

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

### I.

Among the numerous reasons why *Discipline and Punish* continues to be read and to shape the contours of criminology, sociology, political theory, and philosophy, is its attention to the development of criminal subjectivity. The ascendancy of the disciplinary age brought about 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 comes into existence both historically and theoretically at the intersection between discursive orders to manage the contradictions between them, providing a suitable subject for both the court and the penitentiary. The delinquent carries the burden of this discursive interchange, becoming a condition of possibility for the justification of many punitive practices and the widespread deployment of disciplinary surveillance. In short, without the delinquent, Foucault insists, the coherence of the carceral society would be in question.

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 specifically a 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, 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.

Foucault was fully aware of the developing discourse of criminology beyond the disciplinary model and the rehabilitative ideal, and *Discipline and Punish* was hardly his last word on criminality and the politics of punishment. The questions of punishment and the configuration of criminal offenders persist in the lectures given by Foucault in 1978 and 1979 at the Collège de France, *Sécurité, Territoire, Population*, and *Naissance de la Biopolitique*.<sup>1</sup> These lectures follow a trajectory beyond disciplinary techniques, and within the context of crime and punishment, move beyond the rehabilitative ideal. A crucial part of this analysis was Foucault's interest in the American neo-liberal economic thought of the so-called "Chicago School," exemplified in Gary Becker's foundational work in human capital and the economic analysis of crime and punishment.<sup>2</sup> The central feature of this analysis is, according to Foucault, a re-introduction (and critical re-description) of the universal figure of the rational actor as a criminological category: *homo œconomicus*.

*Homo œconomicus* captures the theory of subjectivity of neo-liberal governmentality and points to a greater understanding of the relationship between juridical, disciplinary, and bio-political power. Within our own milieu, *homo œconomicus*, figured as the rational, responsible, and governable figure of the late-liberal state, is the very condition of possibility for contemporary practices that, paradoxically, seems to resist being figured as such. *Homo œconomicus* allows the persistence of deep criminal subjectivity while at the same time providing a plausible deniability that such subjectivity exists. This realization ultimately calls us towards a theoretical analysis of the conditions of the possibility of liberalism in order to make sense of contemporary practices that sit at the boundaries between punitive and other discourses implicated in state power (e.g. citizenship, public safety, or immigration).

Such practices continue to focus on criminological characters such as felons, sex offenders, or illegal immigrants, each of which are treated both as rational actors deserving of punishment and as relatively immutable human kinds. According to the prevailing common wisdom (as well as existing crim-

inal and civil code), these figures require not only punishment for their specific transgressions but also categorical political disenfranchisement, residency restriction, or mass deportation. Foucault's attention to the roots of neo-liberal subjectivity help us to understand how we have arrived at this current condition: a criminological world of fully responsible monsters, delinquents who are also, apparently, *homo oeconomicus*. The paper proceeds largely through an exegesis of Foucault's own reconstruction of American neo-liberal theory, ending with a set of assertions about the pernicious side-effects of neo-liberal criminology, in light of Foucault's reading.

## II.

Foucault's lectures at the College de France during the late 1970s focused in part on how a "third modulation" of power distinct from disciplinary and juridical power became preeminent beginning in the late 19th century and continues to dominate the contemporary period.<sup>3</sup> Biopower, as he called it, is "directed not at man-as-body but at man-as-species."<sup>4</sup> It takes the population as a whole as its object and its domain as the "control over the relations between the human race ... and their environment, the milieu in which they live."<sup>5</sup> Biopower responds not to persons themselves, but to "events" within the population and employs "security mechanisms" including "forecasts, statistical estimates, and overall measures," whose purposes are not to "modify any given phenomenon as such... [but to] intervene at the level of their generality" (STP: 246). For crime, this means priority is given to the management of crime rates over punishing of or rehabilitating offenders. Juridical and disciplinary techniques will continue to be used, but are subsumed under a governmental rationality that seeks to manage crime through self-regulating mechanisms of security.<sup>6</sup> Foucault states:

The law prohibits and discipline prescribes, and the essential function of security, without prohibiting or prescribing, but possibly making use of some instruments of prescription and prohibition, is to respond to a reality in such a way that this response cancels out the reality to which it responds-nullifies it, or limits, checks, or regulates it (STP: 47).

This deployment of power manages and controls the population through the manipulation of the social environment, primarily in a way that will appear as having little or no direct intervention at all, at least in com-

parison to the more “visible” forms of juridical and disciplinary power Foucault has already discussed.

Perhaps more importantly Foucault states, “These mechanisms [of security] do not tend to a nullification of phenomena in the form of the prohibition, ‘you will not do this’ nor even ‘this will not happen,’ but in the form of a progressive self-cancellation of phenomena by the phenomena themselves. In a way, they involve the delimitation of phenomena within acceptable limits, rather than the imposition of a law that says no to them” (STP: 66). There is no *a priori* assumption that the phenomena in question will have its rate be reduced to zero. Instead, the goal is to discover some acceptable “natural” rate. The *raison d'état* that expresses this organization of power, and which takes hold beginning in the 18th century, is *liberal political economy*.<sup>7</sup>

This shift in Foucault’s analytics of power represents an interest in *practices* rather than institutions, and in the underlying forms of knowledge (*savoirs*) supporting these practices. Valverde writes, “[I]t is the practices that are regarded as primary objects of analysis, with the state and related institutions being regarded as ‘coagulations’ of practices.”<sup>8</sup> That is, the interest in practices drives the analytic distinctions between modulations of power far more than an interest in the analytic device itself. Foucault is, rightly so, primarily concerned with understanding the meaning of what it is that we do then in developing a universal theory of power. It is in this spirit that I turn to his analysis of criminal actions and punishments under the terms of neo-liberal economic theory, and in which we discover the central importance of *homo oeconomicus*.

### III.

Foucault’s 1979 lectures were advertised as a direct continuation of the previous year’s lectures, and he noted that “this year’s course was devoted in its entirety to what was to have formed only its introduction” (NB: 322).<sup>9</sup> 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 characteristic 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.”<sup>10</sup> 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.<sup>11</sup> Having spent the previous year’s lec-

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

The radical innovation of the American neo-liberals (compared to their classical and German counterparts) was to insist that the market form is prior to the political sphere, placing the market at the center of analysis and subsuming all political questions underneath it. 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).<sup>12</sup> 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.”<sup>13</sup> 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).

Foucault demonstrates this reversal by reconstructing two areas of study in American neo-liberal scholarship: the theory of human capital and the analysis of crime and punishment (NB: 225). What connects these two examples for Foucault is the re-invocation and subsequent redefinition of the figure of *homo oeconomicus*. Traditionally understood as that individual who interacts with the market, *homo oeconomicus* is, “... an economic man ... the man of exchange ... one of two partners in a process of exchange” (NB: 231).<sup>14</sup> Becker, building on the work of Theodore Schultz, theorizes human capital as a form of personal investment, reframing consumption as productive activity.<sup>15</sup> Under Becker’s neo-liberal theory of human capital, the person is something that can be *invested* in, and *homo oeconomicus* becomes “not at all a partner in exchange. *Homo oeconomicus* is an entrepreneur and an entrepreneur of the self” (NB: 232).<sup>16</sup> As Lemke explains, this theory of human capital re-describes the factors of production such that “[w]age 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.”<sup>17</sup> Individuals are to be understood not as traditional factors of production, but as themselves a site of productive activity through personal self-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.” (NB:232)<sup>18</sup> 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 human subject in its entirety, and the presumption of this universal figure underlies the neo-liberal approach to extending economic analysis to all spheres of social life.<sup>19</sup> 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) developed an understanding of law in economic terms that linked penalties in proportion to the severity of crimes, such that *homo penalis* was in fact *homo œconomicus*.<sup>20</sup> The central paradox of this economy of punishment is that the rationalized application of the law requires a criminal anthropology, the ability to identify the criminal before the crime. 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 *criminology* and give rise to the figure of *homo criminalis* directly out of *homo penalis*. It is in this sense that the classical liberals, even insofar 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 economicus*.

Foucault uses Becker's 1968 article "Crime and Punishment: An Economic Approach" to identify the neo-liberal analytic shift.<sup>21</sup> 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. Insofar 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 economicus* 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 in its cost: punishment as price.<sup>22</sup> Foucault states that crime is, according to Becker, simply that which exposes an individual to punishment. What matters is the double move of 1) placing *homo economicus* at the center of the analysis and 2) recognizing that this figure is in fact already oneself. When we, as *homo economicus*, determine whether an action is a crime, we ponder whether 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 thing which makes him risk being punished" (NB: 257).<sup>23</sup>

The effect of this move is enormous: it completely "passes by the individual subject" and, 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).<sup>24</sup> 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 only treated as any other person who invests in an action, who expects profit and who accepts the risk of

loss” (NB: 258).<sup>25</sup> 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 important, from Foucault’s view, 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).<sup>26</sup> 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 aeconomicus*, and only one kind of social interaction: exchange. This shift renders the question of crime and punishment as one of supply and demand, subject to 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. The deployment of this *savoir* would call for radically different practices of policing, punishing, and management of offenders. It would (as Becker himself insists) call for a complete reworking of criminal law, focusing on the “rules of the game” rather than on the “players” themselves, which is precisely what Foucault means by biopower operating on the level of generality.

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, in 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 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 insofar

as it would impose utility diminishing costs beyond positive returns. Foucault directly refers here to a 1970 article in the *Journal of Political Economy*, “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.”<sup>27</sup> “In consequence,” Foucault says,

Good penal policy does not aim for the extinction of crime, but 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 is fine with a certain rate of crime and it is very poor when it tries to indefinitely reduce the crime rate. What is still asked as the essential question of penal policy is not: how to punish crime? Not even: what are the actions that should be considered as crime? But: what is needed to tolerate crime? Or again: what would be intolerable not to tolerate? It is Becker’s definition in “Crime and Punishment.” Two questions, he [Becker] says: “How many offences should be permitted? Secondly, how many offenders must be left unpunished?” This is the question of punishment (NB: 261-262).<sup>28</sup>

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 general level of the population, 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.

#### IV.

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 oeconomicus* is deployed as the foundational conception of the 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).<sup>29</sup> Even the most monstrous of criminals can be understood in terms of that individual’s sensitivity or responsiveness to punishment. Foucault directly quotes Ehrlich, 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.”<sup>30</sup> Foucault takes this notion, that even if we were to hang on to the notions of criminality from an earlier period, even if we ascribe a level of monstrosity to murder, what matters is that even that murderer 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 must be an action upon the game of possible profits and losses, that is, an environmental action (NB: 264).<sup>31</sup>

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 player 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 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.”<sup>32</sup>

The second consequence is that, in rejecting the effort to shape the deep subjectivity of an offender involved in disciplinary or normalizing penal policy, the neo-liberal approach claims to leave behind the techniques of disciplinary and normalizing society:

It [the neo-liberal ideal society] is no longer a society in which the mechanism of normalization and the exclusion of the non-normalizable would 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 environmental type (NB: 265).<sup>33</sup>

The internal contradiction of the classical liberal position, in which the need to tailor punishment to each specific offence gave rise to normalizing discourses and the biographical doubling of the criminal with the crime, now gives way to a market structure that sees difference as a resource to be “optimised” and understands the role of government to be “environmental” rather than focusing its attention on a specific organism within that environment. Under a biopolitical regime, the analyst of crime policy (as well as all social policy) must be attentive not just to those policies that operate upon the bodies of offenders, but also to other frameworks that establish the milieu in which those offenders find themselves.

Foucault characterizes neo-liberalism as a system in which the by-products of the disciplinary regime, the forces of normalization and the exclusion of the radically abnormal, give way to a society in which difference becomes a market virtue and the work of the state is centered on the individual and 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 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 which power continued to be exercised through discipline, albeit in a more efficient form, the lesson of the governmentality lectures of 1978 and 1979 is to recognize 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 that there is a force relation. “Minority practices,” like crimes, 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 these activities more in line with 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.”<sup>34</sup> Neo-liberalism is neither good or bad, but it, like everything, is certainly dangerous insofar as discourses, especially those which try to function with a universalized subject at base, disavow their internal problems and seek to mask their contingencies and contradictions.

Certainly, Foucault gives credit to the neo-liberals where it is due: a theory of criminal subjectivity in which there is no difference among 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, 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.<sup>35</sup>

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 on the surface to pathologize and dehumanize criminal offenders. Yet, as Foucault has shown, the liberal reformers once paved the way for the penitentiary apparatus to undo their work, leading directly to the fabrication of the delinquent. Foucault is arguing that this new articulation of liberalism, placing *homo œconomicus* at its center and subjecting the *entire* basis of government to the market form, might be able to avoid the old trap of doubling the criminal and the crime. After all, 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 are both its greatest virtues and its most seductive qualities. But this seduction rests on the re-introduction of the universal figure of *homo œconomicus* into the criminal justice context, and it is precisely in this figure that we find the danger.

First, Foucault is intrigued by the way in which *homo œconomicus*, “... 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 appears as the state’s withdrawal need not entail a withdrawal of state power, but rather a different expression or technique of state power. Recall the famous observation that the goal of punishment, over the course of the 18th century was “not to punish less, but to punish better.”<sup>36</sup> 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 demands for efficiency, concerned with

better punishing (or rather, better imposing penalties). As noted in Foucault's the lecture the previous year, neo-liberal governmentality, articulated through an expression of bio-power, pays attention to a populations crime rates, not to individual criminals.<sup>37</sup> The question is not "how do we get rid of criminals" but rather, "what is the acceptable, i.e., socially efficient level of crime?" The figure of *homo economicus* 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 of *homo economicus* as not merely a partner of exchange (the classical conception of the figure), but also 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 consumers/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 economicus*, bears full responsibility, in the market sense, for his or her actions. Lemke 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."<sup>38</sup>

This *homo economicus*, the responsible "interface between government and the individual," is what makes "*homo economicus* ... eminently governable. The intangible partner of *lassiez-faire*, *homo economicus* 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).<sup>39</sup> 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 the view of the state, but rather that they only articulate themselves as *homo economicus*,

governable because they are, to borrow directly from Ehrlich's language, "responsive" to changes in the milieu. This is the moment when, as Gordon puts it, "Economic government here joins hands with behavioralism."<sup>40</sup> Neo-liberal political economy, centered on the responsive *homo aeconomicus*, gives techniques of security, expressions of bio-power, their conceptual footing.

The re-emergence of *homo aeconomicus* demonstrates how the discursive production of criminological features has proceeded following the end of an era in which the rehabilitative ideal was dominant. Part of the reason that liberal theorists have failed to understand the meaning and significance of disenfranchisement is because they have not attended to the discursive exchanges that produce these figures. Nor have they have attended to how these discourses have altered over time. To understand the felon and voting rights restrictions today, it is necessary to understand that this figure has been discursively fabricated within the context of changing discourses of law, citizenship, crime, and punishment, with its sequence of criminological figures, from the delinquent to *homo aeconomicus*. Foucault's analyses give us a conceptual framework, a set of starting points, and most importantly, the proper orientation to the kinds of questions we should be asking. Most importantly, Foucault points us in the direction we must attend to first: a critique of classical liberalism as a doctrine that is founded on punishment, and of neo-liberals that seeks to disavow this history.

## 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*. Moreover, if we read his subsequent interest in the care of the self as an ethical version of the economic entrepreneurship of the self, it seems 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 aeconomicus* does in enabling practices, hiding assumptions, and managing contradictions among (and within) discourses. Neo-liberal theories of crime and punishment have left us with these very real problems.

First, *homo aeconomicus*, 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 meaning of criminality. The monstrous individual, the criminally insane, the incorri-

gible offender, and the recidivist each persist as recognizable figures, yet they 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 residency restrictions and the civil confinement 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.<sup>41</sup>

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 in a different venue or on a different level. While the neo-liberal regime says that we cannot refer 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.<sup>42</sup> What we see emerging in these first two problems are the contradictions produced precisely in the space between the biopower and disciplinary power, as one form shifts into preeminence over the other. These are the tensions that emerge between the delinquent and *homo oeconomicus*.

This is especially problematic because third, the assertion 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.”<sup>43</sup> Classical liberalism, while giving priority to economic exchange and insisting upon a sphere of non-interference in the market, did so while maintaining distinctions among 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 oeconomicus*, refuses any analysis, however productive, insightful, or empirically accurate, about what happens when discourses interact with each other. Given that so many of the most pressing criminal justice concerns are those which sit precisely at the boundaries between discourses, this shift forces us to ultimately miss the point of such practices.

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 redress. This problem can be seen in the co-option of “color-blindness” to discount the lived experiences of people of color. A similar process is at work in the effect of the 1993 “Don’t Ask, Don’t Tell” military policies: an increase in the expulsion of homosexuals for the armed forces.<sup>44</sup> This assertion, admittedly, harkens back to an early critique of liberalism, that of 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.<sup>45</sup>

The same process is arguably at work in asserting the universality of *homo aconomicus* 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.

Our contemporary criminological characters, like the delinquent and *homo aconomicus*, come into existence for a reason, neither intentional nor accidental. The delinquent came into existence historically as a discursive structure to do some very important work — to bridge the gap between the competing yet mutually enabling demands of two fields of play: the rise of the penitentiary apparatus and the rationalization of criminal law. The court needed a figure to carry responsibility for the monstrosity of crime, and the penitentiary needed a body to be reformed, manipulated, and (maybe) returned to society. That the delinquent comes into existence is due to the

spillover, the remainder, the leftover consequence of good intentions. Foucault is attentive, in his analysis of the delinquent, to the effects of discursive exchanges, to those moments when the juridical collides with the disciplinary and something must come into existence to manage that distinction. Likewise, the neo-liberal proposal to radically reconceive the human subject as the rational actor represents yet another well-intentioned attempt to reform and perfect the liberal ideal of an unencumbered, atomistic, and universal subject before the law. The only relevant difference between professor and murderer is to be found in their respective tastes, in their indifference curves and budget lines. It rejects the dangerous effects of discursive exchanges by insisting that there are no such exchanges because there is only one discursive sphere: the market form. No criminological figures are necessary to smooth over these tensions, no monsters really exist, as the only monstrosity out there is a tyrannical and inefficient legal system that is ignorant of the universal character placed before the law: *homo aconomicus*.

For example, the felon, as a figure subjected to countless forms of “collateral consequences” shares much with these two figures yet cannot simply be understood under either of their terms or genesis. Like the delinquent, the felon, defined as the convicted criminal who loses standing as a citizen, who is barred from employment opportunities, whose life course has been profoundly interrupted by incarceration, ultimately carries the burden for the demands of a punitive discourse and as well as a membership discourse (specifically the terms of participatory American citizenship). We citizens do not have to think about punishment as a part of our membership, and when we punish others, we are afforded the right to avoid what it means for our terms of membership. The felon stands precisely in this overlap, and lets us see it as a gap, as a separation. But the resurgence of *homo aconomicus* as the basis of criminality forces us to hold individuals fully responsible for their actions in a way that should have been impossible by our previous understanding of some individuals as criminals before the commission of the crime. We all become nothing more than our revealed market preferences, nothing more than our actions, and thus radically responsible for the “choices” we make between parking legally or illegally, between abiding the law and violating its prohibitions. The felon is, on this account, nothing more than the individual whose actions burden their fellow citizens too much, who “consume” more than they “pay for” and whose costs must be adjusted. But what we have trouble seeing, what is

missing from this picture, is the foundational exclusion, the sacrifice that allows for such a universal *homo æconomicus* to come into existence.

*Homo æconomicus* ultimately turns our sights toward the more foundational questions of liberal theory and practice. That is, a standard response to each of the assertions made above 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 Bentham's, 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.<sup>46</sup> 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.<sup>47</sup>

I want to propose a third possible response, one which has affinities with the prior two, but looks to a different level of the problem. It might very well be true that in liberalism, if some ideal form were to "actually" be practiced, the troubling assertions above would cease to be problems, and *homo æconomicus* 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 æconomicus*?"

- 1 The following convention will be used for citations of the text: *Sécurité, Territoire, Population* (STP), *Naissance de la Biopolitique* (NB). Citations from *Sécurité* refer to the 2007 English language edition, unless otherwise noted. All translations from *Naissance de la Biopolitique* are my own, unless otherwise noted. I include the original French throughout.
- 2 In a May 2008 email correspondence, Becker confirmed that he has never met nor had any correspondence with Foucault. Nor have the editors of the Foucault's lectures contacted him.
- 3 The terms biopower and biopolitics first appear in the final lecture of "*Society Must Be Defended*," and the closing section of *History of Sexuality Vol. 1*, an essay entitled, "Right of Death and Power over Life." In the first lecture of *STP* he states that he wants to pick up where he left off, and, "... begin to study something that I called, somewhat vaguely, bio-power" (STP: 1). The lectures proceed by taking up the question of how a distinct form of power from disciplinary and juridical power, has come to be prevalent beginning in the late 19th century, and continues to characterize the contemporary period. For the first three lectures of the 1978 course, Foucault identifies this technique of power (that which operates on the bio-political level) as mechanisms of *security*. He then abruptly shifts to the neologism "governmentality" for the rest of the lectures.

In order to help distinguish the terms biopower, biopolitics, and governmentality, see Michel Senellart's *course context*, found at the end of *Sécurité, Territoire, Population* and Mariana Valverde, "Genealogies of European States: Foucauldian Reflections," *Economy and Society* 36, no. 1 (2007). On the various schools of biopower that have arising since the 1970s, see Paul Rabinow and Nikolas Rose, "Biopower Today," *BioSocieties* 1 (2006). The pioneering volume 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 Maris Bonnafous-Boucher, "From Government to Governance," *Ethical Perspectives: Journal of the European Ethics Network* 12, no. 4 (2005); Jacques Donzelot and Colin Gordon, "Governing Liberal Societies: The Foucault Effect In The English-Speaking world," *Foucault Studies*, no. 5 (2008); Nikolas Rose, Pat O'Malley, and Mariana Valverde, "Governmentality," *Annual Review of Law and Social Science* 2 (2006).

- 4 Michel Foucault, *Society Must Be Defended: Lectures at the Collège De France, 1975-1976*, trans. David Macey (New York: Picador, 2003), 243.
- 5 *Ibid.*, 245.
- 6 See Valverde, "Genealogies of European States." As Valverde notes, the meaning of the English "security" is not directly equivalent to the French "*sécurité*." She writes, "*Sécurité* is the future-oriented management of risks by contrast, national security and security forces would fall under the rubric of 'sûreté' [safety]" (172).
- 7 See the April 5th lecture of *Sécurité, Territoire, Population*.
- 8 Valverde, "Genealogies of European States," 162.
- 9 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.

- 10 « 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 ont pris leur acuité » (NB: 323).
- 11 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. Colin Gordon, "Governmental Rationality: An Introduction," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991); Thomas Lemke, "'The Birth of Bio-Politics': Michel Foucault's Lecture at the Collège De France on Neo-Liberal Governmentality," *Economy and Society* 20, no. 2 (2001); Michael A. Peters, "Foucault, Biopolitics and the Birth of Neoliberalism," *Critical Studies in Education* 48, no. 2 (2007).
- 12 «Ce n'est pas l'État qui s'autolimite par le libéralisme, c'est l'exigence d'un libéralisme qui devient fondateur d'État.» (NB: 223).
- 13 Lemke, "'The Birth of Bio-Politics': Michel Foucault's Lecture at the Collège De France on Neo-Liberal Governmentality," 200.
- 14 «... 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)
- 15 The key texts are Gary S. Becker, "A Theory of the Allocation of Time," *The Economic Journal* 75, no. 299 (1965); Gary S. Becker, "Investment in Human Capital: A Theoretical Analysis," *The Journal of Political Economy* 70, no. 5, Part 2: Investment in Human Beings (1962); Gary S. Becker, "Irrational Behavior and Economic Theory," *The Journal of Political Economy* 70, no. 1 (1962); Gary S. Becker, "Rational Action and Economic Theory: A Reply to I. Kirzner," *The Journal of Political Economy* 71, no. 1 (1963).
- 16 «Dans le néolibéralisme - et il ne s'en cache pas, il le proclame -, on va bien retrouver aussi une théorie de l'*homo aconomicus*, mais l'*homo aconomicus*, là, ce n'est pas du tout un partenaire de l'échange. L'*homo aconomicus*, c'est un entrepreneur et un entrepreneur de lui-même.» (NB: 232).
- 17 Lemke, "'The Birth of Bio-Politics': Michel Foucault's Lecture at the Collège De France on Neo-Liberal Governmentality," 199.
- 18 «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).
- 19 «... 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).
- 20 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. Punishment is "economical" in so far as 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 œconomicus. 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).
- 21 Gary S. Becker, “Crime and Punishment: An Economic Approach,” *The Journal of Political Economy* 76, no. 2 (1968).
  - 22 Although Foucault makes no explicit mention of it here, he must have been conscious of the striking similarity between Nietzsche’s analysis of punishment in *On the Genealogy of Morality* (the creditor/debtor relationship) and Becker’s definition (as a purely economic relationship).
  - 23 « ... 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, qu’est-ce que c’est que le crime ? Eh bien, c’est cette chose qui fait qu’il risque d’être puni » (NB : 257).
  - 24 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).
  - 25 « 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.»
  - 26 « 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).
  - 27 George J. Stigler, “The Optimum Enforcement of Laws,” *The Journal of Political Economy* 78, no. 3 (1970): 526-527.
  - 28 « 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 châtement». 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).»
  - 29 «... 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).
  - 30 Isaac Ehrlich, “The Deterrent Effect of Capital Punishment: A Question of Life and Death,” *The American Economic Review* 65, no. 3 (1975): 399, quoted with Foucault’s emphasis. 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 moins “respon-

sive”, 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).

- 31 «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.»
- 32 Lemke, “‘The Birth of Bio-Politics’: Michel Foucault’s Lecture at the Collège De France on Neo-Liberal Governmentality,” 200.
- 33 « 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, mais une intervention de type environnemental. » (NB: 265)
- 34 Michel Foucault, *The Essential Foucault: Selections from Essential Works of Foucault, 1954-1984*, ed. Paul Rabinow and Nikolas S. Rose (New York: New Press, 2003), 104.
- 35 Becker, “Crime and Punishment: An Economic Approach,” 209.
- 36 Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Trans. Alan Sheridan (New York: Vintage Books, 1995), 82.
- 37 Season three of HBO’s *The Wire* dramatizes this fact brilliantly. Dramatizing the use of computer-based statistical police management (commonly referred to as COMPSTAT) used most famously in New York City under the Giuliani administration, *The Wire* dramatically depicts how the use of actuarial analysis could play out, and how it could easily alter on the street policing practices.
- 38 Lemke, “‘The Birth of Bio-Politics’: Michel Foucault’s Lecture at the Collège De France on Neo-Liberal Governmentality,” 201.
- 39 « *L’homo aconomicus*, c’est celui qui est éminemment gouvernable. De partenaire intangible du laissez-faire, l’*homo aconomicus* apparaît maintenant comme le corrélatif d’une gouvernementalité qui va agir sur le milieu et modifier systématiquement les variables du milieu » (NB : 274).
- 40 Gordon, 43.
- 41 This quality of punishment is captured nicely in Chapter 2, “The Desire to Punish,” of William E. Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995).
- 42 For examples of how this works in both theoretical and historical terms see Robert Castel, “From Dangerousness to Risk,” in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991); Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007).
- 43 Foucault, *Essential Foucault*, 58.

- 44 See Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (New York: Free Press, 1994); Janet E. Halley, *Don't: A Reader's Guide to the Military's Anti-Gay Policy*, Public Planet Books (Durham, N.C.: Duke University Press, 1999).
- 45 Marx, Karl. "On the Jewish Question." In *The Marx-Engels Reader*, edited by Robert C. Tucker, 26-52 (New York: Norton, 1978), 33.
- 46 Among others, this is roughly the line of thought taken by Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (San Diego: Harcourt Brace Jovanovich, 1991); Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Row, 1962).
- 47 For example, see Charles W. Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997); Carol Patemen, *The Sexual Contract* (Stanford: Stanford University Press, 1988); Smith, "Multiple Traditions in America.,"; Smith, *Civic Ideals*; Jacqueline Stevens and Rogers Smith, "Beyond Tocqueville, Please!," *American Political Science Review* 89, no. 4 (1995).