# The Missing Link.

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*An Inquiry into Michel Foucault's Distinction from "Penal Evolution" Literature between* The Punitive Society *and* Discipline and Punish *(1973-1975)*

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*Introduction*

Foucault did not offer in his written work many references to secondary sources, in fact he even mocked the obsession with "footnotes" in the introductory lecture of *Society Must be Defended*, the type of «useless knowledge, […] sumptuary knowledge, the wealth of the parvenu – and, as you know, its external sign are found at the foot of the page» gathered by «people who love libraries, documents, references, dusty manuscripts, texts that have never been read»[1]. This posture is peculiar in the academic world, although other influential figures of the 20th century, among which the most notable was Albert Einstein, have been famous for being very sparse with scholarly references as well. As an example of this scarcity, his magnum opus, *Discipline and Punish*, cites in the early pages only two major works from which Foucault wishes to distinguish his own inquiry: Durkheim's *Two Laws of Penal Evolution*, a 27-pages paper published in l'*Année Sociologique* in 1900 and Rusche and Kirchheimer's *Punishment and Social Structure*, published in 1939 but rediscovered in the late 1960s.

The edition of *The Punitive Society* (*La société punitive*) in its original French version, rebuilt from Foucault's manuscript and recordings in late 2013, is an important insight in Foucault's positioning in relation to those two academic works. *The Punitive Society* is one of Foucault's earliest Collège de France lecture, given in 1972-1973 (he got elected at the Collège in 1970)[2]. It is is an important book, part draft, part prelude, part alternative to *Discipline and Punish*. According to Daniel Defert, Foucault himself did not see a clear separation between *The Punitive Society* and *Discipline and*

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[1] M. Foucault, *"Society Must Be Defended"*, Picador, New York 2003, p. 4.
[2] Several translations of these lectures are now in the works.

*Punish*, for him it was all «the same project»[3]. We know that Foucault mentioned his work on a «book on sentences» to Daniel Defert in a September 1972 correspondence, and he alludes to «completing the first draft» in April 1973[4] – a few weeks after *The Punitive Society* lectures were finished. The last part of the seminar certainly fits this description "of a single project". In it, we can see "early drafts" of *Discipline and Punish* most famous points, most notably a description of "disciplinary procedures" (March 21st and 28th lectures) and the idea of prison architecture as a metaphor for the modern economy of power (March 28th lecture).

But the majority of *The Punitive Society* has a somewhat different tone than Foucault's later work, and is perhaps closer to an «alternative Marxism»[5]. It is also the peak of Foucault's «political engagement»[6]. My first impression of the first half of *The Punitive Society* was that it was a shocking and combative endeavor. The *jusque-boutisme* and radicalism of the thesis that are exposed in *The Punitive Society* exude a strong Nietzschean posture of controversy, aggression, desire of demolition. In this paper I argue that this radical posture is in part the corollary of Foucault's emphasis on two ideas, two kind of "work hypotheses" that appear to be problematic inside the lecturer-audience relationship, and to necessitate on Foucault's part a certain quantity of explanations in the tone of controversy. Those two problems are that (a) *punishment is a tool of class warfare* and that (b) *prison is a discontinuity in the history of punishment*.

I also argue that while those two problems were perceived as controversial, needing heavy emphasis and explanations in 1973, the prominence placed on them faded in the following years. Those "working hypotheses" became "obvious statements" in 1975. In fact, the link between punishment and political economy on one hand, and the novelty of prison on the other, are the starting point of *Discipline and Punish*. They do no longer need demonstration, part of this will result in Foucault will

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[3] D. Defert in É. Balibar, D. Defert and B.E. Harcourt, *Journée d'études autour de Michel Foucault, "La société punitive"*, EHESS, 17 December 2013: <http://www.canal-u.tv/video/ehess/1ere_session_autour_de_michel_foucault_la_societe_punitive_1972_1973.13895>.

[4] M. Foucault, *La société punitive. Cours au Collège de France. 1972-1973*, EHESS/Gallimard/Seuil, Paris 2013, p. 313.

[5] É. Balibar in É. Balibar, D. Defert and B.E. Harcourt, *Journée d'études autour de Michel Foucault, "La société punitive"*.

[6] B.E. Harcourt in *ibidem*.

detaching himself from the stronger Marxist rhetoric and shifting the focus from the novelty of the birth of prison to the strangeness of the death of corporal punishment.

Finally, I argue that *Discipline and Punish* can be positioned "two steps" away from the classical approaches of changes in punishment policies, what was called at the time "penal evolution" literature. In this perspective, I see the recently published *The Punitive Society* as a "missing link", a "transitional form" in this movement of detachment, distinction, demarcation from a classical literature that still had strong roots in 19th century historicism.

After situation *Discipline and Punish* in this particular context, I will present the problem of the novelty of prison as well as the problem of class warfare.

*The Context:* Discipline and Punish *as a Detachment from "Penal Evolution" Literature*

In *Discipline and Punish* Foucault situates his enterprise as a clean break from a 20th century literature that still had strong ties to the 19th century. This posture is similar to one stated clearly in an 1966 interview after the French publication of *The Order of Things*: «*Je crois que nous vivons actuellement la grande coupure avec le 19ème siècle, avec tout ce début du 20ème siècle. Cette coupure au fond nous l'éprouvons comme, non pas le refus ni le rejet, mais comme la distance prise par rapport à Sartre*»[7]. This notion of distance towards the 19th-20th century's idols and their way of posing and solving problems is essential. In regards to punishment, the figure Foucault is detaching from is not Sartre, but a body of literature that dealt, like *Discipline and Punish*, with the question of the modernization of the criminal justice system at the turn of the 18th century in France.

A Foucault scholar will analyze the study of "the birth of prison" as a replication of an earlier approach already pursued by the author ("the birth of the asylum", "the birth of the clinic"[8]). From this perspective, one will describe *Discipline and Punish* as a refinement and an application,

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[7] M. Foucault, *Entretien au sujet de "Les mots et les choses"*, INA, 1966.
[8] See M. Foucault, *The Lost interview, 1971*, 2012: <http://fonselders.eu/eu/FS_EBKviewer.php?Pid=6&Bid=166>.

for the third time, of the discourse analysis methodologies (*archeology* and *genealogy*) to another birth of a "total institution", in the words of Goffman[9], of a "heterotopia" in his own words. But the birth of the modern criminal justice system was also a recurring focus of socio-historical literature. First, we have the 19th century "philosophy of history", or "historicism" – that drew several examples out of penal history. Second, we have the early sociology of punishment that had a strong historical approach. Those two literatures have a lot in common and have been sometimes been regrouped as the "penal evolution" literature[10].

The starting point of this literature is Hegel's *Lectures on the Philosophy of History*, in which the modernization of punishment is an important (if anecdotal) evidence of a more general «rationalization process» that governs human history and defines it «as a progress of the consciousness of liberty»[11]. To illustrate this progress in the rationalization of criminal law, Hegel refers to the infamous punishment of the debtor by dismemberment in the law of the XII tables (*secare partis*) as an example of the first steps of a journey from barbarism to modernity. The fact that this law has for a long time now been considered a fabrication of later generations[12] is telling to say the least.

While the 19th century saw the rise of several Darwin-inspired "evolutionary" theories on the history of punishment (the most famous being Spencer), Hegel's approach was followed by Rudolf von Jhering's, in particular his *Zweck im Recht* and his *Spirit of the Roman Law*[13]. Jhering placed his historical perspective on punishment as a scholarly application of the Hegelian "progressive" view of History. Hence, his work is more detailed than Hegel's. It rests on two principles: (a) the laws of punishment in a given Society are, more than any other type of law, a reflection upon the

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[9] E. Goffman, *Asylums. Essays on the Social Situation of Mental Patients and Other Inmates*, Anchor Books, New York 1961.

[10] See E.W. Patterson, *Historical and Evolutionary Theories of Law*, in «Columbia Law Review» (1951), pp. 681-709; A. Hopkins, *On the Sociology of Criminal Law*, in «Social Problems», vol. 22 (1975), no. 5, pp. 608-619; S. Raoult, *Etiologie d'une dépossession. L'histoire pénale comme perte progressive de contrôle*, in «Jurisprudence. Revue critique», no. 2 (2011).

[11] G.W.F. Hegel, *The Philosophy of History*, Courier Dover Publications, Mineola 2004.

[12] See M. Radin, *Secare Partis: The Early Roman Law of Execution against a Debtor*, in «American Journal of Philology» (1922), pp. 32-48.

[13] R. von Jhering, *Geist des römischen Rechts: auf den verschiedenen Stufen seiner Entwicklung*, Vol. 1. Breitkopf und Härtel, 1874; Id., *Der Zweck im Recht*, vol. 2, Breitkopf und Härtel, 1905.

"psychology" and "morality" of that Society and (b) the history of punishment is a rationalization and humanization process. Hence, Jhering's conclusion is that the humanization and rationalization of punishment (which he famously dubbed «the history […] of a *constant abolition*») reflects the rationalization and humanization of mankind as a whole. Jhering's approach, as well as Spencer's, was famously critiqued by Nietzsche in the *Genealogy of Morals* second essay on *Guilt, Bad Conscience and the Like*[14]. Those are the "classics" of the 19th century.

At the turn of the 20th century, Émile Durkheim attempted to emancipate historical perspectives on punishment from both biological metaphors and the philosophy of History. To that end, he published in 1900 a paper entitle *Two Laws of Penal Evolution*[15]. This article is a fascinating read and a necessary premise to understanding the clear contribution of Foucault on the modernization of punishment. Durkheim's empirical resources are not different in nature from Hegel's and Jhering's, although he is more systematic and less selective. Another common feature of his approach is that he studies the history of punishment on the longest period possible. Durkheim first gathers historical data on a dozen "epochs": Pharaoh's Egypt, Manu's code, Hebraic laws, Ancient Greece, Roman Republic, Roman Empire, Barbaric France, the *Ancien Régime* and Modern France. He then classifies those countries in terms of «intensity of repression», and it gives a dual trend: first, cycles of oscillating intensity in repression and second «an overall trend of softening in sentences».

The Durkheim paper contains several insights that will be present, reworked, argued for and against in Foucault's work. Apart from the depiction of modernity as the ultimate step in the general «softening of sentences», and the centrality of prison punishment in the modern era, Durkheim also refers to an inverse relationship between the intensity of moral constraint and the width of moral control:

*Telle est la cause qui a déterminé l'affaiblissement progressif des peines. On voit que ce résultat s'est produit mécaniquement. La manière dont les sentiments collectifs réagissent contre le crime a changé, parce que ces sentiments ont changé. Des forces nouvelles sont entrées en jeu ; l'effet ne pouvait pas rester le même. Cette grande transformation n'a donc pas eu lieu en vue*

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[14] F. Nietzsche, *On the Genealogy of Morals and Ecce Homo*, Random House LLC, New York 2010.

[15] É. Durkheim, *Two Laws of Penal Evolution*, in «Economy and Society», vol. 2, no. 3 (1973), pp. 285-308.

*d'une fin préconçue ni sous l'empire de considérations utilitaires. Mais, une fois accomplie, elle s'est trouvée tout naturellement ajustée à des fins utiles. Par cela même qu'elle était nécessairement résultée des conditions nouvelles dans lesquelles se trouvaient placées les sociétés, elle ne pouvait pas ne pas être en rapport et en harmonie avec ces conditions. En effet, l'intensité des peines ne sert qu'à faire sentir aux consciences particulières l'énergie de la contrainte sociale ; aussi n'est-elle utile que si elle varie comme l'intensité même de cette contrainte. Il convient donc qu'elle s'adoucisse à mesure que la coercition collective s'allège, s'assouplit, devient moins exclusive du libre examen. Or c'est là le grand changement qui s'est produit au cours de l'évolution morale. Quoique la discipline sociale, dont la morale proprement dite n'est que l'expression la plus haute, étende de plus en plus son champ d'action, elle perd de plus en plus de rigueur autoritaire. Parce qu'elle prend quelque chose de plus humain, elle laisse plus de place aux spontanéités individuelles, elle les sollicite même. Elle a donc moins besoin d'être violemment imposée. Or, pour cela, il faut aussi que les sanctions qui lui assurent le respect deviennent moins compressives de toute initiative et de toute réflexion*[16].

This relationship between the width and the intensity of control is an essential mechanism studied in *Discipline and Punish*, however Foucault believed it was too superficial in Durkheim's work:

By studying only the general social forms, as Durkheim did, one runs the risk of positing as the principle of greater leniency in punishment processes of individualization that are rather one the effects of the new tactics of power, among which are to be included the new penal mechanisms[17].

The inverse relationship and the overall "utility" of leniency has a more central place in Foucault's work, where it is depicted as (1) a project («leniency as a technique of power»[18]):

[The modern] reform must be situated in a process that historians have recently uncovered through the study of legal archives: the relaxation of penalty in the eighteenth century or, to be more precise, the double movement by which, during this period, crimes seemed to lose their violence, while punishments, reciprocally, lost some of their intensity, but as the cost of greater intervention[19].

[16] É. Durkheim, *Deux lois de l'évolution pénale*, in «L'Année sociologique», vol. 4 (1900), pp. 24-25.
[17] M. Foucault, *Discipline and Punish. The Birth of the Prison*, Random House LLC, New York 1977, p. 23.
[18] *Ibidem*, p. 24.
[19] *Ibidem*, p. 75.

The criticism of the reforms was directed not so much at the weakness of cruelty of those in authority, as at a bad economy of power […] the paralysis of justice was due not so much to a weakening as to a badly regulated distribution of power, to its concentration […] It was not so much, or not only, the privilege of justice, its arbitrariness, its archaic arrogance, its uncontrolled rights that were criticized, but rather the mixture of its weaknesses and excesses, its exaggerations and its loopholes[20].

As well as (2) an effective, actual metamorphosis of power, from *hard and narrow* to *soft and wide*:

*Il est certain que cette gouvernementalité n'a pas cessée, d'un certain point de vue, de devenir plus stricte au cours des âges [...][21].*

This being part of the larger critique of Humanism:

*J'ai essayé de montrer comment l'humanisme était cette espèce de fabrication de l'être humain sur un certain modèle et qu'il ne fonctionne absolument pas comme libération de l'homme mais au contraire comme enfermement de l'homme à travers un certain type de forme qui sont toutes commandées par la souveraineté du sujet[22].*

On specific examples, Foucault often referred to the most serious punishment as "anecdotic" and "weak" as well as more lenient punishment as "efficient" and "deep". For instance on the repression of homosexuality he stated in an interview for *Gai pied*:

I do not know the current situation well […] but, until the 1970s, we knew very well that bar and sauna owners were racketeered by the police; there is here a complex, efficient and heavy chaining of police repression[23].

An efficient system that Foucault contrasted to the «almost inexistent» burnings of homosexuals under the Ancien Régime[24].

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[20] *Ibidem*, pp. 79-80.

[21] M. Foucault, *Entretien à l'Université catholique de Louvain*, 1981.

[22] M. Foucault, *The Lost interview*, 1971.

[23] M. Foucault, *Foucault: non aux compromis*, in *Dits et écrits*, Gallimard, Paris 1994, t. IV, p. 336.

[24] *Ibidem*.

Apart from these similarities, *Discipline and Punish* distinguishes itself from this literature in three fundamental ways, and it is notable that each of those methodological points are emphasized in *The Archeology of Knowledge* (published a few years earlier). We can find those three methodological tools explained as well in several later interviews and debates: (a) the description of historical changes as transformation rather than progress, (b) the focus on an "historical moment" rather than on "History" as a whole, and (c) the emphasis of breaks over continuity.

The *description of historical changes as transformations rather than progress* is one of Foucault's main contention in the history of Knowledge. It is a strong aspects of *The Order of Things*[25], and in his 1971 debate versus Noam Chomsky, Foucault was even clearer on his contention:

For a long time the idea has existed that the sciences, knowledge, followed a certain line of "progress", obeying the principle of "growth", and the principle of the convergence of all these kinds of knowledge. And yet when one sees how the European understanding, which turned out to be a world-wide and universal understanding in a historical and geographical sense, developed, can one say that there has been growth? I, myself, would say that it has been much more a matter of transformation.

Take, as an example, animal and plant classifications. How often have they not been rewritten since the Middle Ages according to completely different rules: by symbolism, by natural history, by comparative anatomy, by the theory of evolution. Each time this rewriting makes the knowledge completely different in its functions, in its economy, in its internal relations. You have there a principle of divergence, much more than one of growth. I would much rather say that there are many different ways of making possible simultaneously a few types of knowledge. There is, therefore, from a certain point of view, always an excess of data in relation to possible systems in a given period, which causes them to be experienced within their boundaries, even in their deficiency, which means that one fails to realise their creativity; and from another point of view, that of the historian, there is an excess, a proliferation of systems for a small amount of data, from which originates the widespread idea that it is the discovery of new facts which determines movement in the history of science[26].

[25] M. Foucault, *The Order of Things. An Archaeology of the Human Sciences*, Psychology Press, Hove 2002.

[26] N. Chomsky and M. Foucault, *Human Nature: Justice versus Power*, 1971: <http://www.chomsky.info/debates/1971xxxx.htm>.

Like the "history of science" literature, "penal evolution" literature had emphasized several "progresses" in the history of punishment: rationalization, humanization, softening, "abolition". In *Discipline and Punish*, Foucault is careful not only never to admit those as fact, but to emphasize the other side of each trend: humanization translate a change in focus from the crime to the criminal, rationalization "a displacement of penal economy", softening "a search for greater efficiency". The change cannot be described as going from *point A* to *point B* on a bi-dimensional figure (progress or decadence), it is a metamorphosis, a redistribution.

This disengagement from the inherent linearity of penal evolution literature is facilitated by Foucault's *refusal to study History as a whole but instead to describe a single historical moment*. Hence, Foucault on crime and punishment reads much differently than penal evolution literature, there is no discussion of a "trend", of "the long run".

But it is Foucault's last point of distinction, the emphasis of breaks over continuity, that *The Punitive Society* offers the most information on the stages followed before arriving to *Discipline and Punish*.

*The Emphasis of Break over Continuities, the Problem of "the Novelty of Prison" and the Opposition to Durkheim in* The Punitive Society

In *The Archeology of Knowledge*, Foucault would write «I have decided to ignore no form of discontinuity, break, threshold, or limit»[27]. This *emphasis of breaks over continuities* is one of Foucault's "signature" research strategies. He explained the reason of this choice at several points of his career, but the most extended discussion of this choice rests in the introduction of this book. After explaining the social function of continuities in academic discourse:

If the history of thought could remain the locus of uninterrupted continuities, it could endlessly forge connexions that no analysis could undo without abstraction, if it could weave, around everything that men say and do, obscure synthesis that anticipate for him, prepare him, and lead him endlessly towards his future, it would provide a privileged shelter for the sovereignty of consciousness. Continuous history is the indispensable correlative of the founding function of the subject: the

[27] M. Foucault, *The Archeology of Knowledge*, Tavistock, London 1972, p. 31.

guarantee that everything that has eluded him may be restored to him; the certainty that time will disperse nothing without restoring it in a reconstituted unity[28].

Foucault provides examples of the «preserv[ation] against all decentring, [of] the sovereignty of the subject»[29] by the focus on continuities:

Against the decentring opered by Marx – by the historical analysis of the relations of production, economic determinations, and the class struggle – it gave place, toward the end of the nineteenth century, to the search for a total history, in which all differences of a society might be reduced to a single form, to the organization of a world-view. […] [Against] the decentring operated by the Nietzschean genealogy, it opposed the search for an original foundation that would make rationality the telos of mankind, and link the whole history of thought to the preservation of this rationality, to the maintenance of this teleology, and to the every necessary return to this foundation[30].

Eleven years later, in an interview for *Campus report* reworked for the *Three Penny Review* Foucault gave perhaps the clearest testimony of his voluntary emphasis on discontinuities as a methodological choice, a "*fiction*" at the service of a political truth:

*Je ne suis pas véritablement historien […] Je pratique une sorte de fiction historique. D'une certaine manière, je sais très bien que ce que je dis n'est pas vrai […]. Je sais très bien que ce que j'ai fait (sur la folie) est, d'un point de vue historique, partial, exagéré. Peut-être que j'ai ignoré certains éléments qui me contrediraient. Mais mon livre a eu un effet sur la manière dont les gens perçoivent la folie. Et donc mon livre et la thèse que je développe ont une vérité dans la réalité d'aujourd'hui […].*

*J'ai écrit un livre sur les prisons. J'ai essayé de mettre en évidence certaines tendances dans l'histoire des prisons. "Une seule tendance", pourrait-on me reprocher. "Alors, ce que vous dites n'est pas tout à fait vrai", Mais, il y a deux ans, en France, il y a eu de l'agitation dans plusieurs prisons, les détenus se sont révoltés. Dans deux de ces prisons, les prisonniers lisaient mon livre. Depuis leur cellule, certains détenus criaient le texte de mon livre à leurs camarades. Je sais que ce que je vais dire est prétentieux, mais c'est une preuve de vérité, de vérité politique, tangible, une vérité qui a commencé une fois le livre écrit*[31].

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[28] *Ibidem*, p. 12.
[29] *Ibidem*.
[30] *Ibidem*, pp. 12-13.
[31] M. Foucault, *Foucault étudie la raison d'État*, in *Dits et écrits*, t. IV, pp. 40-41.

Indeed Foucault's work is full of "novelty", "breaks", "discontinuities". The main themes of foucaldian research revolved around "births" (the birth of the asylum, the birth of the clinic, the birth of prison, the birth of sexuality) and "metamorphoses" (from thanato-power to bio-power, from norm-rule to norm-normality). For the enterprise behind *Discipline and Punish* to be meaningful, its subtitle "The birth of prison" must signify novelty, a real transformation, something that needs to be explained. And behind the historical question (is prison novel?), there is the political one (is prison necessary?), as the proof of novelty is also the proof of the possibility of disappearance:

*[…] ce que j'ai voulu faire c'est de montrer combien finalement cette adéquation, pour nous si claire et simple, de la peine avec la privation de liberté était en réalité quelque chose de récent, c'est une invention, c'est une invention technique, dont bien sûr les origines sont lointaines, mais qui a été intégré véritablement à l'intérieur du système pénal, et qui a fait partie de la rationalité pénale à partir de la fin du 18<sup>ème</sup> siècle. Et j'ai essayé d'interroger les raisons pour lesquelles la prison était ainsi devenue une sorte d'évidence dans notre système pénal. Il s'agit donc de rendre les choses plus fragiles par cette analyse historique, ou plutôt de montrer à la fois, pourquoi et comment les choses ont pu se constituées ainsi mais montrer en même temps qu'elles se sont constituées à travers une histoire précise. Il faut donc montrer la logique des choses […] et […] du moment que (notre rapport à la prison et à la folie) est historiquement constitué, il peut être politiquement détruit […] J'ai voulu déchoir (la prison) de leur statut d'évidence pour leur redonner la mobilité qu'elles ont eu et qu'elles doivent toujours avoir dans le champ de nos pratiques*[32].

In an Italian interview, Foucault was even clearer on this plasticity he was trying to give to power mechanisms, as a self-defined «artificer», «fabricating tools for a siege, a war, a destruction»:

*De ce point de vue, toute ma recherche repose sur un postulat d'optimisme absolu. Je n'effectue pas mes analyses pour dire : voilà comment sont les choses, vous êtes piégés. Je ne dis ces choses que dans la mesure où je considère que cela permet de les transformer*[33].

Pierre Bourdieu, one of Foucault contemporary seemed to criticize this posture that placed emphasis on discontinuities, labelling it an "extreme" and a "delusion", symmetrical to the emphasis on continuities by "conservative sociologists":

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[32] M. Foucault, *Entretien à l'Université catholique de Louvain.*
[33] M. Foucault, *Conversazione con Michel Foucault*, in *Dits et écrits*, t. IV, p. 93.

*[U]n des grands problèmes des sociologues, c'est d'éviter de tomber dans l'une ou l'autre des deux illusions symétriques, l'illusion du "jamais vu" [...], des phénomènes inouïs, des révolutions […] et celle du "toujours ainsi" (qui est plutôt le fait des sociologues conservateurs : "rien de nouveau sous le soleil, il y aura toujours des dominants et des dominés, des riches et des pauvres…"). Le risque est toujours très grand, d'autant plus grand que la comparaison entre les époques est extrêmement difficile : on ne peut comparer que de structure à structure, et on risque toujours de se tromper et de décrire comme quelque chose d'inouïe quelque chose de banal, simplement par inculture*[34].

In *Discipline and Punish*, the fact that "prison is novel" and that this novelty needed to be explored is not extensively argued. Instead, what is central to the demonstration is the corollary of the birth of prison: the sudden disappearances of the cruelest corporal punishment. The book starts with the torment (*supplice*) of Damiens and follows by a question: how could this horrendous, revolting practice disappear so quickly? «Why this universal horror of torture and such lyrical insistence that punishment be "humane"?»[35].

The disappearance of corporal punishment is an obvious and widely accepted discontinuity in the recent history of punishment. Foucault does not have to argue against anyone that this "break" happened, that it is sudden, unique, and that it needs to be explained. Another obvious and widely accepted fact is that this sudden disappearance of the cruelest punishment created an emptiness that was almost "mechanically" filled by the prison. If the murderer cannot be punished by torment, he has to be punished by imprisonment, on the model of other disciplinary institutions, will add Foucault. Hence the focus on "humanization".

But in *The Punitive Society*, Foucault's approach was different. The book does not address corporal punishment and its disappearance. The "modernization" discontinuity is still the focus but Foucault examines the other side of the coin, the novelty of prison itself, not the novelty of abolition. «*La prison est introduite de biais dans la trame dérivative des théories et pratiques, et comme à l'improviste, de force*»[36].

The whole lesson of January 31st argues that modern prison punishment is a «novel» institution, one that has «no historical depth». That which was obvious in *Discipline and Punish* needed to be extensively dem-

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[34] P. Bourdieu, Sur la télévision, Raisons d'agir, Paris 1996, p. 49.
[35] M. Foucault, *Discipline and Punish*, p. 74.
[36] M. Foucault, *La société punitive*, p. 86.

onstrated a few years before, in *The Punitive Society*, as it may, after all, raise several objections:

*Je voudrais commencer cette analyse à partir d'une objection : n'est-il pas périlleux de dire que la prison surgit brusquement à l'intérieur du système pénal vers la fin du 18ème siècle, alors que l'on vit dans une société qui connaît la clôture monastique, une forme-couvent présente depuis des siècles ? Ne serait-il pas plus raisonnable de chercher si ce n'est pas à partir d'une certaine forme de communauté conventuelle que l'on peut retracer la généalogie de la forme-prison ? Ainsi en France, c'est dans les couvents que se sont logés les prisons : l'enfermement cellulaire des prisons*[37].

What and who is Foucault arguing against? Two adversaries, at least. Common ignorance of course is his first target, as he emphasized in a later interview at the *Université catholique de Louvain*:

*Quand on discutait […] au début des années 1970 avec les gens sur la réforme du système pénale, une chose me paraissait très frappante, c'est que, par exemple la, bien sûr on posait la question théorique du droit de punir, bien sûr, d'un autre côté, on posait le problème de comment on peut aménager le régime pénitentiaire mais cette espèce d'évidence, si vous voulez, que la privation de liberté est, au fond, la forme la plus simple, la plus logique, la plus raisonnable, la plus équitable de punir quelqu'un parce qu'il avait commis une infraction, cela n'était pas tellement interrogé*[38].

But the most serious adversary, who is not quoted in *The Punitive Society*, but who will be referenced in *Discipline and Punish*, is Émile Durkheim. The *Two Laws of Penal Evolution* 1900 paper especially argues that modern prison *is not* a novelty, that it is "third stage" in a historical progression. This element is with any doubt essential to Durkheim's demonstration, after all it is one of the "two laws" the paper is about (the first is the softening of sentences and the second one is the progressive replacement of all punishment by the deprivation of liberty). For Durkheim, prison had known three stages in the history of punishment: *a preventive stage*, when jails were only being used for pre-trial detention and prisoners awaiting execution (Socrates jail cell in the *Crito* is the most famous example of this use); a *punitive stage*, when the church sought to replace corporal and monetary punishment by the *penitence* in monasteries; a *generalized stage* when

[37] *Ibidem*, p. 87.
[38] M. Foucault, *Entretien à l'Université catholique de Louvain*.

prison becomes the reference punishment for all crimes. Prison punishment is not novel, it is an invention of the church.

This is precisely the view against which Foucault argues in *The Punitive Society*, stating that «prison is not the monastery of the Industrial era»[39]. This demonstration is essential and one might wonder how and why it disappeared from *Discipline and Punish*. Was it not deemed compelling enough?

In Durkheim's view, the prison is a "vertical" descendant of the monastery while in Foucault's view it is a "horizontal" sibling of its contemporary disciplinary institutions (the asylum, the barracks, the manufacture, the juvenile correction facility, etc.). What arguments does Foucault offer against Durkheim's views?

First, there is the similarity of prison punishment to other structures of the capitalist era. Many of those points will be further developed in later works, but the most striking contribution of *The Punitive Society* is the question of the choice of "time" as the unit of punishment as a mirror of what he calls the "salary-form", that is time as a unit of one's work value in the capitalist era:

*Salaire et prison se rattachent, chacun à son niveau et à sa manière, à cet appareil de pouvoir qui assure l'extraction réelle du temps et qui introduit [le temps] dans un système d'échanges et de mesure*[40].

Second, Foucault differentiates «the function»[41] of the monastery and that of the prison. The monastery protects the inside from the exterior, not the outside world from the interior, «the permeability» is «on the other side»[42]. Also, the monastery, while «linked to Sin» is «not punishment in itself» but «the *condition* of penitence», that is, it gives meaning to other punishments such as flailing or deprivation that will be done inside it.

Third, Foucault argues that the "punitive use" of monastery by the Church was marginal and on the decline. «In France, canonical imprisonment was forbidden by the Church in 1629»[43], and was only practiced in

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[39] M. Foucault, *La société punitive*, p. 88.
[40] *Ibidem*, p. 86.
[41] *Ibidem*, p. 87.
[42] *Ibidem.*
[43] *Ibidem*, p. 88.

borderline cases that had to do with interferences between temporal and spiritual justices.

Foucault concludes: «I do not think that imprisonment is the secularization of a catholic punishment»[44], and, that is the most interesting part, spends the rest of the lecture arguing that after prison punishment emerged as the sole mode of punishment of the modern era is was «re-Christianized»[45], «by its base» says a note on Foucault's manuscript[46]. That is, the prison religious personnel, the intervention of the priests during the 19th century is what gives «an impression of old age», «a thousand-year depth» to «this small model»[47].

In *Discipline and Punish*, this angle will be abandoned, replaced by perhaps a more effective and convincing focus, not on the novelty of prison, but on the novelty of the disappearance of corporal punishment. To show the abruptness of the discontinuity, Foucault resorts to his usual process of exposing "strangeness". In *Discipline and Punish*, he makes the case that Damiens' torment is strange and foreign to us, and perhaps traveling history in this direction makes an easier case.

Foucault still emphasizes the difference between his approach and Durkheim's work in the first pages of *Discipline and Punish*, but the emphasis is on the method one should use to study the modernization break:

[To avoid] run[ning] the risk of allowing a change in collective sensibility, an increase in humanization or the development of human sciences to emerge as a massive, external, inert and primary fact […] [t]his study obeys four general rules:

1. Do not concentrate the study of the punitive mechanisms on their "repressive" effects alone, on their "punishment" aspects alone, but situate them in a whole series of their possible positive effects, even if these seem marginal at first sight. As a consequence, regard punishment as a complex social function.

2. Analyze punitive methods not simply as consequences of legislation or as indicators of social structures, but as techniques possessing their own specificity in the more general field of other ways of exercising power. Regard punishment as a political tactic.

3. Instead of treating the history of penal law and the history of the human sciences as two separate series whose overlapping appears to have had on one

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[44] *Ibidem.*
[45] *Ibidem*, p. 95.
[46] *Ibidem*, p. 92.
[47] *Ibidem*, p. 94.

or the other, or perhaps on both a disturbing or useful effect, according to one's point of view, see whether there is not some common matric or whether they do not both derive from a single process of "epistemologico-juridical" formation; in short, make the technology of power the very principle both of the humanization of the penal system and of the knowledge of man.

4. Try to discover whether this entry of the soul on the scene of penal justice, and with it the insertion in legal practice of a whole corpus of "scientific" knowledge, is not the effect of a transformation of the way in which the body itself in invested in power relations[48].

Foucault positioning towards Rusche and Kirchheimer's work is more subtle, and in this regard, *The Punitive Society* represents a remarkable step in Foucault's relation to Marxism.

*The Problem of Punishment as a Tool in Class Warfare*

The philosophy of history that gave birth to the "penal evolution" literature became slowly discredited at the beginning of the 20th century. Two famous attacks on this intellectual movement are Karl Popper's *On the Misery of Historicism* and Raymond Aron's *Introduction à la philosophie de l'Histoire*. By the second half of 20th century "long trends" were being replaced by socio-histories of particular moments. But a jewel shined in the ruins of penal evolution literature, a swan song of sorts: Rusche and Kirchheimer's *Punishment and Social Structure*.

The first work of the Frankfurt school to be published, in 1939, this Marxist take on the history of punishment was to be forgotten and rediscovered in 1968 – although there was no French translation before the 1990s. The book is subtle and achieves several ends, among which is the last (to the best of my knowledge) "long history" of punishment. Interestingly enough, Rusche and Kirchheimer notice the same type of "punishment cycles" that Durkheim highlighted, although they give no reference to Durkheim's work. However, while Durkheim explained these cycles by «variations in the absolutism of central political power», Rusche and Kirchheimer see in variations of the harshness of punishment a correlation to «phases of economic development» and «demand for man

[48] M. Foucault, *Discipline and Punish*, pp. 23-24.

power»[49]. Punishment is harsher when economic conditions worsens, this is the "Rusche and Kirchheimer hypothesis" that has a major success in contemporary academia[50].

This idea that punishment is not primarily a "response" to crime but a form of management of social marginality is an essential part of *The Punitive Society*, with surprisingly, no reference (yet[51]) to *Punishment and Social Structure*. In fact, the amount of energy and examples Foucault uses to demonstrate that criminal justice perpetuates a class war is striking for the Foucault scholar, as it is not his habitual *modus operandi*. Most of Foucault's lectures are about discussing and dissecting a few examples. In *The Punitive Society*, Foucault buries his audience under examples, of a criminal law forged "against a class" – while showing, as Bernard Harcourt remarks in his *Situation du cours*[52], a certain *malaise* towards Marxist vocabulary (the best example being the expression "class struggle" written on the manuscript, where "struggle" is barred and replaced by "relations"[53]).

These examples are the articulation of *a global discourse of a war against the dangerous class that has to be waged by criminal law*, a discourse repeated by elected officials:

> *Un député du Var disait : "Les lois pénales, destinées en grande partie à une classe de la société, sont faites par un autre […] la presque totalité des délits, surtout de certains délits, est commise par la partie de la société à laquelle n'appartient pas le législateur. Or, cette partie diffère presque entièrement de l'autre par son esprit, ses mœurs, toute sa manière d'être"*[54].

By physiocrates, like LeTrosne:

> *[Les vagabonds] "sont des insectes voraces […] des troupes ennemies répandues sur toute la surface du territoire, qui y vivent à discrétion, comme dans un pays conquis et qui y lèvent de véritables contributions sous le titre d'aumône"*[55].

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[49] G. Rusche and O. Kirchheimer, *Punishment and Social Structure*, Transaction, New Brunswick 2003, p. 8.

[50] *Ibidem*, p. xxiii.

[51] As explained *supra* and *infra*, *Discipline and Punish* references Rusche and Kichheimer's "great book".

[52] M. Foucault, *La société punitive*, p. 295.

[53] *Ibidem*, p. 222.

[54] *Ibidem*, p. 24.

[55] *Ibidem*, p. 50.

By religious communities:

*Wesley disait devant un de ses filiales en 1763, que la tâche principale de l'association est d'empêcher "la classe la plus basse et la plus vile de la société de se saisir des jeunes gens inexpérimentés et de leur extorquer leur argent"*[56].

By civil societies, composed of «notables, lords and member of the church»:

*En 1804, l'évêque Watson, prêchant devant la "Société pour la suppression du vice" disait : "les lois sont bonnes ; mais elles sont toujours éludées par les* lower classes *et les* higher classes *les tiennent pour rien"*[57].

Or, by Colquhoun, founder of the first London regular police:

*Cette agence aura pour cible propre les* lower classes *: "toutes les fois qu'une grande quantité d'ouvriers sera rassemblée en un même lieu, il s'y trouvera nécessairement beaucoup de mauvais sujets, qui, par la raison de leur réunion dans un moindre espace [...] pourront, par leur conduite turbulente, nuire d'avantage à la chose publique"*[58].

All references to the use of punishment as a tool in a "civil war", in a "class warfare" rhetoric is not gone from *Discipline and Punish*, but the focus on Marxism is considerably lighter, approached with more distance. Most notably, this heavy emphasis of *The Punitive Society* seems to be "replaced" by a reference to Rusche and Kirchheimer's work:

Rusche and Kirchheimer's great work, *Punishment and Social Structure*, provides a number of essential reference points. We must first rid ourselves of the illusion that penalty is above all (if not exclusively) a means of reducing crime and that, in this role, according to social forms, the political system or beliefs, it may be severe or lenient, tend towards expiation of obtaining redress, towards the pursuit of individuals or the attribution of collective responsibility. [...] We must show that punitive measure are not simply "negative" mechanisms that make it possible to repress, to prevent, to exclude to eliminate; but that they are linked to a whole series of positive and useful effects which it is their task to support [...].

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[56] *Ibidem*, p. 106.
[57] *Ibidem*, p. 109.
[58] *Ibidem*, p. 113.

Form this point of view, Rusche and Kirchheimer relate the different systems of punishment with the systems of production within which they operate: thus, in a slave economy, punitive mechanisms serve to provide an additional labor force – and to constitute a body of 'civil' slaves in addition to those provided by war or trading; with feudalism, at a time when money and production were still in a early stage of development, we find a sudden increase in corporal punishment – the body being in most cases the only property accessible; the penitentiary (the Hôpital Général, the Spinhuis or the Rasphuis), forced labor and the prison factory appear with the development of the mercantile economy. But the industrial system requires a free market of labor and, in the nineteenth century, the role of forced labor in the mechanisms of punishment diminished accordingly and "corrective" detention takes its place. There are no doubts a number of observations to be made about such a strict correlation.

But we can surely accept the general proposition that, in our societies, the systems of punishment are to be situated in a certain "political economy" of the body[59].

To demonstrate the link between the means of punishment and class war, Foucault gave in *The Punitive Society* a plethora of examples in the discourse while Rusche and Kirchheimer gave «a strict correlation», for which «there are no doubts a number of observation to be made». In *Discipline and Punish*, like the novelty of prison, the link between punishment and political economy no longer has to be demonstrated. But this time, instead of proposing a methodological opposition like with Durkheim, Foucault will use Rusche and Kirchheimer as a stepping stone that one must recognize, but also surpass. An interview given five years later is most telling on Foucault's reaction to reading *Punishment and Social Structure*:

*Je savais peu de choses sur l'école de Francfort. J'avais lu quelque textes de Horkheimer, engagés dans tout un ensemble de discussions dont je comprenais mal l'enjeu et dans lesquelles je ressentais comme une légèreté, par rapport aux matériaux historiques qui étaient analysées. Je me suis intéressé à l'école de Francfort après avoir lu un livre très remarquable sur les mécanismes de punition qui avait été écrit aux États-Unis, par Kirchheimer.*

*À ce moment-là, j'ai compris que les représentants de l'école de Francfort avaient essayé d'affirmer, plus tôt que moi, des choses que je m'efforçais moi aussi de soutenir depuis des années. […]*

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[59] M. Foucault, *Discipline and Punish*, p. 25.

*Quand je reconnais les mérites des philosophes de l'école de Francfort, je le fais avec la mauvaise conscience de celui qui aurait dû les lire bien avant, les comprendre plus tôt. Si j'avais lu ces œuvres, il y a un tas de choses que je n'aurais pas eu besoin de dire, et j'aurais évité des erreurs*[60].

Did this "late discovery" happen after *The Punitive Society*? Was this focus on class warfare «*something that needn't be said*» after reading Rusche and Kirchheimer? From a personal conversation with Daniel Defert on December 17th 2013, it seems that it is not something we can establish or deny with the chronology we have now.

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*The Missing Link. An Inquiry into Michel Foucault's Distinction from "Penal Evolution" Literature between* The Punitive Society *and* Discipline and Punish *(1973-1975)*

Michel Foucault presents his starting point in *Discipline and Punish* by positioning his work in relation to two major socio-historical milestones: a short article by Émile Durkheim, who was trying to explain "the gradual softening of punishment", and the book *Punishment and Social Structure* published by Rusche and Kirchheimer during the interwar period, which laid the groundwork for an economic analysis of criminal justice systems. This positioning is made on two pages of *Discipline and Punish*. Thanks to the recent publication of Foucault's *The Punitive Society*, we find more advanced arguments over these issues and see how, in the months prior to the completion of *Discipline and Punish*, Foucault moved and refined what seemed the most problematic with modern penality.

*Keywords*: Michel Foucault, *The Punitive Society*, *Discipline and Punish*, Penal Sociology, Marxism, Prison, Poverty.

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[60] M. Foucault, *Conversazione con Michel Foucault*, pp. 73-74.