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# PUNISHMENT AND MODERN SOCIETY

A STUDY IN SOCIAL THEORY



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## Beyond the Power Perspective

### *A Critique of Foucault on Punishment*

In my discussion of Foucault's work in this and the subsequent chapter I aim to do two things. The first of these aims is to subject the specific arguments of *Discipline and Punish* to detailed criticism, and to suggest ways in which these critical points reflect upon broader issues within Foucault's work. The second is to deal directly with the broad themes which run through Foucault's work, particularly the themes of 'power' and 'rationality', and to show how these might be developed in order to further our understanding of modern punishment. The general tenor of the discussion will be positive, since I consider Foucault's perspective to be of great value in analysis. But I want to insist that Foucault's work—like that of Durkheim and the Marxists—provides only a partial and limited basis upon which to study punishment or any other social institution. In particular I will argue that neither punishment nor penal history can be wholly understood in terms of power or rationality and that the attempt to analyse them in these terms has led to a number of serious errors in *Discipline and Punish*. The critique which I will develop will not deny the validity of the perspective which Foucault sets out, but will challenge its capacity to stand on its own as an explanatory framework for the analysis of punishment and penal change. Against the singularity of this analysis in terms of power, I will argue that a wider, more pluralistic vision is necessary.

#### 1. FOUCAULT'S HISTORICAL CLAIMS

Before taking up this critique, it is useful to note how historians have dealt with *Discipline and Punish* and the numerous historical claims which it makes. Although my main concern will be to question Foucault's general perspective rather than the historical details of his account, in the end the theoretical generalities and the historical particulars of *Discipline and Punish* are heavily interdependent. As with all historical work, it is the implicit theory which supplies the criteria upon which evidence is selected, given its significance, and fitted into the overall picture, so any criticism of Foucault's 'sociology' will have implications for this 'history' and vice versa.

Characteristically, while sociologists have tended to generalize from Foucault's work, taking up its concepts, developing its logic, and applying it to other materials, historians have been much more hesitant and circumspect.<sup>1</sup> Those who have addressed his substantive work rather than his philosophy or

<sup>1</sup> For discussions of Foucault by historians, see M. Perrot (ed.), *L'Impossible Prison* (Paris, 1980); G. Wright, *Between the Guillotine and Liberty* (New York, 1983); P. O'Brien, *The Promise of Punishment* (Princeton, 1982); Spierenburg, *The Spectacle of Suffering*; R. A. Nye, *Crime, Madness and Politics in Modern France* (Princeton, 1984); Stone, *The Past and the Present Revisited*.

method have tended to modify his theses, presenting alternative, less general interpretations which they claim are more in keeping with the evidence. One thesis which has come under sustained attack has been Foucault's interpretation of when and why the practice of public torture and execution was abandoned in Europe. As we saw, *Discipline and Punish* locates this historical development between about 1750 and 1820 and accounts for it primarily in terms of a strategic shift in the mode of exercising power. This explanation has been challenged on a number of counts by the work of Pieter Spierenburg, which argues that the abolition of the public execution should not be viewed as an independent event but instead as one stage in an extended process of change which brought about the privatization of punishment and a reduction in the display of suffering.<sup>2</sup> This series of events began about 1600 when there was a sharp decline in the judicial use of mutilation and maiming in the European countries and proceeded in gradual stages (the removal of permanent scaffolds, the ending of the routine exposure of corpses, etc.) until by the nineteenth and twentieth centuries most of these nations had altogether abandoned corporal and capital punishments. Viewed in these terms, the changes Foucault describes were already well under way during the *ancien régime*, and appear to have been bound up with developments which were not entirely to do with power or politics. In this respect, Spierenburg sets out a strong case, arguing that the decline in penal suffering and publicity was linked to general changes in sensibility and attitudes towards violence which can be traced over the same extended period—these cultural changes being in turn linked to the formation of states and their internal pacification. More recent work by John Beattie on criminal justice in England between 1660 and 1800 also questions the periodization set out by Foucault in this respect and goes on to show that imprisonment was in fairly widespread use as a punishment for minor offenders in the early decades of the eighteenth century.<sup>3</sup>

Foucault's identification of political exigencies as the primary cause of change is also cast into doubt by alternative accounts. John Langbein's research suggests that changes in the law of evidence probably formed the proximate cause of the abandonment of torture,<sup>4</sup> while Robert Brown argues that the whole confessional system in which torture was grounded depended upon a set of religious and psychological beliefs which had to be altered before

<sup>2</sup> Spierenburg, *The Spectacle of Suffering*, and id., *The Emergence of Carceral Institutions*.

<sup>3</sup> Beattie, *Crime and the Courts*. On the use of imprisonment in medieval Europe, see Langbein, *Torture and the Law of Proof*; R. W. Ireland, 'Theory and Practice within the Medieval English Prison', *The American Journal of Legal History*, 31 (1987), 56–67; and R. B. Pugh, *Imprisonment in Medieval England* (Cambridge, 1970).

<sup>4</sup> Langbein, *Torture and the Law of Proof*. Langbein argues that judicial torture could be abolished in the 18th cent. because prior changes in the law of proof had rendered it unnecessary. It was the growing authority of the legal profession within increasingly stabilized nation states, together with the availability of new punishments other than blood sanctions, which made it possible from the 17th cent. onwards for jurists to develop a new system relying upon the judicial evaluation of evidence, which gradually replaced the old Roman–canon law of statutory proofs.

any change in penal practice was able to take place.<sup>5</sup> There were thus determinants of penal reform which had distinctively legal and cultural roots and which need to be considered alongside the political forces which Foucault describes: they cannot be ignored or simply reduced to questions of power. Equally relevant is Spierenburg's observation that the evidence of scaffold riots and disorders is much less widespread than Foucault suggests, and that, in any case, the risk of disorder had always accompanied executions and could not, in itself, have been sufficient reason to abandon the practice.<sup>6</sup>

Historians have also taken exception to Foucault's account of the role of the reformers in the development of the prison in the late eighteenth century. According to *Discipline and Punish* the reformers were, for all their talk of 'humanity' and the 'rights of man', primarily concerned to 'insert the power to punish more deeply into the social body'.<sup>7</sup> Indeed, it was only their desire for more efficient control and not their detailed programmes which was ever really taken up in practice—ironically enough in the shape of an institution which they had never particularly favoured. In contrast to this version of events, writers such as David Rothman and Michael Ignatieff give a more central place to the efforts of reformers in shaping the precise details of prison regimes. Many of the reformers they discuss were strong advocates of the prison and were instrumental in designing and legislating for the new institutions, and their concerns extended to matters of sanitation and health, the introduction of religious instruction, the proper feeding and clothing of prisoners, and the ending of their brutal exploitation by warders and other inmates.<sup>8</sup> Whereas for Foucault leniency in punishment is understood as a ruse of power, allowing a more extensive form of control to take hold, in these other accounts it is viewed as a genuine end which was sought after, along with others, for reasons of authentic benevolence or religious conviction. That such intentions sometimes resulted in the kind of outcomes that Foucault describes is not denied by these accounts. Indeed it is precisely this problem of distorted, unintended outcomes that they focus upon, showing how the dictates of 'conscience' can in practice become routines of 'convenience' for other purposes. But they stress none the less that these motivational patterns and ideologies did have real effects and are therefore an important factor in understanding penal institutions and the process of penal change. Moreover, as Spierenburg points out, it is perfectly possible to combine a desire for more humane treatment with a demand for greater control, and there is no reason why one should be reduced to the other.<sup>9</sup>

<sup>5</sup> R. Brown, 'The Idea of Imprisonment', *The Times Literary Supplement* (16 June 1978).

<sup>6</sup> Spierenburg, *The Spectacle of Suffering*, p. 108.

<sup>7</sup> Foucault, *Discipline and Punish*, p. 82.

<sup>8</sup> Rothman, *The Discovery of the Asylum*, and id., *Conscience and Convenience* (Boston, 1980), and Ignatieff, *A Just Measure of Pain*, and id., 'State, Civil Society and Total Institutions', in S. Cohen and A. Scull (eds.), *Social Control and the States* (Oxford, 1983).

<sup>9</sup> Spierenburg, *The Spectacle of Suffering*, p. 184.



Foucault's historical account can also be criticized for failing to supply the kind of evidence which is required for the arguments it makes. This is particularly true of the period at the turn of the nineteenth century when imprisonment first became a general policy, and also at the unspecified point later in the century when the penal strategy was revised in order to turn the failures of the prison to good political use. In the first case we are told that the 'prison form' found its way into legislation as a result of a society-wide disciplinary strategy, rather than as an outcome of particular penal theories. However, as Paul Patton points out, one would expect a thesis such as this to be supported by evidence drawn from the actual legislative process, showing how 'disciplinary' considerations entered the discussions and shaped policy decisions.<sup>10</sup> No such evidence is offered.

The same point can be made with even greater force against the second argument, since we are asked to accept that the creation of a criminal class became a deliberate feature in a political strategy. The terms used by Foucault to characterize this development—terms like 'strategy' and 'efforts'—imply that definite elements of intention and calculation lie behind it. He is not claiming merely that events turned out as they did in some unintended functional process; it is rather a matter of strategic calculation, a policy designed and operated in order to work that way.<sup>11</sup> Now there has been much discussion of what exactly Foucault means by the term 'strategy' and it can be accepted that it does not necessarily imply some kind of omniscient strategist who directs operations in line with a plan of operation. But, whether he has in mind an individual, an institution, or even a dispersed pattern of decisions which somehow add up, he needs to produce evidence of these strategic decisions actually taking place. Again no evidence of this kind is presented.

As we saw, Foucault uses this covert strategy argument to explain why the prison has survived despite its failures and the clear implication is that it is this strategy which keeps the prison in place today. However, his account shows only that such a strategy may have made political sense in the particular circumstances of France in the 1840s and 1850s. It says nothing about the basis for its existence in the late twentieth century unless Foucault believes that the same political circumstances prevail today. Whether or not there is evidence to support any part of Foucault's claim, it should be clear that a quite different argument would be necessary to explain the use of the prison in two quite different periods, a century apart.<sup>12</sup>

<sup>10</sup> P. Patton, 'Of Power and Prisons', in M. Morris and P. Patton, *Michel Foucault: Power, Truth, Strategy* (Sydney, 1979).

<sup>11</sup> See Foucault, *Discipline and Punish*, pp. 272 ff., and esp. Foucault, 'Prison Talk', *Power/Knowledge*, pp. 40–2.

<sup>12</sup> Brown in 'The Idea of Imprisonment' makes a related point when he points out that in the 19th cent. societies with widely different traditions, levels of industrialization, and types of political system all adopted the prison. This would seem to cast doubt upon the generalizability of the specific links between the prison and class domination which Foucault identifies in 19th-cent. France.

Finally, *Discipline and Punish* claims that a new, normalizing, disciplinary approach became dominant in the penal system with the emergence of generalized imprisonment in the nineteenth century. However, aside from a few examples and illustrations (the Paris Reformatory, Mettray, etc.), Foucault presents no extensive or quantitative evidence which would substantiate this characterization of modern penal practice. Instead he simply lists what he takes to be the individualizing, disciplinary characteristics of 'modern punishment' and implies that these have all been in place, more or less, since the beginning of 'the carceral era' nearly 200 years ago. Subsequent research has shown, however, that the spread of these individualized normalizing methods only really took off in the early twentieth century and that even now they have not yet succeeded in displacing other non-disciplinary sanctions—such as the fine—from the central position in penal practice.<sup>13</sup> More importantly for Foucault's argument, this trend towards normalizing, disciplinary sanctions and an administrative mode of dispensing them has never successfully banished the punitive, emotive character of the penal process. Throughout the twentieth century, the condemnatory rituals of criminal courts and the humiliating routines of penal institutions have retained a clear concern with expressing punitive passions and moral censure, even in the years when the treatment ethos was at its zenith. This is clearly true in the adult courts, where the figure of the 'rational criminal' was never fully displaced. But even in the sphere of juvenile justice, where the rehabilitative ideal has most clearly taken hold and where the language of punitiveness is now largely absent, normalizing techniques have continued to exist in tension with a measure of punitiveness which has compromised and limited their effects.<sup>14</sup> Accordingly, if the development of discipline was actually slower and more limited in penal practice than *Discipline and Punish* makes out, then this must in turn throw doubt upon its more general claims about the extension of disciplinary mechanisms 'throughout the social body'. If we are not altogether justified in characterizing modern penal systems as 'disciplinary' or 'panoptic', where does this leave the notion of 'the disciplinary society'?

There are other points of detail which could be taken up in this way, as well as more general ones such as Clifford Geertz's observation that *Discipline and Punish* is rather like a Whig history in reverse, tracing the Rise of Unfreedom and the inexorable regress of liberty.<sup>15</sup> But the major critical theme which

<sup>13</sup> See Garland, *Punishment and Welfare*, which argues that although disciplinary measures and reformative aims were a feature of modern imprisonment from the late 18th cent. onwards, the 19th-cent. prison relied upon mass regimes and uniform treatment. Only at the end of the 19th cent. were measures introduced which were designed to individualize and normalize offenders on a basis of detailed knowledge and differentiated treatment. On the place of the fine in modern penal practice, see P. J. Young, *Punishment, Money and Legal Order*, and Bottoms, 'Neglected Features of Contemporary Penal Systems'.

<sup>14</sup> On tensions in juvenile justice, see J. Sutton, *Stubborn Children: Controlling Delinquency in the USA, 1640–1981* (Berkeley, 1989); and R. Webb and D. Harris, *Welfare, Power and Juvenile Justice* (London, 1987).

<sup>15</sup> C. Geertz, 'Stir Crazy', *The New York Review of Books* (26 Jan. 1978).

emerges, and is independently made by many different critics, concerns Foucault's overestimation of the political dimension. *Discipline and Punish* consistently proposes an explanation in terms of strategies of power—sometimes in the absence of any supporting evidence—where other historians would see a need for other factors and considerations to be brought into account. In the remainder of this chapter, I will argue that the reason for this one-sided history is in fact a similarly one-sided understanding of punishment and penal institutions, and that neither do justice to the phenomena they describe.

## 2. FOUCAULT'S CONCEPTION OF PUNISHMENT

Despite its extensive use of historical sources and materials, it is arguable that *Discipline and Punish* is not primarily a historical text. Rather it should be viewed as a work of social theory and cultural criticism which proposes a new way of thinking about social institutions and illustrates this by means of an historical account. The real core of *Discipline and Punish* is in fact the power perspective which it sets out and it is this perspective rather than any specific historical claims which has been most influential.

As we have seen, *Discipline and Punish* interprets punishment in terms of power: as a form of power in itself—'a political technology'—and also as one instrument among others in a wider field of power relations—'a political tactic'.<sup>16</sup> What is meant by 'power' here is the idea of controlling—or rather 'producing'—behaviour, whether directly through the disciplinary training of offenders or, more indirectly, by way of deterrent threat and example to the general population. Punishment is thus thought of as a means of control which administers the bodies of individuals and, through them, the body politic.

It is important to realize that this relationship between punishment and power is not proposed as a hypothesis to be investigated, nor as one aspect among others, but rather as the basis upon which punishment is to be understood. We are invited to approach the study of penal institutions on the assumption that everything that occurs there is fundamentally oriented to the enhancement of control and the maximization of regulatory power. Moreover this punishment-as-control conception refers not just to the intentions of reformers or the aims of administrators; it is taken to be the way in which the system actually works. We are first of all to assume that penal practice is explicable in terms of power and then to explore in what sense this is true.

The force of this theoretical preconception is such that Foucault refuses to accept that there are elements of the penal system which either malfunction and so are not effective as forms of control or else are simply not designed to function as control measures in the first place. In contrast to Durkheim or Mead, who argue that the dynamics of punishment involve deeply irrational and emotive elements—with the result that penalties are often badly adapted

<sup>16</sup> Foucault, *Discipline and Punish*, pp. 24, 23.

to control purposes—Foucault proceeds as if penalty affords no place to non-rational phenomena. When such phenomena do seem to occur, Foucault's reaction is to look more closely, to examine them from every angle, to keep searching until he uncovers their hidden utility for power. The most startling example of this is when the apparent failures of the prison are reconceptualized to emerge as successful moves within a wider strategy of political control, but it is a tendency which is general in his work.

This radical perspective is often revealing and insightful as I have tried to show above, and when used with the inventiveness and subtlety of its author, it can lead to brilliant results. However, like any thoroughgoing scepticism it operates best as a heuristic device, producing questions and interpretations which can later be balanced against the weight of evidence and alternative explanations. It does not work well as a general theory or interpretation. Unfortunately, it has been in this more general and dogmatic mode that the power perspective has been used, both in *Discipline and Punish* itself and in much of the subsequent work which has been written in this style.<sup>17</sup>

Foucault's emphatic depiction of punishment as a technology of power-knowledge and his primarily political account of its historical development have produced an instrumental and functionalist conception of punishment in which penal practice is always shaped exclusively by the requirements of social control and in which its design is always calculated to maximize control effects. This notion of punishment, devoid of irrational or counter-productive features, and directed exclusively to the task of regulating conduct, seems to come very close to the utilitarian ideal set out by Jeremy Bentham in *An Introduction to the Principles of Morals and Legislation*.<sup>18</sup> There is, however, a curious difference between the two. Whereas Bentham set out his rationalistic control framework as an ideal to aim for, and deplored the ritualistic, non-utilitarian actualities of punishment which he observed in practice, Foucault seems to assert that 'Benthamism' is, in fact, a deep description of the actual nature of modern punishment. Bentham's vision turns out to be a reflection of the very nature of things—we live in a thoroughly calculated, controlled, panoptic world—and Foucault's approach is to analyse social institutions in these terms.

There can, of course, be no doubt that penal policy is the subject of strategic planning and rational administration, nor that the control of the behaviour of offenders and potential offenders is one of its central aims. But as even Bentham was forced to acknowledge, these are by no means the only factors involved. Then, as now, penal policy was shaped by a variety of ends—such as justice, economy, vengeance, forgiveness, charity, evangelism, and so on—and had to find a way of combining rational strategies with the demands of

<sup>17</sup> Foucault does say at one point that other interpretations are possible and 'legitimate' (ibid. 25), but he makes no effort to assess the limits of his power-based analysis, and he is dismissive of accounts which are phrased in terms of changing ideologies or sensibilities.

<sup>18</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation* (London, 1789).

legal culture, popular sentiment, and ritualistic tradition. For these reasons, punishment always ends up being rather different from control, pure and simple. Moreover, as Spierenburg's work makes clear, the instrumental use of penal measures for control purposes is always in tension with social and psychological forces which place clear limits upon the types and extent of punishment which will be acceptable in any specific situation. The principles of discipline and power-knowledge techniques may provide a technology of control with a given logic and potential but the extent to which it is used, and the purposes to which it is put, will depend upon wider social and cultural forces.

Cultural traits and sensibilities can be seen to influence the penal system in a variety of ways. Most obviously modern sensibilities and notions of justice place strict limits upon the forms of punishment which are tolerable, thus prohibiting forms of penal control which could be highly effective—such as intensive forms of behaviour modification or brain-washing, not to mention old-fashioned blood sanctions.<sup>19</sup> But contemporary mores also contain more punitive elements which find expression in penal systems to some degree, whether in the symbolic denunciations of the sentencing process or in the petty degradations of institutional regimes. These punitive aspects are often seen as reinforcing the control elements of the system, but they can also have the opposite effect. There is, for example, psychological and penological evidence to show that punitiveness is actually a very inefficient and temporary form of control.<sup>20</sup> It may even be that part of the reason why our penal institutions are poor at exerting control and modifying the conduct of offenders is precisely because they are punitive in form. Advocates of rehabilitation have long argued this position, but have found it difficult to replace traditional punitiveness by more 'rational' forms of control.

### 3. THE PRISON'S PERSISTENCE AND THE SPREAD OF DISCIPLINE

If one returns to the analyses of *Discipline and Punish* bearing this point in mind, some quite different interpretations suggest themselves. Take, for example, the argument that the prison has been retained, despite its apparent defects, because its 'failures' are useful in exerting political control. As we have seen, Foucault is led to make this argument because he has presupposed that imprisonment is to be understood as 'a political tactic'. According to his functionalist logic, an institution which is truly counter-productive could not survive for long, and certainly not for two centuries, so there must be some hidden sense in which it succeeds as an instrument of control. Having put the question thus, he produces an answer of sorts—the prison does not control the

<sup>19</sup> See ch. 10.

<sup>20</sup> See R. H. Walters, J. A. Cheyne, and R. K. Banks (eds.), *Punishment* (Harmondsworth, 1972), for a discussion of the psychological evidence.

criminal, it controls the working class by creating criminals—and this, he claims, is its real function and the reason for its retention.

This answer seems implausible and is not supported by much in the way of evidence, although it or something like it is necessitated by the logic of Foucault's approach. It may well be that the prison's tendency to produce demoralized, recidivist delinquents has some effect in leading others to avoid law-breaking or any contact with law-breakers (though deterrence research leads one to doubt even this).<sup>21</sup> But any value which this might have for the authorities must be weighed against the constant source of embarrassment, criticism, and expense caused by high recidivism rates and the escalating costs of imprisonment. In the absence of any hard evidence that a strategy with these objectives does really exist, it would appear that Foucault is simply taking the (unintended) consequences of the prison to be its (intended) *raison d'être*—a form of invalid reasoning which is often associated with functionalist accounts.

In considering the status of the modern prison we should show more hesitation than did Foucault in accepting the conventional wisdom that the prison has 'failed'. This complaint has become so established that there is little questioning of its basis, but it is important to ask by what standards the prison's performance is being measured when this judgment of failure is made. If the scale is set by the Utopian ambitions of early prison reformers, then clearly a failure has been sustained, but these expectations (of reform, crime reduction, and redemption) were always unrealistic and seem a poor basis of evaluation to use today. If, on the other hand, the prison is measured against the performance of other complex institutions, such as the school, or the hospital, or the social work and social security systems, for example, then its failure is by no means so obvious. All institutions entail social costs and succeed only partially in pursuing their multiple objectives: our judgment of their performance depends upon our understanding of their aims and the expectations which attach to them. To take one important example, no one is surprised when hospitals experience high levels of chronic illness and death alongside a smaller number of successful cures, even though scientific and medical developments have grossly inflated public expectations in this sphere. This is because the proper measure of an effective hospital is not the incidence of cure but rather the efficiency with which appropriate treatments are delivered to patients. (The health of the population and the curative powers of modern medicine are effectively given facts, as far as the institution is concerned.) In the same way, the prison might be evaluated in terms of its ability to deprive offenders of their liberty in accordance with a court order, to

<sup>21</sup> The deterrent potential of imprisonment—as measured against alternative penalties—is not clearly proven. To the extent that the threat of imprisonment does deter, the length of sentence or the consequences of being an ex-prisoner are in some cases less relevant factors than the shame of being imprisoned in the first place. See the review of research by Beylveled, *A Bibliography on General Deterrence Research*.



exclude them from society for a period of time, or to inflict mental suffering in ways which satisfy a punitive public—in which case its only failures would be occasional escapes and unwonted leniencies.<sup>22</sup>

Viewed in this way, the prison becomes much less of a failure than Foucault and a long tradition of critic-reformers would have us believe. To make this point is not to defend the institution—whether conceived as reformatory failures or punitive successes, the majority of prisons still fall below the minimum standards of decency which we should require of civilized institutions. But what we should expect of prisons, and what in fact is expected by those who support the institution, are two different things. And the point here is that when seen against its real social background of popular concerns and political demands the prison is much less anachronistic and much less of a 'failure' than Foucault assumes.

If we leave aside Foucault's assumptions, there are plenty of better explanations which can be found to account for the prison's survival. It may be, as Durkheim suggests, that it satisfies a popular (or a judicial) desire to inflict punishment upon law-breakers and to have them dismissed from normal social life, whatever the long-term costs or consequences.<sup>23</sup> It also may be that any penal system needs an ultimate sanction which can forcibly incapacitate the recalcitrant and take dangerous individuals out of circulation. Following the decline of the death penalty and transportation, the prison represents the only available and culturally accepted means of doing this. Equally, it may simply be that once it was actually built the massive infrastructure of imprisonment represents an investment (in terms of buildings, administrative structures, and professional careers) which is too costly to give up but is sufficiently flexible to adapt itself to the various penal policies which have come into vogue. The prison may thus be retained for all sorts of reasons—punitiveness, economy, or a plain lack of any functional alternative—which have little to do with any latent success as effective control or political strategy.

This example suggests that, contrary to *Discipline and Punish*, there is no reason to suppose that either 'control' or 'power' is the exclusive motivation of penal practice, nor that penal policy is always organized according to instrumental, strategic considerations. Indeed if we think of the practicalities of the criminal justice system, it is clear that no matter how hard administrators strive to develop rational control-oriented policies, they are always in the end the servants of other, independent decision-makers (the judiciary, the legislature,

<sup>22</sup> It is notable that sentencers do not seem to consider the prison a failure, in so far as they use imprisonment time and again for the same individual. It appears that, for sentencers, imprisonment 'works', to some extent at least, because it is intended as a punitive measure. In contrast, many sentencers consider that sanctions such as probation or community service have failed whenever an individual re-offends after having undergone such a sentence. Non-custodial sanctions are often thought of as reformatory or 'second-chance' measures which may or may not 'work'. If they 'fail', sentencers are frequently reluctant to reuse them and instead move up the tariff to what they consider 'real' punishment—i.e. a term of imprisonment.

<sup>23</sup> See Durkheim, 'Two Laws of Penal Evolution'. On the ambivalent place of vengeance in contemporary culture, see Jacoby, *Wild Justice*.

the public) whose demands are often at cross purposes. Within this complex system, control is likely to be a major goal, but one which is always compromised by other considerations, just as power is likely to be divided and internally contested by the different agencies involved. Rather than approaching punishment from the point of view of power alone, our framework of study should also be geared towards the interpretation of the conflicting social forces, values, and sentiments which find expression in penal practice.

Foucault's reluctance to acknowledge the role of any values other than power and control in the development of punishment has other consequences in *Discipline and Punish*. In particular, it leads him to neglect the political and ideological forces which put up a principled opposition to the introduction and extension of disciplinary practices. As was noted above, disciplinary strategies have only ever been partly implemented in most modern penal systems and, in practice, they exist within what is still a predominantly legalistic, judicial framework. These limits of implementation—which make disciplinary practice far less extensive than Foucault implies—are largely the result of a sustained opposition on the part of the liberal political establishment, and particularly by the legal profession and the judiciary. And this resistance stems, at least in part, from a refusal to accept the violations of legal and liberal principles which a full-scale disciplinary programme would entail. These principles—of due process, the rule of law, the rights of the individual, equality of treatment, and so on—have formed a historical counterpoint to the demands of power, and have been used to oppose 'discipline' not just by its working-class targets, but also by important sections of the dominant class. No doubt part of what is at issue in these conflicts is a disagreement on how best to exercise power—just as it was in the debates of the eighteenth-century reformers. But other values also play a part, sometimes as absolute ends in themselves, and they act to limit power, rather than to conceal or extend it.<sup>24</sup>

Foucault's tendency to discuss the spread of discipline as if it were politically unopposed is a serious deficiency in his account. Although he never states this explicitly, his use of terms like 'the disciplinary society' or 'the society of surveillance' give the definite impression that the disciplinary programme has become a reality in a process of unopposed and uncompromised implementation. Having reconstructed a kind of blueprint or ideal type, showing what a totalized discipline would look like, one would have expected him to go on to show the divergences between the real world and this heuristic figure of the 'ideal'. Instead he writes as if the two were identical. This produces a thoroughly alarming depiction of the social world precisely because it ignores all the forces which operate to restrain the disciplinary impulse and to protect

<sup>24</sup> A case in point would be the refusal of the ecclesiastical courts of the Middle Ages to utilize blood sanctions, since these were deemed inconsistent with the clerical station. Instead, the Church authorities developed the use of imprisonment, and in exceptional cases—such as heresy—"relaxed" the condemned heretic to the secular authorities for the imposition of capital punishment' (Langbein, *Torture and the Law of Proof*, p. 29).

liberties. What is in fact a description of the control *potential* possessed by modern power-knowledge technologies is presented as if it were the reality of their present-day *operation*. It is a worst-case scenario which ignores the strength of countervailing forces.

A good illustration of this might be the modern deployment of 'welfare sanctions' such as probation, community supervision, psychiatric orders, and so on. Such sanctions are potentially very authoritarian—as *Discipline and Punish* and my own *Punishment and Welfare* have shown. But counter-powers, safeguards, and limitations may be built into the context in which the sanction is deployed in ways which qualify its power potential and render it less intrusive. Thus the orientation of the agents involved, their ideologies, their resources or lack of them, the legal limits placed upon their powers, the rights of clients, and the resistance that they offer, can all moderate the extent to which the sanction's power is actualized. Foucault's work has the useful effect of highlighting the dangers that such sanctions contain, but it fails to balance this by describing their actual meaning-in-use and the constraints which they encounter.<sup>25</sup>

#### 4. POWERS AND VALUES

These criticisms of Foucault's conception of punishment can be extended to refer to the more general conception of power which runs through *Discipline and Punish*. As we have seen, the scepticism of Foucault's power perspective points to the persistent 'will to power' which is alleged to lie behind the language of penal reform and the events of penal history, producing a kind of penological rendering of Nietzsche's *Genealogy of Morals*. In Foucault's work, as in Nietzsche's before him, systems of morality, ethics, and sensibility are broken down to reveal the more basic questions of power which motivate them and give them their real meaning. This critique of morals in the name of power does more than simply set *Discipline and Punish* apart from more conventional histories of punishment. In so far as these other histories are written in terms of changing morality and social sentiment, it actually subverts them, criticizing their terms as superficial and unanalysed. The ethical values, religious beliefs, and humane sensibilities that others present as contributory causes of penal change are, for Foucault, at best the 'incidental music'<sup>26</sup> which accompanies change, at worst, a euphemistic covering-device for new forms of power.

It is certainly necessary to investigate the circumstances in which social values exist and are transformed, rather than accepting them as basic,

<sup>25</sup> See also Sykes on the defects of total power in the prison setting: 'The lack of a sense of duty among those who are held captive, the obvious fallacies of coercion, the pathetic collection of rewards and punishments to induce compliance, the strong pressures toward the corruption of the guard in the form of friendship, reciprocity, and the transfer of duties into the hands of trusted inmates—all are structural defects in the prison's system of power rather than individual inadequacies' (*The Society of Captives*, p. 61).

<sup>26</sup> The phrase is from Geertz, 'Stir Crazy'.

unconditioned facts. And *Discipline and Punish* gives a classic demonstration of how effective such an approach can be. But it is, however, a mistake to suppose that values and ethics are somehow reducible to the will to power. It is a mistake not because people are necessarily principled moral agents who will uphold ethical values and renounce the pursuit of power. Rather it is a mistake because it is simply untenable to suppose that 'power' can be so completely separated from 'value': powers and values always in practice coexist in an integral relationship—rather like that which links power and knowledge.

Power is not a thing in itself, despite Foucault's tendency to use the term 'power' as if it were a proper noun. Power is instead a relational concept. It is the name we give to the capacity to realize a desired goal in a particular situation, and in human cultures the goals which may be valued and sought after are many and varied. If we wish to abstract our analysis away from real situations, it is possible to discuss technologies of power without reference to values. In that case we are discussing power as a set of means or capacities which may be put to a variety of uses, and so it is reasonable to leave aside questions of value or objective. But once we move on from there to analyse the actual operation of forms of power in society, then a crucial question will always be: what values does this power serve? When he engages in this form of analysis, Foucault writes as if the only possible ends of power are power and more power, control and more control. Yet, as we have seen, this view is untenable even with respect to punishment which is perhaps the nearest thing we have to a control institution: it would hardly make sense in other fields such as health care, education, or welfare where similar technologies of power are put to use.

By focusing his study upon the prison and penal institutions, Foucault gives the impression that the aims of power—the norms which the disciplines impose—are always those of conformity, obedience, and behaviour control. By extension, power in the wider 'disciplinary society' appears to be concerned solely with this kind of domination, albeit in ways which make bodies useful as well as docile. It is true that in subsequent writings Foucault did much to extend and develop this vision of power, emphasizing its capacity to induce pleasure, discourse, action, and subjectivity.<sup>27</sup> But the story which *Discipline and Punish* tells—and the one which most influences current work in the sociology of punishment—is one of meticulous domination and thoroughgoing control, so that we are left with the distinct impression that society's practices of normalization—its imposition of standards upon conduct—are oppressive in all their aspects. Despite Foucault's later stress upon 'subjectification', *Discipline and Punish* tells a story of the *objectification* of human beings through the use of power—knowledge, and its critique of power and society is

<sup>27</sup> See Foucault, *The History of Sexuality*, i, and id., 'The Subject and Power', in H. L. Dreyfus and P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (2nd edn., Chicago, 1983), 208–26.

largely an extension of this imagery of dehumanizing domination.<sup>28</sup> But this sweeping cultural critique is only rhetorically possible because *Discipline and Punish* focuses upon the norm of obedience. Had it focused upon some of the other norms which social and even penal agencies try to inculcate—such as literacy, cleanliness, health, responsibility, independence, stability, etc.—its critique would not have been so easily made. I mention these other norms—which are sometimes enforced using a measure of force or even oppression—because they will probably strike the reader as intrinsically more acceptable than the kind of thought-control that Foucault dwells upon. My point here is that even the forceable imposition of norms is not always reprehensible—it depends on the circumstances and one's evaluative judgment of the norms in question. The essential point of political analysis must be to distinguish and evaluate separately the various objectives which our institutions seek and the means which they use to achieve them. Foucault's work refuses to make discerning judgments about the different purposes to which 'power' can be put, and, in so doing, implies that one is no better than any other.

##### 5. POWER AND POLITICS

If *Discipline and Punish* fails to investigate the objectives of power, it is no better at describing its agents. Of course Foucault rejects the idea that power is a thing that is 'held' by someone, but even if we accept his structural or relational approach to power we still need to know who are the people in positions of power and how they came to be there. On these crucial questions, Foucault is notoriously reticent. Sometimes he uses the abstractions of Marxist terminology ('the dominant class', 'the state', 'the bourgeoisie'), occasionally he mentions 'the judges', 'psychiatric experts', or 'the administration', but more often he simply avoids the issue altogether by using passive grammatical constructions which do not name subjects. This failure to identify agents and decision-makers—or even any recognizable process of policy-making—makes it difficult to accept his use of terms like 'strategy' and 'tactics', even though these terms are often crucial to his argument.

In the absence of any identifying data or descriptions, what emerges is a rather vaguely defined conflict between a dominating class and those who are dominated and next to nothing about the forces which are operative in day-to-day penal politics. Ideological conflicts amongst ruling groups and their implications for penal policy, institutionalized tensions between different agencies in the penal process, popular support for certain measures, and the cross-class alliances that they produce—these feature hardly at all in *Discipline and Punish*. In this sense, Foucault's conception of power is strangely apolitical. It appears as a kind of empty structure, stripped of any agents, interests, or

<sup>28</sup> See Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, chs. 7 and 8, which distinguishes between Foucault's 'Genealogy of the Modern Individual as Object' and his 'Genealogy of the Modern Individual as Subject'.

grounding, reduced to a bare technological scaffolding. It is thus no accident that so much attention is given to the *design* of Bentham's Panopticon, and so little to the actual fate of this project, which in fact fell victim to the struggles amongst political factions and interest groups which dominate government policy-making.<sup>29</sup>

Foucault's use of the Panopticon image to sum up modernity is no doubt intended to evoke echoes of the 'iron cage' of rationality that Max Weber described.<sup>30</sup> But it is also particularly appropriate as a Foucauldian metaphor, because, despite his disclaimers, Foucault understands power as an apparatus of constraint. In the end, power is a kind of total confinement which envelops the individual, moulding the body and soul into patterns of conformity. Power is at once socialization and social control.<sup>31</sup> It constructs the individual as a subject, but it is always an individual who is 'subjected' or subjugated in the same process.

Beneath this oppressive burden it is 'the body' which somehow represents the individual's instinctive source of freedom. It is the body which resists, the body which has to be dominated, and ultimately the body which comes to be 'the prisoner of the soul' (once the soul has been fabricated by society's discipline). This time the theoretical echoes stretch back to Freud and to Nietzsche, and suggest that at the bottom of things lies the old opposition between nature (the body) and culture (the power of social discipline). But we receive nothing more than hints in this regard and so the basis of Foucault's theory remains unargued.

In fact the resistance of prisoners to the disciplinary process, and the failure of the prison to effect their reform, raise serious theoretical problems for Foucault's account which are merely passed over here in silence. First of all, if the prison is a concentrated, totalized form of discipline and it none the less fails in its disciplinary endeavours, how effective are other forms of discipline which lack the prison's coercive advantages?<sup>32</sup> This important problem might be resolved by pointing to the effects of developmental psychology: the disciplines may operate most effectively upon young, immature subjects whose characters have not yet been formed, so families and schools may succeed where prisons usually fail. Or, more interestingly, one could point out the limitations upon the disciplinary process which a punitive context entails; as Durkheim suggests, punitive disciplines may be ineffective precisely because the process of punishment robs the offender of the sense of

<sup>29</sup> On the fate of Bentham's scheme, see G. Himmelfarb, 'The Haunted House of Jeremy Bentham', in id., *Victorian Minds* (New York, 1968). On the influence of Panoptic principles in the history of prison architecture, see Evans, *The Fabrication of Virtue*.

<sup>30</sup> M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (London, 1985), p. 181.

<sup>31</sup> For a discussion on this point, see Stone, *The Past and the Present Revisited*, ch. 15.

<sup>32</sup> It is of interest that this unresolved issue in Foucault's work reflects a parallel tension in Nietzsche. In *The Genealogy of Morals*, Nietzsche says that pain and punishment were used, over millenia, to create man as a calculating, responsible entity. But he also argues that punishment tends to provoke resistance rather than improvement (pp. 189-94, and p. 214).



pride and moral self-respect which self-discipline requires. This Durkheimian point leads on to the important question of the individual's orientation and relationship to disciplinary power. In many disciplinary situations, such as the monastery, the school, or the factory, the individual co-operates in his training because, at least to some extent, he shares the goals of the disciplinary process (to overcome the flesh, to become educated, to earn a wage). The key problem for the prison as a form of discipline is that individual prisoners may have no inclination and no need to take an active part in the process.

Each of these points seems to offer plausible reasons why prison discipline is often ineffective, but in highlighting the role of subjective or psychological factors they seem to lead away from the rather more automatic conception of discipline which Foucault implies. The same problem can be seen if we consider the question of resistance. To the extent that he discusses prisoner resistance—in *Discipline and Punish* and in his subsequent commentaries upon it—Foucault suggests an unreasoned bodily force which hardens itself to resist the demands of disciplinary routines.<sup>33</sup> But in fact the crucial element within this process may have less to do with bodily forces than with the response of the subject to his or her situation. Ian Hacking has argued that in the production of persons—disciplinary or otherwise—a crucial element in the process is always the subjective orientation of the person concerned which may embrace the imposed role or may instead resist it.<sup>34</sup> Neither Hacking nor Foucault has much to say about this crucial vector of responsive conduct but one would expect that the factors which normally have a bearing upon subjective orientation—such as the sense of identity, relationships with others, cultural affiliations, and so on—would play a part in grounding any resistance which occurs. Turning to more empirical research on the issue, one finds that the forms of inmate resistance with which we are familiar do indeed suggest that the social psychology of cultural identification is one key to understanding this process. Resistance to official authority occurs most frequently and most effectively in those prisons where an alternative inmate culture offers oppositional identifications, roles, and forms of support for those who adopt them. The work of Patricia O'Brien, for example, shows that the resistance which figured in the French prisons of the nineteenth century was facilitated not by resistant bodies but by the availability of alternative languages, forms of conduct, and identities which amounted to an inmate subculture.<sup>35</sup>

<sup>33</sup> See Foucault, *Discipline and Punish*, p. 30, where he discusses the nature of prisoner revolts and the history of resistance to the prison: 'In fact, they were revolts, at the level of the body, against the very body of the prison.' Also in the essay 'Body/Power' he states that 'Power, after investing itself in the body, finds itself exposed to a counter-attack in the same body' (in id., *Power/Knowledge*, ed. Gordon, p. 56).

<sup>34</sup> I. Hacking, 'Making Up People', in T. C. Heller et al. (eds.), *Reconstructing Individualism* (Stanford, 1986).

<sup>35</sup> O'Brien, *The Promise of Punishment*, ch. 3. On inmate subcultures more generally, see Clemmer, *The Prison Community*; Sykes, *The Society of Captives*; J. B. Jacobs, *New Perspectives on Prisons and Imprisonment* (Ithaca, NY, 1983); Cloward et al., *Theoretical Studies in Social Organization of the Prison*.

Interestingly, had Foucault investigated these processes, he could have described an irony which would have helped him explain the production of 'the delinquent' in a more convincing manner. In effect, the inmate may embrace the prison subculture in order to avoid becoming a slave of the official system and to maintain a measure of autonomy and self-respect in the face of its disciplinary machine. But the existence of this inmate subculture tends—in the kind of dialectic described by Sartre in his biography of Jean Genet<sup>36</sup>—to increase the stigma of the ex-convict and deepen his criminal identifications: someone who has been inside is not just an offender but is also an 'ex-con': probably schooled in a culture of homosexuality, corruption, violence, and deception. Thus by struggling to avoid an institutional identity which was despised ('the good inmate') prisoners often took on another one (the 'con') which the public had reason to fear and despise. By studying more closely the nature of resistance, Foucault would have done something to balance his account of power, but, as these remarks suggest, he might also have been led to revise this account in some important respects. In particular he might have been led to describe the operation of power upon individuals as being less of an 'automatic' process and more a matter of micro-political conflict in which the individual subject may draw upon alternative sources of power and subjectivity to resist that imposed by the institution.<sup>37</sup>

Foucault's vision of power may be a positive conception in the sense that power moulds, trains, builds up, and creates subjects, but it also involves a thoroughly negative evaluation. Foucault writes as someone who is absolutely 'against' power. His critique is not of one form of power in favour of another but is rather an attack upon power itself. This is why the critical tone of *Discipline and Punish* is never transformed into a truly critical argument which points to alternative forms of regulation which are possible and might be preferable to those which it decries.<sup>38</sup> It never even declares from what position it mounts its critique, since to do so would be to accept the necessity of power and choose between its forms. Instead it is written as if its author were 'outside' of power and therefore outside of society as well.

<sup>36</sup> J.-P. Sartre, *Saint Genet: Actor and Martyr* (London, 1988).

<sup>37</sup> The work of Erving Goffman is an important antidote here. In *Asylums* Goffman outlines a conception of the individual as an entity which defines itself not in conformity with institutional pressures but in tension with them. On this reading, inmates always 'take up a stance' towards the institution, and the individual should be seen as '... a something that takes up a position somewhere between identification with an organization and opposition to it, and is ready at the slightest pressure to regain its balance by shifting its involvement in either direction. It is thus against something that the self can emerge' (p. 280).

<sup>38</sup> T. Mathiesen, *The Politics of Abolition* (London, 1974), explicitly adopts this kind of critical strategy, refusing to propose alternative penal measures to replace those which it criticizes. For a critical discussion, see D. Downes, 'Abolition: Possibilities and Pitfalls', in Bottoms and Preston (eds.), *The Coming Penal Crisis*. On 'abolitionism' as a strategy for change in criminal justice, see, more generally, Bianchi and van Swaaningen (eds.), *Abolitionism*, and the special 'Abolitionist' issue of the journal *Contemporary Crises*, 10 (1986). The essay by R. De Folter in the latter collection argues that Foucault should be understood as an 'abolitionist'.

There is an important sense in which discipline can create freedom as well as control. As Foucault's own subsequent work shows, discipline is necessary to the development of self-control and therefore to subjectivity.<sup>39</sup> Equally it can form the basis for a regulatory network through which the norms of health, security, and welfare can be systematically provided for whole populations—providing a degree of freedom from want, illness, and ignorance which would otherwise be impossible. The ultimate questions which need to be faced, whether in penal policy or in social policy, are not about power or no-power but rather about the ways in which power should be exercised, the values which should inform it, and the objectives which it should pursue. These points are well understood by Émile Durkheim, whose discussion of discipline is in other respects very similar to that of Foucault. Like Foucault, Durkheim sees discipline as a set of forces which act upon individuals, constructing them as centred subjects and subjugating them to social norms.<sup>40</sup> But, for Durkheim, this process is not only a necessary one—for the sanity of the individual, and for the stability of society—it is also a *moral* one, occurring within a sanctioned moral framework which renders it authoritative rather than merely coercive. Durkheim thus distinguishes between disciplinary forces which have an authoritative moral status and those which do not, arguing that the former are essential to social health while only the latter are oppressive in the sense that Foucault implies. It is precisely because the disciplines of the penal realm rarely carry real moral conviction for the offenders concerned that they so signally fail to have a lasting disciplinary effect. On this analysis, the realm of punishment may well have adopted disciplinary techniques as Foucault says, but it is the last place that one would expect them to succeed—unless offenders can be persuaded of the moral as well as the physical force of the rules they have breached. However, the idea that penal measures may contain a genuine moral charge, which commands some degree of social support, takes us outside the framework that Foucault employs.

Foucault's analyses of penal institutions and penal techniques provide us with an invaluable phenomenology of the forms of power and knowledge which are activated in the penal sphere. More than any other theorist, he gives us an account of the micro-physics of penal power and the ways in which penal measures lay hold of individuals and subject them to processes of discipline, normalization, and punishment. But as the preceding arguments have tried to show, it is a mistake to move from an analysis of how power is organized in the penal sphere to the argument that penalty is nothing but this power. Punishment is more than just a political instrument of control, and it is a reductionist conception which sees penal history purely in terms of power-knowledge and

<sup>39</sup> Foucault's *History of Sexuality*, i, develops an important conception of a form of power or governance which he terms 'bio-politics'. This refers to those strategies of governing that concern themselves with the life, health, efficiency, and security of whole populations. Bio-political regulation operates at the level of social groups and populations and is seen as a form of modern power that accompanies and complements the individually oriented 'disciplines'.

<sup>40</sup> See Durkheim, *Moral Education*, esp. p. 46.

its transformations. To say—correctly—that punishment is a form of power immediately raises the question: ‘what kind of power?’ Is it authorized? Does it command popular support? What values does it convey? Which objectives does it seek? How is it shaped by sensibilities and in what kind of culture and morality is it grounded? But even to ask such questions is already to go beyond the limits which Foucault’s critical theory sets for itself.