
BOOK REVIEW

THE FREE MARKET AND THE PRISON

THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER. By Bernard E. Harcourt. Cambridge, Mass.: Harvard University Press. 2011. Pp. 328. \$29.95.

*Reviewed by James Q. Whitman**

I.

In the end, *The Illusion of Free Markets* is a disappointing book, but it certainly includes some striking observations. One of the most striking arrives a dozen or so pages before the conclusion. There Bernard Harcourt, professor of both law and political science at the University of Chicago and a man who brings an inventive theoretical mind to all of his work, combines two figures: incarceration rates in a variety of Western countries, and number of beds in psychiatric institutions in the same countries (pp. 221–31). As he shows, it is not just the case that the United States incarcerates at a spectacularly higher rate than any other advanced country; it is also the case that the United States has spectacularly fewer beds for the mentally ill (pp. 227–28). Moreover, he observes, the explosion in American incarceration over the last generation has been directly paralleled by a decline in the institutionalization of the mentally ill (p. 224 fig.10.1). The implication is clear: American prisons house people who would be hospitalized in other economically advanced democratic countries.

There is nothing surprising about this finding (though as will be discussed later, Harcourt interprets it in a surprisingly callous and unconvincing way). Numerous studies have shown the scandalous prevalence of mental illness in our prisons and jails, and among those who care about this scandal, it is commonplace that the American mentally ill end up in prison largely because the United States has lost the will, and the institutional capacity, to provide them with psychiatric care.¹ Nevertheless, Harcourt's comparative charts shed a stark light on America's place in the world today.

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¹ See, e.g., Human Rights Watch, *Mental Illness, Human Rights and U.S. Prisons* 1–3 (2009), available at http://www.hrw.org/sites/default/files/related_material/Human%20Rights%20Watch%20Statement%20for%20the%20Record_9_22_09.pdf; E. Fuller Torrey et al., *More Mentally Ill Persons Are in Jails and Prisons than Hospitals: A Survey of the States* 1–9 (2010), available at http://community.nicic.gov/cfsfile.ashx/_key/CommunityServer.Components.PostAttachments/00.00.02.91.75/More-Mentally-Ill_5Foo_2_5Foo_3.pdf.

Future historians of America will note that, early in the twenty-first century, our country was throwing the mentally ill into prison. This depressing datum is only one aspect of an imprisonment boom, dating back to the mid-1970s, that is without parallel in any other industrialized country. Nothing like our mass incarceration has ever taken place in a contemporary liberal society. Harcourt summarizes the contemporary American state of affairs forcefully:

After almost fifty years of relative stability in our prison populations, the inmate population skyrocketed nationwide beginning in the early 1970s, rising from fewer than 200,000 persons to more than 1.3 million in 2002 (or, if inmates held in local jails are included, to more than 2 million persons by 2002). In 2008, the United States reached a new milestone: it incarcerated more than 1 percent of its adult population — the highest rate in the world, five times the rate in England and twelve times the rate in Japan, the highest raw number in the world as well.

These staggering numbers were even higher within discrete segments of the population. One in thirty men between the ages of 20 and 34 was incarcerated in 2008, and for African-American men in that age group, the number was one in nine America ranks first among all industrialized nations in its rate of imprisonment — by an order of magnitude

The length of prison sentences in the United States is also astounding. (p. 198)

America has become the home of mass incarceration. There is a historical irony in this development that should depress anyone who cares about our country: Europeans thought of America as a beacon of progress in the early nineteenth century precisely because of its enlightened practices of criminal punishment.² Two centuries later, America has become a byword for harshness, and historians of the great American experiment in liberty will have to find some explanation for what happened.

II.

What, indeed, happened? Harcourt's book offers one version of an answer that has been offered by a number of leading scholars in recent years. The American explosion in imprisonment, these scholars argue — not just Harcourt but leading figures like Professors Loïc

² For the best-remembered text, see GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *DU SYSTÈME PÉNITENTIAIRE AUX ÉTATS-UNIS ET DE SON APPLICATION EN FRANCE* (1833), *reprinted in* ALEXIS DE TOCQUEVILLE, *OEUVRES COMPLÈTES* (M. Perrot ed., 1984). For the larger European admiration for America in this period, see THOMAS NUTZ, *STRAFANSTALT ALS BESSERUNGSMASCHINE: REFORMDISKURS UND GEFÄNGNISWISSENSCHAFT 1775–1848*, at 242–43 (2001).

Wacquant,³ Nicola Lacey,⁴ and Jonathan Simon⁵ — is the result of American society's increasing embrace of free-market ideology over the last generation or so. High rates of imprisonment have appeared because we have abandoned policies of government intervention in favor of market solutions. As Harcourt puts it, American criminal punishment is a case of "neoliberal penalty" (p. 40).

Now, this claim may sound at first like a fringe fantasy of the left wing. *The alleged "freedom" of the market is really about mass imprisonment!* That is certainly how Harcourt's book has been received by, for example, the *Wall Street Journal*, which mocked it from the moment advance copies appeared.⁶ So it is important to begin by insisting that there is more to Harcourt's argument than anticapitalistic sloganeering. There is an entirely plausible prima facie case to be made for the idea that there is some link between a free-market orientation and high rates of imprisonment — a good enough case to trouble anyone who cares seriously about American public policy, and to interest anyone with an urge to solve social-scientific puzzles. The reign of market solutions in American policymaking dates to the same period as the incarceration boom: both are developments whose beginnings we can trace to the mid-1970s; and both accelerated in the 1980s and after, as Harcourt observes (pp. 202–08). Moreover, it is true, as Harcourt insists, that the politics of small government and the politics of "tough on crime" have frequently operated in tandem, notably in the case of President Ronald Reagan (pp. 204–05), and more recently in the case of then-Member of Parliament David Cameron.⁷ The revolution in economic policy and the revolution in penal policy have coincided, and at least some politicians have regarded them as going hand in hand. It is thus entirely natural for scholars to wonder whether they had anything to do with each other.

It is also natural to note the paradox in the making of these two simultaneous policy revolutions. The revolution in favor of markets has been a revolution against intrusions by Big Government, while the penal revolution has brought about a massive growth of a sort of government activity more dramatically intrusive than any other: ours is the age when, as Chief Judge Alex Kozinski and Misha Tseytlin put it

³ See LOÏC WACQUANT, PUNISHING THE POOR 1–3 (2009).

⁴ See NICOLA LACEY, THE PRISONERS' DILEMMA 170–73 (2008).

⁵ See JONATHAN SIMON, GOVERNING THROUGH CRIME 159 (2007) (invoking the idea of "neoliberal" punishment).

⁶ See James Grant, *Price and Punishment*, WALL ST. J., Dec. 20, 2010, at A21, available at <http://online.wsj.com/article/SB10001424052748704034804576026012320513404.html>.

⁷ See, e.g., David Cameron, Member of Parliament, U.K., Address at the Conservative Party Annual Conference (Oct. 4, 2006), available at <http://www.guardian.co.uk/politics/2006/oct/04/conservatives2006.conservatives?INTCMP=SRCH>.

in a Cato Institute publication, *You're (Probably) a Federal Criminal*.⁸ Wacquant describes it as a time when the “Left hand” of government, the gentle hand of ameliorative social policy, has become less and less active, while the “Right hand,” the hard hand of punishment, has come into its own.⁹ Harcourt frames it as a challenge to American self-understanding:

71 percent of American respondents . . . favor the free-market economy as the very best system on which to base the future of the world and, at the very same time, live in a place that operates that world's biggest, most expensive, government-run, interventionist, prison system that incarcerates more than one out of every hundred adults in the country. (pp. 42–43)

This is a paradox indeed. Why is the age when so many American politicians — on both the left and the right — have set out to constrict the state also the age when the state has come to weigh so heavily on such a large percentage of the American population? Is the “price” of preferring market solutions to government intervention an expanded penal state, as Harcourt suggests (pp. 31–32)? If there really is some demonstrable link between free-market policies and rising rates of incarceration, that is a fact that should make many of us uneasy about some of our cherished political commitments.

But is there any demonstrable link? Before evaluating Harcourt's answer, it is important to review what other scholars have said. In 2006, two criminologists, Professors Michael Cavadino and James Dignan, made a social-scientific foray into the problem. Using a variety of socioeconomic indicators, they classified advanced Organization for Economic Cooperation and Development countries into four groups: first, the neoliberal countries, all from the historic Anglo-American world, including the United States, South Africa, England, Australia, and New Zealand; second, the corporatist countries, including Germany, France, Italy, and the Netherlands, all from western continental Europe; third, the Scandinavian social democracies of Sweden and Finland; and fourth, what Cavadino and Dignan called “oriental-corporatist” Japan.¹⁰ Cavadino and Dignan were able to demonstrate that their neoliberal group displayed the highest incarceration rates.¹¹ They were, however, not able to offer much by way of explanation for the correlation they found,¹² and at least as far as their neoliberal group goes, their data are clearly ambiguous, since the fact that all of

⁸ Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43, 44–49 (Timothy Lynch ed., 2009).

⁹ WACQUANT, *supra* note 3, at 289–90.

¹⁰ See MICHAEL CAVADINO & JAMES DIGNAN, *PENAL SYSTEMS* 15 (2006).

¹¹ *Id.* at 339.

¹² See *id.* at 339–40 (describing the difficulty of explaining correlation between neoliberal ordering and high rates of incarceration).

their neoliberal countries are Anglo-American suggests the obvious possibility that there is something in the Anglo-American tradition other than neoliberal economic policies that drives higher incarceration rates.

Subsequent studies have taken a variety of analytical approaches, of which two in particular, those of Wacquant and Lacey, can serve as useful foils to Harcourt's book. Wacquant's recent book *Punishing the Poor* takes its inspiration from *Regulating the Poor*, the classic 1971 study by Professors Frances Fox Piven and Richard Cloward. Piven and Cloward treated the social welfare state not simply as an expression of pure social benevolence but as a complex mechanism for managing social discontent and "regulating the poor."¹³ Picking up where they left off, Wacquant describes contemporary American society as the wreckage of the Piven and Cloward social order forty years later.¹⁴ Neoliberal policies have brought decades of assault on the social welfare state. The result has been to leave the criminal justice system to play a larger and larger role in the management of the American economic underclass.¹⁵ The incarceration boom is thus the result of what scholars of criminal law sometimes call a "hydraulic" process.¹⁶ A generation ago there were two safety valves for relieving the pressure on the system caused by the felt need to "regulate" the poor; as the social welfare valve has been twisted shut, the penal valve has been forced to open wider to accommodate the pressure.

To this, Wacquant adds another argument about the pressures on the system, this one involving one of the most self-evidently important aspects of contemporary American criminal justice: the disproportionate representation of African Americans among the wards of the system. The successes of the civil rights movement, Wacquant argues, left ever fewer outlets for practices of discrimination that used to be tolerated in the nonpenal sphere.¹⁷ Once again, the consequence has been to put a kind of hydraulic pressure on the criminal justice system: as American fear and dislike of blacks lost their lawful outlets in the ordinary interactions of daily life, pressure grew on the penal system to compensate by expanding prosecution and incarceration.¹⁸

Wacquant's focus is principally on the United States, but he believes that the pattern of neoliberal policies is likely to spread to other

¹³ See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* xv–xix (Vintage Books 2d ed. 1993) (1971).

¹⁴ See WACQUANT, *supra* note 3, at 13–14.

¹⁵ See *id.* at 290–91.

¹⁶ James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 122–23 (2009).

¹⁷ WACQUANT, *supra* note 3, at 203–04.

¹⁸ See *id.*

advanced societies as well,¹⁹ and his book is written in a spirit not only of anger but of a kind of apocalyptic gloom. Lacey's 2008 book, *The Prisoners' Dilemma*, is different on both counts. Lacey thinks that comparative study can identify deep structural differences between the United States and other advanced societies,²⁰ and she further thinks that there is hope for practical improvement even in the United States.²¹ Borrowing from the "varieties of capitalism" scholarship of political scientists like Professors Peter Hall, David Soskice, and Torben Iversen, Lacey sets out to demonstrate how political economy can account for the correlation between market liberalism and high imprisonment rates.²² In particular, she focuses on the contrasting political economies of the "liberal market economy" of the United States and the "coordinated market economies" of Western European countries like Germany.²³

Lacey's analysis rests on two claims, one about labor markets and one about electoral systems. Of the two, it is her effort to understand the structure of labor markets that matters most for evaluating Harcourt's book. Lacey starts from a well-known exercise in Marxist penology: the account given in the 1930s by Professors Georg Rusche and Otto Kirchheimer, who treated the prison system as a component of a larger social structure dedicated to the management of the working class.²⁴ The population in the prisons of industrial society, Rusche and Kirchheimer argued, was made up overwhelmingly of the sort of unskilled workers who belonged to the "industrial reserve army"²⁵ of the unemployed of classic Marxist economic analysis.²⁶ The existence of a large floating mass of chronically jobless workers helped keep industrial wages low; but it also required severe social measures of discipline.²⁷ Prisons thus served as a necessary adjunct in industrial society, and their populations could be expected to fluctuate with economic conditions.²⁸

¹⁹ *Id.* at 311.

²⁰ See LACEY, *supra* note 4, at xvi–xvii.

²¹ See *id.* at 206.

²² See *id.* at 56–62.

²³ See *id.* at 57–59. The distinction is laid out in Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM 1, 8–9 (Peter A. Hall & David Soskice eds., 2001). For other important work, see, for example, TORBEN IVERSEN, CAPITALISM, DEMOCRACY, AND WELFARE (2005).

²⁴ See LACEY, *supra* note 4, at 47 (citing and discussing GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (Russell & Russell 1968) (1939)).

²⁵ RUSCHE & KIRCHHEIMER, *supra* note 24, at 112.

²⁶ See *id.* at 85–89, 112.

²⁷ See *id.* at 87–88, 97.

²⁸ See LACEY, *supra* note 4, at 47; RUSCHE & KIRCHHEIMER, *supra* note 24, at 102–05, 138–40. It is worth noting that Rusche and Kirchheimer arguably anticipate Lacey's analysis, describ-

Liberal market economies, Lacey argues, bear a resemblance to the sorts of industrial economies described by Rusche and Kirchheimer, but the coordinated market economies of Western European countries like Germany are inevitably different because they depend on a different form of labor. How so? Modern European coordinated market economies, she explains, “excel in producing high-quality goods, which depend on relatively technical and industry-specific, non-transferable skills.”²⁹ Such coordinated market orders require, not the unskilled “industrial reserve army” of classic Marxist analysis, subject to chronic layoffs,³⁰ but skilled workers with considerable firm- and sector-specific human capital.³¹ It is imperative that these skilled workers be systematically retained, rather than casually laid off. The political economy of criminal punishment in such countries, she argues, reflects the values of their labor markets.³² They are countries, she writes, that function

in terms primarily of long-term relationships and stable structures of investment, not least in education and training oriented to company- or sector-specific skills . . . [In consequence they] may be more likely, other things being equal, to generate incentives for the relevant decision-makers to opt for a relatively inclusionary criminal justice system. For it is a system which is premised on incorporation, and hence on the need to reintegrate offenders into society and economy.³³

By contrast, liberal market economies, descendants of the harsh industrial order described by Rusche and Kirchheimer, focus on “flexibility and innovation, rather than stability and investment.”³⁴ As a result, particularly under conditions of surplus unskilled labour (conditions which liberal market economies are also more likely to produce), the costs of a harsh, exclusionary criminal justice system are less than they would be in a co-ordinated market economy.³⁵ In neoliberal economies, which casually engage in large-scale layoffs, workers can be regarded as fungible and so can be more easily discarded into the prison system. (Lacey also makes a striking argument about the role of electoral systems in the functioning of her two market orders, which, in the interest of brevity, I summarize in the margin.³⁶)

ing the modern industrial order in which “[t]he senseless imprisonment of individuals became undesirable” as modes of production shifted. *Id.* at 140.

²⁹ LACEY, *supra* note 4, at 79.

³⁰ *See id.* at 78.

³¹ *See id.* at 79.

³² *See id.* at 79–80.

³³ *Id.* at 58.

³⁴ *Id.* at 59.

³⁵ *Id.*

³⁶ Students of the American penal explosion frequently point to the politicization of the crime question in our country. *See, e.g., id.* at 69–70. Especially since the late 1960s, politicians have

III.

I think there are doubts to be raised about the arguments of both Wacquant and Lacey,³⁷ but there is no doubt that both have made productive attempts to understand the mechanics of the link between free market policies and mass incarceration. That fact makes their books useful contrasts to *The Illusion of Free Markets*. Harcourt, unlike Wacquant and Lacey, has little interest in working out the mechanics of the relationship between criminal punishment and market ordering or in analyzing the structural workings of either markets or government. *The Illusion of Free Markets* is neither a study in political economy nor a book about the hydraulic interrelationships between criminal punishment and other governmental and social practices. Harcourt tackles the problem in a very different way: his book is an

regularly run on tough-on-crime platforms (p. 41). As a result, we have witnessed what Professor William Stuntz has called a kind of political “bidding war,” William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1998 (2008), as each new crop of politicians tries to outcompete the last by passing ever tougher criminal legislation (p. 41). To the extent politicization is the key factor, the puzzle is about why the American pattern of politicization does not emerge elsewhere. Lacey suggests that the answer lies, once again, in the contrast between liberal market and coordinated market varieties of capitalism. LACEY, *supra* note 4, at 64–66. The politics of coordinated market orders resemble the economics of those orders in an important way. In both politics and economics, these societies tend to treat associations rather than individuals as the basic governing units of society. Just as unions and employer associations dominate in the economic sphere, the political sphere “is rather regularly constrained by the need to negotiate with groups incorporated in the governmental process.” *Id.* at 65. By the same token, political parties tend to represent defined group interests. It is for this reason that we find something Lacey deems to be of essential importance: systems of proportional representation. *See id.* at 64. Systems of proportional representation permit parties that do not attract a majority of the votes in a given election to take seats in the legislature, fostering a kind of representation of group interests even when those interests do not constitute an electoral majority in any district. By contrast, the liberal market order of the United States, much more individualistic in orientation, displays little or no commitment to group representation in the legislature. Correspondingly, rather than using proportional representation, the United States uses a first-past-the-post system, in which the candidate who attains a plurality of the vote in a given district takes all. That system means that the two dominant American parties must appeal broadly to voters on “the left” or “the right” if they hope to make it first past the post.

This difference in electoral systems, Lacey argues, has a direct impact on the politicization of crime. *See id.* at 76. Politicians in a coordinated market economy like Germany face an environment significantly different from the environment faced by their American counterparts. German politicians have no need to cobble together amorphous constituencies in order to make it first past the post. For that reason they have no need to hunt for issues that will appeal to the “floating’ median voter[.]” *Id.* at 66. Crime is precisely such an issue — which implies that, at the margins, politicians in the American neoliberal order are inevitably more likely than continental European ones to thump on crime. *See id.* at 66–67.

It is in the sphere of politicization that Lacey sees hope for improvement, by removing criminal policy from democratic decisionmaking and entrusting it to experts. *See id.* at 190–96.

³⁷ I have expressed these doubts elsewhere. *See* James Q. Whitman, *Of Neo-Liberalism and Comparative Punishment*, 37 CRITICAL SOC. 217 (2010) (reviewing WACQUANT, *supra* note 3); James Q. Whitman, Book Review, 13 NEW CRIM. L. REV. 625 (2010) (reviewing LACEY, *supra* note 4).

exercise in discourse analysis of the kind associated with Michel Foucault.

Now here I should rush to reassure those who might be unduly put off by the phrase “discourse analysis.” Too many of us have learned to associate “discourse analysis” with the portentous and jargon-ridden writings of second-rate literature scholars and specialists in cultural analysis — with the writings of what a recent critic sneeringly calls “Foucaultphiles.”³⁸ I do not by any means think that Harcourt has avoided all of the pitfalls in doing Foucauldian discourse analysis, but it should be said immediately that he has not written that sort of Foucaultphile book. *The Illusion of Free Markets* is a serious, able, and mostly jargon-free piece of scholarship.

Nevertheless, an exercise in discourse analysis it is, which means that it is not about the mechanics of markets. Instead, *The Illusion of Free Markets* is a book about a thought-world. It is about what Harcourt argues is a “discourse,” a form of “rationality” that has accompanied advocacy for the free market since its eighteenth-century beginnings (p. 43). While he would by no means deny the value of approaches like those of Wacquant and Lacey, both of whom he cites respectfully (p. 226), Harcourt’s claim is that he has identified a “discourse” that matters, and in the end the value of his book depends on whether that claim is convincingly borne out by his scholarship.

In particular, *The Illusion of Free Markets* argues that a “discourse of liberty” emerged in the eighteenth century in connection with a tendency to “naturalize” markets (pp. 32, 102). From the outset, Harcourt argues, this discourse of liberty was associated with a drive toward “discipline” and “legal despotism” (pp. 51–52); although the market was proclaimed to be a realm of liberty, in point of fact, lovers of the market order, from the moment of the birth of free market ideology, were always advocates of some form of “legal despotism” (pp. 92–102). The revival of this discourse of liberty in the Chicago School has seen a re-iteration of the familiar pattern: an attachment to a supposedly “natural” free market ordering has gone hand in hand with a burgeoning penal state (pp. 121–50).

Harcourt’s argument is thus conceived in the classic style of the early work of Foucault himself, the style of *The Birth of the Clinic*³⁹ and *Discipline and Punish: The Birth of the Prison*.⁴⁰ It is a book about the “birth” of an epistemic order in the eighteenth century: “[I]t

³⁸ JEAN-MARC MANDOSIO, LONGÉVITÉ D’UNE IMPOSTURE: MICHEL FOUCAULT 93 (2010).

³⁹ MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC* (A.M. Sheridan Smith trans., Pantheon Books 1973) (1963).

⁴⁰ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

is crucial,” Harcourt declares, “to trace the birth of natural order and explore how it developed into its current market-efficiency manifestation” (p. 31). Harcourt’s interpretation of this “birth” is moreover very much in the spirit of Foucault. Foucault often liked to argue that moments that might seem at first glance to represent a triumph of enlightenment and liberty in fact brought with them “discipline” — techniques of control.⁴¹ His early work on the emergence of such “discipline,” we should remember in particular, focused not only on prisons but also on mental asylums, which he described in an important study as instruments of “le grand renferment,” “the great confinement” of the seventeenth century and after.⁴² Harcourt’s argument follows very much in this line.

Of course, there are some obvious intellectual risks in analyzing the world in this Foucauldian way. It is no easy trick to write like Foucault without slipping into the language of a kind of New Left libertarianism — of Tea Party-like cries of alarm at the creeping progress of government-as-bodysnatcher. So once again, it should be said immediately that Harcourt’s book is much better than that. In mounting his version of a “discipline” argument, Harcourt displays an exceptional range of scholarly abilities. He chews carefully over methodological issues. He takes a nuanced and skeptical view of many of Foucault’s claims. He makes important and interesting discoveries in intellectual history and even ventures into the eighteenth-century Paris archives, something few scholars without professional historical training dare to do. It goes without saying that he gives able accounts of contemporary American legal argument. He also makes pointed and sardonic observations about the regulation of the Chicago Board of Trade. There are not many scholars of any school who can range so widely.

Harcourt’s methodological claims are laid out early in the book. His aim, he says, is to employ Foucault’s “nominalism” (p. 45). By this he means that he will refuse to accept the given-ness, the naturalness, of categories like “free markets” and “excessive regulation” (pp. 44–46). Instead, he will assume that those categories are human impositions on the human world, whose structures have to do with the “logic” of their own discourses rather than with the nature of the phenomena they purport to describe. That does not mean that these discourses dictate the course of events. On the contrary, Harcourt is careful to avoid making causal claims. American carceral developments, he emphasizes, “have been facilitated by — not caused by, but made possible by — the rationality of neoliberal penalty: by, on the one hand, the assumption of government legitimacy and competence in the penal arena

⁴¹ See generally *id.*

⁴² MICHEL FOUCAULT, *HISTOIRE DE LA FOLIE* 75–76 (1972).

and, on the other hand, the presumption that the government should not play a role elsewhere” (pp. 202–03). In particular, familiar categories like “natural order,” “market efficiency,” and “discipline” itself “are in fact misleading and incoherent and have had detrimental consequences” (p. 52).

The history of the “misleading and incoherent” discourse of market liberty, as Harcourt tells it, begins in eighteenth-century France. In particular, like the brilliant pioneer of studies in the thought-world of early capitalism, Professor Albert Hirschman,⁴³ Harcourt begins with the Physiocrats, the influential coterie of eighteenth-century French theorists who believed that agriculture was the only source of productive wealth, and who set some of the terms for the rise of modern economic thought (p. 93). He focuses, in an interesting study in intellectual history, on the thought of François Quesnay and Pierre-Paul Le Mercier de la Rivière, whom he credits with “naturalizing” the economy — making it out to be a kind of healthy spontaneous order — while simultaneously insisting on the necessity of a “legal despotism” founded in harsh laws aimed at repressing “thieves and derelicts” whose “unregulated passions” threatened the economic order (p. 94).

Harcourt rests his case in particular on an interesting 1767 essay by Quesnay, entitled *Despotism in China* (pp. 94–95). Harcourt does us a service by excavating this essay. As Li Chen argues in an important recent dissertation, eighteenth-century French authors like Montesquieu frequently took Chinese law as their model in their efforts to modernize the criminal law of the West,⁴⁴ and Quesnay was evidently one of them.⁴⁵ In particular, Quesnay saw the notorious “despotism” of China (as Westerners then understood it) as a healthy and necessary program for the maintenance of a market ordering founded on agricultural production:

The natural and fundamental laws of societies . . . imprint themselves on men’s hearts, they are the light that illuminates and masters their conscience: this light can only be weakened or obscured by their disordered passions [*leurs passions dérégées*]. The principal object of positive laws is this very disorderliness [*dérèglement*], to which they oppose a severe punishment to those perverse men [*une sanction redoutable aux hommes pervers*]. For, on the whole, what is it that is truly necessary for the prosperity of a nation? *To cultivate the land as successfully as possible and to keep society safe from thieves and evil people* [*des voleurs et des méchants*].

⁴³ See generally ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* (20th anniversary ed. 1997).

⁴⁴ Li Chen, *Law and Sensibility of Empire in the Making of Modern China, 1750–1900*, at 189–213 (2009) (unpublished Ph.D. dissertation, Columbia University) (on file with the Harvard Law School Library).

⁴⁵ *Id.* at 190 n.28.

The first part is governed by self-interest, the second is entrusted to the civil government. (p. 95)⁴⁶

For Harcourt, this Quesnay passage is the original statement of a proposition that would, he argues, come to seem self-evidently right to lovers of the free market thereafter: the market is a natural order that must be protected from “perverse men” of “disordered passions” (pp. 240–42). This truism implies that the liberty of the market ordering must of necessity be accompanied by a legal despotism of the criminal law. The discourse of market liberty was thus always also a discourse of despotism.

Harcourt devotes most of his book to tracing the recurrent appearance of this pattern within the discourse of free market advocacy. His investigations take him through some inventive and interesting readings of the works of Cesare Beccaria (pp. 53–77) and Adam Smith (pp. 79–85)⁴⁷ as well as of Le Mercier de la Rivière’s experience as civil governor of Martinique (pp. 176–79). Harcourt’s argument allows him to tie the Bentham of the Panopticon together with the Bentham of market ordering in the effort to account for the “sharp contrast between the ambiguity in [Bentham’s] economic views and his unbending interventionism in the field of crime and punishment” (p. 30). It leads him to suggest that the penitentiary movement of the Jacksonian era went hand in hand with an attachment to free markets (pp. 215–17). Not least, his account of this recurrent pattern allows him to argue that theories of the Chicago School, notably those of Professor Richard Epstein and Judge Richard Posner, writing in the wake of Professor Gary Becker’s famous 1968 article *Crime and Punishment: An Economic Approach*,⁴⁸ expressed the same inveterate tendency (pp. 133–50). In particular, Judge Posner’s early theory of crime as “market bypassing” displayed the proclivity of those who think of the market as “natural” to criminalize the behavior of those who do not (pp. 136–39).

Harcourt is not content simply to do intellectual history, though. He also sets out to do what intellectual historians would rarely attempt: a close study of how markets work in practice. It is this desire to understand actual practice that takes him into the archives in order to examine just how French authorities policed eighteenth-century grain markets (pp. 166–75). It also brings him to the Chicago Board of Trade, a supposed outpost of pure market freedom that is in fact, as

⁴⁶ Harcourt quotes FRANÇOIS QUESNAY, *ŒUVRES ÉCONOMIQUES COMPLÈTES ET AUTRES TEXTES 1016–17* (Christine Théré ed., 2005).

⁴⁷ Harcourt includes an elegantly executed historical vignette on the encounter between Smith and Quesnay (pp. 81–85).

⁴⁸ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

Harcourt shows in a merry exercise in legal analysis, regulated to its very fiber (pp. 179–85).

IV.

All of this adds up to a study with many fine and perceptive observations — a book that is a pleasure to read. Nevertheless, I fear that more about this enjoyable book is wrong than is right. The shortcomings of the book have partly to do with its claims about the birth of the discourse of liberty, which are argued in ways that seem uncomfortably sloppy by the standards of professional intellectual history; but they also have to do, more deeply, with fundamental weaknesses in Foucauldian historiography and Foucauldian social science.

This is, to say it once more, not the sort of academic book that gives Foucaultphilia its bad name, but it remains the case that there is simply too much Foucault in this book, and too little effort to justify all the Foucault. All too often, one has the sense that Harcourt is writing, not in response to a careful reading of the sources, not in response to the need for a compelling social-scientific framing of his problem, not in response to the large body of fine work in intellectual history that has appeared in the last few decades, not in response to an urgent problem that faces America, but in response to Michel Foucault.

Doubts crop up from the first pages of the book, which concern the activities of a Paris grain market commissioner in 1739 (pp. 1–8). Why, an American law professor browsing the book will ask, begin a study of twenty-first-century neoliberalism with a market in early-eighteenth-century France — a society quite different, after all, from our own? Why choose *these* grain markets in particular? The eighteenth-century French grain markets were famously subject to intense political pressure, since bread riots were a prime source of social disorder up to and including the French Revolution.⁴⁹ Surely if we are looking for the example of a typical market on which to base large generalizations of the kind Harcourt's book promises, this peculiarly tense and violence-prone setting is a methodologically problematic choice. After all, it is hardly surprising that there was a discourse of "discipline" surrounding a critical subsistence market that was afflicted by chronic riots.

⁴⁹ See, e.g., JUDITH A. MILLER, *MASTERING THE MARKET* 1 (1999) ("The problem of the grain supply was a perpetual concern of townfolk in early modern France. At the slightest rumor of failure, crowds in cities and towns would assail farmers . . . and harass any visible representatives of public authority. In the countryside, too, [there was disorder] . . . The king, his ministers, his intendants, and greater and lesser law courts would struggle to keep order . . .").

So why does Harcourt choose the eighteenth-century French grain markets? The answer, one notes uneasily, has to do with Foucault: the opening pages of Harcourt's book invoke Foucault speaking to "his overflowing auditoriums" on the subject of the eighteenth-century *police des grains* (p. 8). Harcourt observes that "[t]o many today, the *police des grains* has become the example of pure discipline" (p. 8). He has chosen this market, that is, because it is a familiar example to readers of Foucault. Is that a good enough reason? Not for me, and, I hope, not for anybody seriously concerned with the great and pressing social problem that is Harcourt's subject. This is a book based on a close descriptive account of two examples: the eighteenth-century French grain markets and the twentieth-century Chicago Board of Trade. It is not a book with a model. It is not a book that works through the mechanics of neoliberal markets in an effort to construct a generalizable social-scientific account of the relationship between the discourse of free markets and the dynamics of imprisonment. It is a book based on close study of only two examples; and, one worries, such a book has to meet a higher standard of methodological rigor in making its choices.

Nor is it entirely easy to swallow the conclusions that Harcourt draws from his chosen examples. Harcourt argues that a "discourse of liberty" has been in place since the eighteenth century (p. 102), one that links Quesnay with Judge Posner and President Reagan (p. 31). "[W]hat is puzzling," as Harcourt writes, "is not just the veneer of 'freedom' that is imposed on our practices today, but first that our predecessors imposed that same veneer on the practices that dominated their time" (p. 25). The puzzle that interests him is not how labor markets or electoral systems or social welfare states work. The puzzle that interests him is why lovers of the free market have been trapped in the self-contradictions of the "discourse of liberty" and the "veneer of 'freedom'" ever since "[t]he [b]irth of [n]atural [o]rder" in the eighteenth century (p. 26). The puzzle is why "eighteenth-century thinkers perceived the *police des grains* as liberty enhancing," just as their successors would be caught up in comparable contradictions for the next two centuries (p. 22).

But is the puzzle really there? Readers who know the modern literature of intellectual history will know that Harcourt faces an uphill battle in his effort to link the "discourse of liberty" of the eighteenth century with our own age. The literature of the last several decades has worked hard indeed to dispel the anachronistic notion that early modern ideas of liberty were the same as ours; it has been the study, in the words of Professor Quentin Skinner, of "[l]iberty [b]efore

[l]iberalism.”⁵⁰ Certainly anybody who spends time with the sometimes-bizarre literature of eighteenth-century French thinkers will know that they rarely sound quite like we do.⁵¹ That does not mean that there are not continuities that can be traced between their world and ours, but it does mean that the continuities have to be traced with scholarly care. In particular, as Skinner and his Cambridge School have long insisted,⁵² they have to be traced in a way that is scrupulously conscious of the risk of anachronism.

Harcourt, eager as he is to describe the “birth” of a discourse, is far too casual about that risk. To be sure, he is too shrewd a scholar to claim that his discourse of liberty has existed unchanged for centuries: he insists that he is showing “strong parallel[s],” not perfect continuities (p. 147). Nevertheless, his urge to show continuities is powerful enough to tempt him into troubling historical waters. He tells us, for example, that the early-eighteenth-century *Traité de la Police* of Nicolas Delamare was committed to the project of linking “police administration” and “the liberty of ordinary citizens” (p. 18). Yet he offers no quotations in support of this reading of Delamare (pp. 18–19),⁵³ and I admit to finding it hard to see how the case could be made. What would Delamare, an early-eighteenth-century magistrate deeply committed to the project of royal centralization,⁵⁴ have made of the phrase “the liberty of ordinary citizens”? “Citizens,” in the sense in which we use it, is a word that came into vogue among very different sorts of people, at a significantly later period in the dawning Enlightenment. Indeed, Professor Daniel Gordon, in his well-known study *Citizens Without Sovereignty*,⁵⁵ argues that Rousseau’s seminal conceptualization of the “citizen” represented a rejection of the worldview of none other than Nicolas Delamare,⁵⁶ and Gordon seems to me to be talking

⁵⁰ See generally QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998).

⁵¹ The point has been made by much modern scholarship on how the French Revolution was “thought” or “invented” in an eighteenth-century world that was, in the words of François Furet, “too archaic for its modern aspects and too modern for its archaic aspects.” FRANÇOIS FURET, *INTERPRETING THE FRENCH REVOLUTION* 110 (Elborg Forster trans., Cambridge Univ. Press 1981) (1978); see also, e.g., KEITH MICHAEL BAKER, *INVENTING THE FRENCH REVOLUTION* (1990).

⁵² See generally Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *HIST. & THEORY* 3 (1969).

⁵³ However, Harcourt does cite two pages to support the limited proposition that merchants’ “bad motives” made regulation “necessary” (pp. 19, 247 n.84). Harcourt cites these pages to establish that Delamare believed that “[t]he bad motives of the merchant class made the regulations necessary” (p. 19). He leaves us wondering, however, what passages in Delamare might support his larger claims about Delamare’s commitment to “liberty.”

⁵⁴ See Nicole Dyonet, *Le commissaire Delamare et son Traité de la police (1639–1723)*, in *ENTRE JUSTICE ET JUSTICIABLES* 119 (Claire Dolan ed., 2005) (describing Delamare’s thought as “impregnated by the thesis of divine right monarchy” (translated by author)).

⁵⁵ DANIEL GORDON, *CITIZENS WITHOUT SOVEREIGNTY* (1994).

⁵⁶ See *id.* at 21–23.

sense. As for Delamare's conception of "liberty," it was, as far as I can judge from a rapid study, limited to the license to act in certain ways in the marketplace to the disadvantage of competitors.⁵⁷ It had to do not with the problem of freedom among "ordinary citizens" in a neo-liberal society but with the management of economic competition among guild-like groups in what Professor Roland Mousnier famously called a "society of orders."⁵⁸ Maybe Harcourt has found passages somewhere in Delamare's sprawling text that chime with our modern understandings, but in his book he does not quote them, and one is left with the feeling that his interpretation is plucked out of thin air.

Nor are the worries limited to his treatment of the eighteenth-century grain markets. Harcourt tells us that the theories of Smith and Beccaria were meant to work "in furtherance of liberty" (p. 21). This is undoubtedly true in some way of Smith; but it is not easy to say in what way: the many scholars who have devoted themselves to Smith over the last couple of decades vigorously debate the extent of his comfort with the values of market society.⁵⁹ As for Beccaria: it is certainly true that he thought of himself as an opponent of "tyranny" (pp. 59, 74). But how neat is the line of filiation between Beccaria, a Milanese aristocrat opposed to practices like judicial torture,⁶⁰ and a modern American skeptic of Environmental Protection Agency (EPA) regulation? No doubt a story can be told, but it is a challenging and difficult story, and pains must be taken in telling it. Similarly, there may be something to Harcourt's interpretation of the Jacksonian era, but he offers little by way of quotations that show that the "discourse of liberty" that he has taken as his subject was in some way dominant (pp. 42, 208–20). Maybe the Jacksonians were just like us; but maybe if we read more passages from their writings closely, we would decide they were not.

Harcourt offers his argument in what is surely a good cause. "The liberty of ordinary citizens" is indeed a passionate concern of modern Americans, and one that I find as intermittently comical and sinister as Harcourt does. The "naturalization" of the market does indeed present an intellectual and moral danger. I believe that Harcourt is right in

⁵⁷ See, e.g., 3 NICOLAS DELAMARE, *TRAITÉ DE LA POLICE* 61 (2d ed. 1729) (discussing conflict over "liberty" to buy calves).

⁵⁸ ROLAND MOUSNIER, *THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY* 26 (Brian Pearce trans., Univ. of Chi. Press 1979) (1974).

⁵⁹ This problem lies at the core of the immense literature on Adam Smith. Compare, e.g., CHARLES L. GRISWOLD, JR., *ADAM SMITH AND THE VIRTUES OF ENLIGHTENMENT* 254–55 (1999) (discussing Smith's belief that the market can be trusted to alleviate social suffering), with RYAN HANLEY, *ADAM SMITH AND THE CHARACTER OF VIRTUE* 4–5 (2009) (discussing Smith's determination to "remedy . . . the challenges . . . of commercial society," *id.* at 5).

⁶⁰ See CESARE BECCARIA, *OF CRIMES AND PUNISHMENTS* 34–42 (Jane Grigson trans., Marsilio Publ'g 1996) (1964) (denouncing use of judicial torture).

arguing that successfully functioning markets require extensive regulation. Not least, I endorse with all my heart the proposition that understanding the history of our ideas is an indispensable means of coming to terms with our dilemmas. But it is rare that careful historians can pinpoint the moment of “birth” of any constellation of ideas;⁶¹ and convincing history must digest what are now decades of hard study among intellectual historians.⁶²

Of course, Harcourt does reproduce some wonderful texts and archival material. Yet even here his interpretations too often come across as disappointingly cursory. Take the relationship between Quesnay and the Chicago School. Quesnay, as Harcourt shows, was concerned (at least in part) with “perverse men” of “disorderly passions,” who were incapable of responding to the “natural” norms of the market (p. 95). Becker’s inspiration was quite the opposite: he treated criminal offenders and market participants as persons constituted in precisely the same way, as persons who responded to incentives (pp. 39–40). To that extent, Becker made no distinction at all between the “orderly” and the “disorderly” segments of the population; and the same has been true of modern American economic thinking in general. Harcourt knows well enough that this contrast between physiocratic and modern American thought exists (pp. 39–40), and even that the same contrast can be found between the thought of Quesnay and the thought of Beccaria (pp. 64–65); but he makes unsatisfyingly little effort to explain how one can see continuity in a discourse that seems to differ over such a fundamental point.

Harcourt’s fine archival research is unsatisfying in exactly the same way: it leaves too many unanswered questions about the purported links between the “discourse” of the French past and the pattern of the American present. Harcourt goes into the archives to examine the re-

⁶¹ Indeed, some of our very earliest legal sources already show a concern with regulating the market. See, e.g., *Laws of Ur-Nammu*, in *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 16 (Martha Roth ed., 1995) (discussing, in a source from approximately 2100 B.C.E., standardization of weights and measures and regulation of river traffic). It would be well worth writing a history of market regulation, but such a history could hardly begin in the eighteenth century C.E.

⁶² Even when Harcourt cites (and praises as “remarkable” (p. 49)) a prior scholar like Hirschman, he allows himself to ignore passages in Hirschman’s work that seem to contradict his own interpretation. Harcourt presents Quesnay as a scholar who believed regulation was necessary because the market was threatened by “dérégés.” Yet Hirschman quotes Quesnay as indicating that the danger of “dérèglement” comes from the state: “[T]he despotism of the sovereigns and of their underlings, the shortcomings and the instability of the laws, the disorderly excesses (*dérèglements*) of the administration, the uncertainty affecting property, the wars, the chaotic decisions in matters of taxation destroy men and the wealth of the sovereign.” François Quesnay, *Hommes* (1757), quoted and discussed in HIRSCHMAN, *supra* note 43, at 96. No doubt these seemingly contradictory pictures of Quesnay could be reconciled; but it is a source of frustration that Harcourt leaves us wondering just how.

ality of discipline in the eighteenth-century grain markets. What he finds makes an elegant contribution to his account of the eighteenth century: in point of fact, he shows, the eighteenth-century “regulators” were largely concerned with unswept fecal matter — “MF for *matières fécales*” (p. 23). The “discipline” of the market was to that extent a “myth,” a “chimer[a],” an artifact of the discourse just as “liberty” is an artifact of the discourse (p. 151). It is entertaining to learn this archival tidbit, and what Harcourt has to say about it surely counts as an important contribution to Foucault scholarship. But does it count as an important contribution to the problem of explaining “neoliberal penalty”? American mass imprisonment, if it need be said, is neither a myth nor a chimera. It is a real human tragedy, and a challenge to American national self-understanding. How much of an advance have we made if we link it to the farcical species of “discipline” that was French anxiety over sweeping feces from doorways 250 years ago? Maybe there is an argument to be made, but Harcourt seems too intent on addressing initiates of Foucault to make it.

V.

Harcourt is a man with immense energy and cultivation, and he is ready to embark on fine adventures in the libraries and archives; but there are too many moments when he fails to nail his arguments down, and too many items on his scholarly agenda that are taken from the book of Foucault. Frustrating as that is, though, it is not, to my mind, where the largest problems with the book lie. The largest problems lie with Foucauldian concept formation.

In particular, they lie in the grandiosity of Foucauldian concepts and in the imprecision that inevitably goes along with that grandiosity. It is, I think, very odd to call Michel Foucault a “nominalist.” What was most striking about Foucault was his genius for coming up with large abstractions, like “discipline,” “governmentality,” or “the biopolitical,” that were well designed to sweep together seemingly disparate phenomena.⁶³ It was of course his capacity to generate exciting grand abstractions that drew so many avid and reverential followers to his lecture halls; and in Foucault’s hands the grand abstractions were sometimes used to impressive intellectual effect, indeed sometimes almost magical intellectual effect. By arguing that schools, insane asylums, and prisons all represented cognate forms of “discipline,” for ex-

⁶³ See generally FOUCAULT, *supra* note 40; THE FOUCAULT EFFECT (Graham Burchell et al. eds., 1991); MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS (Michel Senellart et al. eds., Graham Burchell trans., Palgrave MacMillan 2008) (2004).

ample, Foucault managed to say something that was authentically revealing about eighteenth- and nineteenth-century France.⁶⁴

But there is an inevitable danger in using these sorts of grand abstractions, thrilling though they may seem. By their very nature, concepts that are well designed to sweep many disparate phenomena together under a single rubric are poorly designed to make careful analytic distinctions among those phenomena. It is for this reason that the most hardheaded of social science methodologists, Professor Robert Merton, argued in favor of middle-range generalizations.⁶⁵ By deploying the grand abstraction “discipline,” for example, we may allow ourselves to see revealing similarities among schools, asylums, and prisons, but we leave ourselves no way of accounting for how they are different; and this shortcoming is precisely the danger to which Harcourt’s book ultimately falls prey. His Foucauldian concept of “discipline” is so hopelessly general that it is analytically useless; and the same is true of his concept of “the market.”

Consider the striking observation with which we began: the contemporary United States incarcerates a substantial population of persons who would have received treatment in mental institutions in an earlier American era, and who would still receive treatment in mental institutions in other advanced countries. So Harcourt shows. To me, and (I fervently hope) to many other people of goodwill, this is depressing evidence of a decline in high standards of civilization in America. Of course, there must be some observers who see nothing wrong in using prisons to house this population. But even those who do not object to incarcerating these persons must recognize that something has changed dramatically in our practices over the last generation. A society that sends mentally ill people to mental institutions is plainly different from a society that sends them to prisons.

Yet Harcourt’s attachment to his method leads him to minimize the plain significance of his data. He is an heir to Foucault, and Foucault, in a way redolent of the New Left of the late 1960s and early 1970s, saw the hand of The Man in every form of “discipline,” in every form of “confinement.” Harcourt is undoubtedly not ready to go quite so far as Foucault did: he acknowledges that “neoliberal penalty” has abandoned the orientation toward rehabilitation that once reigned (pp. 133–34). Nevertheless, the Foucauldian impulse remains: the “penal sphere[],” he asserts, “include[s] not only prisons, jails, and psychiatric hospitals, but also immigration detention centers and other forms of social control” (p. 231). His conclusion, from the comparative and his-

⁶⁴ See FOUCAULT, *supra* note 40.

⁶⁵ ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 39–69 (enlarged ed. 1968).

torical data he compiles, is thus not that something disturbing has happened in the United States, where we have closed the mental institutions and expanded the prisons. Instead, his conclusion is that the difference between contemporary America and the America of the past has been exaggerated, as has been the difference between contemporary America and contemporary Europe. We are still “disciplining” much the same percentage of the population we have always disciplined, and much the same percentage that is being disciplined in, say, Scandinavia today. The right measure of comparison is not the incarceration rate but the combined “penal sphere” rate of incarceration and institutionalization, not to mention “other [unspecified] forms of social control” (p. 231).

Now this is certainly a striking argument, and Harcourt’s figures do dramatize a point of real importance: a certain proportion of the population in all of these societies is likely to be confined in some way, and we should be frank enough to admit as much. There *is* something gained from the use of the grand abstraction “discipline.” But is there ever something to be lost! It is a confession of intellectual and moral bankruptcy if the tradition of Foucault can find no principled way to distinguish between treatment in a mental institution and imprisonment. No, it is not all one “grand renferment.”⁶⁶ It is different, and far better, to provide the mentally ill with treatment in institutions intended for that purpose.

The problem, moreover, is not just that Foucault’s working concepts are too broad as a matter of social science methodology; it is also that his ideas are sadly out of date as a matter of politics. Foucault wrote in New Left circles whose targets were the Western societies of circa 1965, societies that prided themselves on their decency. His aim, like the aim of so many of his contemporaries (among them Piven and Cloward), was to show that something ugly and oppressive lurked behind all of the self-proclaimed benevolence of the West. His aim was to expose the spirit of “discipline” at work in the hidden heart of the supposed gentleness and enlightenment of a Western world engaged in building social welfare states and prisons dedicated to rehabilitation. But the fact of the matter is that the United States of 2012 has long since ceased to be a society that proclaims its attachment to the decencies of 1965. We are not dedicated to building social welfare states or managing rehabilitationist prisons. We are not a self-proclaimed decent society. We have become an unembarrassedly tough place, a self-congratulatorily tough place; the moment when Foucault-style critiques of American “discipline” could claim any political relevance at all is long since past. Here Wacquant’s understanding of American

⁶⁶ See FOUCAULT, *supra* note 40.

history is much more secure than Harcourt's. Wacquant recognizes that our interpretation must have something to do with the collapse of the pieties of the 1960s.⁶⁷ Harcourt, by contrast, is so caught up in nostalgia for the lecture halls of Foucault that he permits himself to write as though it were still 1975.

If Harcourt's "discipline" is conceived in far too general and abstract a way to be analytically useful, the same is true of his concept of "the market." The great problem at hand is the problem of identifying the links, if any, between neoliberal economic ordering and harsh criminal punishment. This is not a problem that can be cogently addressed unless we begin by assuming that some forms of economic ordering are more "neoliberal" than others. Any persuasive analysis must demonstrate some correlation between the presence or absence of "neoliberalism" and the presence or absence of harsh punishment practices. That is why both Lacey and Wacquant begin their analyses by contrasting different kinds of market societies. For Lacey, the difference is between two different kinds of market ordering, "coordinated" market ordering and "liberal" market ordering.⁶⁸ Wacquant, for his part, locates the difference in a contrast between a market society that uses some measure of social welfare state redistribution in order to regulate the poor, and one that does not.⁶⁹

Harcourt, by contrast, has chosen to write about "the market" in an undifferentiated way, one that offers no more analytic purchase than writing about undifferentiated "discipline" does. Of course, he is not alone. Scholars of many stripes cheerfully write about "the market" in ways that risk obscuring deep-seated historical and comparative differences. Nevertheless, Harcourt's book is particularly disappointing on this score because his research provides some interesting hints about differences in market structure. It is striking, for example, to reflect on one passage from Quesnay that he highlights: "*Do not believe that the low price of commodities is beneficial to the humble folk; for the low price of goods reduces the wage of the common people, decreases their wealth, provides them with less work and fewer lucrative jobs, and destroys the nation's revenue*" (p. 91).⁷⁰

This passage suggests clearly enough that Quesnay's concept of the market must somehow have been different from prevailing contemporary American concepts, which generally idealize the capacity of competitive markets to benefit consumers by delivering low prices. The same is true of a passage from Mercier that Harcourt quotes, which

⁶⁷ See *supra* p. 1216.

⁶⁸ See *supra* pp. 1217–18.

⁶⁹ See *supra* p. 1216.

⁷⁰ The author quotes QUESNAY, *supra* note 46, at 570.

speaks of setting bread prices “in such a way as to be equitable to those who make it and to those consume it” (p. 177).⁷¹

Now, I have a view about the kind of market structure that Quesnay and Mercier had in mind. They thought of markets in a way of which we still find a vibrant echo in continental Europe to this day: they thought that the fundamental rights at stake in a market ordering were the rights of producers much more than the rights of consumers. They worried more about providing lucrative jobs than about providing cheap goods. It is my view that these differences in orientation are basic to any understanding of why American market ordering is — as it is — so dissimilar from continental European market ordering.⁷² Perhaps I am wrong in my characterization of the differences, but the differences are surely there. It is a fact that we see, not “markets” as such, but divergent forms of market ordering in continental Europe and the United States. It is also a fact that we see divergent forms of criminal punishment as well. Any persuasive social science effort to analyze possible links between economic ordering and criminal punishment must be able to make sense of these basic divergences. Lacey is absolutely right about that.

By contrast, a methodology like Harcourt’s can never make sense of our world. By speaking so grandly of “the market,” Harcourt may succeed in stirring the kind of excitement Foucault stirred with his own grand concepts, but he denies himself any hope of understanding what are profoundly important differences in the world we live in, just as surely as he does by casually lumping mental institutions together with prisons. He leaves us with a book that is ultimately addressed to the circle of those who are already committed Foucauldians — and that is not what we need. We need books addressed to a larger American public that must somehow be roused over the fearsome changes of the last generation.

⁷¹ The author quotes DURAND-MOLARD, *CODE DE LA MARTINIQUE* 2:241 (1807).

⁷² See generally James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 *YALE L.J.* 340 (2007).