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State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment

ABSTRACT

Three books published during the seventies, by Michel Foucault, Michael Ignatieff, and David Rothman, greatly revised the history of the penitentiary. Contrary to the received wisdom which located the penitentiary’s origin in the altruism of Quakers and other humanitarian reformers, and portrayed it as a humane advance from the squalid jails and workhouses, corporal and capital punishment, and transportation that preceded it, the revisionist accounts characterized the penitentiary, and other nineteenth-century “asylums” as weapons of class conflict or instruments of “social control.” Social theories on a grand scale, such as Marxism or structural-functionalist, however, claim too much. The revisionist historiography of the prison followed these theories into three major misconceptions: that the state controls a monopoly over punitive regulation of behavior, that the state’s moral authority and practical power are the major sources of social order, and that all social relations can be described in terms of power and subordination. The next generation of historical writing on crime and punishment must subject these distorting misconceptions to empirical examination.

Until recently, the history of prisons in most countries was written as a narrative of reform. According to this story, a band of philanthropic reformers in the second half of the eighteenth century, secular Enlightenment theorists like Beccaria and Bentham and religious men and women of conscience like the Evangelicals and the Quakers, set out to convince the political

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leadership of their societies that public punishments of the body like hanging, branding, whipping, and even, in some European countries, torture were arbitrary, cruel, and illegitimate and that a new range of penalties, chiefly imprisonment at hard labor, could be at once humane, reformative, and punitive. This campaign in Europe and America was powered by revulsion at physical cruelty, by a new conception of social obligation to the confined, and by impatience with the administrative inefficiency manifested in the squalid neglect of prisoners. The Enlightenment critique of legal arbitrariness and the vernacular of religious humanitarianism gradually created a moral consensus for reform which, after many delays and reversals, culminated by 1850 in the curtailment of hanging, the abolition of branding and the stocks, and the widespread adoption of the penitentiary as the punishment of first resort for major crime (Whiting 1975; Cooper 1976; Condon 1962; Stockdale 1977; O. Lewis 1967; Teeters 1935; D. Lewis 1965).

All of these accounts emphasized conscience as the motor of institutional change and assumed that the reformative practice of punishment proposed by the reformers was both in intention and in result more humane than the retributive practices of the eighteenth century. A third common feature of these accounts was their administrative and institutional focus on change within the walls and within the political system which ratified or resisted these changes. With the exception of Rusche and Kirchheimer’s work (1939) on the relation between prison routines and emerging patterns of labor market discipline after 1550, few studies of imprisonment ventured beyond the walls of the prison itself.

The history of prisons therefore was written as a sub-branch of the institutional history of the modern welfare state. As such it has had an implicitly teleological bias, treating the history as a progress from cruelty to enlightenment. In the early sixties, historians in a number of fields, not just in the history of prisons but also in the history of mental health, public welfare, juvenile care, hospitals, and medicine, began to point up the political implications of this history of reform. To interpret contemporary
institutions as the culmination of a story of progress was to justify them at least in relation to the past and to suggest that they could be improved by the same incremental process of philanthropic activism in the future. A reformist historiography thus served a liberalism of good intentions, which in turn seemed to legitimize dubious new initiatives—psychosurgery, chemotherapy, and behavior modification—as legitimate descendants of the reforming tradition. It was in part to question the legitimacy of these “reforms” in the present that a new group of revisionist historians set out to study the reforms of the past. Another broader motive was perhaps at work too—the libertarian, populist politics of the 1960s revised historians’ attitudes toward the size and intrusiveness of the modern state; the history of the prison, the school, the hospital, the asylum seemed more easily understood as a history of Leviathan than as a history of reform.

Some, if not all, of the new historiography was avowedly political. Moreover, it saw itself offering intellectual support for the welfare rights, mental patients’ rights, and prisoners’ rights campaigns of the time. These motives inspired an outpouring of new revisionist history on the modern urban school (Katz 1968; Lazerson 1971), the welfare system (Piven and Cloward 1971), the asylum (Scull 1979), the juvenile court (Platt 1969), and the prison. Three works best embody the revisionist current as far as prisons were concerned. The first was David Rothman’s *The Discovery of the Asylum* (1971), an ambitious and justly well-received attempt to relate the emergence of the penitentiary, the mental institution, juvenile reformatory, and the urban school to the transformation of American society from the late colonial to the Jacksonian period. The second major work, dealing with France, was Michel Foucault’s *Discipline and Punish* (1978), which followed his studies of the origins of the mental institution (*Madness and Civilization* 1967) and the origins of the hospital (*Birth of the Clinic* 1973) and his work on the evolution of the social and natural sciences in the eighteenth and nineteenth centuries (*The Order of Things* 1970). *Discipline and Punish* was not only about imprisonment but about the disciplinary ideology at
work in education and in the army, and in the new psychology and criminology which claimed to offer a scientific analysis of criminal behavior and intention. The third major work of the revisionist current was my own *A Just Measure of Pain: The Penitentiary in the Industrial Revolution* (1978). Narrower in scope than the others, it concentrates only on the penitentiary’s emergence in England in the period from 1770 to 1840.

Despite these differences of scope and intention, all three agreed that the motives and program of reform were more complicated than a simple revulsion at cruelty or impatience with administrative incompetence—the reformer’s critique of eighteenth-century punishment flowed from a more not less ambitious conception of power, aiming for the first time at altering the criminal personality. This strategy of power could not be understood unless the history of the prison was incorporated into a history of the philosophy of authority and the exercise of class power in general. The prison was thus studied not for itself but for what its rituals of humiliation could reveal about a society’s ruling conceptions of power, social obligation, and human malleability.

Within the last two or three years, however, as the wider political climate has changed, these revisionist accounts have come under increasing attack for overschematizing a complex story, and for reducing the intentions behind the new institution to conspiratorial class strategies of divide and rule. The critique has put into question the viability of both Marxist and structural-functionalist social theory and historical explanation, not only in the area of prisons, but by extension in other areas of historical research. These larger implications make the revisionist anti-revisionist debate of interest to readers beyond the historians’ parish.

What this review of the debate hopes to show is that revisionist arguments, my own included, contained three basic misconceptions: that the state enjoys a monopoly over punitive regulation of behavior in society, that its moral authority and practical power are the binding sources of social order, and that all social relations can be described in the language of subordina-
tion. This does not, by implication, make the counter-revisionist position correct. Insofar as it is a position at all, it merely maintains that historical reality is more complex than the revisionists assumed, that reformers were more humanitarian than revisionists have made them out to be, and that there are no such things as classes. This position abdicates from the task of historical explanation altogether. The real challenge is to find a model of historical explanation which accounts for institutional change without imputing conspiratorial rationality to a ruling class, without reducing institutional development to a formless ad hoc adjustment to contingent crisis, and without assuming a hyper-idealist, all triumphant humanitarian crusade. These are the pitfalls; the problem is to develop a model that avoids these while actually providing explanation. This paper is a step toward such a model, but only a step. Since I am a former, though unrepentant, member of the revisionist school, this exercise is necessarily an exercise in self-criticism.

The focus on three books, and on a narrow if crucial period, is necessary because this is where debate has been most pointed and most useful. With the exception of David Rothman's *Conscience and Convenience* (1980a), Steven Schlossman's *Love and the American Delinquent* (1977), James Jacobs's *Stateville* (1977), and Anthony Platt's *The Child Savers* (1969), the revisionist and counter-revisionist debate has not extended itself into the terrain of the twentieth century. We are still awaiting a new historiography on the disintegration of the nineteenth-century penitentiary routines of lockstep and silence; the rise of probation, parole, and juvenile court; the ascendancy of the psychiatrist, social worker, doctor, and the decline of the chaplain within the penal system; the history of drug use as therapeutic and control devices; the impact of electric and TV surveillance systems on the nineteenth-century institutional inheritance; the unionization of custodial personnel; the impact of rising standards of living upon levels of institutional amenity and inmate expectation; the long-term pattern of sentencing and the changing styles of judicial and administrative discretion; the history of ethnic and race relations within the walls; the social and institutional origins of
the waves of prison rioting in the 1950s and late 1960s. This is the work that needs to be done if historians are to explain the contemporary crisis in prison order epitomized at Attica and more recently at Santa Fe (Wicker 1975; Silberman 1978; for England, see Fitzgerald 1977). The classics of prison sociology in the forties and fifties described prisons as communities, guaranteeing a measure of order and security through a division of power between captors and captives (Sykes 1958; Clemmer 1940). Why has this division of power broken down so often in the sixties and seventies? Thus far, only Jacobs's exemplary study of Stateville penitentiary in Illinois has offered a truly historical answer integrating changes in institutional governance, inmate composition and expectation, and the racial politics of the outside world into a working explanation. His conclusions, that prisoners were often surer of their physical safety under the tighter and more self-confident authoritarian regimes of the forties than they were under the well-meaning but confused reformist regimes of the sixties, might appear to suggest that a return to authoritarianism is the best way to guarantee prisoners' and guards' physical security, if nothing else. Unionized guards and the militant prisoners of today will not permit a return to the prisons of the forties. But if we cannot and ought not repeat history, we can at least learn from history where we went wrong. In the market place of good ideas—decarceration, inmate self-management, due process grievance procedures, institutional redesign, token economies, behavior modification—history offers a reliable guide to consumer choice and its invariable lesson in caveat emptor. Criminal justice activists may be disappointed by the literature I will review here because no answers are offered to the question, What is to be done? I do hope there is use, however, in learning some of the subtler errors which good intentions can entrain.

I. What Happened: the Revisionist Account
Let me begin by describing the revolution in punishment between 1780 and 1850. Rothman, Foucault, and my own work may differ about explanation but we do agree about what happened. In each society the key developments seem to have been:
The decline of punishments involving the public infliction of physical pain to the body. Beccaria's campaign against the death penalty in the 1760s, the Pennsylvania statute of 1786, the reformed codes of the "enlightened despot," the French revolutionary decrees against the capital penalty, and Romilly and MacIntosh's capital statutes campaign in England culminated by the 1830s in the restriction of the death penalty to first degree murder and treason. The form of execution was also changed—in France the guillotine was adopted in 1792 as a scientific instrument of death sparing the victim the possible incompetence of the hangman; the traditional Tyburn processional of the condemned through the streets of London was abolished in 1783 in order to curtail the public symbolism of the death spectacle (Foucault 1978; Linebaugh 1977, pp. 246–70); public executions in England ended in the 1860s, and hanging henceforth took place behind prison walls (D. Cooper 1974). The lesser physical penalties were also curtailed or abolished (abolition of branding in England, 1779; pillory, 1837; whipping of women, 1819; see also Perrot 1980, pp. 59–60, for France). By 1860 the public ritual of physical punishment had been successfully redefined as a cruel and politically illegitimate means of inflicting pain.

The emergence of imprisonment as the preeminent penalty for most serious offenses. Imprisonment had been used as punishment on a selective but insubstantial scale prior to 1770. Places of confinement were generally used as waystations for persons awaiting trial, for convicted felons awaiting execution or transportation, and crucially for debtors. Nearly 60 percent of the institutional population in Howard's census of 1777 were debtors (Ignatief 1978, p. 28; Pugh 1968; Sheehan 1977). Vagrants and disobedient servants convicted for a range of minor, work-related property offenses punishable at summary jurisdiction were confined at hard labor in houses of correction (Innes 1980b; DeLacy 1980, chap. 1; Beattie 1974, 1977). This use of imprisonment increased in the eighteenth century, for reasons we do not yet understand. In England it was not until the suspension of transportation in 1776 that English JP's and assize judges began to substitute sentences of imprisonment for sentences of transportation (Webb
and Webb 1963; Ignatieff 1978, chap. 4). At first criminal law reformers like Beccaria showed no particular enthusiasm for imprisonment itself, preferring to replace hanging with penalties ranging from hard labor in public to fines. It was only after 1776 in America and after 1789 in France that imprisonment began to replace hanging as the penalty appropriate to modern, enlightened republics (Foucault 1978, p. 115; Rothman 1971, p. 59).

The penitentiary came to be the bearer of reformers' hopes for a punishment capable of reconciling deterrence and reform, terror and humanity. In England between 1780 and 1812, half a dozen counties built small penitentiaries mostly for the control of minor delinquency. The first national penitentiary, Millbank, was opened in 1816. An enormous warren of passages and cells built in the style of a turreted medieval fortress near the Houses of Parliament, it soon was condemned as a costly failure—the prisoners were in revolt against the discipline more or less continuously in the 1820s; a violent outbreak of scurvy closed the prison for a year in 1824; but the lessons of failure were learned at Pentonville, opened in 1842. Its penitential regime of solitude, hard labor, and religious indoctrination became the model for all national penal servitude prisons and most county prisons besides. In America the key developments of the penitentiary regime occurred between 1820 and 1830—Auburn, 1819–23; Ossining, 1825; Pittsburgh, 1826; Philadelphia, 1829 (Rothman 1971, pp. 80–81), and in France, La Petite Rocquette, 1836, and the juvenile reformatory at Mettray, 1844 (Perrot 1980, pp. 60–1).

As systems of authority, the new prisons substituted the pains of intention for the pains of neglect (Ignatieff 1978, p. 113). Reformers like Howard were appalled that the squalor in neglected institutions was justified for its deterrent value. Accordingly, regular diets replaced the fitful provision of food in eighteenth-century institutions; uniforms replaced rags and personal clothing; prisoners received regular medical attention, and new hygienic rituals (head shaving, entrance examination, and bath) did away with the typhus epidemics which were an intermittent feature of eighteenth-century European prison life.
These hygienic rituals in turn became a means of stripping inmates of their personal identity. This indicates the ambivalence of "humanitarian" reform: the same measures that protected prisoners' health were explicitly justified as a salutary mortification of the spirit (Ignatieff 1978, p. 100).

The new prisons substituted the rule of rules for the rule of custom and put an end to the old division of power between the inmate community and the keepers. All accounts of eighteenth-century prisons stress the autonomy and self-government of prisoner communities. Since common law forbade the imposition of coercive routines on prisoners awaiting trial and debtors, they were able to take over the internal government of their wards, allocating cells, establishing their own rules, grievance procedures, and punishments (Innes 1980a, 1980b; Sheehan 1977, p. 233; De- Lacy 1980, chap. 2). The implied authority model of the colonial American and British prison was the household. The keeper and his family often resided in the institution and the prisoners were called "a family." They did not wear uniforms, they were not kept to routines, and they defended an oral and common law tradition of rights, privileges, and immunities (Rothman 1971, p. 55). By the 1840s in all three societies, a silent routine had been imposed to stamp out the association of the confined and to wipe out a subculture which was held to corrupt the novice and foster criminal behavior. Under the silent associated system of discipline, prisoners were allowed to congregate in workshops but were strictly forbidden to communicate. In the separate system at Pentonville and Philadelphia, prisoners were kept in complete cellular isolation and were forbidden any form of communication or association (Rothman 1971, p. 81; Ignatieff 1978, chap. 1; Henriques 1972). While advocates of both systems argued fiercely over their respective merits, they both agreed in principle on the necessity of suppressing the prison subculture and ending the tacit division of authority between captors and captives which had prevailed in the ancien régime. From a positive point of view, solitude exposed the individual prisoner to the obedience training of routine and the religious exhortation of the chaplain.
The chaplain, not the doctor or the governor, became the chief ideologist of the penitentiary, justifying its deprivations in the language of belief.

*The new institutions enforced a markedly greater social distance between the confined and the outside world.* High walls, sharply restricted visiting privileges, constant searches and patrols ended the mingling of outside and inside in the unreformed prison. Before reform, visitors enjoyed the run of the yards, women commonly brought their husbands meals, and debtors and outsiders drank together in the prison taproom. The aim of reform was to withdraw the prisoner from the corrupting influence of his former milieu and, at the same time, to inflict the pains of emotional and sexual isolation. Once again the mixture of humane and coercive motivations becomes apparent. As an unintended consequence, however, the check to the power of institutional personnel offered by constant visitors was reduced. The new institutions, therefore, did not resolve the old question, Who guards the guards? Instead they posed the question in a new and thus far more intractable way (Ignatieff 1978, conclusion; DeLacy 1980, conclusion).

All three versions agree that the emergence of the modern prison cannot be understood apart from the parallel history of the other total institutions created in this period—the lunatic asylum, the union workhouse, the juvenile reformatory and industrial school, and the monitorial school. Besides being the work of the same constituency of philanthropic and administrative reformers, these institutions enforced a similar economy of time and the same order of surveillance and control. They also expressed a common belief in the reformative powers of enforced asceticism, hard labor, religious instruction and routine.

The preceding paragraphs provide a schematic summary of the revolution in discipline as the revisionist account would have it. Before considering the explanations offered for this revolution, we ought to pause to consider the objections that have been raised to the revisionist account as valid description. A
number of theses and monographs completed within the last couple of years have insisted that the descriptive picture is more complex, contradictory, and inchoate than Foucault, Rothman, or I have suggested.

Margaret DeLacy’s excellent Princeton dissertation on county prison administration in Lancashire, 1690–1850, argues that even a relatively dynamic county administration like Lancashire lacked the resources to impose the highly rationalized Pentonville model on all the county institutions (1980). Many of these remained much the same as they had been in the eighteenth century. Eighteenth-century historians, particularly Joanna Innes, have argued that the prereform prison was neither as squalid nor as incompetently administered as the reformers made it out to be (Innes 1980b). By implication, therefore, the revisionist account may have been taken in by the reformers’ sources. It is less clear, therefore, that the history of the institution between 1780 and 1840 can be described as a passage from squalid neglect to hygienic order.

Michelle Perrot and Jacques Leonard have made the same case for France, arguing that the highly rationalized institutions like La Rocquette and La Mettray cannot be taken as typical of the mass of local lockups, jails and hulks in mid-nineteenth-century France. In these institutions, the persistence of disease and the continued use of whipping and chains would appear to suggest a melancholy continuity with the worst features of the ancien régime (Perrot 1980).

It appears then that the revolution in punishment was not the generalized triumph of Weberian rationalization which the revisionist account suggested. Foucault’s work (and my own as well) remained captive of that Weberian equation of the ancien régime with the customary, the traditional, and the particularistic, and of the modern with the rational, the disciplined, the impersonal, and the bureaucratic. The gulf between the reformers’ rationalizing intentions and the institutionalized results of their work ought to make us rethink this equation of modernity and rationalization, or at least to give greater room for the
idea that modernity is the site of a recurring battle between rationalizing intention and institutions, interests and communities which resist, often with persistent success.

Yet even if we admit that Pentonville and the Panopticon (Bentham 1791), Auburn and La Rocquette were "ideal types" rather than exemplary realities of their time, we still have to explain why it became possible between 1780 and 1840 and not before to conceive and construct them. However much else remained unchanged in the passage from the ancien régime to the industrial world of the nineteenth century, the penitentiary was something new and unprecedented and was understood as such by the great observers of the age, Alexis de Tocqueville, Charles Dickens, and Thomas Carlyle. A counter-revisionist account that considers only the local institutions, which went on much the same as before, will miss what contemporaries knew had to be explained about their own age.

II. Jacksonian America: The Emergence of the Asylum

Let us turn to this business of explanation and let us begin with the American case, with the work of David Rothman. In Rothman's account, the new total institutions of the Jacksonian period emerged in an overwhelmingly rural and agricultural society, growing beyond the boundaries of the colonial past yet still a generation away from the factory system, industrialism, European immigration, and the big city. It is a fundamental mistake, he argues, to interpret the total institution as an "automatic and inevitable response of an industrial and urban society to crime and poverty" (Rothman 1971, p. xvi). Americans were anxious about the passage of colonial society and the emergence of a restless, socially mobile population moving beyond the controls of family, farm, and town meeting, but there was nothing in this process which itself required the emergence of the new asylums and prisons. The catalyst for institutionalized instruction was not social change itself but the way it was organized into an alarmist interpretation of disorder and dislocation by philanthropic reformers. Crime was read for
the first time not as the wickedness of individuals but as an indictment of a disordered society. This explains the emergence of new institutions aiming at the reformation and discipline of the deviant, disorderly, and deranged.

For a society which interpreted crime as the sign of the passing of the colonial order, the penitentiary symbolized an attempt to re-create the godly superintendence and moral discipline of the past within a modern setting. Rothman demonstrates brilliantly that the language developed in a society to explain disorder and deviance also defines the solutions it develops for these problems. An environmentalist theory of crime and faith in the reformatory effects of isolation from the environment were linked together in a system of ideas, each legitimizing the other.

Rothman is better at re-creating the reformers’ systems of belief than in locating these beliefs in a believable social and economic context. We need to know something about actual trends in crime during 1780–1820 if we are to understand the changing fit between reform and rhetoric and their social context. In the absence of such data, crime becomes a static and empty category in Rothman’s analysis, and the reformers’ alarmist discourse drifts away from any point of reference.

Why, we need to know, were the Jacksonians so specially anxious about change and disorder, and why did they look back with such nostalgia to colonial society? Rothman simply accepts the Jacksonian reformers’ picture of the stable pre-revolutionary society they were leaving behind, but surely this was a questionable historical fable. Many eighteenth-century Europeans regarded colonial America as a restless, rootless, dynamic, and explosive society. Tom Paine’s Philadelphia was no deferential idyll (Foner 1976). Yet Rothman never questions the Jacksonian’s rosy image of their own past, never asks how their account of it should have been so out of joint with what we know of colonial society.

One would also have liked Rothman to explore the relationship between the rise of the total institution and the theory and practice of Jacksonian democracy. This was after all
the period of the extension of universal manhood suffrage in the United States. Tocqueville himself thought the relation was one of contradiction: "While society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism" (Beaumont and Tocqueville 1964, p. 79). As Tocqueville suggested in the "tyranny of the majority" sections of Democracy in America, democratic republics which represent law and order as the embodied will of all the people treat disobedient minorities more severely than monarchical societies which have no ideological commitment to the consensual attachment of their citizens. Rothman suggests but leaves unexplored the possibility of a connection between Jacksonian popular sovereignty, an environmentalist theory of crime as being the responsibility of society, and an interventionist social therapy taking the form of the "total institution."

III. Sovereignty and the Margin of Illegality
If we turn to Foucault, we find that the relation between forms of sovereignty outside the walls and carceral regimes inside constitutes the main axis of his interpretation. Public executions, which the reformers of the Enlightenment condemned as a carnal and irrational indulgence, can be read, Foucault argues, as symbolic displays of the highly personalized sovereignty of the king and of his alternatively vengeful, merciful relation toward his wicked subjects.

The execution suited a philosophy of order that ignored minor delinquency to concentrate instead on the ritualized dispatch of selected miscreants. This exercise of sovereignty in turn implied a loosely articulated political nation in which each of the different social strata had its margin of tolerated illegality; the non-application of the rule, the non-observance of the innumerable edicts or ordinances were a condition of the political and economic functioning of society.... the least favoured strata of the population did not have in principle any privileges, but they benefited within the margins of what
was imposed on them by law or custom, from a space of
tolerance, gained by force or obstinacy. (Foucault 1978, pp.
84–5)

The illegalities of the poor, like the tax exemptions of the
rich, were tolerated because of the persistent weakness of an
underfinanced, chronically indebted state, the tenacious survi-
val of regional and local immunities, and the persistent counter-
vailing power of the parlements (see Montesquieu, The Spirit of
the Laws, 1748), the judiciary, and the nobility. Above all, the
margin of illegality enjoyed by the poor reflected a ruling con-
ception of national power as the sovereign’s will rather than the
operation of a bureaucratic machine. The state, moreover,
shared the punitive function with civil society, in the double
sense that its public rituals (execution, pillory, whipping, and
branding) required completion by the opprobrium of the crowd
if they were to have full symbolic effect, and in the sense that
household heads, masters, and employers punished directly
without invoking the state’s power.

Independently of Foucault, Edward Thompson and Douglas
Hay seem to have reached a similar description of the exercise
of sovereign power in eighteenth-century England. They put
the same emphasis on the symbolic centrality of the public
hanging in reproducing awe and deference before the
sovereign’s mighty but merciful power, and they describe a
philosophy of order essentially similar in its permissive ap-
proach to the small fish.

Permissive, however, is too nostalgic or sentimental a word
for a tactics of order uneasily poised between an obvious and
sometimes brutal concern to defend property rights and an
equal distaste, moral, libertarian and economic, for the ap-
paratus of state police (Hay 1975, pp. 17–65; Thompson 1975,
conclusion). The Revolution Settlement and the common law
tradition imposed limits on the discretionary power of
eighteenth-century magistrates, and the common people them-
selves were quite capable of forcibly reminding magistrates of
“the rights of free born Englishmen” and of the protocol of
customs guaranteeing free assembly (Thompson 1971). It is possible that there was no corresponding corpus of rights in common law available to the French poor, but is is hard to believe that they did not hold to some customary beliefs and traditions about the proper bounds of monarchical “police.”

Hay’s and Thompson’s works show up Foucault’s tacit assumption that the only limits on public order policy were the mental assumptions of the authorities themselves and the structural weaknesses of the state apparatus. What is missing in his work is the idea that public order strategies were defined within limits marked out not only by the holders of power but also by those they were trying, often vainly, to persuade, subdue, cajole, or repress. Foucault’s account consistently portrays authority as having a clear field, able to carry out its strategies without let or hindrance from its own legal principles or from popular opposition. Power is always seen as a strategy, as an instrumentality, never as a social relation between contending social forces. We need to know much more about the social process by which the margin of illegality enjoyed by the poor in the ancien régime was established before we conclude with Foucault that it owed its existence to the toleration of the authorities.

IV. Class Conflict and the Prison
However we interpret the margin of popular illegality under the ancien régime, Foucault and I agree that the penitentiary formed part of a new strategy of power aiming at its circumscription between 1780 and 1850. This new strategy was the work of Burke’s “sophisters, economists, and calculators”—the monarchical administrators like Turgot and Le Trosne, and gentry men of letters like Beccaria. In England, the new ideology found expression in Henry Fielding’s proposals for reform of London police in the 1760s, in Howard’s penitentiary scheme of the 1770s, and in the hospital and asylum reforms led by the provincial Nonconformist professional classes in the 1790s (Ignatieff 1978, chap. 3). In the
1780s, too, Bentham and Romilly began their campaigns for the codification of law and for the curtailment of public executions. The ideal of reforming through punishment and of apportioning just measures of pain to crimes previously tolerated or ignored was compatible with the democratic ideals of the French Revolution—equal rights, equal citizenship, equal punishment—but it proved no less compatible with Napoleonic centralism and the Bourbon Restoration. Beneath the whole surface play of debate about political rights and regimes between the 1770s and 1840s, Foucault argues, a new “carceral archipelago” of asylums, prisons, workhouses, and reformatories slipped into place. The political divisions over regimes and rights hid a deeper, unstated consensus among the ruling orders on the exercise of power over the criminal, the insane, and the pauper. This ideology forged in the 1760s by the Enlightenment reformers and opponents of the ancien régime was transmitted and reproduced by social interests in the Restoration and the July Monarchy often deeply hostile to the rationalist or egalitarian spirit of the philosophers themselves.

In England, the first bearers of the new disciplinary ideology were the reforming county magistrates and the Dissenting professional classes of the provinces—reformist in politics, scientific in mental outlook, rational and improving in their management of labor, county finance, and personal estates. The new asylums, prisons, workhouses, and schools which they built appealed to their residual religious asceticism, to their scientific and rationalist outlook, and to their impatience with the administrative incompetence and political corruption of the ancien régime. In the crisis years of early industrialization after 1815, the disciplinary ideology was taken up by the evangelized professional, mercantile, and industrial classes seeking to cope with the dissolution of a society of ranks and orders and the emergence of a society of strangers. The philanthropic campaigns to reform old institutions and to build new asylums, workhouses, prisons, and hospitals gave expression to a new strategy of class relations. In return for the humanity of mini-
mal institutional provision, the disobedient poor were drawn into a circle of asceticism, industriousness, and obedience. They would return to society convinced of the moral legitimacy of their rulers. The persistent ideal of prison reform was a kind of punishment at once so humane and so just that it would convince the offender of the moral legitimacy of the law and its custodians. The penitentiary was designed to embody this reconciliation of the imperatives of discipline with the imperatives of humanity.

My own account places more stress than Foucault's on the religious and philanthropic impulses behind institutional reform. His version of the disciplinary ideology retains the secular rationalist tone of its initial Enlightenment formulation, while mine stresses the fusion of the secular rationalism embodied in Benthamism with the Quaker and Evangelical language of conscience epitomized by Elizabeth Fry. The penitentiary in England had at its core the religious discourse of the chaplain, just as the new Evangelical language of class relations had at its core the idea of rich and poor bound together in the common experience of sin and the common salvation of faith and industry.

My own account also places more stress than Foucault's upon the reformers' concern to defend and explain institutional routines to the confined. As a consequence I have put more emphasis on the humanitarian intentions of the reformers. They were genuinely repelled by the chains, squalor, and neglect they discovered in existing institutions, especially because these compromised the moral legitimacy of the social system in the eyes of the confined. In their theory of the reform of character, the crucial task was to persuade the poor to accept the benevolent intention behind institutional deprivations. Once convinced of the benevolence of the system, reformers argued, prisoners would be unable to take refuge from their own guilt in attacking their confiners. Personal reformation thus meant succumbing to the benevolent logic of their captors. In Foucault's account on the other hand, reformers were not centrally concerned to legitimize new penal measures as humane.
Reformers in his account simply took the humanity of their measures for granted and looked to the discipline to routinize the habits of the poor. My model of the reform of character is one of symbolic persuasion; Foucault’s is of disciplinary routinization.

We both agree, however, on the relation between this new strategy of power and the social crisis of the post-1815 period, exemplified in recurrent surges of distress-related crime, pauperism, and collective pauper unrest. Foucault is sketchy in the extreme about the causation of this social crisis, but it is clearly implied as the backdrop of the institutional revolution in France. My account likewise does not purport to be a social history of crime and pauperism in the 1815–48 period, but it does locate three major sites of crisis. The first was the breakdown of social relations in the agricultural counties of the southeast between 1815 and 1831 as a result of the casualization of the agricultural proletariat. Rising rates of vagrancy, pauperism, and petty crime through the 1820s and the explosion of the Swing Riots in 1831 are the symptoms of this crisis in rural social relations. The second site of crisis was in London, where the Anti-Corn Law Riots of 1815, the Spa Field disturbances of 1816, and the riots attendant upon Queen Caroline’s trial proved that the existing parish constabulary was hopelessly outdated in coping with urban crowd control while the soldiery brought in upon these occasions was a clumsy, brutal, and therefore alienating instrument of order (Silver 1967). In addition there was growing anxiety among magistrates and philanthropists about the rising incidence of juvenile crime in the metropolis after 1815. Masterless apprentices, orphans, underemployed youths, child prostitutes, all seemed to symbolize a breakdown in the order of the family, the parish, and the workshop. The third site of crisis lay in the new northern industrial towns where regional labor markets tied to single industries like cotton proved extremely vulnerable to cycles of demand in the international economy. Mass unemployment in “bad years” like 1826 threw up the specter of recurrent breakdown in labor market disciplines (Ignatieff 1978, chap. 6).
There cannot be much doubt that the new strategy of mass imprisonment, the creation of the Metropolitan Police in 1829, and the diffusion of paid constabularies through the agricultural counties and the industrial towns in the 1830s, 40s, and 50s must be seen as a “response” to this crisis of public order (Storch 1975). The creation of permanent police courts, the expansion of the scope of the vagrancy and trespass statutes, and the formation of the union workhouse system in 1834 represented additional attempts to “grapple for control,” to cope with a social order problem the size and magnitude of which clearly grew faster than any of the authorities anticipated (Silver 1967; Hart 1955, 1965; Radzinowicz 1968, vol. 5; DeLacy 1980; Philips 1977).

Yet there are dangers of social reductionism in this explanation. Institutional reformers did not justify their program as a response to the labor discipline needs of employers. Indeed the reform discourse antedates the labor discipline crisis. Howard's penitentiary schemes, the police theory of the late Enlightenment, the hospital and asylum campaigns of the 1790s, all anticipated the post-1815 crisis. Moreover, as Rothman pointed out in the American case, the fact of crisis itself would not explain why authorities chose the particular remedies they did, why they put such faith in institutional confinement when greater resort to hanging or to convict gang labor in public might have been equally eligible responses to the perceived breakdown of social controls.

A. Divide and Rule

Foucault's argument and mine nonetheless is that the massive investment in institutional solutions would have been inconceivable unless the authorities had believed that they were faced with the breakdown of a society of stable ranks and the emergence of a society of hostile classes. This diagnosis of the malaise of their times in turn suggested an institutional solution. Mass imprisonment offered a new strategic possibility—isolating a criminal class from the working class, incarcerating the one so that it would not corrupt the industriousness of the
other. The workhouse likewise would quarantine pauperism from honest poverty (Foucault 1978, pp. 276–78). Beneath the surface debate over whether these institutions were capable of reforming or deterring their target populations, Foucault argues, lay a deeper consensus among the ruling orders about using institutionalization to manufacture and reproduce social divisions within the working classes between working and criminal, rough and respectable, poor and pauperized. Foucault claims that this strategy of division actually worked—that the institutional quarantine of the criminal did create a criminal class separate from the working-class community. In this lay the secret “success” of prison, beneath all its apparent failures as an institution of reform and deterrence.

The divide and rule argument works best in respect to the workhouse, where the creation of the Bastilles of 1834 (see Babington 1972) does appear to have succeeded in making pauperism disgraceful to the poor. Before the Bastilles, the poor conceived of relief as a right and did not look upon it as a disgrace; afterwards while many continued to insist on their rights, working-class respectability came to insist on avoiding the degradation of appealing for relief and ending one’s days in the public ward. The Bastilles do seem to have dug the gulf deeper between pauperism and poverty within the value system and the social behavior of the poor themselves.

As regards imprisonment, however, the divide and rule argument seems to me now to have fallen prey unwittingly to the problem inherent in what criminologists call “labeling theory.” The notorious difficulty with this approach is that it makes the state’s sanctions the exclusive source of the boundary between the deviant and the respectable. This would seem to ignore the degree to which, in the nineteenth as in the twentieth century, the moral sanctions condemning murder, rape, and sexual and personal assault were prior to and independent of the punitive sanction, commanding assent across class lines. In punishing these offenses, the state simply ratified a line of demarcation already indigenous to the poor. Even in the case of petty property crime, it is not clear that the criminal sanction was labeling
acts which the poor excused as an inevitable response to distress or which they justified in the vernacular of natural justice. The poor, no less than the rich, were victims of property crime, and any study of London police courts in the nineteenth century shows they were prepared to go to law to punish members of their own class (Davis 1980; Philips 1977). If a constant process of demarcation was underway between criminals and the working classes, it was a process in which the working classes themselves played a prominent part, both in their resort to law and in the informal sanctioning behavior which enforced their own codes of respectability. Doubtless there was sympathy for the first-time offenders and juveniles convicted for minor property offenses during hard times; doubtless there were offenders whom working people felt were unjustly convicted. Certainly repeated imprisonment did isolate the criminal from his own class. But it is a serious overestimation of the role of the state to assume that its sanctioning powers were the exclusive source of the social division between criminal and respectable. The strategy of mass imprisonment is better understood in class terms as an attempt by the authorities to lend symbolic reinforcement to values of personal honor which they themselves knew were indigenous to the poor.

The behavior of the politicized sections of the working classes leaves no doubt that they drew a very strict demarcation between themselves and the criminal. Michelle Perrot's study of French prisons in 1848 shows that the revolutionary crowds who stormed the prisons reserved liberation for prostitutes, political offenders, and conscripts, not for ordinary criminal offenders (Perrot 1980, p. 241). In England, while political radicals often cited the criminal statistics as proof of the grinding pressure of distress on the poor, they never questioned the ultimate legitimacy of their convictions (Ignatieff 1978, chap. 4; DeLacy 1980).

B. Class Fear

Thus if fears by the ruling orders of a potential union of interest and action between the criminal and working classes are
to be regarded as having had some influence in generating public support for mass imprisonment, it must be recognized that these fears were without actual sociological foundation. We are dealing with a form of social fantasy detached from observable reality. Moreover, it is not clear how general these fantasies of revolution were or even how influential they were in galvanizing public opinion in support of the total institution. The difficulty with arguments from class fear is that they are simply too vague, too global, to account for the specific timing of institutional or legislative change. Class fear among educated public opinion in the 1820s and 1830s may have contributed something to the consensus that public order was too parlous and insecure to go on with the haphazard punishment and police strategies of the eighteenth century. But class fear cannot account for the specific idiosyncrasies of the institutional solution—the faith in silence, solitude, religious indoctrination, and hard labor.

If we return to what reformers said they were doing, it becomes clearer to me now than it was when I wrote *A Just Measure of Pain* that the adoption of the penitentiary in particular and the institutional solution in general cannot be explained in terms of their supposed utility in manufacturing social divisions within the working class. This is because at bottom reformers like most of their own class understood deviance in irreducibly individual rather than collective terms, not ultimately as collective social disobedience, however much distress and collective alienation influenced individuals, but as a highly personal descent into sin and error. Given this individualist reading of deviance, the appeal of institutional solutions lay in the drama of guilt which they forced each offender to play out—the drama of suffering, repentance, reflection, and amendment, watched over by the tutelary eye of the chaplain. Foucault's neglect of the religious vernacular of reform argument obscures the deep hold which this symbolic drama of guilt and repentance held for the Victorian imagination. To be sure, this hypothetical drama bore little if any relation to what actually happened in prisons, asylums, and workhouses, and many Victorians, Charles Dick-
ens among them, knew this full well. But nevertheless, even skeptics like Dickens and Mayhew were not immune to the appeal of a symbolic system of associations in which the reform of the guilty criminal was held to reveal the triumph of good over evil, conscience over desire, in all men and women. If there was a social message in the ideal of reform through institutional discipline it was that the institutional salvation of the deviant acted out the salvation of all men and women, rich and poor alike.

V. Who Directed the Carceral Archipelago?
Where does all this leave the problem of agency? Whose interests did the new institutions serve? In whose name were the reformers speaking?

A. Foucault and the Disciplinary “Savoir”

On these questions of agency, Foucault’s answers are notoriously cloudy. At some points, he refers to the “bourgeoisie” though this is hardly an adequate categorization of the shifting alignment of class fragments, aristocrats, financiers, professionals, industrialists, who competed for power in France between 1815 and 1848. At other points, Foucault slips into a use of the passive voice which makes it impossible to identify who, if anyone, was the historical agent of the tactics and strategies he describes. Yet before we condemn them out of hand it is worth noting that Foucault is trying to work free of what he regards as the vulgar Marxist conception of agency according to which the prison is a tool of a definable class with a clear-sighted conception of its strategic requirements. He also rejects the functionalist model according to which the prison is the designated punitive instrument within a social division of labor. In place of these accounts, he argues that punitive power is dispersed throughout the social system: it is literally everywhere, in the sense that the disciplinary ideology, the savoir which directs and legitimizes power, permeates all social groups (with the exception of the marginal and deviant), ordering the self-repression of the repressors themselves. The prison is only the most extreme site for an exercise of power which extends
along the whole continuum of social relations from the family, to the market, to the workplace, and to citizenship. If prisons and factories came to resemble each other in their rituals of time and discipline, therefore, it was not because the state acted in response to the labor discipline strategies initiated by employers but because both public order authorities and employers shared the same universe of assumptions about the regulation of the body and the ordering of institutional time.

Given that all social relations were inscribed within relations of domination and subordination, ordered, so he says, by a continuous disciplinary discourse, it is impossible to identify the privileged sites or actors that controlled all the others. The disciplinary ideology of modern society can be identified as the work of specific social actors but once such an ideology was institutionalized, once its rationality came to be taken for granted, a fully exterior challenge to its logic became impossible. The institutional system took on a life of its own. One cannot say, Foucault argues, that the political apparatus of modern states actually controls the prison system. There is a formal chain of delegation and responsibility from the legislature to the bureaucracy, from the bureaucracy to the warden, and from the warden to guards and prisoners, but this does not take into account the way institutional systems develop their own inertial logic which each “actor” feels powerless to change (even those at its very summit).

Since the appearance of *Discipline and Punish*, Foucault has reformulated this problem of agency as one of historical causation, putting a new stress on the way in which the new institutions emerged as the unintended consequence of levels of change, which in themselves were independent of each other—the new discourse on discipline in the Enlightenment, the search by the propertied for stricter legal and social protection, and the crisis in public order. The new discourse emerged prior to the social revolution of the nineteenth century and prior to the labor discipline needs of employers, but once in play ideologically, it provided the program around which constituencies assembled their response to social turbulence and
labor indiscipline. Once the disciplinary discourse's independence of its social grounding is granted, it becomes possible to work free of the various traps which the problem of agency has caused for historians—the conspiratorial all-seeing ruling classes of the Marxist account; the low rationality model of ad hoc responses to social crisis, and the hyperidealist version of reform as a humanitarian crusade (see Foucault’s interview in Perrot 1980).

B. The Middle Class as a Ruling Class

But where does this leave the concept of a ruling class as the historical actor behind the making of the penitentiary? My own work has been criticized for using middle class as a synonym for ruling class in a period in which it would be more accurate to speak of a bewilderingly complex competition for political power and social influence by different class fractions, professionals, industrialists, and merchants, aristocratic magnates, and small gentry farmers. While it is a convention of Marxist argument that such division of interest and jockeying for power were stilled whenever “the class as a whole” felt threatened from below, my own work on the intense debates about social order policy suggests that choral unanimity was rare even in moments of universally recognized crisis. Unquestionably justices, members of Parliament, and philanthropists recognized each other as the rich and regarded vagrants, pickpockets, and the clamoring political mob as the lower orders, but their sense of “we” versus “they” was not enough to make the ruling class into a collective social actor. One can speak of a ruling class in the sense that access to strategic levers of power was systematically restricted according to wealth and inheritance, but one cannot speak of its acting or thinking as a collective historical subject. One can only ascribe historical effectivity to identifiable social constituencies of individuals who managed to secure political approval for penal change through a process of debate and argument in the society’s sites of power. It would be wrong to think of these constituencies of institutional reformers as acting for their class or expressing the logic of its strategic im-
peratives. This would make them into ventriloquists for a clairvoyant and unanimous social consensus. In fact they managed to secure only the most grudging and limited kind of approval for their program. The penitentiary continued to be criticized from multiple and contradictory points of view: it was inhumanly severe; it was too lenient; it was too expensive; it could not reconcile deterrence and reform; the reformation of criminals was a sentimental delusion; and so on.

In his most recent reflections, Foucault himself admits that the new carceral system was not the work of an overarching strategic consensus by a ruling class, but instead fell into place as a result of a conjuncture between transformations in the phenomena of social order, new policing needs by the propertied, and a new discourse on the exercise of power.

Yet for all his disclaimers, Foucault's conception of the disciplinary world view, the savoir as he calls it, effectively forecloses on the possibility that the savoir itself was a site of contradiction, argument, and conflict. In England at least, for example, a preexisting legal tradition of rights imposed specific limits to the elaboration of new powers of arrest, new summary jurisdiction procedures, just as habeas corpus limited carceral practice toward the unconvicted. At every point, new proposals for police, prisons, and new statutory powers raised the question of how to balance the changing conceptions of security against preexisting conceptions of the liberty of the subject. Foucault makes no mention of these legal limits.

There is more than a touch of Marxist reductionism in Foucault's treatment of law as a pliable instrument of the ruling class. Recent Marxist legal theory describes the autonomy of law as a historical sedimentation of the outcome of earlier struggles over the competing rights of subjects which as such imposes rules not only on subjects but on rulers themselves. The jury system, the legal criteria of evidence and proof, and the legal ideology of the "rights of free-born Englishmen" constituted a court of appeal in England against plans or projects for tightening the law's grip (Pashukanis 1978; Renner 1949; Fine et al. 1979, pp. 22-24; Thompson 1975, conclusion). Penal
practice, far from representing the unfolding of an all-embracing disciplinary savoir, should be seen as embodying the compromise outcomes of often heated political and legal debates. Foucault seems to ignore the possibility of conflict between the claims of private wealth and the requirements of public order. Compromise was also required between the desire to punish minor delinquency more strictly and the desire to avoid criminalizing normally law-abiding members of the popular classes through mass imprisonment. The conflict between these two imperatives frequently pitted policemen against magistrates, and magistrates against employers (Ignatieff 1978, pp. 186–87). The erratic line of policy traced out by these conflicts could be said to have been functional to the reproduction of a ruling class only in the relatively trivial sense that the existing distribution of social relations was not overthrown by revolution; but once the elaboration of carceral policy is seen as the unplanned outcome of compromise and conflict, it seems rationalist and conspiratorial to call it an unfolding strategy of a carceral savoir.

VI. "Social Control" as Historical Explanation

These questions about the ruling class as a historical actor ought to be connected to earlier questions raised about the role of prisons in disciplining the working class. Given the frequency with which the popular classes themselves sought to invoke the penal sanction against members of their own social group, it would be difficult to maintain that they were simple objects of the punitive sanction. While the majority of punished offenders undoubtedly came from the popular classes, it would not follow from this that the function of imprisonment was to control those classes as such. Foucault's and my own work, I think, confused statements about the social fears motivating the construction of institutions with statements about their actual function.

The "social control" model of the prison's function which informed my own work assumed that capitalist society was systematically incapable of reproducing itself without the constant
interposition of state agencies of control and repression. This model essentially appropriated the social control models of American Progressivist sociology according to which society was a functional equilibrium of institutional mechanisms in the family, the workplace, and marketplace working together to ensure the cooperation of individuals in the interests of social order (Stedman Jones 1977; Rothman 1980b; Muraskin 1976). As Stedman Jones has pointed out, the Marxist version of this idea, and the structuralist version of it reproduced in Foucault, carries on the assumption of society as a functionally efficient totality of institutions. When applied to prison history, this model implies that institutions "work," whereas the prison is perhaps the classic example of an institution which works badly and which nonetheless survives in the face of recurrent skepticism as to its deterrent or reformative capacity. Instead of looking for some hidden function which prisons actually succeed in discharging, we ought to work free of such functionalist assumptions altogether and begin to think of society in much more dynamic and historical terms, as being ordered by institutions like the prisons which fail their constituencies and which limp along because no alternative can be found or because conflict over alternatives is too great to be mediated into compromise.

The second assumption in Marxist social control theory is that the use of the state penal sanction is essential to the reproduction of the unequal and exploitative social relations of the capitalist system. Marx himself qualified the centrality of state coercion, arguing that while the hangman and the house of correction were central in the "primitive accumulation" process, that is, in the forcible establishment of wage relations, once such wage relations were in place, "the silent compulsions of economic relations" "set the seal on the domination of the capitalist over the worker." The extra-economic coercion of the state penal sanction was then invoked only in "exceptional" cases (Marx 1976, p. 899). My own work on the expansion of vagrancy, trespass, and petty larceny statutes in the 1820s and 1830s suggested that state penal sanctions were required by
employers, especially in the agricultural counties, to prevent their chronically underemployed casual labor force from passing out of the wage system into theft and vagrancy (Ignatieff 1978, pp. 180-83; also Linebaugh, forthcoming).

Important as the penal sanction may have been in sustaining discipline in pauperized labor markets, or in constituting wage discipline itself in the face of worker resistance, we ought not to take these instances as typical of the role of state force once the wage bargain has been broadly accepted. We ought not to assume that exploitative social relations are impossible to reproduce without threat of force. Even in objectively exploitative, underpaid, and unhealthy conditions of labor, one can conceive of men and women voluntarily coming to work not in the sense that they are free to choose wage labor but in the specific sense that they derive intrinsic satisfaction from the sociability of labor, from the activity itself, from the skill they manage to acquire, and from the pride they take in their work. Marxist theories of labor discipline consistently ignore these aspects of submission to the wage bargain and consequently overstate the centrality of penal force in reproducing those relations. The fact that workers do submit to the wage bargain need not imply that they accept the terms of their subordination as legitimate; it is a cliché of labor history that those whose wage levels, skill, and pride in craftsmanship gave them the most reasons for satisfaction with industrial labor were often the most militant in their political and moral challenge to it as a system. The point is simply that the punitive sanction of the state need not be regarded as decisive in the reproduction of exploitative and unequal social relations.

Going still further, it could be asked whether force itself, apart from its specific embodiment in state apparatuses of coercion, is decisive to the maintenance of social order. The tacit social theory of Foucault's *Discipline and Punish* describes all social relations in the language of power, domination, and subordination. This would imply that individuals are naturally unsocial or asocial, requiring discipline and domination before they will submit to social rules. Not surprisingly, therefore,
Foucault sees the family as an authority system, linked to the carceral system of the state outside:

We should show how intra-familial relations, essentially in the parent-children cell, have become "disciplined," absorbing since the classical age external schemata first educational and military, then medical, psychiatric, psychological, which have made the family the privileged locus of emergence for the disciplinary question of the normal and the abnormal. (Foucault 1978, p. 215)

Can fathers' or mothers' social relations toward their children really be defined only in terms of Foucault's disciplinary question? Foucault would seem to be taking to the limits of parody a fashionable current of thought, nourishing itself in the Freudian analysis of Oedipal conflict and in the feminist critique of patriarchal domination, which has, to my way of thinking, "over-politicized" family social relations, neglecting the collaborative and sacrificial elements of family attachment and over-emphasizing the power aspects of family interaction. This makes it easy to locate the family as an institution of domination on a continuum with the prison, enforcing the same overarching disciplinary rationality, but it does so by ignoring obvious distinctions between the basis of our obligations as family members and our obligations as citizens to the law. It also neglects the extent to which loyalty to one's family or the desire to maintain one's authority as a family head can constitute the basis for rejection of state authority, for example, in resistance by families to the introduction of compulsory school attendance.

By describing all social relations as relations of domination, Foucault neglects the large aspects of human sociability, in the family and in civil society generally, which are conducted by the norms of cooperation, reciprocity, and the "gift relationship." He neglects that human capacity which Adam Smith called "sympathy," by which we voluntarily adjust our behavior to norms of propriety in order to stand well in the eyes of our fellows (Smith 1759). In Smith's social theory the
order of civil society was reproduced, without state direction or class design, by an uncoordinated molecular process of individual self-regulation. Our obedience to legal norms could be understood both in terms of this largely subconscious order-seeking behavior and as an expression of conscious belief in the utility and the justice of such rules in themselves. In Smith's theory threat of penal sanction was not necessary to the reproduction of normal patterns of obedience. Punishment did not constitute the order of civil society; rather, it gave ritual and symbolic expression, in retributive form, to the moral value attached by individuals to rule-obedient behavior (Smith 1763).

Smith's theory of social order may underestimate human beings' mutual malignity, and it is justly criticized by Marxists for writing the facts of power, domination, and subordination out of its account of the social process. But precisely because it tried to think of social order in terms that go beyond the language of power, it offers a more persuasive account of those social activities which we do experience as uncoerced subjects than one which conceives of order as the grid imposed by a carceral archipelago.

My point here is not to argue the virtues of Smithian social theory as against Foucault's structural functionalism or Marxist social control, but rather to use Smith to point to hidden features of both: their state-centered conception of social order and their tendency to reduce all social relations to relations of domination.

How then are we to think through a theory of the reproduction of social life which would give relative weights to the compelled and the consensual, the bound and the free, the chosen and the determined dimensions of human action in given historical societies? Contemporary social theory is increasingly aware that it has been ill-served by the grand theoretical tradition in its approach to these questions—a Parsonian functionalism which restricts human action to the discharge of prescribed roles and the internalization of values; a Marxism which in its hostility to the idealist account of human subjectivity went a long way toward making the active human
subject the determined object of ideological system and social formation; and a structuralism which likewise seems to make individual intellectual creativity and moral choice the determined result of cultural and discursive structure (Giddens 1976). Work-a-day historians and sociologists of criminal justice may well ask at this point what this high-flown theoretical debate has to do with them, or what they could possibly contribute to it. Its relevance is that any theory or history of punishment must make some ultimate judgment about what weight to attach to the state's penal sanction in the reproduction of obedient behavior. What weight you give depends ultimately on how much importance you attach to the consensual and voluntary aspects of human behavior. The social control theory of the 1920s, as Rothman points out in an excellent review of that literature, placed so much stress on the consensual that it neglected the coercive; the social control literature of the seventies exaggerated the coercive at the expense of the consensual (Rothman 1980b). The first step back to a balance between these perspectives will require us to ask how crucial the state has been historically in the reproduction of the order of civil society. My suspicion is that the new social history of law and punishment in the seventies exaggerated the centrality of the state, the police, the prison, the workhouse, and the asylum.

If we are going to get beyond our present almost exclusive focus on the state as the constitutive element of order, we will have to begin to reconstitute the whole complex of informal rituals and processes within civil society for the adjudication of grievances, the settling of disputes, and the compensation of injury. Historians have only just begun to study dispute and grievance procedures within civil society in the same way as these are studied in the anthropology of law (Diamond 1974; Roberts 1980). Among such studies are Edward Thompson's discussion of the "rough justice" rituals of sixteenth- and seventeenth-century English villages, by means of which wife-beaters, scolds, and couples who married out of their age cohort were subjected to public scorn and humiliation by their neigh-
bors (see also Davis 1975; Thompson 1972; Thomas 1971). Because studies of such grievance procedures exist only for the early modern period, it would be easy to conclude that the state expropriated such functions in its courts and prisons in the course of consolidating its monopoly over the means of legitimate violence (Weber 1947, pp. 324–37).

But the idea that the state enjoys a monopoly over legitimate means of violence is long overdue for challenge. The crimes which it visits with punishment ought to be interpreted as the tip of an iceberg, as a small part of those disputes, conflicts, thefts, assaults too damaging, too threatening, too morally outrageous to be handled within the family, the work unit, the neighborhood, the street. It would be wrong, I think, to conclude that early modern English villages were the only communities capable of exercising these de facto judicial powers. Until recently, social histories of the working-class family and the working-class neighborhood were too confined within their subdisciplines to include discussion of the anthropology of dispute settlement and the social history of relations with the police, the courts, and the prisons. But what is now opening up as an area of study is the social process by which crime was identified within these units of civil society, and how decisions were taken to channel certain acts or disputes for adjudication or punishment by the state. The correlative process, from the state side, is how agents like the police worked out a tacit agreement with the local enforcers of norms, determining which offenses were theirs to control, and which were to be left to the family, the employer, or the neighborhood (Fine et al. 1979, pp. 118–37). Such research would indicate, I think, that powers of moral and punitive enforcement are distributed throughout civil society, and that the function of prison can only be understood once its position within a whole invisible framework of sanctioning and dispute regulation procedure in civil society has been determined. We have always known that prisons and the courts handled only a tiny fraction of delinquency known to the police. Now we must begin, if we can, to uncover the network which handled the “dark figure,” which
recovered stolen goods, visited retribution on known villains, demarcated the respectable, hid the innocent, and delivered up the guilty. This new area of research will not open up by itself. Empirical fields of this sort become visible only if theory guides historians to new questions. This essay amounts to a plea to historians, criminologists, and sociologists to involve themselves seriously with texts they have been apt to dismiss as abstract and ahistorical—the classical social theory tradition of Smith, Marx, Durkheim, and Weber. The involvement ought to take the form of self-criticism, for if I have argued correctly, these texts are the hidden source of some basic misconceptions—that the state enjoys a monopoly of the punitive sanction, that its moral authority and practical power are the binding sources of social order, and that all social relations can be described in the language of power and domination. If we could at least subject these ideas to practical empirical examination, a new social history of order, authority, law, and punishment would begin to emerge.

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