental superiority of England's unwritten constitution, and what elevated the English monarchy above the absolutist tyrannies across the Channel.

Modernity in England and across Europe had brought changes in many spheres of life, not least of which were the ones defined and regulated by legal transactions. Feudal methods of conveying property or of bringing a personal action had become outmoded by modern commercial transactions. What, then, would be the best way to update the law? Writing a new code, as endorsed by Blackstone's Continental counterparts, was one method to accommodate

²⁶⁵ Blackstone *Commentaries*, pg. 267-268

such changes.²⁶⁶ The rules could be rewritten to better serve a modern era. However, in Blackstone’s view, this would be both difficult and dangerous. It required an absolutist government, legislators to take on the “Herculean” task of “formulating a concise, and perhaps uniform, plan of justice,” and an enterprising sovereign with the power to instill fear in the “presumptuous subject who questions its wisdom or utility.”²⁶⁷ Even after overcoming these obstacles, the real danger in new laws lay in the unforeseen future consequences of their promulgation. Perceiving these dangers, English jurists had, in Blackstone’s words,

wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavored by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice.²⁶⁸

Blackstone saw the English system as superior because it took into account the difficult fact that written laws do not always work the way their drafters intended. Rather than embark on the challenging task of writing new laws that might be suited to the present moment, but at an unforeseen expense to a future one, better to leave intact an outdated structure and figure out how to renovate it. The architectural metaphor, here, is not mine. Blackstone continues:

The only difficulty that attends them [the languishing remedies of the Common Law] arises from their fictions and circuities: but, when once we have discovered the proper clew, that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.

²⁶⁶ The late eighteenth century was a time of several big codifications in Europe—the period is known as the “age of codification”—that began with the Prussian Civil code (promulgated in 1784) and was exemplified by the *Code Civil des Français* (Napoleonic Code), promulgated in 1804. [REF]

²⁶⁷ Blackstone *Commentaries*, p. 267

²⁶⁸ Blackstone *Commentaries*, p. 267

Blackstone presents the Gothic castle as a metaphor for an authoritative past that fundamentally structures the principles of the English remedial law. This structure has been made commodious for modern times, by allowing for remedies more appropriate to address new legal problems. This retrofit was ultimately made possible by the use of fictions, whose labyrinthine paths allowed one to navigate between past and present.

This passage is well-known, most often cited as an indication of Blackstone's critical attitude towards the feudal system of tenures.²⁶⁹ But I think it's worth taking a closer look at how the metaphor is deployed in the text. It is especially notable given Blackstone's other uses of architectural imagery, as this is not the sole example of a building metaphorically representing the common law in his *Commentaries*. Consider this alternative version from the introductory lecture, in admonishing the "mischiefs that have arisen to the public" from unconsidered alterations in the law. "The common law of England," Blackstone writes,

has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties.²⁷⁰

Though both these passages use a metaphorical building to demonstrate the way change affects law, there are several important differences here between this and the description of the Gothic castle. For one, this structure is not imagined as Gothic but rather classical: displaying the properly refined characteristics of symmetry, proportion, and simplicity. Second, the imagined

²⁶⁹ Wilfred Prest and Carol Mathews have both taken up Blackstone's interest in architecture, and attributed this passage to distaste, in general, for the medieval. Wilfred Prest, "Blackstone as Architect: Constructing the Commentaries," *Yale Journal of Law & the Humanities*: Vol. 15: Iss. 1, Article 3 (2003). Carol Matthews, "A Model of an Old House" in Prest, Wilfrid R. *Blackstone and His Commentaries: Biography, Law, History*. (2009).

²⁷⁰ Blackstone *Commentaries* vol. 1 p. 10

change projected onto the structure is purposeful. This change is also portrayed as producing negative effects. While the Gothic castle has become “cheerful and commodious” through some passive and unnamed process, the Classical structure has been ruined by “rash and unexperienced workmen.” Finally, the Classical structure is understood in terms of exterior style and ornamentation, while the description of the Gothic castle emphasizes instead interiority and functional use.

So what to make of these two quite different images of buildings, each purporting to represent the Common Law as a whole and the way that it changes over time? These metaphors deserve special consideration in part because Blackstone had demonstrated significant interest in the field of architecture, separately from his work in law. Beyond his involvement in several minor building projects over the course of his life, this interest was developed to the extent that he had even composed his own architectural treatise (first drafted in 1743, it was expanded and revised in 1746-1747).²⁷¹ These specific architectural metaphors are thus certainly not arbitrarily chosen. I would argue that Blackstone’s architectural metaphors, understood together, were specific to how he understood the law’s relationship with its own past. More, the metaphors make an explicit connection between a historical understanding and a geographical understanding of the law.

The classical building is perhaps more easily explained. Blackstone, after all, is writing a treatise about a legal system that does not readily demonstrate order. But his *Commentaries*—explicitly pedagogical, as it is based on his lecture course—does, of course, need some kind of structure. Most importantly, Blackstone needs to demonstrate to his readers that the system he

²⁷¹ Blackstone’s treatises on architecture “An Abridgement of Architecture” (1743) MS 89022, Special Collections, Getty Research Library; and “Elements of Architecture” (1747) Codrington MS 333, 36

describes will be legible as such.²⁷² While the immediate aim of the passage is to warn of the dangers that would follow from a rash alteration of the laws, the classical building is an apt image to invoke on behalf of the law as a whole, especially so if that law needs to be understood as a legible system that follows principles and rules. The classical building is a stand-in for, more generally, the idea that the Common Law as he describes it will be structured and therefore comprehensible. And Blackstone's own architectural treatise, after all, was on the classical orders: a perfect exemplar of a system that had a clearly defined organizational structure.²⁷³ In fact, his *An Abridgment of Architecture* was prefaced by a diagram that demonstrated this organizational structure explicitly.²⁷⁴

(Figure 3.2 William Blackstone, "Analysis of this Abridgement")

So what then to make of the Gothic castle? The passage in the *Commentaries* is notably different from Blackstone's treatment of the "gothic orders" in his architectural treatise.²⁷⁵

It was certainly a Work of great Industry, & has something oddly artificial in it; huge ponderous Roofs being raised on slender Pillars or rather Bundles of Staves, without Entablature: Every thing is crammed with Roses, Crosses, Lace, & other Quaintnesses, which glut ye Eye instead of filling it, by means of such a profusion of silly ornaments. Whereas in ye Greek architecture there is not a single member or ornament but has its propriety as well as Beauty....

²⁷² Even if we agree with Watson that the organization of the *Commentaries* is derived, at least in part, from the structure of Justinian's *Institutes*, Blackstone doesn't want to explicitly say as much.

²⁷³ Matthews believes that the architectural treatise was an explicit precedent for the structure of his *Commentaries*. While I don't think we need to take it that far, we can see how the principle of a structured treatise more generally might have been influential. Matthews (2009).

²⁷⁴ In Blackstone's classical building metaphor, the symmetry and proportion are naturalized; purposeful alteration risked degradation of symmetry, and "specious embellishments and fantastic novelties"—whim and style—risk the degradation of the entire structure.

²⁷⁵ While the treatise was on classical architecture, he includes a section on the "gothic" order. Of his five named precedents for this work, Henry Wotton *Elements of Architecture* (1624), Gibbs *Rules for Drawing* (1732), and Evelyn Fréart's *A Parallel* (1664) do not mention the "gothic." John Evelyn's *Account of Architects and Architecture* (1723) mentions the gothic only in dismissive terms.

This passage certainly seems to reinforce the celebration of a classical ideal: one of pure proportions, not marred by excessive and illogical ornamentations. Here, the Gothic is seen not only as unlovely and silly, but also as artificial—not a likely candidate to represent the Common Law. But in remarkable contrast, Blackstone’s gothic castle in his *Commentaries*—that one pervaded by fictions—is not dismissive of its style in a way we might expect given this account in his architectural treatise. Recall his words: the Common Law was like an “old Gothic castle, erected in the days of chivalry... The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious.”

In the *Commentaries*, Blackstone appears to see the Gothic castle as standing in for a particular understanding of England’s legal past. The castle, perhaps the most reliably recognizable technological innovation of the High Middle Ages, was counterpart to the most reliably recognizable legal innovation of the High Middle Ages: the fief. Both were vital parts of the system of feudalism, defined in the narrow legal sense. These legal and technological mechanisms were also, more broadly, integral in shaping the social and cultural life of medieval England.²⁷⁶ Blackstone’s picture of the law’s past is grounded in this system despite his attempts to distance himself from feudalism elsewhere in the *Commentaries*. Here, the Gothic castle is imagined as one built for war and victory: it has “embattled towers” and “trophied halls” rather than a “glut” of “silly ornaments.”²⁷⁷

²⁷⁶ For a classic history of the narrow technical legal definition of feudalism see François Louis Ganshof, *Qu'est-ce que la féodalité* (London: Longmans, Green [1952]). For a broader social view, see Susan Reynolds’s *Fiefs and Vassals* (1994), and Marc Bloch’s *La société féodale* (1949).

²⁷⁷ This, notably, was well before the mainstream Gothic revival of the nineteenth century.

More than produce a certain image of England's feudal past, the castle allowed Blackstone to present—albeit covertly—a picture of how the law changed over time. This indirect discussion of the Common Law's historical change was important, since much of legal doctrine in England was based on the principle that the Common Law had existed since “time immemorial”—which, in practice, was said to have begun with the Domesday survey of William the Conqueror.²⁷⁸ This past era, which had given rise to the Common Law, had been governed by terms of vassalage and benefice. Now, in Blackstone's day, the Gothic castle itself would no longer be required as a technology of medieval battle, as that the social order of feudal England for which it had been built had faded. The castle was no longer needed for battles, nor for maintaining personal relationships established through the exchange of services and tenements. But the castle—and the analogous historic structure of the law—while “useless” perhaps for answering modern legal claims, was venerable because it had provided the foundation on which men and women had created their alliances: to each other, and, ultimately, to the Commonwealth.²⁷⁹

The explicitly historic structure of the Gothic castle was important as a visible symbol of the foundations of the Common Law, while the inferior apartments were now given primary functional importance. In Blackstone's metaphor, they have been made comfortable for modern life—“accommodated to daily use.” Unlike the rash embellishments that had ruined the exterior façade of the classic structure in Blackstone's first architectural image, these “cheerful and

²⁷⁸ This manuscript, a survey of the lands of England, was in effect an outline of feudal relationships as they existed at the time of the conquest. In modern terms this could be seen as “ownership;” and in fact many property claims were based on the information taken from this survey. Maitland, Frederic William. *Domesday Book and beyond: Three Essays in the Early History of England* (1987 [1897])

²⁷⁹ These institutions of feudalism had created the legal framework that tied men and women to each other and, ultimately, to the crown, since the King was the highest lord (and all held of the King). The created a system of nested layers of subinfeudation. See Milsom, *Historical Foundations of the Common Law* (1968), esp. ch.1.8, “Feudal Jurisdictions”

commodious” apartments are authorless; they seem to have sprung into being from patterns of daily use. If, in the first Classical metaphor, Blackstone was admonishing those who might attempt to produce change through legislation, here he was making clear that change through daily use was acceptable, so long as it was properly housed within a venerable structure.

There is one more important part of Blackstone’s metaphor: how was one to reconcile the venerable past and the modern present? The lack of apparent contradiction between exterior (past) and interior (present) was itself made possible because of fiction. Bridging between the venerable, but otherwise useless, structure of the past and the useful modern remedies were the circuitous paths of legal fictions. As Blackstone described them here, these fictions might be difficult to navigate at first; but were, ultimately, only a minor nuisance that would allow the new remedies to be accommodated within the old structure. Thus for English law, accommodating modernity would not require new legislation. In arguing for the continued use of legal fiction in this way, Blackstone was making a case for the importance of the imperceptibly slow and incremental change that happened naturally through legal practice. English law had the unique ability to adapt to changing circumstances precisely because its foundational principles were based not in books but in the working of the courts. England didn’t need periodic re-writing of statutes, since the very idea of change itself was necessarily built into the system.

Blackstone thus accounted for the use of fictions as a necessary complication that allowed the Common Law to evolve without major legislative overhaul.²⁸⁰ His own work in the *Commentaries*, more broadly, would aim to provide that “proper clew,” as he put it. Allowing

²⁸⁰ Kathleen Davis, in her work on historical periodization, sees Blackstone’s castle as a symbolic marker for England’s feudal past. She sees the castle itself as “stand[ing] in for the real past;” and therefore, as Blackstone’s work turned towards the authorization of historical fact, the “authorizing edifice of the law.” Davis sees the fictions themselves not as any part of the (metaphorical) structure, but rather as an “approach... through historical imagination.” See Kathleen Davis, “Feudal law and colonial property,” *Periodization and Sovereignty: how ideas of feudalism and secularization govern the politics of time* (2008)

the reader to navigate these complex circuitries would allow for an understanding both of a historic structure of the common law, as well as its contemporary practical applications. That this clue is not to be found in principles analogous to architectural classism is no accident. The legibility of a law whose organization was based on substantive rules and regulations—such as Justinian’s *Institutes*—might well find easy analogy in the classical orders, as its principles were fixed, determined by a logical order. Classism, at least as Blackstone understood it, was on the surface perfectly legible. But the price of this perfect legibility was inflexibility. The classical system had no room to accommodate change, and rash alterations would only ruin the structure as a whole. In contrast, the flexibility inherent to the common law needed to be understood not as a flaw but as its merit. A proper understanding of the common law required understanding it as a system that had the capacity to change without the destruction of its underlying principles.

One final indication that Blackstone might have early on identified the usefulness of the gothic “order.” In his architectural treatise he had introduced the topic thus:

The gothic order, if it indeed deserves that name, is that which in any manner whatsoever differs from ye regular antique architecture: so that when a building can be reduced to no other order, it is then perfectly Gothic; wherefore we can expect no rules of proportion, since that would destroy ye very essence of ye order.

The gothic is defined by the fact that it cannot be rationalized, nor can it be easily placed within an ordered system. Despite this, the Gothic castle, as transposed to Blackstone’s *Commentaries*, remains absolutely necessary: a repository for all that is, by its own winding logic, the illogical practice of the common law.

Fiction and historical geography

Blackstone’s metaphor can certainly be read as a straightforward representation of legal thought, not unlike the way architecture has been used as a structural metaphor throughout

Western philosophical practices from Plato to the deconstructivists.²⁸¹ Read in this way, the castle provides the historic “foundation” for what Blackstone sees as the proper way to think about the remedial law. What makes this particular metaphor more complex, however, is the way in which it relies on a nested abstraction of legal space. The relationship between the real space of historic jurisdictions (Middlesex County and so on) and the imagined space of the fiction that was deployed in the Middlesex Bill already produces one layer of legal abstraction: a material geography that has been reconfigured as a fictional legal geography in the court’s documents. Rather than directly address this relationship, Blackstone embeds it within the architectural metaphor of the castle. These legal fictions become the “winding and difficult” labyrinth—the paths that allow for modern remedies to be housed within the venerable structure of the law. The metaphorical labyrinth, in other words, represents the ways in which legal practice always requires an already-abstract understanding of geographic space.

Blackstone needed the architectural metaphor because he was describing a practice that could not be written down. Recall that a legal fiction, by its definition, could not appear on the record to be false. Addressing fiction directly in a treatise that was meant to provide a rational and holistic account of the law would not only display inconsistencies between the law as practiced and the law as written, but would undermine any venture to produce a legible treatise of the Common Law in the first place. Architecture was useful because it provided a readily-understood image that could demonstrate how English law was tied to an abstract understanding of geography, without explicitly calling out discrepancies between fiction and fact.²⁸²

²⁸¹ Plato’s images of the house; “de-constructing;” etc.

²⁸² In this case, a gothic castle (England’s legal past), cheerily renovated for daily use (England’s legal present).

A successful fiction, legal or otherwise, is not arbitrary. It requires us to be able to understand the story *as if it were true*. In a similar way Blackstone's Gothic castle draws a picture that we can imagine as if it were true, as if it existed in the world. Rather than draw out the details of the fiction, Blackstone produced an image of a building: robust, inhabitable, at the same time both ancient and modern. Architecture was thus used to show that while the fiction might not correspond to a lived geography, there was still a spatial logic at work in its construction. More than this, the specific image—a feudal castle that has been renovated for modern use—made explicit the idea that the law was tied to a place (England), and also adaptable over time.

For Blackstone, fiction was a primary method by which the Common Law accommodated historical change. In a similar way for contemporary historians, these fictions, when revealed through otherwise unexplained discrepancies in the written record, can similarly provide a framework for understanding England's legal past. This is important precisely because Common Law jurisdictions relied on precedent rather than legislation, often obscuring the historic parameters of the courts. But this close look at Blackstone's metaphor reveals that the use of fiction might also be useful in understanding how the law relies on representations of geographic space. Rather than take at face value the recorded locations of important events, we need to be able to frame these places in terms of what they were doing for the practice of law. This requires us to question what we otherwise might understand as a straightforward account of the locations of past events. Since we cannot interpret all the details we find in legal reporting as fact, we need a new framework for understanding the importance of place in legal practice. Understanding a historical geography of the Common law requires unpacking when, and why, legal fact and geographic fact do not coincide.

Fictions can provide an important clue, because although a fictional legal narrative did not correspond to an accurate account of past events, its construction still required a precise understanding of the substantive scope and geographic placement of each court. As I think Blackstone well understood, a geographic account of space did actually matter, even if the geography of the legal account might not correspond with the geography of the events in dispute. The Middlesex bill procedure example as described above, while entirely fictional, can still be envisioned in cartographic terms. This fiction articulated a very specific set of spatial arrangements, and we are thus still able to draw a diagram of what the procedure might have looked like, even if it didn't actually play out in that way. The geography of legal fiction was not arbitrary. On the contrary, it relied on a precise understanding of where all the characters ought to be located. In this way, a legal fiction was not divorced from reality; rather, it was produced out of the real world. As Jeremy Bentham would put it, fiction requires an understandable image to exist in the world in order to make sense.

The particular example of the bill procedure, and Blackstone's representations of it, is important in the context of a history of prison spaces because of the way it produced a fictional account of custody, of holding the body. If fictions can only be understood in conjunction with the way they represent real space, understanding fictional custody of the prisoner's body was inseparable from how that body could be held by architecture. At the same time Blackstone was formulating his structure of England's law, debates regarding what to do with prisoners actually held in physical custody were beginning to gather political currency. In fact, the jail population throughout England was increasing beyond capacity in existing structures, creating the crisis that had sparked the prison reform movement itself. Having a robust ability to treat bodies as if they

were in custody when in fact they were not posed a significant problem for those who saw corporeal ‘holding’ as crucial to enforcing a just and certain law.

IV Ghosts, legal rights, and other unreal entities

Real and fictitious entities

Jeremy Bentham hated legal fiction. He had been a student at Oxford when Blackstone had delivered his famous lectures, and when the *Commentaries* were published Bentham responded with his own *Fragments on Government*, and, later, the *Comments on the Commentaries*, in which he expressed his own deep skepticism that any law based on such blatant misstatement of fact could operate properly.²⁸³ Rather than accept the logic that legal fictions were harmless as commonly understood though unwritten formulations, Bentham argued that they led to unnecessary confusions as to what the law actually was. For him, fictions prevented the law from producing its proper effect: the maximization of happiness for the most people.

It makes sense that Bentham, who remained a vocal proponent of legal codification throughout his career, would be in favor of abolishing the practice of legal fiction—especially those that had to do with the custody of prisoner’s bodies. After all, his proposed penal scheme would require the *fact* of imprisonment in order to work. But his precise views on fiction are worth keeping in mind, as they lend a new lens through which to look at his famous panoptic prison scheme. In fact, Bentham had a more nuanced understanding of fictions than it might first appear—and a ghost provides a clue that this was the case. Specifically, a ghost that haunted the

²⁸³ Jeremy Bentham, *A fragment on government; or, a comment on the commentaries: being an examination of what is delivered on the subject of government in general, in the introduction to Sir William Blackstone's commentaries.* (1829)

grounds of his childhood home. Bentham believed in ghosts. Or to be more precise, he believed in their effects. While as an adult he understood that these ghosts had been merely a figment of a child's imagination, he did not doubt that they had produced profound feelings of terror in him. Later, as an adult, he understood his fear of ghosts as evidence that an entity did not have to be real to have, nevertheless, very real effects.²⁸⁴ The distance between unreal entities and the real effects that these entities could produce would haunt Bentham's work in advocating for legal reform in general, and, in particular, his project for a panopticon penitentiary.²⁸⁵

While his panopticon writings are among Bentham's most well-known works, they were produced in a broader context of advocating for legal reforms, and, in particular of codifying English law.²⁸⁶ Bentham didn't like lawyers, and had decided early on in his career that he would rather describe the law as it ought to be than to practice within the flawed system that he observed around him. But this did not mean that he understood his role as that of a mere philosopher. Bentham desired very much that his work be applied to specific legal reforms.²⁸⁷ And for him, English law was in dire need of reform. The system was unwieldy and opaque, and,

²⁸⁴ Colin Dayan writes that Bentham realized, then, that "to know that ghosts do not exist yet to recognize the grim effects of that unreality." Dayan (2011), p. 13

²⁸⁵ Several scholars have noted the influence of these ghosts on Bentham's formulations of the distinction between real and imaginary, and later, between real and fictitious entities. Schofield follows Ogden in noting that Bentham's obsessions with ghosts necessarily predates his engagement with the continental philosophers with whom he credits with influencing the development of his theories of Utilitarianism, and therefore ought to be taken seriously as a factor in his intellectual development. See Philip Schofield, "Real and fiction entities" in *Utility and democracy: the political thought of Jeremy Bentham* (2006); and C.K. Ogden, *Bentham's Theory of Fictions* (1932)

²⁸⁶ For the full panopticon writings see Bentham, Jeremy, and Miran. Božovič. *The Panopticon Writings* (1995). For a discussion on Bentham's arguments in favor of codification, see Schofield, Philip. *Utility and Democracy: the Political Thought of Jeremy Bentham* (2006).

²⁸⁷ Janet Semple has given an excellent account of Bentham's decades-long work advocating for the panopticon penitentiary, and shows that, for Bentham, the project could only be considered successful if it had been actually built. Semple does not see Bentham as a political philosopher, but rather as a man bent on proposing practical reforms for what he believed would better society. Janet Semple, *Bentham's prison: A Study of the Panopticon Penitentiary* (1993)

most problematically, subject to the whims of individual judges. All this amounted to what he famously called *dog-law*:

It is the judges...that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.²⁸⁸

This dog-law, as the English Common Law had become, no longer served the purpose of providing swift and efficacious remedies because the system could only be navigated by those trained in its nuances—judges and other lawmen. These judges could not be held accountable for their decisions because there was no transparency in their work. The law of the land, Bentham wrote, was impossible to understand by the layperson because there was no authoritative text that stated what the law was, nor an authoritative body through which it could be enforced. It was, in effect, unauthored.²⁸⁹ “If we ask,” he wrote in one of his petitions for codification,

who it is that the common law has been made by, we learn, to our inexpressible surprise, that it has been made by nobody; that it is not made by King, Lords, and Commons, nor by anybody else: that the words of it are not to be found anywhere: that, in short, it has no existence; it is a mere fiction; and that to speak of it as having any existence, is what no man can do, without giving currency to an imposture.²⁹⁰

This fiction was particularly dangerous not only because one might not know for certain which rights were given to them by the law, nor what obligations were imposed upon them by it. Most troubling was that a violation of the law's unknowable constraints would be met with severe

²⁸⁸ From the essay “Truth versus Ashhurst; or, the law is contrasted with what it is as it is said to be” (written December 1792; first published 1823). Bentham *Works* Vol. 5., p. 235

²⁸⁹ Of course, Bentham's frustration with the authorless Common Law was directly contradictory to Blackstone's views, who had (as we saw) warned his metaphoric Classical building of the dangers of authoring new laws.

²⁹⁰ “Petition for Codification,” dated 4th July 1831, accompanied by a “petition for justice.” Bentham *Works*, vol 5. p. 546

consequences. As he warned, “Thus, while the rights we are bid to be grateful for are mere illusions, the punishments we are made to undergo are sad realities.”²⁹¹ In other words, for Bentham, the Common Law was an unreal entity that had, nevertheless, very real effects.

Bentham’s description of the law as a “mere fiction” must be qualified here. For him, fictional constructions were dangerous because they deliberately obscured the proper object of the law. But this danger was even more concerning when the law was understood as the foundation upon which English liberties stood. Unlike Blackstone, for whom this foundation allowed the venerable principles of the law to remain in place, Bentham saw the use of fiction as not only unnecessary but fundamentally treacherous. In response to Blackstone’s dismissal of their danger, he argued that “the indestructible prerogatives of mankind have no need to be supported upon the sandy foundation of a fiction.” The use of fiction in legal practice resulted in a confusion that rendered the whole of English law nonexistent as such: incomprehensible, unenforceable, and subject to the arbitrary decisions made by individual judges.²⁹² If, for Blackstone, fiction had allowed the Common Law to retain its foundational principles while adapting over time, Bentham saw fiction as producing a dangerously unstable ground. Bentham thought the law ought to be certain and knowable, and believed that it was only through a comprehensive legislative overhaul, resulting in the written codification of the legal system, that

²⁹¹ The problems with the Common Law for Bentham seem to be both that it is authorless, but also that this lack of authority produces a set of rules that follow no pattern of rational or logical reasoning. *The Works of Jeremy Bentham*, Ed. John Bowring, vol 5. “Petition for Codification” p. 546

²⁹² These words were in direct response to Blackstone’s treatise. Bentham found his dismissal of fictions particular dangerous, and urged that they be done away with immediately. Of course, even though Bentham claimed that abstractions were a harmful distractions when it came to discussing the law, he had no problem using his own metaphors (here, fiction as a “sandy foundation”). Jeremy Bentham, *A fragment on government, or, a comment on the Commentaries* [1823].

this would be possible.²⁹³ For him, legal fictions—at least the way they worked in English practice—were at the heart of the problem because they produced deliberate obfuscation rather than allowing for a direct statement of what the law was. The “sandy foundation” of legal fiction threatened the stability of the entirety of the English law.

Problems with fiction, for Bentham, did not stop at the technical legal sense of the term. Bentham’s thinking about certainty in the law developed in parallel to what he would later describe as his ontology of fictions.²⁹⁴ This ontology distinguished three categories of entities: real, fabulous, and fictitious. The category of *real entities* consisted of things that existed in the world, things which had “corporeal substance.” Real entities were further divided into perceptible real entities—ones that could be perceived directly by human senses—and inferential real entities, those which could not be directly observed, but could be inferred through a chain of reasoning. *Fabulous entities* did not exist in the world; they were entities that referred to objects that, while not believed to be real, could nevertheless be pictured in the mind. A fabulous entity required a corresponding image: a unicorn, for example, or a deity from Greek mythology, could be pictured even though these entities are understood to not actually exist in the world. In contrast, a *fictitious entity* neither existed in the material world, nor could be pictured in the mind: it was an entity that only existed as it pertained to a quality or qualities of real (corporeal) entities. For example, the color blue, the value justice: both describe qualities of real objects, rather than objects themselves, and for Bentham, these qualities could not be understood apart from the corporeal entities to which they were attached.

²⁹³ Bentham was a vocal advocate of codification, and had much praise for the French and their approach: “The French have had enough of this *dog-law*; they are turning it as fast as they can into *statute law*, that everybody may have a rule to go by: nor do they ever make a law without doing all they can think of to let every creature among them know of it. The French have done many abominable things, but is this one of them?” Bentham *Works* Vol. 5., p. 235

²⁹⁴ Check ref. is this Bentham himself, or Odgen, that calls it his “ontology of fiction?”

However, while a fictitious entity could not exist independently in the material world, it nevertheless was often “for the purposes of discourse be spoken of as existing.”²⁹⁵ Here, for Bentham, was a real problem, especially when it came to the law. When he described the Common Law as having “no existence... but mere fiction,” the danger lay not only in the fiction in itself, but also in the mischaracterization of the Common Law as an entity that had real substance. Like the specters that inhabited his family home, this fictional entity had very real effects on those who did not abide by its principles. Moreover, because this fictional entity was impossible to picture—it had no substance, in other words—it was impossible to predict, with precision, its effects.²⁹⁶ A law without predictable outcomes, a law that could not be described authoritatively: that was no law at all. Bentham’s theory of fictions is thus important in understanding the way he saw proposed penal strategies working to produce a better society. For him, it was only by accepting the profound separation between the materiality of things in the world, and their effects on human understanding, that one could use the manipulation of corporeal material to best effect.²⁹⁷ His deliberations on imprisonment must be seen in this light, as he believed that new penal strategies would need to be based on a certain and legible image, in order to have the effects on reform that he saw as necessary.

Bentham was well aware that custody in law, as it stood, held little correspondence with custody of the body. He understood that a legal claim of custody did not necessarily mean that the body was actually held in confinement:

When an action, for example, is brought against a man, how do you think they contrive to give him notice to defend himself? Sometimes he is told that he is in jail: sometimes that

²⁹⁵ In discourse, adjective becomes noun. Jeremy Bentham, *Of fictional entities*, 7 July 1821, Logic, Section 5

²⁹⁶ He had evidently not been paying attention to Blackstone’s architectural metaphors!

²⁹⁷ If fictitious entities were described as being separate from the real entities that they described, it would not be possible to be precise about their effects.

he is lurking up and down the country, in company with a vagabond of the name of Doe; though all the while he is sitting quietly by his own fireside: and this my Lord Chief Justice sets his hands to. At other times, they write to a man who lives in Cumberland or Cornwall, and tell him that if he does not appear in Westminster Hall on a certain day he forfeits an hundred pounds.²⁹⁸

Resolving this discrepancy, for Bentham, was crucial to much-needed legal reform.

Proper punishment: custody made certain

Punishment was a central concern of Bentham's political philosophy and in his arguments for legal reform. In his view, legal punishment was necessary, although necessarily odious. Like others that would promote a utilitarian philosophy of government, Bentham believed that implementing a robust system of punishment, whose purpose was to deter and rehabilitate criminals, would be for the better good of society. However, in outlining details for a new penal code one could not forget that the criminal himself was also a member of that society. In accordance with this utilitarian thinking, punishment needed to be the least severe possible (to minimize pain for the convict), while severe enough to deter future crimes. Bentham's thinking in this regard mirrored that of Enlightenment philosophers and their debates on the individual's role in society, generally, and on the character of the criminal in particular.²⁹⁹ A new understanding of the criminal mind was developing: one that accounted for a separation between the criminal as a person and the crime as an act. In parallel was an increasing awareness of how an environment might affect character, and on an individual's capacity to reform. On the continent, these ideas coalesced in the writings of philosophers such as Voltaire, Montesquieu,

²⁹⁸ Bentham is also complaining about the way judges use inconvenient geography as a way to make a little money. The passage closes: "When he comes, so far from having anything to say to him, they won't hear him; for all they want him for, is to grease their fingers." Jeremy Bentham, *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838-1843). 11 vols. Vol. 5., p. 234 (Hereafter Bentham *Works*)

²⁹⁹ For how these philosophers influenced penal reform on the continent (especially France), see Patricia O'Brien, *The Promise of Punishment: Prisons in Nineteenth-century France* (1982).

and especially Cesare Beccaria, who all were vocal against corporeal punishments and the death penalty. These writers claimed that purely retributive sanctions were both ineffective in deterring future crime, and unnecessarily cruel on the criminal himself. Beccaria, most well known for his book *Dei delitti e delle pene* (published in Italian in 1764 and in English translation in 1767), argued that alternative forms of punishment could serve as both deterrence and rehabilitation, if the prisoner was given work and spiritual guidance.³⁰⁰ His arguments were foregrounded by calling attention to the arbitrary nature of existing punishments, which were both too severe and yet not universally enforced. He argued that a more certain, but more lenient, punishments would better serve society.

These ideas were quickly taken up by Bentham, who, in a publication entitled *Rationale of Punishment* (first drafted in the 1770's), had examined different modes of punishment and ranked them according to twelve principles that he devised. He concluded, through this work, that imprisonment was the most suitable form of punishment.³⁰¹ A prison sentence could be calibrated according to the severity of the crime (and therefore be distributed equitably); as well, a working prison could make use of valuable human labor that would otherwise be wasted to society. In addition, a prison sentence was reversible in the case of a wrongful judgment (a quality which capital punishment decidedly did not have).³⁰² Most importantly, however, this form of punishment could be known and understood by the lay public, as it could be presented in the form of a fixed table of sentencing terms, calibrated according to the severity of offence

³⁰⁰ Marquis Beccaria of Milan. *An essay on crimes and punishments*. With a commentary by M. de Voltaire. (1788)

³⁰¹ Jeremy Bentham's work *The Rationale of Punishment* was published in English in 1830, but from a translation from French by Dumont *Le Théorie des Peines* (1811), which themselves were based off Bentham's own manuscripts written in the 1770's.

³⁰² A prison sentence was "reversible" in that a wrongly convicted man or woman could be released; an execution was final.

committed. This ideal form of punishment was to have one single variable: the time spent in confinement. Everything else had to be made certain, and guaranteed equivalent for all convicted. A minutely graduated scale of the severity of the crime could be measured against this single variable. Bentham believed that in order for the law to have the most beneficial result, people needed to know how and why one was punished, and the prison sentence provided a legible calculus that could be distributed in equal measure according to the wrongs committed.

Beccaria and Bentham were not alone in coming to the conclusion that imprisonment could be a productive form of punishment. In fact, as historians have shown, the long eighteenth century saw a decisive shift—both ideologically and in practice—in terms of the particular forms of legal punishment, as well as the role of punishment more generally in the practice of law. This shift was famously encapsulated by Michel Foucault’s juxtaposition of the torture of the regicide Robert-François Damiens (1757) with Bentham’s own panoptic prison scheme (first published in 1791).³⁰³ The data corroborates (allowing a century or so of implementation): by 1875, a national penitentiary system had indeed been put in place in England, and imprisonment accounted for 90% of sentences handed down by London’s central criminal court.³⁰⁴ By the late nineteenth century, imprisonment as punishment was the norm both in practice and in common understanding, and followed strict protocols. I will return in the following chapter in detail to the makings of the national penitentiary system that arose in the first half of the nineteenth century. But it is important to note here that, while capital punishment certainly garnered much attention (from both legal reformers, as well as the lay public), the majority of convictions—even in Bentham’s day—did not lead to the gallows. In fact, death and imprisonment should not be seen

³⁰³ Michel Foucault. *Discipline and punish: The birth of the prison* (1977)

³⁰⁴ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), Tabulating year against punishment, between 1775 and 1875. Counting by punishment.

as the only (and opposing) options that were being debated at the time.

Figures from the proceedings of the Old Bailey, London's central criminal court, can help clarify this transition, as well as add details specific to the English context. In 1757, the year of Damien's death, just 2 men were given sentences of imprisonment (a statistically negligible number), while 42 women and men were sentenced to be hanged and 14 to other corporeal punishments. However, these numbers alone are misleading, since the corporal and capital punishments together only account for 21% of the total sentences that year, while the majority—61%, or 143 women and men—were sentenced to terms of transportation: between 2 to 7 years hard labor in one of Britain's overseas colonies.³⁰⁵ That particular year is not a statistical anomaly; these percentages are fairly consistent until transportation encountered a serious roadblock in the form of declaration of war by the American colonists, who had previously absorbed the majority of England's convict labor.³⁰⁶ Even after the declaration of American independence, when it had become finally clear that transportation to those particular colonies would not resume, the practice itself was by no means abandoned as a penal strategy. The question surrounding transportation, even at the end of the eighteenth century, was not whether, but where. When the temporary measure of keeping prisoners onboard hulks in the river Thames was declared unsustainable, the penal colony in Botany Bay was finally established, after much debate, in 1788.³⁰⁷

³⁰⁵ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), Tabulating year against punishment, between 1700 and 1875. Counting by punishment.

³⁰⁶ *Ibid.* In 1775 just 14 women and men were given sentences of imprisonment (3.75%), while 81 and 206 were given sentences of death (21.7%) or transportation (55%), respectively.

³⁰⁷ See Smith for more on transportation, and Langbein for a general history of penal sanctions in Europe, and in particular for the argument that the death penalty was not the immediate predecessor of the prison sentence. As he convincingly argued, the decline of the death penalty was not the result of successful advocacy on the part of humanist philosophers, but rather was made possible by workable alternatives, such as transportation, that already existed. Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America, 1607-1776*

Bentham was thus arguing for his panoptic prison in a political atmosphere in which the death penalty was already on the decline, and the penalty of transportation to overseas colonies for hard labor considered best practice. But for Bentham, transportation had obvious drawbacks. Not least of these was that, as he saw it, the Common Law did not have a good track record in accounting for the actual location of prisoners. If custody itself was so often a fiction, how could a punishment based on relocating prisoners be guaranteed to actually move those bodies? The practice of transporting criminals was too dangerously close to the Common Law's acceptance of the fictional custody of bodies—bodies that, while legally in the custody of the jail, were actually “warming themselves by the comfortable fire at home.” If one were to propose a system of custody that would itself be punishment, this system could only work if that custody were guaranteed in fact. The second major problem with transportation had to do with visibility. Once prisoners were transported, they would be removed from the public eye. The convicts might be paying a price for their infractions, but the secondary benefit of a highly visible sanction—deterrence of future crimes—was not possible through transportation.

By contrast, not only did the prison sentence provide a method for measuring punishment, but the building itself, necessary for its implementation, would be a visible representation of the certainty of the law. Once having decided on this best form of punishment, Bentham set about working out the details. His well-known panoptic prison was the resulting project. Inspired by a sketch made by his brother while inspecting naval operations in Russia, it consisted of a six-story circular structure with wedge-shaped cells for individual prisoners arrayed along the outer edge, along with a raised central platform for the governor's house

(1947). J.H. Langbein, “The historical origins of the sanction of imprisonment for serious crime. *The Journal of Legal Studies*, 5 (1), 35-60 (1976)

(which would allow for perfect visibility into the cells).³⁰⁸ Everything about the structure was aimed to reduce variability in the prisoners' experience. Individual cells meant that prisoners could not form alliances or otherwise influence one another; the ingenious trick of the unknowable gaze from the governor's house meant that a constant and equal effect of surveillance could be guaranteed on each prisoner, even with limited resources.

(Figure 3.3 Bentham's *Panopticon*, plan and section drawings by Reveley)

From early on in his development of the project, Bentham was intent on securing the services of an architect to properly illustrate his ideas. Illustrate, because architecture, or the employment of an architect, seemed to be primarily for the purposes of convincing his audience—necessary for implementing a project that was already, in his mind, fully developed. He needed architectural drawings because the words, in his own view, would not be enough to fully describe the project. “There would be no end in giving descriptions by letter,” he wrote in a letter to the parliamentarian John Parnell. “But the treatise would be imperfect without engraved plans annexed to it. Those you saw, though better than nothing, do not come up to the purpose. They ought to have the latest improvements resulting from the consultations with the Architect.”³⁰⁹ Architecture, for Bentham, was necessary to provide the proper representation of a project—proof that it could exist in the real world.

This, for Bentham, would be one of the major reasons that the project required an architect's services. After all, the technical details had already been designed by his brother, an engineer, who by early in 1790 had also produced a physical model. This model, while necessary

³⁰⁸ Bentham, Jeremy. *Panopticon; or, The inspection-house: containing the idea of a new principle of construction applicable to any sort of establishment, in which persons of any description are to be kept under inspection: and in particular to penitentiary-houses, prisons, houses of industry, and schools: with a plan of management adapted to the principle. In a series of letters, written in the year 1787 (1791).*

³⁰⁹ Jeremy Bentham, Letter to John Parnell, August 1790. *Correspondence*, vol iv, p. 177.

to serve as the basis for calculating expenses, and for negotiating the building and management contracts, was not enough to promote the project. How this building would actually work needed to be advertised widely in order to convince both legislators that would fund the project, as well as the lay public, that this novel penitentiary would in fact contain convicts. This was, of course, the crucial point for Bentham. The panopticon building, to function correctly, needed to be known as a structure that revealed the actual containment of prisoner's bodies. In other words, the drawings of the project—the plan and section, which clearly indicated individual cells that would contain each prisoner—was the architectural image that proved that the prison sentence could be transformed in an ideal, and certain, form of punishment.

For Bentham, the panopticon was not a theoretical project. To be successful it needed to be implemented. It never was, at least not in a way he would consider successful. The Pentonville penitentiary (opened in 1842), perhaps the closest that Britain would come to the prison as a “total institution,” might have enforced a regimented schedule for offenders, but did not share the same reliance on the building itself to produce visibility: Bentham's major criteria for a successful project. But his work on the panopticon informed the trajectory of penal sanctions, as well as the design of prison buildings, for the next few decades. Physical custody of the body, if it were to be used as punishment, would now need to be fact. It would need to be guaranteed by a building. In the next chapter, we will look at how existing buildings in England would be reframed in legal discourse in order to serve this role.

Foucault's Diagram

Bentham is less known for his theories of fictions than for his “haunted house,” as he himself called his panopticon scheme. This scheme itself was made famous as much because it

was placed at the center of Foucault's theories of modern society.³¹⁰ Foucault traced changes in the practice of corporeal punishment—from the spectacle of public flogging to the institutionalism of correctional facilities—and showed how the body of the prisoner was increasingly removed from an overtly corporeal display of judicial punishment.³¹¹ Public displays of physical torture were replaced by systems of surveillance, measurement, correction and normalization.³¹² This transition followed new thinking regarding how so-called 'devious elements' (criminals, but also vagrants, prostitutes, etc.) in society ought to be treated. The doctrine of criminal punishment shifted from a focus on bodily harm (which was seen as direct retribution for the crime), to a focus on the more mental processes of the reform and the rehabilitation of the criminal's spirit. However, this new attention to the spiritual reform of the criminal still required control over the prisoner's body. Though no longer drawn and quartered in public, the body of the prisoner remained at the center of judicial control. The modern prison, with its spatial arrangement calculated to separate and control prisoners was yet another way that the law meted bodily punishment on the errant citizen. For Foucault, this judicial control was ultimately an expression of political control (what he would later incorporate in his theories of biopolitics).

Jeremy Bentham's proposal for the Panopticon prison was the perfect illustration of the way this control would manifest. For Foucault, Bentham's ideas were useful far beyond

³¹⁰ As several recent texts have it, Bentham would have perhaps languished in relative obscurity if Foucault had not used his Panopticon scheme as exemplary apparatus of the disciplinary state. See especially the introduction to Anne Brunon-Ernst, *Beyond Foucault: New Perspectives on Bentham's Panopticon* (2012)

³¹¹ Foucault (1977).

³¹² Of course, this wasn't strictly about prisons. In the broader context of Foucault's work, the prison became a so-called "model apparatus" in service of the modern state, and historical changes in types of punishment could be traced through his characteristic stages of governmentality: the juristic sovereign state, the disciplining state, and the security state. See Michel Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-78* (2007).

understanding shifts in methods of criminal prosecution. In fact, the panopticon was less important as a specific tool of legal punishment than as demonstrating a new method of societal control. The panopticon, in Foucault's words, "abstracted from any obstacle, resistance or friction, must be represented as a pure architectural and optical system: it is in fact a figure of political technology that may and must be detached from any specific use."³¹³ In other words, for Foucault, the principles behind Bentham's panopticon were applicable to any number of political apparatuses of the disciplining state, as he would go on to demonstrate with examples of hospitals, military barracks, and schools. The panopticon was useful for Foucault as a visible diagram of relationships of power, rather than as a building that might exist, materially, in the world.³¹⁴

But of course, for Bentham and his contemporaries who had devoted themselves to legal reform, the panopticon project was compelling precisely because of the way they believed it would redress the myriad of obstacles, resistances, and frictions they encountered in legal practice. For an Englishman practicing law at the end of the eighteenth century, the panopticon was very much about reforming a system that they perceived was threatened by the disparity between the principle of the law and the reality of its enforcement. Rather than an abstraction of them, the panopticon (along with other projects of prison reform and design) was conceived precisely to reconcile frictions in everyday legal practice. Uncertainty and deviation in human behavior was to be replaced by the certainty of the physical prison as a building, and the prison sentence as the ultimate judicial sanction which could be precisely calculated—a calculation which relied on the materiality of the building itself. If, for Foucault, a "pure architectural and optical system" was a representation that required an abstraction from specific use, Bentham's

³¹³ Foucault (1977) pg 205. A couple of things are worth elaborating on. What does Foucault mean by "pure architectural and optical system"? And in what ways is this system "abstracted from any obstacle?"

³¹⁴ On Foucault and diagrams, see Agamben, Giorgio. *What Is an Apparatus?: And Other Essays* (2009).

concept very much required the building itself to produce the necessary specificities in material form that would guarantee the way that prisoner's bodies would be held in custody.

Importantly, the panopticon project did, in fact, rely on a kind of fictional abstraction. While he was vocal against the use of fictions in everyday legal practice, Bentham conveniently ignored the fiction that underlies his own project. The primary idea behind the panopticon is, of course, that the technological fact of the building would replace the necessary surveillance of the guard; in this way, the building itself produces a fiction—here, not a fictional presence of the prisoner, but rather of the guard. Bentham was, in effect, not proposing the total elimination of fiction, but rather proposing that it was the *specific* fiction of the prisoner's body that ought to be abolished. In this way, he was implicitly claiming that the facticity of the prison building, insofar as it could be demonstrably capable of securing convicts, would produce a kind of certainty that might allow for an acceptable fiction regarding the prison guard. It was the drawings of the building itself that had made this possible. Bentham had produced an image of a building—recall his own distinctions between real and fictional entities, in which an entity that could be pictured clearly could not be considered entirely fictional—that allowed the custody of the prisoner's body to be made visible.

Bentham might have been distressed to learn that, through the work of Foucault, his project would come to be widely known primarily as an abstract diagram of power relationships. But in many ways, of course, that is precisely what the panopticon's drawings produce, especially when taken out of their historical context. By looking at his arguments against the use of fiction in English legal practice, we are able to understand, more precisely, the role of the architectural image in forming the ideas behind the project.

V Conclusion

By the early nineteenth century, the prison sentence indisputably emerged as the dominant legal sanction in England and across Europe for minor infractions, replacing corporeal punishments and transportation to oversea colonies. Jeremy Bentham's scheme for a panoptic prison has been seen (most notably, by Michel Foucault) as the intellectual height of this so-called prison reform movement that occurred in England at the end of the eighteenth century. In this chapter, I have argued that Bentham's arguments in favor of the prison sentence as legal punishment is usefully positioned with regards to concurrent debates regarding the codification of English law and the use of legal fiction in Common Law practice.

Foucault's (and others) dominant focus on this period is the transition from the public display of corporeal punishment, to the exacting control and organization of populations through the material form of the prison building. In Foucault's genealogy, Bentham's project is staged directly in opposition to the dramatic public execution of the regicide Robert-François Damiens. The spectacle of the convict's body, drawn and quartered in the public square, is replaced by the organization of the convict's body within the walls of the panopticon. For Foucault, the diagrammatic organization of the panoptic prison building replaced public spectacle.³¹⁵ But examining this transition in the context of legal fiction and codification expands the set of architectural questions that must be addressed. The geometric figuration of the floor plan, as produced by a professional architect as an illustration of his panoptic prison, is certainly one of the ways in which architecture lent its own methods of abstracting space to the practice of law. But this was not the only way. As I have shown, a robust framework in place which allowed for using fictional suits in legal practice was itself a specific version of abstract legal space. Taking

³¹⁵ For him, the image of the building is a necessary mark of modernity, and the pre-modern mode of punishment relied on the space of the public square.

seriously the fictitious space of Common Law practice means repositioning pre-modern carceral spaces as being integral to producing an abstract geographic legal space—one that would be necessary to ground the architectural projects that would follow.

The dominant juxtaposition would not then be between the architectural chaos of medieval Newgate and the carefully calibrated architectural plans of Pentonville (as per Evans); nor between the execution of Robert-François Damiens and the surveillance apparatus of the Panopticon (as per Foucault).³¹⁶ For every one regicide Damiens, violently and publicly eviscerated, there were thousands of John and Jane Does, held in county jails. There were exponentially more held by practices of slavery, or other forms of exploitative bondage. And, at the same time, there were thousands of Jane and John Does in legal custody of the King's Bench, who were in fact warming themselves by the fire in the full comforts of their own homes. Parsing the difference between how these forms of custody were produced—both the virtual and the real—is fundamentally an architectural question, since they are each about producing an understanding of how buildings are able to hold the prisoner's body.

Unpacking how the law pictures space through the use of fiction has also complicated the connections between architecture, material geography, and legal practice that I have outlined in preceding chapters. In these chapters, we saw how the legal significance of a particular place was created through the enactment or use of buildings in the practice of law, and one of the ways we began to understand how this legal meaning was produced with buildings was by considering their material geographies.³¹⁷ In both previous chapters, I outlined several ways in which the

³¹⁶ As I have noted elsewhere, these projects are all about understanding how the visibilities of certain populations is produced through the form of the building.

³¹⁷ This implies that legal significance can be detached from material space, if it takes work to produce it. So far, we've seen how material geography played an important role in determining how buildings acquired legal

material geography of legal practice influenced or produced specific legal outcomes. In the *habeas* chapter, for example, we saw how the physical location of the jails mattered. Even though geography was not explicitly mentioned in the words of the writ, its procedure required certain spatial parameters in order that it be effective as a supervisory mechanism. Importantly, these spatial parameters were not named as such; we could only infer their importance by tracing the movements of writs and prisoners, and recognizing that the writ system only worked when infrastructure was in place to support it.³¹⁸ In the *jurisdiction* chapter, we saw how particular places gained legal significance when the law made specific claims on them. We looked at examples of buildings that became essential to producing these legal claims because they created a legible marker of that particular place. These examples showed how architecture was a crucial component in claiming the specificity of place that could project the idea of jurisdictional borders. Architecture's usefulness in marking jurisdictional boundaries lay in its ability to make a rhetorical claim on a space that was distinctly bounded. By marking the ground, architecture was a key to creating a legal-material geography, made legible through these indices of jurisdictional boundaries. Legal fictions—and their abstract representations of legal space—has to be seen against the construction of this material geography. By positioning Bentham's panopticon against Blackstone's metaphorical Gothic castle, we can see that a certainty produced by architecture—as Bentham desired—required him to explicitly reject other ways in which architecture could produce images of legal space.

significance; or, conversely, how buildings produced legible markers in real space. This chapter will look at how the geography of the legal fiction required a specificity of *image* that only architecture could provide.

³¹⁸ This geography becomes explicit when talking about the reach of the writ “across the seas” – I return to this in the final chapter. The examples given in this chapter don't make any specific claims about the particular importance of each jail; rather, the writ makes a general claim about the concept of the ‘jail’ as it relates to its relationship within this network of legal spaces.

*Twelve feet in length, eight in breath, and eleven in height,
nor less than ten in length, seven in breath, and nine in height.*³¹⁹

Chapter 4

How to calculate a jail: the measured space of punishment

³¹⁹ 19 Geo. III c.74 (Penitentiary Act, 1779)

I Introduction

Over the course of the final decades of the eighteenth century, widespread attention was being drawn to the space of the prison, and to the social ills that were perceived to be developing therein. As we saw in the last chapter, on the European continent Voltaire, Beccaria, and Montesquieu all were vocal against judicial punishments such as the death penalty, as well as against the conditions that convicts were kept in while awaiting trial or execution. In England Jeremy Bentham, influenced by these views, translated one facet of his philosophy regarding legal codification into an intellectual project that required a specific architectural image. This architectural image—his well-known Panoptic penitentiary—was explicitly aimed to correct what Bentham saw as the dangerous habit of English lawyers producing fictional custody of prisoners who were, in fact, at large.

But the panopticon project—as a direct illustration of Bentham’s desire to produce a more exact and true custody of prisoner’s bodies—was but one of two projects aimed at rationalizing the English jail at the end of the eighteenth century. This competing project was not born in a philosopher’s mind, but rather was produced through extensive on-the-ground research regarding already-existing prisons and jails. As we will see in this chapter, the prison reformers John Howard and Elizabeth Fry, among others, visited jails around England, and collectively amassed a large quantity of data regarding their current conditions. This work, together with Bentham’s, coalesced into what is still seen as a “reform movement” in prison administration. This movement resulted in new guidelines for the construction, maintenance, and administration

of jails. As we will see, these new guidelines produced the possibility for imaging a nation-wide system of punishment: one based on the prison sentence.³²⁰

As I will argue in this chapter, while the idea of the prison sentence as legal sanction may have been articulated explicitly by Bentham and others, its implementation relied on a robust understanding of practices occurring in existing buildings. This understanding was the result of, in part, the work of John Howard. Through meticulous measurements of physical structures that were already used as jails, his research allowed for a translation between the measured local spaces of the jail into a national system of judicial sanction. Though it was not his aim (as we will see, Howard was not a proponent of the jail sentence) his work allowed for the practical implementation of a newly-understood penal strategy.

Existing accounts of Howard's work have focused on his role as a religious philanthropist, or else dismissed his project as simply data collection—data collection made more prominent because his is still the most comprehensive data currently available regarding the medieval jail.³²¹ In this chapter, I re-frame Howard's work as having been necessary to understand the jail as a measurable building type. In a different way from Bentham, whose ideological position required the invention of brand new building, defined exactly in terms of its geometric form, Howard's research produced a systematic way of understanding the local jail as a necessary part of a larger system. While Howard never stated this explicitly, the underlying framework of his research methods produced a new way to conceptualize the jail. This jail—and specifically, its material form—was measurable, quantifiable, and comparable to other local

³²⁰ As we have also seen in the previous chapter on *Jurisdiction*, at this time figure within the established architectural profession were designing prison buildings. But despite its innovation in architectural style, we still have to see Newgate as a pre-modern jail.

³²¹ As Pugh (1968) and others note, this makes it difficult to get to a un-biased view of the medieval jail.

jails. The county jail could no longer be seen as an idiosyncratic and local condition; but rather had to be situated within a system of similar jails dispersed across the country. His work, in other words, was a covert form of ideology that would be necessary to support the idea of a national prison system.³²²

In this chapter, I will also address directly the prison sentence as a form of punishment. I show how information regarding existing jails was used to produce a coherent account of carceral spaces in current use, and argue that this account was a necessary form of knowledge that underlay the Penitentiary Act—an act that would, for the first time, legislate the specific material conditions of the prison. I introduce the topic through an image produced by an architect—Sir John Soane’s project for this very penitentiary.

II Penal regimes and legal process

The Utopian penitentiary

For a brief moment at the cusp of the nineteenth century, the prison as an architectural project was closely aligned with the goals of legal reformers who were spearheading a movement aimed at restructuring English penal practice. Sir John Soane’s project for the National Penitentiary at Battersea (1781-1782) is an excellent example of this alignment. Ten years before Jeremy Bentham’s *Panopticon* writings, Soane’s (unbuilt) competition drawings already exhibit many of the architectural features that would later be promoted by Bentham, John Howard, and other reformers. The brief called for the design of two separate penitentiaries, one for three

³²² If we see Howard’s work as producing a new idea of an existing type, we still have to separate this newly-discovered (but already-existing) building type and the legal sanction that would become closely associated with it.

hundred female prisoners and one for six hundred male prisoners.³²³ Soane imagined the two buildings as variations on a similar arrangement: three groupings of radially organized cells, with a chapel at the center, the whole surrounded by a blank crenelated wall. Prisoners, grouped according to the severity of their crimes within the three blocks, would spend their days combatting the vice of idleness with the virtue of labor—made possible by workrooms located along the periphery of the complex. At night, in the isolation of their cells, they would have time and space for reflection and prayer.³²⁴

As revealed in plan, Soane’s project thus exhibits many characteristics of internal spatial organization that would become expected of the reformed prison. Individual cells would serve to provide necessary isolation for the repentant prisoner, and their legibility in the architectural floor plan drawings would serve to indicate the locations of actual prisoner’s bodies. The tripartite arrangement of groups of these cells served to isolate classes of criminals, and, again, these divisions were made visible in the orthographic drawing. Additional programmatic functions—spaces to work, eat, and bathe—would allow the penitentiary to be a fully enclosed, and fully autonomous building. The prison was imagined here as a zoned Utopia, albeit one with a specific overall function: to punish and reform the criminal element in society.³²⁵

(Figure 4.1 John Soane, National Penitentiary, plan drawing)

³²³ A detailed outline of this competition, and Soane’s involvement in it, can be found in P.du Prey, “The Competition for the first Howardian penitentiaries,” in *John Soane: the making of an architect* (1982). A longer discussion of the Penitentiary Act itself follows later in this chapter.

³²⁴ See Evans (1982), along with Michael Ignatieff, *A just measure of pain: the penitentiary in the industrial revolution 1750-1850* (1978), for descriptions of a prisoner’s typical day in a post-reform penitentiary prison.

³²⁵ The project also reflects many of the characteristics of “ideal cities,” from Sforzinda to Chau—a platonic form, that aims to produce a specific image of political order. See ie, Colin Rowe, “The Architecture of Utopia,” in *The Mathematics of the Ideal Villa, and Other Essays* (1976).

Soane's drawings indicate that a new direction had been taken with regards to the architectural image of a prison building—one that can perhaps be seen to have begun with Dance's Newgate (as we saw in Chapter 2). The prison building was now, clearly, an autonomous architectural object. Although the architects who submitted for this competition had been given the parameters of a real site—land in Battersea had been acquired by the committee appointed to actualize the National Penitentiary project—no indication of this site is given on any of Soane's drawings or sketches. If Dance's project had produced an explicit distance between Newgate jail and the historic significance of its site, Soane's project removed the prison from the city entirely. Withdrawing totally from the civic realm, the penitentiary created its own bounded legal space.

This aspect is most clearly revealed in Joseph Gandy's bird-eye rendering of Soane's competition entry, completed seventeen years later for a Royal Academy exhibition.³²⁶ The solitary structure of the penitentiary (the image shows the men's block only) dominates the foreground of an imagined landscape, flanked by forest and scrub. Open fields, in which one can make out specks of sheep, lie between the penitentiary and the rough outline of a city's skyline at the water's edge. A caravan of five or six faint figures—convicts, perhaps—can be made out approaching on a road, which winds past a plume of smoke towards the building to the left. While the penitentiary itself appears castle-like, it certainly cannot be mistaken for one: watchtowers that punctuate the perimeter wall have no windows or viewing platforms; the only entrance to the compound faces away from the distant city and towards the forest that encroaches

³²⁶ Soane Museum, cat. # SM 13/ 1/19. This image is dated 20 July 1799, but was never actually used in exhibition.

in the foreground.³²⁷ Nor can the skyline and its environment be mistaken for a distant view of London, as would have been visible from the Battersea site, procured after years of negotiations.³²⁸ Inhabiting the middle ground between the forest and civilization, the penitentiary turns its back to an anonymous city.

(Figure 4.2 Soane and Gandy, National Penitentiary, Bird's Eye view, 1799)

Neither reminiscent of the tangled and claustrophobic spaces of the medieval jail, nor of Dance's formidable and impenetrable Newgate, this image instead shows the prison as an ideal city; a utopic mirror of the real city, barely discernable on the horizon. This in itself would not be particularly notable was it not for the role that prisons played in legal procedure up until that time. Carceral spaces were useful in legal practice precisely because they were *not* isolated from the urban environments in which the courts also operated. Nor had jails been previously legible outside their particular use in local practice.³²⁹

By contrast, this image presents the prison as a building both isolated from an urban center, and distinctly organized internally according to well-defined categories of inhabitants. This space was distinctly bounded, separated from its surroundings by a fortified wall. Further, the articulation of interior space corresponded exactly to the articulation of the legal status of those held within. One had only to read the drawings to understand that this building reified legal relationships between convicts, prison keepers, and judges, as well as with the city they were all

³²⁷ These gestures towards the prison as a fortified structure can, again, be related to the "ideal cities," especially those of the Renaissance. As well, the drawings bear some similarities to Robert Adam's "castle style" prisons (especially the Edinburgh Bridewell).

³²⁸ For more specifics of how the land was acquired (basically, by making small deals with local landowners), see K. Bailey, 'Battersea and "The National Penitentiary"', in *Aspects of Battersea history 1770-1910*, 2010, Paper 18, p.10

³²⁹ The building was now also unapologetically authored. Soane's use of the competition motto "mihi turpe relinquitur est" – borrowed from Dance, in turn from Horace. (The motto is visible on the elevation drawings, SM (10)13/1/20)

held apart from.³³⁰ The reform prison building produced a model of legal space that could be drawn, seen, and understood by those with neither legal nor architectural training. The measured space of the building, legible in plan as well as on by its face, can be seen as the grounding for a new definition of legal punishment.

In many ways, this reading of Soane's penitentiary project coincides nicely with dominant historiographical narratives regarding the evolution of punishment in the law. These narratives takes for granted the novelty of the idea of the prison building as punishment, and typically views the turn of the nineteenth century as an important moment in this transition. Here, the drawings authored by a well-known architect, born from a geometric sketch and translated to measured drawing, show how the prison sentence relied on a particular form of architectural knowledge. The measured, and authored, architectural drawings of the prison building provided discursive backdrop for developing a measured penal sanction. As we now turn directly to the development of the prison sentence as legal punishment, it is worthwhile to spend a few moments on the use of sanctions in law. It is impossible, after all, to look at this project, and at prisons in general at the end of the eighteenth century, without contextualizing them within the history of legal punishment over a longer period of time.

Changing penal sanctions

Sanctions, generally speaking, are a crucial part of the way law reinforces its own authority. Legal punishment can be seen as a direct expression of political power (as defined by Weber), especially so when the object of legal punishment is the body of the convicted.³³¹ The

³³⁰ This image is strikingly similar to the ways in which the space of territorial jurisdiction was coming to be described and understood (as we saw in Chapter 2). See, again, the work of Richard Ford.

³³¹ Weber's familiar definition of the state—the entity that claims “the monopoly of the legitimate use of force within a given territory”—is useful here, especially when we take seriously the legitimacy of this force. In many

ability to mete out punishment on third-party disputes is both an act of immediate power as well as a display of that power to others. In this way legal punishment itself can be seen as pure display of sovereignty. But more generally (and perhaps more generously), law is useful because it provides a mutually-agreed upon external system which has been given the authority to settle disputes conclusively. Sanctions, more often than not, are considered a marker of that conclusion.³³² This is perhaps the only general thing we can say, since what would be considered the most fitting form of legal punishment changed considerably in Europe across the past centuries. Most notable is that the prison sentence itself became the standard criminal sanction only in the nineteenth century, replacing fines, corporeal punishment, banishment, or death.³³³

The replacement of blood sanctions with penal incarceration is one of the ways in which modern Europe sought to distance itself from a medieval past—a past that Enlightenment thinkers saw as barbaric, unfair, and irrational.³³⁴ But medieval practices rejected by Enlightenment philosophers have more in common with modern penal sanctions than we might

ways, the evolution of legal sanctions is, in part, very much related to demonstrating claims of legitimacy. Max Weber, “Politics as Vocation,” (1946; [1919]) p. 1

³³² We can also state this the other way: as Shoemaker notes, punishment—between the 15th-20th centuries, was almost exclusively discussed within the domain of the law (Karl Shoemaker, “Punishment” (2010).

³³³ Of course, it is impossible to separate sanctions from the legal system as a whole (something that I hope was made clear in the previous chapters). This is especially apparent when looking at how the body of an accused was used throughout the legal process. The body of the accused (and convicted) criminal is used, in different ways, as a means of arranging a final settlement for a dispute. The general historiographical placement of prison design and incarceration within the narratives of legal history, social history, and architectural history differ, though not wildly, and most focus on the prison and its use in punishment.

³³⁴ The trial itself (in addition to punishment) was another area of legal practice that was similarly reconfigured, though this occurred several centuries earlier. Medieval forms of trial—such as trial by ordeal, wherein guilt or innocence would be determined by whether or not the wound caused by a hot iron placed in the hand of the accused would be deemed sufficiently healed after a certain amount of time—would eventually be replaced by the jury trial. Robert Bartlett has made the compelling argument that the ordeal was not abandoned because it was irrational: rather, it became irrational because it was abandoned. By the end of the thirteenth century, the (human) construction of the ordeal trial was seen as impious because it was asking god to answer a test; it was asking for a miracle. In other words, criticisms of the ordeal were not coming out of a new rationalism, but rather out of metaphysics. Regardless, the distancing from a former legal practice that was now construed as “irrational” was similarly an attempt to create an explicit break from the past. Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (1986)

expect, especially if we look at the purpose of sanction as marking the conclusion of the legal procedure itself. If the process of law is one by which disputes between individuals are to be settled with finality, a system that remains open-ended ceases to be useful.³³⁵ In this sense, many medieval forms of legal punishment—indeed, even those of Anglo-Saxon England—can be seen as perfectly reasonable methods of allocating blame and preventing further (private) restitution.³³⁶ For example, the *wergilds* of Æthelbert’s “code” (which consisted of a list of prices based on one’s status within the community, and the severity of harm done, that would have been awarded to a plaintiff) exhibits many characteristics that the eighteenth century legal reformers explicitly desired in their own reforms: a tabulated, measured system; proportional to the perceived severity of crime; with the authoritative backing of the central government.³³⁷

In addition imprisonment, like many other forms of legal punishment, requires the physical fact of human bodies. Apart from levying fines or confiscating property, legal retribution involving the physical marking of the body (maiming or tattooing), and other bodily harm (death, or, in some few cases, torture) has played a prominent role across a wide range of

³³⁵ A legal sanction must both 1) mark the end point of judgment, which often requires that it 2) provides a sense that it has been allocated with reason.

³³⁶ See Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (1999) for a discussion of the English “barbarian” codes; as well as Lisi Oliver *The Beginnings of English Law* (2002); and Finkelstein, “The Ox That Gored” (1981) for a comparative discussion of sanction in antiquity.

³³⁷ I admit I am guilty of several anachronisms here—note, of course, that Æthelbert is not a territorial ruler in the way we might assume today. Regardless, his “code” (promulgated around 602) remains important because it is seen as the first written law of the Germanic peoples; the date is notable as it is just a few decades after Justinian’s compilations, though the *corpus juris* appeared after centuries of refinement, in practice, of the Roman law. See A.W.B. Simpson, “The Laws of Ethelbert” (1981) for a concise account of the historical context of Æthelbert’s code. This context is important, because, as Simpson clarifies, “Today, of course, we draw a distinction between legislation on the one hand and adjudication on the other... legislation involves the idea of laying down abstract general rules to deal with situations that, it is thought, will arise in the future: adjudication on the other hand involves giving decisions in particular cases after they have arisen. But this distinction was not part of the intellectual stock of ideas of the seventh century.”

legal systems and historical periods.³³⁸ In the context of Western Europe (including England), the development of the modern prison sentence at the turn of the nineteenth century is but one form of legal sanction that relied on the body itself.³³⁹ The prison sentence is thus not so dissimilar to prior penal regimes, and it is useful to keep in mind similarities, as well as the differences, in penal practice. Looking at how legal sanctions were construed with respect to sanctions of the past allows us to restate the work that the architectural prison was being asked to perform at the end of the eighteenth century.

In many ways, of course, the study of legal punishment is about more than the sanction itself. Even within the history of law narrowly defined, historians have looked at forms of punishment as a way to help explicate both the procedure of the criminal trial as well as definitions of criminal acts themselves.³⁴⁰ For example, in the Common Law, where categories of criminal offences were not defined in statute, categorical definitions of a wrong are made most visible through its corresponding punishment. Changing forms of legal sanction can also reveal trends in the perceived purpose of legal punishment—whether it be deterrence, rehabilitation, or retribution—and likewise can show changing attitudes towards morality, religiosity, and truth, and how a society understands the role of secular law in regulating each of these.

In this way understanding penal sanctions has proved fruitful beyond histories of law. The bulk of the legal historian's evidentiary material—documents left behind by the assize

³³⁸ See John Langbein, *Torture and the law of proof* (1977) and Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (1986).

³³⁹ This is, of course, one of the reasons that Foucault saw the public execution of Damiens as an appropriate counterpoint to Bentham's panopticon. (Foucault 1975)

³⁴⁰ See, in particular, the work of John Beattie, who gives a detailed and convincing account of the ways in which understanding changes in criminal law requires taking into account the connections between forms of crime, criminal law procedure, and punishment—and how all three are perceived by contemporaries. (J.M. Beattie, *Crime and the courts in England, 1660-1800*, 1986)

sessions and the recorders at the Old Bailey, including affidavits, indictments, gaol delivery calendars, transportation and hanging schedules, and so on—also reveal otherwise inaccessible details regarding the lives of the poor, the marginalized, and the unwritten-about. Understood as a whole, these documents show how lives were structured by a changing society’s attitudes towards property, death, and violence. But even more than giving us an otherwise inaccessible picture of life from another era, a framework for understanding the underlying motivations of penal sanctions has proved invaluable for understanding power structures of the modern world.³⁴¹

This mode of understanding punishment was especially prominent in a wave of scholarship that, beginning in the early 1970’s, had begun to question the more heroic narratives that cast the modern state and its legal systems as rational and fair. Since the publication of Michele Foucault’s influential book *Discipline and Punish: the Birth of the Prison* (1975), the development of the modern prison has become inextricably associated with what Foucault saw as a fundamental shift with regards to how control over the human body was implicated in structures of power.³⁴² For Foucault, the historical shift in legal sanctions across Europe, which pivoted away from public displays of bodily punishment and towards the prison sentence as the normative penal sanction, signaled a wider trend in the ways in which political and legal authority would manifest itself in Europe around the turn of the nineteenth century. A new expression of what he called “governmentality,” modern political regimes required the measurement, classification, and control of the human body—not only in law, but also in many

³⁴¹ The so-called “history from below.” For a few prominent examples, see E.P. Thompson, *Whigs and hunters: the origin of the Black act* (1975) or Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, Cal Winslow. *Albion’s fatal tree: crime and society in eighteenth-century England* (2011).

³⁴² These ideas become more fully elaborated in his later work on theories of biopolitics. Michel Foucault, *Discipline and Punish* (1975); and see the essays in Foucault, Michel, and Faubion, James D. *Power Works*. 1997; v. 3.

other aspects of everyday life.³⁴³ According to Foucault, this “soft” form of bodily control would become one of the defining characteristics of modernity’s political power.

The modern prison was an ideal apparatus to demonstrate these changes, as the structures of power that Foucault described had quite literally been embodied in buildings. In fact, his own argument (as we saw in the last chapter) made extensive use of the drawings of Jeremy Bentham’s Panopticon, which Foucault saw as an architectural “diagram;” a perfect exemplar of this new form of control. Foucault was not alone in casting the modern prison as an invention of modernity. For example in architectural history, Robin Evans also located a definitive shift in the relationships between architectural form and legal punishment at the end of the eighteenth century.³⁴⁴

While these works continue to be important in formulating theories of modern political power, their historical claims, specifically with regards to legal punishment, have been questioned. Most prominently in law, John Langbein cautioned against placing too much weight on the role philosophers played in changing law practice, especially in terms of sanctions.³⁴⁵ He has convincingly argued that, in most cases, legal practice changes when viable alternatives already exist; as such, change (such as Foucault describes it) is not usefully bracketed so cleanly. For Langbein, the Enlightenment philosophers—including Bentham—were influential only insofar as they were able to articulate and give name to practices that were already changing: throughout Europe, the death penalty was *already* on the decline, because developing institutions of the modern nation-state were already making possible viable alternatives to death, maiming,

³⁴³ Foucault’s other primary examples are the hospital and the school (Foucault 1975).

³⁴⁴ Evans (1980)

³⁴⁵ Langbein calls the idea that Enlightenment writers inspired monarchs to abolish torture an “abolition fairy-tale”, and rather shows that a new system of proof, developed by a new legal science, meant that a system of proof that required torture was no longer necessary. (See John Langbein, *Torture and the law of proof*, 1977, pp. 10-12)

and banishment. In particular, the galley sentence (in France), the workhouse (in Prussia, Austria, and the Low countries), and the transportation of criminals to overseas plantations (in England) all can be seen as important historical precedents for imprisonment as a sanction for serious crime.³⁴⁶ In Langbein's view, the moral concerns of Enlightenment Europe did not create a widespread interest in reforming penal codes; rather, changing circumstances required a new moral explanation, which the philosophers obligingly provided.

Regardless of whether or not Langbein gives too little agency to philosophers in the production of a prevailing ideology, his work calls attention to the broad political and economic organizational strategies that are required of different types of sanctions. Blood sanctions and capital punishment are relatively easy to inflict without an organized state bureaucracy. In comparison, the workhouse, the galley sentence, and transportation were only possible under a stronger state with the capacities to organize and maintain the apparatus necessary for a mobile workforce. In addition, new economic and social conditions, such as labor shortages and growing populations of urban poor, made these alternatives even more desirable, as they were seen to satisfy needs of a changing society.³⁴⁷ The "new" sanction of the prison sentence did not arise out of a vacuum.

Specifically with regards to the development of the prison sentence in England, Langbein's work suggests that taking account of the existing use of jails is important to understand how the ideology of the prison sentence developed. In response to changing social and economic possibilities, the prison sentence was beginning to be understood as an appropriate

³⁴⁶ Langbein (1976)

³⁴⁷ See Langbein (1976, 1977) as well as Garland (1985) for detailed accounts of these general shifts.

legal sanction.³⁴⁸ Moreover, as we have seen in previous chapters, carceral space already played an active role in the practice of English law.

And thus it would seem as though we have all the necessary pieces to understand the development of the prison sentence, even without new ideas in architecture: social conditions that might have predisposed lawmakers to accepting the prison as a penal sanction, as well as existing infrastructure to support this sanction. Nonetheless, work was needed to transform these existing practices into something that could be seen as a new form of sanction. The new prison sentences of the eighteenth century were positioned as the most rational and just form of sanction; while earlier systems of sanction were cast as irrational, barbaric, and subject to the personal whims of the judges. In order to produce this image makeover, the modern prison building needed to project an image of certainty and rationality. Importantly, this image of certainty did not come only from thinkers such as Bentham and architects such as Dance or Soane. A crucial role in producing the prison building as a legible building type was played by John Howard.

The legal historian John Beattie has cautioned that much of what we know about sixteenth- and seventeenth-century jails comes from the accounts of reformers, such as Howard himself (among others), whose work was motivated by very specific agendas. With this in mind, I take this as a cue to reposition his work vis-à-vis our understanding of the modern prison building. His book *The State of the Prisons in England and Wales* was not an inert collection of data, but rather, in some sense, was necessarily in producing the conditions against which the modern prison would develop.

³⁴⁸ As we saw in the last chapter, these ideas were expressed explicitly by Bentham, et. al. But what Langein and Hay (among others) are arguing is that the conditions for this possibility was already in place, especially in England.

III The measured prison as a national project

John Howard's measured buildings

Soane's penitentiary would perhaps be novel in its specific arrangement of parts and the ways in which it was represented. As well, we can see quite clearly the ways in which its internal organization reflected contemporaneous ideas of what the modern prison plan should look like, as evidenced by its similarities to Jeremy Bentham's panoptic prison scheme. But while these projects were, in large part, an invention of a new generation of architects, Soane's project was also based on a category of buildings that were beginning to be seen as an existing type, in a particular way. This type would be made known through exacting measurements of its structures and the ways in which they were administered.

If, as we saw in the very first chapter, the writ of habeas corpus produced one kind of coherent framework to understand the medieval and Early Modern jail, the English legal reformer John Howard would publish a book that can be seen as producing a different kind of coherent framework for understanding carceral space. Howard's methodology was not based on outlining personal legal relationships, but rather was based on the measurement of the physical structures themselves. If previously jails had been known primarily through anecdotal accounts—by magistrates and, of course, prisoners—the jail building as such would now be given a coherent descriptive framework that specifically tied its material geometric form to its function within English legal practice.

As we have seen in previous chapters, jail buildings across England were integral to the temporal flow of legal procedure, even if they were not used for punishment. To understand why, it is important to keep in mind criminal law procedure as it was practiced up until the end of the eighteenth century. In towns and cities across England, a person accused of a felony would be

immediately be taken, either by the victim themselves or by a so-called “thief-catcher” (common in a time when police as we know them today did not yet exist) to a local magistrate and have his or her deposition taken. The accused person would then be kept in the county jail until the next assize session, as posting bail would only be possible for those accused of minor offences (and even then at the discretion of the magistrate). As we saw in our discussion of the assize courts in Chapter 1, the circuit schedule produced a kind of seasonal cycle in the county jails. Since these courts convened only twice per year (most often in April or May and again in July or August), even an innocent person would spend up to six months in jail, depending on when her arrest occurred in relation to the next assize trials. Nor would the trial necessarily mark the end of the jail’s usefulness in criminal law procedure. While the exonerated would hence be free to go, those convicted of a capital crime would be remanded to wait the hanging schedules. In addition, once transportation to overseas colonies as laborer became a common penalty (beginning around the early eighteenth century), a convict would be returned to the jail to wait for the next available ship, often for another several months.³⁴⁹

For the most part ad-hoc spaces in pre-existing buildings, these county jails were privately-run enterprises that held a mixture people awaiting further steps in these legal proceedings. Especially in smaller counties whose jails were small, those awaiting trial and sentencing for more serious offences were held in spaces ordered not by type of offence committed, but rather by how much each prisoner could afford to pay.³⁵⁰ In England while there

³⁴⁹ The courts of the quarter sessions, held four times per year, would hear misdemeanors. In the early part of the seventeenth century there was a little flexibility as to which court a criminal trial would be held; by the period in question here felonies would be almost the exclusive purview of the assize. See Beattie *Crime and the Courts*, (1986), esp. chapter 6 “coming to trial,” and John Langbein, *Prosecuting crime in the renaissance: England, Germany, France* (1974)

³⁵⁰ For more on the specific procedures relating to early modern jail administration, see: Beatrice Webb and Shaw Webb, *English Prisons under Local Government* (1922); and Seán McConville, *A History of English Prison Administration* (1981)

were statutes in place regarding jail delivery (when and where the accused would be ‘delivered’ for judgment), as well for regulating the fees that sheriffs and turnkeys could charge to prisoners, there was no national system to enforce these statutes.³⁵¹ While the maintenance of the jail buildings did occupy the attention of magistrates—acts of parliament had been passed in the late seventeenth century to encourage repair and rebuilding, and counties often petitioned for further monetary support from parliament—there were no mechanisms to ensure that funds were actually collected and then distributed to counties in need.³⁵² Throughout England—especially in the weeks leading to the assize circuits as jail populations swelled—county jails were frequently crowded and diseased. These spaces, as we have seen, had no consistent spatial organization, nor working regulatory apparatus.

It was through the publication of a series of studies on these buildings that the state of jails in England and around Europe gained a specific kind of public visibility (and notoriety) in the late eighteenth century.³⁵³ These studies were conducted by a handful of English reformers, who were, generally speaking, more interested in so-called “practical reforms” than in publishing philosophical texts. Unlike continental philosophers such as Beccaria and Montesquieu, these English reformers made first-hand observations of jails, compters, and bridewells throughout England and abroad. Their published work was based on accounts of these visits, and through their writings, we have a certain picture of what conditions inside might have been like.³⁵⁴

³⁵¹ See John Beattie, *Crime and the courts in England, 1660-1800* (1986)

³⁵² Act ref. 1698 & 1699. And see Beattie (1986)

³⁵³ Prior to this, jails were primarily known through narrative writings, and through various popular broadsheets (hanging schedules and the like). This was especially the case of jails in London (as we saw with the *Newgate Narratives* in Chapter 2). See also David Wilson, *Pain and retribution: a short history of British prisons, 1066 to the present* (2014), pg. 35-37, for a brief account of the importance of this narrative form.

³⁵⁴ Elizabeth Fry, John Eden, and John Howard were the most well-known of these reformers. Fry’s primary work on the general conditions of prisons was published under her brother’s name: Joseph John Gurney, *Notes on a Visit*

The most celebrated of these English reformers was John Howard, whose book *The State of the Prisons in England and Wales* was first published in 1777.³⁵⁵ Howard came into what would become his life's work almost by happenstance. Calvinist philanthropist with no clear vocation, Howard had attempted to travel to Lisbon after the great earthquake of 1755 to offer aid to the beleaguered city. He never made it to Lisbon, as along the way his ship was captured by French privateers. Howard was imprisoned in Brest for six days, where, despite his brief tenure as prisoner, he was appalled by the conditions under which people were kept. Howard credited the memory of this experience as providing the spark to his later interest in conditions inside prisons. As he wrote in the introduction to his study, "perhaps, what I suffered on this occasion, increased my sympathy with the unhappy people, whose case is the subject of this book."³⁵⁶

This memory may have provoked his interest in the state of prisons, but by Howard's own account, it was only after his subsequent appointment, in 1773, as Sheriff at Bedfordshire that he truly began his investigations into the "distress of prisoners."³⁵⁷ His duties as sheriff included, of course, oversight of the county's jail. Howard immediately discovered that the jail

Made to Some of the Prisons in Scotland and the North of England. (1819). Under her own name she published a report of women's prisons, as well as a memoir of her travels to the prisons. Elizabeth Gurney Fry, *Observations on the Visiting, Superintendence, and Government of Female Prisoners* (1827), and *Memoir of the Life of Elizabeth Fry, with Extracts from Her Journal and Letters* (1848).

³⁵⁵ John Howard, *The State of the Prisons in England and Wales: With Preliminary Observations, and an Account of Some Foreign Prisons* (1777). Thereafter *The State of the Prisons*.

³⁵⁶ Howard, *The state of the prisons* (section 1 – pg. 11, footnote)

³⁵⁷ Recognizing that this carries the risk of putting too much weight on Howard himself as author, I am using his text as a primary document pointing to new methodologies in understanding carceral space. Of course, this work was not carried out by one man alone in a vacuum. R. England has an interesting take on Howard's fellow researchers, arguing that his (anonymous) collaborations were necessitated by his lack of literacy, as well as his collaborators' status as Dissenters from the Church of England. England, R. "Who Wrote John Howard's Text? "The State of the Prisons" as Dissenting Enterprise." *British Journal of Criminology, Delinquency and Deviant Social Behaviour* 33, no. 2 (1993): 203-215. And for a brief biographical account of Howard, see Martin Southwood, *John Howard, prison reformer: an account of his life and travels* (1958); and a more recent one: Tessa West, *The Curious Mr. Howard: Legendary Prison Reformer* (2011).

was poorly run. Struck by the fact that many prisoners remained in jail well after having been acquitted or otherwise ordered released—most often because they were unable to pay the fees levied by the jailer and the clerk of the assize for the time spent in jail—Howard petitioned for a sum of money to be set aside for his county, so that the jailer might be supported by a salaried post in lieu of collecting fees. The Bench, while tentatively moved to grant the money, requested that Howard provide a “precedent for charging the county with the expense,” and so Howard “rode into several neighboring counties in search of one.”³⁵⁸ He was unable to find a single suitable precedent of a jail that was staffed by a salaried man who abided properly by the rules of his post. Struck by the “same injustice [that] was practiced in them,” Howard resolved “therefore to gain a more perfect knowledge of the particulars and extent of it, by various and accurate observation, [to visit] most of the county gaols in England.”³⁵⁹

Howard’s subsequent travels across England and abroad provided material—in the form of first-hand observations—for his subsequent publications. In total, he visited several hundred jails over the next two decades, and for each he made detailed notes regarding the conditions in which prisoners were kept, as well as on the jail’s administrative organization.³⁶⁰ For Howard, these first-hand observations were essential. At each site, he “entered every room, cell, and dungeon with a memorandum book in my hand...” so that “the legislature will be better acquainted with the real state of gaols; and magistrates will be able to judge whether the prison over which they preside, and to which they commit offenders, be fit for the purposes they are

³⁵⁸ [This is all according to Howard’s own account—perhaps some records of the Bedfordshire assize might be interesting to look at here.] Howard, *The state of the prisons* (Introduction – pg. B)

³⁵⁹ Howard (Introduction – pg. 1)

³⁶⁰ In its attention to measurement and record-keeping, Howard’s work can be seen as exemplary of an enlightenment empiricism.

designed to answer.”³⁶¹ Howard’s argument for the necessity of this attention to material details that had previously been ignored is telling of his own position with regards to the prevailing attitude towards jails. He writes,

My minuteness with respect to measurement and other circumstances relating to the construction and government of these buildings, will require no apology with those who consider, that in the formation of new establishments, it is of use to be acquainted with many things which, though apparently trivial, are frequently of material consequence to the purposes intended to be answered.³⁶²

Howard was in effect proposing a new methodology for understanding jails, one that was comprised of observations of their physical as well as regulatory apparatus. Each detailed description of the physical structure—which included room layouts and measurements, number of entrances and other openings, and notes on the general condition of the building—was accompanied by a table of fees and salaries, as well as allowances awarded to each prisoner. Howard set out to collect as much data from as many jails as he could around England and abroad.

This form of research regarding jails was unprecedented. While (as we have seen) the assize circuit courts, along with the writ system, had produced a certain kind of legal centralization, much of this had to do with oversight regarding the trials themselves.³⁶³ Local jailing practice was still very much local; and this is in large part why it remains difficult to make general claims about the physical structure of the pre-modern jail. Howard’s data, for the first time, placed a diverse group of structures within a single category. While they had not been conceived as such, the existing jails in England comprised a nation-wide network that supported

³⁶¹ Howard (Section VII – pg. 211)

³⁶² Howard (Section VII – pg. 11 – footnote)

³⁶³ As we have seen, this was, of course, why the Common Law “system,” as it were, was so useful: it provided a means to supervise and centralize without having to replace local systems already in place.

the Common Law system. John Howard's book made this network visible as such. He had, in a sense, invented the jail as a building type—though there was still little in terms of formal similarities between the buildings. For perhaps the first time, the various gaols, bridewells, and county compters could together be seen as forming the basis for a national system, albeit one that had yet to be regularized.

What the measurements revealed

This portrait of the existing prison 'system,' as it were, was not a flattering one. The current state of affairs, Howard argued, produced prisoners that became "...victims, I must not say to the cruelty, but I will say to the inattention, of the sheriffs, and gentleman in the commission of the peace."³⁶⁴ Because there was little oversight, and no standardized procedures, prisoners were extorted on a daily basis by sheriffs and bailiffs. And although there were extant remedies for this type of abuse, these remedies were difficult to obtain: "I know there is a legal provision against this oppression; but the mode of obtaining redress...is attended with difficulty: and the abuse continues."³⁶⁵ Howard saw this extortion as resulting from the administrative organization of the jails themselves, rather than necessarily related to the character of particular jailers. After all, the fact that the jails and compters were run as private enterprises meant that turnkeys earned the majority of their income by charging prisoners for their keep; prisoners were responsible not only for these fees, but also needed to provide for their own food and other

³⁶⁴ Howard (section 1 – pg. 1). This passage reads to me as a chilling pre-echo of what Arendt would call the "banality of evil" in the Nazi concentration camp. *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

³⁶⁵ Howard (section 1 – pg. 5)

needs.³⁶⁶ This, of course, had been the impetus for Howard's initial research; and his forays into each county in England only confirmed that his experience at Bedfordshire was commonplace.

While Howard had begun his project as a way to prove that reforms were needed regarding oversight of the jailers themselves, the common fact of prisoner extortion was only the first of three general themes that emerged from Howard's research. The second major problem was related to the health of prisoners. Often densely packed, and with little to ensure that spaces would be cleaned regularly, most county jails (so Howard discovered) were as filthy as anecdotal accounts portrayed them to be. These conditions were coming to be seen as causally related to the spread of disease, as the idea of environmental causes of illness had become widespread.³⁶⁷ Because county jails also saw frequent comings-and-goings of various visitors, disease spread beyond their walls.

This problem was not new. Howard cites John Stow's *Survey* of London (first published in 1589), which, among anecdotes of escaped prisoners from the city's jails, mentioned the sickness that caused deaths in Newgate and Ludgate; nor would the more recent outbreak of typhus from Newgate, in 1750, have escaped Howard's attention.³⁶⁸ The spread of disease from jails was a problem beyond London. Oxford's famous Black Assize of 1577 (widely known from its account in Baker's *Chronicle of the Kings of England*), in which three hundred people reportedly died from the spread of Gaol Fever from the prisoners to the Assize sessions, was a

³⁶⁶ Again, there were statutes regulating this, but they were little enforced. Many prisoners in the city (London, in particular) could rely on people giving charities at Newgate (Stow even mentions the "begging grate" in his survey)—but these would not be guaranteed. Of course, it is easy to see similarities here with prison practices in the United States even today, where contracts for prisons are bided out to private companies.

³⁶⁷ John Pringle had published his book on *Observations on the nature and cure of Hospital and Jayl-Fevers* in 1750; and inventors such as Stephen Hales, as we have seen, had been focused on producing technological solutions for the spread of disease, thought to be transmitted through unhealthy air. For more on these specific developments related to health and disease, see Margaret Delacy, *Contagionism Catches On: Medical Ideology in Britain, 1730-1800* (2017).

³⁶⁸ Stow *Survey*, Newgate. Pg. # Howard (Introduction – pg. 2)

frequently cited example.³⁶⁹ In general, Howard remarked, crowded prisoners were robbed of water and air, the “genuine cordial of life.”³⁷⁰ Closely related was Howard’s final theme: conditions inside the jails fostered moral degeneracy. Howard echoed the prevailing sentiment that mixing different types of prisoners together would spread moral corruption, as it was believed that prisoners held for minor offences became hardened criminals over the course of their time spent locked up.³⁷¹ As with disease, bad morals spread from within the jail to outside its walls.

These unhealthy conditions—morally, physically—inside most jails were, for Howard and other proponents of the reform movement, a direct affront to the very idea of justice.³⁷² If the jail was simply meant as a temporary hold while suspects awaited trial, the fact that gaol fever killed more people than the death penalty itself—meant only for those convicted of the worst crimes—was a sure sign that the jails hindered rather than promoted justice. While the jail might have been positioned, in the past, as a neutral technology used for the practical purpose of streamlining legal procedure by collecting suspects and releasing convicts at predetermined moments, it had become clear that this supposedly neutral space had deleterious effects on those inside. Moreover, those effects would be measurable. The jail, in other words, could no longer be

³⁶⁹ Early accounts of jail fever locate the source of illness generally in the jail, but are less certain about its exact origin. As Baker writes: “About this time, when the Judges sate at the Assizes in *Oxford*, and one *Rowland Inkes* a Book-seller was questioned for speaking approbrious words against the Queen, suddenly they were surprised with a pestilent favour; whether rising from the noysome smell of the prisoners, or from the dampe of the ground, is uncertaine, but all that were there present, almost every one, within forty hours died, except Women and children; and the Contagion went no further. There died *Robert Bell* Lord chief Baron, *Robert D'Oylie*; Sir *William Babington*: *D'Olye* Sheriffe of *Oxford-shire*, *Harcourt*, *Weynman*, *Phetiplace*, the most noted men in this Tract; *Barham* the famous Lawyer; almost all the Jurours, and three hundred other, more or lesse. (Richard Baker, *The Chronicles of the Kings of England* (1643), Elizabeth pg. 44) [And rumors that this was a poisoning plot...?]

³⁷⁰ Howard (Introduction – pg. 6). Howard is reading the works of Hale and Pringle, and getting ideas about healthy air and water from them.

³⁷¹ Howard (p. 7-9)

³⁷² This was, of course, a major theme of Bentham’s work as well, as we will see shortly.

seen as a neutral space with respect to criminal law procedure as it was currently operating. And if effects of the prison space itself on prisoners could be made known through measurements of the building, this meant that new, measured space could be drawn up—space that could be, in theory, demonstrably better for the lives of those prisoners.

Howard had had the intention of producing a report that focused primarily on regulatory apparatus. But if he had begun his survey with the idea of producing more regular mechanisms for administrative oversight, the resulting work showed clearly that the material conditions of the buildings themselves were crucial in understanding many of the problems endemic to the county jail. This meant that for meaningful reforms to take hold, it would not be sufficient to put in place more robust administrative oversight of personnel. The offending structures themselves would also need to be remediated. In his final published work Howard included a sketch for an ideal county prison, along with further instructions regarding how the building should be laid out. He specified that such buildings should be situated near a stream if possible, for the proper circulation of water and air, and that new prisons should not be built in the middle of a town, nor near any other buildings.³⁷³ He argued in general terms for individual cells (so that, in solitude at night, they might be better able to reflect on their actions), as well as for the complete separation of quarters for men and women, and of debtors from criminals. In other words, Howard was advocating for the new construction of buildings that would, through their physical attributes, solve many of the problems that he had encountered during his research.³⁷⁴

(Figure 4.3 John Howard, plan for a County Gaol, 1780)

³⁷³ Howard, pg. 21

³⁷⁴ The parameters that Howard defined of the ideal jail closely resembled those of the modern prison, as it would be defined in the next few decades. Important to note here, however, that Howard is defining these parameters as an explicit counter to existing conditions that he saw as problematic.

Howard's research allowed the jail to be seen as a distinct category of buildings that ought to be understood systematically, and his attention to the particularities of material form separated the conditions of the buildings from administrative issues that, together, had resulted in the dire situation of many prisoners. Importantly, this meant that the physical characteristics of the buildings could be seen to have an effect on the experience of imprisonment. While this may seem obvious, it is important to remember that for the most part the space of the prison was known to the wider world mainly through anecdotal accounts written by famous former prisoners.³⁷⁵ By contrast, Howard's account positioned the jail as a structure that could be known separately from its inhabitants; a building whose materiality could be understood and analyzed to produce an objective view of carceral space.³⁷⁶

Howard's ideas regarding the regulation of the physical structures of jails, and the published works that resulted, were not aimed at transforming the prison sentence into a form of punishment.³⁷⁷ In this regard, his ideas diverged explicitly from those of his contemporary Jeremy Bentham. Howard's proposed reforms, while directed towards the physical arrangement and administration of a series of buildings that could now be understood systematically, did not address the use of the prison as an instrument for legal sanction. In fact, Howard continuously emphasized that properly reformed jails should serve their original purpose, but better. In his view, the jail could become a truly neutral space that allowed for the safe custody of suspects and convicts while waiting further steps in their legal proceedings. In Howard's words,

However sanguinary the wish of an angry creditor may be when he arrests and imprisons his debtor; there is no doubt but everyone who listens, not to his passions, but to reason,

³⁷⁵ Again, as we have seen before—especially as it relates to jail-breaks.

³⁷⁶ Objectivity

³⁷⁷ This, of course, was an absolute difference between Howard and Bentham, whose work was aimed at exactly that: positioning the prison sentence as an ideal form of punishment.

must know and will own, that it is a flagrant crime to take away the life of a man for debt. And as to felony, a gaol is not designed for the final punishment even of that; but for the safe custody of the accused to the time of trial, and of convicts till a legal sentence be executed upon them.³⁷⁸

This, of course, reflected existing attitudes towards the jail, as it was still seen as an integral part of a national system of legal administration, rather than as a proper form of punishment.

Imprisonment still held a temporary place in criminal prosecution. While a permanent building was necessary, its purpose was still to house prisoners during what was considered simply a pause between two events, rather than for a measured length of time: the temporary stasis inbetween the moment of arrest and the moment of sanction.³⁷⁹

For Howard, improving the material conditions inside (local) county jails better was ultimately the responsibility of the English nation, writ large. His failed search for a local precedent of well-run jail—a precedent that might have allowed him to procure funds for a salaried position in his own small jail at Bedfordshire—had instead produced a thorough and researched account, backed up with measured data, of a nation-wide system of jails in distress. Howard’s project was no longer about the individual county jails, but rather about advocating for a national system of reforms that took into account the physical buildings themselves.

In his arguments in favor of a better-run system of local jails, Howard appealed directly to a sense of national pride: “Shall these irregularities, the sources of misery, disease, and wickedness, be endured in a nation celebrated for good sense and humanity; and who from these principles, do treat one sort of prisoner [prisoner of war] with tenderness and

³⁷⁸ Howard (section III – pg. 19)

³⁷⁹ The different consideration of time, here, is important—because pre-prison sentence, being arrested (“stopped”) and held in jail was technically speaking considered a suspension of time, rather than a measured time. More on this in Bentham section.

humanity?”³⁸⁰ Moreover, his work was gaining attention beyond Bedfordshire. In 1774, Howard was summoned to the House of Commons to present his arguments for the necessity of comprehensive reforms. The House soon passed a pair of bills regarding the fees and health of prisoners, applicable to jails across England. That these bills would be as little enforced as their predecessors was of little consequence: Howard was already engaged in preparing recommendations for the Penitentiary Act, which would be passed in 1779. This Act would, for the first time, legislate the physical layout of a prison.

IV The prison sentence as punishment

The Penitentiary Act, 1779

While many, like Howard and Blackstone, were committed to seeing the jail maintain its role as a temporary space to hold safe custody of prisoners while awaiting further procedures, the prison sentence was in fact coming to be seen as a potentially useful mode of punishment in the late eighteenth century. As we saw in the previous chapter, this was reflected in the work of philosophers who argued for its moral superiority over capital punishment. While these philosophers positioned the sanction as an entirely novel approach to legal punishment, in fact, while not common, imprisonment as a punishment was not entirely unknown. Though rare, short terms of imprisonment had been sentenced since the fourteenth century.³⁸¹ But perhaps more

³⁸⁰ Howard (pg. 11)

³⁸¹ Pugh (1968), Delacy (1988). Also early account of Newgate and Ludgate (see especially Stow’s *Survey*) show that short sentenced were sometimes levied especially for minor infractions. An early version of a prison sentence being used to punish those who would break the peace is found in John Carpenter’s *Liber Albus*, (which dates from around 1419):

...the better to preserve the peace of his lordship the King, that that each may fear the more to break his peace, it is ordained, that if any person shall draw a sword, misericorde, or knife, or any arm, even though he do not strike, he shall pay into the City half a mark, or remain in the prison of Newgate fifteen days. And is he shall draw blood of any one, let him pay unto the City twenty shillings....

importantly, sentencing of five to seven years of hard labor in overseas colonies had become an acceptable, and much-used, form of punishment.³⁸² As we saw in the previous chapter, this sanction of transportation to overseas colonies for hard labor was still very much considered an ideal punishment.³⁸³ The jail played an important role in implementing the sanction of transportation, as it allowed for the safe custody of those sentenced while they awaited the ships that would bring them to the colonies. Even without the prison sentence as the norm, the jail was becoming more important in the implementation of legal sanction. How was one to think systematically about these buildings?

The question was precipitated by an event: the outbreak of war with England's rebellious American colonies. The American War of Independence had abruptly halted the ability of England to transport convicts to its colonies overseas, which had absorbed the majority of England's convicts. Passed four years after the war's start, the Penitentiary Act sought to contend with a growing prison population that had quickly overwhelmed existing structures throughout England. Without anywhere to go, convicts sentenced to terms of transportation languished in county jails, sometimes for years, while awaiting the start of their term. After temporary measures to assuage the problem had failed, repeatedly—the prison hulks on the Thames being the most visible evidence of a growing problem—the Penitentiary Act outlined new terms by which convicts sentenced to transportation could be kept for hard labor on ships, while those

John Carpenter, *Liber albus: the white book of the City of London* – trans. by Riley (mentioned in Griffiths, pg. 28)

³⁸² See Smith, Abbot Emerson, *Colonists in Bondage; White Servitude and Convict Labor in America, 1607-1776* (1947) for more on transportation.

³⁸³ Importantly, however, the sentence of imprisonment and hard labor was still considered a pardon (as only capital conviction would result in hard labor at the penitentiary). While the prison sentences was on its way to becoming an official sanction, it still was conditional and required that pardon. For more on discretionary mercy and class structure, see Douglas Hay, "Property, Authority, and the criminal law" in Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, Cal Winslow. *Albion's fatal tree: crime and society in eighteenth-century England* (2011).

convicted of capital crimes would instead be sentenced to hard labor at a penitentiary house to be located outside London.³⁸⁴

First drafted by John Howard, along with William Eden and Sir William Blackstone, and revised after suggested made by Jeremy Bentham, the stated purpose of the Penitentiary Act was “to explain and amend the Laws relating to the Transportation, Imprisonment, and other Punishment of certain offenders.”³⁸⁵ This Act had three major objectives: 1) to outline new parameters for penal transportation; 2) to establish two houses of hard labor; and 3) to clarify the use of the hulks on the Thames, which were to be reserved for the worst of the offenders.³⁸⁶ While the bulk of the Penitentiary Act is, in fact, dedicated to outlining new terms of transportation, this was in effect clarifying parameters of a system that was already known. The true novelty of the legislation was in its proposal for the establishment of a new national penitentiary.

Although it was only a small part of the bill, its real innovation was the mandate to “erect two plain, strong, and substantial edifices,” buildings that would be constructed for the sole purpose of “confining and employing the male and female convicts in hard labor, separately.”³⁸⁷ For the first time, an act of legislation provided both the money for, and the physical parameters of, a pair of purpose-built penitentiaries. These buildings were to be built with the goal of “...not only of deterring others from the Commission of the like Crimes, but also of reforming

³⁸⁴ For a detailed history of the prison hulks see Charles Campbell, *The Intolerable Hulks: British Shipboard Confinement, 1776-1857* (1994)

³⁸⁵ Penitentiary Act of 1779, 19 Geo. III, c.74.

³⁸⁶ For a concise historical outline of the drafting of the Act, see Simon Devereaux, “The Making of the Penitentiary Act, 1775-1779,” *The Historical Journal* vol 42 no. 2 (Jun 1999) pp 405-433.

³⁸⁷ 19 Geo. III, c.74

the Individuals, and inuring them to Habits of Industry.”³⁸⁸ In other words, deterrence and rehabilitation, rather than punishment alone, had become a primary objective of official legal sanction. The Penitentiary Act thus made explicit that imprisonment could be understood as a proper legal punishment, and clarified that this sanction would serve both to deter others from the life of crime, as well as to reform the criminals convicted through their labor. As well, the Act acknowledged that a building, designed expressly for this purpose, would be needed to properly institute this new sanction.

Jeremy Bentham’s ideas can clearly be seen in these mandates; and indeed, his revisions helped to clarify the Act’s stated objectives in terms of legal punishment.³⁸⁹ But in a major way the Penitentiary Act did not properly convey Bentham’s ideal vision of a penal system: the parameters of the building itself. In fact, the Act specified little with regards to how the buildings themselves would be laid out. In contrast, outlined in great detail were the financial and corporate arrangements required to purchase an acceptable piece of land, as well as the administrative organization of the enterprise and the procedures by which a convict would be admitted and assigned work. The number of hours and types of labor that convicts would be working, exact provisions for food and furniture, schedule of doctors’ and barber’s visits, and inspections at all levels, were outlined in full.³⁹⁰ All of these parameters were related to the administration of the penitentiaries—in other words, to how they would be governed. While the

³⁸⁸ Penitentiary Act of 1779, 19 Geo. III, c.74

³⁸⁹ Janet Semple has argued that Jeremy Bentham’s notes on the first drafts of the act produced many of these exacting details. See Semple (1993) ch. 3, “View of the hard labour bill and the penitentiary act of 1779.”

³⁹⁰ Penitentiary Act of 1779, 19 Geo. III, c.74

specific terms of labor were new, these administrative parameters were not unlike those governing local county jails that were already in place throughout England.³⁹¹

But although not as specific as Bentham's plans, the Penitentiary Act did not forgo entirely the physical structure. It specified that the location of the penitentiary was to be chosen with special consideration to "healthiness and accommodation of water, avoiding places where other buildings may be contiguous to the outward fence or enclosure, or a situation within a populous town"—a close parallel to Howard's original site suggestion for his ideal county jail.³⁹² The buildings themselves were to be large enough to accommodate six hundred male convicts and three hundred female. Convicts were to be kept each in their own separate rooms, "not exceeding twelve feet in length, eight in breath, and eleven in height, nor less than ten in length, seven in breath, and nine in height, and without any window within six feet of the floor."³⁹³

The penitentiaries were also to accommodate the additional programmatic requirements pertaining to the convicts as a labor force, as well as all the other necessary spaces to produce a fully autonomous interior world; these included "storehouses, warehouses, workhouses, and lodging-rooms, an infirmary, a chapel and burying-ground, a prison divided into dark but airy dungeons, a kitchen-garden, and also proper airing grounds, yards, offices, and other necessary apartments for the several Officers and servants." Of more exact specifications for the designs of the buildings, the act only specified that before any contracts were to be signed "the plan of houses and buildings, with estimates of expenses, shall be approved of by persons to whom the approbation of ground is referred."³⁹⁴

³⁹¹ Of course, these had not been properly enforced in the past, as John Howard had made clear throughout his work.

³⁹² 19 Geo. III, c.74 , Sec. 5

³⁹³ 19 Geo. III, c.74 , Sec. 33

³⁹⁴ 19 Geo. III, c.74 , Sec. 14

While the Penitentiary Act specified, in accordance with the philosophies of Jeremy Bentham, the prison sentence as a proper legal punishment, the legislation relied on a model of prison space that bore closer similarities to the measured jails of John Howard's research. Rather than a precisely calibrated overall geometry, Howard's measurements began from the inside-out. He did not have an overarching theory of how a trick of architecture would produce a more exacting form of custody, but rather found exacting corollaries between the mundane elements in existing buildings—windows, doors, the space of the cell—and the quality of life inside. It is these kinds of measurements that we find in the legislation of the Penitentiary Act, which specified the size and shape of each cell, rather than their relationships to one another.³⁹⁵

A national project

Howard's new methodology did two things. As we can see in the legislation of the Penitentiary Act, it allowed for the measured system of the prison sentence to be translated to measured space of the building. While this idea had been partially developed through Bentham's work, Howard's system could be more easily deployed since it did not rely on an overly precise overall geometry. But perhaps more importantly, Howard's was a system based on pre-existing buildings. In that sense, his work comprised both a discovery (of existing practices) and invention (of a way to systematize them).

The Penitentiary Act was explicitly a national project. If it had been built according to plan, it would have been the first national penitentiary that would hold convicts from the whole of England and Wales. This was a notable departure from previous attempts to pass bills to fund individual houses of hard labor for each county, or bill to fund repairs of existing county

³⁹⁵ As well, the additional programmatic spaces all served to support the necessary aspects of prisoner life that had previously been subject to the whimsy of the prison guard.

computers and jails.³⁹⁶ The National Penitentiary—the building itself—was conceived from the start as a national building project, rather than for the support of local practices. This is a very different way of using the jail to centralize government than we saw in previous chapters. The Penitentiary thus has to be seen as national project from its inception, and as a crucial part of the wider debate about the “Englishness” of the Common Law.

It is worthwhile to note that the project was still seen as an “experiment,” and the way that the Act negotiated the question of scale provides one more link between the prison and the nation. The two penitentiary houses, meant to hold 600 men and 300 women at most, would have only been able to accommodate a fraction of those convicted at any given time. This was an acknowledgment of the imperfect corollary between the nation-wide numbers of convicts, and the feasibility of new construction. Indeed, the Act specified the numbers of convicts that would be accepted each term from each circuit.³⁹⁷ These numbers do not seem to be derived from actual percentages of convictions within each circuit, but rather gives an equal weight according to size of territory. One more map of English territory is here translated down to the scale of the penitentiary; the prison, once again, cast as a symbolic marker of sovereign law. In this sense, Soane’s utopic vision of the prison seems all the more appropriate. Once again, Howard’s work was crucial in allowing the proposed National Penitentiary to carry the weight of an ideal representation—as he had provided a method to understand existing buildings, necessary still to

³⁹⁶ It was not. The first official national penitentiary, at Millbank, was not completed until 1816, after new legislation was passed (52 Geo. 3 C.44, Penitentiary House Act of 1812). Millbank was completed under the direction of Robert Smirk, who took over the project from Thomas Hardwick. See, for a contemporaneous account, George Holford, *An Account of the General Penitentiary at Millbank* (1828).

³⁹⁷ The numbers break down thus: not more than 2 from the Great Sessions in any one of the Circuits of Chester or Wales; 4 from London; 9 from Middlesex; 8 from all the sessions within the Northern Circuits; 10 within the annual Midland Circuits; 12 within the oxford Circuits; 12 within the western circuits; and 15 within the annual Home Circuits. This provides yet one more map of English territory, and relates it back to the Penitentiary. 19 Geo. III, c.74 , Sec. 25

be used as prisons, since the National Penitentiary would only accommodate a fraction of those sentenced.

Now that imprisonment was itself sanction, architecture had a new role to play in articulating the goals, as well as in producing the material conditions necessary for this sanction. In many ways, the modern prison sentence as a legal sanction, and the modern prison as a building, cannot be understood separately. As I have noted, the prison sentence as legal sanction requires the fact of the building itself; the articulation of the prison as a building type allowed the legal sanction of incarceration to be understood as a having a particular form in space. Robin Evans argued that this form was developed explicitly by architects (such as John Soane) in conjunction with social reformers and legislators (such as John Howard and Jeremy Bentham) in the last decades of the eighteenth century. Their collective work was aimed at implementing Enlightenment ideas regarding the purpose and form of legal punishment.³⁹⁸

Evans further argued that architectural representations in general, and plan drawings, in particular, allowed the prison building to become widely recognizable as a distinct *type*. Evans saw the architectural plan as the primary device with which to read the connection between ideas of human psychology and the discovery of architecture as a tool for social reform.³⁹⁹

Architectural drawings were not invented at this time, of course. But with the widespread dissemination of information in the form of the architectural drawing, the prison could be understood by the lay public as a cognizable translation of British penal strategies. The

³⁹⁸ Evans (1980) For the Englishmen who play the leading roles in Evans's narrative, translating these ideas into practice required outlining specific principles for how prisoners should best be held in confinement. With a proper building attributed to it, the legal sanction of imprisonment could be properly defined as punishment that provided salvation for the souls of criminals. The principles that these architects and reformers developed would in turn be distributed throughout the world, as the legibility of their architectural projects allowed for new prisons to be built according to their ideas regarding the health, organization, and visibility of prisoners.

³⁹⁹ Not the only place he does this; see also the essay "Figures, Doors, and Passages," in Robin Evans, *Translations from Drawing to Building* (1997).

architectural drawing, in other words, would replace both the anecdotal first-person accounts of prison life, as well as provide a standard template through which the prison, and the legal sanction it produced, could be known. Evans concludes that through these drawings, architecture could now be seen as an independent force, which had a unique ability to modify human behavior. The modification of human behavior was, of course, one of the crucial doctrinal principles of the penitentiary itself.

“Drawings,” Evans writes, allow one to see a building “before the fact of its construction.”⁴⁰⁰ If the fact of the prison building allowed these new sanctions to become possible in practice, architectural drawings allowed the principles behind the sanction to become understandable to a lay public, even before the buildings themselves were built. The architectural legibility of the floor plan produced the legal legibility of the prison sentence. The clarity of the prison as a new building type allowed incarceration—as the legally-prescribed confinement within a fixed structure for a fixed period of time—to become a commonly understood, and commonly accepted, method of legal sanction across borders and legal systems. It is from here that we inherit our standard image of a typical prison: single- or double-loaded corridors with individual prisoner’s cells, in blocks segregated by types of offenders.

But as the work of John Howard reveals, the image of the modern prison was not produced solely by architects and their inventions. Howard had systematically measured the existing carceral spaces across England, and through this work had produced a new way of understanding jails: as buildings that could, in fact, be measured and drawn. Moreover, these buildings, in supporting the practice of the Common Law, together could be seen as comprising a national system. This work explicitly informed the work of architects such as John Soane. An

⁴⁰⁰ A building can thus be understood “as if it were a dissected body” Evans (1980) pg. 45

early sketch John Soane's project for the National Penitentiary at Battersea (that we saw at the start of this chapter) is found in Soane's notebook, following four pages of his notes on Howard's text. The sketch, quite close in overall form to the elaborated final project, shows three rectangular blocks arranged around a central circular court, and is accompanied by calculations of the dimensions of each cell. Soane may have produced an image of a new ideal prison, but this work relied on an understanding of the already-existing local jail.

(Figure 4.4 Pages from John Soane's Notebook, 1781)

V Conclusions: the failure of architectural certainty

The Penitentiary Act was a formalization of practices that had been gradually developing in England: the use of a fixed period of time served as a legal punishment. As such, the Penitentiary Act can be seen as a legislative marker, a bracketing that allows us to see the culmination of one era of (medieval) legal sanctions as distinct from the beginning of another, more modern era. This new era foregrounded forms of punishment that were, in many ways, positioned as being sharply distinguishable from previous punishments of death and bodily harm—momentary acts of infliction that produced permanent results. The prison, before only used to hold those convicted until that moment of penalty arrived, now itself was seen as an adequate instrument to punish. But imprisonment as a penal strategy did not simply require an ideological shift regarding the proper method to punish criminals. Imprisonment also required a physical infrastructure that could be measured, built, and represented as having an exacting correlation to legal principles of retribution and reform. Perhaps most importantly, imprisonment, to work properly as it was understood by those who advocated for the penal strategy, needed to exhibit its quantifiable properties. The Act thus demonstrates a decisive shift

in focus towards a measured penal strategy, in which measured buildings were equated with measured time served by convicts.⁴⁰¹

This is, indeed, how many have viewed this particular moment: as an identifiable mark between one era and another. In his description of the birth of the prison building as a new typology, Evans saw the transition from architecture as a façade (displaying, on the surface, an “emblem of political order writ large,”) to architecture as a method of fixing or controlling experience.⁴⁰² Here, for the first time, architecture had developed its full potential to shape of human experience, and it had captivated an audience ready to exploit this potential. The legal reformers of the late eighteenth century believed that with architecture, they might finally be able to remove the arbitrariness of prison life—and thus the arbitrariness of the way the law was enforced. In its place, a penal code would make the law certain, and this certainty could be transposed into the impartiality of the prison buildings themselves.

Ultimately, however, the movement was seen as a failure, as the buildings never could be shown to fulfill their intended results. We continue to live with the notable failures of the invention of the prison sentence today. Much has been said about the pervasive problems that continue to plague national penal systems (most especially in the United States). In many instances, these problems closely mirror those that troubled the eighteenth century reformers: privatization and lack of oversight; high rates of recidivism and failure to prepare inmates for a future outside prison; disease, maltreatment, and other problems resulting from poor physical

⁴⁰¹ There is one more way we can stage this transition: Imagine you were a judge in sixteenth century London, and you were concerned about the location and well-being of one of His Majesties’ subjects, who had complained of being wrongfully detained. You needed to know where and how this body was being contained, and you used a writ of *habeas corpus* to find it. Now imagine you are a judge in nineteenth century London, and you have a similar question. You wouldn’t need a writ to find the body: the architectural drawing would tell you exactly where it was located. That was the promise of the reform prison; that was one of the goals of Jeremy Bentham’s proposed reforms.

⁴⁰² Evans (1980), pg. 6

conditions. Moreover, this narratives discounts the other ways in which bodies were accounted for and used to produce labor—most notably, in the transatlantic slave trade, which at this same moment was at its peak.⁴⁰³ Evans does not account for these failures; as for him, clearly, the work of the prison reform movement was over: to give architecture (as it developed its own language of representation) a reason and means to understand how the tools of the profession could be used to control human behavior. When Evans sees the prison building fail in intended purposes in the decades that follow his survey, he moves on to other projects; it is no accident that his book is bracketed by the particular dates he chooses.⁴⁰⁴

In the final chapter, I will pick up after these dominant historical narratives leave off—after the implementation of the national penitentiary system, and after imprisonment is widely considered the most suitable form of punishment. If we accept that architecture helped to invent the prison sentence, perhaps it can help us to understand the ways in which the sanction fails.

⁴⁰³ Simone Brown and Christina Sharpe have produced important counter-narratives to this period, and have argued that accounting for Black bodies, specifically as they were enslaved and transported to American colonies, is a necessary factor in understanding penal “reform” in this period. Simone Browne, *Dark Matters: On the Surveillance of Blackness* (2015); and Christina Sharpe, *In the Wake: On Blackness and Being* (2016).

⁴⁰⁴ As pointed out by Mark Jarzombek (albeit in a different context) Evans seemed to be on the lookout for examples that prove that architecture can reveal patterns of human behavior. Mark Jarzombek, "Corridor Spaces." *Critical Inquiry* 36, no. 4 (2010).

Chapter 5

How to tell a story: architecture, history, and narratives of *habeas corpus*

I Introduction

In the first chapter, we looked closely at the prerogative writ of *habeas corpus* in seventeenth century England. I argued that the formulaic text of the writ provides a useful framework through which to examine the early modern jail, and in doing so I also argued that legal procedure itself might be a valid mode of understanding architectural space.⁴⁰⁵ In subsequent chapters we saw how the prison sentence emerged as the normative legal sanction, and how the architectural form of the prison building was a crucial element in solidifying (both literally and figuratively) this shift in penal law. Carceral space—once understood primarily through legal discourse—had now been made legible through the modern prison’s geometric arrangement of parts. Architectural discourse had become necessary in understanding the space of the prison, and its modern form that emerged at the cusp of the nineteenth century became the dominant lens through which to read carceral space.

Previously we saw how the writ of *habeas corpus* was declared a valid mode of contesting detention, regardless of where, physically, an English subject was being held. In fact, the question of legal doctrine—was *habeas* returnable from otherwise exempt jurisdictions?—was formally answered in the affirmative in the early seventeenth century. As we saw, this principle was established in *Richard Bourn’s Case* (1619), when the King’s Bench decided that *habeas* review would supersede the special jurisdictional privileges of the Cinque-Ports. This important constitutional case had established a precedent that confirmed the reach of the writ to otherwise exempt jurisdictions. However, the ways in which precedents such as this would be deployed was not always straightforward.

⁴⁰⁵ As I argued, these spaces existed in disparate buildings that otherwise would have had little to tie them together in a coherent architectural history.

This final chapter returns to the writ of habeas corpus, and explores how the continued use of habeas practice after modern reforms in penal law might disrupt the seemingly closed historical narrative of the prison building. I approach this from two directions. First, we will see how, despite the abstracted form of the modern prison, the geography of the prison building continued to matter. This is especially evident in the ways in which penal regimes were practiced in British colonial territories. We previously saw how the English prerogative writs, in theory, reached extensive territory controlled by the crown beyond England. I argue that this geographic reach of habeas, made possible by the mobile bodies of subjects and judges who were using the Common Law, helped to define crown territory as such. Through the process enacted by the writ and its return, the body of the prisoner was made legible to sovereign law. This process produced a reciprocal legibility of Crown territory, as the prisoner's body was made visible through its verifiable presence in specific fixed buildings throughout a growing empire: the jail and then the courthouse.

Second, by contextualizing the narratives of legal procedure itself, we will see how habeas cast the prison building as a space used to contest a final judgment—rather than a space used to confirm judgment. Looking at habeas practice after the prison reforms of the late eighteenth century provides an opportunity to question the resolution of the narratives of the prison building in architectural history that have remained more or less stagnant since the nineteenth-seventies. In the examples that follow, I show how habeas produced a nuanced understanding of both colonial territory and incarceration within the process of law. To understand these cases, we have to keep in mind ideas of jurisdictions, fiction, and punishment that have been previously discussed. These cases challenge a straightforward understanding of legal doctrine, and the ways in which it constructs and re-constructs historical precedent.

II The territorial reach of prerogative writs: legal precedent, or historical fact?

Boumediene and its historical antecedents

While it is considered an important constitutional protection, most people never encounter habeas directly. Today as throughout its history, we are most likely to hear about the writ when it has been suspended or access to its protections have been limited, and *habeas corpus* remains a rallying cry for those who would like to bring attention to the broader significance of a government that engages in unlawful detention.⁴⁰⁶ For example, recently in the United States, the landmark Supreme Court case *Boumediene v. Bush* (2008) successfully reinstated habeas rights for prisoners held at the U.S. Naval Station at Guantánamo Bay in Cuba. The case contested the combined effects of the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 on prisoners who were being held indefinitely at the military base.⁴⁰⁷ Each of the 28 petitioners had denied alleged connections with al Qaeda, which had served as the original basis for his detention, and had petitioned for habeas; these petitions had been summarily rejected by the District Court, which maintained it had no jurisdiction over the matter as these petitioners were alleged to be foreign enemy combatants. The prevailing opinion of the Supreme Court ruled that these Acts, in combination, had thus prevented proper access to federal courts and constituted an unconstitutional suspension of habeas rights to foreign nationals

⁴⁰⁶ More quietly but no less problematically, habeas in the US today is used primarily as a last-resort measure in contesting capital convictions. See the works of Eric Freedman for an account the current state of habeas practice today, in relation to its historical development in the early Republic. Eric Freedman, *Habeas Corpus: Re-thinking the Great Writ of Liberty* (2001). The primary textbook on habeas gives a detailed outline of the practice today, and also includes a short chapter on the writ's history. Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (2011).

⁴⁰⁷ Respectively, Pub. L. No. 109-366, 120 Stat. 2600 (which declared that any alien unlawful enemy combatant is subject to trial by military commission); Pub. L. No. 109-148, Tit. X, 119 Stat. 2739 (which established special tribunals at GITMO).

held in military detention by the United States. This result in *Boumediene* rested on an interpretation of the territorial ambit of the Constitution and its Suspension Clause, and on the particularities of a mixed jurisdiction. Justice Anthony Kennedy, writing for the majority, laid out the argument:

The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.⁴⁰⁸

The Government, in denying the habeas petitions, had framed its position in terms of an adherence to the letter of the law. This consisted of two related parts: one having to do with territory, the other, with the status of the prisoners vis-à-vis the United States. The military base at Guantánamo was geographically located within the boundaries of another sovereign nation and thus not under the immediate purview of United States Constitution. That the prisoners were foreign nationals (rather than US citizens) meant that for the defense, the protections afforded by habeas had no relevance to the men imprisoned there. As Antonin Scalia wrote in his dissenting opinion, “the writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is entirely *ultra vires*.”⁴⁰⁹ In other words, there was no reason that the United States should be accountable for foreign nationals located on foreign soil. The men imprisoned at GITMO were thus positioned as being both literally and legally beyond the reach of the Constitution’s authority.

⁴⁰⁸ *Boumediene v. Bush* (2008), Syllabus. <https://supreme.justia.com/cases/federal/us/553/723/opinion.html>.

⁴⁰⁹ *Boumediene v. Bush* (2008), Dissent (Scalia). Of course, as those protesting the use of the military base as a detention center understood it, this was precisely why the base had been chosen for detaining these particular prisoners in the first place.

While he made no argument with the status of the prisoners as foreign nationals, nor with the status of the land on which the base was built as being foreign territory, Kennedy in contrast argued that the detainees should be granted habeas rights. For him (writing on behalf of the majority opinion), the *de facto* control of the base by the United States government meant that it had the responsibility to adhere to the same principles that would apply on sovereign territory. Kennedy's interpretation relied on a historical understanding of the way the Common Law writ worked in England: agents of the sovereign, no matter where they were located, were beholden to uphold sovereign law.

Kennedy referred extensively to an *amicus* brief filed by legal historians on behalf of the detainees, who wrote that "history demonstrates that the writ's primary function was to ensure the legal behavior of any agent acting pursuant to the Crown's authority in territory over which the Crown exercised *de facto* control."⁴¹⁰ These historians set the stage for Kennedy to argue that the *de facto* jurisdiction by the American government over the base trumped the sovereign jurisdiction maintained in general by Cuba over the entire island. The petitioners themselves had argued that the site of their detention was analogous to exempt jurisdictions, as well as to colonial courts of the British Empire, with regards to this *de facto* control. But this historical understanding of the writ's territory was not obvious in terms of how it could be deployed with respect to the military base. A close look at these historical precedents in practice reveals that the analogy was not as directly applicable as might be expected.⁴¹¹

⁴¹⁰ *Brief of legal historians as Amici Curiae in support of petitioners* Nos. 06-1195, 06-1196, pg. 2 https://www.mayerbrown.com/public_docs/probono_Boumediene_FINAL.pdf

⁴¹¹ "Petitioners argue that the site of their detention is analogous to two territories outside England to which the common-law writ ran, the exempt jurisdictions [ie Channel Islands, Cinque Ports, etc.] and India [and other colonies], but critical differences between these places and Guantanamo render these claims unpersuasive. The Government argues that Guantanamo is more closely analogous to Scotland and Hanover, where the writ did not run, but it is unclear whether the common-law courts lacked the power to issue the writ there, or whether they refrained from doing so for prudential reasons." *Boumediene v. Bush* (2008) Syllabus, p. 3

The ways in which historical precedents and analogies were used in the *Boumediene* decision reveals that legal argumentation may rely on the interpretation, and re-interpretation, of geographic facts that we might otherwise assume to be stable. These geographic facts are not necessarily those declared by statutes or drawn in maps. Rather, they are the geographic facts that are revealed only through the practical constraints of the performance of law.⁴¹² Kennedy himself revealed that this quite quotidian understanding of the writ’s geography was important in thinking about how to apply precedents to this case, as he wrote “the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.” It is to this “practical question”—of how overseas jurisdictions are constructed through both technology and discourse—that we now turn.

Off-shore detention in the English Channel (Cape’s Case)

Anxieties about offshore jails beyond the reach of the law are not new. In fact, in early modern England, the idea that such legal enclaves could be established in order to escape the reach of the King’s Bench figured prominently in discussions that eventually resulted in the Habeas Corpus Act of 1679. Among other counts of treasonous actions, the 1667 impeachment proceedings against Edward Hyde Earl of Clarendon had accused him of having “advised and procured divers of his majesty’s subjects to be imprisoned against law, in remote islands, garrisons, and other places thereby to prevent them from the benefit of the law; and to introduce

⁴¹² This calls attention to the explicit distinction drawn between doctrinal reading of the law and the ways in which the practice of law produces its own form of (legal) knowledge.

precedents for imprisoning other of his majesty's subjects in like manner."⁴¹³ This accusation pictured a situation in which Hyde's prisoners were not able to benefit from the legal oversight—not because the King's Bench had no proper jurisdiction, but because the prisoners were held in places that were physically remote or otherwise inaccessible. This was, in effect, an explicit acknowledgment that there might be a disparity between technological access and jurisdictional access to certain places. In response, parliament passed the Habeas Corpus Act of 1679, which sought to address these deficiencies among others:

XI And be it declared and enacted by the authority aforesaid, That an *habeas corpus* according to the true intent and meaning of this act, may be directed and run into any county palatine, the cinque-ports, or other privileged places within the kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, and the islands of *Jersey* or *Guernsey*; any law or usage to the contrary notwithstanding...

XII For preventing illegal imprisonments in prisons beyond the seas; (2) be it further enacted by the authority aforesaid, That no subject of this realm that now is, or hereafter shall be an inhabitant or resident of this kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, shall or may be sent prisoner into *Scotland*, *Ireland*, *Jersey*, *Guernsey*, *Tangier*, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his Majesty, his heirs or successors; (3) and that every such imprisonment is hereby enacted and adjudged to be illegal...⁴¹⁴

The act thus attempted to address the issue of lawless enclaves in declaring that the writ of habeas corpus would have the power to run to otherwise exempt jurisdictions despite specific privileges (article XI), as well as places that were chosen because they were physically remote (article XII).

The English Channel Islands were both. In the words of Victor Hugo, writing from his self-imposed exile in the Channel, these islands were “morceaux de France tombés à la mer et

⁴¹³ Proceedings in Parliament Against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and Other High Crimes and Misdemeanors: 15 and 19 Charles II A.D. 1663-1667, 6 State Trials 291, 330, 396 (1668).

⁴¹⁴ Habeas Corpus Act 31 Car. 2, c. 2, 27 May 1679

ramassés par l'Angleterre,” and they continue to exist geographically and culturally at the margins of both France and England.⁴¹⁵ The in-between nature of the islands is echoed in their laws, as the Bailiwicks have always been places of legal exceptionalism. They continue to be so quite literally today, as they remain the only places where an early form of Norman law is still in practice.⁴¹⁶ As we saw earlier (in chapter 2 “Jurisdiction”), this lingering legal regime was made possible by a series of royal charters from the English monarchs that secured the Islands’ unique jurisdictional privileges. Coke’s descriptions of the jurisdictional limits of the islands coincided with the physical limits of the islands, and these limits appeared to be self-evident. We saw, of course, how the legal limits of the islands would be tested as jurisdiction became more closely associated with geographic territory. It is the self-evident nature of the islands as enclosed territory that concerns us again here. What did it mean to be considered an overseas territory with respect to imprisoned subjects, and what can these formulations tell us about how extraterritorial incarceration was imagined?

The bailiwicks of Jersey and Guernsey provide an excellent model for examining English legal practice overseas—not only for us, but also for the jurists practicing law in the seventeenth

⁴¹⁵ Victor Hugo, *Les Travailleurs de la mer*, Tome 1 (1891) p. 1

⁴¹⁶ Norman customary law (at its zenith in the tenth through thirteenth centuries) essentially died out on the continent as a centralized French law gradually superseded local law (a final fatal blow to local particularities being dealt by the promulgation of Napoleon’s *Code Civil des Français* in 1804). Outside the Channel Islands, Norman practices are known today mostly through the *Très ancien coutumier* (circa 1200-1245) and the *Grand coutumier de Normandie* (circa 1235-1245). These, along with other coutumiers (Bretagne, Auvergne, Orléanais, etc.), were written by professionals for the purpose of making legal practice legible when local disputes were to be resolved by a higher authority. The coutumiers organized and codified, to a certain extent, local practice just as it was in the process of being taken over by a centralizing pre-modern state. They thus mark the height of visibility of these local practices (to the medieval state as well as to modern historians) just as they mark the eventual disappearance of them. In other words, they are written by people who are not necessarily the participants, and written with a structure in mind that already refers to a structure that would be understood in the political center. (An interesting correlation between customaries and the codification process). Guernsey and Jersey interesting models for legal historians interested in studying a *longue durée* development of customary law. Practices such as the *dolleance*, a form of appeal to royal authority, and the *Clameur de Haro*, a complaint of delictual fault in which a plaintiff must announce his grievance directly at the site of wrongdoing, have provided a living glimpse into an otherwise obscured past. This work has been important for understanding the ways in which coutumiers diverge from the practices they describe.

and eighteenth centuries. Despite being “beyond the seas,” with the implication that they were geographically beyond the reach of legal authority, the islands were not lawless places by any means. Nor, as we will see, were they particularly difficult to reach physically. The Channel Islands were important to the drafters of the 1679 Act because they could operate as an imagined surrogate for places that were both physically remote, and also jurisdictionally complicated, even as they maintained close connections with Westminster. The *Habeas Corpus* Act of 1679—written in the aftermath of the Clarendon affair—named the Channel Islands specifically among the places where the writ would run. This was, no doubt, a reason the Bailiwicks appear as historical analog in the syllabus for *Boumediene v. Bush*, providing a supposedly centuries-old example for offshore detention that would have been reviewable by habeas. Despite this, there is little indication that habeas did actually run to Guernsey and Jersey.

Instead, there is evidence to the contrary. In 1832, a seemingly minor dispute brought to light the fact that the Habeas Corpus Act of 1679 had, in fact, never been registered on the islands. When this was made known in Westminster, an order in council, dated July 11th 1832, was issued to the Royal Court of Guernsey requiring them to register the act. The States of Guernsey wrote back, and after a recitation of the list of liberties they had held since King John, the letter concluded:

Hence, my Lord, it is manifest, that the original Act of *Habeas Corpus* would have been, if imposed on the Islands, a direct violation of the rights and immunities of the inhabitants, because, contrary to their Charters and the legal decisions grounded thereon, that Act vested in the Courts of Westminster the power to interfere with the insular jurisdictions, to take from them causes originating in the Island, and to force the inhabitants to plead out of them. But whatever may have been the intention of Parliament, *that Act has never been enforced in Jersey or Guernsey, has never been sent there for registry; nor is there any instance upon record of a single writ sent there for execution.* [my emphasis]⁴¹⁷

⁴¹⁷ Letter to Viscount Melbourne from Deputies of the Islands of Jersey and Guernsey, August 13th 1832, copy. (Guernsey) Island Archives, SP 07-052

The States rested their arguments on: 1) a review of the ancient liberties of the Islands, which had been ratified by a succession of monarchs and 2) the injustice of having to travel to Westminster to resolve a dispute, based on the incompatibility of legal systems. This injustice was compounded by 3) the difficulties of physically traveling to Westminster, because of the dangerous sea travel involved.

This letter is puzzling, not least because it does not seem to fit with the prevailing narratives of habeas doctrine—narratives that remain current to this day—that insist that the “Great Writ of Liberty” is capable of reaching even the most remote places. The letter provokes a series of questions. If the point of the Habeas Corpus Acts was to insist on procedural review of these very places, why did it fail in this instance? How did this matter come to the attention of Westminster at this time, and how had two hundred years passed between the declaration of the Habeas Corpus Act in parliament and this dispute over its registration? And perhaps most importantly, how is it that the Channel Islands have remained acceptable analogues for historians writing on behalf of the detainees at Guantánamo, even though the writ had not, apparently, actually run there?⁴¹⁸

The initial dispute had nothing to do with wrongful detention. On July 9th 1831, a pauper by the name of James Streep, along with his wife and two children, was brought to Guernsey by the officers of the parish of St. Pancras (Middlesex County) where he had presumably been receiving alms. Guernsey refused to accept the family. Though Streep had been born on the island, his father was alleged to be an English soldier garrisoned at Castle Cornet at the time of the French wars. Streep, now a grown man with a family of his own, had been brought back to

⁴¹⁸ A full outline of the dispute, in a tone sympathetic to the Bailiwicks, was published in *The Guernsey and Jersey Magazine*, Vol. V 1838, pp 232-239.

Guernsey because parliament had recently repealed an act that made paupers born on Guernsey and Jersey chargeable to parishes in England. Guernsey refused to register the repeal of this Paupers Act, claiming that the maintenance of all children fathered by garrisoned soldiers would have been an overwhelming burden to the island's parishes. Streep and his family, as a result, would not be able to receive alms on Guernsey, and ordered that the officer of St. Pancras, a beadle by the name of John Capes, return to Middlesex with his charges. Perhaps thinking that the matter would sort itself out among the islanders, Capes attempted to leave Guernsey on a packet ship to Southampton without the paupers. Apprehended on the ship during the crossing, he was sent back to Guernsey. His second attempt to leave the island was more successful; however, unbeknownst to him, the paupers had been boarded on that same ship. Within a few months, the whole group had returned to St. Pancras parish.

But Guernsey had not yet seen the last of them. Following a complaint by St Pancras to the Secretary of State, an Order in Council was issued to Guernsey directing that the act repealing the provisions for paupers to be registered there. In December of 1831, this order, along with the original paupers (and now joined by a fifth), was conveyed back to Guernsey, again by John Capes. On the 15th of December, the day after the parties arrived in Guernsey, a special meeting of the States (Guernsey's legislative organ) was convened. It was agreed that provisions for the paupers could not be made in Guernsey. Capes was prohibited from leaving the island without them. Nothing more was heard of the paupers or of John Capes until March of 1832, when upon being caught trying to leave the island alone, Capes was detained on £100 bail. After giving his assurance that he would not attempt to leave again without settling the matter, he was released without bail—at large on the island, but unable to leave.⁴¹⁹

⁴¹⁹ Records relating to this case at Kew TNA, HO 98/53 and HO 98/54

Meanwhile, St Pancras wanted its Beadle back. After a failed application for an ex-parte order from the Privy Council, the authorities of the parish successfully secured a writ of habeas corpus to bring back the body of John Capes. On March 24th 1832, the writ was issued to Thomas Le Retilly, Deputy King's Sheriff of Guernsey. The writ remained unanswered, and that May a tipstaff sent by the Chief Justice attempted to execute a warrant of arrest for Le Retilly. Refusing still, the Royal Court of Guernsey had the tipstaff himself arrested. Guernsey declared that the Habeas Corpus Act of 1679 had not been registered on the island, and thus the writ would have no power to run here. In July, an Order in Council directed Guernsey to register the Habeas Corpus Act of 1679, and a meeting of the States was convened. They refused to register the act until a representation of the islands was heard. A delegation, comprising two men each from Guernsey and Jersey sent for the purpose arrived in London to present their arguments at Whitehall—arguments that resulted in the letter quoted above. Answering the writ of habeas corpus would be in direct violation of the rights and immunities of the inhabitants of Guernsey.

The outcome of this meeting with respect to registering the Acts did not matter to the imprisoned Capes. Over the course of these deliberations—perhaps to avoid escalating tensions—a compromise appears to have been reached. Though the details are not explicitly recorded, on August 9th 1832, John Capes was permitted to leave Guernsey. He had the paupers with him.

Guernsey: real island, rhetorical island?

Despite the legislative intent of the Habeas Corpus Act of 1679, it appeared that the writ would not run to Guernsey. The failed attempt to compel a return of the writ in *Capes' Case* reveals several things about why it wouldn't run there, and helps us to understand the disparities between habeas in theory and habeas in practice. Perhaps most directly, the case shows that the

writ required complicity from those to whom it was issued. Guernsey would not accept that the prerogative writ of habeas corpus would run to the island, and without the participation of local officials, Westminster's hands were tied. Short of resorting to graver measures (threats of force), the King's Bench could do nothing further unless Guernsey agreed to send back the body of Capes. In this respect the case demonstrates one of the limitations of legislative declarations: while the Act certainly revealed the desire for obedient agents of the Crown, it still required mutual acknowledgment of the Bench's authority in order to be effective.⁴²⁰

But the case also reveals an important discrepancy between the ways in which the Habeas Corpus Act pictured the territories, as opposed to the ways in which the island's physical and legal geographies were understood through practice. As distant as they were in the judicial imaginary of the writers of the Act of 1679, the Channel Islands were not lawless, nor were they physically remote places. In fact, quite the opposite. The Bailiwicks had their own robust legal system, as well as a lengthy historical record of their legal relationship with Westminster. Liberties on the Islands had been explicitly laid out, and reconfirmed, by a sequence of English monarchs since John.

Furthermore, despite protestations on the part of the islanders themselves, Guernsey was not particularly difficult to reach physically. In fact, the island's position in the Channel insured that it was still quite at the center English trade routes as well as an important naval base for British soldiers, as evidenced by the initial dispute regarding the paupers. In the eight months of the *Capes' Case* affair, at least eight separate voyages by those directly involved in the dispute were made between Guernsey and London (this does not even count the written correspondences). While the bodies that traveled back and forth across the English Channel did

⁴²⁰ Most specifically here, this case shows that it is perhaps more fruitful to read the Act of 1679 as revealing of the anxieties of the time than in producing a real change in the way the writ operated overseas.

not include that of the prisoner named in the suit, much travel between Guernsey and London did occur over the course of this dispute.⁴²¹ Islands are actually easy to get to—especially these ones—even though their island-ness allows them to be pictured as being difficult to reach.⁴²²

The matter was dropped quietly perhaps in part because everyone had an interest in maintaining good relations: the Islands wanted to keep their liberties, but also the benefit of England’s military strength; while Westminster still needed to maintain good relations with this territory, strategically positioned in the Channel. And perhaps it was easy enough to drop the issue, since John Capes could not tell a story that resonated precisely with the anxieties regarding extrajudicial imprisonment that the Habeas Corpus Act had framed. Capes had not been sent to Guernsey so that he could be held without trial; nor had he been extradited to Guernsey so that his captors might avoid judicial oversight. Rather, he had been sent on an errand, and his detention was the unfortunate result of that errand not sitting well with Guernsey’s local magistrates.⁴²³ Moreover, while certainly he was held on the island against his will, he not ill-treated nor even kept in jail. Since ultimately the matter was resolved quietly, both sides could record the outcome as they saw fit. Whitehall seemed to be satisfied with the receipt of the *Habeas Corpus Act* on the islands by mere virtue of sending it; and in any event, Cape’s return to his home parish meant that no further action would be needed. From Guernsey’s point of view,

⁴²¹ Like many of the cases that become important precedents, the initial problem and those involved—in this case, the paupers—are obscured by the decisions by Westminster et. al. to take up the case in order to make a point. This is another way that this history diverges from the Foucauldian theories of governmentality, since the bodies that are being moved here are not the ones that would be ‘normalized’ by the prison, school, hospital etc.

⁴²² As Marc Shell reminds us, the defining rhetorical characteristic of islands is that they are bounded and separate from other spaces; this allows islands to be thought of distant even if they may not be. Marc Shell, *Islandology: Geography, Rhetoric, Politics* (2014).

⁴²³ In *Capes’ Case*, no one was being sent to Guernsey for the explicit purpose of avoiding justice. Despite the implications of the Act, the Channel Islands were not places where prisoners are being sent in order to escape judicial oversight. This is precisely, however, the way that the military base at GITMO was being used.

the habeas return for Cape's body was never properly fulfilled, and the Habeas Corpus Act was never officially registered. As of today, it still has not been.

In this case, the writ did not accomplish the task of asserting Westminster's authority over a lesser jurisdiction. But this was not because the island of Guernsey was lawless, or so physically remote that distance became a barrier to justice. The Channel Island Bailiwicks had served as an important rhetorical device in the Act of 1679, which stated that the writ would, indeed, run to remote places. But that statutory declaration was distinct from the actual practice of habeas, and the Channel Islands, it seems did not actually need to operate as these (lawless and remote) places. Two hundred years had passed since the real places of the Channel Islands had been transposed into a rhetorical place by the Habeas Corpus Act, and by the time of *Cape's Case* it would be too late to revoke that status. These rhetorical places could still be mobilized for cases that violated the spirit of the Act—including that of *Boumediene v Bush*—even if the writ would not run to the actual islands named in the original Act.

Cape's Case thus reveals an important discrepancy between how extraterritorial sites are imagined by law, and how they are used in practice by law. But the case also shows how ideas of incarceration were not as fully determined as one might expect given the date of this dispute with respect to broader developments in penal practice. The concept of containment as it played out on the ground was very different from the space of a prison as had been defined by the legal reforms of the previous decades. Notably, John Capes, the subject whose unlawful detention was being questioned by the writ, was not actually held in jail. Thus in sending the writ claiming that Capes' body had been detained, the entire island itself was figured as a self-evident container. Despite the events of this case occurring well after the prison reform movement—and the subsequent rebuilding of Guernsey's prison in accordance with its principles—the architectural

space of the prison was not what was under question. The entirety of the island was here understood as a self-contained entity, much in the way that the Wood Street Compter was seen in 1605. *Cape's Case* asks us to question the ways in which precedent was established (or perhaps more properly understood, circumvented) to produce the result in *Boumediene*. In addition, the use of habeas to contest this detention suggests that it might be possible to re-read the architectural of the prison—typically understood as the necessary technology for a particular sanction—in broader terms.

By the mid-nineteenth century, the architectural prison was meant to have firmly established an authoritative image of the law's final judgment with regards to criminal cases. But throughout Common Law jurisdictions, the prerogative writ of *habeas corpus* still provided recourse for those who believed they had been improperly imprisoned. By recounting the legal narratives told over the course of one more overseas imprisonment thus contested (*Lees, a Prisoner v. The Queen*, 1858), the concluding sections of this chapter show that habeas made the architectural space of the prison legible not as the necessary end point of a criminal conviction, but rather as a space necessary for judicial review of a process that was otherwise meant to be final. Buildings were thus crucial in producing legal narratives, not only for representing and staging legal authority, but also for producing an avenue by which this authority could be contested.

III Narratives of habeas on the high seas: *Lees, a Prisoner v. The Queen*.

The testimony

11 July, 1856. 5:30 p.m. At sea. Latitude 27.55 S. Longitude 4.35 E. A fight broke out onboard the merchant vessel *Senator*, on route from Bombay to Liverpool.⁴²⁴ The crew had been disorderly and mutinous, or so the resident Master of Marine claimed. The ship's log records what would later be presented in support of his testimony:

I went on deck and found the sails wanted trimming. Being the 2nd mate's (Burch) watch on deck at the time, I told him to get a pull on the lee fore brace. He turned round to me with a *sneering* laugh, and asked me if he should slack the weather ones?...⁴²⁵

The argument escalates; the two men exchange blows. They return to their quarters, but the master—Charles Frederick Lees—finds he has been so much disfigured that he determines to send Burch to the forecabin. He takes his pistol with him. The log continues:

“I went towards the second mate's room – he was sitting at the door. I told him to go forward, out of that, or I would blow his brains out. He went, I thought no more about it, but / It being dark, and some sails in the way, I slipt down, and the pistol went off, and the ball entered the 2nd mate's right side, and I will be upon my oath that it was accidentally, and not intentionally. That I will swear.

“The second mate replied that he did not turn round with a sneering laugh, and that the yards did not want to be trimmed.”

We have no reason to question Lees's own account of this drama that took place on 11 July 1856, in open seas about 800 miles south-east of the Crown Colony of St. Helena. This is not to say that the narrator is necessarily trustworthy. It was the “accidental” nature of the shooting that would become subject to legal interrogation, and no doubt it was in part Lees's untrustworthiness in the eyes of his jury that led to his indictment and eventual conviction of a

⁴²⁴ Documents regarding the case “Lees, a Prisoner v. The Queen” compiled at the National Archives Kew, Treasury Solicitor Records 18/159 [thereafter TNA TS 18/159]

⁴²⁵ TNA TS 18/159/Ship's log

“shooting with intent to do grievous bodily harm” by the Supreme Court of St. Helena three months later. But Lees has delivered the perfect testimony: an illustration that allows us to picture a scene, quite clearly.

We can frame this scene with a little context, gleaned from the ship’s log. The crew have been onboard since they embarked at Liverpool nine months prior; they have reached the ports of Bombay to load cargo, then, more briefly, Aden to replenish supplies. The final stretch homewards approaches.⁴²⁶ All necessary details regarding the act in question are provided by Lees himself. It’s early eve (5:30); the wind shifts (the sails need trimmed). There is subordination on deck (a *sneering* laugh). Regarding the shooting itself, Lees does not deny that his pistol went off; nor does he deny his anger (*I would blow his brains out*). He denies simply that his act was intentional. It’s his only option, really, as we can also assume that there were witnesses to that act.⁴²⁷ But as intention is notoriously difficult to prove, Lees aims for plausible deniability. Not for committing the act, but rather for the intentionality of his actions. Note here the space of the ship, crucial as a framing device for his testimony in this regard, a cascade of uncontestable particulars. The deck, quarters down below, the forecastle: a mobile geography of the merchant vessel. Within this space, we are able to map out the characters and their actions. Burch, at his door. Darkness. Errant sails in the corridor. Lees, slipping down. The pistol went off. The reliability of this space is further emphasized by the second mate Burch’s own testimony, which does not aim to contest the scene itself. His retort challenges the signs that were fleeting, clues that might have been interpreted otherwise. *The sails did not need trimmed; he did not sneer*. As in all good testimonies, Lees has provided a vivid depiction that allows his

⁴²⁶ On 29th September 1855, the *Senator* had left Liverpool. The last significant stop had been in early May, at Aden, where several crew had been in hospital with venereal disease. TS 18/159/Ship’s log.

⁴²⁷ Ship’s log notes other crew on deck at the time of initial fight.

audience to project themselves back to the eve of the act. The scene is set for a judgment to be made.

But my focus here is not on this little drama at sea; or at least, not the initial telling of it, which ultimately failed to prevent Lees's conviction. On 2nd October 1856, a criminal Quarter Session of Oyer Terminer and Gaol Delivery, at James Town on the island of St. Helena found Lees guilty of a felonious wounding and sentenced him to serve three years time in jail.⁴²⁸ Case, it seems, is closed. Two years into this sentence, however, a packet ship would deliver a message that would require that same scene to be interpreted once again. "*VICTORIA by the grace of God of the United Kingdom of Great Britain and Ireland Queen defender of the Faith*" the message began. And in faithful rendition of a well-used script the writ continued:

TO THE SHERIFF of the Island of St. HELENA and to the keeper of the gaol at St. Helena GREETING. WE COMMAND YOU that you have in our court before us at Westminster Hall in the County of Middlesex on the second day of November next the body of CHARLES FREDERICK LEES...⁴²⁹

On the 15th January 1859 Lees, having been removed from the jail at St. Helena, was duly brought before the court of the Queens Bench, together with the jailer's return of a writ of *habeas corpus*.⁴³⁰

An image of finality

As we have seen in previous chapters, penalty, retribution, and rehabilitation are the terms by which we have understood the prison in architectural (as well as legal) history. The prison sentence had emerged in the early nineteenth century as the dominant legal sanction in

⁴²⁸ TNA TS 18/159/ habeas return, appendix RR. (Oyer & Terminer and Gaol Delivery. Courts that convened at regular intervals (in St. Helena, once per year) to hear criminal matters. From Law French, "to hear and determine.")

⁴²⁹ TNA TS 18/159/habeas writ (copy), submitted with return

⁴³⁰ He was late. TNA TS 18/159/letter accepting return [dated Wednesday December 15th; LHT doc 6164]

England for most criminal infractions. This historical fact is itself not particularly controversial.⁴³¹ Replacing corporeal punishments and transportation to oversea colonies, the punishment of imprisonment in designated buildings for a fixed term became the norm for a wide range of criminal convictions. Over the course of this transition, which occurred roughly between the mid-eighteenth to mid-nineteenth centuries, the jail building was repositioned with regards to its role in criminal law procedure. Previously an instrument used primarily to detain suspects prior to indictment and trial, the jail—newly rebranded as prison—became an instrument used primarily for the punishment of those convicted. As we saw, the new terms of imprisonment as sanction drafted by legal reformers relied heavily on architectural descriptions of the carceral space that would be necessary for its implementation. The decades that bracket the turn of the nineteenth century thus saw a decisive shift—both ideologically and in practice—in terms of the ideal forms of legal punishment, as well as in the ideal form of the buildings necessary for this punishment.⁴³² As a result (so our standard historical narrative goes) the prison building, to be purpose-built for the fulfillment of this specific judicial sanction, would now be read solely in terms of its capacity to behave as an instrument of punishment.

⁴³¹ This shift was famously encapsulated by Michel Foucault's juxtaposition of the torture of the regicide Robert-François Damiens (1757) with Jeremy Bentham's panoptic prison scheme (first published in 1791). (Foucault 1975.) The data corroborate (allowing a century or so of implementation): by 1875, a national penitentiary system had indeed been put in place in England, and imprisonment accounted for 90% of sentences handed down by London's central criminal court. *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 6.0, 17 April 2011), Tabulating year against punishment, between 1775 and 1875. Counting by punishment.

For accounts that focus on the legal sanction in particular, see the excellent overview by J.H. Langbein, (1976) "The historical origins of the sanction of imprisonment for serious crime." *The Journal of Legal Studies*, 5 (1), 35-60. Langbein argument is convincing in part because he focuses on precursors to the prison that made its implementation as a sanction possible: the galley sentence (France), the workhouse (Prussia & Austria), and transportation (England). And for a more in-depth study of England in particular, see ie John Beattie, *Crime and the courts in England, 1660-1800*. Princeton, NJ, 1986

⁴³² In this sense, the modern prison building could now be envisioned as an entirely new building type for an entirely new form of punishment.

By no accident, this view of the prison building closely aligned with those of late eighteenth century legal reformers who sought to remove the personal and arbitrary nature of legal punishment that, in their minds, had led to a degradation of the Common Law itself.⁴³³ A primary motivator behind the idea of the prison sentence, after all, was that it provided a definitive schedule of punishments that could be clearly understood by lawmen as well as by the lay public. It was through the geometric form of the prison building itself that this knowledge was, in part, produced.⁴³⁴ The prison building provided a bounded space that could be both understood abstractly (as in its diagrammatic configuration in plan); while at the same time, its immediate physical instantiation would be an unmistakable symbol of sovereign authority in built form.

That this measured and calibrated sanction was not subject to interpretation was key for representing the ideal end to a criminal prosecution. By any measure, the definitiveness of judgment is crucial in legitimizing legal authority.⁴³⁵ But at the same time, the interpretation of a sequence of past events through narrative form have long been acknowledged as important in producing legal judgment, especially in criminal law.⁴³⁶ The form itself of the adversarial criminal trial was explicitly constructed in this way; a successful trial relied as much on the

⁴³³ Especially, of course, for Bentham: the “dog law” (as he called the Common Law) was in shambles as he saw it in large part because there was no clearly understood correlation between crime and its punishment. Jeremy Bentham, “Truth versus Ashhurst; or, the law is contrasted with what it is as it is said to be” (written December 1792; first published 1823). Bentham *Works* Vol. 5., p. 235

⁴³⁴ For example, see the descriptions of the ideal prison in the Penitentiary Act of 1779—a written description of the prisoner’s measured geometric arrangement of parts. (19 Geo. III c.74)

⁴³⁵ If the one of the primary goals of any legal process is to produce an end to a dispute that will be mutually accepted, there can be little room for contested judgment.

⁴³⁶ Langbein’s account of the origins of the adversarial criminal makes clear how the form of the trial is itself inimical to truth-finding. A slightly less damning judgment of the form of the criminal trial still acknowledges the importance of constructing narratives: in its most simplistic form, as Weisburg notes: “Law is narrative in the sense that cases, at least, have factual basis in human events that can be rendered in conventional narrative form.” (John Langbein, *The Origins of Adversary Criminal Trial* (2002). And Robert Weisburg, “Proclaiming Trials as Narratives,” in Brooks, Peter, and Paul D. Gewirtz. *Law’s Stories: Narrative and Rhetoric in the Law* (1996), p. 66).

rhetorical skills of the pleader in their presentation of bare “facts” as on those facts themselves. In England in particular, the courtroom itself was seen as providing the primary space in which lawyers summoned evidence in support of or against the accused, and where those standing trial aimed to convince their juries of their own innocence. But this reconstructed drama of the jury trial, played out within the space of the courtroom, was to reach its conclusion when judgment was handed down in favor of the most convincing narrative. The interpretive aspects of the law—insofar as it was admitted that the law did indeed rely on a form of interpretation—were meant to be confined to the juror’s bench. Once judgment had been made the ruling was meant to be undisputable. This finality of judgment was marked by the handing down of the sentence, followed by the punishment itself. And while in many ways the prison sentence was seen as a more just form of sanction, what it did not deliver—could not deliver, by its very nature—was the definiteness of its alternatives (especially capital punishment). Producing a legible image of finality was thus also an important aspect of the work that the prison building needed to accomplish.

An idealized condition of finality in judgment, in which one standing trial was either found guilty or not (and was therefore imprisoned or not) can arguably be read in architectural drawings of prisons, which, in geometric form, represented the proper distribution of convicts’ captured bodies in cells and workrooms.⁴³⁷ In fact, for architectural historians, the invention of the prison sentence as legal sanction required the specific expertise of the professional architect in this regard. Robin Evans, for example, saw the architectural drawing in particular as a primary

⁴³⁷ I think a clue that this new form of punishment was important as a doctrinal presentation of an ideal condition can be found in the Penitentiary Act of 1779 itself, which explicitly laid out numbers of convicts from each county that could be accommodated—despite the fact that the actual number of convicts would far exceed the space allotted. (19 Geo. III c.74)

mechanism that allowed the prison's objective and legible form to be broadly disseminated.⁴³⁸

The geometric arrangements of prisoner's cells, workrooms, corridors, washrooms, chapels, and inspector's quarters in plan produced a common discourse regarding the prison building that could easily be translated to prison sentence as punishment. Importantly, these drawings did not need the expertise of the professional lawyer to be interpreted, as the measured geometry of the prisoner's cell, distinctly bounded within the prison building, was itself seen as a clear translation of the legal sanction. The drawings of these buildings were unmistakable. Their aim was to demonstrate that the prisoners therein, having been convicted, would proceed through the proper stages of retribution and rehabilitation. In other words the prison buildings, and their drawings, seem to have left us—by design—little room for reinterpretation.

Or have they? The prison building can be read as a static object only if we make the assumption—and, I argue, a misleading assumption—that the narratives of law are confined to the discrete spaces that have been handed to us by legal doctrine. Evidence pointing to doctrinal changes—in particular, with regards to crime and punishment—may indeed be productively read from the prison drawings of the late eighteenth century. The writ of habeas corpus does not overturn this reading. It does, however, provide an avenue by which we can ask an overlapping set of questions that may still posed by the space of the prison, as habeas requires us to look at the prison building outside its well-known geometric form. In revealing doctrinal attitudes about crime and punishment, prison drawings concealed the ways in which legal decisions were made, and subsequent convictions were contested. In contrast, habeas reveals the contextual nature of the prison building, and reminds us that the prison was always situated within a wider political

⁴³⁸ In many ways the account comfortably takes a normative stance towards the profession itself. While the subject of prisons (not being the subject of many scholarly inquiries) was relatively novel, Evans found, in their drawings, a way of tracking societal changes which also happened to require the authoring hand of the architect. Robin Evans, *The fabrication of virtue: English prison architecture, 1750-1840* (1982)

geography. More, habeas reminds us that the prison building does not necessarily represent the final stage in judgment.

Lees, again: reopening a closed case

Recall Mr. Lees, convicted of a felonious shooting with intent to do grievous bodily harm, sentenced to serve three years time in the jail at St. Helena. A writ of habeas corpus had been issued by the judges of the Queen's Bench on his behalf; he is brought to Westminster so that the legality of his detention may be reviewed. The writ here, evidently, was working as it was intended: serving as a mechanism by which the Queen's Bench could review an imprisonment ordered by a lesser jurisdiction (in this case, one overseas). How did this mechanism work in this instance, and what can it tell us about the space of the prison? Records from the Queen's Bench, and correspondences between the Bench, the Privy Council, and the Court of Admiralty show habeas to be very much an embodied process. Moreover, these details reposition the space of the jail as one among several important in the process of criminal law administration, and show how the jail was important not only in representing the final stage of judgment, but also in providing a space from which a prisoner might have his voice heard once more.

Lees had been held in jail for nearly two years before the writ arrived at St. Helena. In this case the recipient of the writ did not resist. Custody of Lees's body was duly transferred by warrant from William Carrol (Sheriff of St. Helena) to William Allen of the ship *John McVicar*, bound for London on 26th October 1858.⁴³⁹ Together with the body of Lees, Allen has been

⁴³⁹ In effect, the warrant transferred the legal custody of Lees's body from the jailer at St. Helena to William Allen the ship captain (Allen thus acting as Sheriff with regards to Lees). The writ was received on St. Helena 24 days before a warrant transferring custody was issued; there is no sign that the court at Helena resisted submitting a return. TNA TS 18/159/Warrant transferring custody [LHT doc 6218]

charged with transferring the documentation that consists of the proper return to the writ. His ship arrived in London on the 13th December 1858; two days later, William Allen in his capacity as temporary custodian of Lees presented himself at the Crown Office with the writ's return. As the court had recently adjourned for vacation, Allen received an order transferring Lees to Newgate.⁴⁴⁰ The jailer at Newgate now had legal custody of Lees, and in early January of the following year delivered his charge, along with the documents that consisted of the writ's return, to the Queen's Bench at Westminster.

These documents do not offer further information about the eve of the felonious act itself. By the writ's nature they cannot. Habeas, as a procedural remedy, is concerned strictly with matters of law, not matters of fact.⁴⁴¹ This means that while reports of the original evidence may be submitted along with the return, no more may be added. This original evidence pertaining to the act in question (here, the shooting) must be taken at face value. What is permitted, however, are certain additional details regarding the aftermath of the event originally in question, along with the jurisdictional parameters of the court under interrogation. But while ostensibly concerning only legal questions regarding the scope of the courts, the "matters of law" that a habeas case investigates does require facts, of a particular kind. The evidence presented in a habeas return consists of details regarding the legal and quasi-legal actions that produced the detention under investigation. In this case, Lees must show that he was wrongfully held in jail;

⁴⁴⁰ Allen made two trips to the Crown Office, after the first warrant to transfer Lees to the Queen's Bench Prison was rejected. Meanwhile, Lees had telegraphed Liverpool to secure affidavits & council. TNA TS 18/159/Affidavit Lees

⁴⁴¹ "Matters of fact" are details that pertain to the criminal act in question (i.e., did he shoot the gun? Was his act intentional?); while "matters of law" are details that pertain to the parameters of the courts (i.e., does the court have jurisdiction over the case?). The fact / law distinction is important in this context, because it reinforces an assumption that a criminal act should be seen as separate from the court's proceedings. For more on the fact/law distinction see ei Barbara Shapiro, *A Culture of Fact: England, 1550-1720* (2000). And Stephen A. Weiner, "The Civil Jury Trial and the Law-Fact Distinction," *54 Cal. L. Rev.* 1867 (1966).

while the Sheriff of St. Helena must show that he had proper authority to detain the prisoner. Importantly, each side's argument, in a different way, relied on a spatial understanding of the events in question and its aftermath. In other words, the "matters of law" under question here could only be answered by understanding clearly the parameters of the specific political geography that lay between St. Helena and Westminster.

Lees's primary reason for his detention to be reviewed by the Queen's Bench was that the trial on St. Helena had been unfair, as it had not proceeded according to the principles of the Common Law as he understood them. Pertaining the courtroom proceeding itself, Lees tells us, not a single man learned in law was present apart from the very lawyer who had prepared his indictment and pleaded in support of it. Lees's own witnesses, whom he had called to speak on his behalf, had been removed from the island before they could stand testimony. So prejudiced against him by default, the jurors had necessarily found him guilty. For further proof of the incompetency of the court, Lees was unable to obtain his original indictment by which he might have appealed, until January 1858, a full eighteen months into his sentence.⁴⁴²

But Lees's account of the legal processes that led to his incarceration begins before the trial. As recorded in an affidavit presented at the Queens' Bench, these events began three days after the shooting. On the 14th July, he recounted, without warning

... the crew seized said ship, and me, and placed a rope round me, and doubly ironed me, and so kept me for several days until I was taken on shore at St. Helena as afterwards mentioned.

That the said ship was anchored in the open sea about a mile distance from the Shore and Land of St. Helena.

That on the Third day after anchoring and whilst the said ship was in the same position in said Boadstead and open Sea and on the High Seas, I was taken into a Boat in irons, and

⁴⁴² Lees's other principle objection to his sentencing was technical—as the documents had failed to mention that he was an Englishman (although he clearly was: his sister and other witnesses were from Liverpool, and "Lees" is an English name).

taken ashore and landed at St. Helena. And then and there for the first time learnt, and was informed, that a charge was made against me.”⁴⁴³

The times and places of this sequence of events that occurred in the immediate aftermath of the shooting were important. It would seem as though the crew understood the parameters of the Court of Admiralty, which allowed a warrant of arrest to be served within six months of an infringement, so long as it was served within three miles of the coast.⁴⁴⁴ This would become the focus of the primary legal question that would be asked in London. How did the jurisdiction of Admiralty intersect with that of St Helena, and did the Supreme Court at St. Helena have proper jurisdiction over the dispute in the first place?

The Sheriff of St. Helena argued, of course, that it did. He contested Lees’s account of the proceedings, and stated outright that trial had been conducted properly under provisions granted by the Crown.⁴⁴⁵ The Sheriff’s reply put the fore the institutional relationship between Westminster and the colony. This relationship was relatively new, technically speaking. The uninhabited island of St Helena had been discovered by the Portuguese in the early sixteenth century, but not permanently settled until it was annexed by the East India Company in 1659 in order to provide a convenient stop for ships on route from East Asia to replenish food and water supplies before heading north.⁴⁴⁶ The settlement remained small—its remote location a barrier to attracting a larger population—but continued to operate as an important stop for ships returning

⁴⁴³ TNA TS 18/159/Lees’ Affidavit of Verification *ex parte* in the Queens’ Bench [LHT doc 6211]

⁴⁴⁴ These details fit precisely with the parameters of the Admiralty Court. T. Eustace Smith, *A summary of the law and practice in admiralty: with an appendix* (1882)

⁴⁴⁵ In particular, citing 12 and 13 Vict. Cap. 96. “all persons charged in a felony with offences committed on the high seas may be tried & dealt with in the Colony in the same way as by the law of the colony he would have...” Along with the original Charter of the St Helena (3 and 4 Will 4, Cap. 85, sec. 112).

⁴⁴⁶ Not really “colonial”—EIC bylaws in force, which were based on English law in the first place. No local population before EIC. See Stephen Royle, *The Company’s Island: St Helena, Company Colonies and the Colonial Endeavour* (2007) for a good overview of St. Helena’s Company period. Utopian settlements but difficulty in establishing it / etc.

to England from eastern routes. Officially established as a Crown Colony under an Act of 1834, St. Helena was granted the authority to conduct criminal trials on behalf of the Crown, as “all forts factories public edifices & hereditaments whatsoever in the said Island are to be used for the service of the Government therefore shall be vested in his Majesty....”⁴⁴⁷ That Lees’ witnesses had left before their trial could not be helped, as under conditions of this same charter the Criminal Sessions were to convene but once per year, on a fixed schedule.

The legal question (did the Supreme Court of St. Helena have proper jurisdiction over a shooting that occurred on the High Seas, and was the trial conducted properly?) was settled relatively quickly through a series of correspondences between the Colonial Office and the Judicial Committee of the Privy Council. As these letters confirmed, under the Admiralty Offences Act (1849) any person charged on a colony with an offence committed within the jurisdiction of the Admiralty (in this case, on the high seas) could not be removed to England for trial.⁴⁴⁸ This meant that St. Helena did, in fact, have jurisdiction over the dispute. The writ thus confirmed the legal relationships between the Supreme Court of St Helena and the Court of Admiralty, as adjudicated by the Queen’s Bench. Indeed, in a final letter sent to the Office of Colonial Affairs from the Secretary of Treasury, the issue of judicial oversight was explicitly given as the reason for interest in the case, as “... the proceedings in question are likely to raise very important questions as to the jurisdiction of colonial courts in criminal matters.”⁴⁴⁹ This case shows us that habeas corpus did have the ability to oversee jurisdictions that were at a remove from Westminster. While ultimately the authorities agreed that the Supreme Court of St.

⁴⁴⁷ TNA TS 18/159/Return of habeas corpus, appendix R

⁴⁴⁸ 12 and 13 Vic c96 (1849); TNA TS 18/159/letter 21 December 1859 [LHT doc 6139]

⁴⁴⁹ TNA TS 18/159/Brief of the Crown/ Letter from the Colonial Office by the Secretary of the Treasury

Helena had proper jurisdiction over Lees's trial, the case allowed a question regarding colonial courts' jurisdiction to be tested explicitly.⁴⁵⁰

Lees's account of the events following the shooting depicted a sequence of spaces lawfully under one jurisdiction being usurped by another. His ship on the high seas, taken with force from the mutinous crew; the courtroom at St. Helena, operating improperly under the auspices of the Common Law. In contrast, St. Helena's account depicted a newly-constituted colonial territory that was operating within the legal parameters granted by the Crown. But for the jurors of court of St. Helena, of course, the matter of how Lees got to shore in the first place was not their business, nor were the jurisdictional limits of St. Helena's Supreme Court. They were there to interpret matters of fact, not law: and in particular, the facts within the immediate vicinity of the shooting itself. As this case demonstrates, the distinction between matters of fact and matters of law was a distinction between the delimitations of different kinds of legal space. For the jurors of Lees's trial, the space of the ship, specifically as it framed the shooting, was the only one that counted in their deliberations. The territorial space of colonial St. Helena, and the parameters of the Supreme Court of the Island and its jail, were not within their purview.

The juror's narration of the events in question was ultimately not so different from Lees's original account, though they evidently did not accept that the shooting was an accident:

And the Jurors aforesaid upon heir oath Do further present that the said Charles Frederick Lees ... then and there being did make an assault and a certain pistol then and there loaded with gunpowder and two leaden bullets which said Pistol the said Charles Frederick Lees in his Right hand then and there felonious and unlawfully did shoot with intent... to do some grievous bodily harm, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen her Crown and Dignity.⁴⁵¹

⁴⁵⁰ Only ten years had passed between Admirably Offences Act and this case, and there is good reason to think that St. Helena had not yet come up against a contestation of its own authority under a relatively new Royal Charter.

⁴⁵¹ TNA TS 18/159/Return of habeas corpus

Lees was thus convicted, serving his time. Regardless of if one agrees with the judgment, case is closed. This is what we like to believe about the law; or perhaps we can even go so far to say that this is the purpose of the law. It allows for the resolution of disputes to be considered final. The prison building, read as geometric form, confirms this final resolution by providing a legible image of that finality. But habeas threatens instability because it questions that closure. It draws attention to the parameters of the legal narratives that produce judgment—and calls attention to how these parameters always matter.

Importantly, while habeas questions the interpretations of legal narratives, in doing so it relies on a certain kind of spatial knowledge. As we have seen, habeas is very much a self-contained legal problem, as its purpose is to interrogate the legality of a detention, not the events that gave rise to the detention in the first place. But this technical legal instrument requires a certain kind of spatial evidence. In order to be set into motion habeas needs the fact of a contained body; it thus requires a prison building. This prison plays a different role than that culminating a linear narrative of crime, judgment, and punishment. Habeas casts the prison as an architectural space that was crucial not for providing the technological apparatus of the legal sanction, but rather as a space used to contest local authority; and, ultimately (in this example), to confirm legal relationships between the Queen's Bench and the Supreme Court of St. Helena. In this capacity, the primary role of the building was not to punish, but rather to provide a necessary backdrop for understanding the institutional and interpersonal relationships between the crown and an overseas jurisdiction.

One final word regarding this particular example. Lees's case is both ordinary (a paradigmatic example of a habeas case) and a latent potential (though unrealized) for precedent. Lees was not a well-known man (and, at any rate, we can safely assume that the designation of

most famous exile on St. Helena had been claimed already by Mr. Bonaparte).⁴⁵² Nor did this case go on to be cited in future habeas arguments. Indeed, the Brief for the Crown made it explicit that there was no desire for Lees's case to become a precedent in this way. So long as the colonial courts were operating properly, there was every reason to avoid such unnecessary interventions. After all, the Bench had had to pay the expenses of Lees's travels back to London, as well as expenses related to his incarceration at Newgate while awaiting his habeas hearing. If it became a regular occurrence for Westminster to respond to requests for habeas writs from the colonies, "such a course it is would lead to a very great inconvenience [for the Queen's Bench]."⁴⁵³ The tension between the anonymity of this case and its potentiality to serve as a precedent, should the suitable situation arise, can be clearly felt here. This tension exists in any Common Law case. While the outcome of any particular dispute has immediate repercussions on those directly involved, its longevity in the law—by the nature of case law, where authority is based on the interpretations of past decisions—cannot be predicted.

Lees's case has not yet (as I know) been used for legal argument. But this does not mean we cannot use it here in service of a different kind of (historical) argument. Charles Frederick Lees was given notice of bail on the 21st of February 1859, for the sum of 250£.⁴⁵⁴ While the Queen's Bench had determined that the Supreme Court at St. Helena did in fact have proper jurisdiction over the dispute, the judges saw no reason to remand the prisoner because, as they

⁴⁵² Napoleon had, of course, been sent to St. Helena precisely because it was considered so remote. For more on his exile see John Abbott, *Napoleon at St. Helena; Or, Interesting Anecdotes and Remarkable Conversations of the Emperor during the Five and a Half Years of His Captivity* (1855); and a more recent view see Johannes Willms, *Napoleon & St Helena: On the Island of Exile* (2008).

⁴⁵³ Here, a delicate balance is explicitly at stake: on the one hand, the Bench needs to uphold the principle of habeas review. On the other hand, using the recourse too often would overwhelm the system. TNA TS 18/159/Brief for the Crown [LHT doc 6204].

⁴⁵⁴ TNA TS 18/159/notice of bail [LHT doc 6209]

claimed, he had “at least sustained as much punishment as the circumstances of the case warranted (perhaps more).”⁴⁵⁵ With his bail thus posted, this Master of Marine who, accidentally or not, once shot his second mate, vanishes from the records of the Queen’s Bench. Lees’s story is not one encompassing events that have changed the course of the Common Law. However, his petition for legal review via habeas has left behind a trace of how the English law understood the practical constraints of running an empire. In this context Kennedy’s words with regards to his *Boumediene* decision bear repeating: “the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised *in fact* by the Crown” [my emphasis].⁴⁵⁶ As I hope to have demonstrated, these practical questions were answered, at least in part, by locating imprisoned bodies and the buildings that held them.

If we abide by disciplinary conventions, the jail on St. Helena would be understood primarily by its capacity to operate as a technology suitable for punishment—especially as made visible in architectural drawings. I do not have these drawings for this building. In the opening passages of his book, Evans precludes an architectural understanding of jails outside this framework, in claiming that such buildings exhibit a “geography, but not yet a geometry.”⁴⁵⁷ To which I can only respond: exactly. The jail on St. Helena, as every other reached by the writ of habeas corpus, had, in fact, an exact geography. A place inscribed by a building, holding an imprisoned body, both of which were made legible to political authority by means of a formal written document. Limiting architectural history, in this subject, to questions of geometry at the

⁴⁵⁵ TNA TS 18/159/letter from Merivale [LHT doc 6221]

⁴⁵⁶ *Boumediene v. Bush* (2008) Syllabus, p. 3

⁴⁵⁷ Evans (1982) p. 6

expense of questions of geography—to the measurement of the earth and not also to the writing of it—obscures architecture’s complicity in producing this geography of custody that was integral in establishing legal oversight across the British Empire.

IV Conclusion: Legal Legibility

If habeas threatens the stability of judgment, the wording of the writ itself has retained remarkable consistency over the past four centuries. Operating as a diagram, which remains legible across contexts because it defines relationships between parts, the writ of habeas corpus has been able to adapt to changing material forms of incarceration.⁴⁵⁸ Rather than focusing on physical space, habeas jurisprudence has revolved around the legal ideas that the writ confirms—in particular, the right to due process and rights of personal liberty. The meaning of habeas in this way has been further flattened by the limited number of treatises on the Common Law.⁴⁵⁹ When Blackstone’s *Commentaries* called it the "the most celebrated writ in the English law... the great and efficacious writ, in all manner of illegal confinement... running into all part of the Queens dominions: for she is at all time entitled to have an account, why the liberty of any of her subjects is restrained, wherever that restraint be inflicted," its status as the “great writ of liberty” was confirmed, and it has remained hallowed as such ever since.⁴⁶⁰ Anyone interested in the ideas inherited through habeas practice from England to the United States could, for example,

⁴⁵⁸ I take this formulation from Bruno Latour, and argue that the writ itself is an actor that operates as his “immutable mobile.” Bruno Latour, “Visualisation and Cognition: Thinking with Eyes and Hands.” In H. Kuklick (ed) *Knowledge and Society Studies in the Sociology of Culture Past and Present*, Jai Press vol. 6, pp. 1-40, 1986. p. 6

⁴⁵⁹ As Halliday (who actually went to the archives) notes, “We read Coke, Blackstone, and a handful of printed reports, then claim that we know what the law ‘was’ in 1789 or some other moment. If we do that while countless parchment court records and case reports surviving only in manuscript lie unread in archives, then we have been derelict as historians. If we act upon such claims in our courts, we may be derelict in our jurisprudence, our claims resting on hollow foundations” (Halliday, pp. 3–4).

⁴⁶⁰ Blackstone *Commentaries* (1855) p. 485

read this passage from the authoritative Blackstone, and might well feel assured that *habeas corpus* signifies liberty. This attention on the development of abstract legal concepts has obscured the embodied aspect of habeas, and the ways in which the corporeal presence of the prisoner was a necessary factor in the writ's deployment.

Throughout the centuries of British imperial expansion, stories of improper incarceration were constructed into a unifying narrative by the writ of *habeas corpus* and the judges who issued them. While the writ was mobilized by prisoners in order to contest the legality of their imprisonment, we saw how it was also a method by which the judges of the King's or Queens' Bench could secure judicial oversight on lesser jurisdictions. These judges interpreted technical points of law in order to lay claim to juridical authority. Their discussions primarily revolved around legal relationships. Who was the local authority, and what was their relative jurisdictional relationship to Westminster? Would local authorities accept Westminster's authority, and return the writ?⁴⁶¹ In these discussions, negotiating the limits of legal relationships was the primary concern. Little attention was paid to the physical space in which they were negotiated. However, the spaces evoked by the words of the writ—the network of prison buildings and courthouses—provided a necessary framework for the enactment of this law across Crown territories.

This is important because while the writ was contained within an immutable proper form, its use relied on judgments regarding how crown territory would be understood. As with any form of legal practice, the writ of *habeas corpus* has evolved over time.⁴⁶² And as with many aspects of the Common Law, this change was not made through legislation alone. Rather,

⁴⁶¹ As we saw in *Capes' Case*, institutional relationships could certainly hinder the return of the writ, even if nothing else would.

⁴⁶² In this sense, of course, the writ is not an immutable invention. While its use did shape and control local practice, local practice also shaped it.

through the literal movement of prisoners from prison to courthouse, in cases deemed appropriated by the judges of the King's Bench, a gradual change in ideas about liberty and confinement were produced. These ideas do not necessarily follow ideas about the space of the prison as were produced by the architects of the prison reform movement. The space of the prison did not need to be legible in architectural terms, as Bentham's panopticon did. Instead, a different kind of spatial legibility is produced: one that makes the subject's body visible as such by its very fact of containment. John Capes, at large on the island of Guernsey, was considered a contained body just as was Nicholas Lowe's in the Wood Street Compter two and a half centuries earlier.⁴⁶³

I would thus like to claim that, in these terms, *habeas corpus* is a proper (and useful) object of (and for) architectural history. In particular, I have made the argument that the writ, if taken seriously at its word and understood from the vantage of those using it in the practice of law, is a useful framework for developing an expanded architectural history of the jail in Anglo-American jurisdictions. This expanded history might, among other things, allow the discipline to make claims about spaces of incarceration that formerly fell outside the dominant narratives in our field. It could draw attention to carceral spaces that have been dismissed as being illegible on account of a lack of "proper" architectural representation. It would show how buildings were crucial in producing legal narratives, not only for representing the final results of a criminal judgment but also for contesting them. It shows how imprisonment was useful in laying the claims of sovereign law, not only to punish or produce labor, but also to provide an avenue by which a subject might petition for liberty from another.

⁴⁶³ The formal stability of the writ is in its words, not in the places they describe.

And what of those subjects, those who, in the long history of habeas, have inhabited these spaces described by this writ? Sometimes, of course, the characters are already famous, or were made so by the case. For the most part, however, the writs concern ordinary women and men (if such a designation means anything), and in this sense any broader account of habeas is necessarily populated by the little lives of those whom otherwise we would not know much about.⁴⁶⁴ But this is not just a history taken from the registers of the convicted.⁴⁶⁵ It is a particular subset of them, who share in common the desire, and the ability, to petition for relief. Habeas is a record of agency. While the writ needs the machinery of power that has produced its legal framework, it also needs an active agent claiming, through her own body, a willingness to submit to this power only if it might provide release from imprisonment. Each writ of habeas is a record of someone who knows that their original indictments will not be necessarily overturned; that they will remain the criminal. Despite this, they know that the circumstances in which their stories are re-told can provide a different frame for a different kind of verdict. The prisoner's body, brought from prison to courtroom in this context, is now also that of a subject claiming personal liberty. By questioning the circumstances in which a legal verdict is made, habeas by necessity exposes the constructed process of the law itself.

The prison buildings evoked in these narratives do not provide indices of definitive endings. Rather, the prisons and jails reached by habeas reveal the uncomfortable truth that the stories we tell ourselves in the law are just that: stories, which, upon retelling, have always the capacity to be rendered in a different hue. For architectural history, I take this as an opportunity to retell the history of the prison building: a case once deemed closed.

⁴⁶⁴ As in "history from below."

⁴⁶⁵ Michel Foucault, "The Lives of Infamous Men" in *Power* ed. Faubion (2000)

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- NA The National Archives, Kew UK
- BL British Library, London UK
- BM British Museum, London UK
- GRI The Getty Research Institute, Los Angeles CA
- IA Island Archives, Bailiwick of Guernsey, UK
- JA Jersey Archives, Bailiwick of Jersey, UK
- LMA London Metropolitan Archives, London UK
- SM Sir John Soane's Museum Foundation, London UK
- OBO *Old Bailey Proceedings Online*

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Figures

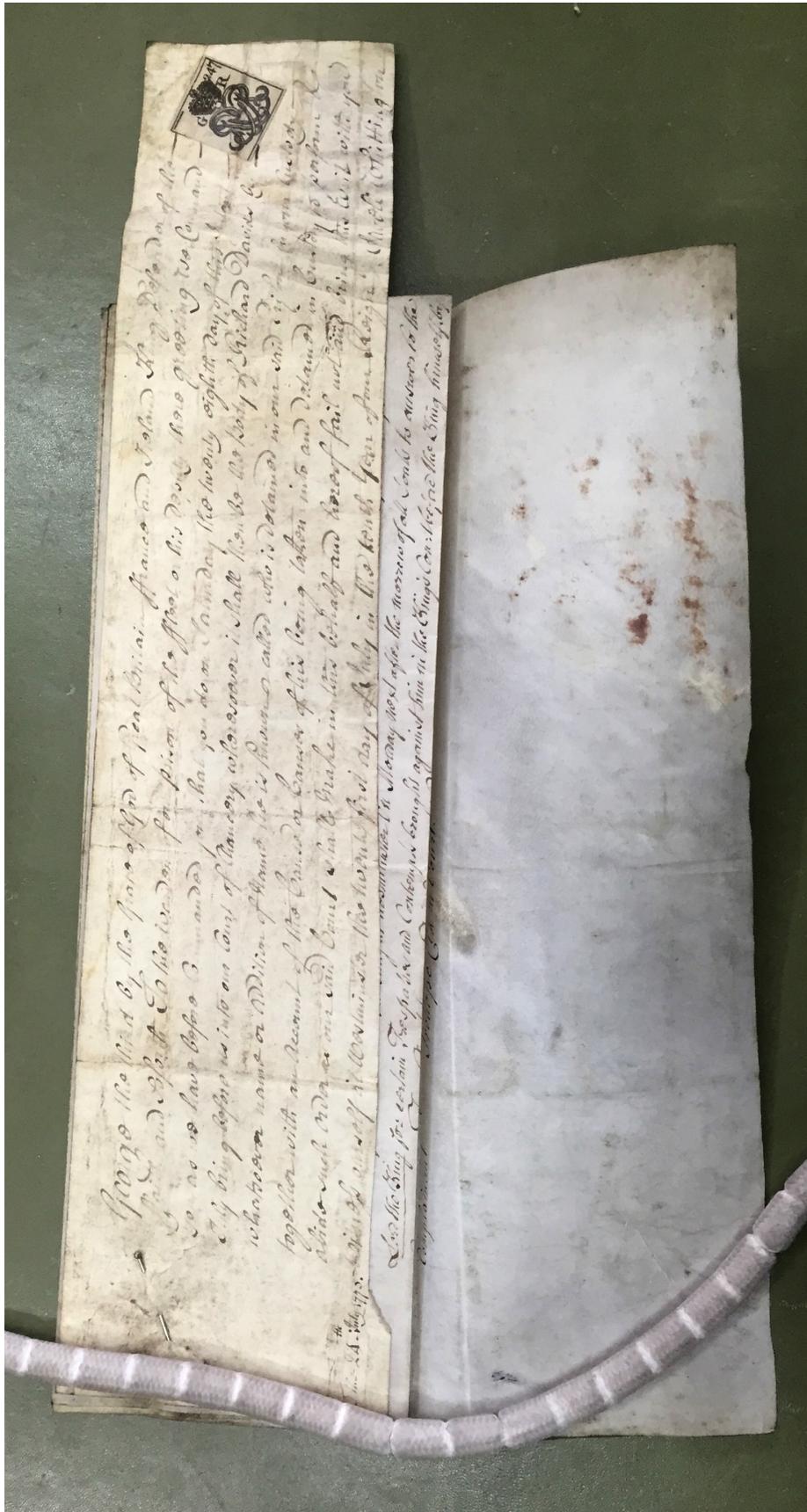


Figure 1.1 A writ of habeas corpus and its return.

Early writs would often have the return written directly on the back. Here, the return is pinned to the back of the original writ (approximately 2.5 x 10 inches) on a separate paper. This is how the writ would have been returned, with the body of the prisoner, to the King's Bench. Sent to the Fleet Street Prison, July, 1775. Note the stamp of George III, top right.

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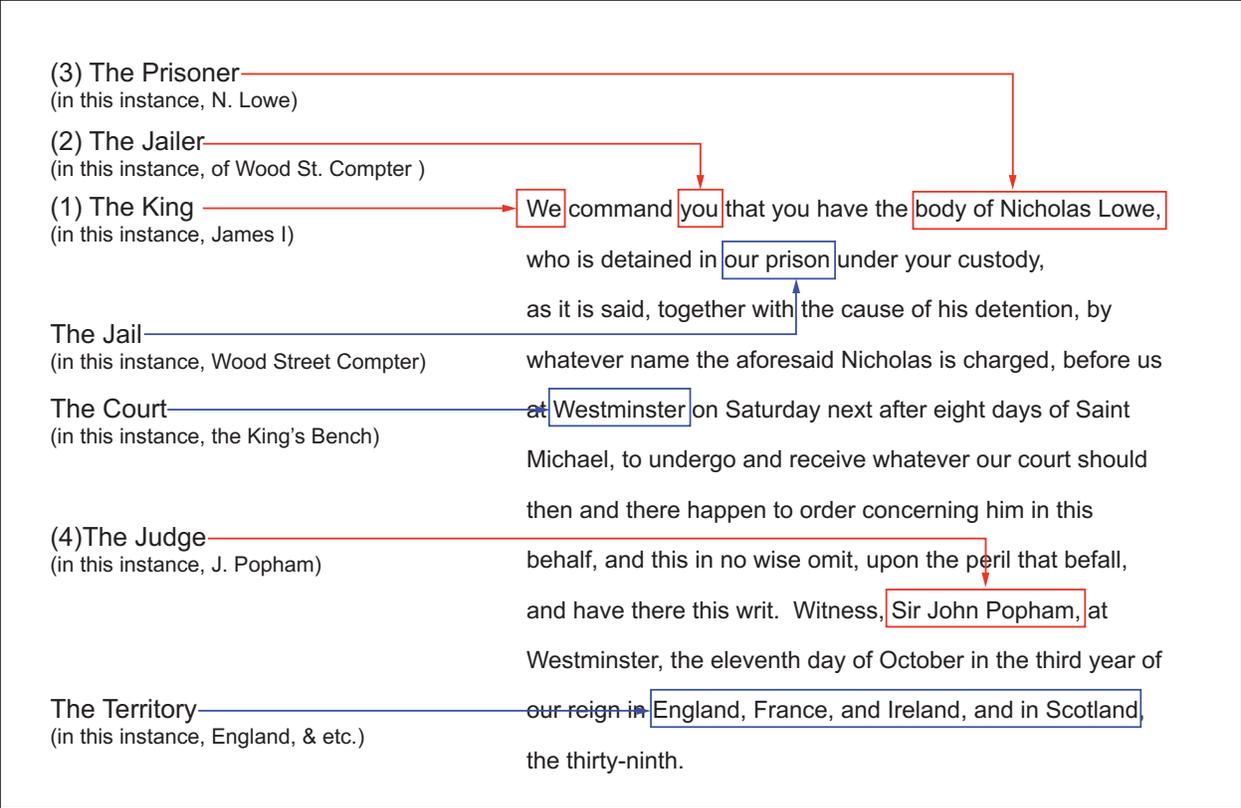


Figure 1.2 Habeas Corpus text, diagram 1.

Outline of the named characters, and spaces, evoked by the writ. Here, the writ names (1) the King, James I; (2) the jailer of the Wood Street Compter; (3) the prisoner, Nicholas Lowe; and (4) the judge John Popham. While the people filling these roles would change, the general designation of sovereign, jailer, prisoner, and judge would always be the same (diagram LHT).

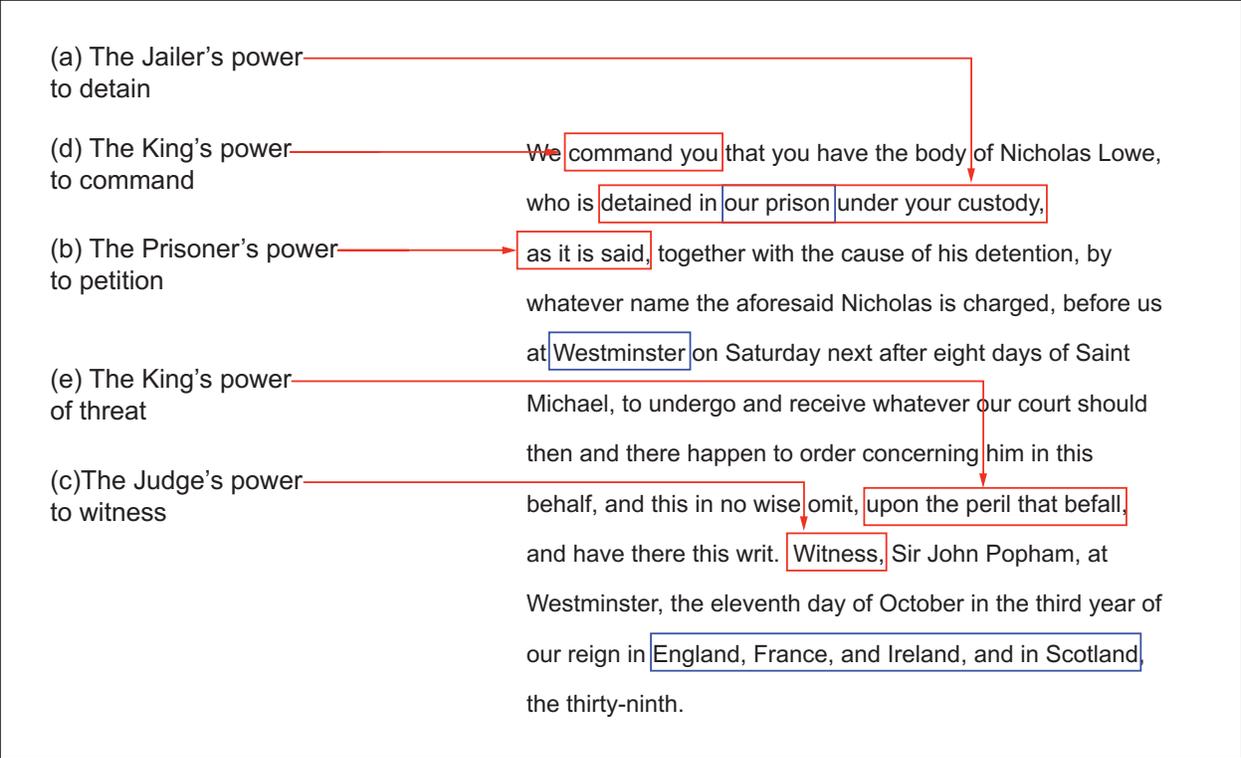


Figure 1.3 Habeas Corpus text, diagram 2.

Outline of each characters' "capacities," or powers, which were either called into question or activated by the writ (diagram LHT).

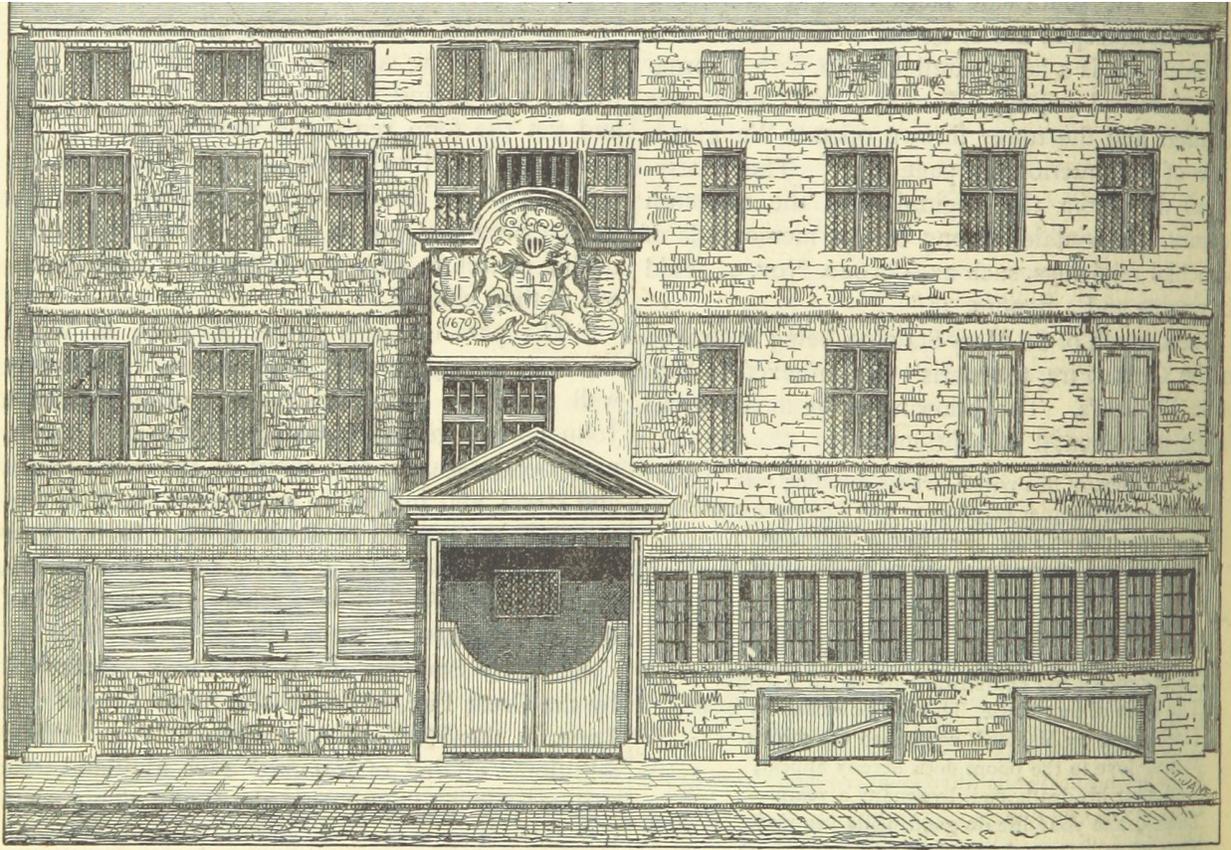
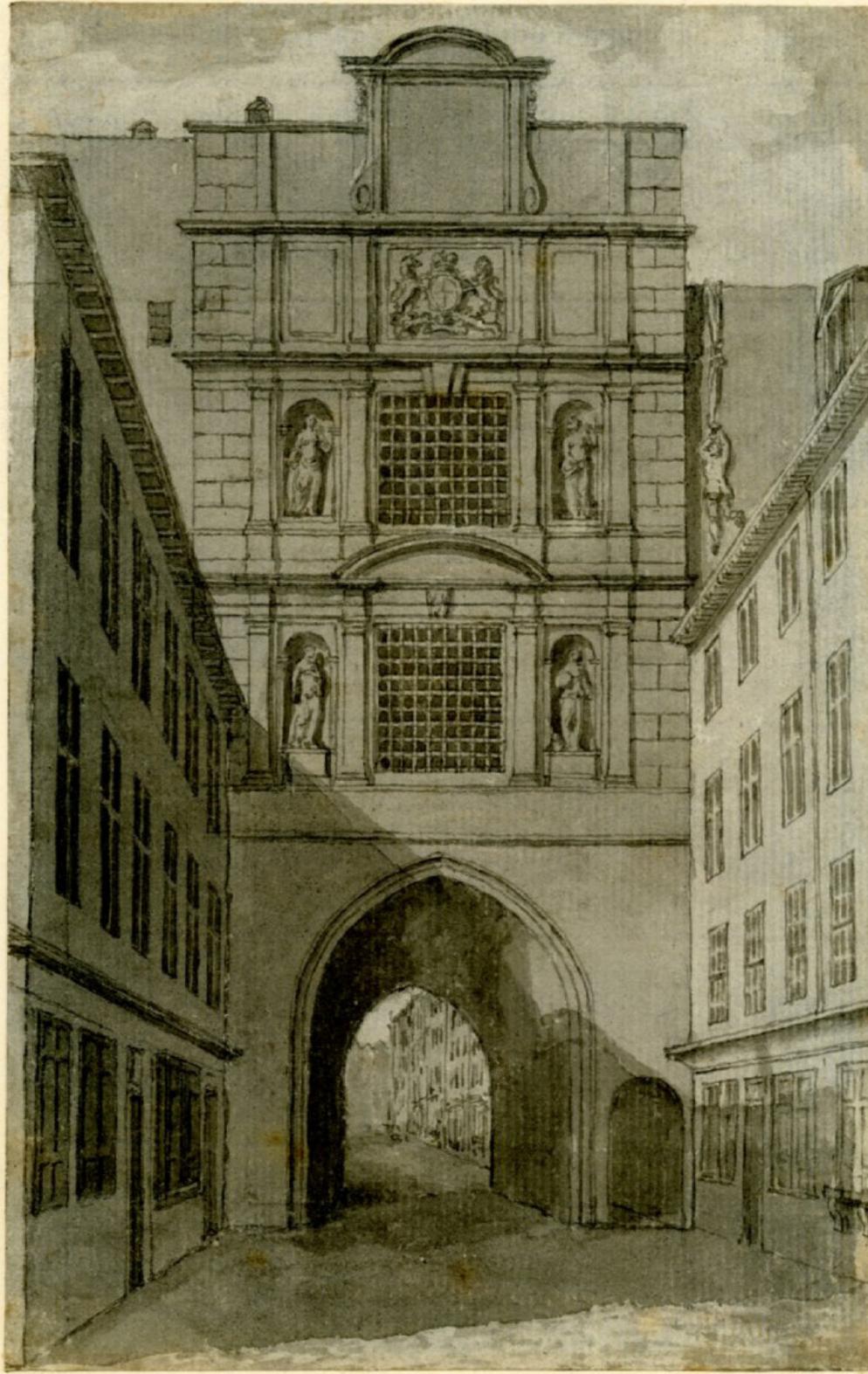


Figure 1.4 Wood Street Compter, elevation.

This drawing, published two years after the compter had been replaced by the one at Giltspur Street, does not tell us much about the primary organizational metrics of the jail, which was determined by price each prisoner was willing to pay.

Walter Thornbury, *Old and New London*, vol 1., pg 384, 1873. British Library HMNTS 010349.1.1



Newgate Street (away
from city center)



Figure 2.1 Samuel Wale, *John Sheppard escaping from Newgate*, Tyburn Chronicle, Vol II, p. 97, 1730

British Museum 1863,0214.762



The True Effigies of
JOHN SHEPPARD
with the Exact manner of his Confinement
in the Castle-room of Newgate

Figure 2.2 Anon., *The True Effigies of / John Sheppard*, c. 1724-1725

British Museum 1980,U.1056

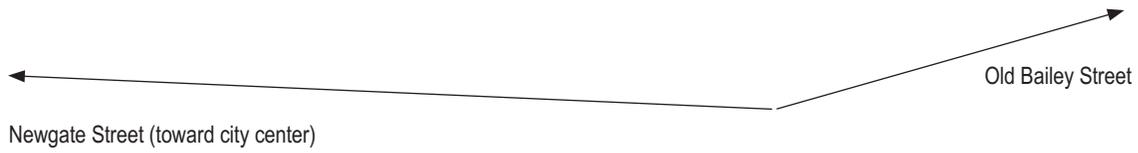


Figure 2.3 Francis Stuart (photograph), Newgate Prison, c. 1890
Museum of London, IN 37106



Figure 2.4 Anon., Newgate Prison, detail view of entrance, c. 1890

Life of Charles Dickens, Box 330 Charles Dickens (Life and Works), slide no. 4. The Boswell Collection, Bexley Heritage Trust

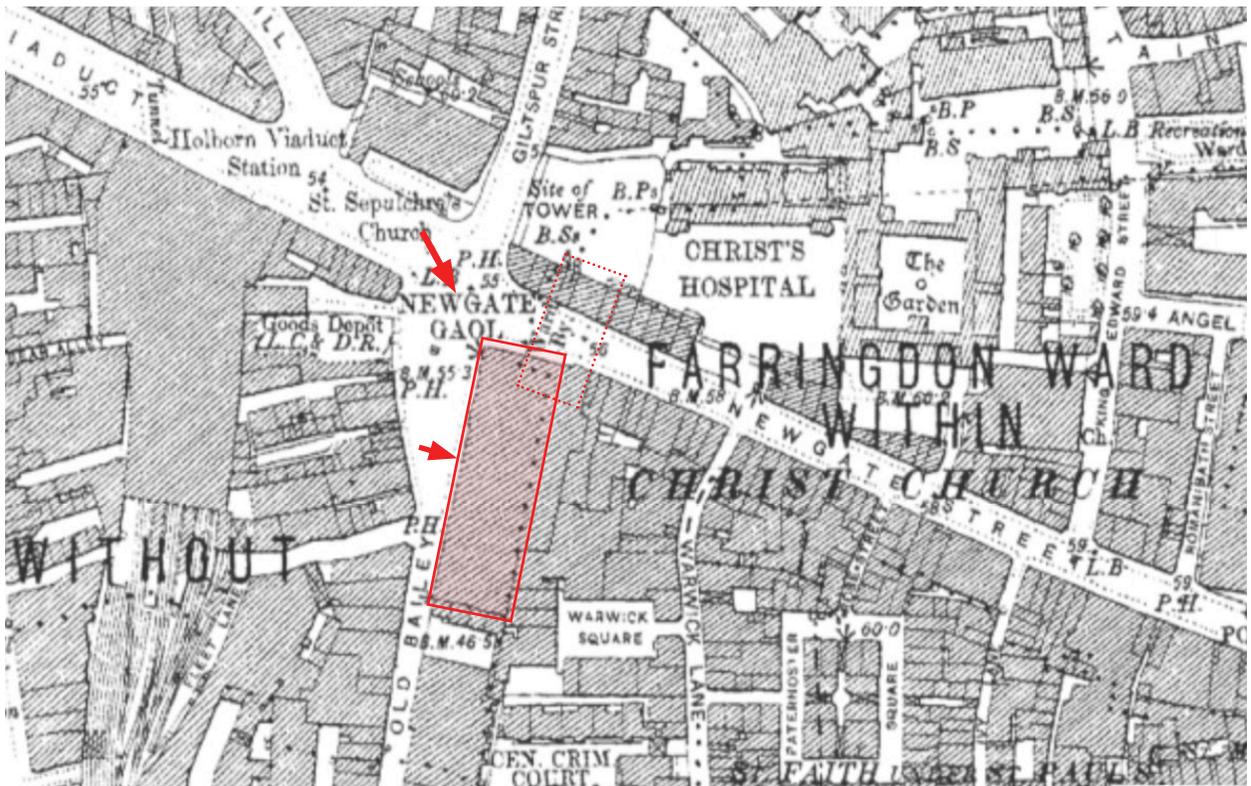
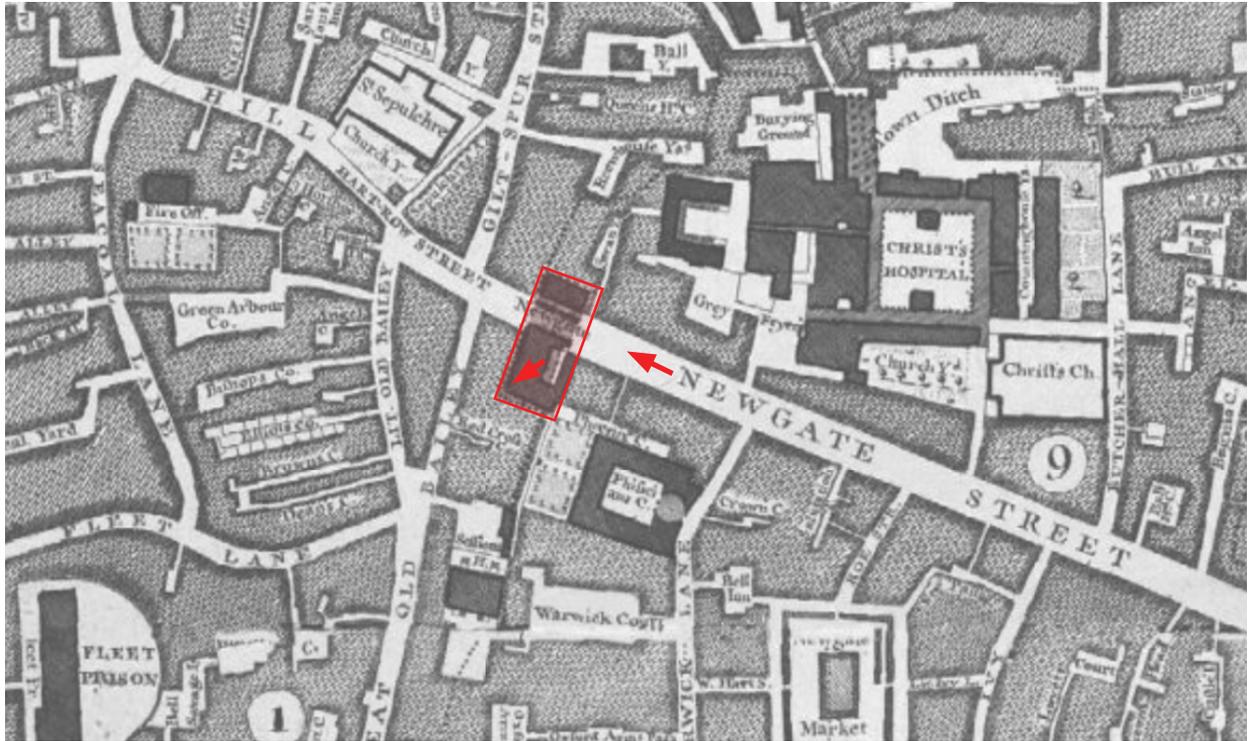


Figure 2.5 Two maps of London, showing location of Newgate Jail
 The arrows indicate the approximate location of POV of previous images (above).

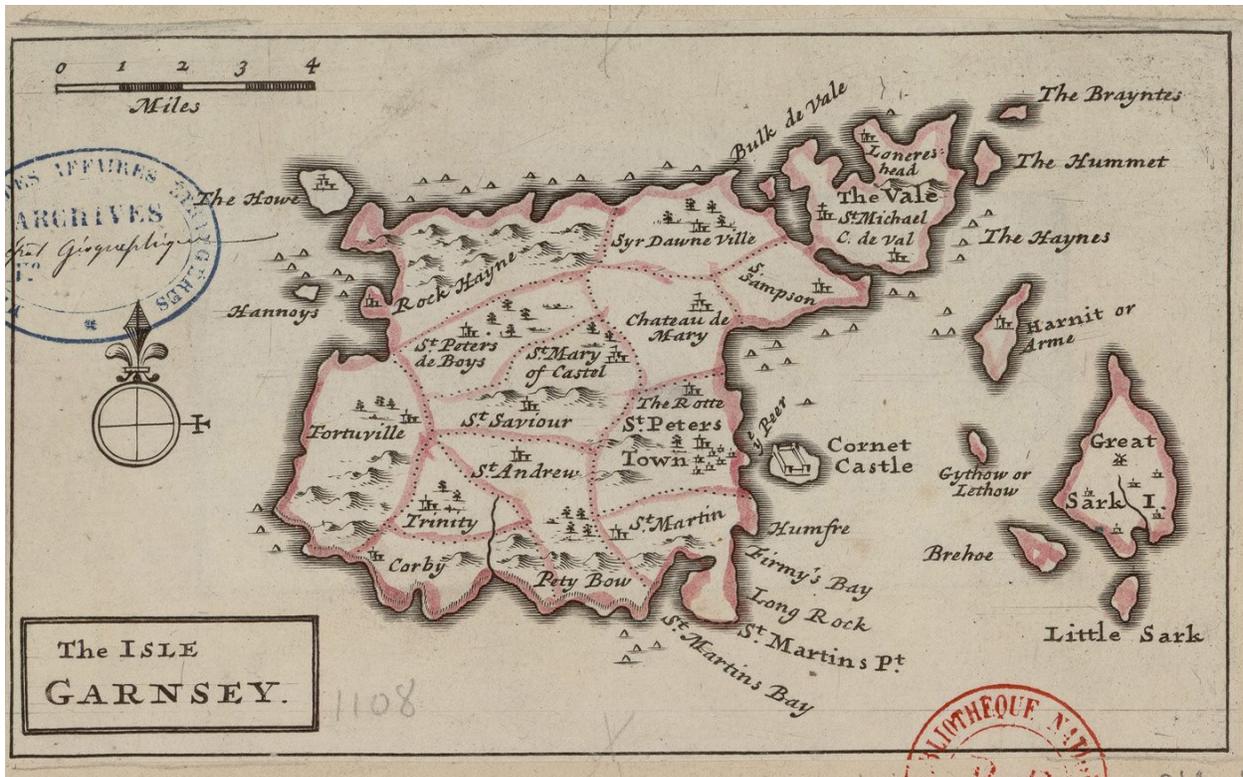


Figure 2.6 Herman Moll, *The Isle Garnsey*, c. late 17th century.

Below, detail showing location of Castle Cornet in relation to St. Peter Port.

Bibliothèque nationale de France, département Cartes et plans, GE DD-2987 (1108)



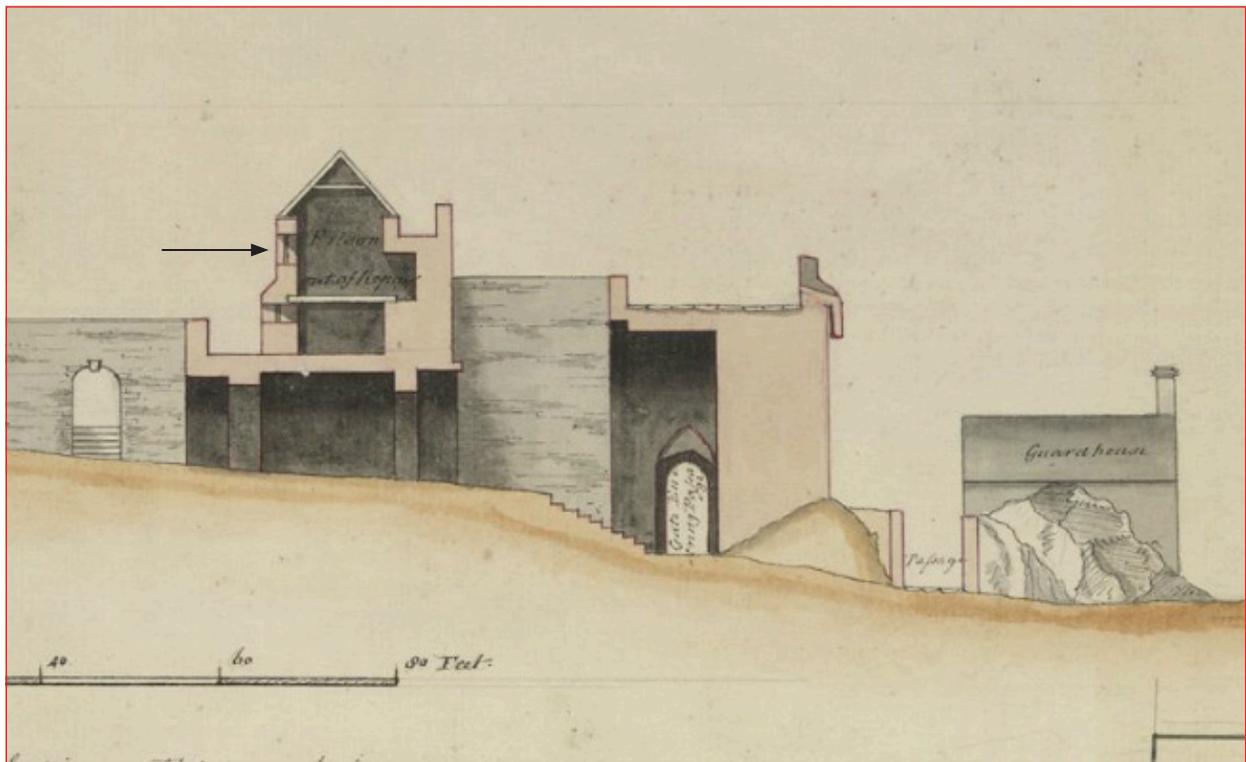
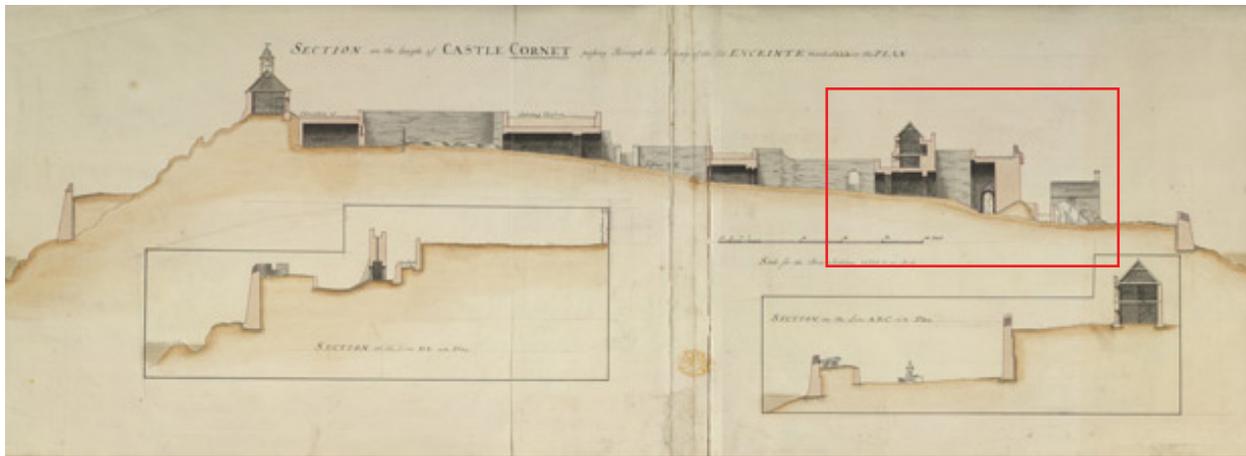


Figure 2.7 W. Romer, Castle Cornet, section, c. 1710

This section drawing, from the early eighteenth century, indicates clearly the castle's prison. The Guardhouse is also shown here, just below the castle wall.

BL K top LV66



Figure 2.8 The jail at Castle Cornet

As Pugh notes, many medieval county jails in England were located within the walls of a castle. Most often, a small hut was built for the purpose in the castle yard. Guernsey's jail at Castle Cornet was no exception. (Pugh 1968, pp. 347-8)

Photograph LHT 5/2015

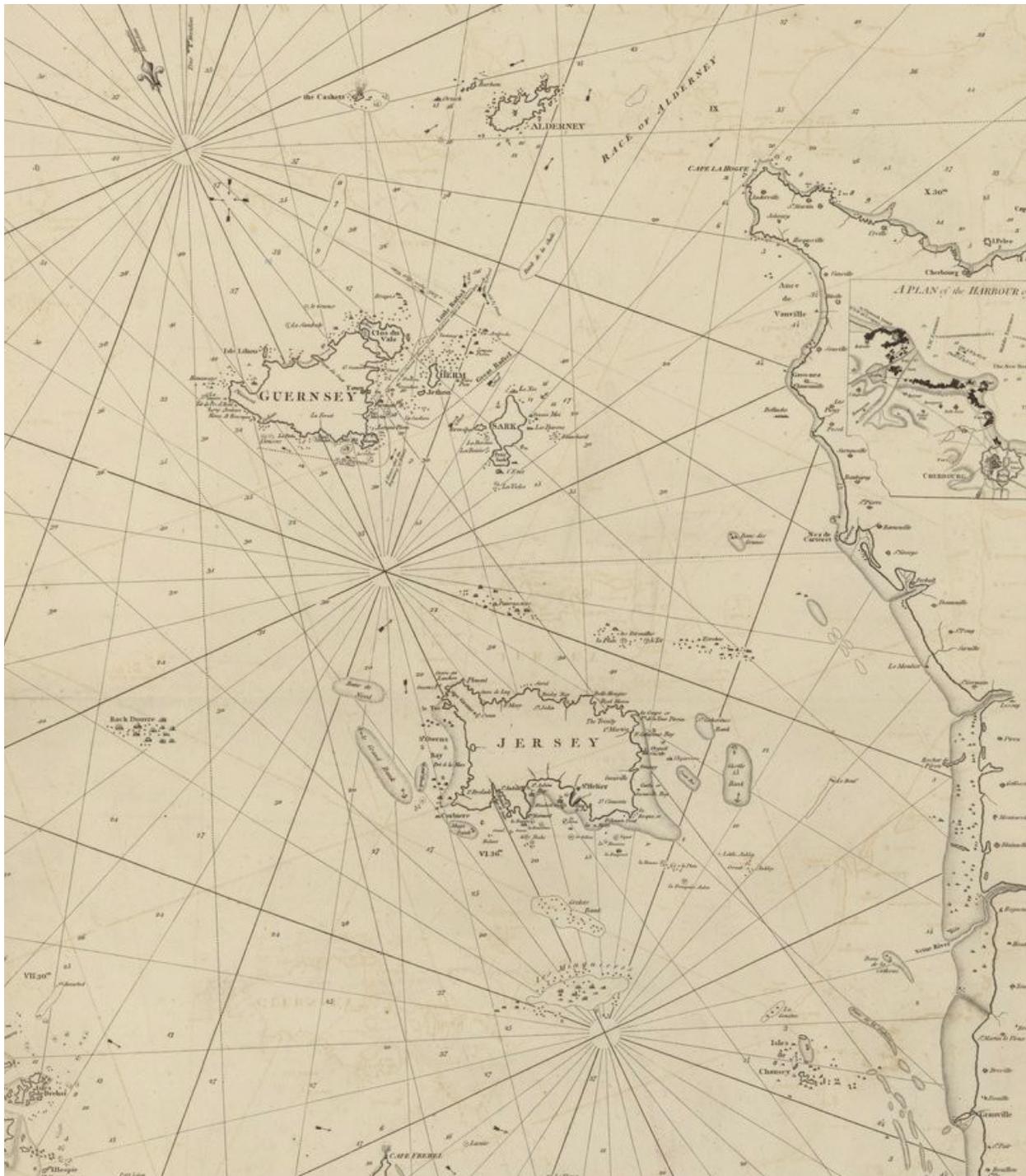


Figure 2.9 John Hamilton Moore, *A new chart of the islands of Guernsey and Jersey with the adjacent coasts of France*, 1793.

Detail, showing the location of Guernsey in relation to the French coast. The Channel Island Bailiwicks of Jersey and Guernsey are the Crown territories closest to continental Europe.

Bibliothèque nationale de France, département Cartes et plans, GESH18PF39DIV2P13



Figure 2.10 Martin Beckman, *Prospect of the Town of St. Peters and Castle Cornet in the Island of Guernsey*, 1694.

Castle Cornet's prominent position at the mouth of St. Peter Port's harbor is visible for a long stretch of Guernsey's quite hilly coast. Here, we can see the relatively small town of St Peter Port at the end of the seventeenth century, especially with regards to the Castle (flying the English flag).

BL Ktop LV 62

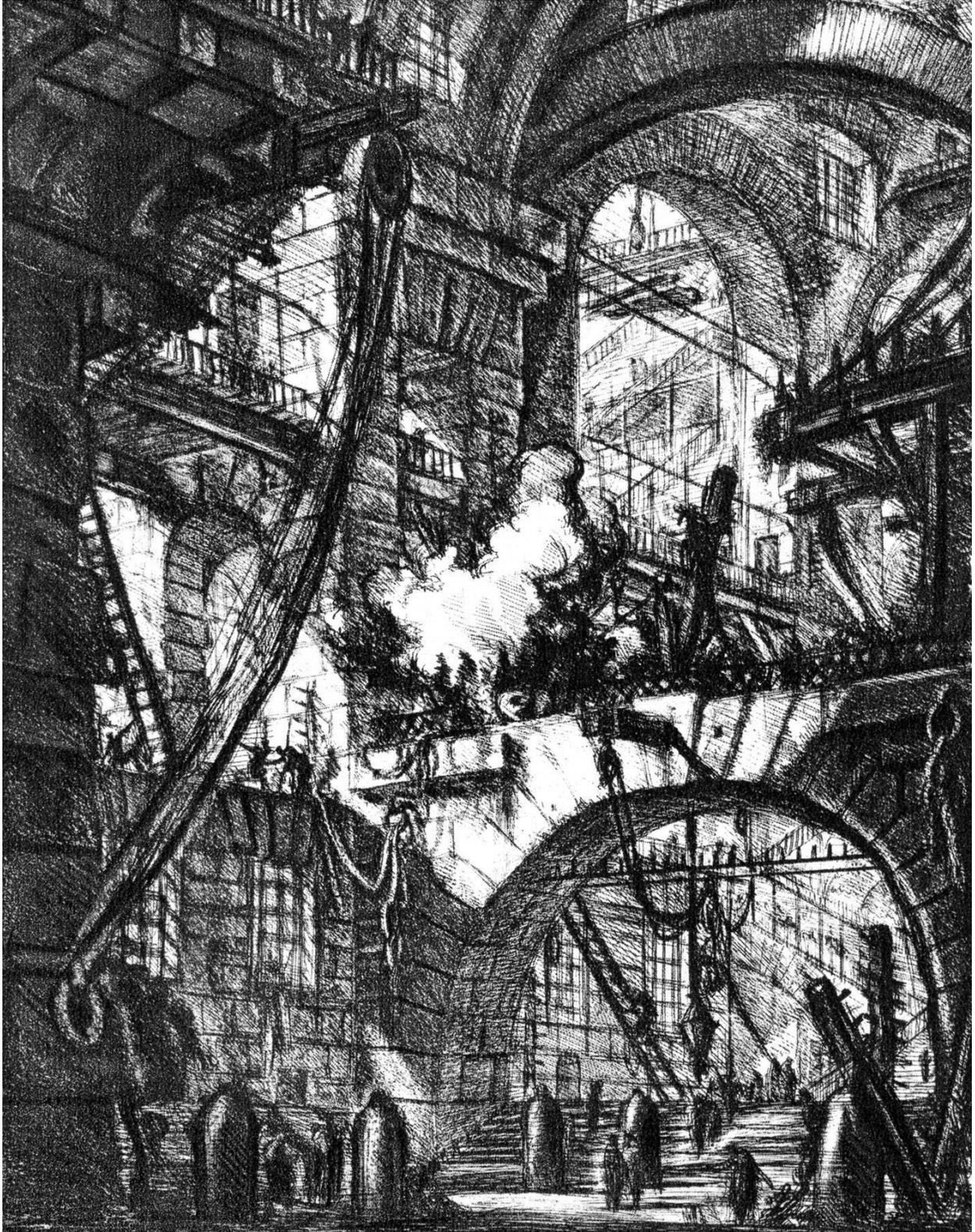


Figure 2.11 Giovanni Battista Piranesi, *Le Carceri d'Invenzione*, Plate VI (second state), 1761

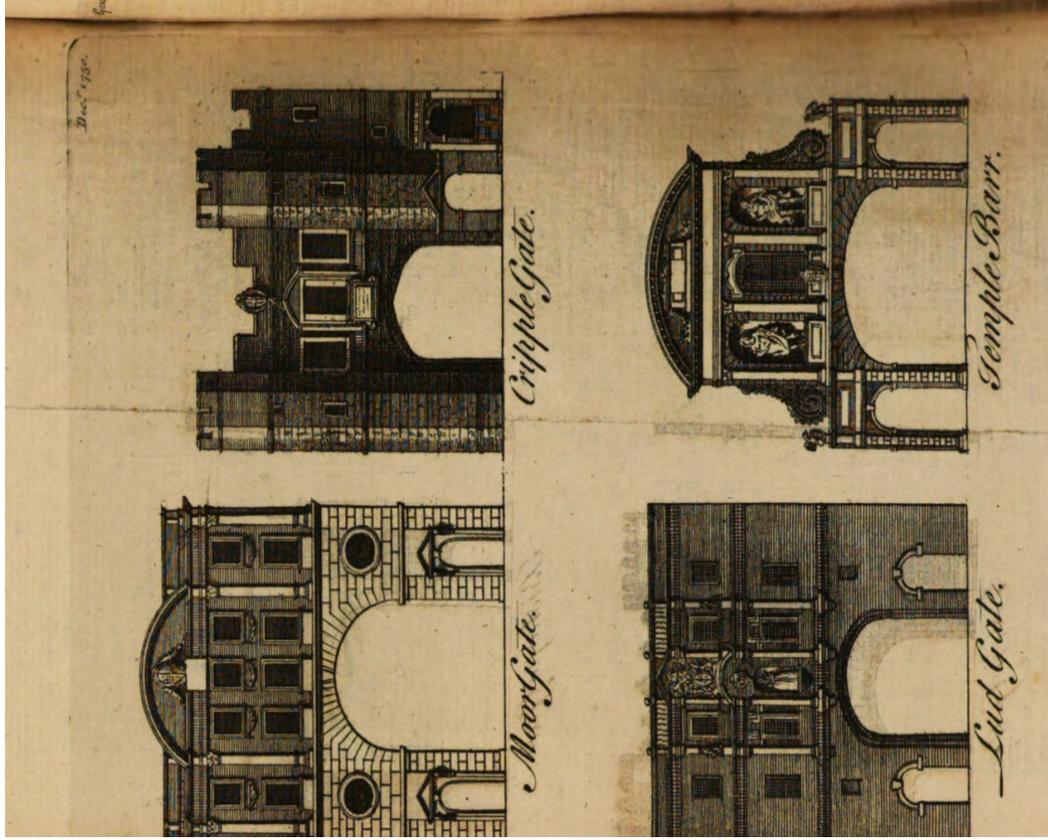
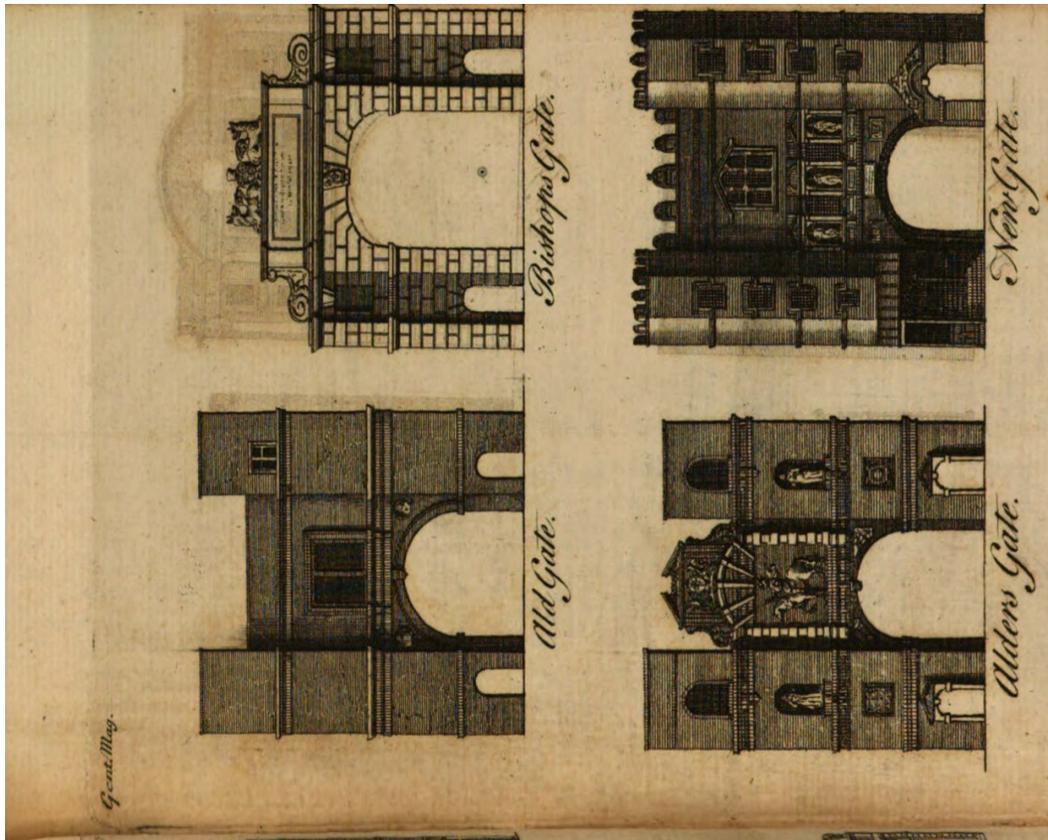


Figure 2.12 The Gates of London, 1750

The Gentleman's Magazine: and historical chronicle, Dec 1750; 20, British Periodicals pg. 588-9



Figure 2.13 Anon., York County Gaol, c. 1701

When Dance began his project for Newgate, the relatively new York County Gaol was one of the few jails to have been purpose-built with architectural intent. It is thought to have been designed not by an architect but by the lawyer William Wakefield, though this is unconfirmed. The new County Gaol was erected in the place of the former garrison of the Castle of York, and the “noble prison for debtors, which does honour to the country” is described in detail by Francis Drake. (Francis Drake, *Eboracum: Or, The History and Antiquities of the City of York, from Its Origin to This Time...*, 1788)

York Castle, Debtors' Prison from N.W., in *An Inventory of the Historical Monuments in City of York, Volume 2, the Defenses*, (London: Her Majesty's Stationery Office, 1972), Plate 16.

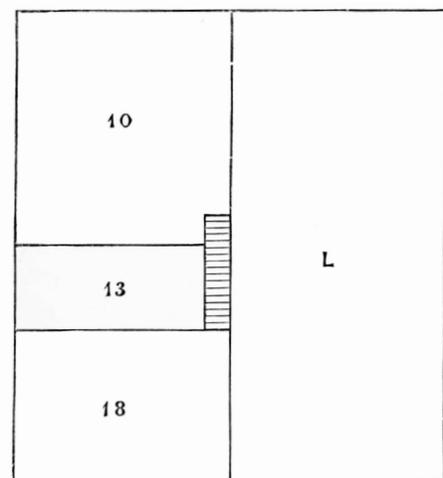
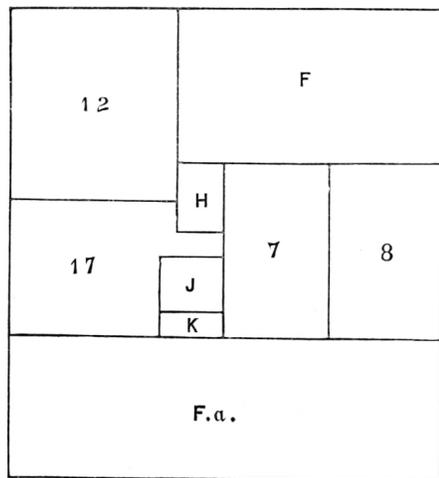
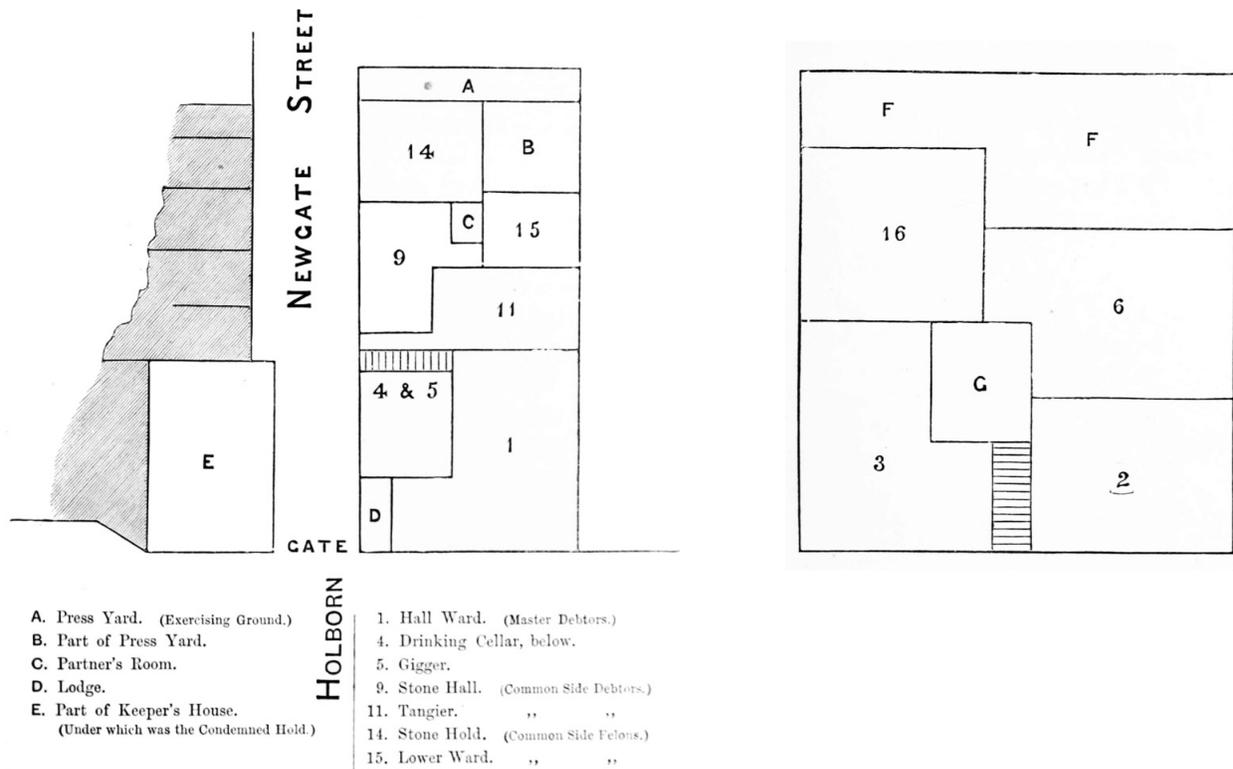


Figure 2.14 Medieval Newgate, plan diagrams

These diagrammatic plan drawings, produced for Arthur Griffith's two-volume *Chronicles of Newgate* (1884), show the interconnected spaces of medieval Newgate.

Arthur Griffiths, *The Chronicles of Newgate*, 1884

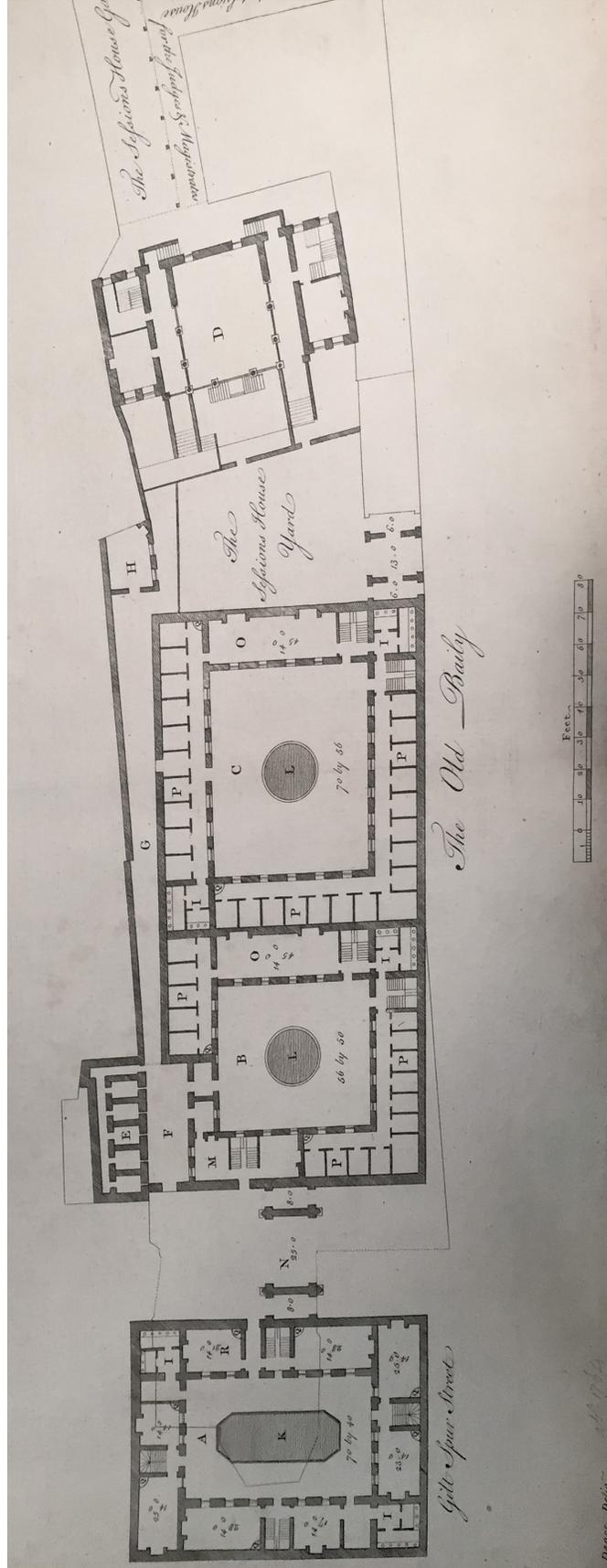
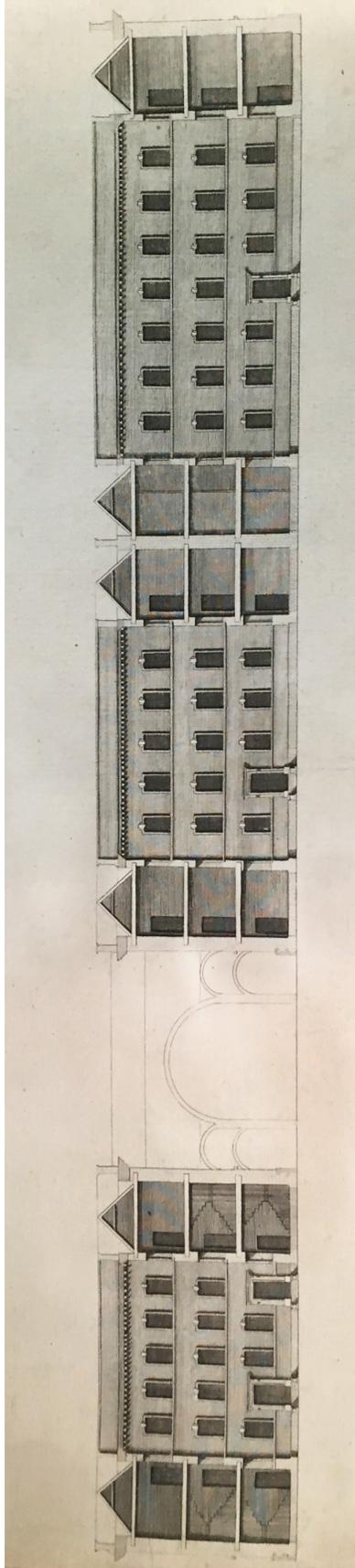


Figure 2.15 George Dance the Elder, project for Newgate Gaol. Section drawing and ground floor plan, 1784.

Soane Museum, Collected drawings and Prints, cat. # 154.86



Figure 2.16 George Dance the Elder, project for Newgate Gaol. Elevation drawing showing detail of gate. Soane Museum, Collected drawings and Prints, cat. # 154.88.

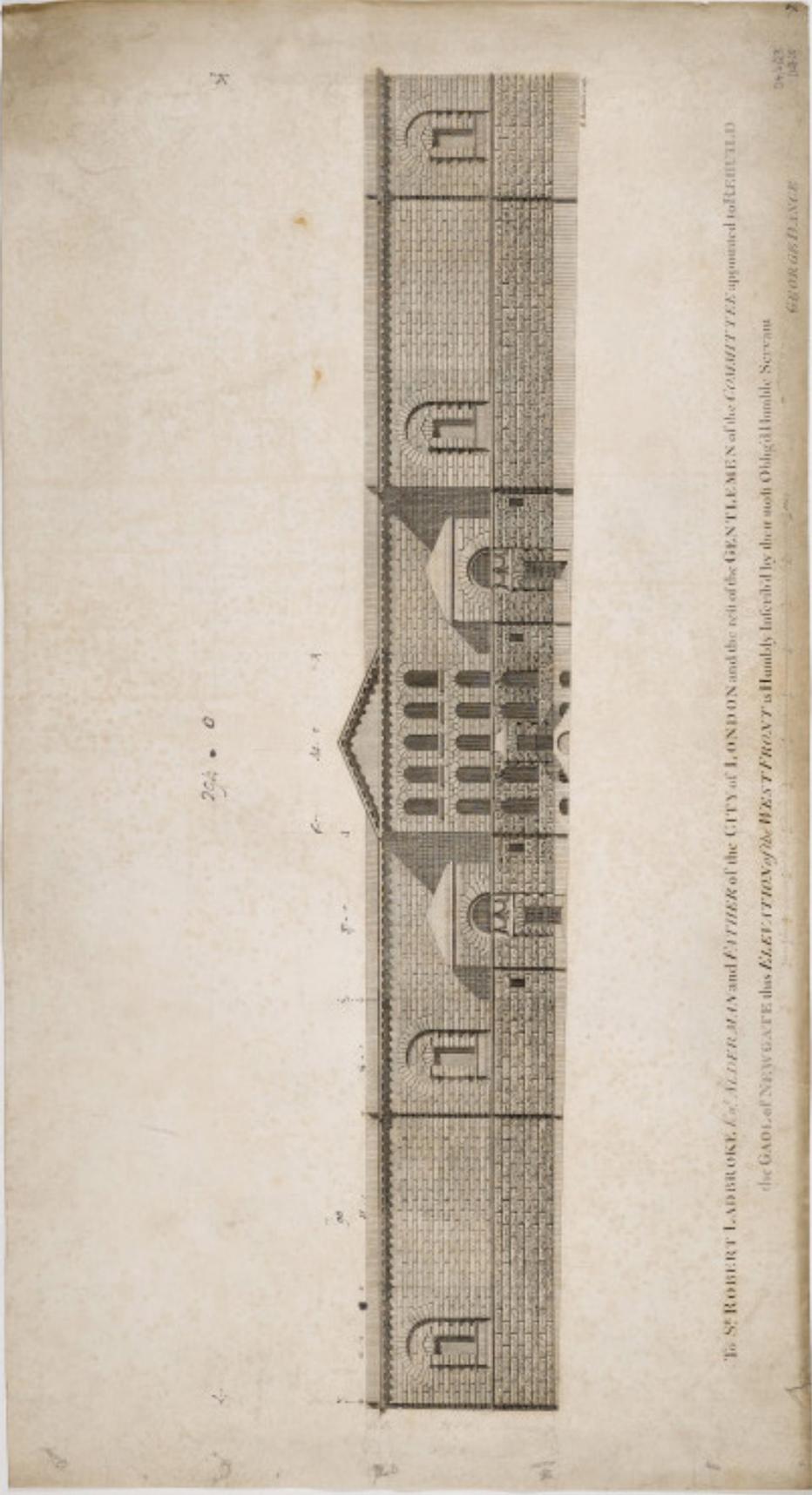


Figure 2.17 George Dance II, Newgate Gaol. Contract drawings, west elevation, 1782

SM, Collected drawings and Prints D4/4/23

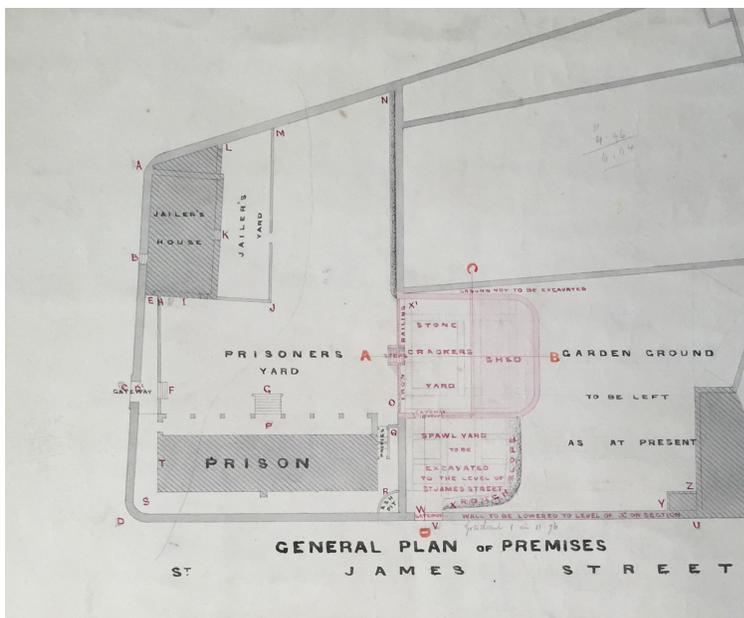


Figure 2.18 Map, St. Peter Port, 1848; and site plan showing prison.

Showing the path between the Royal Court and the jail on Castle Cornet (in red); the new prison is shown in purple.

Guernsey Island Archives

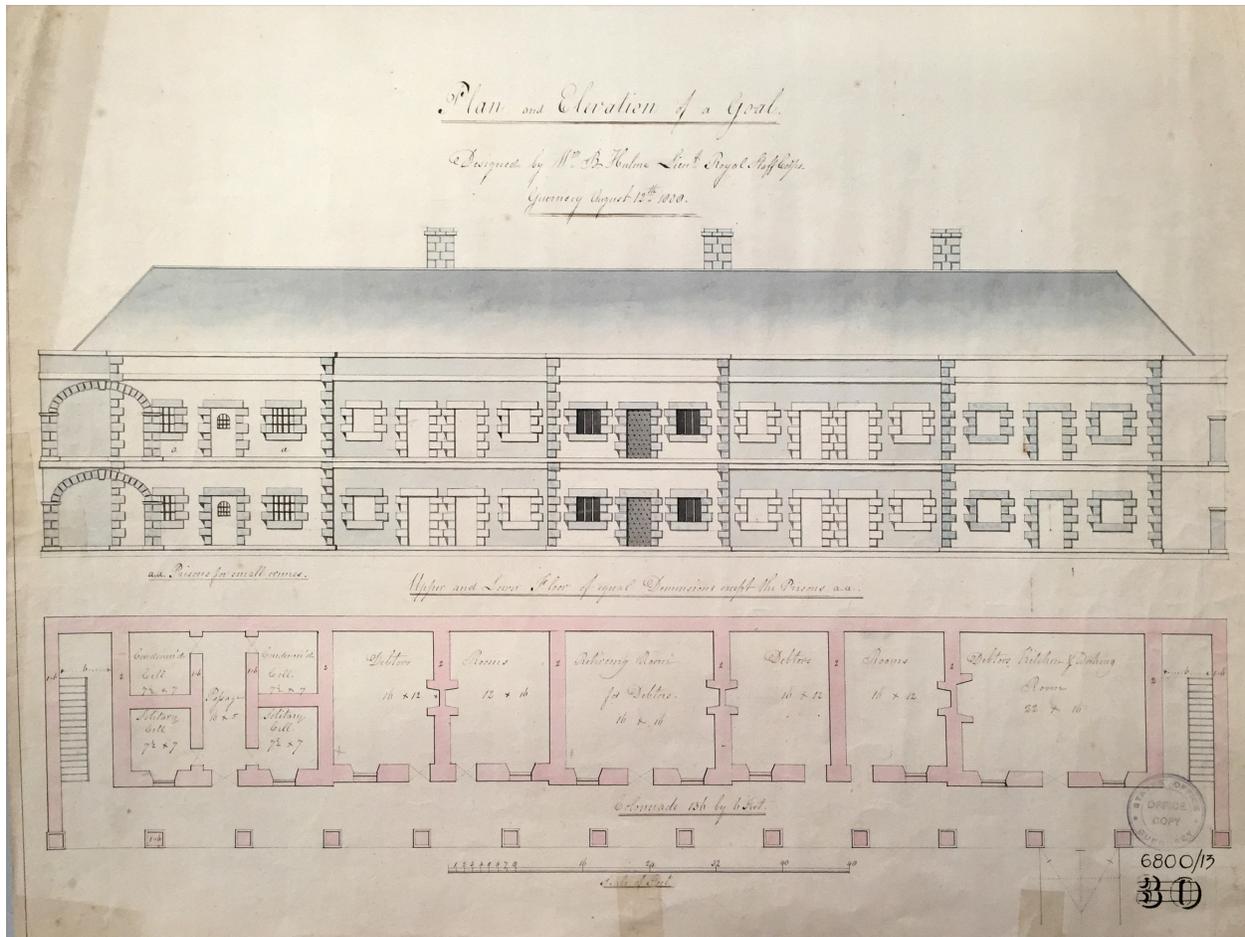


Figure 2.19 William B. Hulme, States Prison, St. Peter Port. Plan and elevation drawings, 1808

These drawings are very close to Guernsey's new prison as built in the town of St. Peter Port (completed in 1810). Interestingly, the elevation is drawn here without its colonnade—perhaps an indication that the ideal image of the prison building is one of enclosure and solidity.

Guernsey Island Archives, 6800/13

D owes P some money. They both live in Surrey County.

P would like the matter resolved by the King's Bench (perhaps he thinks this will give him a better chance to recover his debt).

The King's Bench is located in Westminster Hall, which is in Middlesex County. This court does not have jurisdiction over minor private disputes, such as this one, that concern those not residing in the County.

The King's Bench wouldn't mind hearing the case (perhaps additional revenue would not be unwelcome).



Middlesex

Surrey

P sues by bill for trespass (in Middlesex)

D is now officially in custody of the King's Bench, since he is accused of breaking the King's Peace.

(But D is actually still at home in Surrey)

P sues by bill for the debt, since D is now in the custody of the court.

D is not found (*non est inventus*) in Middlesex.

D is still in custody of the King's Bench, but must be out on bail.

(He's obviously not found in Middlesex. He's been at home in Surrey this whole time)

D is still in custody of the King's Bench, but must be out on bail.

A writ of *latitat et discurrit* (lurks and wanders) is issued to bring D to answer for a personal action; D is summoned to Westminster before the King's Bench.

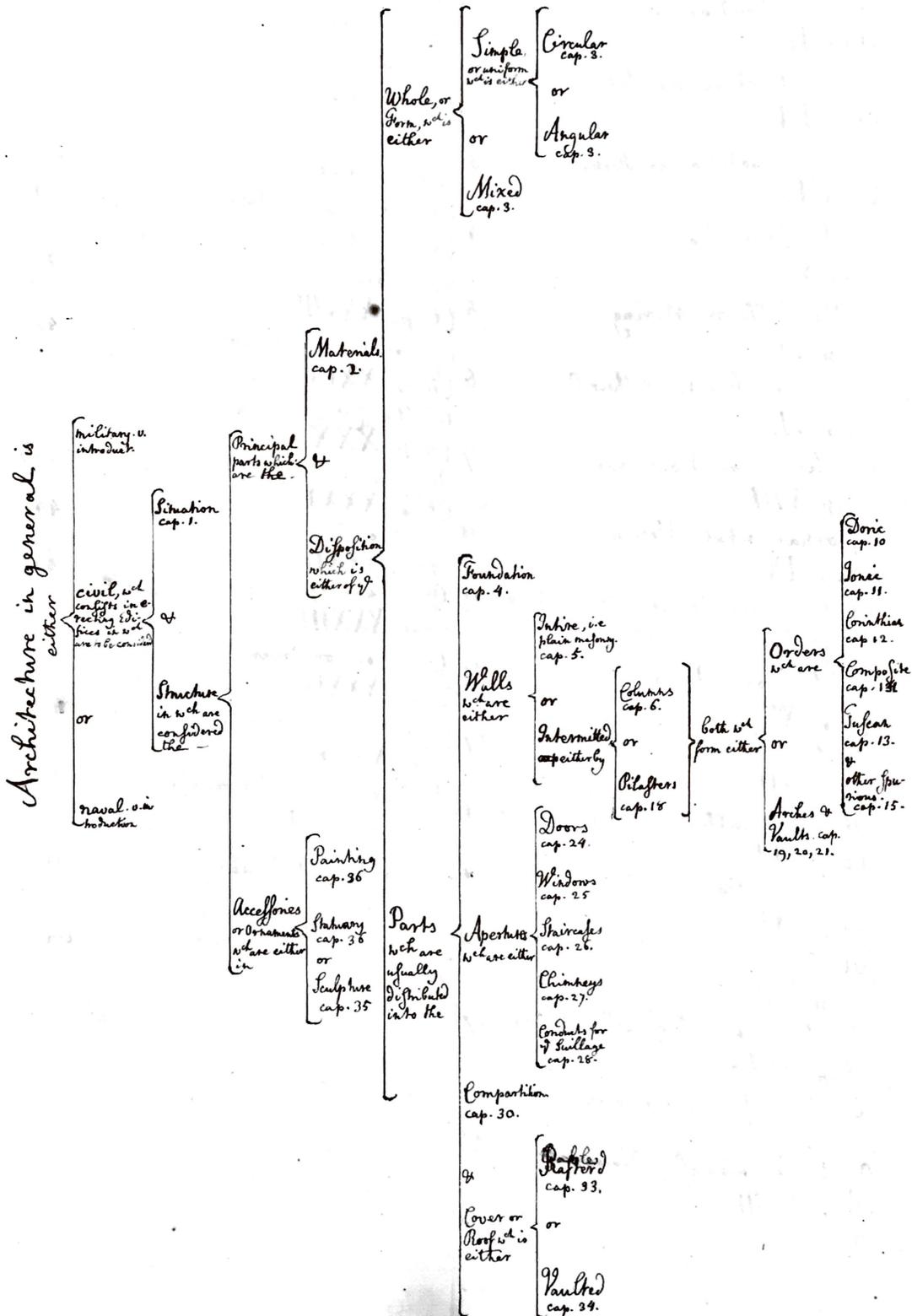
The trespass is discontinued.

(Just kidding! That trespass never happened.)

D must now answer against a claim of private debt owed to P, at the King's Bench.

Figure 3.1 The Middlesex Bill: a fictitious chain of events (diagram)

Analysis of this Abridgement.



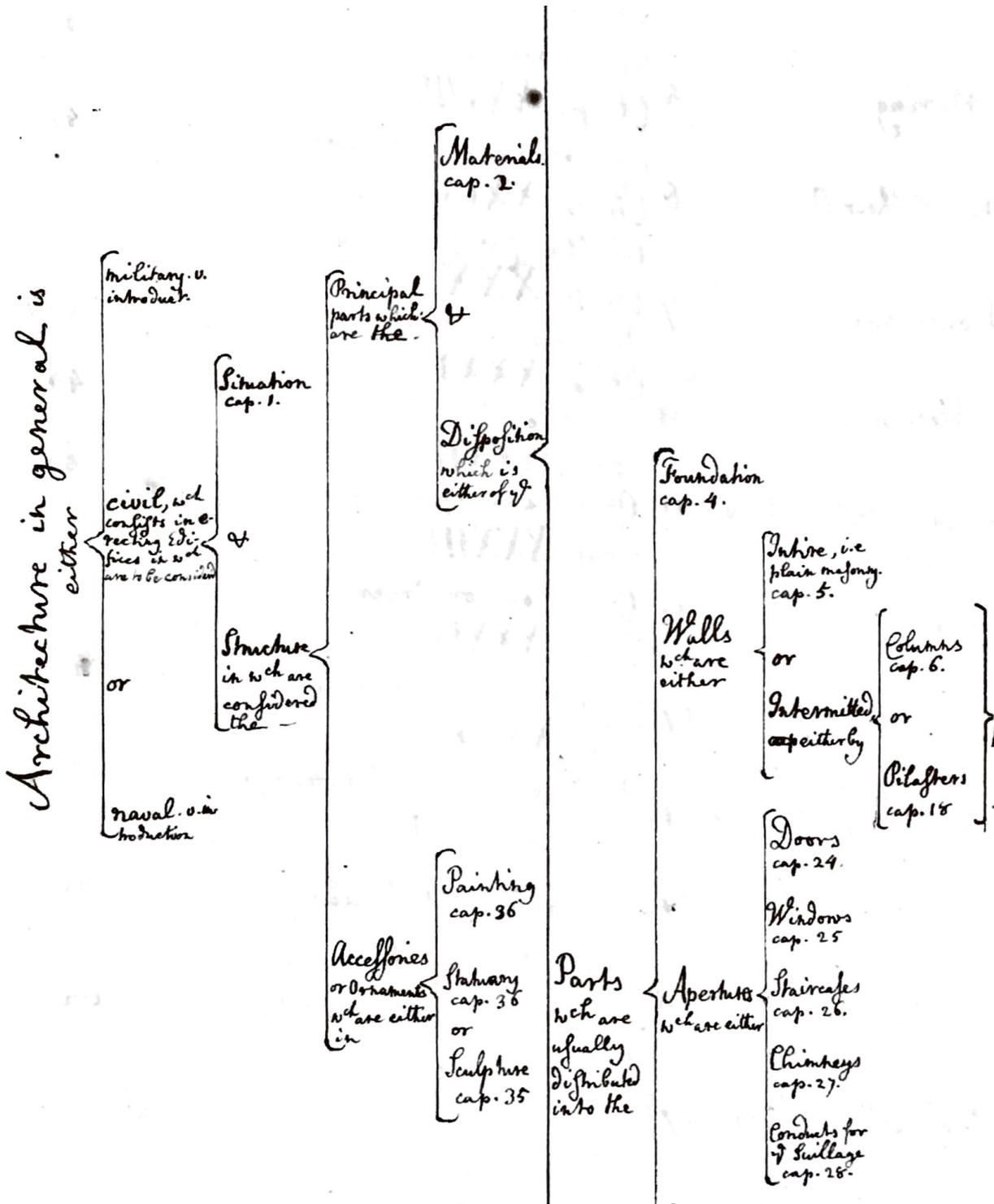


Figure 3.2 William Blackstone, "Analysis of this Abridgment," *An Abridgment of Architecture*, 1743

Here, detail; previous page full analysis.

Getty Research Library, Special Collections, MS 89022

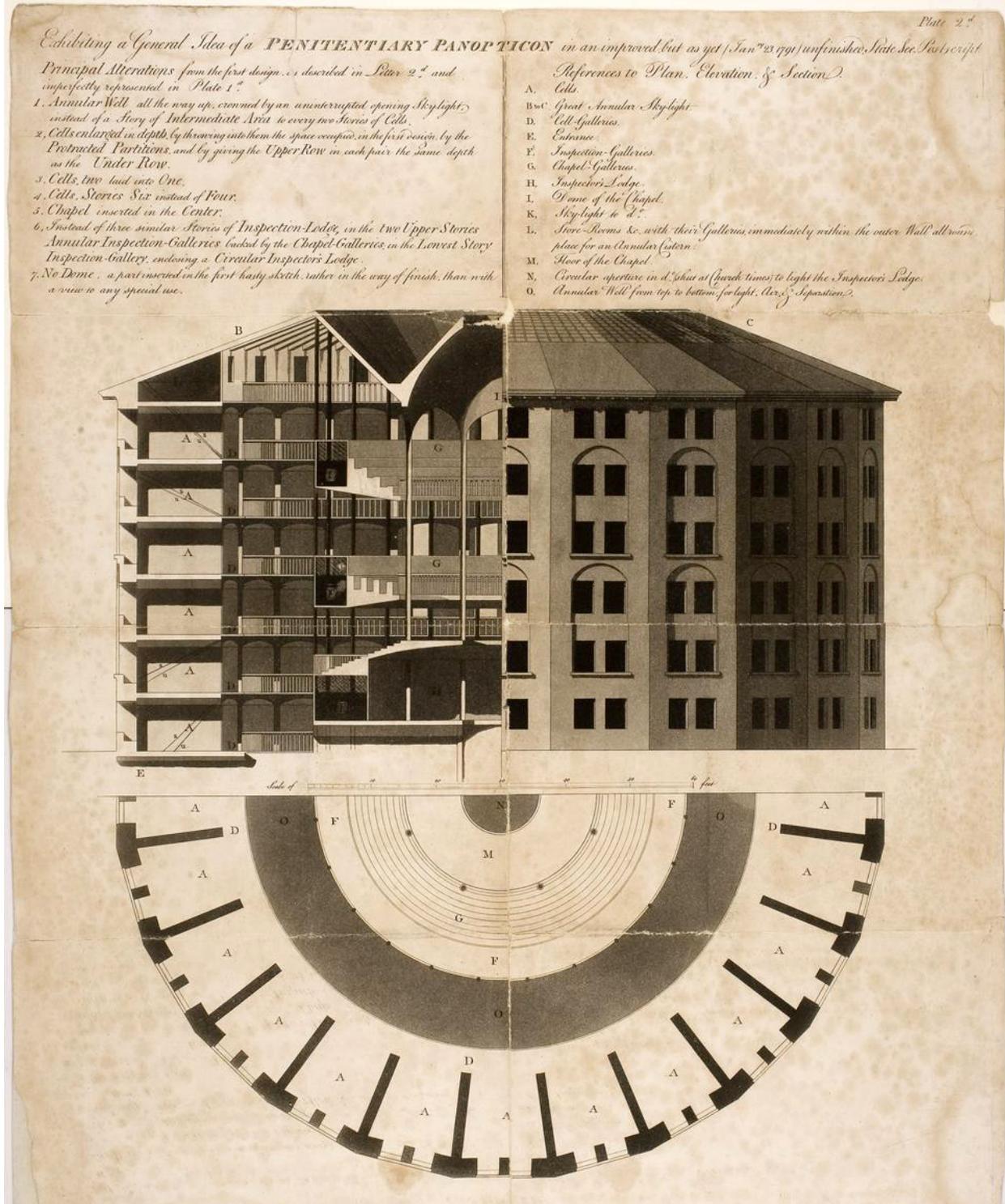


Figure 3.3 Willey Reveley, *Section of the Panopticon or House of Inspection*, 1791

This drawing, which shows plan, section and elevation of the Panopticon, is very close to the one as published by Bentham to accompany his writings.

UCL Bentham Manuscripts Box 115-44

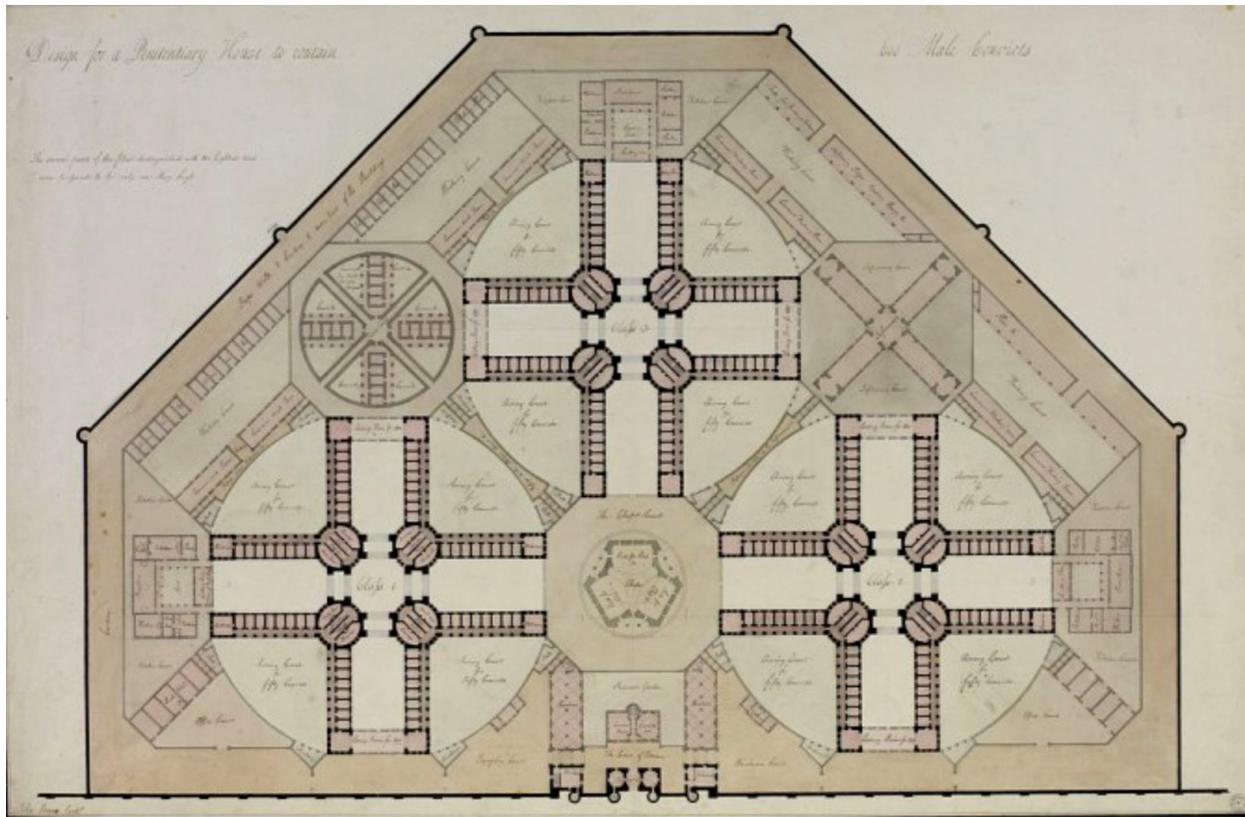


Figure 4.1 Sir John Soane, *Design for a Penitentiary House to contain 600 Male Convicts*, 1782

Ground floor plan showing arrangement of cell blocks (3 classes); workrooms; chapel; governor's house; washrooms; eating rooms; and dungeons.

Sir John Soane Museum, SM (13) 13/1/16



(previous page)

Figure 4.2 Sir John Soane, J.M. Gandy, *Competition Design for a Penitentiary House*, 1799

Sir John Soane Museum, SM (13) 13/1/19

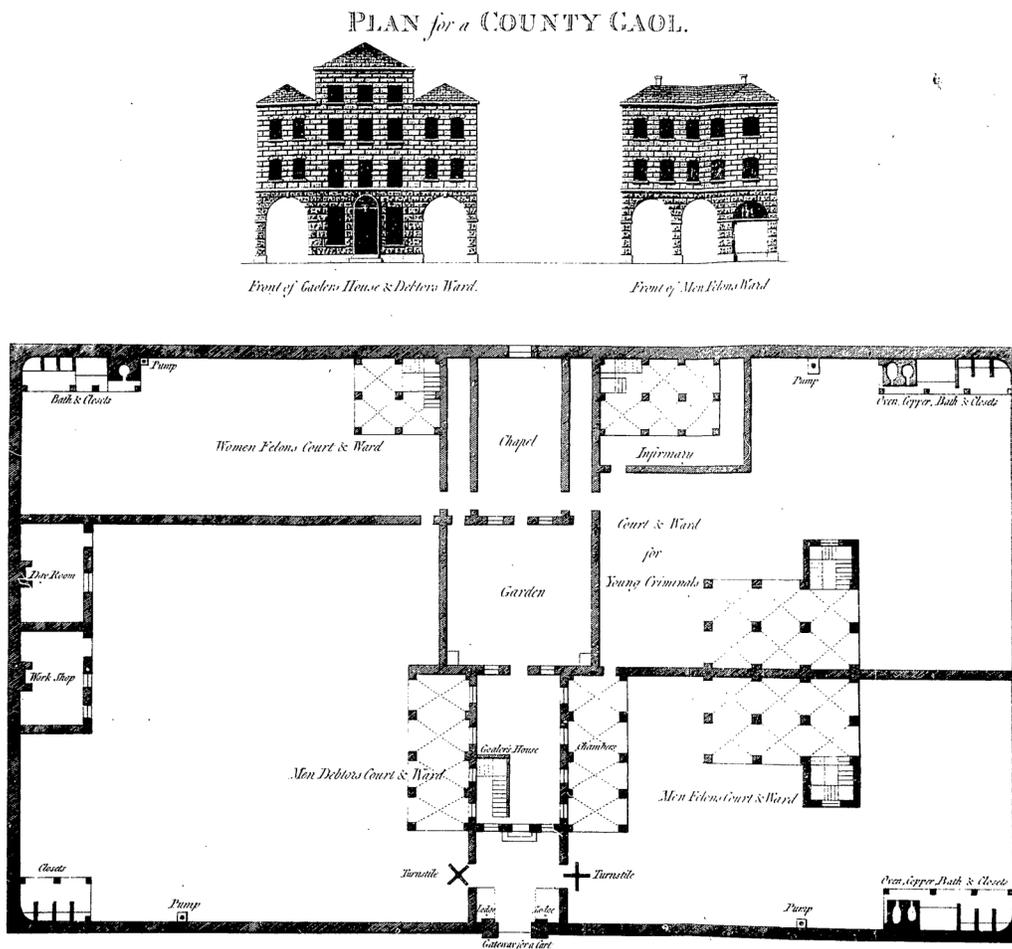


Figure 4.3 John Howard, *Plan for a County Gaol*, 1780

The state of the prisons in England and Wales, with preliminary observations, and an account of some foreign prisons and hospitals. The second edition, 1780. p. 35

