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## The '73 Graft: Punishment, Political Economy, and the Genealogy of Morals

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GENEALOGY OF MORALS

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# The '73 Graft: Punishment, Political Economy, and the Genealogy of Morals

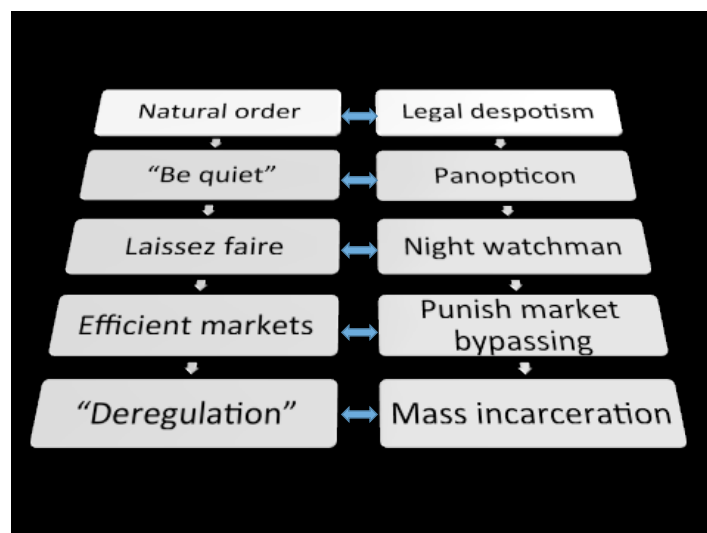
Bernard E. Harcourt

## Abstract

*In this essay, I explore the place of a genealogy of morals within the context of a history of political economy. More specifically, I investigate the types of moralization—of criminals and delinquents, of the disorderly, but also of political economic systems, of workers and managers, of rules and rule-breaking—that are necessary and integral to making a population accept new styles of political and economic governance, especially the punitive institutions that accompany modern political economies in the contemporary period. The marriage of political economy and a genealogy of morals: this essay explores how the moralization of certain groups of people has been necessary to render tolerable the great American paradox of laissez-faire and mass incarceration. How, in effect, practices of moralization are necessary to make tolerable the intolerable.*

## Introduction

In previous research on *The Illusion of Free Markets*, I tried to demonstrate how the emergence of liberal economic ideas in the eighteenth century was inextricably linked to the idea of a strong police state, and how this relation has influenced our current political condition of massive, racialized over-incarceration.<sup>1</sup> In that work, I tried to document simultaneously, first, the *diachronic* evolution of two historical ideas—namely, that of the free market on the one hand (represented by the left column in the diagram below) and of the police state on the other (the right column)—and, second, the *synchronic* linkage at each historical stage of these two necessarily imbricated notions:



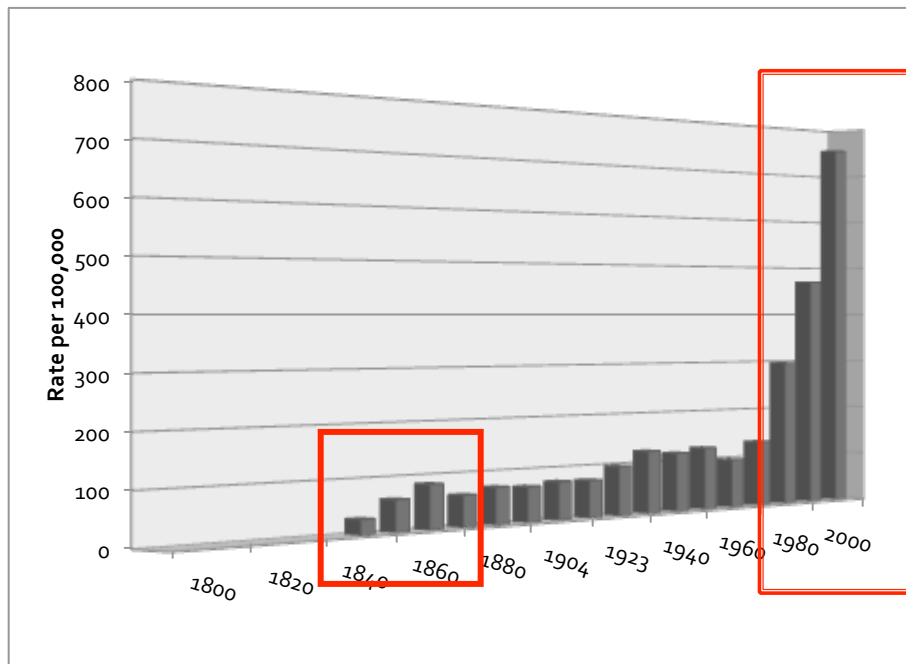
The analysis explored, on the one hand, how the concept of the free market emerged from eighteenth-century notions of “natural order.” It traced the transformations and variations from an early divine notion of orderliness tied to natural law in the work of François Quesnay and the Physiocrats, through Jeremy Bentham’s (admittedly complicated and messy) maxim that the government should “Be Quiet” in economic affairs, through the more secular ideas of self-interest, expertise, and informational advantage reflected in conventional nineteenth century *laissez-faire* ideas, to the cybernetic notions of “spontaneous order” elaborated by Friedrich Hayek, and finally to the more scientific and highly technical economic theories of the Chicago School of Economics regarding the efficiency of competitive markets. This is the left column.

On the other hand, the analysis demonstrated how these varying notions of economic orderliness have been linked, since their inception and at each stage, with a paradoxical trust in governmental competence when it comes to policing and punishing. This latter concept of the police state, just like the idea of the free market, evolved over time, from early notions of “legal despotism” in Quesnay’s writings<sup>2</sup> and in the policing practices of Le Mercier de la Rivière when he was *Intendant* of Martinique (paradoxically, his parting gift to the island was a police force); through the omnipresent, pervasive intervention of the state in Bentham’s *panopticon* prison and criminal law writings (recall that Bentham viewed the penal code as a “grand menu of prices” and invented the *panopticon* for all sorts of institutions of social control, including penitentiaries, asylums, workhouses, etc.); to the conventional nineteenth century notion of the state as “nightwatchman” in the classical *laissez-faire* approach (the metaphor had never struck me, in fact, until I hit upon this genealogy); to the symbiotic function of the criminal law to efficient competitive markets in Chicago School theory. As my colleague Richard Posner would write, in 1985, precisely capturing this symbiotic relationship:

“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.”<sup>3</sup>

In fact, Posner would *define* crime as inefficient behavior or market bypassing in 1985. Just like legal despotism in Physiocratic thought, the criminal law represents the outer boundary of the free market and natural order. Penal law is its diametrical other, where the state must intervene through punitive practices in order to sustain and guarantee the natural orderliness of the economic domain or free market. This is the right column.

Throughout, the analysis seeks to demonstrate the paradoxical linkage of the notion of orderliness in economics with the need for a Big Brother state when it comes to policing and punishing. This is the series of synchronic arrows relating the two diachronic series. In contrast to other critical thinkers who also study what has been called “neoliberal penalty” today—namely, the paradox of a supposedly hands-off government and a massive prison apparatus—I argue that the symbiotic relationship preceded the neoliberal turn in the 1970s and was itself inscribed in early liberal thought in the eighteenth century. I resist Loïc Wacquant’s suggestion that “the expansive penal state is the distinct creation of *neo*-liberalism, and not an inheritance from or resurgence of classic liberalism.”<sup>4</sup> I trace our present political condition further back and argue that this paradoxical set of beliefs—on the one hand, in the incompetence of government in the economic domain and, on the other hand, in the competence and legitimacy of government in the penal sphere—has facilitated the exponential growth of the prison and jail populations in the United States, not only with mass incarceration in the twenty-first century, but also at the birth of the penitentiary during the “Market Revolution” of the Jacksonian era.



An undercurrent in that work—perhaps one that was too far under the surface, but one that I would like to explore here—concerns the mechanisms and devices by which these concepts of natural order and policing would become accepted, tolerated, and so pervasive. The central concern, throughout, is to explore the production of these truths—more specifically, how they become held as truths. This is especially important in our contemporary times marked by the toxic combination of neoliberalism and mass incarceration. And one vital dimension to this question—one to which we often do not pay sufficient attention—is precisely the issue of moral economies, of the moralization of social relations and behaviors.<sup>5</sup>

One place to start, though this may be surprising, is with E. P. Thompson, whose work on “The Moral Economy of the English Crowd in the Eighteenth Century,” or more generally, on the notion of moral economies, would make us rethink seemingly spontaneous and spasmodic food riots as fully-coherent resistance to new forms of economic relations and ideas. Thompson highlighted the extent to which the resistance was itself a *moralized* resistance, grounded in notions of

moral fault, responsibility, and blame, of right and wrong, of good and evil. The riots were not merely irregular, spasmodic responses to shortage and hunger; rather, they represented a righteous indignation, a moralistic and thus political response to the shift away from a paternalistic rationality of custom, intended to protect the people, to a purportedly amoral and abstract force of the market. For Thompson, the most compelling proof of the moral underpinnings, you will recall, was that the seditious crowd did not simply steal food, but rather, against their own interests, destroyed the mills, the very instruments that would have provided them with food. The riots, Thompson showed, were aimed at dismantling the instruments of the new political economy.

It should be surprising to start with Thompson because he was moralizing—and justifying—resistance, whereas the task here is rather to show how these new political economies became acceptable and tolerated, in other words to enlist a genealogy of morals as a key element in the eventual acceptance of new economic regimes. These are connected because, sadly, the same crowd that resisted would eventually come to embrace the new spirit of capitalism. But that also would not come naturally, spontaneously or spasmodically. The men and women of the crowd had to be prepared, tilled, shaped into the kind of subjectivities that would come to embrace the demoralized, free flowing, more fluid market-based and self-interested economies. And this would not happen without a large dose of moralization. In order for it all to become palatable, it had to be made right.

This is where Max Weber—the Nietzschean Weber, the Weber of the *Protestant Ethic* in its original, not Parsonian version—would be so important. The spirit of capitalism would feel so natural to many, like a well-worn glove, because it had been, for many, a calling, as Weber suggested. The ascetic, rationalistic life-style, which had been a calling for the Puritans, would become second-hand. “Remember, that *time is money*... Money can beget money, and its offspring can beget more, and so on.” Weber’s genealogy of capitalism passed through morals—producing new political

economies and processes, such as “machine production,” that would govern our lives. “[T]he spirit of religious asceticism,” Weber wrote, “has escaped from the cage,”<sup>6</sup> but not us, with our materialism and “care for external goods.” The modern materialist—the acquisitive capitalist—would remain cloaked in a shell of steel. For how long, or whether forever, Weber could not tell. “No one knows who will live in this cage in the future...”<sup>7</sup> What was for sure, though is that this Nietzschean Weber had utter contempt for these *last men*, these rationalist capitalists, who in their “nullity” “imagine[] that it has attained a level of civilization never before achieved.”<sup>8</sup>

Our Anglo-American reading of Weber’s final passage was distorted by Talcott Parsons’ translation, with these “last men” becoming, in Parsons’ hand, “the last stage”—the Nietzschean reference expunged and cleansed, the genealogy erased, for a while. But only for a while. In the end, though, it is the Nietzschean Weber that returns to show us the extent to which the many are prepared, morally and ethically, for capitalism. The soil has to be tilled, it does not bear the fruit of capitalism spontaneously.

So we have, then, Thompson on the moral economies of resistance, and a Nietzschean Weber on the moral economies of acceptance. Foucault would marry the two in his Collège de France lectures on *The Punitive Society* in the winter of 1973. Foucault would graft a genealogy of morals on a political economy by means of what he called “*illégalismes*.”

The core concept of *illégalismes* is a term that has somewhat erroneously been translated as “illegalities” in the English edition of *Discipline and Punish*. It would be more appropriate to use a neologism, such as “*illegalisms*,” because “illegalities” is actually the end state, that which, in some sense, resolves the struggle. Illegalities is what represents the culmination of a power struggle that operates through illegalisms.



The idea of illegalisms is that the law itself is a struggle, a negotiation, agonistic combat, a competition over the very question of defining the line of illegality—the line that divides deviations, disorderliness, rule-breaking, rule-interpretation, from illegality and the sanction.

Foucault elaborated in 1973 a political economy based on this notion of illegalisms—a theory in three steps. As you realize, I am giving you the theory and not the historical details.

Foucault starts, first, with the idea that illegalisms were widespread throughout the eighteenth century and well distributed across the different strata of society: the different classes practiced strategic games at the borders and interstices of the law. “[I]n every system, different social groups, different classes, different castes each have their illegalisms,” Foucault would declare.<sup>9</sup> In the eighteenth century, he would identify not only the popular illegalisms—the illegalisms of the popular classes—but illegalisms of merchants and men of commerce, as well as “illegalisms of the privileged who escape by status, tolerance, as an exception to the law,” and even illegalisms of power—of the *lieutenant de police*, of the *commissaires*, etc. These illegalisms were nested, sometimes in conflict, often in symbiosis, both working together and in tension. But for the most part, the privileged in the eighteenth century tolerated popular illegalisms because they also practiced their own forms of deviance against the monarchy, and the relationship “worked” in a certain way. “It seems to me that in the late eighteenth century,” Foucault said in February 1973, “a popular illegalism was not only compatible with, but useful to the development of the bourgeois economy. [But] there came a time when these popular illegalisms that had meshed with the development of the economy became incompatible with it.”

Second, then, Foucault identifies a break, toward the end of the *ancien régime*. As the nineteenth century approached, the popular illegalisms began to be perceived as a threat, a danger by the more privileged in society, the merchants, aristocrats, and bourgeois in France, but also in

England, Russia (where Bentham's brother, Samuel, was inventing the *panopticon*). The new forms of wealth accumulation, of moveable goods, of stocks and supplies—as opposed to landed wealth—exposed massive amounts of chattel property to the workers who came in direct contact with this new commercial wealth. The accumulation of wealth began to make popular illegalisms less useful—even dangerous—to the interests of the privileged. “These illegalisms ceased, at a certain time, to be tolerable to the class coming to power, because wealth, in its materiality, was spatialized in new forms ...”

Foucault then identifies, in a third moment, a turn to the penal sanction. In the late eighteenth century, the commercial class seized the mechanisms of criminal justice to put an end to these popular illegalisms—not only the depredation of material property and private wealth, but also the “dissipation” of their own time and bodies, of the strength of the workers themselves, of their human capital (dissipation that took “the form of absenteeism, delay, laziness, parties, debauchery, nomadism.”) In this way, , the privileged would seize the administrative and police apparatus of the late eighteenth century to crack down on popular illegalisms. The result would be a turn to the penitentiary and the prison-form—which was not so much a model of confinement for violations of a statute, so much as imprisonment for irregular behavior.

So far, though, we are still at the level of an explanation in political economy. But a genealogy of morals would come next. For it was only through the *moralization* of those acts of debaucherie and absenteeism that the managerial classes would be able to transform formerly tolerated behaviors, even encouraged behaviors, into illegal acts.

Foucault would excavate and discover this move first in the writings of the Quakers and other dissenters. He located there a moralized discourse that would introduce the idea of the penitentiary, of penitence, into the sphere of punishment. He found echoes of this discourse among

the more privileged classes of the early nineteenth century, echoes revealing how certain writers in France and England—Colquhoun in London, for instance—would use moral notions of fault, guilt, and penance to facilitate the construction of the capitalist enterprise.<sup>10</sup>

The transformation of popular illegalisms into illegalities operates first by means of their conversion into morally reprehensible acts that deserve penance, into moral failings and failures. Foucault unearths these brutal passages, written by early nineteenth century reformers, about the moral inadequacies and failings of the working class—here, for instance, he minutely dissects this text by a jurist and reformer from the Napoleonic era regarding revisions to the penal code, a brutal text referring to the popular classes as that “bastardized race”:

There, hard souls, dry, fierce, devoid of moral ideas, will only obey their gross sensations; laziness, immorality, greed, envy will prove the irreconcilable enemies of wisdom and labor, of the economy and of property. There will thrive misdemeanors and crimes of all kinds, less in the masses of the nation than in the dregs of the foreign tribe in general, which is formed next to the real people by the force of circumstances and habits accumulated for centuries. Almost always, for such a nation, the punishments must be measured against the nature of this bastardized race, which is the source of crimes, and the regeneration of which can barely be glimpsed, after many years of the wisest government.

*Là, des âmes dures, sèches, farouches, dénuées d'idées morales, n'obéiront qu'à leurs grossières sensations ; la paresse, la débauche, l'avidité, l'envie, se montreront ennemies irréconciliables de la sagesse et du travail, de l'économie et de la propriété. Là, pulluleront des délits et des crimes de toute espèce, moins dans la masse de la nation que dans la lie de cette peuplade étrangère au caractère général, qui s'est formée à côté du vrai peuple par la force des circonstances et des habitudes accumulées pendant des siècles. Presque toujours, pour une telle nation, les peines doivent être mesurées sur la nature de cette race abâtardie, qui est le foyer des crimes, et dont la régénération se laisse à peine entrevoir, après une longue suite d'années du gouvernement le plus sage*

Foucault would unearth and dissect this other, equally violent passage from the rural context:

The peasant is an evil, cunning, ferocious beast, half-civilized; he has neither heart nor integrity, nor honor; he lets himself be led to ferocity, were it not that the other two states crushed him mercilessly and reduced him to not being able to commit the crime he would want to commit.

*Le paysan est un animal méchant, rusé, une bête féroce, à demi-civilisée ; il n'a ni coeur, ni probité, ni honneur ; il se laisserait souvent entraîner à la férocité, si les deux autres états ne fondaient impitoyablement sur lui et le réduisaient à ne pouvoir exécuter le crime qu'il voudrait faire*

And in a fictitious dialogue between the popular class and the privileged, Foucault asks on behalf of the workers: “What has changed? Didn’t we together violate the law, and circumvent the rules?” To which the privileged respond, “under the *ancien régime*, we were all together fighting power, unjustifiable abuses of the monarchy, we were taking on sovereign power. But now, you are just attacking private property. Formerly, we fought together against abuse of power. Now, you are violating the law. And it manifests a complete lack of morals.” And in his manuscript, Foucault ends this dialogue with a marvelous exclamation: “Allez et faites pénitence.”

“Go, and do your penance”: this is the moment where Foucault would turn from an archeological method, which had been inadequate to explain the generalization of the prison-form, to the genealogical method. For Foucault, the prison-form could not be derived from an archaeological examination of the penal theories of the great reformers of the eighteenth century. It traced instead to the moralized notion of penitence.

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The thesis in *The Illusion of Free Markets* may not have paid sufficient attention to this dimension, namely to the moralization that is necessary for so many of us to swallow neoliberal penalty. But it was certainly present. The traces of a moral struggle, of a battle, of what Foucault described in *The Punitive Society* as a civil war, the idea of the criminal as social enemy, these are all over the texts, from the eighteenth to the twentieth centuries.

Beginning with François Quesnay, who referred to “*les hommes pervers*,” “*les voleurs et les méchants*.” Quesnay would write:

The natural and fundamental laws of societies . . . imprint themselves on men's hearts, they are the light that illuminates and masters their conscience: this light can only be weakened or obscured by their disordered passions [*leurs passions dérégées*]. The principle object of positive laws is this very disorderliness [*dérèglement*], to which they oppose a severe punishment to those perverse men [*une sanction redoutable aux hommes pervers*]. For, on the whole, what is it that is truly necessary for the prosperity of a nation? To cultivate the land as successfully as possible and to keep society safe from thieves and evil people [*des voleurs et des méchants*]. The first part is governed by self-interest, the second is entrusted to the civil government.<sup>11</sup>

Dupont de Neumours as well would moralize his discourse. As you may recall, Beccaria had included a chapter on contraband in his little tract from 1764, *On Crimes and Punishments*, where he had advocated severe penalties, including the galleys, for smuggling. “Such a crime deserves a fairly heavy punishment,” Beccaria wrote, “even up to imprisonment or penal servitude.” In the case of a tobacco smuggler, for instance, Beccaria prescribed a prison regime including “toil and exertion in the excise service which [the smuggler] wished to defraud.”

Du Pont's reaction in the *Éphémérides* was visceral and it centered on the moral righteousness associated with private property. To Du Pont, the real criminals are not those who smuggle contraband, but those who regulate commerce: “If there is, then, a true offense that deserves prison and penal servitude, it's not that of the smugglers, but that of the Regulators who have proposed and still propose, who have compelled and still compel the adoption of royal edicts that hamper trade, of fiscal inquisitions, and of monopolistic threats to the natural rights of citizens, to their property, to their civil liberty, deterring useful work, and as fearsome for public as for private wealth.” The notion of the “real” criminal, of the “real enemy of society”—this moralization of crime infuses Dupont's response to Beccaria.

Fast forward to the present. Once again, my colleague Richard Posner is another one who does not mince his words. I have often been struck by his statements about criminals—or about the moral rightness of hating criminals. Posner's personal views surrounding the hatred of criminals are displayed best in his 2012 article on James Fitzjames Stephen titled, “The Romance of Force: James

Fitzjames Stephen on Criminal Law.”<sup>12</sup> In the course of rehearsing Stephen’s views that popular hatred of criminals is morally justified, Posner goes further and develops an entire utilitarian justification for it.

According to Stephen, popular hatred is an important aspect of law, because it motivates the (vengeful) enforcement of justice. If criminal injury did not cause outrage, Stephen reasons, there would be no impetus for revenge through the legal system. Law, he writes, is “an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought . . . to be satisfied in a regular public and legal manner.”<sup>13</sup> Posner notes that it “was natural” to think of criminal justice in terms of personal vengeance in Stephen’s day due to the smaller, less-bureaucratized character of criminal justice back then; but Posner then argues that the view is still valid *today* as well. Posner writes, “the criminal law *is* rooted in vengeance. Vengeance is the stage in the control of antisocial behavior that precedes law and leaves its shape upon law.” Emotion is what makes law function, in Stephen’s time and ours:

This is still the case, because while our criminal law system (and England’s as well) is now dominated by professionals, who chase and prosecute and punish criminals not out of hatred but because they are paid to do those things, these professionals depend heavily on private citizens for aid in enforcement, including crime victims, the victims’ families, bystanders, jurors, and others who usually have no pecuniary stake in assisting in the apprehension and prosecution of criminals. The widespread popular support for capital punishment and other severe punishments, and the widespread popular opposition to legislators and judges perceived as “soft on crime,” are based to a great extent on hatred of murderers; and so if you fear crime and believe in deterrence, *you think it morally right to hate criminals*.<sup>14</sup>

Posner not only offers an updated justification, he actually apprises us of our own hatred of the criminal: anyone who believes in deterrence, anyone who is in that sense rational, already does hate the criminal and should think it is morally right to do so. In effect, Posner’s view regarding the hatred of the criminal is that it serves a moral role insofar as it contributes to a utilitarian calculus

that ensures the efficient functioning of legal pursuits. It is a valuable aspect of our social psychology because it provides the impetus for the enforcement of law.

Posner has other interesting things to say about the accused—innocent as well as guilty—particularly in the context of the legal representation of indigent persons:

I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hardheaded we must recognize that this may not be entirely a bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for the defense of indigent criminal defendants may be optimal.<sup>15</sup>

Gary Becker presented a somewhat more nuanced view, but one that paradoxically also moralized delinquency. Becker, of course, claimed to have extracted all moralization and morality from his theory of crime and punishment, and to have rested it instead purely on economic reasoning. Yet, there remains a clear notion of individual responsibility in his thought—of the placement of responsibility on the individual delinquent. Here, we could turn to his theory human capital, which retains a notion of individualized responsibility for investments in the self. Each and everyone of us is ultimately responsible for our own returns on investment. In the end, we are each responsible for what happens to us, individually.

Becker revealed this notion of individual responsibility in the first of two conversations we had at the University of Chicago on Foucault's 1978-1979 lectures, *The Birth of Biopolitics*, where Foucault discussed Becker's work. At one juncture in the discussion, Becker was defending the implications of human capital theory, and stated:

How it links to power relations... well ... if I look at the United States, how can I understand what young African-American men are doing? To me, this theory—and I'm not saying I fully understand what they're doing—but the theory says, well, they have a lot of different options available.

What we're pointing out *to them* is, if you drop out of high school in the United States, you're pretty much destined to be unemployed, to have low earnings, to be in poor health, to have low marriage rates, and the like. That's what the theory points out *to them*. And what it then points out to them is that you can overcome that in various ways. Not you alone, but with the state and so on. So to me it's a very much uplifting theory, where again, we're putting the individual—what they do—at the center, rather than as the instruments of what others are doing. They're the center. And it's their interaction with each other and with the power relationships that give us the outcomes. So I find it very difficult to agree with the notion that it's a demeaning view of the individual.<sup>16</sup>

Here again, economic rationality has slid into a notion of individual responsibility that has significant moral overtones.

The moralization of criminality and of delinquents has a long, storied, and troubled history in the twentieth century in this country. Katherine Beckett, David Garland, and others have demonstrated how the very category of crime was produced as a political category in the 1960s—in both a racialized and moralized way—as a political response to the Civil Rights gains, and we see reflections of that even today with renewed claims about a supposed “Ferguson Effect.”<sup>17</sup> Dorothy Roberts has explored the production of a moralized discourse over “Black criminality” and its role in justifying the massive incarceration of young black men.<sup>18</sup> Others have analyzed the moralized tropes of the “welfare queen” in relation to the evisceration of the welfare state and the shift from welfare to workfare; of the “disorderly” in relation to the Broken-Windows Theory; of the “ne'er-do-well” in relation to parole prediction instruments; or of the “present oriented” in the writings of Edward Banfield—a category that overlapped squarely with race and poverty.<sup>19</sup> The 1960s especially were scarred by a moralized discourse that linked race, poverty, and liberalism to violence, crime and immorality. Richard Nixon's acceptance speech in 1968 captures that well:

For the past five years we have been deluged by Government programs for the unemployed, programs for the cities, programs for the poor, and we have reaped from these programs *an ugly harvest of frustrations, violence and failure across the land*. And now our opponents will be offering more of the same—more billions for Government jobs, Government housing, Government welfare. I say it's time to quit pouring billions of dollars into programs that have failed in the United States of America.



One need only think back to John DiIulio's earlier interventions in the 1990s—a time when he developed (and would later regret) the theory of “superpredator youths,” what he referred to as that “new generation of street criminals” who are “upon us”: “the youngest, biggest and baddest generation any society has ever known.”<sup>20</sup> “Based on all that we have witnessed, researched and heard from people who are close to the action,” DiIulio wrote with two co-authors, “here is what we believe: America is now home to thickening ranks of juvenile ‘superpredators’—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders.”<sup>21</sup>

These are some of the moralizations that make us tolerate the paradoxes of neoliberal penalty and blind us to the reality and devastating consequences of mass incarceration today.

Let me close with this. The importance of moralization should not be underestimated. The idea of “the criminal as social enemy,” the notion of perverted men, of brutally remorseless youngsters, of the righteous hatred of the criminal—these must alert us to the seriousness of the struggle. So I will end with a particularly striking passage from Foucault's lesson of February 28, 1973. After having engaged the ruthlessly brutal texts about the “bastardized races” of rural peasants and unearthed their violent premises, Foucault tells his audience at the Collège de France:

We're always used to talking about the “stupidity” of the bourgeoisie. I wonder if the theme of bourgeois stupidity is not a theme for [artists, for intellectuals, for philosophers]: those who think that merchants are dim-witted, that financiers are obtuse, that those in power are simply blind. Sheltered by these caricatures, in fact the bourgeoisie is remarkable in intelligence. The lucidity and intelligence this class, which has captured and retained power under the conditions that we know, produces many effects of stupidity and blindness, but where? - if not exactly among intellectuals. We might be able to define intellectuals as those upon whom the intelligence of the bourgeoisie produces an effect of blindness and stupidity.<sup>22</sup>

And then he adds in the margin of his manuscript: « *Ceux qui le nient sont des amuseurs publics. Ils méconnaissent le sérieux de la lutte.* »<sup>23</sup> “Those who deny this are public entertainers. They don’t recognize the seriousness of the fight.”

One gets a sense of this when one rereads Dilulio or Banfield, or when one goes all the way back to Quesnay and Dupont. Our understanding of the political economy of punishment today must be twined to a genealogy of morals—that is the only way to understand how the new political economies of mass incarceration, how, in effect, the intolerable becomes tolerable.

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<sup>1</sup> Harcourt, *The Illusion of Free Markets* (Harvard 2011).

<sup>2</sup> See generally Scott Horton, “Quesnay: The Despotism of Natural Law,” *Harpers*, Nov. 22, 2011, here: <http://harpers.org/blog/2011/11/quesnay-the-despotism-of-natural-law/>

<sup>3</sup> Richard Posner, “An Economic Theory of Criminal Law,” *Columbia Law Review* 1985 here: [http://chicagounbound.uchicago.edu/journal\\_articles/1828/](http://chicagounbound.uchicago.edu/journal_articles/1828/)

<sup>4</sup> Loic Wacquant, “Three steps to a historical anthropology of actually existing neoliberalism,” *Social Anthropology/Anthropologie Sociale* (2012) 20, 1, p. 66–79, at p. 76 n.9.

<sup>5</sup> This is a topic that Didier Fassin has explored in depth. See [http://www.cairn-int.info/article-E\\_ANNA\\_646\\_1237--moral-economies-revisited.htm](http://www.cairn-int.info/article-E_ANNA_646_1237--moral-economies-revisited.htm)

<sup>6</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, p. 181.

<sup>7</sup> *Ibid.*, 182.

<sup>8</sup> *Ibid.*, p. 182.

<sup>9</sup> Foucault, *La Société punitive* (BEH translations; will track down Burchell translations and pages).

<sup>10</sup> This is so important, it is precisely why I placed Foucault’s remarkable passage about Colquhoun on the jacket of the 1973 lectures, an utterly riveting passage:

Unfortunately, when we teach morality, when we study the history of morals, we always analyze the Groundwork of the Metaphysics of Morals and do not read [Colquhoun], this character who is fundamental for our morality. The inventor of the English police, this Glasgow merchant ... settles in London where, in 1792, shipping companies ask him to solve the problem of the superintendence of the docks and the protection of bourgeois wealth. [This is a] basic problem ...; to understand a society’s system of morality we have to ask the question: Where is the wealth? The history of morality should be organized entirely by this question of the location and movement of wealth.

<sup>11</sup> Quesnay 2005:1016-1017 (« Les lois naturelles et fondamentales des sociétés ... s’impriment dans le cœur des hommes, elles sont la lumière qui les éclaire et maîtrise leur conscience : cette lumière n’est affaiblie ou obscurcie que par leurs passions dérégées. Le principal objet des lois positives est ce dérèglement même auquel elle[s] oppose[nt] une sanction redoutable aux hommes pervers. Car en gros de quoi s’agit-il pour la prospérité d’une nation ? *De cultiver la terre avec le plus grand succès possible et de préserver la société des voleurs et des méchants*. La première partie est ordonnée par l’intérêt, la seconde est confiée au gouvernement civil »).

<sup>12</sup> Richard Posner, *The Romance of Force: James Fitzjames Stephen on Criminal Law*, 10 Ohio St. J. of Crim. Law 263 (2012).

<sup>13</sup> Posner 2012, p. 268.

<sup>14</sup> Posner 2012, p. 268 (emphasis added).

<sup>15</sup> Richard Posner, *The Problematics of Moral and Legal Theory* 163–64 (1999).

<sup>16</sup> Gary Becker in Gary Becker, François Ewald, and Bernard E. Harcourt, “Becker on Ewald on Foucault on Becker: American Neoliberalism & Michel Foucault’s 1979 *Birth of Biopolitics Lectures*,” *The Carceral Notebooks*, Volume 7 (2011) at [http://www.thecarceral.org/cn7\\_Becker\\_Ewald\\_Conversation.pdf](http://www.thecarceral.org/cn7_Becker_Ewald_Conversation.pdf)

<sup>17</sup> See Beckett, *Making Crime Pay* (1997); Garland, *The Culture of Control* (2002); “Don’t believe the fictitious crime trends used to undermine police reform. The ‘Ferguson Effect’ is part of an ugly history of using crime to delegitimize civil rights movements. That’s why we must be especially vigilant against it,” at <http://www.theguardian.com/commentisfree/2015/jun/06/dont-believe-ferguson-effect-fictitious-undermine-police-reform>

<sup>18</sup> Roberts, “Race, Vagueness, and the Social Meaning of Order-Maintenance Policing,” 1999.

<sup>19</sup> See <http://colabradio.mit.edu/broken-windows-again-3/>; generally Harcourt, *Illusion of Order* (Harvard 2001)

<sup>20</sup> See generally [http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?\\_r=0](http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?_r=0)

<sup>21</sup> Bennett, DiIulio, and Walters, *Body Count* (1996)

<sup>22</sup> *La Société punitive*, Leçon du 28 février 1973, p. 168.

<sup>23</sup> *Ibid.*, note d (App. cours no. 9, premier feuillet), p. 168.