

MICHEL FOUCAULT MEETS GARY BECKER:
CRIMINALITY BEYOND *DISCIPLINE AND PUNISH*

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1978-1979 Collège de France Lectures

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I.

Among the numerous reasons why Foucault's classic *Discipline and Punish* continues to be read and to shape the contours of criminology, sociology, political theory, and philosophy, is its attention to the "fabrication" of the delinquent as a by-product of the discursive needs of the penitentiary technique and the requirements of the juridical law. The figure of the delinquent (along with the abnormal individual) comes into existence both historically and theoretically at the intersection between two discursive orders to manage the contradictions between them. The delinquent, on this reading, carries the burden of this contradiction, and is a condition of

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possibility for the justification of certain punitive practices, surveillance, and more radically, the coherence of the Foucault's description of carceral society.¹

Contemporary practices of the carceral society as well as criminological analysis have surely not dispensed with the notion of delinquency, nor departed from an attachment to think of some individuals as a distinct human kind imbued with a deep affinity with crime, as persons who are "criminal before the crime." But the sway held by this conception of criminal subjectivity has surely waned over the course of the 20th century in criminology and legal theory. It is a simple but often unstated point that *Discipline and Punish*, while surely a project engaged in the theorizing of the present, is the genealogy of the penitentiary form and the carceral society: dated firmly in the modern, rather than the contemporary period. Simply put, *Discipline and Punish* often seems clumsy when applied to contemporary punitive practices, and directly out of step with current criminology. Further, it is arguable that the phenomena characterizing our period, such as mass incarceration, sex offender registration, statistically based policing, or sex-offender registration, are unexplainable under the limited terms of disciplinary power. It is not surprising, in this light, that criminology and other analyses of punitive policy have consciously tried to move beyond *Discipline and Punish*'s framework. We arguably find ourselves in a period in which the organizing figure of criminology looks less and less like a deranged, monstrous, and deeply criminal delinquent. Instead, we have seen the return of an old friend from classical liberalism, recast in the terms of rational choice theory and symbolizing the emergence of neo-liberalism: *homo oeconomicus*.

In order to move beyond Foucault, and especially for those of which who seek to critique neo-liberalism as an organizing social and political principle, it turns out that we don't actually

¹ This paper is drawn from a much longer chapter on Foucault's analysis of criminal subjectivity. An early section of the chapter focuses on the figure of the delinquent as explicated in *Discipline and Punish* and *Abnormal*.

have to move beyond him, as *Discipline and Punish* was hardly Foucault's last word on criminality and the politics of punishment. This paper takes up Foucault's analysis of crime in the lectures given by Foucault in 1979 at the Collège de France, *Nassiance de la Biopolitique*,² in which he focused his attention on the neo-liberal economic approach of the so-called "Chicago School," exemplified by Gary Becker's foundational work in human capital and the economic analysis of crime and punishment, and centered, according to Foucault, on the re-introduction of *homo œconomicus* to the conversation.³

Foucault sees *homo œconomicus* as expressive of subjectivity under neo-liberal governmentality and points to a greater understanding of the relationship between juridical, disciplinary, and bio-political power, and that within our own milieu, *homo œconomicus*, figured as the rational, responsible, and governable figure of liberal state, is the very condition of possibility for contemporary practices which, paradoxically, seem to resist being figured as such. *Homo œconomicus* allows the persistence of deep criminal subjectivity while providing a level of plausible deniability that such subjectivity exists, ultimately calling for a theoretical analysis of the conditions of the possibility of liberalism.

Part II presents a close reading of the March 1979 lectures in which Foucault explores the "Chicago School" of American neo-liberalism and their theory of crime punishment, centered around the work of Gary Becker. Foucault shows how the neo-liberal conception of *homo œconomicus* is at the heart of an inversion in the liberal conception of the relationship between the state and the market. Part III shows how the figure of *homo œconomicus* signals the neo-

² The following convention will be used for citations of the text. *Sécurité, Territoire, Population* (STP), *Nassiance de la Biopolitique* (NB), *Discipline and Punish* (DP). Citations from *Sécurité* refer to the 2007 English language edition., unless otherwise noted. All translations from *Nassiance de la Biopolitique* are my own, unless otherwise noted. I include the original French where translation might be in question throughout.

³ To the best of my knowledge, Michel Foucault and Gary Becker have never met nor had any correspondence. Prof. Becker recently confirmed this in email correspondence, stating that he has never met Foucault, nor was he even aware that Foucault had shown interest in his work.

liberal attempt to reject the “anthropology” of the criminal and move beyond disciplinary or normalizing power. Part IV draws out the “dangers” of *homo œconomicus*, recasting Foucault’s otherwise positive account of the neo-liberal *homo œconomicus* in a more critical light. Part V draws on this perspective to make a set of assertions about the effect of the emergence of the neo-liberal figure, and proposes some possible critical responses to these assertions.

II.

Foucault’s 1979 lectures were advertised as a direct continuation of the previous year’s lectures, yet, by his own admission, “this year’s course was devoted in its entirety to what was to have formed only its introduction” (NB: 322).⁴ In order to properly “introduce” the study of biopolitics, what he succinctly refers to in the course summary as, “the endeavor ... to rationalize the problems presented to governmental practice by the phenomena characteristics of a group of living human beings constituted as a population,” Foucault found it necessary to dwell on, “the framework of political rationality within which they appeared and developed their urgency.”⁵ This framework can be broadly understood as liberalism, and the lectures take the form of an extended analysis of classical liberalism, German *ordo*-liberalism, and American neo-liberalism. Having spent the previous year’s lecture describing in great detail the target (the population) and the techniques (mechanisms of *sécurité*), Foucault is self-consciously turning to the question of political economy as the *savoir* of governmentality, insisting that it is the liberal

⁴ This quote is taken from the course summary written by Foucault at the end of the lecture series. The translation quoted here is taken from *The Essential Foucault*, 1994. Until the 2004 publication of *Naissance*, this course summary was the only part of the lectures widely available in English, with some other selections available in French and German. See Senellart’s essay on the context of both STP and NB, p. 400, note 142 in STP for these other sources.

⁵ « J’entendais par là manière dont on a essayé ... de rationaliser les problèmes posés à la pratique gouvernementale par les phénomènes propres à un ensemble de vivants constitués en population ... Il m’a semblé qu’on ne pouvait pas dissocier ces problèmes du cadre de rationalité politique à l’intérieur duquel ils sont apparus et on pris leur acuité » (NBP : 323).

and neo-liberal forms of political economy that are most relevant forms for thinking about biopower.⁶

Naissance de la Biopolitique proceeds in roughly four sections, covering the classical liberal thought developed in the 17th and 18th centuries, primarily in England and France, German *Ordo*-liberalism clustered around the “Freiburg School” during the 1920s and ‘30s, American neo-liberalism as it developed around the “Chicago School” during the 1960s and early ‘70s, and finally, the political economy of the Scottish Enlightenment.⁷ The analysis of American neo-liberalism occurs primarily during three lectures given March 14th, 21st, and 28th. While the European variants of neo-liberalism are shaped largely in response to the interwar period and coming to terms with Nazism, American neo-liberalism is a response to the center of left economic programs in the United States and United Kingdom spanning the post-dpression to Vietnam War era. Foucault specifically cites three policy areas that were central targets of American neo-liberalism: 1) the New Deal and its associated Keynesian economic program, 2) the “social pacts” established as part of war policy during the 1940s (most notably the Beveridge plan in the UK), and 3) the social programs focusing on poverty, education and segregation under the Truman and Johnson administrations (NB: 221-223).

American neo-liberalism differed from both classical liberalism as well as the German *ordo*-liberalism by rethinking the fundamental relationship between the state and the economy.

⁶ I have omitted from this version of the paper an extended analysis of governmentality, *securité*, and biopolitics more generally. On the use of biopower/biopolitics, the recent review essay by Rabinow and Rose (2006) distinguishes between the various schools of biopower (Negri, Agamben, Foucault, Rose, etc). The pioneering text on governmentality is, of course, *The Foucault Effect*, which included the fourth lecture of STP in English under the title “Governmentality” and a collection of essays, many of which were by Foucault’s own students. For excellent surveys of recent work in governmentality, see Rose, O’Malley, and Valverde (2006), Bonnafous-Boucher (2005), and Donzelot and Gordon (2008). The two most useful texts that directly distinguish the various terms of art are Michel Senellart’s *course context*, found at the end of *Sécurité, Territoire, Population* and Valverde (2007).

⁷ Gordon (1991) and Lemke (2001) both provide excellent syntheses of the entire lecture course. Peters (2007) in particular, covers the analysis of German *Ordo*-liberalism.

Classical liberalism (specifically the expression of liberalism inherited by Americans from British and French sources and which helped define the terms of the American revolution) was driven by an understanding of the principle of *lassiez-faire* policies as the basis of individual liberty. Proponents of individual liberty, on this account, look to the state as a founder and protector of a sphere of non-interference for the individual to exist freely in. For the German *ordo*-liberals, Lemke (2001) explains that their “starting point was their idea of a ‘social market economy’, in other words they started from a notion of a market that was constantly supported by political regulations and had to be flanked by social intervention” (197). Both conceptions presupposed the existence of the state (or at least take the state to be necessarily contingent) to that of the functioning of the market. Classical liberals and *ordo*-liberals, while perhaps primarily concerned with the market, still took the state for granted and theorized the market as an external limit to politics, delimiting the reach of policy from the outside.

The radical departure of the American neo-liberals, on the other hand, was to insist that the market form is prior to the political sphere, bringing the market not only “inside” of political questions, but placing it squarely in the center of analysis. Foucault describes this as a reversal of the relationship between state and market, in which the market itself becomes the foundation of the state. He writes, “It is not that the state limits itself by liberalism, it is the demand of liberalism which becomes the founder of the State” (NB: 223).⁸ Lemke provides an excellent gloss on this point: “For the neo-liberals the state does not define and monitor market freedom, for the market is itself the organizing and regulative principle underlying the state.... Neo-liberalism removes the limiting, external principle and puts a regulatory and inner principle in its place: it is the market form which serves as the organizational principle for the state and society”

⁸ «Ce n’est pas l’État qui s’autolimité par le libéralisme, c’est l’exigence d’un libéralisme qui devient fondateur d’État.» (NB: 223).

(Lemke 2001: 200). Under this re-articulation of state and economy, the classic concept of *laissez-faire* itself undergoes a similar transformation. The theory of state and economy does not call for a retraction of the state in order to secure a space of negative liberty in which one can act freely. Rather it becomes the purpose for government itself and a “permanent economic tribunal” against which all governmental activity is judged (NB: 253).

To explain these differences, Foucault carefully reconstructs two areas of study in American neo-liberal scholarship: the theory of human capital and the analysis crime and punishment (NB: 225). What connects these two examples for Foucault is the re-invocation and subsequent redefinition of the figure of *homo œconomicus*. Traditionally understood as that individual who interacts with the market, *homo œconomicus* is, “... an economic man ... the man of exchange ... one of two partners in a process of exchange” (NB: 231).⁹ Becker, building on the work of Theodore Schultz, theorizes human capital as a form of personal investment, reframing consumption as productive activity. Under Becker’s neo-liberal theory of human capital, the person is something that can be *invested* in, and *homo œconomicus* becomes, “not at all a partner in exchange. *Homo œconomicus* is an entrepreneur and an entrepreneur of the self” (NB: 232).¹⁰ As Lemke (2001) explains, this theory of human capital re-describes the factors of production such that, “Wage labourers are no longer the employees dependent on a company, but are autonomous entrepreneurs with full responsibility for their own investment decisions and endeavoring to produce surplus value” (199). The individual is to be understood not as a traditional factor of production, but as themselves the site of productive activity through self-

⁹ «... cet homme économique qu’est-ce que c’est Eh bien, c’est l’homme de l’échange, c’est le partenaire, c’est l’un des deux partenaires dans le processus de l’échange.» (NB: 231)

¹⁰ «Dans le néolibéralisme – et il ne s’en cache pas, il le proclame –, on va bien retrouver aussi une théorie de l’*homo œconomicus*, mais l’*homo œconomicus*, là, ce n’est pas du tout un partenaire de l’échange. L’*homo œconomicus*, c’est un entrepreneur et un entrepreneur de lui-même.» (NB: 232).

development. Foucault attributes this development directly to Becker's theory of consumption as production: "The man of consumption ... is a producer. What does he produce? He produces most simply his own satisfaction."¹¹ This is a complete change, Foucault argues, in the content of this classic figure of economic analysis. Whereas in the classic liberal conception, *homo œconomicus* was not the totalizing aspect of an individual, but rather one aspect among others, under neo-liberal analysis, *homo œconomicus* describes the complete character of all analysis, and the existence of this figure underlies the neo-liberal approach to extending economic analysis to all spheres of social life.¹² This disciplinary extension of economic analysis is driven by the new conception of *homo œconomicus*, and is exemplified in its starkest clarity, Foucault argues, in the work of Becker, Stigler, and Ehrlich on crime. Their approach to the question of crime and punishment demonstrates all the hallmarks of the neo-liberal shift in analysis, and most importantly, represents a complete rejection of the multiple figures of *homo legalis*, *homo penalis*, and *homo criminalis* in favor of a universal *homo œconomicus*.

Foucault draws his contrast between the classic liberal and neo-liberal conceptions of crime by briefly re-articulating some of his analysis from *Discipline and Punish*. The early liberal theorists of punishment (Beccaria and Bentham, specifically) were the first to understand punishment in economic terms, but they did so through the mechanism of law. The penal law that built on Beccaria's plan of reform and which was schematized by Bentham, used the law to dispatch the most economical regime of punishment in the sense that the amount and kind of punishment called for satisfies utilitarian concerns. That is, punishment is economical in so far as

¹¹ «L'homme de la consommation, dans la mesure où il consomme, est un producteur. Il produit quoi? Eh bien, il produit tout simplement sa propre satisfaction» (NB: 232).

¹² «... les néolibéraux américains essaient d'utiliser l'économie de marché et les analyses caractéristiques de l'économie de marché au déchiffrement de rapports non marchands, au déchiffrement de phénomènes qui ne sont pas des phénomènes strictement et proprement économiques mais qui sont ce qu'on appelle, si vous voulez, des phénomènes sociaux» (NB: 245).

1) a crime is defined in the law, 2) penalties are fixed in law, 3) the same law fixes those penalties in proportion to the severity of the crime, and 4) the criminal court will be the location that applies this law, determining the specific penalty undergone by the criminal in relation to the severity of the crime (NB: 254). What these principles produce is the “least costly and most certain” way to “obtain punishment and the elimination of behaviors harmful to society” (NB, 254). Under this classical sense, the individual who can be punished is the same as the economic individual, and in this sense, it is the law that brings together the penal and economic: “*Homo penalis*, the man that is punishable, the man that has exposed himself to the law and may be punished by the law is,” Foucault argues, “in a strict sense, *homo æconomicus*. And it is the law which permits, precisely, the articulation of the problem of punishment on to the problem of the economy” (NB: 254-255).

Recalling the earlier analysis of *Discipline and Punish*, the central paradox of this economy of punishment is that the rationalized application of the law requires a criminal anthropology. Prohibitive law is defined in terms of bad actions, but cannot be applied to actions themselves. It can only be applied to those actors who are rightly called offenders. But insofar as the punishment can serve as a deterrent to other possible offenders, and insofar as the punishment’s severity lets the offender make amends, it becomes necessary to delve into the life of the offender. The economical requirements of the classical liberal system call forth, quite literally, for *criminology*, and gives rise to the figure of *homo criminals* directly out of *homo penalis*. It is in this sense that the classical liberals, even in so far as they may have sought to rationalize their criminal law, enable and support the notion of an economy of punishment in which some individuals are of a criminal kind, even if they are, in a sense, also *homo æconomicus*.

Foucault uses Becker's 1968 article "Crime and Punishment: An Economic Approach" to identify the neo-liberal analytic shift. What Becker wants, according to Foucault, is to return to Bentham and Beccaria's insistence on economy and reformist impulse, but to somehow escape the "problem of history" and, most importantly, to place the principle of utility *within* the juridical structure. In so far as Bentham and Beccaria understood punishment through an economic approach, it was to subject punishment to economics. Foucault notes that the slide from *homo legalis*, to *homo penalis*, and finally to *homo criminalis*, was a process of subjecting the law to economic constraints, to making it align with an external principle of utility. The neo-liberal approach, however, starts with *homo aeconomicus* and refuses any slippage towards a pathologized criminal kind. The problem of crime, in this approach, begins and ends with economic analysis as an interior logic, prior to the use of any legal framework. It is not that the application of the law should be economical, but that economics should dictate the law.

On Foucault's account, Becker begins by noting that the proper definition of a crime is not found in the law, but through its cost: punishment. Foucault tells his class that crime is, according to Becker, simply that which exposes an individual to punishment. What matters is the double move of 1) placing *homo aeconomicus* at the center of the analysis and 2) recognizing that this figure is oneself. The point of view, Foucault notes, is what changes in this definition. If we think of ourselves (i.e. *homo aeconomicus*) as trying to determine if an action is a crime, we think about if it is something that would expose us to punishment. The perspective of the law is exchanged for the perspective of the subject. Foucault insists, "... this definition is the same, but the point of view has simply changed. ... One asks the question: what is it for him, for the acting

subject, for the subject whose behavior or conduct is at stake, what is it that is crime? Well, it is that that thing which makes him risk being punished” (NB: 257).¹³

The effect of this move is huge: it completely “passes by the individual subject” and, along with the definition of crime as “that which an individual takes on the risk of being punished”, one arrives at Becker’s classic implication that there is no difference between a traffic violation and premeditated murder (NB: 258).¹⁴ Foucault states, “It also means that the criminal is not, in this perspective, marked by moral or anthropological traits. The criminal is any person, and is treated as any other person who invests in an action, which expects profit and which accepts the risk of loss” (NB: 258).¹⁵ There is no such thing as a moral or anthropological “criminal” kind but only individuals who function in a market of possible profits and losses. But perhaps most importantly on Foucault’s terms, is the sharp distinction from the logic of the delinquent, “In this sense, you can see that which the penal system will occupy itself, there is no more reality doubling the crime and the criminal” (NB: 258).¹⁶ There is no doubling of criminal and crime, since there is, strictly speaking, no such thing as a *criminal*. There is only one kind of human, *homo œconomicus*, and only one kind of one kind of social interaction: exchange. This shift renders the question of crime and punishment as one of supply and demand, subject to

¹³ « ... la définition est la même, main le point de vue a simplement changé. ... On se pose la question : qu’est-ce que c’est pour lui, c’est-à-dire pour le sujet d’une action, pour le sujet d’une conduite ou d’un comportement, quest-ce que c’est que le crime ? Eh bien, c’est cette chose qui fait qu’il risque d’être puni » (NB : 257).

¹⁴ Becker writes, “Some persons become ‘criminals’ ... not because their basic motivation differs from that of others persons, but because their benefits and costs differ” (Becker 1968: 176). “A crime is apparently not so different analytically from any other activity that produces external harm and when crimes are punishable by fines, the analytical differences virtually vanish” (Becker 1968: 201).

¹⁵ “Ça veut dire également que le criminel n’est aucunement, dans cette perspective, marqué ou interrogé à partir de traits moraux ou anthropologiques. Le criminel, c’est toute personne, enfin il n’est traité que comme n’importe quelle autre personne qui investit dans une action, qui en attend du profit et qui accepte le risqué d’une perte.”

¹⁶ “Dans cette mesure-là, vous voyez que ce dont le système pénal aura à s’occuper, ce n’est plus cette réalité dédoublée du crime et du criminel” (NB: 258).

standard economic analysis. Borrowing specifically from welfare economics, crime is taken as a market with strong negative externalities, and as such, punishment should be thought of in the same way that taxation is used by the state to adjust costs associated with any market activities that produce negative externalities.

One crucial side effect of this approach, Foucault notes, is a split between law and its enforcement. The law is reduced (or perhaps revealed) as a nothing other than a command. It is, Foucault states in English clearly invoking J.L. Austin, “*a speech act*” (NB: 259). It has a reality of its own but calls into question the force of that reality, which in turns calls upon the question of (and again, Foucault uses English here) the “enforcement of law,” something which is more than the application of the law precisely because, on neo-liberal terms, it is an open question of social and political reality. It is, in other words, not necessarily the case that just because the law prohibits something, it will be, in all places and in all times, necessarily prohibited in actual fact. The enforcement of law, like all forms of intervention from the neo-liberal point of view, has an equilibrium point not necessarily (nor at all likely) to be equal to zero. The level of enforcement is subject (like all things under this neo-liberal regime) to an efficiency test. Foucault carefully reconstructs the economic analysis: if crime is characterized by an upward slopping supply curve, than enforcement of the law represents negative demand. The result is that the neo-liberal approach to crime does not seek the complete elimination of crime (a goal which, however difficult, was still a chief motivation for classical liberal thinkers about crime). The complete elimination of crime is not just practically difficult, it is undesirable in so far as it would impose utility diminishing costs beyond positive returns. Foucault directly refers here to a 1970 article in the *Journal of Political Economy*, which is most likely Stigler (1970) writing, “The goal of enforcement, let us assume, is to achieve that degree of compliance with the rule of prescribed

(or proscribed) behavior that the society believes it can afford. There is only one reason why the society must forgo 'complete' enforcement of the rule: enforcement is costly" (Stigler 1970: 526-527).

"In consequence, ," Foucault says,

... the good politics of punishment does not aim for the extinction of crime, but an equilibrium between the curves of the supply of crime and of negative demand. Society does not need undetermined conformity. Society does not need to obey an exhaustive disciplinary system. A society finds itself well, with a certain rate of rate and it finds its poor when it means to indefinitely reduce the crime rate. What is still posed as the essential question of penal politics is not: how to punish crime? Note even: what are the actions that should be considered as crime? But: what is needed to tolerate crime? Our again: what would be intolerable not to tolerate? It is the definition of Becker in "Crime and Punishment." Two questions, he says: "How many offences should be permitted? Secondly, how many offenders must be left unpunished?" This is the question of punishment (NB: 261-262).¹⁷

No longer is there a concern for the eradication of crime, or even a specific concern for individual criminals. The only relevant questions are those that operate at the level of generality, about the crime rate. Further, in drawing on the assumptions of neo-liberal economic theory, the equilibrium point is given by market conditions, and never assumed to be equal to zero. As with other market phenomena (e.g. employment, inflation, etc.) there is some non-zero level of crime that can be called a "natural" rate.

III.

This is a familiar (and possibly hegemonic) account of crime and punishment in contemporary criminology. At a certain level, what is most striking is that 1) Foucault gives a

¹⁷ « En conséquence , la bonne politique pénale ne vise aucunement a une extinction du crime, main à un équilibre entre des courbes d'offre de crime et de demande négative. Ou encore: la société n'a pas un besoin indéfini de conformité. La société n'a aucunement besoin d'obéir à un système disciplinaire exhaustif. Une société se trouve bien avec un certain taux d'illégalisme et elle se trouverait très mal de vouloir réduire indéfiniment ce taux d'illégalisme. Ce qui revient encore à poser comme question essentielle de la politique pénale, non pas: comment punir les crime? Ni même: quelles sont les actions qu'il faut considérer comme crime? Mais: qu'est-ce que qu'il faut tolérer comme crime? Ou encore: qu'est-ce qu'il serait intolérable de ne pas tolérer? C'est las définition de Becker dans «Crime et châtiment». Deux questions, dit-il: «Combien de délits doivent être permis? Deuxièmement, combine de délinquants doivent être laissés impunis?» C'est ça question de la pénalité (NB: 261-262).»

very fair and reasonably accurate characterization of the Chicago school's early approach to crime and punishment and the underlying re-conceptualization of the theory of human capital as fundamentally about self-investment, and 2) he clearly foresaw the importance of this approach. He even, at times, seems particularly impressed by its implications.¹⁸ Foucault closes the March 21 lecture drawing out two key consequences of this approach to crime and punishment as an example of extending the market form to encompass a non-market sphere of activity.

First, there is the “*Gommage anthropologique du criminel*,” a “gumming up of the works” in terms of the anthropological understanding of criminality, of the psychological criminal, and of the delinquent as particular human kinds (NB: 264). *Homo œconomicus* is deployed as the foundational conception of human agent, an individual whose only activity is consumption, differing from others only through their revealed preferences, and perhaps, their level of aversion to risk. The “*gommage*” does not, Foucault insists, eliminate all techniques of power that influence an individual's behavior, but rather is the “postulation that there is an element, a dimension, a level of behavior that can be interpreted as economic behavior and the control of economic behavior” (NB: 264).¹⁹ Even the most monstrous of criminals can be understood in terms of that individual's sensitivity or responsiveness to punishment. Foucault directly quotes Ehrlich (1975), saying, “There is no reason a priori to expect that persons who hate or love others are less *responsive* to changes in costs and gains associated with activities they may wish to pursue than persons indifferent towards the well-being of others” (Ehrlich 1975: 399, quoted with Foucault's emphasis).²⁰ Foucault takes this notion, that even if we were

¹⁸ A good deal has been written about Foucault's seeming approval of liberalism. See Gordon (1991) for a brief discussion of this.

¹⁹ «... postulations d'un élément, d'une dimension, d'un niveau de comportement qui peut être à la fois interprété comme comportement économique et contrôle à titre de comportement économique» (NB : 264).

²⁰ Foucault's translation of this passage is as follows: «Le caractère horrible, cruel ou pathologique du crime n'a absolument pas d'importance. Il n'y a pas de raison de croire que ceux qui aiment ou haïssent d'autres gens sont

to hang on to the notions of criminality from an earlier period, even if we ascribe a level on monstrosity to the murder, what matters is that even that individual is more or less a

“responsive” individual. He states:

All the distinctions that there have been, that may have been introduced – among born criminals, criminals of opportunity, perverts and non-perverts, recidivists – these have no importance. One must be able to admit in any case that, even pathologically, if you will, that the subject is, at a certain level and seen from a certain angle, this subject is to a certain extent, and in a certain measure, “responsive” to these changes in profit and loss, that is to say, that penal policy is an action upon the game of possible profits and losses, that is, an environmental action (NB: 264).²¹

Foucault is making two points here. First, that even if we don’t completely relinquish the terms of the disciplinary age, the neo-liberal approach notes that there is a responsive quality to any offender – that even the most pathological are in at least in some sense responsive to changes in penal policy. Second, this means that changing penal policy is about altering the rules of the game rather than acting upon the places of that game. Penal policy, under this framework, is a form of environmental policy, that is, a policy concerning the field of play in which players find themselves. As Lemke (2001) puts it, “[Neo-liberal penal policy] focuses not on the players, but on the rules of the game, not on the (inner) subjection of individuals, but on defining and controlling their (outer) environment” (200).

The second consequence is that, in rejecting the kind of deep subjectivity of the disciplinary or normalizing penal policy, the neo-liberal approach claims to overcome the techniques of disciplinary and normalizing society:

moins “responsive”, sont moins accessibles, répondent moins facilement aux changements dans les gains et les pertes associés à leur activité que les personnes indifférents au bien-être des autres» (NB: 264).

²¹ «Toutes les distinctions qu’il y avait, qu’on a pu introduire entre criminels nés, criminels d’occasion, pervers et pas pervers, récidivistes, ceci n’a aucune importance. On doit pouvoir admettre que de toute façon, aussi pathologique, si l’on veut, que soit le sujet à un certain niveau et vu sous un certain angle, ce sujet est jusqu’à un certain point, dans une certaine mesure responsive à ces changements dans les gains et les pertes, c’est-à-dire que l’action pénale doit être une action sur le jeu des gains et des pertes possibles, c’est-à-dire une action environnementale.»

It [the neo-liberal ideal society] is no longer a society in which the mechanism of normalization and the exclusion of the non-normalizable will should be required. On the contrary, there is the image or idea or the theme of a society in which there will be the optimization of systems of difference, in which the field should be free of oscillating processes, in which there will be a tolerance between individuals and minority practices, in which there will be an effect not on the players of the game, but on the rules of the game, and finally in which there will be an intervention which should not be of the type of adjustment internal to individuals, but an intervention of the type of environmental (NB: 265).²²

This is a rather bold and sympathetic account of the promise of neo-liberal rationality writ large on the societal level. The internal contradiction of the classical liberal position, the need to individuate punishment to the each specific offender giving rise to normalizing discourses, to the biographical doubling of the criminal with the crime, give way to a market structure which, sees difference as a resource to be “optimised” and understands the role of government to be “environmental” rather than focus its attention on a specific organism within that environment.

With this conception of crime and punishment and its radical revision of the notion of criminal subjectivity (or rather, it’s refusal of any such subjectivity) in mind, Foucault closes the lecture with this utopian dream of neo-liberalism. A system in which the by-products of the disciplinary regime, the forces of normalization and the exclusion of the radically abnormal gives way to a society in which difference becomes a market virtue, and in which the work of the state is centered not only the individual, but on the conditions in which the individual (hopefully) thrives. Most telling is the line depicting a “tolerance between individuals and minority practices.” Is this to mean that the neo-liberal conception of society allows the flourishing of activities that, under the disciplinary regime, are excluded? What exactly, does “tolerance” of

²² « Ce n’est pas non plus une société dans laquelle le mécanisme de la normalisation générale et de l’exclusion du non-normalisable serait requis. On a au contraire, à l’horizon de cela, l’image ou l’idée ou le thème-programme d’une société dans laquelle il y aurait optimisation des systèmes de différence, dans laquelle le champ serait laissé libre aux processus oscillatoires, dans laquelle il y aurait une tolérance accordée aux individus et aux pratiques minoritaires, dans laquelle il y aurait une action non pas sur les joueurs du jeu, mai sur les règles de jeu, et enfin dans laquelle il y aurait une intervention qui ne serait pas du type de l’assujettissement intere des individus, main use intervention de type environnemental. »

such practices entail? Given that a central principle of the neo-liberal regime is the extension of the market form to all spheres of social life, it must be the case that “tolerance” refers to those activities that can express themselves under that form. Ideally, of course, there is no set limit to what these practices are, yet it is precisely here that Foucault, in invoking what seems to be a rather glowing appraisal of the neo-liberal view, is, after all, calling attention to its hidden underside.

If we understand Foucault’s interest in neo-liberalism as continuous with his longstanding project of tracing and identifying the ways in which power transforms its configuration under different contexts and in different institutional and inter-subjective relations, what we should see in his description of neo-liberalism is not a glowing appraisal, but a map of where one should look for the exercise of power under such a regime. If the lesson of *Discipline and Punish* was to recognize the way in power continued to be exercised through discipline, albeit in a more efficient form, the lesson of the governmentality lectures of ’78 and ’79 is see how power is now exercised through the management of the “rules of the game” and the “environment.” It is precisely in the tolerance of the neo-liberal rationality of government in which there is a force relation. “Minority practices,” like a crime, for example, are tolerated in the sense that they are not in and of themselves taken as morally inappropriate actions. But in so far as a minority practice might generate a negative externality (as a crime most likely would be thought to do), what is meant by toleration becomes more clear: an associated tax or penalty attached to the activity in order to bring the supply of said activities more in line the socially optimal level. Toleration, in market terms, in no way needs to mean flourishing. Foucault once famously noted that his point was “not that everything is bad, but that everything is dangerous” (Foucault 1994: 104). Neo-liberalism is not, on Foucaultian terms either good or bad, but it, like

everything, is certainly dangerous, in so far as discourses, especially those which try to function on a totalizing logic, disavow their internal problems, and often seek to mask their contingencies and contradictions.

IV.

What is the danger within the neo-liberal analysis of crime? And what is the danger of *homo œconomicus*? Certainly, Foucault gives credit to the neo-liberals where it is due: a theory of criminal subjectivity in which there is no difference between murderers, traffic violators, and professors of economics throws a much needed wrench in the criminological works. It is a deeply refreshing move, and one that, as Foucault notes and Becker himself is aware of, has deep roots in classical liberalism. Becker closes his famous 1968 article writing:

Lest the reader be repelled by the apparent novelty of an ‘economic’ framework for illegal behavior, let him recall that two important contributors to criminology during the eighteenth and nineteenth centuries, Beccaria and Bentham, explicitly applied an economic calculus. Unfortunately, such an approach has lost favor during the last hundred years, and my efforts can be viewed as a resurrection, modernization, and thereby I hope improvement on these much earlier pioneering studies. (Becker 1968: 209).

Becker and company see themselves as rational reformers of punishment, just as Bentham and Beccaria did. The liberal and neo-liberal approach to crime and punishment refuses to pathologize and dehumanize criminal offenders on the surface. Yet, as Foucault has already shown, the liberal reformers paved the way for the penitentiary apparatus to undo that work, leading directly to the fabrication of the delinquent. Foucault is arguing that this new articulation of liberalism, placing *homo œconomicus* at the center pragmatically and epistemologically, and subjecting the entire basis of government to the market form, might avoid the same trap of doubling the criminal and the crime. It does not, by its definition, fabricate the category of delinquents in order to solve the discursive tension between the court of law and the penitentiary. To the reform minded individual, neo-liberalism’s rationalism and purity is both its greatest

virtue and its most seductive quality. But this seduction rests on the re-introduction of the totalizing figure of *homo æconomicus* into the criminal justice context, and it is precisely in this figure that we find the “danger.”

First, Foucault is intrigued by is the way in which *homo æconomicus*, “... is the interface between government and the individual” (NB: 258). The figure provides that “surface contact” between a governmental reason and the individual. This is interesting because it reflects a new organization of state power, a new technique. As noted above, the governmentality at work in the neo-liberal context is one that centers on the management of individuals through the management of environmental factors. What might appear as the withdrawal of the state need not entail a withdrawal of state power, but rather a different expression or technique of state power. Recall the famous observation that punishment, over the course of the 18th century is “not to punish less, but to punish better.” (DP: 82). The development of a neo-liberal governmentality, especially as it is applied to punishment, is a move of the same sort. The goal of Becker’s theory of punishment is expressly driven by concerns for efficiency, concerned with punishing (or rather, imposing penalties) better. As noted in the lecture from the previous year, the governmentality driven by neo-liberalism, articulated through an expression of bio-power, focusing itself on the population, pays attention to crime rates, not to criminals. The question isn’t “how do we get rid of criminals” but rather, “what is the acceptable, that is, socially efficient level of crime?” The figure of *homo æconomicus* is the interface between the population level and the individual, and as such becomes a new location in which power is exercised.

The effect is that this individual becomes fully ‘responsible’ for their actions. This is the second key characteristic in the idea of *homo æconomicus* as more than a partner of exchange (the classical conception of the figure), but rather as an entrepreneur of the self. This conception

draws directly from Becker and Schultz's theory of human capital as having an investment structure. Individuals are people who work upon themselves for a future return, acting as consumer/investors in order to increase their value on the labor market. This shift in perspective (to see one's consumption choices as investments in the self) reconfigures the individual to bear the responsibility for good *and* bad investments in the self. That is, entrepreneurs are rewarded for taking risks that achieve high returns, while they are "punished" if the risks they take turn out to be poor investments. They bear the *entire* burden of their investments. The individual, as *homo œconomicus*, bears full responsibility, in the market sense, for their actions. Lemke (2001) notes, "The [neo-liberal] strategy of rendering individual subjects 'responsible' ... entails shifting the responsibility for social risks such as illness, unemployment, poverty, etc., and for life in society into the domain for which the individual is responsible and transforming it into a problem of 'self-care.' The key feature of the neo-liberal rationality is the congruence it endeavors to achieve between a responsible and moral individual and an economic-rational actor" (201).

This *homo œconomicus*, the responsible "interface between government and the individual" is what makes "*homo œconomicus* ... eminently governable. The intangible partner of *lassiez-faire*, *homo œconomicus* now appears as the correlate of a governmentality that is going to act on the milieu and systematically modify the variables of that milieu" (NB: 274).²³ An era in which techniques of security (i.e. risk management) come to have "preeminence" over other forms of power (i.e. disciplinary and juridical), is one characterized by intervention at the level of the population, meaning that this organization of power takes the population as a whole as its object. This is not to say that individuals cease to exist from the point of view of the state, but

²³ « *L'homo œconomicus*, c'est celui qui est éminemment gouvernable. De partenaire intangible du *laissez-faire*, l'*homo œconomicus* apparaît maintenant comme le corrélatif d'une gouvernementalité qui va agir sur le milieu et modifier systématiquement les variables du milieu » (NB : 274).

rather that they only articulate themselves as *homo œconomicus*, governable because they are, to borrow directly from Ehrlich's language, "responsive" to changes in the milieu. This is the moment when, as Gordon (1991) puts it, "Economic government here joins hands with behavioralism" (43). Neo-liberal political economy, centered around the responsive *homo œconomicus*, gives techniques of security, expressions of bio-power, their conceptual footing.

V.

Foucault, true to form, only points our attention in these lectures to the relatively hidden dangers of this way of thinking. He does not take an explicitly normative position on these dangers. If we are interested in analyzing bio-power, bio-politics, or governmentality, we must understand its conceptual framework, its *savoir*. And, if we read his subsequent interest in the care of the self as an ethical version of the economic entrepreneurship of the self, one could hypothesize that Foucault really was quite taken by this line of thought. But here, it is our job to make more explicit the work that this figure of *homo œconomicus* does in enabling practices, hiding assumptions, and managing contradictions between (and within) discourses. These are the very real problems that neo-liberal crime and punishment theory has left us with. As such, I close this paper with a set of examples of such work, and propose the *kind* of analysis of liberalism that Foucault's lectures calls for.

First, *homo œconomicus*, by implying a form of complete responsibility for criminal behavior, combined with existing attachments to criminals, delinquents, ne'er-do-wells, gangsters, etc., actually enables a new modulation of criminality. Popular conceptions of the monstrous individual, the criminally insane, the incorrigible offender, and the recidivist each persist, yet become fully responsible despite their "known" condition of fundamental irresponsibility. Central to the disciplinary conception of these forms of otherness implied by the

disciplinary form was 1) they could be changed or reformed, and 2) the same qualities that demonstrated their difference, also diminished their culpability. Yet, as is evident in practices such as civil commitment of sex offenders, life sentences without parole, trying juveniles as adults, or the rise of the supermax prison, there is a conception of the irresponsible being held responsible for all the harm committed by that individual.²⁴

Second, a new conception of “dangerousness” emerges as a result of *homo oeconomicus* taking center stage. The standard justification for the aforementioned practices of incapacitation is that these individuals, regardless of their culpability, are the sources of danger and potential harm. While *homo oeconomicus* proclaims that there is no fundamental difference between the murderer and the traffic violator, it still allows these differences to assert themselves, albeit under a different basis of knowledge. While the neo-liberal regime says that we cannot make reference to any form of deep subjectivity of these individuals, it still allows, and in fact encourages, the prediction of harm and the assessment of risk based on past actions and descriptive characteristics. While the neo-liberal position might reject the clinical assessment of dangerousness, it wholly embraces an actuarial assessment of dangerousness.²⁵

Third, asserting that a single discursive regime covers all social life (i.e. there is only a market form, and it can cover all social spheres), disables any analysis of what Foucault calls “interdiscursive dependencies” (Foucault 1991: 58). Classical liberalism, while giving priority to economic exchange and insisting upon a sphere of non-interference in the market, did so while maintaining distinctions between the market, the family, and the state. The position taken by neo-liberalism that there is a unitary interface between individual and all social life, *homo*

²⁴ Chapter 2, “The Desire to Punish,” in Connolly (1995) captures this quality about punishment nicely.

²⁵ See Castel (1991) and Harcourt (2007) for examples of how this works in both theoretical and historical terms.

œconomicus, refuses any analysis, however productive, insightful, or empirically accurate, about what happens when discourses interact with each.

Lastly, asserting a universal conception of subjectivity, which admittedly purports to “optimize difference” rather than exclude or normalize it, is ultimately a way to disavow difference altogether, especially along lines of race, gender, sexuality and disability, ultimately leaving those forms of difference to reassert themselves but without recourse to a political address. Examples of this problem can be seen in the co-option of “color-blindness” to discount the lived experiences of people of color, or in the effect of the 1993 “Don’t Ask, Don’t Tell” military policies: an increase in the expulsion of homosexuals from the armed forces.²⁶ This assertion, admittedly, harkens back to an early critique of liberalism, Karl Marx. In *On the Jewish Question*, Marx writes:

“The state abolishes ... the distinctions established by *birth, social rank, education, occupation*, when it decrees that birth social rank, education, occupation are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member of society is an *equal* partner in popular sovereignty, and treats all the elements which compose the real life of the nation from the standpoint of the state. But the state, none the less, allows private property, education, occupation, to *act* after *their* own fashion, namely as private property, education, occupation, and to manifest their *particular* nature. Far from abolishing these *effective* differences, it only exists so far as they are presupposed; it is conscious of being a *political state* and it manifests its *universality* only in opposition to these elements (Marx 1978: 33).

The same process is at work in asserting the universality of *homo œconomicus* as an *equal* condition of all and market as the universal sphere of activity. Not only does this assertion ban difference from being taken seriously in the market, as a universality, it logically presupposes such difference in order to assert itself as the universal arbiter of that difference.

²⁶ See Gunier () and Halley (1999).

A standard response to each of these assertions is that the problem is not with liberalism per se, but with a failure to properly enact liberalism or to truly act as liberals. If we were actually the liberals we claim to be, if we followed Becker's advice to the letter (or Rawls', for that matter), these problems would resolve themselves. That is, the problems I cite here are not failures of liberalism, but failures of being properly liberal.²⁷ A second kind of response insists that the purity of liberalism is sullied either by intimately connected anti-liberal discourses or that liberalism contains within it contradictory principles which are actively disavowed.²⁸

I want to propose a third possible response, one which has affinities with the prior two, but looks to a different level for the problem. It might be very well true that in liberalism, in some ideal form were to "actually" be put into practice, the troubling assertions above would cease to be problems, and *homo oeconomicus*, would cease to generate the above effects. But this kind of purity is impossible, not necessarily because of an *internal* contradiction within liberalism, but because the conditions of possibility for liberalism's coherence, for its terms of legitimacy and analysis to have meaning, is predicated on a prior anti-liberal foundation. It is within the conditions of possibility of liberalism that the trouble is found. The ruptures and fissures that emerge are symptoms of prior foundational work that has been disavowed or forgotten. In this context, the question becomes, "Who or what had to be sacrificed in order to posit the conditions of *homo oeconomicus*?"

²⁷ Amongst others, this is roughly the line of taken by Hartz (1991) and Myrdal (1962).

²⁸ For example, see Patemen (1988), Mills (1997), Smith (1993, 1997), and Stevens (1995).

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