International Journal of the Sociology of Law (1999), **27**, 379–399
Article No. ijsl.1999.0094, available online at http://www.idealibrary.com on IDEAL®

Michel Foucault: Regimes of Punishment and the Question of Liberty

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'Sex abuse' has recently become an object of knowledge of the human sciences and thereby, juridical punishment. While not diminishing the problem of sexual violence, this paper explains the intensification of the sexual abuse discourse as contingent upon an incitement to talk about it in a 'confessional society'. The paper argues that notions such as 'normality', 'deviance' and therefore (ab)use, are produced by power and are, consequently, contestable. It examines the ways that under the current punitive disciplinary rationality, there is an imperative of continuous production of knowledge that incites the sex abuse discourse. In a liberal society, failure to determine such knowledge is a threat to liberty and thereby, liberalism itself.

Introduction

> [F]or liberal government ... liberty is a condition of security (Gordon 1991: 18).

'Sex abuse' has recently become a prominent object of knowledge of the law in part through the discourses of the human and social sciences. It was introduced into the psychiatric discourse in a substantial way in 1994 (DSM IV). It has also developed an intensified profile in advertising, in practices of investigative journalism, in the eroticized art photography of children, in the

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0194-6595/99/040379+21 $30·00/0

sexual abuse storylines of soap operas on television, and in the normalization of the notion of family life under social surveillance. Sex abuse is associated not only with a proliferation of images, but with a sense of truth-value invested in these images. The emergence of the discourse around 'sex abuse' raises questions about liberty; in a liberal state it is certainly a political question. Under liberalism, state security turns on economic strength and that, in turn, depends on knowledge developed by experts in the human sciences where the politics of interpretation based on knowledge implies continual agonistic contests. That discourse overtly competes with the juridical one at court, even though the general perception is that the latter is the only one that is operating. In relation to the contests involved in interpretation, sex abuse discourse has real effects in law and has made expertise integral to defining, disclosing, and prosecuting sex abuse. Liberty, then, is contingent upon a certain knowledge production and not a universal condition. Under modern conditions, liberty is already and always under reconstruction. Critique is thus never complete.

The paper begins by locating liberalism as the underpinning rationale of the law in many Western countries. It adopts a position similar to the Critical Legal view that the law is a more problematic discourse than can be admitted by realist legal doctrine. While not attempting to dismiss the reality of sexual violence, the paper explains the recent intensification of the sexual abuse discourse as contingent upon an incitement to talk about it in what Michel Foucault (1978) calls a 'confessional society'. Next, the paper examines the ways in which, under the current punitive disciplinary rationality, there is an imperative of continuous production of knowledge in the human and social sciences that incites the sex abuse discourse. It argues that criminals, already defined as 'offenders', were redefined as 'delinquents' to be treated. Then, a discussion of the governance of dangerousness traces the move from eugenics to what Donzelot (1979) calls the expert *psy*-knowledge that underpins the human sciences. The paper concludes that any failure in law to distinguish between the sex abuse discourse and actual violence is a threat to liberty and thereby, liberalism itself.

Liberalism

Liberalism is the major public discourse that underpins the law in many Western countries. Its tenets are freedom, rationality, equality, and individualism, but how these are worked out in practice is, of course, a matter of creative contest. At the 'progressive' end of the liberal spectrum, legitimate authority is seen as central and society is thought of as a liberal democratic framework. At the 'conservative' end of the liberal spectrum is a philosophy that wants government out of the lives of individual citizens. In all versions of liberalism there are claims about the rights of individuals in preferences to authoritarian

rule. Rationality is fundamental to liberalism on the basis of two notions: first, humans are essentially rational by nature, and second, all beliefs should be open to rational scrutiny. Consequently, the structures, social institutions and even the idea of authority itself would function contingent upon their ability to withstand rational investigation. The liberal position on justice is that it does not represent the interests of any particular group, but claims to provide a neutral framework to support pluralism. The appeal is to a standard deemed to be independent of the interests of contending parties. The law is idealized in this role, and while the advocacy of freedom is still a central plank in liberal theory, the nature of this freedom is in dispute. On the basis of a fundamental distinction between negative and positive freedom, Marshall (1996: 56) suggests it "may be better to see liberalism, not as a set of basic ideas or principles, but, rather, as an attitude of mind".

In a reversal of traditional liberal explanations and, following Foucault, this paper argues that expertise in a disciplinary society is a form of power relations that produces knowledge about sex abuse at the intersection of law and sexuality. This provides one likely partial explanation for the rise of the sex abuse discourse. In order to provide a focus for the law, the paper turns to Foucault's work on the history of sexuality and governmentality. Following Brown (1995: ix), this paper suggests that the discourse of sex abuse is an example of a "well-intentioned contemporary political project and theoretical position that inadvertently redraws the very configuration and effects of power that it seeks to vanquish". Brown (1995: ix–x) asks about the perils of pursuing emancipatory political aims within largely repressive regulatory and depoliticizing institutions that themselves carry elements of the regime (i.e. masculine dominance) whose subversion is being sought? This is not to suggest that empowerment is merely, or only, an illusion. Rather it is to say that many deployments of that idea draw heavily of an undeconstructed subjectivity such that it is possible to feel 'empowered' without being so. This illusion forms an important element of legitimacy for anti-democratic dimensions of capitalism. Where under oppressive circumstances the individual is asked to examine their inner psychology independent of the realities of the outer world.

Liberal institutions have been cited for their anti-democratic effects, as Nietzsche notes "liberal institutions cease to be liberal as soon as they are attained: later on, there are no worse and no more thorough injurers of freedom then liberal institutions: . . . they undermine the will to power: . . . they make men small, cowardly, and smug" (Nietzsche 1889: 103).

Foucault, Governmentality, and the Law

Foucault (1991) employs the term 'governmentality' to mean the art of government and, historically, to signal the emergence of distinctive types of rule that

became the basis for modern liberal politics. His starting point for the examination of the problematic of government is the *series*, security, population, and government. He maintains that there is an explosion of interest on the 'art of government' in the 16th century which is motivated by diverse questions: the government of oneself (personal conduct); the government of souls (pastoral doctrine); and the government of children (problematic of pedagogy). Foucault says that the problematic of government can be located at the intersection of two competing tendencies—state centralization and a logic of dispersion. This is a problematic that poses questions of the *how* of government, rather than its legitimation, and seeks "to articulate a kind of rationality which was intrinsic to the art of government without subordinating it to the problematic of the prince and of his relationship to the principality of which he is lord and master" (Foucault 1991: 89). Foucault (1979*a*, 1991) explains that we are not ruled simply by laws, but by the whole governmental apparatus. In other words our governance is not only legalistic, but also governmental and thus open to relations of power that offer contestable streams of advice. Governments tell us, for instance, that the complexities of modern life are such that it is inevitable that a measure of freedom must be sacrificed so that the government can make our lives efficient. Since we are told by so-called legitimate authority that it is necessary to be dealt with in this way, we believe it must be right, or natural, or both. According to Foucault (1991), to get beyond this liberal thought, it is necessary to study the 'networks of power' beyond the 'official' institutions of power. Then we might see that jurisprudence could be characterized as a study of attempts to legitimate the exercise of power through the use of mythology. This imaginary juristic "relationship of domination (is) fixed throughout its history, in rituals, in meticulous procedures that impose rituals and obligations" (Foucault 1977*c*: 150).

Foucault suggests that a characteristic of modernism is the claim that the law expresses, even preserves and secures certain truths. The idea of justice is an effect that for Foucault, "has been invented and put to work in different societies as an instrument of certain political and economic power or as a weapon against that power" (cited in Rabinow 1984: 6). Law had become synonymous with truth. The study of law, then, is not a study of philosophy or ethics, but of politics and power where "the systems of right ... should be viewed ... not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates" (Foucault 1977*a*: 96).

The Confessional Society

The paper adopts a view of subjectivity in which the subject's experience is interpreted as the complex, often contradictory outcome of unconscious desires, conscious rationality, and available positions in a multiplicity of discourses. This view accepts that an individual can no longer be assumed to

communicate their experiences in a singular or logically consistent way, as is assumed by the unitary, rational subject adopted by the social and human sciences that the law employs to inform its processes.

One pervasive, powerful, and ordinarily invisible method of subjugation in our society is the confessional mode that incites us to talk ourselves into certain ways of being. Foucault (1978: 59) argues that modern society can be regarded as a confessional, where with the help of professionals, truth about oneself can be discovered through self-examination of consciousness, and the confession of one's feelings, attitudes, desires, thoughts and acts. "Western societies have established the confession as one of the main rituals ... for the production of the truth .... The truthtful confession was inscribed at the heart of the procedures of individualization by power" (Foucault 1978: 58–59).

The imperative of the confessional is that every sexual act and thought be brought to light, catalogued, and examined. In the Christian mode, confession is buttressed by the activity of the priest, who, on God's authority, proclaims salvation in such 'findings'. The individual therefore implicates his or herself when they (re)construct and confess such events and declare guilt. From the 18th century to the present, the techniques of verbalization have been reinserted in a different context by the so-called human sciences in order to use them without renunciation of the self, but to constitute, positively, a new self (Foucault 1988*a*: 49). The idea of 'self as truth' so derived, is the antithesis of the notion of self held by the ancient Stoics, who simply examined their consciences and declared who they were for self accounting purposes rather than for renouncing themselves; theirs was an ethic of self. Christianity adopted the Stoic form but introduced self-renunciation. Since our era is one of rapid change, the self is entrepreneurial and constantly reconstituting itself under the human sciences. Even so, Foucault notes, the knowledge of self as truth is still firmly embedded in sexuality. Clearly, these practices are powerful tools for teaching the connection between knowledge of sex and erotic pleasure.

The confession based on 'scientific' knowledge is a productive mode of self-constitution that is both therapeutic and controlling. Nowadays we increasingly know who we are through experts—whether they are in advertising, marketing, or psychology, and much of that self-knowledge is constructed through sexual imagery. Foucault exposes the relationship between sex and language when he writes "modern societies dedicated themselves to speaking about it [sex] *ad infinitum*, while exploiting it as the secret" (Foucault 1978: 35). As he puts it, "[t]he association of prohibition and strong incitations to speak is a constant feature of our culture" (Foucault 1988*a*: 16–17).

The subject is thus governmentalized by the twin imperatives of secrecy and the compulsion to talk. This form of power depends on a belief that we 'have' a depth to ourselves that can be revealed only with *psy*-expert help. Through the expertise of (*psy*)chologists, (*psy*)chiatrists, and (*psy*)chotherapists, we come to know who we are through the ways in which we constitute

ourselves through confessional practices within their ambit. Sexuality is thus not a timeless universal expression of human desire, rather, it is contingent upon forms of expertise dedicated to speaking its truth. For Foucault, in the modern world, expertise, with its vocation to incite 'sex talk', produces knowledge about sex abuse. The law then takes what Foucault (1977*b*) calls power/knowledge about sex as its own 'truths'.

This type of self-constitution is radically different from that articulated by previous thinkers as diverse as Rousseau and Kant. For them, if things changed, the self was still constructed by familiar concepts. Their world was slow to change and few, if any, new moral concepts came into circulation. Today we have a radical reconstitution of self through new concepts emerging under the human sciences, e.g. the criminal of either genetic or psychological origin, of which the child sex abuser is but the representative specimen in a new syndrome.

Syndrome development

Following Gordon (1991: 18), we can say that liberalism functions as a 'fertile problematic' and 'a continuing vector of political intervention' as its 'neutral' structures allow for the emergence of 'syndromes' that discipline social life. Increasingly, representations of one such syndrome, sex abuse, currently encircle us. This is particularly relevant to the question of sexual abuse in terms of the recent 'discovery' of evil practices to which, according to some experts, so many have, so far, been 'blind'.

The number of reported cases of sexual abuse has markedly increased. In New Zealand for instance, *The Waikato Times*: 9 November 1994, reports a spokesperson from the *Accident Rehabilitation and Compensation Insurance Corporation* as saying that over one 4-month period as many as 500 people a week were filing claims for sexual abuse. A government spokesperson believes that the claims reflected people's awareness and greater willingness to talk about sex abuse rather than a rise in its incidence. The basis of this belief was not examined. The New Zealand experience reflects a worldwide phenomenon. Scott (1996) saw the issue emerging in the U.S.A. in 1987 when some forms of sexual harassment were made legally actionable. On the basis of a government funded research project in the United States into the relationship between images of children, crime, and violence in *Playboy, Penthouse*, and *Hustler* magazines, Reisman (undated) concluded that "in sum, these magazines paired adult female nudity with images of children, crime and violence, for millions of juvenile and adult readers over decades". The McMartin's Preschool case in California in the early 1980s involved 208 counts of child molestation, led to the longest and most costly court trial in U.S. history, and ended without a conviction (Meyer 1997: 3). The case of Judge Clarence Thomas from Oklahma, accused by Anita Hill of sexual harassment dominated

American press in 1991 and 1992 (see for example Paglia 1992: 46–48). Then came accusations by 24 women against Republican Senator Bob Packwood, accusations of the sexual abuse of a large group of women by men of the U.S. Navy at the infamous Tailhook convention, and more recently in 1994 accusations against President Clinton by Paula Jones that he sexually harassed her at Little Rock in 1991. The latest and most famous of all, of course, is the case of Monica Lewinsky and Bill Clinton.

Interpretations

General propositions in law do not necessarily decide concrete cases. Cotterrell (1989: 211) for example, refers to "the general apparatus of legal doctrine as transcendental nonsense [and as] mystification [and] because of the manipulability of concepts, legal texts are infinitely interpretable". Ward (1998) says that critical legal studies are not alone in accepting the realist idea that general concepts in legal doctrine do not determine outcomes; the liberal law tradition relies on human and social sciences that themselves are based on a justification of a particular kind of society. Therefore, the influence of the human and social sciences upon legal doctrine is far from neutral. Curzon (1992: 261) argues that "on several grounds, liberal jurisprudence stands condemned; at best it is muddled, at worst it is a cloak for class interests". According to the philosopher and historian of statistics Ian Hacking (1995), the empirical evidence around for sex abuse is problematic, if not incoherent. It seems then, that the spaces between real sexual violence and the discourse are occluded.

Definitions within the sex abuse discourse itself have been moving. Scott (1996: xvi–xvii) for instance, points out that in 1987 the most widelly accepted definition of sexual abuse was "the involvement of dependent, developmenteally immature children and young people in activities which they cannot fully comprehend, to which they cannot give informed consent, and which violate the social taboos of the culture". By 1989 the law in the United Kingdom gave mandatory guidance to professionals within its ambit; sexual abuse had been defined as "actual or likely exploitation of a child or adolescent. The child may be dependent and/or developmentally immature" (Scott 1996). There are many interpretations that could arise from such a definition, for example, what counts as evidence for 'likely', and what constitutes exploitation? These issues are far from resolved. Quite rightly then, Scott (1996: xvii) asserts that because of definitional problems the field of research into child abuse is fraught with difficulty. She writes, "as definitions became more restrictive, there is some evidence that prevalence appears to fall". This partly explains the wide variation in the data on the prevalence of sex abuse; logically the restriction in definition means there is less of whatever counts as sex abuse. According to recent research (Scott 1996: xvii), "the rates (of abuse) are highly discrepant and vary from 3 to 90 percent". These discrepancies in definition

became a matter for governmental concern in England in 1995 when it was reported that research found that one in six adults claimed to have suffered sexual abuse during childhood. As a possible explanation for this claim, Scott (1996: xvii) offers, "no distinction had been drawn between reports of rape, molestation, and indecent exposure". Against this claim were others asserting that too narrow a definition of abuse works against children's rights. But the capacity to construe almost any situation as abusive could result in the statistics being ignored and/or the issue not being taken seriously.

Psychiatry provides an insight into the problematic knowledge claims of the human sciences. The DSM III (1980: 236) manual notes that trauma must be an event which lies outside the normal pattern of human experience and which would clearly cause suffering in virtually anyone. The idea of 'trauma' still required a social interpretation such that there was agreement about what constitutes 'suffering in virtually everyone'. And in the common sense world such a determination is probable. This meant that the psychiatric discourse had accepted the Wittgensteinian (Wittgenstein 1953: 92) edict that there is a major difficulty with a private language that has no independent criterion of correctness. By the time the DSM IV manual was published in 1994, it was no longer the observers/(psy)experts who determined what should be regarded as traumatic, rather it was limited to the individual's own interpretation, i.e. private language. Foucault (1997: 46–47) provides a deconstructive commentary on the logic of what he terms the 'depsychaitrization' in such discursive manoeuvres in relation to the 'consultation' where private language reinforces professional power. He reports that the doctor says:

> I only ask one thing of you, which is to speak, but to tell me effectively everything that crosses your mind . . . . You won't be able to boast about fooling your doctor any more, since you will no longer be answering questions put to you; you will say what occurs to you, without even needing to ask me what I think about it, and should you try to fool me by breaking this rule, I will not really be fooled; you will be caught in your own trap, because you will have interfered with the production of the truth, and added several sessions to the total you owe me (Foucault 1997: 46–47).

Even if the personal interpretation of the speaker was a free floating signifier, in order to count as 'sex abuse' it must still align itself with the categories provided in the psychiatric manual. The ordinarily assumed position of truth telling is thus subverted. That provides the same outcome as the DSM III (1980) in the sense that the categories in the manual govern what can be said. The truth, i.e. that of which we can speak, therefore, is not inherent in what is said, but rather, in the discourse. In the case in question it is partially constructed from the DSM IV (1994) categories.

The DSM IV (1994: xviii) points out that its categories are "a descriptive approach that attempted to be neutral with respect to theories of etiology".

Each category "is a useful indicator for a mental disorder, but none is equivalent to the concept, and different situations call for different definitions" (DSM IV 1994: xxi); mental disorder is more than mere language can describe. We are not told if the concept changes in different situations or if the interpretation changes, and in the absence of language, how we would know. Without a theoretical position, definitions derived from interpretations of phenomena are the basis of the category constructions. What this implies is an ahistorical and atheoretical basis where diagnosis is based on the analysis of observable phenomena that itself is 'self-evidently' explained in terms of the phenomena. It might not be too much to suggest that there is something circular here.

The DSM IV (1994: xxiii) discusses the problem in forensic situations of the fit between the law and the DSM IV categories—"the clinical diagnosis of a DSM IV mental disorder, is not sufficient to establish the existence for legal purposes of a 'mental disorder', 'mental disability', 'mental disease', or 'mental defect'. However, further on we find the contradictory statement that "DSM IV may facilitate the legal decision makers' understanding of the relevant characteristics of mental disorders" (DSM IV 1994: xxiv). What is required in addition, it is argued, is "information about the individual's functional impairments" (DSM IV 1994: xxiii). If mental disorder and functional impairment are actually different they would exhibit different phenomena. If both are real then what is their relationship. Could impairment manifest as, or cause, a disorder, for example? If a mental disorder were to cause a functional impairment or vice versa, the origins of the phenomena would be ambiguous. If a mental disorder were to be diagnosed in association with a disability, there is no telling whether they are different or if one is the manifestation of the other or *vice versa*. In this last case there may be no difference. That would, of course, collapse the category distinctions between disorder and impairment. By its own admission the DSM IV has no explanation of causes (DSM IV 1994: xviii) and phenomena is interpreted. What would make the difference is the ways in which the interpretation occurs. But how, one wonders, would one know what to look for when constructing a category. The problem is that when we decide to observe something, we have already decided what to pay attention to from infinite possibilities—we have already formed a theory about what we regard as important.

What constitutes disorder is essentially that which is regarded as 'disordered' for a particular set of cultural values—in this case a eurocentric profession. What makes it true is the power to enforce the definitions. If this is so, then the theory of interpretation will be from within the professional framework. The terms used are indeed "merely terms of convenience" (DSM IV 1994: xxv).

The DSM IV (1994: xxii) claims that its categories do not classify people "when actually what are being classified are disorders that people have". This is like saying a person is separate from their experience, i.e. people 'have'

disorders like they 'have' heads, that may, as possessions, be removed (i.e. cured) with expert help. What they do have instead, is the application of labels from an ordered professional system for classifying people. What this amounts to is a process of observation that denies any theoretical framework, and which constitutes grounds for unproblematic category construction. Any claim that the development of the categories was based on empirical investigations into thousands of situations merely compounds the problem (or advances the profession, depending on where interests lie).

In both the DSM III (1980) or the DSM IV (1994), we would be dealing with a memory of a real or imagined past event. The individual's speech is taken as evidence although, given the problems of memory as argued by Hacking (1994, 1995), there could very well have been no event. The only requirement under the DSM IV confessional mode is that individuals constitute themselves subject to the categories provided. Even though in this case it is the victim who speaks, it is still the experts who set the categories. The logic does not require verification or evaluation of the statements except to ensure a 'proper' fit under the classification system. Given the massive increase in categories from the DSM III (1980) to the DSM IV (1994), such knowledge is infinitely malleable, highly productive, and therefore problematic.

Historically, the production of knowledge has been problematic. In the case of the Witches of Salem, under an ancient rationality of trial by ordeal, a woman who confessed was deemed to be a witch as also were those who, by not confessing, were said to be in denial and therefore, guilty. In a re-interpretation of the case, Brenner (1976) reports that by the time Governor Phipps called a halt to the proceedings in 1692 and decided that there were no such things as witches, 19 people had been hanged, 100 were awaiting trial, more had been accused and not yet charged, and a further 50 had confessed to witchcraft. Later analysis of the phenomena of witches attributed it to economically based political factionalism and struggles for control. Nietzsche (1966: 129) points out (by analogy) that 'sinfulness' is not a fact, merely an interpretation of a physiological depression. He says the fact that someone feels guilty or sinful is no proof they actually are guilty or sinful. As he states, "recall the famous witch trials: the most acute and humane judges were in no doubt as to the guilt of the accused; the 'witches' themselves did not doubt it—and yet there was no guilt" (Nietzsche 1966: 129). In relation to sex abuse, the individual interpretations under the categories of the DSM IV (1994) where victims alone 'recall' a memory (albeit with the help provided by psychiatric categories), may or may not be based on an event in real life. In order to establish a credible standard of proof in other parts of the law, corroboration of others would also be required. But, by definition, through guidance offered by the DSM IV (1994) manual, all that the law requires from the medical profession is the documented confession of the victim/accuser.

Criminology: The Birth of a Special Knowledge

Knowledge changes as concepts changes their function over time, often gradually and without notice. Before we more to Foucault's work in detail, we should refer to Wittgenstein who offers explanations as to how and why concepts change their meaning based on a change in function. Rather than employing a transcendental explanation, Wittgenstein argues for deriving meaning from the ways in which practices happen in ordinary life. Wittgenstein rejects the reference to mental activities, but creates a much larger discursive domain for interpretation and meaning. The meaning of a word, according to Wittgenstein, is in its use in the context of what he calls a 'language game' or discourse. Wittgenstein (1953: I, 83) states: "A rule stands there like a sign-post (and) the sing-post is in order—if, under normal circumstances, it fulfils its purposes". According to Marshall (1996: 205) "for Wittgenstein ... where regularity is perceived, the rule is already 'laid down'; if the present situation is sufficiently like previous situations, then there is warrant for following the rule". The point is that if punishment can be shown to be applied in a manner that is different from the traditional juridico-legal one, its meaning has shifted. The meaning of punishment is in its practices, i.e. the rules that we could take as signposts for its meaning under any particular punitive rationality (see also Marshall 1996). The meaning of punishment had changed as Kritzsman (1988: 125) points out:

> the psychiatrization of crime ... emphasized the character of the criminal rather than the crime in which he participated ... the judicial system focus(sed) on the criminal's potential danger to society instead of his particular crime (it enabled) the judicial machine to police public hygiene.

From an investigation of the history of the 'dangerous individual' in the 19th century, Foucault (1977*c*: 129) concludes something similar in that the intervention of psychiatric medicine in the penal system:

> is neither the consequence nor the simple development of the traditional theory of the irresponsibility of those suffering from *dementia* or *furor*, (but) is due to the regulating of two phenomena arising necessarily, one from the functioning of medicine as public hygiene, the other from the functioning of legal punishment as a technique for transforming the individual ... these two demands are both bound up with the transformation of the mechanism of power through which the control of the social body has been attempted in industrial societies since the eighteenth century.

In examining the basis of psychiatric power, Foucault (1997: 40) points out that the relation between power and knowledge indicates that knowledge is a function of our socio-political world rather than having any inherent truth value:

> For a long time, medicine, psychiatry, penal justice, and criminology remained—and in large part still remain—within the limits of a

> manifestation of truth inside the norms of knowledge ... the second of these (i.e. psychiatry) tending to hide beneath and getting its justification from the first. The current crisis in these disciplines ... calls knowledge into question ... it questions the relations between our society's economic and political structures and knowledge (not its true and untrue contents but its 'power-knowledge' functions).

Because judicial punishment is a consequence of knowledge produced outside of itself—i.e. under the psychiatric sex abuse discourse—this is a problem, especially for a positivistic legal position that has a liberal view of punishment [1]. Through a version of a historical explanation termed genealogy adopted from Nietzsche, Foucault (1977*c*) argues that the concept of punishment has changed its meaning from juridico–legal to disciplinary. Although on the surface 'crime' is said to be the target of the juridico–legal system, and therefore it may appear that the juridico–legal view has not been replaced, its processes are informed through the power/knowledge of the disciplinary discourse experts.

An illustration of changes in regimes of punishment can be seen in the work of Pasquino (1991), who investigates a genealogy of two chronologically distinct punitive rationalities towards the end of the 19th century in Europe—classical penal justice and the new penal science—and what makes their transformation possible and intelligible at the level of practices (see Appendix). The previous classical legal justice system was constructed around three things; law, crime, and punishment, and had emerged from earlier times to fix limits on sovereign power as well as to support the Hobbesian social contract. Under that penal code, on occasions, those who were otherwise circumscribed within society's values, committed crime. Foucault (1997: 41) points out by analogy, that "before the 18th century, madness was not systematically iterned; and it was considered essentially as a form of error or illusion". Like madness, the existence of a criminal act had to be proven, but there was no assumption of, or reference to, that special class, the 'criminal'. The right to punish under classical legal justice was based on the rule of law. Under its utilitarian philosophy, punishments were graded and modulated according to the crime. Since under the social contract individuals were considered to have free will, crime might be considered to be a miscalculation, but there were no special types.

The key technologies of classical legal theory were intervention by way of intimidation, and dissuasion under the shadow of Bentham's panoptican (see Foucault 1979*b*). The panoptican technology of the classical legal justice system provided the very means to develop knowledge for the human sciences. Pasquino (1991: 240) remarks on the "imaginary theatre of punishments"; although the panoptican technology was indeed visible for deterrent effects, it is also known that an individual's imagination exaggerates, and therefore increases the potential of its effects. During what he explains as 'The Great Confinement', Foucault (1979*b*) says the disciplinary blocks such as prisons, lunatic asylums,

schools and military academies, incarcerated, observed, examined, classified, and eventually normalized individuals according to the statistical norms of the human sciences. The process of normalization also structures the individual to the extent that individuals come to accept normalized constructs as their own. From these classifications, remedial treatments could be calculated. A rationale for 'criminal nature'—*homo criminalis*—had now been developed.

Pasquino (1991: 236) points out that after a protracted process of changes in juridical codification, the birth of the modern penal sciences was inaugurated in 1885 "by means of a contrast drawn on a number of crucial points with the prevailing doctrines of the classical school of legal theory". The prevailing penal code had failed on two counts: the incidence of crime continued to rise, and, despite the rule of law, those who committed crime had not been accepted as entirely normal. One notable example was the failure of the penal code to explain an unusual high number and severity of murders in France in the early part of the 19th century. Recounting the infamous case of Pierre Revierre, Foucault (1975) illustrates the ways in which the insertion of medical knowledge into the judicial system constituted a move towards the creation of a penal science (since medical knowledge was, and in large part still is, considered scientific). All accounts of the case, including the memoirs of the perpetrator of the crime, Pierre, were credible; the problem was that they were all different and therefore not criteria for judgement; rationality had failed. The solution was supplied by psychiatry. Homicidal monomania—a type of partial insanity—was the new explanation under which "the madman, retaining the use of almost his entire reason, harbours delusions on any one subject or on a very few subjects; feelings, reasoning, thinking, and acting just as he felt, thought, and acted before he fell ill" (Fontana 1975: 276). True to scientific form, monomania was subdivided into subcategories; 'intellectuals', 'instinctives', and 'reasoners', categories which at times intersected, became difficult to interpret, and which, therefore, required expert help to decipher. Because of its occluded nature, monomania was only to be used "with extreme caution in the interest of the social order [and] decisions . . . should be reserved solely [based on] the informed opinion and probity of doctors" (Fontana 1975: 278). Criminality and mental disease were thus associated under the law. That association was also made in the literature and popular imagination of the time. In Dostoievesky's *Crime and Punishment* (1955: Part 1, Section 6) for example, the character Roskolnikov illustrates that association with his view that:

> an eclipse of reason and loss of willpower attacked a man like some sort of disease, developed gradually, and reached its climax a short time before the crime was actually committed; it continued the same way at the moment of the crime and for a short time afterwards, according to each individual; then it passed off like any other disease.

Cases like these reflected the new explanations for the reformation of criminals; penal science. Rather than punishing the crime according to a

predetermined scale, the criminal was to now be invented as a sick specimen—a monomaniac—and treated accordingly. It is, therefore, important to note the shifting grounds of explanation. Foucault (1988*b*: 140) states that the idea of monomania was abandoned shortly before 1870 on the basis that mental illness was not properly explained as partial insanity, it was too negative as well as being unreliable because of its episodic occurrences. Thereafter, mental illness was to be seen as, firstly, an attack on the emotions rather than an attack on thought and, secondly, as a notion of degeneration that operated across several generations. (De)generation was allied to the developing theories of eugenics.

The law adopted medical explanations and consequently retained its capacity to explain what would otherwise have been unexplainable. The critical point was the emergence of the anthropology of the sub-species of the 'criminal'; a new figure—*homo criminalis*—had been engendered outside the sphere of classical penal thought. The person of the criminal had now entered into the concept of law and it was necessary to undertake the pathological and psychological study of criminals; that it to say, a person whose psychic and moral constitution is not normal. "There is no point in searching for the motive of his or her act: the reason for the crime is, precisely, the person's criminality" (Pasquino 1991: 236). "Beyond admission, there must be confession, self-examination, explanation of oneself, revelation of what one is. The penal machine can no longer function simply with a law, a violation and a responsible party" (Foucault 1988*b*: 126). Criminology was consequently promoted under this transformation. Pasquino (1991: 246) outlines the three key tasks of the new penal sciences: "[to] establish a pedagogy to provide criminologists with the knowledge necessary to carry to their duties ... [to] explain the socio-psychological causes of crime [and to] attack the very roots of criminality". He goes on:

> the penal theory which established itself in the late eighteenth century proceeds from the premise of society as a source of life and right to deduce the activity as a self-defending subject via a special anthropology which is at once a symptomatology, a pathology and a therapeutic for a social body prone to all the disorders induced by subjects who are unreliable because they are inadequately subjected/subjectified and therefore always dangerous (Pasquino 1991: 247).

The focus was now on the origin or aetiology in order to find the causes. That search led to a consideration of social defence and the practices of elimination of causes. There now comes into being a new domain of intervention called social hygiene, to prevent, as well as to sanitize, the social breeding grounds of crime. There is a move from deterrence to neutralization. If we apply this logic to the criminal, we can attribute the cause of crime to a malfunction within the criminal type. In other words, because

of his typology, the criminal is attributed a pathology (i.e. is unhealthy or not normal) and requires treatment to neutralize the cause. Criminals had become medicalized; they were now the 'other' to be normalized. Since that pathology was 'mental' it was a target for reconfiguration by *psy*experts and their various *psy*technologies, all essentially based on the self-constituting confession.

From Offender to Delinquent

In a litigious context, the idea of offence conjures up images of offender for which punishment is legislated, whereas delinquency brings up images of personal culpability and the possibility of correction through 'treatment'. After criminals had been invented then, they were redefined from 'offenders' to 'delinquents' with real effects:

> The delinquent is also to be distinguished from the offender in that he is not only the author of his acts ... but is linked to his offence by a whole bundle of complex threads (instincts, drives, tendencies, character). ... A zoology of subspecies and an ethnology of the civilizations of malefactors, with their own rites and language, were beginning to emerge in a parody form ... but an attempt was also being made to constitute a new objectivity in which the criminal belongs to a typology that is both natural and deviant (Foucault 1979*b*: 252–253).

The delinquent was to be diagnosed and treated according to the degree of variance they exhibited from what was defined as normal. *Psy*experts classified delinquents according to knowledge produced through observation under panoptical conditions, and calculation and normalization through statistics. In these ways, the classification systems of the human sciences literally created new descriptions and new ways of being a person.

Normalization refers to normality or normalcy. But 'normalcy', as Hacking notes, is a meta-concept because no one thing or person is simply 'normal' or 'abnormal' in one or more particular aspects. "The idea of normalcy was transferred from individual bodies to kinds or classes of people or their behaviour, it was then internalized, and worked upon us from the inside. In our souls we strive to be normal" (Hacking 1994: 38).

Canguilhem (1991: 125) points out an ambiguity about the meaning of normal:

> normal is that which is such that it ought to be: (ii) normal, in the most usual sense of the word, is that which is met with the majority of cases of a determined kind, or that which constitutes either the average or standard of a measurable characteristic ... it designates at once a fact and a value attributed to this fact by the person speaking, by virtue of an

> evaluative judgement for which he takes responsibility (Canguilhem 1991: 125).

Normal, as Hacking (1994: 38) explains, is "our most striking example of a concept which is both descriptive . . . and evaluative". The first sense of normal is 'typical' and the second is 'average'. In the second sense, normal is calculable, functions as a standard to aspire to, and is to be internalized by responsible individuals. That internalization would indicate a 'cure', and that the cause had been eliminated. The delinquent could then be paroled on the basis he/she had been rehabilitated, i.e. 'normalized'.

Normalization is thus a form of historically constructed rationality that gives a form of political domination to the notion of autonomy based on such rationality. Through what Foucault (1979*b*) calls disciplinary knowledge we now 'know' how to be 'normal'. The enlightenment idea of human nature has been displaced by that of 'normal people' and 'normal behaviour'.

Under the human sciences, 'deviance' has been 'invented', just as was 'madness' through a relation to a statistical norm. Sexuality *per se* has not been repressed, rather certain facets of it have been incited to prominence. But the deviance produced by the discourse is nevertheless to be treated under the prevailing liberal rationality, as it is presently understood. This raises issues about what it means to be normal under a legal attribution of individual responsibility for so-called sexual deviations and perversions. If the sexuality of the individual is positioned by the discourse, it follows that there is no universal or essentially 'incorrect' object of sexual desires—merely politically motivated degrees of agreement and perhaps what the individual themselves may desire through their governmentalized position. Under liberalism however, any 'deviant' construction of sexuality convicted in court is now usually defined as a deficit to be cured.

Governing Dangerousness

Where configurations of personal sexual ethics are not normalized, there are also problems. Some 'not normal' individuals are defined as criminal, and where a critical mass of such individuals is documented, a new problem—the governance of dangerousness—is defined. Pratt (1977: 74) argues that in an attempt to govern dangerousness, "eugenics . . . had been an important force behind the development of the new penology and provided the main analytical framework for understanding crime and classifying criminals". Since criminality was classified as genetic, criminals were said to breed criminals, and that possibility should therefore be dealt with scientifically. As Pratt (1997) illustrates:

> sexual offenders could be dealt with scientifically: (i) by furnishing expert medical or surgical reports or evidence; (ii) by sanctioning an

> indeterminate sentence; (iii) by segregating persons so sentenced and subjecting them, under proper safeguards, to any medical or surgical treatment which may be deemed necessary or expedient either for their own good or in the public interest.

It was also recommended that the carriers of germ plasma be sterilized. Criminality had clearly been moved into the realm of medicine.

But by the 1930s, Pratt (1997: Ch. 4) argues, the developments in *psy*chological sciences soon outflanked eugienics and the *psy*experts became the definers of normalcy. They saw deviance as merely a surface product: the 'real' problem lay hidden, to be discovered through *psy*methods (see Donzelot 1979). *Psy*knowledge had an advantage over eugenics in that it offered the eventual hope of a 'return' to normality to which the delinquent could aspire. It was then possible to encourage individuals to co-operate the treatment of their conflicts, as these were said to be hidden deep in the personality. Actions were not thought to be as important as the *psy*chological motives underlying them; criminality was thus installed deeply at an unconscious level inside the individual. Eugenics located the problem in the genes. Its theory however, was politically unacceptable in the era of faith in progress of human kind, because it was too deterministic as it advanced no rationale for treatment as genes could not be (re)formed (as yet—see for example, Wilkie 1993).

Criminals were divided further into even finer classifications; the 'normals' and the 'habituals', with the latter group sub-divided into two further categories; 'the mentally and morally weak', and the 'pathological' (Pratt 1997: 82). Variable regimes of treatment were then devised. Notions of public hygiene legitimated preventative detention that was reserved for the pathological to protect society rather than to cure these individuals who were regarded as beyond help anyway. This reflects the idea that public policies of social hygiene search for a root cause to neutralize. These social hygiene campaigns require the most efficient administrative effort, because under liberalism in the interests of security based on economic strength, society must maximize its resources directed at its protection.

What undoubtedly started out as a humane project of prison reform directed at the soul of the offender, became a mechanism of social control in a new form, but with no lessening of power over citizens as subjects. Criminals were classified as delinquent and their souls were to be reformed through the application of power to the body. The construction of the notion of delinquency and the way it has been subsequently 'treated' to the present day, is thus a fabrication of power.

> At the point that marks the disappearance of the branded, dismembered, burnt, annihilated body of the tortured criminal, there appeared the body of the prisoner, duplicated by the individuality of the 'delinquent', by the soul of the criminal, which the very apparatus of punishment fabricated as a point of application of the power to punish and as the

> object of what is still called today penitentiary science (Foucault 1979*b*: 254–255).

With this change one can see a:

> penal discourse and psychiatric discourse crossing each other's frontiers; and there, at their point of junction, is formed the notion of the 'dangerous' individual, which makes it possible to draw up a network of causality in terms of an entire biography and to present a verdict of punishment-correction. (Foucault 1979*b*: 252).

Final Comments

While Foucault has been employed in this paper to explain that 'sexuality' is socially constructed, this is not to deny the presence of actual sexual violence as a danger. Neither is it an attempt to deny the danger to liberty arising from a concept—i.e. 'sex abuse'—that is regarded and 'treated' unproblematically. The problem for the law is that since sex abuse is contingent upon the human sciences, as the latter change, so too do the concepts they produce. That makes discourse production a historical effect. Incarceration of delinquents is also a real effect of a legal conviction and is contingent upon those same discourses. Since sex abuse has been criminalized under the new penal sciences, it is a problem for liberty and since liberty is a central tenet of liberalism, it is also a matter for the law.

Notes

1 See Marshall (1996) for a discussion about the features of the Hart-Flew-Benn model and its comparison to punishment as a concept derived from the work of Foucault.

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Appendix

Two chronologically distinct punitive rationalities and their transformation

	Classics	New penal science
Period	1740–1885	1885
Subject	*Homo penalis* same theory as *homo economicus* based on free will	*Homo criminalis* criminal is excrement of social body, naturally savage and socially abnormal criminal as the 'other' subject of penal science
Parameters	law, crime, punishment law is primordial	nature of criminal society is primordial
Rationale for emergence	emerged to fix limit on sovereign power and to defend the social contract utilitarian	failure of Beccaria's theory incidence of crime still rose criminal not normal

Technologies	intervention—intimidation, dissuasion disciplinary blocks panoptican, e.g. visible but also exaggerates the imagination modulated and graded punishments of intimidation and disciplinary blocks	focus on origin/aetiology to find causes elimination of sources of crime move from deterrence to neutralization promotion of public hygiene, human capital theory to establish value
Central elements	the right to punish is based on rule of law crime based on 'free will' but calculates badly anyone can commit a crime—no special type	the right to punish is based on rules of society new domain of intervention called social hygiene of prevention and clean-up of social breeding grounds figure of criminal, a sub-species that moved from monster to madman requiring treatment, i.e. medicalized
Key tasks	no special knowledge required or developed—merely requires knowledge of life in general	*establish* a pedagogy (criminology—knowledge of law and criminals) *explain* socio-psychological causes of crime *attack* root cases of criminality
Knowledge	law, crimes, punishments, life in general, social contract	human sciences—*a la* Foucault, (hierarchical observation, surveillance, classfication examination, normalization)
Directions of development	superseded by new penal science some residuals—displays of power, intimidation	policy of neutralization minimization of the costs of administration