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## Neoliberal Penalty: A Brief Genealogy

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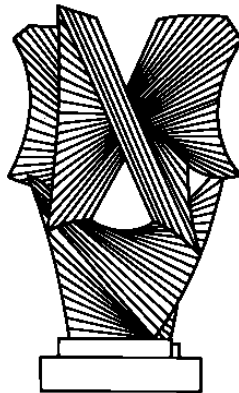
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## NEOLIBERAL PENALTY: A BRIEF GENEALOGY

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## Neoliberal Penalty: A Brief Genealogy

Bernard E. Harcourt

*The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the “market,” explicit or implicit—in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange... When transaction costs are low, the market is, virtually by definition, the most efficient method of allocating resources. Attempts to bypass the market will therefore be discouraged by a legal system bent on promoting efficiency.*

Richard Posner (1985)

*The market is the best mechanism ever invented for efficiently allocating resources to maximize production... I also think that there is a connection between the freedom of the marketplace and freedom more generally.*

Barack C

The turn of the twenty-first century witnessed important shifts in punishment in the United States and other western industrialized nations. The most shocking and graphic trend, in the United States at least, is mass incarceration—the exponential rise in the number and rate of prisoners in state and federal penitentiaries and in county jails. After fifty years of relative stability, the rate of incarceration in the United States began climbing exponentially in 1973 to the point where, today, one out of a hundred adults is behind bars. Similar though more attenuated trends were observed in Italy, France, the United Kingdom, and other European countries during the late twentieth and early twenty-first centuries.

Another stunning shift in the United States is the turn to actuarial methods and instruments—to risk assessment tools to predict the success or failure of inmates on parole, to assess the potential for future dangerousness, and to identify violent sexual offenders. Canada too began experimenting with actuarial instruments and the logic of actuarial prediction—though not necessarily the instruments themselves—penetrated a number of European countries, such as France, which warmly embraced preventative detention (*réention de sûreté*) in 2007.

The United States, Canada, and European countries also experienced—at different times and to different extents—the increased use of order-maintenance policing strategies, such as zero tolerance

and broken windows policing; harsher treatment of juvenile offenders; increased use of video surveillance, biometric data collection, data mining, and information gathering through initiatives such as the “total awareness program” in the United States, CCTV video surveillance in the United Kingdom, and DNA database collection in England and in France; and harsher sentencing practices, including the adoption of mandatory minimum sentences, “three-strikes laws,” drug and gun enhancements, and lengthier fixed sentencing guidelines.

In many of these developments, the United States has been a net exporter of ideas and technologies, such as broken windows policing and mandatory minimum sentencing. But not in all. The United Kingdom has been a leader in the use of CCTV video surveillance and the collection of DNA; France was an early innovator in the field of paramilitary anti-riot security forces; and Italy has been at the forefront of bunker-style judicial proceedings. The leading actuarial instrument used in the United States—the “Level of Services Inventory-Revised” (LSI-R)—was actually invented and developed by Canadian researchers, and the same is true of the Hare Psychopathy Checklist-Revised (PCL-R).

#### I.

It is tempting to view these developments as evidence of something new that emerged in the mid-1970s—of a new culture of control, a new penology, or a new turn to biopower. The shocking graph of American incarceration rates—with its exponential curve beginning in 1973—is seared in our collective imagination, and, along with the simultaneous collapse of the rehabilitative model and the enactment of law-and-order measures around that time, it militates in favor of an explanation that would coincide, temporally, with the early to mid 1970s.

But it would be a mistake to place too much emphasis on that pivotal moment. Order-maintenance, after all, is a disciplinary practice that traces back at least to the nineteenth century (Foucault 2004a:47; Harcourt 2001:160). Actuarial tools were used to predict deviance in the early 1930s in the United States (Harcourt 2007a:59) and they too trace back to positivist criminology and the *défense sociale* movement of late nineteenth century Europe (Tulkens 1986). Biometric-data collection and its use have tragic antecedents in the early twentieth century in Europe and North America—with forced sterilization, eugenics, and phrenology (King 1999). And even mass incarceration is by no means unprecedented. The fact is, the United States institutionalized mental health patients in all sorts of closed facilities in the 1930s, 40s, and 50s, at similar rates to imprisonment today (Harcourt 2006; 2007b). Those trends are equally shocking:

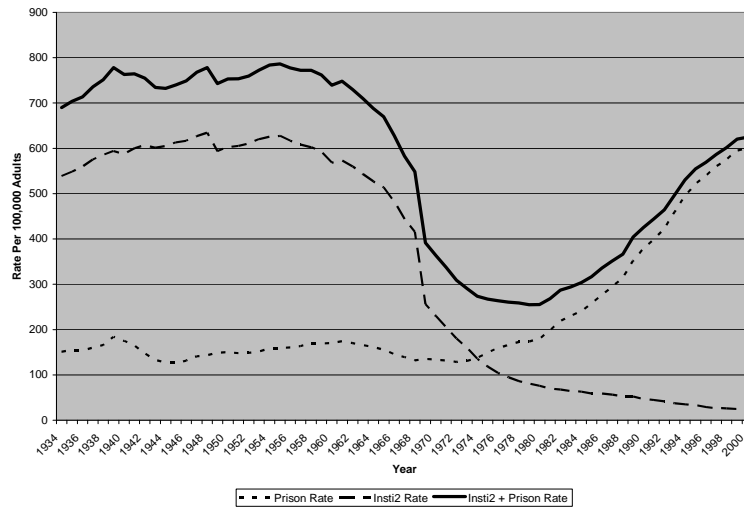


Figure: Rates of Institutionalization for Residents in All Mental Institutions and State and Federal Prisons in the United States (per 100,000 adults)

In the period 1935 to 1963, the United States consistently institutionalized in mental institutions and prisons at rates above 700 per 100,000 adults—with highs of 778 in 1939 and 786 in 1955. And there were a panoply of mental institutions at mid-century, including not only state and county public mental hospitals, but public and private institutions for “mental defectives and epileptics,” public and private institutions for “the mentally retarded,” psychiatric wards in veterans’ hospitals, “psychopathic” hospitals, as well as private mental hospitals. The cumulative rate of detention was at least as high as it is today.<sup>1</sup>

It is important, then, to step back and explore the arc of penalty over a longer course. To relate mass incarceration and these recent developments to their earlier kin at the turn of the twentieth century and to place them within a larger historical framework spanning several centuries—not just decades. What that larger perspective reveals is that the pattern of confinement and control in the past century has been facilitated by the emergence and gradual dominance of “neoliberal penalty.” By neoliberal penalty, I have in mind a form of rationality in which the penal sphere is pushed outside political economy and serves the function of a boundary: the penal sanction is marked off from the dominant logic of classical economics as the only space where order is legitimately enforced by the state. On this view, the bulk of human interaction—which consists of economic exchange—is viewed as voluntary, compensated, orderly, and tending toward the common good; the penal sphere is the outer bound, where the government can legitimately interfere, there and there alone.

<sup>1</sup> The rates in the figure above do not include jail populations because data on jail populations are extremely sparse and not reliably measured until 1970; but nevertheless, when they are included in the overall national numbers, the trend remains the same: only recently does the prison revolution of the 1980s and 1990s approach the earlier levels of aggregated institutionalization from the 1940s and 50s (Harcourt 2007b).

This discourse of neoliberal penalty—born in the eighteenth century, nurtured in the nineteenth century, and today in full fruition—facilitates the growth of the carceral sphere. Neoliberal penalty makes it easier to resist government intervention in the marketplace and to embrace criminalizing any and all deviations from the market. It facilitates passing new criminal statutes and wielding the penal sanction more liberally *because that is where administration is necessary, that is where the state can legitimately act, that is the proper sphere of governing*. By marginalizing and pushing punishment to the outskirts of the market, neoliberal penalty unleashes the state on the carceral sphere.

This vision of an ordered market delimited by the penal sanction dominates the public imagination today and has led to a fundamental separation between the natural order and efficiency of market exchange and the need for decisive governmental intervention in the penal domain. The criminal sanction tends to be viewed today as the exceptional extremity to an otherwise unregulated orderly market, where there—and *there alone*—the state must intervene to calibrate the calculations of rational actors. It is this precise combination—order in the market and government at the border—that helps shape the modern neoliberal vision of penalty. It is precisely this view that is reflected in the writings of Richard Posner, eloquently formulated in the simple but blunt epigraph quoted above—in his idea that the major function of the criminal sanction in a capitalist society is to prevent market bypassing (Posner 1985:1195). In this passage, the idea of market efficiency leads to a penal theory where the only legitimate space for the government to intervene is in punishment. Elsewhere, it must leave alone voluntary, compensated exchanges—as if the space of the market existed somehow independently of the policing, as if the two domains were distinct.

These ideas of market efficiency and of the penal exception trace back, remarkably, to earlier liberal thought. The first—the idea of naturally efficient markets—traces directly to the birth, emergence, and triumph of the idea of natural order in economics. It traces to the Physiocratic thought of François Quesnay, the Marquis de Mirabeau, Dupont de Nemours, Le Mercier de la Rivière, and other early French economists during the period 1756 to 1767. Their writings were highly influential in France and abroad, and it is precisely their notion of natural order that metamorphosed, over time, into the modern economic notion of market efficiency that is at the heart of neoliberal thought.

The birth of natural order in the writings of the Physiocrats also led seamlessly to the expansion of the penal sphere as the only legitimate space for governmental administration and intervention. The idea of orderliness matured into a political theory that combined inactivity in commercial matters with centralized, authoritarian policing elsewhere—what the Physiocrats referred to as the doctrine of “legal despotism.” Under the rubric of legal despotism, François Quesnay and Mercier de la Rivière formulated a political ideal of complete governmental inactivity in *all but* the penal sphere. Given the existence of natural laws governing commerce, the *économistes* envisaged no role for the legislature *except* to criminalize and punish severely those who deviate from the natural order.

Natural order in the universe implied legal despotism in human affairs. The Physiocrats embraced this doctrine in 1767 with the publication that same year of both Quesnay’s essay,

*Despotisme de la Chine*, and Le Mercier's book, *L'Ordre naturel et essentiel des sociétés politiques*. Their economic writings led them, in a syllogistic manner, to the conclusion that natural order in the autonomous economic sphere demands both that there be no human intervention (in terms of positive law) in the economic realm and that positive law limit itself to punishing deviance from the natural law, in other words that it limit itself to punishing theft and violence. The logic proceeded as follows:

1. The economic realm—agricultural and commercial—is governed by fundamental natural laws that inherently promote the best interests of mankind.
2. Positive, man-made laws can at best simply mirror the natural order and instantiate natural law. In the economic domain, positive law usually deviates from natural law, producing disorder rather than order.
3. Therefore, positive law should not extend to the domain of natural laws, or, as Quesnay stated, “Positive legislation should therefore not reach the domain of physical laws” (Quesnay 2005:1017). Precisely for this reason, there is no need for a separate legislature. All law-making power should be centralized in a unified executive—a legal despot—who learns and directly implements the laws of nature.
4. There are, however, some men whose passions are out of order—whose passions, Quesnay wrote, are “déréglées” (Quesnay 2005:1017)—and who fail to appreciate and follow the fundamental laws of nature.
5. The only legitimate object of positive man-made laws, then, is to punish severely those men whose passions are out of order in order to protect society from these thieves and derelicts—“des voleurs et des méchants,” as Quesnay would write (Quesnay 2005:1017).

The notion of natural order does all the work in this logical argument, and it leads inexorably to a penal sphere that is, on the one hand, marginalized but, on the other hand, unleashed and allowed to expand without any limitation. Since some men's passions are out of order and these men cannot appreciate the natural order, the legal despot has full and unlimited discretion to repress and punish. Man-made positive law serves only one legitimate function: to punish those who violate the natural order, who are disordered, who do not respect the laws of nature. Natural order went hand-in-hand with “legal despotism” in eighteenth century Physiocratic thought—in the very same way that market efficiency today goes hand-in-hand with neoliberal penalty.

## II.

Loïc Wacquant has made a significant contribution by tying our recent developments in penality to the larger issues of neoliberalism and to the regulation of the poor in his important essay in this issue, *Crafting the Neoliberal State: Workfare, Prisonfare and Social Insecurity*. Wacquant frames his intervention in relation to the insightful writings of Frances Fox Piven and David Harvey, and, at least in



part, in opposition to Michel Foucault's notion of discipline. I would not be so quick, however, to dismiss Foucault. The place to look for guidance in Foucault's work is not in his magisterial *Discipline and Punish* and the notion of discipline that he developed there, but instead in Foucault's 1978 and 1979 lectures at the Collège de France—in *Sécurité, Population, Territoire* (2004a) and *Naissance de la biopolitique* (2004b). In those lectures, Foucault explored the more recent penal manifestations of the late 1970s—the management of large carceral populations—through a different paradigm than discipline, one that he called *sécurité* and later renamed *gouvernementalité* (Foucault 2004a:111). Foucault began to explore the concept of *sécurité* as a way to understand the shift in our penal practices away from the treatment and reform of the individual and toward the management of large prison populations. Not entirely surprisingly, those lectures on *sécurité* and biopolitics would become, in truth, lectures on neoliberalism (2004b:23, 25).

In this essay, I would like to use the term “neoliberalism” to get at a larger arc of political and social theory that spans several centuries. The term itself—like most terms—is deeply contested, even among those who carefully study the concept (Campbell and Pedersen 2001:270). I will use the term here to capture at least three specific dimensions. The first represents a chronological dimension. It distinguishes twentieth century thinkers such as Friedrich Hayek, Milton Friedman, and George Stigler from early liberal thinkers such as Adam Smith and François Quesnay. The second dimension is more “ideological.” Early liberal thinkers had a set of ideas that had not been put to the test; they were, in a sense, more utopian or idealist. Contemporary neoliberals come after a lot of experimentation and some history, including the Great Depression, the New Deal, and the 2008 financial collapse. In this sense, contemporary neoliberalism has a more pronounced ideological element because it often minimizes historical market failure. The third dimension has to do with conviction or faith: neoliberalism here is understood as the belief that we actually live in a free market system in the United States today and that this system has triumphed. It is the belief that the early European markets of the eighteenth century were completely and excessively regulated and that those of the United States today are free.

Overall, then, I am employing the term neoliberal in a slightly larger sense than some of the more critical writings on neoliberalism which tend to focus more heavily on the period following 1970—referring to the period before that as “embedded liberalism”—and especially on the rise of Ronald Reagan and Margaret Thatcher, on the wave of privatization that ensued, and on the “Washington Consensus” that followed in the 1990s (Harvey 2005:13, 11; Duménil and Lévy 2004:1, 205-6, 211; Peck and Tickell 2002:33, 37). I am also trying to distinguish neoliberalism from globalization—with which it is too often confounded (Peck and Tickell 2002:35)—as well as “transnational neoliberalisms” (Peck 2004:394).

From this larger historical perspective, neoliberalism today represents a set of default assumptions in favor of unregulated markets. It does not map on perfectly to the more extreme market libertarian position associated with the early Chicago School. It is instead a more moderate view: the view that government intervention in the economic domain *tends to be inefficient* and should therefore be avoided. What characterizes this more moderate view is a set of softer *a priori* assumptions that are reflected, especially, in the rhetoric of economic debate. In contrast to the more extreme rhetoric of the

early Chicago School—for instance, the argument that the free market is practically always more efficient—market neoliberals suggest that government intervention *tends to be* less efficient; that it is generally the case that market mechanisms work better, in part because of lower transaction costs, but also because market participants are better information gatherers and tend to be more invested in the ultimate outcome; and that government agencies suffer from greater principal-agent problems, are less nimble at adjusting to changing market conditions, and become more entrenched and subject to interest group capture. These are familiar arguments and, together, they tend to promote a loose default position that favors market mechanisms over “regulation”—a tilt in favor of “free markets.” It is, in many ways, what Jean Comaroff and John Comaroff identify as that “impulse to displace political sovereignty with the sovereignty of ‘the market,’ as if the latter had a mind and a morality of its own” (2001:43).

The logic of neoliberal penalty *facilitates* contemporary punishment practices by encouraging the belief that the legitimate space for government intervention is in the penal sphere—*there and there alone*. The key to understanding our contemporary punishment practices, then, turns on the emergence in the eighteenth century of the idea of *natural order* and the eventual metamorphosis of this idea, over the course of the twentieth century, into the concept of *market efficiency*. It is the idea of *natural order* that renders coherent and makes possible the belief in self-adjusting and self-sustaining markets. The idea of self-stabilizing internal flows that function best when left alone—this conceptualization of natural orderliness, of spontaneous equilibrium, of natural harmony in the economic realm, is what allowed eighteenth century thinkers to reimagine social reality, to separate economy and society, and to relocate and expand the penal sphere.

### III.

But it was not always so. There was an earlier time when the organization, administration, and policing of markets formed an integral part of the field of public economy. The young Adam Smith understood this well and in fact used the discourse of *police* to lecture on public economy, on the regulation of markets, and on monopolies, money, and trade—on how, in sum, to increase the wealth of a nation. In his *Lectures on Jurisprudence*, which he delivered at Glasgow University during the period 1762 to 1764—after the publication of *The Theory of Moral Sentiments* in 1759 but before the *Wealth of Nations* in 1776—Smith used, and used exclusively, the rubric of “police” to discuss public economy. He identified the principal task of “police” as facilitating *bon marché*. Once the internal security of a nation was ensured and subjects could benefit from their private property, Smith reportedly lectured in 1762-63, the state’s attention should turn to the task of promoting the state’s wealth. “This produces what we call police,” Smith said. “Whatever regulations are made with respect to the trade, commerce, agriculture, manufactures of the country are considered as belonging to the police” (Smith 1978:5 [i.1-2]).

Smith traced the notion of police to French administration, citing the folklore that the king of France demanded three services from his *lieutenant général de police*—namely, that he assure the cleanliness and security of the nation and the abundance and cheapness of goods at market. Smith referred specifically to the marquis d’Argenson, chief of police in Paris from 1697 to 1718, and to the legend that, upon acceding to the post, d’Argenson was told that the king of France expected him to take care of three things: “1<sup>st</sup>, the clean[n]ess or neteté; 2<sup>nd</sup>, the *aisance*, ease or security; and 3<sup>rd</sup>, *bon marché* or cheapness of provisions” (Smith 1978:5 [i.2]). Thus, under the heading of police, Smith stated in his 1763-64 lectures, “we will consider the opulence of a state,” or, more specifically, “the consideration of cheapness or plenty, or, which is the same thing, the most proper way of procuring wealth and abundance” (Smith 1978:398 [5]; 487 [205]).

To the early public economists, “police” was what ensured the abundant provision of necessary foods and commodities. As Michel Foucault, Pasquale Pasquino, Mariana Valverde, and others have shown, this early notion of “police” conveyed a number of meanings—not just the enforcement function associated with the *lieutenant général de la police* that, at least in some respects, resembles more closely our contemporary understanding of law enforcement and blue uniforms (Olivier-Martin 1988 [1945]:13-22, Kaplan 1976:Vol.I:11-14; Foucault STP 2004:320-322; Pasquino 1991:109-116; Napoli 2003:8; Dubber and Valverde 2006:1-2). The expression “police” also captured, in broader terms, what we could call today “administration,” but administration limited to the subdivisions of the state; the term *gouvernement* or governing, in contrast, covered the administration of *l’État* or the state (Olivier-Martin 1988 [1945]:13). But the different meanings were imbricated: the administration of subsistence and markets fell under the jurisdiction of policing functions and were perceived as calling for surveillance. As the early Smith lectures demonstrate, public economy and “police” were continuous.

It would take but a small step to extend this logic directly to the field of punishment. The young Milanese aristocrat, Cesare Beccaria, would do just that in his short but seminal tract, *Dei delitti e delle pene* (*On Crimes and Punishments*)—published in 1764. The new field of public economy, Beccaria boasted, had tamed and civilized nations through commerce. “We have discovered the true relations between sovereign and subjects,” Beccaria declared, “and there is waged among nations a silent war by trade, which is the most humane sort of war and more worthy of reasonable men” (1995:8). The same lessons, Beccaria believed, could tame and civilize our punishment practices, and, in the process, eliminate the brutal excesses of seventeenth century penalty.

Under Beccaria’s influence, the field of public economy would colonize the penal domain and impose the same logic of measured and proportional responses to the same problem of man’s natural tendency to deviance. In the penal sphere—just as in the economic domain—the solution Beccaria proposed was to properly administer a rational framework of tariffs and prices. For Beccaria, “police” was an integral part of public economy. Beccaria’s lectures in public economy delivered in Milan in 1769—the notes of which were published posthumously—covered five areas: agriculture, arts and manufacturing, commerce, finance, and *police*. “Of Police” constituted an integral part of the study of public economy—an entire section alongside commerce and finance—because it shared the same rationality, namely that of public administration (Beccaria 1984-90; Pasquino 1991).

The common thread in the young Adam Smith and Beccaria is the continuity between “police” administration and economics. For both, the two spheres were completely overlapping. To Smith, the umbrella category is “police,” and that category subsumes the discussion of public economy and the wealth of a nation. To Beccaria—and other *cameralists* of his time—the overarching category is public economy, within which “police” forms one important sector alongside commerce and finance. In both, though, the two domains are seamless and continuous. The two fields overlay.

#### IV.

It is precisely this vision of a seamless relation between public economy and “police” that gives way in the second half of the eighteenth century to a far different ideal. If cheapness and plenty, if *bon marché* was the goal of public economy and of the *police des grains* at mid-century, things could hardly have been more different only a decade later. The contrast is striking and captured by the new dogma of François Quesnay:

*Abondance et non-valeur n'est pas richesse.*

*Disette et cherté est misère.*

*Abondance et cherté est opulence* (Quesnay 2005:570).

In other words, abundance and plenty do not translate into the wealth of a nation. Scarcity and high prices, of course, are misery. It is abundance *and* high prices that produces opulence.

This shift would radically transform the meaning, the connotation, and the role of *policing*—as it did first in the writings of the earliest *économistes*. From François Quesnay’s first published contribution in the field of political economy—his entry on *Fermiers* (Farmers) in Tome VI of the *Encyclopédie* in 1756—to his final contributions to economics collected and published in Dupont de Nemours’ *Physiocratie* in 1768, Quesnay would fundamentally reorient the relationship between public economy and “police”: governmental intervention in the markets would become oppressive and interfere with the autonomous functioning of an economic system governed by natural laws and natural order. By 1776, the year *The Wealth of Nations* was published, Adam Smith would no longer use the rubric “police” to discuss public economy. In fact, the word “police” would appear rarely in the text of *The Wealth of Nations*.

François Quesnay presented his idea of an autonomous economic system governed by natural order in his *Tableau économique*, first published in an augmented volume of the Marquis de Mirabeau’s *L’Ami des hommes* in 1760. The *Tableau* was a graphic depiction of cash and commodity flows between the three principle classes of society—the cultivators, the property-owners, and the manufacturers. By means of a simple graph and its zig-zag lines, Quesnay sought to visualize his main theses, namely that agricultural production is the sole source of all societal wealth, that wealth can only be produced by

means of an autonomous system of exchange, and therefore that the state must cease intervening with tariffs, restricting the flow of trade, and interfering with other regulations.

Quesnay's *Tableau économique* received a lot of attention because it attempted to graphically and systematically represent an economic system—what Louis Dumont refers to as “an ordered whole” (Dumont 1977:41).<sup>2</sup> But what was even more important and influential on future liberal thought was not simply the notion of an economic *system*, it was the underlying idea of *natural order*. Systems can function well with external calibration and intervention: an engine may function as a perfect whole so long as one adds fuel. What was remarkable about Quesnay's *Tableau* is that his system was governed by natural order and was entirely autonomous of external inputs. What Quesnay really contributed was not just the idea of a system, but that of natural orderliness—an idea that would eventually receive its most elaborate articulation in Le Mercier de la Rivière's 1767 book, *L'Ordre naturel et essentiel des sociétés politiques*.

The birth or, perhaps to be fair,<sup>3</sup> the emergence and maturation of the idea of natural order helped shape a vision of the economic sphere as an autonomous, self-adjusting, and self-regulated system that could achieve a natural equilibrium spontaneously and produce increased wealth. This same notion resurfaces in the later work of Adam Smith and Jeremy Bentham, and, today, in the work of contemporary neoliberal thinkers, such as Richard Posner and Richard Epstein. The idea of natural order has metamorphosed today into the belief in the *efficiency of the market*.

It is precisely natural order that makes possible Richard Posner's belief that “[w]hen transaction costs are low, the market is, virtually by definition, the most efficient method of allocating resources” (Posner 1985:1195-96). In fact, natural efficiency is so central to Posner's thought that he *defines* criminal behavior in terms of efficiency: criminal behavior *is* human behavior that is inefficient. As Posner explains, “I argue that what is forbidden is a class of inefficient acts” (1985:1195). The very definition of crime turns on the notion of natural efficiency. In the very same way, the Physiocrats would define criminality as disorder and deviance from natural laws. Today's neoliberal thought traces back to this severing of “police” and public economy.

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<sup>2</sup> This is precisely what Marx found so brilliant. Marx wrote of Quesnay's *Tableau*, in his *Theories of Surplus Value*, that “this attempt to represent the whole in one table that is composed in fact of only five lines, connecting six points of departure to their endpoints, in the second half of the eighteenth century, at the infancy of public economy, was a stroke of genius, without a doubt the most brilliant in the history of public economy” (Marx 1974:399).

<sup>3</sup> Of course, the idea of natural order was not entirely new. Simone Meyssonier, in her history of the origins of French liberal thought in the eighteenth century, *La Balance et l'Horloge* (1989), traces the idea back to Pierre Le Pesant de Boisguilbert who wrote almost one hundred years earlier in the period 1695 to 1707. Joseph Schumpeter famously traced the notion back to the Scholastics—the theologians of the fourteenth and fifteenth centuries (Schumpeter 1968:97). And Dupont de Nemours himself—the chief publicist and greatest admirer and disciple of Quesnay—traced the Physiocratic doctrine to, among others, the Marquis d'Argenson, who is credited with the maxim “*Pas trop gouverner*” (Dupont 1808:309). But true originality is not the sole source of influence. Quesnay's obsession with natural order was *perceived* as new—which is often what matters more. As new and radical. Many believed that it inaugurated, in the words of Dupont de Nemours, “a new science in Europe” (Rothschild 2004:4) and many championed Quesnay as the founding father of that new science.

## V.

The next question is: At what price have we come to believe that the economy is the realm of natural order and that the legitimate sphere of *policing*—of administration and government—lies elsewhere? At the price, first, of significantly distorting and expanding without limit the penal sphere, and, second, of naturalizing and hiding the regulatory mechanisms in our contemporary markets and thereby masking the enormous wealth distributions that occur daily.

First, the distortion of the penal sphere. The new penal paradigm significantly influenced nineteenth century liberal and modern neoliberal thought. This is most evident in Jeremy Bentham's work. Though he, like Adam Smith, would reject Physiocratic thought—primarily because of Quesnay's devotion to agriculture as the sole means of creating national wealth—he embraced and developed a notion of *natural order* in his economic writings and reproduced—by an odd conjunction of liberal economic theory and Beccarian punishment theory—the same relationship between markets and punishment: natural order in the economic sphere but government intervention in the penal sphere. On the public economy side, as evidenced in his *Manual of Political Economy* written in 1794, Bentham embraced Adam Smith's liberalism (Bentham 1952 Vol. 3:233-235). On the punishment side, however, Bentham embraced Beccaria whole cloth. In all matters penal, Bentham aligned himself with Beccaria's notion of *policing* and administration—of a sphere of human activity that must be shot through with government intervention. In fact, the criminal code, for Bentham, was precisely a “grand catalogue of prices” by means of which the government set the price of deviance. The penal code was a menu of fixed pricing—the exact opposite of *laissez faire*. Beccaria's influence on Bentham's writings on punishment was formative (Hart 1982:45).

This vision of an ordered market delimited by the penal sanction dominates the public imagination today. Modern penal practices in the United States are consistent with this. The size and the cost of our neoliberal penal sphere in the United States far exceeds those of earlier periods.<sup>4</sup> A study by the PEW Center on States published in March 2008 reports that prison spending in the United States has outpaced all other comparable spending budgets except Medicaid. “Criminal correction spending is outpacing budget growth in education, transportation, and public assistance, based on state and federal

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<sup>4</sup> My argument focuses on a shift over time from an earlier penal rationality to neoliberal penalty. As a result, it is important to compare *modern* neoliberal penal practices to earlier periods in the *same* neoliberal countries, whether it is the United States, Britain, or France. It is often tempting to compare *modern* neoliberalism to other *contemporary* discourses—such as socialist, or communist, or fundamentalist, or authoritarian forms of rationality—and to suggest that neoliberalism may or may not be *worse*. That it produces a *larger* penal sphere, *more* punishment, *more* incarceration—or not. For these comparisons, many rely on the fact that the United States leads the world in its rate of persons behind bars, and even in the raw number of persons in prison—taking the gold medal even in competition with a country like China that has a population about three-and-a-half times larger than the United States. Those comparisons between neoliberalism and *other* existing discourses, though, are not what motivate my project. My argument is, in this loose sense, an internal critique of the direction that *our* discourse has taken, suggesting that it has gone in a direction that facilitates the growth of the penal sphere and that it could have gone in a very different direction. It is not, again, in a loose sense, an external critique in that it does not compare neoliberalism with *other* contemporary discourses and does not evaluate whether the former is “better” or “worse” in terms of its effects on the penal sphere.

data. Only Medicaid spending grew faster than state corrections spending, which quadrupled in the past two decades” (Moore 2009). According to the PEW report, corrections spending cost the states a staggering \$47 billion in 2008, in large part because of the extraordinarily high rates of incarceration—“One in every 31 adults, or 7.3 million Americans, is in prison, on parole or probation, at a cost to the states of \$47 billion in 2008” (Moore 2009). The last time these costs were studied, in 2001, the fifty states spent a combined \$38 billion on corrections budgets alone (all of this excludes prison building) (BJS 2004). California's annual corrections budget for 2007-08 was almost \$10 billion dollars in 2007, nearly twice as large as it was in 2001 (CDCR 2007). For many states, the annual budget allocates *more* funding for prisons than for four-year colleges (MTF 2003). The numbers are staggering. With about one percent of the adult population in the United States behind bars, the size and cost of our penal sphere is undoubtedly greater than it was in pre-liberal periods.

Second, the rhetoric of neoliberalism naturalizes the market and thereby hides the massive distributions that takes place there. It masks the state’s role, the state’s ties to non-state actors and associations, and the extensive legal and regulatory framework that encases those entities. It also hides the freedom that existed before. In other words, it masks *both* the amount of liberty in the earlier eighteenth century *and* the amount of regulation today. There is, and has always been far more “constraint” in our contemporary markets than we typically acknowledge today. The truth is, every action of the broker, buyer, seller, investment bank, brokerage firm, exchange member—even non-member—is scrutinized and regulated. The rules, oversight committees, advisory letters, investigations, as well as legal actions, abound. The list of dos and don’ts is extensive. For instance, exchange members on the New York Stock Exchange may get together and fix the commission rate on stock transactions of less than \$500,000—that is, they may set the price of buying and selling stock—but freely negotiate commissions in larger stock transactions (*Gordon 1975*). Brokerage firms may combine and use blacklists to restrict retail buyers from reselling their public offering stock during a “retail restricted period” of between thirty and ninety days following their purchase of newly offered stock, but the same brokerage firms may allow large institutions to dump their stock in the aftermarket at any time (*Friedman 2002*). The rules and regulations surrounding our modern markets are intricate and often arcane, and they belie the simplistic idea that our markets are “free.” The reality is far more complex.

## VI.

A genealogy of neoliberal penalty—of which this essay is just a sketch—would seek to explore how this mode of rationality became naturalized. How this dominant form of reasoning became believable. How it became so obvious, and at what price. In this sense, this project continues in the furrow of a lengthy nominalist tradition—a strain of thought that runs through the work of thinkers as far back as the Medieval Franciscan friar William of Occam, to the sixteenth century Renaissance essays of Michel de Montaigne, to the nineteenth century polemics of Friedrich Nietzsche. It starts by conceptualizing “natural order” and “market efficiency” as what William of Occam would have called “universals” and then explores what work those universals are accomplishing. It challenges the very existence of those

universal categories in order to discover, first, what the designation serves, but second, what it hides regarding the unique aspects of individual entities—in this case, individual forms of social and economic organization.

The answer that I develop in these pages reflects this nominalist influence: we have developed and deployed these categories or universals to make sense of what are in fact irreducibly individual phenomena, to place discrete and divergent practices into a coherent framework, to deploy simple heuristic devices or stereotypes to expedite our evaluation and judgment. In so doing so, we have created structures of meaning that do work for us—at a steep price.

The historian, Paul Veyne, in his recent book *Foucault: Sa pensée, sa personne* (2008), excavates a similar nominalist influence in the work of Foucault, drawing particular attention to the opening passage of Foucault’s 1979 lectures, *Naissance de la biopolitique* (Harcourt 2008b; Veyne 2008:19). Foucault’s method was to critically examine the very conceptions that we construct in order to learn something about ourselves (Foucault 1994:726). In a similar vein, this brief genealogy asks in essence: suppose that “natural order” or “market efficiency” does not exist. What does that tell us about the work that those concepts perform?

My argument, ultimately, is premised on the belief that we have no way of knowing whether our contemporary practices are more or less regulated, more or less freedom enhancing, more or less coercive. We have far more administration today than meets the eye or that we tend to recognize. Whether it amounts to more or less regulation than there was in the eighteenth century, that is impossible to quantify. But, the fact is, we *characterize* our contemporary practices as more liberty enhancing<sup>5</sup>—which is precisely the problem. We draw on the categories of liberty and constraint to praise our modern practices. And in the process, we mask the distributions that these modern practices—the free market *regulations*—operate. As John Campbell and Ode Pederson suggest, correctly I believe, “neoliberalism does not so much involve *deregulation* as *re-regulation* of economic activity” (2001:3). The trouble is, it masks all that re-regulation under the façade of deregulation.

## Conclusion

It is surprising that the second epigraph was not penned by Friedrich Hayek, nor by Milton Friedman—though it does echo Friedman’s statement that “economic freedom is also an indispensable means toward the achievement of political freedom” (1962:8). No, those words belong instead to Barack Obama, uttered at a time when, in the summer of 2008, the financial debacle was upon us—after the collapse of Bear Stearns and of the securitized-mortgage market. And even after the bottom would fall out of the American banking system—after the failure of Lehman Brothers, the bailouts of Fannie Mae,

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<sup>5</sup> The work I am doing here bears a family resemblance to the research of Marion Fourcade and Kieran Healy, especially in their article “Moral Views of Market Society” where, expanding on Albert Hirschman’s analysis, they depict the numerous representations of the market as civilizing, destructive, or feeble, and increasingly today as intensely moralized and moralizing (Fourcade and Healy 2007:286).



Freddie Mac, and A.I.G., and the passage of a \$700 billion TARP rescue package for the financial industry—President Obama’s Treasury secretary, Timothy Geithner, would nevertheless declare that: “We have a financial system that is run by private shareholders, managed by private institutions, and we’d like to do our best to preserve that system” (Krugman 2009). Never mind that the American people, as a result of the first \$350 billion partial nationalization of the biggest banks, were at that point the largest shareholders of Citibank, with 7.8 percent of its equity, and the largest holders of Bank of America stock, with 6 percent of its shares.

The persistence of this rhetoric of market efficiency is indeed remarkable. The perseverance of both the faith in free markets and the use of that key dichotomy—free versus constrained, private versus government controlled—is simply astonishing. And it has had a significant toll in the penal sphere. By marginalizing and pushing punishment to the outskirts of the market, neoliberal rationality effectively reinforces the carceral domain.

The hitch is that the foundational categories on the one hand of “natural order,” “market efficiency,” or “the free market,” and on the other hand of “excessive regulation,” “governmental inefficiency,” or “discipline,” are illusory and misleading categories that fail to capture the irreducibly individual phenomena of different forms of market organization. In all markets, the state is present. Naturally, it is present when it fixes the price of a commodity, such as wheat or bread. But it is also present when it subsidizes the cultivation or production of wheat, when it grants a charter to the Chicago Board of Trade, when it permits trading of an instrument like a futures contract, when it protects the property interests of wheat wholesalers, when it criminalizes the coordination of prices, when it allows the merger of grain companies, when it polices the timing of trades, etc. All markets are highly regulated. At the same time, in all markets, there is freedom. Even in a controlled economy where the price is fixed, there are variations in the quality of the goods sold and along other dimensions that create product differentiation. These produce queues at certain stores and not at others.

In the economic sphere, there is liberty and there is constraint. What we see is a reflection on us, not on the market. What is most important is to remember that the categories we use to organize, understand, discuss, categorize, and compare the different organizing principles are just that—labels. They do not capture the true individuality of the objects described. And they have the unfortunate effect of obscuring rather than enlightening. They obscure by making one set of objects seem natural and necessary, and the other naturally unnecessary.

This essay is just a prolegomenon, a necessary first step in the direction of properly assessing modern forms of social and economic organization. Necessary, because of the deafening and dominant discourse of natural order and market efficiency. The very idea that we would use the term “free” to describe our current market system—a system which is regulated through and through—is a testament to the work that needs to be done. It may be fair to say that neoliberalism has so deeply and fundamentally distorted our understanding of economic systems that it will take a lot of work to reach the point where we can properly assess different alternatives for the administration of markets and punishment, and in the process dismantle our neoliberal penalty.

## BIBLIOGRAPHY

- Beccaria, Cesare. 1995 [1764]. *On Crimes and Punishments and Other Writings*, ed. Richard Bellamy. Cambridge UK: Cambridge University Press.
- Beccaria, Cesare. 1984-1990. *Edizione Nazionale delle Opere di Cesare Beccaria*. Ed. Luigi Firpo. 7 volumes. Milano : Mediobanca.
- Bentham, Jeremy. 1952. *Jeremy Bentham's Economic Writings*. Ed. W. Stark. 3 vols. Leicester: The Blackfriars Press Limited.
- Bureau of Justice Statistics ("BJS"). 2004. *Special Report: State Prison Expenditures, 2001*. Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>.
- California Department of Corrections and Rehabilitation, "CDCR." 2007. *2007-08 Budget Overview*. Available at <http://www.cdcr.ca.gov/BudgetRegs/budgetOverview0708.html>.
- Campbell, John L. and Ove K. Pedersen, eds. 2001. *The Rise of Neoliberalism and Institutional Analysis*. Princeton, NJ: Princeton University Press.
- Comaroff, Jean and John L. Comaroff, eds. 2001. *Millennial Capitalism and the Culture of Neoliberalism*. Durham, NC: Duke University Press.
- Delamare, Nicolas. 1729. *Traité de la police*. Amsterdam: Aux dépens de la compagnie.
- Dubber, Markus D. and Mariana Valverde. 2006. *The New Police Science: The Police Power in Domestic and International Governance*. Stanford, CA: Stanford University Press.
- Duménil, Gérard and Dominique Lévy. 2004. *Capital Resurgent: Roots of the Neoliberal Revolution*. Derek Jeffers trans. Cambridge, MA: Harvard University Press.
- Dumont, Louis. 1977. *Homo aequalis: Genèse et épanouissement de l'idéologie économique*. Paris : Gallimard.
- Dupont de Nemours. 1808. « Sur les Économistes » dans *Œuvres de Mr. Turgot, Ministre d'État, Précédées et accompagnées de Mémoires et de Notes sur sa Vie, son Administration et ses Ouvrages*. Ed. Dupont de Nemours. Tome 3. Paris: Imprimerie de Delance.
- Foucault, Michel. 1979. *Discipline and Punish*. Trans. A. Sheridan. New York: Vintage Books.
- 1994. *Dits et écrits IV – 1980-1988*. Paris: Gallimard.
- 2004a. *Sécurité, Territoire, Population : Cours au Collège de France. 1977-78*. Paris: Seuil/Gallimard

- 2004b. *Naissance de la Biopolitique: Cours au Collège de France. 1978-1979*. Paris: Seuil/Gallimard.
- Fourcade, Marion and Kieran Healy. 2007. "Moral Views of Market Society." *Annual Review of Sociology* 33:285-311.
- Friedman v. Salomon/Smith Barney Inc.*, 313 F.3d 796 (2d Cir. 2002).
- Friedman, Milton. 1962. *Capitalism and Freedom*. Chicago IL: University of Chicago Press.
- Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).
- Harcourt, Bernard. 2001. *Illusion of Order: The False Promise of Broken Windows Policing*. Harvard University Press, Cambridge, Massachusetts.
- 2006. "From the Asylum to the Prison: Rethinking the Incarceration Revolution," *Texas Law Review* 84:1751-86 (2006).
- 2007a. *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. University of Chicago Press, Chicago.
- 2007b. "From the Asylum to the Prison: Rethinking the Incarceration Revolution - Part II: State Level Analysis," University of Chicago Law & Economics, Olin Working Paper No. 335 (March 2007).
- 2008a. "Supposons que la discipline et la sécurité n'existent pas: Rereading Michel Foucault's Collège de France Lectures (with Paul Veyne)," *Carceral Notebooks*, Vol. 4 (forthcoming). Available at <http://www.thecarceral.org/journal-vol4.html>.
- 2008b. « Cesare Beccaria et son traité "Des délits et des peines" », In LES GRANDES ŒUVRES JURIDIQUES, eds. Jean-Louis Halperin et Olivier Cayla. Paris: Editions Dalloz.
- Hart, H.L.A. 1982. "Bentham and Beccaria," Chapter 2 in *Essays on Bentham: Jurisprudence and Political Theory*. Oxford: Oxford University Press.
- Harvey, David. 2005. *A Brief History of Neoliberalism*. Oxford: Oxford University Press.
- Kaplan, Steven L. 1976. *Bread, Politics and Political Economy in the Reign of Louis XV*. 2 Volumes. The Hague: Martinus Nijhoff.
- King, Desmond. 1999. *In the Name of Liberalism: Illiberal Social Policy in the United States and Britain*. Oxford, UK: Oxford University Press.
- Krugman, Paul. 2009. "Bailouts for Bunglers," *New York Times*, February 1. Available at <http://www.nytimes.com/2009/02/02/opinion/02krugman.html?scp=4&sq=krugman%20&st=cs> e).

- Le Mercier de La Rivière, Pierre-Paul. 1910 [1767]. *L'ordre naturel et essentiel des sociétés politiques*. Paris: P. Geuthner.
- Leonhardt, David. 2008. "[Advanced] Obamanomics" in *New York Times Magazine*, August 24, 2008, p. 28-54.
- Marx, Karl. 1974. *Théories sur la plus-value (Livre IV du « Capital »)*. 3 tomes. Sous la direction de Gilbert Badia. Paris : Editions Sociales.
- Massachusetts Taxpayers Foundation, "MTF." 2003. *Bulletin: State Spending More on Prisons than Higher Education*, Nov 24, 2003. Available at <http://www.masstaxpayers.org/data/pdf/bulletins/11-24-03%20Corrections%20Bulletin.PDF>
- Meyssonnier, Simone. 1989. *La Balance et l'Horloge. La genèse de la pensée libérale en France au XVIIIe siècle*. Montreuil, France : Les Editions de la Passion.
- Mirabeau, Marquis de. 1760. *L'Ami des hommes*. Hambourg: Chez Chrétien Herold.
- Moore, Solomon. 2009. "Prison Spending Outpaces All but Medicaid." *New York Times*, March 3, 2009.
- Napoli, Paulo. 2003. *Naissance de la police moderne: Pouvoir, normes, société*. Paris : Éditions La Découverte.
- Olivier-Martin, François. 1988. *La police économique de l'Ancien Régime*. Paris : Éditions Loysel. [Reprint of *Cours d'histoire du droit public rédigé d'après les notes et avec l'autorisation de M. Olivier-Martin, Professeur à la Faculté de Droit de Paris*. Diplôme d'études supérieures, Droit Public 1944-1945. Paris: Les Cours de Droit. Published in 1945.
- Pasquino, Pasquale. 1991. « Theatrum Politicum : The Genealogy of Capital – Police and the State of Prosperity, » in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon and Peter Miller. Chicago: University of Chicago Press.
- Peck, Jamie. 2004. "Geography and public policy: constructions of neoliberalism." *Progress in Human Geography* 28(3):392-405.
- Peck, Jamie and Adam Tickell. 2002. "Neoliberalizing Space." In *Spaces of Neoliberalism: Urban Restructuring in North America and Western Europe*. Neil Brenner and Nik Theodore, eds. 33-57. Oxford UK: Blackwell Publishing.
- Posner, Richard. 1985. "An Economic Theory of the Criminal Law," *Columbia Law Review* 85(6): 1193-1231 (October 1985).
- Quesnay, François. 1969. *Tableau économique des physiocrates*. Paris: Calmann-Lévy.
- 2005. *Œuvres Économiques Complètes et autres textes*. Ed. Christine Théré, Loïc Charles et Jean-Claude Perrot. 2 volumes. Paris : Institut National d'Études Démographiques (Ined).

- 2005. "Despotisme de la Chine" in *Œuvres Économiques Complètes et autres textes*. Ed. Christine Théré, Loïc Charles et Jean-Claude Perrot. 2 Volumes. Volume II, pp. 1005-1114. Paris : Institut National d'Études Démographiques.
- 2005. "Fermiers" in *Œuvres Économiques Complètes et autres textes*. Ed. Christine Théré, Loïc Charles et Jean-Claude Perrot. 2 Volumes. Volume I, pp. 127-161. Paris : Institut National d'Études Démographiques.
- Rothschild, Emma. 2004. "Global Commerce and the Question of Sovereignty in the Eighteenth-Century Provinces." *Modern Intellectual History* 1, 1 (2004): 3-25.
- Schumpeter, Joseph A. 1968 [1954]. *History of Economic Analysis*. New York: Oxford University Press (Seventh Printing 1968).
- Smith, Adam. 1937 [1776]. *The Wealth of Nations*. New York: Modern Library.
- 1978 [1762-63; 1766]. *Lectures on Jurisprudence*. Ed. R. L. Meek, D. D. Raphael, and P.G. Stein. Oxford: Clarendon Press.
- 2002 [1759]. *The Theory of Moral Sentiments*. Cambridge: Cambridge University Press.
- Tulkens, Françoise. 1986. "Introduction" to Adolphe Prins, *La défense sociale et les transformations du droit pénal*. Genève : Editions Médecine et Hygiène.
- Veyne, Paul. 2008. *Foucault: Sa pensée, sa personne*. Paris: Albin Michel.
- Wacquant, Loïc. 2009. "Crafting the Neoliberal State: Workfare, Prisonfare and Social Insecurity." *Theoretical Criminology* \_\_: \_\_\_\_.

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