

Columbia Law School

Scholarship Archive

Faculty Scholarship

Faculty Publications

2013

Becker and Foucault on Crime and Punishment – A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session

Gary S. Becker
gbecker@midway.uchicago.edu

Francois Ewald
Conservatoire National des Arts et Métiers, few@orange.fr

Bernard E. Harcourt
Columbia Law School, bharcourt@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Criminal Law Commons](#), [Law and Economics Commons](#), [Law and Philosophy Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Gary S. Becker, Francois Ewald & Bernard E. Harcourt, *Becker and Foucault on Crime and Punishment – A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session*, UNIVERSITY OF CHICAGO COASE-SANDOR INSTITUTE FOR LAW & ECONOMICS RESEARCH PAPER NO. 654; UNIVERSITY OF CHICAGO PUBLIC LAW & LEGAL THEORY WORKING PAPER NO. 440; COLUMBIA LAW & ECONOMICS WORKING PAPER NO. 456 (2013).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1823

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

CHICAGO

COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 654

(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 440



COASE-SANDOR INSTITUTE
FOR LAW AND ECONOMICS

THE UNIVERSITY OF CHICAGO LAW SCHOOL

BECKER AND FOUCAULT ON CRIME AND PUNISHMENT

*A Conversation with Gary Becker, François Ewald, and Bernard Harcourt:
The Second Session*

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

September 2013

This paper can be downloaded without charge at the Institute for Law and Economics Working Paper Series: <http://www.law.uchicago.edu/Lawecon/index.html> and at the Public Law and Legal Theory Working Paper Series: <http://www.law.uchicago.edu/academics/publiclaw/index.html> and The Social Science Research Network Electronic Paper Collection.

"Becker and Foucault on Crime and Punishment"

A Conversation with Gary Becker, François Ewald, and Bernard Harcourt:

The Second Session

The University of Chicago – May 15, 2013¹

Bernard Harcourt: Welcome everyone to the second session. Last year, we met to discuss Gary Becker's theory of human capital in conversation with, or in confrontation with, Michel Foucault's reading of Becker's theory and Foucault's critique of neoliberalism. That discussion was located primarily in Foucault's lecture of March 14, 1979, in his *Collège de France* lectures titled *The Birth of Biopolitics*.²

In this second session, we will focus on Gary Becker's 1968 theory of crime and punishment³ and Foucault's discussion of that work in the following lecture, which was delivered on March 21, 1979.⁴ We are going to use that exchange to explore the relationship between, on the one hand, Foucault's writing on punishment (from *Discipline and Punish*⁵ in 1975 through *The Birth of Biopolitics* in 1979) and, on the other hand, the economic theory of crime and punishment.

We are dealing with two seminal texts in the field of twentieth century thought. Gary Becker's 1968 article has been described by Judge Richard Posner, in his tracing of the history of the law and economics movement, as the origin or the "first shot": Posner wrote, in 2001, that

¹ This is an edited transcript of a conversation held at The University of Chicago on May 15, 2013, in Foster Hall 505, the seminar room of the Committee on Social Thought. The video recording of the open seminar can be viewed on-line at <http://vimeo.com/68074285>. It represents a continuation of a conversation begun the year before, titled "Becker on Ewald on Foucault on Becker": *American Neoliberalism & Michel Foucault's 1979 Birth of Biopolitics Lectures*. That first session can be viewed on-line as well at <http://vimeo.com/43984248>, and the transcript of that first session can be read here http://www.thecarceral.org/cn7_Becker_Ewald_Conversation.pdf. Professors Gary Becker and François Ewald have individually reviewed their portions of the conversation; Professor Bernard Harcourt has edited and annotated the text. We are extremely grateful to Eléonore Rimbault for transcribing the conversation.

² Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, ed. Michel Senellart, English series ed. Arnold I. Davidson, trans. Graham Burchell (Palgrave Macmillan 2008), pp. 215-239; Foucault, *Naissance de la biopolitique. Cours au Collège de France. 1978-1979*. Ed. Michel Senellart (Gallimard/Le Seuil 2004).

³ Gary S. Becker, "Crime and Punishment: An Economic Approach," *The Journal of Political Economy*, Vol. 76, No. 2. (Mar. - Apr., 1968), pp. 169-217. A sample of Professor Gary Becker's other publications include: Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (University of Chicago Press 1964); *The Economics of Discrimination* (University of Chicago Press 1971); *A Treatise on the Family* (Harvard University Press 1991); and *Accounting for Tastes* (Harvard University Press 1996).

⁴ Foucault, *The Birth of Biopolitics*, pp. 239-265; Foucault, *Naissance de la biopolitique*, pp. 245-270.

⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (Pantheon Books 1978 [1975]); cf. also Michel Foucault, *La Société punitive. Cours au Collège de France. 1972-1973*. Ed. Bernard E. Harcourt (Gallimard/Le Seuil forthcoming 2013).

“If one year must be picked for the beginning of the [law and economics movement], it would be 1968.”⁶ Why? Because, Posner writes, “in 1968, Gary Becker published his article on crime, reviving and refining Bentham,” and thereby demonstrating, in Posner’s words, “that no field of law could not be placed under the lens of economics with illuminating results.”⁷ As for Foucault’s work, *Discipline and Punish*, and his *Collège de France* lectures as well, those are perhaps the texts on punishment from the twentieth century that have had the greatest influence in the field and on Western contemporary theory.

To start this exchange, then, I would like to turn first to François Ewald, who was present at the lectures, who was at the time Michel Foucault’s assistant at the *Collège de France*, and who was one of Foucault’s closest interlocutors.⁸ I should note, once again, that Gary Becker has read Foucault’s March 21st 1979 lecture and he sent me an email—as he did last time before the first session—with some thoughts, noting that the lecture was interesting, and asking whether there is disagreement or not. In his own words, “I read the lecture, and it is interesting. Does he agree with the approach I take? Not clear, but he does not obviously disagree.”⁹

With that, let me turn first, then, to François Ewald.

François Ewald: Thank you, Bernard. Thank you, Professor Becker, for your time.

I will make three remarks about Foucault’s views on your writings on crime and punishment. The first remark will be about the reason why Foucault was so interested by your work, especially with respect to penalty. My second remark will be about insights that you, Professor Becker, might find—not so much in this particular lesson, but more broadly in *Discipline and Punish*. And the last one will concern themes that I would like to develop regarding penal judgment and the economy of justice.

First remark, then. I think that the first connection between you and Foucault is a methodological one: Foucault saw in your work the possibility of a critique of governmentality. I think we have to understand critique here both in a political sense, but also in a philosophical one—in the sense of a Kantian critique.

Foucault interprets your kind of critique of governmentality as “cynicist.” Yes, that is what is written – “*le cynisme*.”¹⁰ For Foucault, that is not bad! Because the Cynics, for Foucault,

⁶ Richard Posner, *Frontiers of Legal Theory*, Cambridge, MA: Harvard University Press, 2001, p. 34.

⁷ *Ibid.*

⁸ Professor François Ewald’s publications include, in English: François Ewald, “*Omnes et singulatim*. After Risk,” *Carceral Notebooks 7*, pp. 77-107 (2011); François Ewald, “The Return of Descartes’s Malicious Demon: An Outline of a Philosophy of Precaution,” in Tom Baker and Jonathan Simon, eds., *Embracing Risk* (University of Chicago Press 2002); and François Ewald, “Insurance and Risk,” in Graham Burchell, Colin Gordon & Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991); and in French: François Ewald, *L’État providence* (Grasset 1986); and François Ewald, Christian Gollier, and Nicolas de Sadeleer, *Le principe de précaution* (PUF 2001).

⁹ E-mail correspondence from Gary Becker to Bernard Harcourt dated May 13, 2013 (on file).

¹⁰ Foucault, *Naissance de la biopolitique*, p. 252; Foucault, *Birth of Biopolitics*, p. 246

are the kind of people who define a new type, or a new possibility of truth-telling.¹¹ For Foucault, your critique of governmentality produces the capacity to be true without or outside of moral considerations.

The second connection between you and Foucault is that Foucault, I believe, found your work helpful. *Discipline and Punish* offered a very thorough criticism of the modern penal system, of the modern art of punishing; but it ultimately provided no solution. Many people asked Foucault: “Perhaps penal policy does not work, but what do you think is the solution?” And you gave, on his view, an alternative to modern penal policy. And there are two or three elements in this lesson that specifically contribute to an alternative vision. With you, we have a model of a penal policy that moves away from *homo criminalis* toward a new kind of objectivation of criminal behavior—the model of *homo economicus*. Your model conveys the idea that there is no particular psychology of the criminal, that the criminal is the man on the street. The only difference is his relationship to *risk*. In this respect, you were a liberator for Foucault, a liberator from past models, with this new objectivation of criminal behavior.

The final connection between you and Foucault is certainly the idea that the optimal public policy against crime does not seek to eradicate crime, but rather to make the offer of crime as unattractive as possible, under specific conditions. Here, you addressed a very important concern of Foucault: power and its limits. For Foucault, it was very important that power have its limits, limits which give people the possibility to play with the rules, the possibility for “*illégalismes*” in society.

Gary Becker: Can you restate that? I’m not sure I understand.

François Ewald: Yes. For Foucault there is, in our society, in a modern liberal society, there is a temptation of power to seek control of each person, each individual, each agent. This is total power. Against that, we have to manage, we have to create limits to power, and thus create a field of tolerance—this was very important for Foucault—a field of tolerance that is part of our rights, in the sense of a “bill of rights.” Thanks to these limitations, we have the right to be outside, not entirely inside the domination of power. For me, these are the three connections: your critique, an alternative, and the idea he shared with you of tolerance.

My second point is about what you could find helpful for your work in *Discipline and Punish*. There is, perhaps, in that work a way to complete your economic analysis of crime. The project of Foucault in *Discipline and Punish* was also an economic approach to crime. The idea is of course somewhat metaphorical, but through it, Foucault tried to describe an “economy of power.” There is an attempt to develop a new vision of power in relationship with the idea of an economy. Economy, for Foucault, is not exactly the same concept as what you call economy: Foucault’s notion of economy is related to having a strategy, to making a calculus. But in this sense, they are both connected.

¹¹ On truth-telling, see generally, Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*, eds. Fabienne Brion and Bernard E. Harcourt (University of Chicago Press, forthcoming).

In this respect, what could be of interest to you is the idea that prison is a failure, that it is something that does not work, that the goals of the prison have not been achieved. But that this failure has a positive aspect: it allows power to control a certain kind of population, namely the population that ends up in prison. And with the control of this population, it may be possible to control a certain form of crime. This could be interesting for you: to take into account not only the cost of crime, but the benefits and side effects of a failed policy. I'm not sure what would be the right translation...

Gary Becker: ...I understand what you're saying...

François Ewald: ... but it is the idea that behind a failure, there is an advantage. What is the value of this advantage? Well, it turns out that, as between the failure and costs of prisons and the benefits of the control of criminality, prison may not be as expensive, perhaps, as would be a National Security Agency, for example.

A second aspect of the insight that *Discipline and Punish* might provide is that you would have to add, to the calculus of the costs and benefits of crime, the value provided by the management of crime and the exercise of power. Through these kinds of public policies, power finds a way to exercise its domination. That is important, there is a value in that. From your perspective, I believe—though I am no expert—that the costs and benefits are taken to be those typically associated with a state's budget. But perhaps we should add some other value to crime, perhaps we should consider other costs and benefits than those described in a state's budget.

Finally, one last remark, but here you will have to be indulgent. I said earlier that Foucault saw in your work the possibility for a new kind of critique; but your work is not merely critical. It also contains a proposal about the proper character of penal judgment. As you know, penal judgment is complex: in imposing a punishment, we make two different kinds of judgments. First, a judgment of conviction: we have to attribute such fact, such illegality, to this particular person. The second judgment concerns the person who is convicted: it determines what kind of penalty should be imposed on him or her. The difficulty is to understand the relation between these two kinds of judgment. And you have a view about both. Regarding the judgment of conviction, you provide arguments about, for instance, certainty: for you, the certainty of conviction is important, and so is the rapidity of the conviction. But you also have a proposal about the second judgment, the imposition of punishment.

It is difficult for me to express this, but I think that the difficulty for you, with regard to penal judgment, is that you propose a punishment that is not addressed to the person convicted but to other possible cases ...

Bernard Harcourt: ... not to the particular defendant, but to other individuals, as in a general theory of deterrence...

François Ewald: ... yes. And that is a key question: we have to ask whether it is just to attribute to a particular defendant the task of preventing other individuals. In this respect, the form of your penal judgment is predictive, with all of the uncertainty linked to this kind of prediction.

We do not know what will be their reaction, what effect this penalty will have on the others. The consequence is that you have to make a lot of differentiations between kinds of crimes, kinds of criminals, and so on. And I think it is extremely difficult to do that in practice. And at this point, you are in conflict with the logic of law. The law has a universal logic, it is addressed to the general case, the reasonable man. By contrast, for you, punishment has to be perpetually differentiating, for each particular case. That becomes complex: How is it possible to reconcile the generality of a public policy of punishment and this idea that the public policy has to be adapted to each situation, to each case. You need, for that, a lot of knowledge about individuals, in which case perhaps you have come back into the domain of criminology. And that creates a tension: at the beginning, you said you wanted to leave aside the criminological approach; but in the end, you may need to use just such kind of knowledge.

One last remark. I would like to raise some questions—but here I speak with respect for the courage of your statement—about your position on capital punishment and the death penalty.¹² In your blog about capital punishment, you give this equation: for murder, the death penalty is valid because individuals may be sensible to the risk associated to this penalty. You give this reasoning: in the case where one execution deters five homicides, naturally, the cost-benefit analysis militates in favor of saving the five lives and thus in favor of the death penalty. You extend this reasoning to the case where one execution saves one life. You argue that in this situation as well, you would choose capital punishment. Why? Because, you say, the value of the life of both individuals involved is not the same: the life of the murderer does not have the same value as that of the innocent person.

Okay. We could perhaps agree with you. But this then raises two questions: first, that kind of statement, that kind of assessment is not exactly an economic one. It is a moral one. Also, when you say such kinds of things, the murderer is absolutely condemned for the rest of his life, while you do not know what will be the future of the innocent person. At that point, your evaluation of the price of life is not exactly an economic one in a relation of risk, but a moral one. And here, then, you are in competition and conflict with other kinds of moral evaluation. For instance, when I was young, I had to read *Les évangiles*, and I found statements there of Jesus saying, with regard to the criminals: “For my Father, the criminal Magdalene, has the same value—maybe even more value—than a good, moral person.”

So, I would ask: Aren't we here at the limit of economic reasoning? It is a presupposition of economic analysis that everything has a value that can be expressed by a price, a money value. But the question here, in the context of the death penalty, is: “Is it possible to assess the price of life, of the future of an individual?” That is perhaps beyond the limit of economics, and it is why, in my opinion, you are making at this point a moral judgment, not an economic one. That was my final remark. I thank you for this opportunity.

Bernard Harcourt: Gary, do you want to address some of those comments?

¹² Gary S. Becker and Richard A. Posner, *Uncommon Sense: Economic Insights, from Marriage to Terrorism*, Chicago: University of Chicago Press, 2009, pp. 253-258.

Gary Becker: Well, let me address it in a broader context. I will come to some of the comments, definitely, because they are very interesting comments and I appreciate them.

Let me first come back to Foucault. I'm no expert on Foucault, unlike both of you. In fact, the only things I've read of Foucault are these two lectures that you had me read. I should be reading more, if I were sensible, because of what I've found in reading these two essays. My beliefs about modern French philosophers were that they were opaque, impossible to understand. So I read Foucault, these two essays—they are lectures in translations, obviously not the best from the point of view of giving clarity—and yet they were clear. I mean, I understood what he was saying, and generally agreed with most of what he said, which I'll come to in a little while. But I thought they were perceptive, clearly written, not hiding behind a lot of complicated phraseology that didn't amount to anything. So to me, it said that I should be reading more of him. He's a very good thinker.

Now, in discussing his comments on my work, let me first give people here, who may not be that familiar with my paper on crime, a very short synopsis of what I do there. Then I'll discuss some of Foucault's comments on it, and then I'll discuss, François, your comments.

I set up a very simple model, fundamentally. It's a normative model. It explicitly was normative. And the normative question was: We have laws—and I don't evaluate whether these are good laws or not, and I'll come back to that in the context of what Foucault says—we have laws and we try to discourage up to a point, and only up to a point, violation of these laws. And so, the question posed in that essay is, "What's the optimal way to approach that kind of a problem?" When I say "optimal" it means taking account of various considerations. You have to integrate several different types of considerations in order to see this problem, and try to attack the problem. Now what are the considerations? Well, first of all, you have the laws and then you have some assessment about what the cost is to society of violating these laws—what Foucault calls, I don't know if I use that language—the "externality" involved. You have potential criminals, and how can you deter their behavior with the instruments you have available?

Now, what are the instruments? In the *Crime and Punishment* paper, I stress two instruments, and you mention them in discussion: the likelihood that you're going to apprehend and convict somebody, and the magnitude and nature of the punishment that you impose. Now the framework there, of course, deals with other instruments. Maybe a more effective way to reduce crime is to educate the population better, so their opportunities are better in non-criminal activities. You have various instruments, and the paper focuses on the probability of conviction and the magnitude of the punishment. And punishment can take different forms. It could be a fine. In fact, I argue that one possible fine is actually the best form of punishment from an effectiveness point of view. But of course it often deals with imprisonment for the more serious crimes, because fines are not adequate for a variety of reasons in those situations.

Now, it's costly to impose punishment: police, the imprisonment (or other types of punishment), the judiciary—there are a variety of costs. And these costs—and this is

important—these costs limit how much you want to do in terms of the punishment. I'll come back to Foucault's comments on that a little bit later.

And finally you have: How responsive are criminals to different punishments? So if criminals respond a lot, in Foucault's language—I don't know if I use it, I guess I use it in my paper—if criminals are very elastic to the punishment (this is language Foucault uses in his lecture) then maybe a small amount of punishment can have a big effect. On the other hand, if criminals are very unresponsive, then you say, well, maybe the punishment won't do any good because you won't be able to deter them. When I say criminals, I mean not simply the criminals that you are punishing in a particular courtroom, but all criminals who might be engaging in theft, robbery, rape, murder and other crimes. It's not just an individual, even though the theory is based on an individual. It's really a group behavior that you're concerned about. How does punishing X affect the criminal activities of Y, Z and everybody else?

Now it's true that when you punish X by putting X in prison, you prevent X from committing crime—at least against non-prisoners—while they're in prison. But basically, the framework asks: "How do you affect other people?" And if you don't have much effect on other people, that says, well, maybe you don't want to use this instrument very much, because you really can't accomplish a lot with this instrument. I mean, you may like to do it, but the cost of doing it is too great.

That's the framework. What are the components of it? You have the laws, you have the potential criminal—and the approach doesn't say there's one type who are criminals and another type who isn't—it doesn't make any distinction, fundamentally. Yes, of course some people may be more willing to obey the law for non-punishment reasons, but it doesn't say there's some criminal type based on physiology, etc. It basically says that most, if not everybody, can be affected if you have the right sort of instruments, including education and punishment. So you have the criminal, you have the laws, you have the cost of enforcing the laws, and then you come out with some conclusion about how much you want to do with regard to different crimes and with regard to different types of individuals. That's the framework that Foucault is commenting on.

So then I read Foucault's essay, and here I'll have to look at some of the comments I made as I was reading the essay. Foucault doesn't like neoliberalism, and he classifies me as a neoliberal. And I am a neoliberal, I suppose, whatever that term means. I am a liberal, a classical liberal I would classify myself as, and that's sometimes meant as a neoliberal. So he doesn't like neoliberalism, and the first part of this chapter he criticizes some other neoliberals: Röpke and some of the others, then he criticizes Bentham—I don't know if you would call him a neoliberal, but he criticizes Bentham—and Beccaria and so on.

Foucault puts me in this class of neoliberals, but as I read the essay it's hard for me to see something in that essay that Foucault doesn't like in terms of my work. I'll tell you to look at the various comments he makes. What he likes is—he starts out, when he discusses my essay, and he's also discussing essays by some other economists, important essays by George Stigler, a

colleague and friend of mine, and a former student of mine, Isaac Ehrlich, but he mainly focuses on my essays. I'll act as if it's my essay, but there's other literature that he discusses.

He says, "Well, Becker says that all one is interested in, in terms of the definition of crime, is what the penal code defines as behaviors that can be punished." And then, the editor notes, "there's laughter" in the auditorium. And Foucault scolds his audience. He says, "No, you shouldn't laugh at that. That's what the French penal code says, basically." It's not a bad approach to the problem, he says. So that's how he starts off.

And what he likes about that approach and what he doesn't like about Bentham, in particular, is there's no attempt to have a calculus of what laws there should be or shouldn't be in that approach. There's other literature that goes into it, and I've gone into that literature, as in the capital punishment case and other cases; but he says, there's no attempt in this approach, one doesn't try to do that, and he likes that, because he's critical of a lot of the laws that get passed.

The second thing is that he dislikes Bentham. His interpretation of Bentham—and I didn't go back to read Bentham but it seemed to be right—was that Bentham thought he could eliminate all crime by having the right punishment and this panoptic prison where every criminal can be seen all the time, there is no privacy, and the like. And he says, in this approach, in this economic approach, one recognizes the cost of punishment, which means that there will be an optimal amount of crime. I mean, I like to challenge people and I say, "The theory is about the optimal amount of crime." Optimal in what sense? There are different meanings you can give to the word optimal, but the meaning that I'm giving it in this context is: optimal in the sense that you have to benefit the value of trying to reduce crime versus the gain.

Foucault gives an example, I like the example. It was not up in the air, but a very practical example of how you reduce theft of inventory in a store. If theft is at a high rate, you can cut it down pretty easily from 50% to 40% to 30%, you go through a bunch of numbers – except, when you get down to 5% to cut it down any more, it's going to be very costly and it probably doesn't pay to do it. So that's the optimal amount of theft in that case, would be 5%. And I think that's absolutely right, it's a very good example, and it's certainly fundamental to this type of approach.

Now the third thing it seems to me he liked, was it recognizes that there's no fundamental person we can identify as a criminal by their physiology, their genetics, and so on. Maybe genetics will eventually tell us about it, but we definitely don't know that now. We know there's a lot of influence in determining whether people commit crime and the different types of crime—that people who commit white collar crimes are different in terms of education and background, typically, than people who commit assaults and felonies of various types. There's not a criminal individual, per say, but a different individual is going to be affected differently, to be sure, by the punishment, depending on the nature of the individual, or the nature of the individuals committing a crime, and the nature of the crimes.

So you have this heterogeneity both by type of crime and type of individual, and in principle you like to tailor the punishments to take account of this type of heterogeneity. You may not know enough to be able to do it, but you try to do what you can in that regard.

Here's an example. Let's say drugs. Now my paper doesn't discuss drugs, although I've since written a fair amount on the drug question. Foucault says, "Well, people respond differently. The addict," he says, "is not at all responsive to price." I don't think that's right. The addict is a bit responsive, but in the long run they can be considerably responsive. Modern analysis and I think data, if you look at data, show that addicts respond to punishment and higher price, but they may, in general, respond less. People respond differently and you want to have, maybe, different punishments for the addict and the person who's just starting out in taking drugs. If you want to reduce the incident with drugs, that's his approach: the high price for the person who's experimenting so they don't experiment, and a low price for the addict—because they're addicted, you're not going to do any good and with a high price; they'll just commit a lot of crime, so you'll want to cut that down.

So there's, I thought, a lot of insight in that analysis. I wouldn't agree that the addicts aren't responsive, but the basic framework, I think, is the right one. So, those are my basic comments on Foucault.

My conclusion was—I think, Bernard, you asked me, "Well, where did Foucault agree and where did he disagree?"—and I didn't find any place where he explicitly disagreed. I mean, in these lectures. Maybe in his other work he does.

It's a bit hard to tell how much he's expositing what I'm saying, and how much he's agreeing with what I'm saying. He wasn't hesitant to disagree with Bentham, Röpke, and some of the other neoliberals. I don't see anything in there where he's really disagreeing, so maybe we'll come back to that.

Bernard Harcourt: Yes.

Gary Becker: Now, let me come to your comments, François. I agree with a lot of what you said, and some of them are related to what I said. Let me just mention a few of them: criticism of government, analysis aside from moral reasoning, and I'll come back to the capital punishment issue that you raised. Nowhere in my essay do I discuss capital punishment, by the way, but my former student Ehrlich discussed capital punishment. In some subsequent blogs, I discuss capital punishment,¹³ so I'll stand behind what I said about capital punishment. I'll have to come back to that later on.

My essay is not taking a moral stand on laws and government; it's just looking at how you can affect the adherence to these laws. I agree there's no psychology. The criminal you mention—I agree, there's not a psychology of the criminal. I think most attempts to give a psychology of the criminal have really misled penology and how to deter crime. What I was trying to do in this essay was free one's thinking from that approach to criminology.

¹³ Becker and Posner, *Uncommon Sense*, pp. 253-258.

“Not to eradicate crime”—you mention that, and I agree 100%. “Limit to the power of the state that implies the limits of the power of the state, because they can only do a limited amount of activities,” which I agree. “Economy of power”—I mean, absolutely. A neoliberal is very much worried about the power of the state, what laws get passed, and so on. That’s why neoliberals come out generally for a small state, a limited state. I haven’t read Foucault’s other work on power, but I think overall, on the basic picture, I would tend to agree with that. You don’t want to have an economy of power, it’s too easily corrupted. Imprisonment can be used as a way of enforcing the power of the state, and certainly it’s a great concern of myself and neoliberals in general. This essay recognizes that you may be imprisoning people for the wrong reasons, they’re not criminals, you’re doing other things, and so you have to balance. And even if the intent is right, the evidence is limited. You convict people on limited evidence, and so you have to have a procedure whereby—I mean, you want to have a procedure whereby you can reevaluate the evidence in the light of additional evidence. That’s what the appeal process does in most societies. You want to provide a lot of protection in that dimension. I think this approach certainly does that.

Fundamental to the approach, and I think you didn’t use the word, is “deterrence.” In your discussion you didn’t use the word deterrence, but you’re really describing deterrence. Deterrence is fundamental to this type of approach. I agree with you on that. You can’t deter [everyone] because it’s too costly to do, basically. There’s a couple of qualifications to that.

Now my last comment would be on capital punishment. The theory is silent on whether you want capital punishment or not. It’s a calculation: what’s the advantage in terms of what’s the deterrent effect of capital punishment? If capital punishment didn’t deter, you still want to prevent murderers from committing additional murders, so you may keep them in prison, and so on. That’s fine. You could easily come out with this theory and say you’re opposed to capital punishment. I don’t have the slightest argument with that.

When I discuss the capital punishment in my blog... Let me tell you a funny story about this. I gave a lecture in Italy for roughly 2,000 individuals, so a huge audience. I was lecturing about education, nothing to do with this topic, and there was a question and answer period and somebody got up to me—and the boy, he was obviously very emotionally involved and he said to me, “You have written in favor of capital punishment. You should be thrown out of Italy for doing that!” So I said, “Well, I wasn’t talking about capital punishment.” I went in and discussed my views on capital punishment, and he calmed down a little bit.

The theory is agnostic about whether you want to use capital punishment. The view I took in my blog, and I still take, depends upon how much you can reduce subsequent murders by capital punishment. If you can reduce a lot, and remember you’re comparing capital punishment to alternatives, so let’s say life in prison is an alternative. In fact, most people convicted of murder do not spend life in prison in the United States. I don’t know the French situation, but if life in prison is the alternative, what additional deterrent effect and cost involved in capital punishment versus others, recognizing that you may be making an error when you convict somebody of murder and you have to watch the appeal process. You may

conclude from that, the additional benefit is not worth the cost both in terms of improper conviction and the like.

Why do I conclude, therefore, that I favor capital punishment? I make the judgment based on very poor and limited evidence. There's a great controversy in the empirical evidence—hold that for a moment, and let me make a broader point. I said in the beginning that the essay was normative: asking what should governments do, what would be best policy. It had in it a lot of positive or empirical aspects to it: How big is deterrence? Does it differ if you send someone to prison, or fine them, or increase the probability of apprehension? What's the cost of punishing people? How do you change that by varying your police force, and the like? It led to a lot of empirical work based on trying to assess for different types of crime, how can you deter crime? Including things like: increasing education, reducing unemployment, providing better opportunities for individuals who might commit felonies. It led to a lot of empirical work. A very small fraction of that empirical work dealt with capital punishment, and the evidence is mixed on that. Some studies conclude that capital punishment had very little deterrent effect; some studies conclude that capital punishment has pretty sizable effect, starting with Ehrlich's study, but other subsequent studies. And so it is mixed.

The exact evidence isn't clear, but we have to have a policy. My judgment is that capital punishment does deter murder. Then I go into this discussion that you didn't like, and I'll try to defend what I was doing. I say most people would agree that if we were convinced that using capital punishment could reduce five murders, most people would be inclined to say, "Well, we don't like capital punishment, but we're going to use it." Just like we don't like going to war, but we're going to use it. So the question I ask is: "Where is the dividing line?" Nobody knows where the dividing line is, because a lot of people don't ask that question. They usually just say, "I don't like capital punishment," without asking: "Are you saving lives? How many lives are you saving?" To use a hypothetical, we'll come to your example: "If I could save one life, would I be in favor of capital punishment?"

That's a tough one. It's not easy. You're taking one life and you're saving one additional life. And I argue there, it was a judgment. It doesn't come out—I mean, it comes out in maybe some other analysis, there is a whole literature, as you know, on the statistical value of life which tries to measure that.

I suppose I could measure that and integrate that into this, and if I did that I would come to the conclusion: Yes, on the whole it's worth using capital punishment, because the life you're saving is going to be some innocent person. It's more valuable than the life you're taking who is going to, on the whole, be some other person who's going to commit other crimes and so on.

If you accepted that, push it further. Say you agree 1:1 – what about .75:1? You save $\frac{3}{4}$ of a life for the murder you take. It's getting tougher. What about $\frac{1}{2}$:1? I mean, I don't know where to draw the line. But I do believe that most people would conclude that if you felt capital punishment deterred at least one life for each capital punishment, most people would say, "Well, I don't like it, but it's worth using," taking account of all the cost.

I'm just about finished.

Bernard Harcourt: Okay.

Gary Becker: That's my basic comments. I'll summarize what they are, aside from giving an outline of what I try to do in the paper. And remember, capital punishment was not in the paper. I don't consider that an important part of the work of the economics of crime, because, I mean, you can take that either way. It doesn't have a conclusion. It is a framework for discussing a lot of different crimes, and I read Foucault on this and I like what he said. Maybe because he was agreeing with what I said. I didn't detect—even though he doesn't like neoliberalism and he classifies me explicitly as a neoliberal, which is right—I didn't detect any significant criticism. Maybe I'm wrong about that. I'd like to discuss some of them, if there are any.

Bernard Harcourt: All right. Let me try to sharpen the exchange, then, in a couple of ways.

Last session we were discussing human capital and we did identify one particular critique of your theory of human capital. The critique concerned the investments and disinvestments in populations that would follow from a human capital approach. Let's put that aside for now, and move to Foucault's second lecture, which is about crime and punishment.

Here I think that Foucault's text—which is an analysis of the kind of rationality that forms the basis of your theory—motivates two separate critiques. Unfortunately, the two critiques are further developed and come out more clearly in the next lecture that Foucault delivered, on March 28, 1979—so we are going to need to have a third session! But in any event, the text motivates two critiques.

The first critique has to do with the particular type of governable actor that is assumed and that is integral to the rational actor model—and that is evident in your *Crime and Punishment* article from 1968. This critique is located in Foucault's lecture around the time when the audience laughs¹⁴—I will come back to this later because that passage is a critical moment in the lecture, in the sense that it also reveals, importantly, a critical path not taken. In any event, at that moment, Foucault draws a parallel between your economic model and French penal law. There is both a parallel and an important distinction. The parallel is that your model defines crime in the same way as French penal law: Crime is defined, in a positivist way, as behavior that is punishable under the criminal code. You use a formal definition of crime, as does the French penal code, limiting yourself to the words of the criminal code. Same formal approach, but a very different view. Your view is from the perspective of the rational actor in the model, whereas the French view is from the perspective of the sovereign in the model. This differential produces a very different way of thinking about and then governing individuals.

It's that differential—namely, the fact that we're now looking at it from the view of the rational actor, from the individual's point of view, rather than from the perspective of the sovereign—that produces the unique mode of governability of neoliberalism, namely the mode that involves behavioral techniques and environmental changes, etc. Foucault discusses this mode of governability on page 252 of the English edition, but actually the payoff, or the

¹⁴ Foucault, *Birth of Biopolitics*, p. 251; Foucault, *Naissance de la biopolitique*, p. 256.

critique, comes in the next lecture around page 270, where he talks about the more aberrant forms of behavioral techniques associated, for instance, with Skinner.¹⁵ But it is...

Gary Becker: I don't want to associate with Skinner.

Bernard Harcourt: No, of course not, and Foucault is not associating you with Skinner. But that is the slope or the direction in which this particular notion of governability can lead.

The second critique that Foucault's text motivates is an epistemological critique. It is connected to what we might call the "theory of the subject," but it also has to do with an epistemology of governance: What we can know well, and what we cannot know well about the subject, about the individual, about his or her interests. The insight here is that the rational actor model rests on the premise that the individual subject *can* know well his personal interests, in contrast to the State that doesn't have that knowledge in the same way. There is an inextricable connection between the rational actor knowing his interest best, but being faced by a governing body that does not, and whose calculations misfire because they don't have that knowledge. And this produces, by itself, a certain need for limited government intervention.

In other words, the idea of a limited government is built into the theory of the subject in the rational actor model. And this second critique, we will have to address at our next session in more depth. It will take us to page 282 of the English edition, where you will find the argument that the theory of the subject ultimately disqualifies the political sovereign.¹⁶ These then are two critiques that emerge specifically out of Foucault's reading of your 1968 essay.

However, I would like to develop a third critique that could have been made, but was not, and that represents, to my eyes, a more penetrating critique. And this takes me back to the passage discussed earlier where Foucault defends you against his French audience—when he chastises his audience. It is a critical passage because Foucault, at that moment, makes a formalist move that, in my opinion, results in his missing his target.

Gary Becker: He being Foucault?

Bernard Harcourt: Yes, Foucault. Foucault misses his target—in other words, you—at that particular juncture by adopting, as you do, a formalist view of the law. Let me explain.

By not questioning the formalist definition of the criminal law in your work—in other words, by taking the penal code as a given, as a limiting factor that defines the behaviors that we are then going to subject to a social welfare analysis—you are doing a few things. You are bracketing out some of the most important considerations. Now I can understand that it's an attempt to find a partial equilibrium; that you are bracketing out the definition of crime to

¹⁵ *Ibid.*, p. 270; French edition, p. 274.

¹⁶ *Ibid.*, p. 282; French edition, p. 286.

simplify the model. But it seems to me that what you've done by bracketing out the definition of crime is problematic for three reasons.¹⁷

First, you're bracketing out the whole complexity of the problem, the definitions of the criminal law, where all of the morality, all of the theories of dangerousness, all of the psychiatry, etc., are going to be at play. So you are trying to create a theory that eliminates the need for psychiatry and criminology, but you've almost done that by definition at the very outset, at the beginning of the enterprise, by bracketing off the very definition of crime.

Second, and more importantly, you also avoid the radical potential of your own theory. Simultaneously, you create tension between what you can then say, for instance, with regard to drugs. There's an internal tension in the sense that, ultimately, you might want to say we should *decriminalize* drugs—you do not say it in this text, but in other work...

Gary Becker: I do believe in that, yes.

Bernard Harcourt: Yes, you do believe in that, but then there's a tension –

Gary Becker: Not necessarily that this theory leads to that conclusion.

Bernard Harcourt: Right. But the tension... well, wait a minute. We're taking the definition of crimes as given. If so, how can it be that a social welfare analysis would then lead to the elimination of a definition of crime? That is precisely the tension that I would want to push you on.

What this tension reveals is that there would have been a far more radical theory that you could have developed in '68, which would have been to subject *all human behavior* to the kind of calculus to which you subject only criminal behaviors defined as such in the criminal code. Your theory could have *defined* crime. It could have addressed *all* behaviors, whether or not they are formally defined as crimes in the penal code, and determined which should be criminalized. The model would have defined as criminal any behavior that if punished—i.e. criminally sanctioned—in the right amount and to the correct extent would maximize social welfare and minimize social costs.

That is the theory, it seems to me, that you could have and should have argued for in 1968: Any human behavior that can be efficiently regulated by means of the criminal sanction—by means of punishment properly applied—should be criminalized. If you had done that, of course, *all* domains of economic, social, political life would have been subjected to potential regulation. It opens all human activity to state sanction, including, well, anything. We can draw the list: infidelity, impoliteness, sexism, political protest, financial contributions to political parties—in sum, any activity could be subjected to the kind of analysis that you're proposing, and we would then know what should be criminal: that which you can efficiently regulate by means of the criminal law and punishment. Some things we can efficiently regulate by punishment, and some things we can't—but there is no way of knowing ahead of time.

¹⁷ See also Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Harvard University Press, 2011), pp. 127-128 and 133-136.

When you limited the definition of crime to the formal definition, you severely limited the potential of your model. But worse, you injected into the theory a particular political vision – a somewhat libertarian vision. There are certain libertarian values that are lurking in the very decision to bracket the definition of crime. The more radical model would subject all human behavior to social welfare analysis and could potentially expand the scope of government regulation. Instead, your 1968 model begins by taking a defined subset of human behavior—behavior defined as crime by law—and then limits that scope.

So I think that Foucault missed an important critique by agreeing with your decision to formally bracket the definition of crimes. I believe that that formalist move reveals a libertarian bias that should make one suspicious about the positivistic nature of the model itself, and about all of the measurements that would then have to be made. After all, your model calls for a myriad of complicated measurements—the costs of policing and punishing, the values of life, victimization, etc. These are really complicated measurements. But your decision to bracket makes me suspicious that something is biased in your approach, biased against state intervention.

One final point on the death penalty. When you say –

Gary Becker: But I don't want to spend a lot of time on the death penalty. It's not a big part of the essay.

Bernard Harcourt: No, me neither, but it's a good illustration of the same critique. When you say, how many lives are we saving, that calculation itself is only the tip of the iceberg. You see, Gary Becker wouldn't just ask "How many lives are we saving?" Gary Becker would have to ask the next questions, which are the much more complicated questions: "How much money does it cost to engage in an execution? How much could an equivalent amount of money buy in health care? How many lives could be saved if we used that money differently?" Etc.

In other words, we don't limit ourselves simply to the empirical fact that an execution may deter one or more homicides, assuming that it does. It is not just a question of how many lives. It turns into the larger calculus whether the money could be better spent saving lives in some other domain, such as health care or education or nutrition, etc.

At which point, I think, you have to throw up your hands and say, "I can't say I'm in favor of the death penalty, I can't say I'm against the death penalty." I'd say it's a hugely, massively complicated calculus that involves lots of different factors—not just whether it's one life to one life, but also how much money are we spending for lawyers, should we be spending that money differently, etc.

I think that Gary Becker would have to say, "I don't know the answer to this complex question."

Gary Becker: Yes, okay, thanks. Let me respond to these comments.

This essay had a limited goal. It was not trying to say what laws we should have, and what laws we shouldn't have. We have some laws, how are we going to engage in deterrence with regard to these laws.

In my other manifestations, in my other writings, of course I've written a lot about what laws we should have. I believe there's a lot of risk of government overregulating society with too many laws, and that's why I've always been a small government person.

This essay has a more modest goal, it says, given the laws that we have and the various cost that we have, what is the best way to sort of optimize social welfare? When they say, "Well, it's a bad law so you should get rid of the law rather than trying to optimize it," and I don't disagree with that. No one essay can try to deal with every single problem, and I didn't try to do that in this essay.

Now let me deal with a couple of the other issues that you mention. The individual versus the sovereign: yes, this takes the individual's point of view. I had the feeling from my reading of Foucault in this chapter that he liked that, as opposed to taking the sovereign's point of view. I don't know if I have the exact statement on that, but I think it wasn't a critique that he had, but I'll have to find what he says.

Bernard Harcourt: It's on the bottom of page 252 of the English edition. Basically, what he says is: "It simply means that economic behavior is the grid of intelligibility one will adopt on the behavior of a new individual. It also means that the individual becomes governmentalizable"¹⁸ in a particular way.

Gary Becker: Yes. I don't see any critique of that. *Homo economicus* is "the surface of contact between the individual and the power exercised on him,"¹⁹ but that doesn't mean that every individual has no other motivations. Anyway, it is nowhere... I don't think you can cite, Bernard, a passage where he says that that is a worse view than taking it from the point of view of the sovereign, which he does say is the French approach. So my reading of this essay—but I may be wrong on that—is that he didn't think it was inferior to taking the sovereign's approach.

Now, "taking laws as given": you mentioned that on several different occasions. The same approach might be useful in discussing what laws we should have. It may be useful. For instance, in a cost-benefit analysis of particular types of legislation, let's say, whether drugs should be illegal or not. We have a benefit-cost analysis of whether drugs should be illegal: I've done that, and a lot of other people have done that. One looks at similar types of considerations: what's the benefit of having a law? How much effect does it have on drug use? What's the cost of doing it? Is it worth having this law when there are other alternatives, for instance taxing the use of drugs? So the same approach is an approach to law in general, I agree. He says he doesn't try to do that because you have to go down other dimensions, you have to evaluate in various ways what law is doing. You have, and you can take that benefit-

¹⁸ Foucault, *Birth of Biopolitics*, p. 252; Foucault, *Naissance de la biopolitique*, p. 258.

¹⁹ *Ibid.*, pp. 252-253; French edition, p. 258

cost analysis and do that, and much evaluation of public policy, whatever the approach, is really implicitly doing that.

Bernard Harcourt: Right. But not just laws. Behaviors, right? We could subject *any* behavior to some sort of calculus to determine whether or not the use of punishment, the state sanction...

Gary Becker: Well, state sanction would mean: “we have a law against this type of behavior.” That’s a state sanction. And therefore you have to ask yourself: “Is it desirable or not to have that law?” And then you have to do an analysis of it. I don’t care if you take this approach or any other approach.

Bernard Harcourt: The only difference would be civil remedies versus criminal penalties. So what would be criminalized would be those behaviors for which, when you go through your analysis, if you impose a criminal form of punishment (rather than civil liability, compensation, etc.), it would most efficiently bring that behavior to a level at which it minimizes the social costs or maximize social welfare, right?

Gary Becker: Absolutely. In my essay, I do distinguish between torts or civil law, and criminal law. And I have a definition that people may not like, according to which criminal law applies to activities or crimes that you cannot use a fine to deter, as opposed to civil violation. If you can use a fine, then it’s part of tort law or civil law. If you cannot then it becomes a crime. So, yes, I think that distinction comes out of the analysis. You don’t have to add it as a separate distinction.

Bernard Harcourt: But notice how radically regulatory, how much government analysis of social welfare would be going on if we in fact did that for any possible behavior, including being impolite, talking too much...

Gary Becker: Well, we may have a general principle for a lot of issues that when the effectiveness of government is so poor, we don’t want to regulate, and that’s my view. The government makes matters worse on many issues, rather than making them better. Take the capital punishment issue: you say, “Well, someone has to adopt a certain approach and make all these calculations.” What’s the alternative? What kind of calculation would you make?

Bernard Harcourt: Well, one approach is, as you say, to make a huge calculation about whether using capital punishment is an efficient use of resources.

Gary Becker: Right. What’s the alternative?

Bernard Harcourt: There are plenty of alternatives. For instance, we could adopt a deontological principle. You could come up with the principle that we don’t take life, among other alternatives.

Gary Becker: But then you have to analyze that principle: “We don’t take life because of that reason, this reason, and even though we may be saving ten lives we’re not taking this life.” Okay, you may want to do that, but you still have to go through, you still have to probe behind

that phrasing and make some sense out of it. You still have to go into some kind of analysis of this kind.

Bernard Harcourt: Well, you do not necessarily have to do a social welfare maximizing analysis of a deontological principle, but my point is not to argue for one versus the other.

My point was to develop an internal critique of a social welfare maximizing approach to the death penalty. I meant to argue that, in fact, we have got a lot of calculations to make, we have to do far more than find out the number of lives that we might save, because even if we could be saving five lives—even if that were true, if those studies were true—it might still turn out that with the amount of money it takes to execute someone, which is say, 2.5 million dollars because of judicial expenses and whatnot, we could save twenty lives through improved health care.

Gary Becker: Any approach has to do something like that. Unless you want to avoid analysis and replace it by a phrase, like “We don’t take lives”. That’s avoiding analysis. If you got to provide an analysis you have to analyze such a sentence, and wonder: “Why do I not want to take a life? What are the consequences, plus and minus?” And if you don’t want to do this, you’re avoiding the question, not answering it.

Bernard Harcourt: Right. But I would say that from your approach, which may be the right approach, one cannot *ex ante* say one is in favor of the death penalty. That’s all.

Gary Becker: Absolutely. That’s what I said. I think The paper does not even take a stand on this. I could easily be convinced not to use capital punishment!

Bernard Harcourt: And similarly, all behaviors would also be subject to that analysis.

Gary Becker: Well, there’s a lot of uncertainty about all this. And a model sets out various concepts. Now, to implement a model in actual policy, you have to quantify these contexts. That’s why I said my analysis stimulated a lot of literature trying to quantify these concepts. What’s the cost of doing this? How much deterrence is there? Tremendous literature, controversial literature. These are not things that are easily discovered. I’m not saying one can just take the model and say: “Well, we want to do this, and that.” No, it requires various judgments. I’m willing to make a judgment, we all have to make judgments, but in order to make stronger judgment we have to make them from a foundation.

Bernard Harcourt: Alright. But when you say, “that’s why I’ve always been a small government person,” where does that come from? What’s the *basis* for that statement?²⁰

Gary Becker: It comes from a belief that the government usually makes things worse, rather than making them better, for the bulk of the population. It’s an analysis—it may be a wrong analysis, but that’s the analysis. Some people may say that’s not true, that the government is better than the private sector for solving a lot of problems.

²⁰ Cf. Harcourt, *The Illusion of Free Markets*, p. 40.

Bernard Harcourt: Right, but I'm just trying to figure out... How did you come to that conclusion? Is it an evidence-based conclusion?

Gary Becker: I think so, but not a conclusion that is a hundred percent proven, so that somebody else couldn't have a different conclusion. Why do people differ on different public policy? I think most of the differences between people on public policy is not due to the fact that your values are different from mine, but to the fact that we have different evaluations of the consequences of different types of behaviors. So it's a different judgment about magnitudes.

When I say I'm a small government person, I am making the judgment that whatever the imperfection when the private sector operates, the effects are worse when I see the government operating. Now other people may say that the evidence for that is not so clear, that in other sectors it is different. I recognize that. But that is what it would be based on.

Bernard Harcourt: Okay, but just to get back to Foucault, and to let François Ewald have the last word...

Gary Becker: Yes, François, you should say something!

Bernard Harcourt: ... I have a sense that what Foucault is arguing—and this will be for the next session because it comes out in the third and final lecture on American neoliberalism...

Gary Becker: People say there is no good second act, now we're going to have a third!

Bernard Harcourt: I have a sense that what Foucault is arguing is that, somehow, embedded in the theory of subjectivity that is part of your 1968 article, and that differs from the French perspective on sovereignty, that somehow embedded in your notion of subjectivity is the conclusion that, in your words, "I'm a small government person."

Gary Becker: That does not stem necessarily from my essay by the way. You can read my essay, believe in the essay, and say I'm a big government person because there are tools... I mean there are other types of readings. I guess Foucault considered himself a socialist?

François Ewald: Socialist, no! On the Left.

Gary Becker: But well, what does Left mean? In terms of the role of government, let's say that Left usually means bigger government.

François Ewald: At this time, Foucault was in search of a new kind of governmentality. It was the research for new possibilities in politics that motivated his work on governmentality.

Bernard Harcourt: In fact, what Foucault explicitly says in these lectures is that socialism lacks a theory of governmentality.²¹ And so, to a certain extent, what he's doing when he's probing your thought is trying to explore forms of governmentality, in particular the form of neoliberal governmentality.

²¹ Foucault, *Naissance de la biopolitique*, p. 93 ; Foucault, *Birth of Biopolitics*, p. 92-94.

Gary Becker: Yes, well, in probing that—I don't know enough about Foucault to know where he ends up—you have to make some evaluation. Is the government going to do X or Y? I put it in pragmatic terms because these are the issues we tend to deal with. What should be the role of government health care policy? That takes some analysis. I don't care what conclusions you come out with, whether you say government should control prices or not... You have some analysis of that problem.

And when I say that I'm a small government person, I don't mean that there should be no government. Government is crucial to the functioning of any society. But for a lot of these policies, my judgment—and the evidence is limited in many of these areas—is that intervention just makes matters worse. And I don't see how you can resolve these issues... To me the crucial issue is, if you want to resolve these issues, is that you have to have some analysis, and an analysis is going to take you down the path of considering some costs and benefits. Now people may have different costs and benefits, and different assessments. They may put value on having freedom and people not being coerced by the government, things like that. And mine is just one particular form of that type of analysis.

Bernard Harcourt: So I'm going to give the last word to François Ewald to close this discussion. But while you think of your last word, François, I will just say that from the perspective of an internal critique, everything you say I can buy within the system, *except* making any kind of claim about being a small government person or not. It's just subject to a kind of complicated calculus that we need to make in every case, and I don't know what the outcome is ahead of time.

Gary Becker: I don't disagree. You need that calculus, and in a lot of areas we don't have enough evidence to make that calculation with confidence. So one is making a judgment when one says one thinks the government should be extended or contracted; one is making a judgment in the face of very imperfect knowledge and information about what the outcomes will be. It's not a judgment based on certainty. The framework—and I'm going to stress this—the essay I wrote on crime and punishment could easily be used by people who think the government should dominate the economy. There is nothing in there that dictates the conclusion that one should be a small government person.

Bernard Harcourt: Well, except for the fact that you limit the definition of crime to the penal code. You are effectively bracketing the space within which we are going to explore government intervention, and then, within that limited space, you bracket it even more by deciding what is not efficiently regulated by the criminal law.

I think you would want to say—you, Gary Becker—if you could rewrite the essay now: "The same economic analysis applies to *all* behaviors. Frankly, I can't tell you what the outcome will be. I cannot tell you whether I'm a big or small government person. You have to do the work!"

Gary Becker: Well, you would say this particular framework does not lead you to any conclusion about whether you're a big or small government person. You would need other kinds of evidence to determine that. But I did say something like that elsewhere...

Bernard Harcourt: Okay, we will read that too for the next seminar! François?

François Ewald: I think the discussion has addressed two aspects of your analysis. The first has to do with the economic analysis as a critique of a specific type of public policy. I think that, in this respect, there is no problem. And yet, at the same time, and after your work, people tried to set up new ways of punishing, relying on the normative rather than the critical side of your work. The side on which you try to rebuild, to conceive a new kind of art of punishment. But both sides are embedded in your work.

You were useful for Foucault for your critical insights. And you gave him the idea that it may be possible to make a critique of governmentality that is internal to a system. That is, you are a positivist. You take a set of laws and you wonder if they are effective, optimal. And you give us answers. For that, you build a specific set of tools, a *dispositif* of economic analysis.

The main question comes with the normative dimension of your work – it is there that you enter into competition with other approaches. For example, a moral one, with respect to deterrence, especially if you are Kantian. Kant says that the main moral rule is that it is forbidden to treat a man as a means, you always have to treat a man as an end. So then, what of deterrence? With deterrence as a tactic of punishment, you punish a person to protect and dissuade other persons. This takes one as a means to another end. At this point, you enter in the normative dimension and you are in competition with other normative views. And you can ask the question again about the effectiveness of these other dimensions. Indeed. But that is not the only way to compare them.

My second remark is that our problem, the main problem about punishment, what is it? It is not the evil of men, but a lack of information. You can only observe crime after it has been committed. And I think the difficulty with punishment, if it is given the role of deterring future crime, is that this tool, to use punishment to do this, is immensely difficult. The dream—or the horror—would be the capacity to prevent the crime before it happens. We are faced with a lack of information. This last observation brings out a major difficulty because it would imply that to build an effective punishment policy, we have to know everything. And that is, for you, impossible.

Bernard Harcourt: Thank you François. Thank you Gary.

Readers with comments should address them to:

Professor Bernard Harcourt
harcourt@uchicago.edu

Chicago Working Papers in Law and Economics
(Second Series)

For a listing of papers 1–600 please go to Working Papers at <http://www.law.uchicago.edu/Lawecon/index.html>

601. David A. Weisbach, Should Environmental Taxes Be Precautionary? June 2012
602. Saul Levmore, Harmonization, Preferences, and the Calculus of Consent in Commercial and Other Law, June 2012
603. David S. Evans, Excessive Litigation by Business Users of Free Platform Services, June 2012
604. Ariel Porat, Mistake under the Common European Sales Law, June 2012
605. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, The Dynamics of Contract Evolution, June 2012
606. Eric A. Posner and David Weisbach, International Paretianism: A Defense, July 2012
607. Eric A. Posner, The Institutional Structure of Immigration Law, July 2012
608. Lior Jacob Strahilevitz, Absolute Preferences *and* Relative Preferences in Property Law, July 2012
609. Eric A. Posner and Alan O. Sykes, International Law and the Limits of Macroeconomic Cooperation, July 2012
610. M. Todd Henderson and Frederick Tung, Reverse Regulatory Arbitrage: An Auction Approach to Regulatory Assignments, August 2012
611. Joseph Isenbergh, Cliff Schmitt, August 2012
612. Tom Ginsburg and James Melton, Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence, August 2012
613. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
614. Gary Becker, François Ewald, and Bernard Harcourt, “Becker on Ewald on Foucault on Becker” American Neoliberalism and Michel Foucault’s 1979 *Birth of Biopolitics* Lectures, October 2012
615. William H. J. Hubbard, Another Look at the Eurobarometer Surveys, October 2012
616. Lee Anne Fennell, Resource Access Costs, October 2012
617. Ariel Porat, Negligence Liability for Non-Negligent Behavior, November 2012
618. William A. Birdthistle and M. Todd Henderson, Becoming the Fifth Branch, November 2012
619. David S. Evans and Elisa V. Mariscal, The Role of Keyword Advertisign in Competition among Rival Brands, November 2012
620. Rosa M. Abrantes-Metz and David S. Evans, Replacing the LIBOR with a Transparent and Reliable Index of interbank Borrowing: Comments on the Wheatley Review of LIBOR Initial Discussion Paper, November 2012
621. Reid Thompson and David Weisbach, Attributes of Ownership, November 2012
622. Eric A. Posner, Balance-of-Powers Arguments and the Structural Constitution, November 2012
623. David S. Evans and Richard Schmalensee, The Antitrust Analysis of Multi-Sided Platform Businesses, December 2012
624. James Melton, Zachary Elkins, Tom Ginsburg, and Kalev Leetaru, On the Interpretability of Law: Lessons from the Decoding of National Constitutions, December 2012
625. Jonathan S. Masur and Eric A. Posner, Unemployment and Regulatory Policy, December 2012
626. David S. Evans, Economics of Vertical Restraints for Multi-Sided Platforms, January 2013
627. David S. Evans, Attention to Rivalry among Online Platforms and Its Implications for Antitrust Analysis, January 2013
628. Omri Ben-Shahar, Arbitration and Access to Justice: Economic Analysis, January 2013
629. M. Todd Henderson, Can Lawyers Stay in the Driver’s Seat?, January 2013
630. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, Altruism Exchanges and the Kidney Shortage, January 2013
631. Randal C. Picker, Access and the Public Domain, February 2013
632. Adam B. Cox and Thomas J. Miles, Policing Immigration, February 2013
633. Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases, February 2013
634. Ariel Porat and Lior Strahilevitz, Personalizing Default Rules and Disclosure with Big Data, February 2013
635. Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero, February 2013
636. Oren Bar-Gill and Omri Ben-Shahar, No Contract? March 2013
637. Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law, March 2013
638. M. Todd Henderson, Self-Regulation for the Mortgage Industry, March 2013
639. Lisa Bernstein, Merchant Law in a Modern Economy, April 2013
640. Omri Ben-Shahar, Regulation through Boilerplate: An Apologia, April 2013

641. Anthony J. Casey and Andres Sawicki, Copyright in Teams, May 2013
642. William H. J. Hubbard, An Empirical Study of the Effect of *Shady Grove v. Allstate* on Forum Shopping in the New York Courts, May 2013
643. Eric A. Posner and E. Glen Weyl, Quadratic Vote Buying as Efficient Corporate Governance, May 2013
644. Dhammika Dharmapala, Nuno Garoupa, and Richard H. McAdams, Punitive Polic? Agency Costs, Law Enforcement, and Criminal Procedure, June 2013
645. Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, Libertarian Paternalism, Path Dependence, and Temporary Law, June 2013
646. Stephen M. Bainbridge and M. Todd Henderson, Boards-R-Us: Reconceptualizing Corporate Boards, July 2013
647. Mary Anne Case, Is There a Lingua Franca for the American Legal Academy? July 2013
648. Bernard Harcourt, Beccaria's *On Crimes and Punishments*: A Mirror of the History of the Foundations of Modern Criminal Law, July 2013
649. Christopher Buccafusco and Jonathan S. Masur, Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law, July 2013
650. Rosalind Dixon & Tom Ginsburg, The South African Constitutional Court and Socio-economic Rights as "Insurance Swaps", August 2013
651. Maciej H. Kotowski, David A. Weisbach, and Richard J. Zeckhauser, Audits as Signals, August 2013
652. Elisabeth J. Moyer, Michael D. Woolley, Michael J. Glotter, and David A. Weisbach, Climate Impacts on Economic Growth as Drivers of Uncertainty in the Social Cost of Carbon, August 2013
653. Eric A. Posner and E. Glen Weyl, A Solution to the Collective Action Problem in Corporate Reorganization, September 2013
654. Gary Becker, François Ewald, and Bernard Harcourt, "Becker and Foucault on Crime and Punishment"—A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session, September 2013