Foucault's work urges us to question the relationship of law-breaking to social life, to social movements with aims of revolution, and to understandings of power relations more generally.

Illegalist Foucault, Criminal Foucault

Delio Vásquez

might even wonder what difference there could ultimately be between being a historian and being a Marxist" ("Prison Talk," 46–47).

105. Karl Marx, *Capital: A Critique of Political Economy, Vol. 1*, trans. Ben Fowkes (1976), 896.

106. Bussard, "The 'dangerous class' of Marx and Engels."

107. *Discipline*, 285.

108. Bernard Harcourt, Didier Fassin, Axel Honneth, and Nadia Urbinati, "Foucault 3/13: The Punitive Society," Symposium at Columbia University, October 2015.

109. Doug Imrie, "The Illegalists," *Anarchy: A Journal of Desire Armed*, Fall-Winter (1994–1995).

110. Stephen MacSay, "Illégalisme," *L'Encyclopédie anarchiste*, ed. Sébastien Faure (1934). Unpublished translation by Rebekkah Dilts. My thanks to Alex Feldman for drawing my attention to this text.

111. Phillippe Gavi, Jean-Paul Sartre, and Pierre Victor, *On a raison de se révolter: Discussions*, trans. Mitch Abidor.

112. Ibid.

113. *Discipline*, 273–274, 278.

114. Ibid., 275.

115. Ibid., 273.

116. Ibid., 274.

117. Ibid., 274–275.

118. Ibid., 275.

119. Ibid., 278–288.

120. Ibid., 289, 287. Translation edited.

121. Ibid., 292. Translation edited.

122. *Punitive*, 131.

123. Priscila Piazentini Vieira, "Foucault e o grupo fourierista La Phalange," *ecopolítica* 14, (Jan-Apr, 2016): 28–46. Macey, 269.

124. Simon, "Michel Foucault on Attica," 32. 125. Ibid., 43.

126. *Punitive*, 13. *Discipline*, 49, 53.

127. For more, see Andrew Culp's influential "Insurrectionary Foucault: Tiqqun, The Coming Insurrection, and Beyond," *The Anarchist Library*, 2010.

128. *Discipline*, 308.

129. Ibid., 289–290. *Surveiller*, 296. Translation edited.

130. *Discipline*, 26.

131. Ibid., 272. *Surveiller*, 277. Translation edited.

132. *Discipline*, 282.

133. *Abnormal*, 22.

134. Ibid., 21, 18. Michel Foucault, *Les Anormaux: Cours au Collège de France 1974–1975* (2001). Translation edited.

135. *Discipline*, 289. *Surveiller*, 295–296. Translation edited.

136. *Discipline*, 292.

137. Michel Foucault, "What Is an Author?" trans. Josué V. Harari, *Aesthetics, Method, and Epistemology (Essential Works of Foucault: 1954–1984, Vol. 2)*, ed. James D. Faubion (1998), 206.

138. "Masked Assassination," 154, 143, 147.

139. Ibid., 141, 156.

140. Ibid., 140.

141. "On Popular Justice," 17.

142. *Discipline*, 289. Translation edited.

Illegalist Foucault, Criminal Foucault

Delio Vásquez

2020

Mullaney, "Frégier and the 'Dangerous Classes': Poverty in Orleanist France," *International Social Science Review* 58, no. 2 (Spr 1983): 88–92.

78. *Discipline*, 285.

79. Simon, "Michel Foucault on Attica," 26.

80. *Discipline*, 88.

81. *Punitive*, 46–47, 173, and lectures 9, 10, 11. Emphasis added.

82. Ibid., 47, 173.

83. Ibid., 45.

84. *Discipline*, 83, 88. *Surveiller*, 85. Translation Edited.

85. *Discipline*, 76.

86. Ibid., 76–78, 88, 101, 256. *Punitive*, 49–53.

87. *Punitive*, 46. *Discipline*, 88.

88. *Discipline*, 278.

89. Ibid., 83. *Surveiller*, 86. Translation edited.

90. *Discipline*, 214–216. *Punitive*, lecture 7.

91. *Punitive*, 149. Emphasis added.

92. *Discipline*, 89–93.

93. *Discipline*, 63.

94. Ibid., 240.

95. Ibid., 285.

96. "On Popular Justice," 23.

97. Simon, "Michel Foucault on Attica," 32.

98. It is worth explaining here that Foucault's use of the word *proletariat* was meant to echo the common usage among French communists in the 1960s, which is now indeed also the global standard, according to which the word refers simply to the "working class." For that reason, Foucault's use of the phrase "non-proletarianized plebs" is clearly meant to refer to the dispossessed who have not been transformed into a "working class." However, it must be stated, strictly speaking, for the later Marx the term proletariat in fact refers to *all those who have been dispossessed or who have descended from the dispossessed*, employed and unemployed alike.

99. Karl Marx and Frederick Engels, *Manifesto of the Communist Party*, trans. Samuel Moore, 1888, 20. Karl Marx, *The Eighteenth Brumaire of Napoleon Bonaparte*, trans. Saul Padover, 1869, 37–38, 42. Karl Marx, *The Class Struggles in France*, 1848–1850, 23.

100. "On Popular Justice," 21.

101. *Punitive*, 125.

102. *Discipline*, 280.

103. Michel Foucault, "Prison Talk," *Power/Knowledge*, 40.

104. For explicit references to *Capital*, see: *Discipline*, 163–164, 175, 221. More generally, however, Foucault explained: "But I quote Marx without saying so, without quotation marks, and because people are incapable of recognising Marx's texts I am thought to be someone who doesn't quote Marx. When a physicist writes a work of physics, does he feel it necessary to quote Newton and Einstein? He uses them, but he doesn't need the quotation marks, the footnote and the eulogistic comment to prove how completely he is being faithful to the master's thought. And because other physicists know what Einstein did, what he discovered and proved, they can recognise him in what the physicist writes. It is impossible at the present time to write history without using a whole range of concepts directly or indirectly linked to Marx's thought and situating oneself within a horizon of thought which has been defined and described by Marx. One

as "both economic and political," and at other times, as "neither completely of the order of common law, nor of the order of politics" (*Punitive*, 143).

57. Ibid., 142. "A propos de l'enfermement pénitentiaire," as quoted in *Punitive*, 152, fn 3. *Discipline*, 85, 84.

58. *Discipline*, 82.

59. Ibid., 82, 85.

60. Ibid., 83.

61. The word-root *infra* means "below," as with *infra-red light*, whose frequency is below that of visible light.

62. *Discipline*, 84, 88.

63. Maurice Agulhon, *La République au village* (1970): 375. *La République* was the second in a three-part series, of which Agulhon's 1971 *La vie sociale en Provence* (cited in *Discipline*, 85; *Punitive* 157, 167) was the third installment. Where Foucault uses the term infra-power, he does not explicitly cite Agulhon.

64. James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts*, (1990). Scott discusses Agulhon primarily in Ch. 7, "The Infrapolitics of Subordinate Groups" (189) and *Discipline and Punish* is important throughout the text.

65. Scott, *Domination*, viii, 188. For Scott, infrapolitics grows out of "ideological insubordination"—which arises through the dynamic interplay between "hidden" and "public" expressions against authority—and then feeds into and creates the conditions for material contestation over resources (*Domination*, xiii). Further describing "the 'micro' pushing and shoving involved in power relations" (*Domination*, 197), Scott is of course also drawing on Foucault, for whom the "political investment of the body and the micro-physics of power" is part of a larger social matrix, a "civil war" within which all plays of forces and exertions of power occur (*Discipline*, 28).

66. *Discipline*, 87.

67. Ibid., 273.

68. Ibid, 84: "[A] number of transformations had operated in the breach that was being widened every day by popular illegalism; the bourgeoisie had needed these transformations; and economic growth was due, in part, to them." *Punitive*, 145.

69. Michel Foucault, "Alternatives to the Prison: Dissemination or Decline of Social Control?" (March 1976), *Theory, Culture & Society* 26, no. 6. (2009): 12–24. "Besides, social classes were themselves locked in rivalry, and often in complicity around illegalisms. Smuggling, for example, which enabled a whole layer of the lower classes to survive, benefited the bourgeoisie just as much, and the latter did nothing in the eighteenth century, or even the seventeenth century, to suppress the smuggling of tobacco, salt, etc."

70. *Punitive*, 148.

71. Ibid., 145–146, 151, 155.

72. *Discipline*, 85.

73. Ibid., 85–86. *Punitive*, 146–147, 167 fn. 1, 259.

74. "A propos de l'enfermement pénitentiaire," as quoted in *Punitive*, 152.

75. *Discipline*, 76. See also: Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (1991).

76. Ibid., 61–65.

77. Ibid., 88, 90, 276–278. *Punitive*, 162–163, 260. French political economist H. A. Frégier's 1838 text, *Des classes dangereuses*, became foundational for modern criminology. For more on Frégier's term and its impact, see: Marie Marmo

What is the political meaning of crime? Must crime be understood in absolute terms, or is the use of the category itself already a political matter? During the 1960s and '70s, social movement theorists pursued these questions as a matter of political strategy. Globally, but especially among Black radicals and within the decolonizing Third World, revolutionary theorists of the Left increasingly sought to grapple with the question of the political role of the unemployed and 'criminal classes.' In the past, this mixed group had been disparaged and discounted by Marxists as dangerously 'counter-revolutionary,' labeled a *lumpen* (meaning "ragged" or "scoundrel") *proletariat*, and held in contrast to the idealized working class industrial *proletariat* of nineteenth- and early twentieth-century communist labor movements.[1] However, in the 1960s and '70s, inspired by Third World struggles for decolonization, Western Marxist historians, sociologists, and militants developed a research program to understand the historical importance of "social crime" (such as riots and banditry) in popular resistance movements during the early development of capitalism. I argue that, given this political and intellectual context, informed by (1) the increasingly militant political clashes of the early 1970s and (2) innovations in Marxist historiography on the origins of capitalism, philosopher Michel Foucault took up the "lumpen question" as well.

The recent publication of Foucault's 1972-'73 lectures on *The Punitive Society* has drawn attention to the importance he placed on "popular illegalisms," Foucault's term for a variety of forms of spontaneous law-breaking among the poor which became newly targeted and criminalized during early capitalism.[2] Scholarly engagement with the concept has been limited, however.[3] The most extensive discussion to date, Alex Feldman's "The Genesis of Foucault's Genealogy of Racism: Accumulating Men and Managing Illegalisms," focuses primarily on how illegalisms came to be made use of for the economic benefit of the dominant classes, concerns that Foucault develops in more detail in the later 1970s.[4] However, there has yet to be a substantial effort to fully account for Foucault's extensive use of "illegalisms" in his influential *Discipline and Punish*, where it in fact serves as the primary concept through which Foucault describes resistance.

Instead, *Discipline and Punish* has been burdened with the reputation of being a politically "pessimistic" text, supposedly lacking any account of social movements. In 1983, Edward Said wrote that "Foucault never discusses the resistances that always end up dominated by the system he describes," and he ultimately accuses Foucault and his readers of justifying political inaction.[5] Others have lamented the "deep despair" that many students and readers experience through the text, which is said to present a powerful case "against modern prison systems" while offering "no response to it."[6] These misreadings have been exacerbated, especially among British and American audiences, by the severe shortcomings of Alan Sheridan's 1977 translation, which mistranslates not only the French term *illégalisme* but also several key passages on illegal forms of political struggle.[7] Against a considerable tradition of prior readings, I argue that *Discipline and Punish* in fact presents a thorough account of the earliest social movements against industrial capitalism in Europe, but that Foucault's attention to these movements has been overlooked because of their illegal character and because of the reality that the political meaning of crime is nearly unspeakable under modern society. I establish that a close examination of under-treated portions of *Discipline*, combined with Foucault's lectures, interviews, and activist writings from the early- to mid-1970s, when properly contextualized within his personal history of activism and the larger historical context, all together reveal Foucault's theorization of illegal and criminalized political contestation to be both extensive and systematic. In fact, *Discipline and Punish* proves to be the most detailed theoretical and historical engagement with the Marxist "lumpen question" produced during the twentieth

James D. Wright (2015): 108–113. Lucien Febvre, *Combats pour l'histoire* (1992).

45. Foucault cites Le Roy Ladurie's writing from *Contrepointe* (1973) (*Discipline*, 76) and Chaunu's work overseeing the publication of *Annales de Normandie* (1971) (*Discipline* 75–77).

46. Foucault cites Bois's *Paysans de l'Ouest* (1960, Western Peasants) (*Punitive*, 141–143, 152), Festy's *Les délits ruraux et leur répression sous la Révolution et le Consulat* (1956, 'Rural Crimes and Their Repression during the Revolution and the Consulate') (*Discipline*, 85), and Agulhon's *La vie sociale en Provence intérieure au lendemain de la Révolution* (1971, 'Social Life in Inner Provence in the Aftermath of the Revolution'). He also draws from Agulhon's *La République au village: les populations du Var de la Révolution à la Seconde République* (1970, Republic in the Village: The People of the Var from the French Revolution to the Second Republic), though without citation in *Discipline and Punish* (*Discipline*, 85, 87, *Surveiller*, 87, 90, and *Punitive*, 157–159, 167).

47. E. P. Thompson, "History from Below," *Times Literary Supplement*, April 7 1966: 279–80.

48. Foucault explicitly cites Hobsbawm (*Discipline*, 278) and borrows the language of Thompson (*Discipline*, 273 and *Punitive*, 29, 40) several times. Bernard Harcourt has also pointed out (*Punitive*, 119) that Foucault discusses the British Gordon Riots of 1780 in both *Discipline and Punish* (12) and in his essay "Truth and Juridical Forms," citing Christopher Hibbert's *The Roots of Evil* (1966) in the former. It is hard to fathom that Foucault would not have been familiar with the most foundational article on that very topic, written by British historian—and Lefebvre's mentee—George Rudé ("The Gordon Riots: A Study of the Rioters and their Victims," 1956).

49. Eric Hobsbawm, *Primitive Rebels* (1959), 2–5. Eric Hobsbawm, *Bandits* (2000).

50. E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Customs in Common* (1993), 189. Foucault draws on Thompson's work without explicit citation when he describes "the looting of shops and the forced selling of products at a 'fair price'" (*Discipline*, 273).

51. Thompson, "The Moral Economy...," 212.

52. Thompson, "Custom and Culture," *Customs in Common*, 4.

53. Harcourt cites conversations with Daniel Defert (*Punitive*, 29, 40), as well as the notes for Punitive which cite Thompson's "The Moral Economy..."; Thompson's article was first published in 1971 in the journal *Past and Present*. In 1967, *Past and Present* also published Thompson's "Time, Work-Discipline and Industrial Capitalism," an article whose topical overlaps with Foucault's *Discipline and Punish* are difficult to ignore, as well.

54. *Punitive*, 140, 152.

55. Richard Marsden has echoed this analysis in different terms: "Foucault construes disciplinary power as a means of containing opposition to the privatization of property, the development of industrialism and the exploitation of labour, entailed by this process, during the eighteenth and nineteenth centuries. Foucault calls this opposition 'popular illegalities,' but, in the light of the labour theory of property... I prefer to regard them as the inalienable rights of labour, an indigenous form of law." Marsden ultimately argues that "only a reader with a non-fetishistic conception of [productive] 'forces' can see the significance for Marxism of what Foucault achieves in that book." Richard Marsden, *The Nature of Capital: Marx After Foucault* (1999), 141, 21.

56. In the lectures, Foucault oscillates between referring to illegalisms as "social,"

28. Foucault, *Punitive*, 178, 184 fn. 19.

29. Michel Foucault, Catherine von Bülow, Daniel Defert, "The Masked Assassination," trans. Sirène Harb. *Warfare in the American Homeland*. ed. Joy James (2007), 154–155. Huey P. Newton, *Revolutionary Suicide*, ed. J. Herman Blake (2009), 355–356.

30. "The Masked Assassination," 155.

31. Despite some weaknesses in framing, Brady Heiner's controversial "Foucault and the Black Panthers" remains informative and usefully provocative as it draws more rigorously from actual BPP theory than any other published treatment of the question of the BPP's influence on Foucault. Brady Heiner, "Foucault and the Black Panthers," *City* 11, no. 3 (2007): 313–356. For more evidence of conceptual overlaps, see also: Dylan Rodriguez, *Forced Passages: Imprisoned Radical Intellectuals and the US Prison Regime* (2006). Lastly, in addition to Joy James' *Warfare in the American Homeland*, her historical analysis and critique of the role of intellectuals in the 1960s prison abolition movement is invaluable. See especially: Joy James, "The Architects of Abolitionism: George Jackson, Angela Davis and the Deradicalization of Abolition Struggles," Center for the Study of Slavery and Justice at Brown University, Providence, April 8, 2019.

32. Christopher Chitty, "Towards a Socialist Art of Government: Michel Foucault's 'The Mesh of Power'," *Viewpoint*, Sept 12 2012. Julian Bourg, *From Revolution to Ethics* (2007), 59, 51–95. Macey, 217–219, 265.

33. Macey, 258, 394–395.

34. John K. Simon, "Michel Foucault on Attica: An Interview," *Social Justice* 18, no. 3 (1991): 26–43, 32.

35. Demers, "Prison Liberation by Association."

36. Macey, 343, 341–350.

37. Michel Foucault, "Va-t-on Extrader Klaus Croissant?" *Michel Foucault: Dits et écrits, tome III: 1976–1979*. ed. Daniel Defert (1994). Michel Foucault, "Letter to Certain Leaders of the Left," trans. Robert Hurley, *Michel Foucault: Power*, ed. James D. Faubion (2000). Originally published in *Le Nouvel Observateur* in November and December 1977, respectively.

38. Macey, 392–394.

39. Ibid., 226–228, 257, 263, 280, 283, 292, 298, 300, 304–305, 308, 309, 315, 342–343, 349, 352, 383–384, 386–387, 393–394, 398, 410–411. Didier Eribon, *Michel Foucault*, trans. Betsy Wing (1991). David M. Halperin, *Saint Foucault: Towards a Gay Hagiography* (1995).

40. Macey, 295.

41. Robert J. C. Young, "Foucault in Tunisia," *Postcolonialism: An Historical Introduction, Anniversary Edition*. (2016). Heliana de Barros Conde Rodrigues, *Ensaios sobre Michel Foucault no Brasil: Presença, efeitos, ressonâncias* (2016). Behrooz Ghamari-Tabrizi, *Foucault in Iran: Islamic Revolution After the Enlightenment* (2016).

42. Marcelo Hoffman and Bernard E. Harcourt, eds. *Carceral Notebooks Vol. 13: Foucault and the Politics of Resistance in Brazil* (2017).

43. Peter Burke and Eric Hobsbawm, "Reflections on the Historical Revolution in France: The Annales School and British Social History," *Review (Fernand Braudel Center)*, 1, 3/4; The Impact of the "Annales" School on the Social Sciences, (Winter-Spring, 1978): 147–164.

44. Andrew I. Port, "History from Below, the History of Everyday Life, and Micro-history," *International Encyclopedia of the Social & Behavioral Sciences*, ed.

century, though it has not been recognized as such. Reconsidered in this way, Foucault's work urges us to question the relationship of law-breaking to social life, to social movements with aims of revolution, and to understandings of power relations more generally. In this essay, I flesh out somE of the primary contours and conceptual centers of Foucault's theorizations on the politics of the illegal, in advance of further work.

Section 1 hones in on one of Foucault's most daring provocations about the political value of crime—"for the liberation of our society"—contextualizing it alongside the Black radical and French Maoist theories and social movements that in turn inspired Foucault's own activist advocacy of the illegal and the criminalized. In Section 2, after detailing his reliance on the work of French and British Marxist historians, I reconstruct Foucault's historical account of how everyday theft and vagrancy came to be violently criminalized during the rise of capitalism, transformed from "popular illegalisms" into what we now understand as "crime." In Section 3, I analyze Foucault's account of how dispossessed communities came to be especially targeted, and how elites recruited the cooperation of both workers and non-workers to enforce the prison system. Foucault insists on a historical analysis of how and why "the poorer classes" came to be "split" into "workers" and "delinquents," ultimately critiquing Marx's fundamental denunciation of the so-called *lumpenproletariat*. Section 4 explores the development of Foucault's approach to "illegalist" practice and "illegalist" theory, the relationship between common crime and political crime, and his eager support of social movements that have sought to "re-establish or constitute the political unity of popular illegalisms."

1. "The Liberation of our Society"

The following passage, which has remained untreated and indeed avoided by academics, features Foucault's most explicit political advocacy of crime:

> In the course of this anti-penal polemic, the Fourierists no doubt have gone further than all the others. They have elaborated—the first to perhaps—a political theory which is at the same time a positive valorization of crime. If it is, according to them, an effect of "civilization," it is equally and by the same token a weapon against it. It carries within it a vigor and a future. "The social order dominated by the fatality of its repressive principle continues to kill by way of the executioner or by

the prisons those whose robust nature rejects or disdains its prescriptions, those who, too strong to remain enclosed within its tight swaddling-clothes, break from them and tear them to pieces, men who do not wish to remain children" (*La Phalange*, 10 Jan 1837). There is not, therefore, a criminal nature but rather plays of forces which, according to the class to which the individuals belong, will lead them to power or to prison: if born poor, today's magistrates would no doubt be populating the convict-ships; and the convicts, if they had been born well-off, "would be presiding in the courts and dispensing justice." When it comes down to it, the existence of crime is a fortunate manifestation of an "incompressibility of human nature"; rather than a weakness or an illness, one must see in it an energy that rights itself, a "radiant protest of human individuality" which no doubt gives it, in the eyes of all, its strange power of fascination. "Without crime, which awakens in us a mass of torpid feelings and half-extinguished passions, we would remain ever longer in disorder, that is to say, in languor" (*La Phalange*, 10 Jan 1837). It may so come to be that crime constitutes a political instrument which may eventually be as precious for the liberation of our society as it has been for the emancipation of black people; indeed, will such an emancipation take place without it? "Poison, fire, and sometimes even revolt, attest to the ardent miseries of the social condition" (*La Phalange*, 10 Jan 1837). And the prisoners? Those "most unhappy and oppressed within humanity." *La Phalange* sometimes agreed with the contemporary aesthetics of crime, but for a quite different fight.[8]

Much can be said about this passage, to which I will return in portions throughout this essay. One overwhelming fact is its seemingly intentionally bewildering construction. It is difficult to tell where Foucault is simply reporting the views of *La Phalange*'s nineteenth-century utopian socialist editors (the Fourierists), how much of this is Foucault's analysis and interpretation of *La Phalange*, where he is in fact offering his own ideas, and when he is perhaps "ventriloquizing" through La Phalange for his own purposes. As Lynne Huffer has argued in her close examination of syntactically similar passages in *History of Sexuality, Vol. 1*, we can identify across Foucault's body of work an extensive and seemingly strategic use of *free indirect discourse*, a style of writing through which the place of the subject and/or author in a text is destabilized or obscured. This technique is notable "for its rhetorical capacity to produce in the reader a felt experience of cognitive and ethical dis-orientation."[9] Free indirect discourse is at work when a narrator's descriptions of a character's thoughts come to be subtly replaced by the narrator's own thoughts through the gradual disappearance of that character as the syntac-

(2006).

12. David Macey, *Lives of Michel Foucault* (2019), 305–313.

13. Akinyele Umoja, "Repression Breeds Resistance: The Black Liberation Army and the Radical Legacy of the Black Panther Party," *New Political Science* 21, no. 2 (1999): 131–155. Jalil Muntaqim, *We Are Our Own Liberators: Selected Prison Writings* (2010).

14. Daniel Defert, "Chronologie," *Michel Foucault: Dits et Écrits: 1954–1988, tome 1: 1954–1975* (1994): 33.

15. Mao Tse-tung, "Analysis of All the Classes in Chinese Society (December 1925)," *Mao's Road to Power: Revolutionary Writings (1912–1949), Vol. 2 (National Revolution and Social Revolution, December 1920-June 1927)*, ed. Stuart R. Schram, Nancy J. Hodes (1994), 259–260.

16. Frantz Fanon, *The Wretched of the Earth*, trans. Constance Farrington (1963), 11, 129.

17. Ibid., 137.

18. Eldridge Cleaver, "On the Ideology of the Black Panther Party: Part 1," *Target Zero: A Life in Writing*, ed. Kathleen Cleaver (2006), 178–179. Huey P. Newton, "Speech Delivered at Boston College: November 18, 1970," *To Die for the People*, ed. Toni Morrison (1972), 27–28.

19. Jean Genet, who authored *The Thief's Journal* and the introduction to George Jackson's *Soledad Brother* (1970), smuggled BPP newspapers to the activist community in France and to Foucault in particular. Genet had been approached in March 1970 by Connie Matthews, BPP's International Coordinator, in a request for aid. Stuart Elden also points out that, during Foucault's interview at Attica Prison in April 1972, Foucault's estimate of the US prisoner population and of the proportion comprised by Black men is at odds with the US government's figures, but matches precisely those tabulated by the BPP and reported in their newspaper. Jason Demers, "Prison Liberation by Association: Michel Foucault and the George Jackson Atlantic," *Atlantic Studies* 13, no. 2 (2016): 165–186, 175, 183 fn. 38. Robert Sandarg, "Jean Genet and the Black Panther Party," *Journal of Black Studies* 16, no. 3 (Mar 1986): 269–282. Elden, *The Birth of Power*, 137.

20. Cleaver, 180.

21. Michel Foucault, "On Popular Justice: A Discussion with Maoists," trans. John Mepham, *Power/Knowledge: Selected Interviews and other Writings 1972–1977*, ed. Colin Gordon (1980), 16–17. Macey, 297.

22. In "On the Relevance of the Church: May 19, 1971," Newton states, "Of course people do courageous things and call themselves the vanguard, but the people who do things like that are either heroes or criminals. They are not the vanguard because the vanguard means spearhead, and the spearhead has to spearhead something. If nothing is behind it, then it is divorced from the masses and is not the vanguard." Huey P. Newton, *To Die for the People*, ed. Toni Morrison (1972), 71.

23. Erik H. Erikson and Huey P. Newton, *In Search of Common Ground: Conversations with Erik H. Erikson and Huey P. Newton* (1973), 40.

24. Fanon, 129.

25. Andrew Dilts and Peter Zurn, eds. *Active Intolerance: Michel Foucault, the Prisons Information Group, and the Future of Abolition* (2016).

26. George L. Jackson, *Blood in My Eye* (1990), 139.

27. George Jackson, *Soledad Brother: The Prison Letters of George Jackson* (1970), 10.

tant error, mistranslating *vigueur* as "figure" rather than "vigor." In sentence seven, I have moved "fortunately" (*heureusement*) outside of the quotation, consistent with Foucault's original. I have also chosen the more literal "incompressibility," and because "manifest" is not commonly used as a transitive verb in English, I have nominalized it and given it a prepositional phrase as its object. I have also attempted to address a couple instances of ambiguous pronoun reference on Sheridan's part (eg. "it should be seen" vs. "one must see in it" (*il faut voir en lui*)) and I have eliminated paraphrasing. For sentence eight, I have addressed another blatant error, re-translating *éteintes* as "extinguished" rather than "distinguished." At the end of that sentence, I have also replaced the inadequate "in weakness" with the fuller and more precise "that is to say, in languor" (*c'est-à-dire dans l'atonie*), where *atonie* (a somewhat out-moded medical term) should be understood as akin to "atrophy" or "stasis." In the ninth sentence, I have fleshed out the introductory language to match better, and I have translated Foucault's use of *des Noirs* as "of Black people" rather than Sheridan's egregious error of "of the Negroes." In the tenth sentence, I have translated *témoignent* as "attest to" rather than "are evidence of." In the twelfth and final sentence, I have translated Foucault's *combat* as "fight" rather than "cause," and, for Foucault's temporally ambiguous *rejoignait*, I have chosen the vague "agreed with."

9. Huffer explains: "In *Sexuality One*, Foucault exploits the radical doubt of free indirect discourse... to destabilize the philosophical subject and its claims to truth." According to Huffer, Foucault is here likely mimicking nineteenth-century novelist Gustave Flaubert, whose controversial *Madame Bovary* "offers the canonical example of the strategic use of free indirect discourse in French for producing, through irony, psychological disorientation and moral ambiguity." Flaubert's evasive technique proved inadequate, however, as he was eventually brought to trial for the "moral transgressions" of his writing. Lynne Huffer, "Foucault and Sedgwick: The Repressive Hypothesis Revisited," *Foucault Studies* 14 (Sept 2012): 20–40.

10. The most influential theorization of the modern prison to date, Foucault's *Discipline and Punish* has been taken to task for its conspicuous silence regarding the imprisonment and enslavement of African diasporic people. In 1998, Angela Davis critiqued Foucault's Eurocentric approach to periodization and narrative, which she argued leaves out particularly racialized forms of corporeal violence under modern society. For this reason, she rejected Foucault's argument in 1975 that there has been a sharp turn from the pre-modern spectacle of torture to the modern disciplinary institution of the prison. See: Angela Y. Davis, "Racialized Punishment and Prison Abolition," *Companion to African American Philosophy*, ed. Joy James (1998): 96–107. Joy James, *Resisting State Violence: Radicalism, Gender, and Race in U.S. Culture* (1996). I would suggest that Foucault's tendency to limit the focus of his writings to France or sometimes Europe—despite the clear influence of Third World writers on his thought—was so strangely consistent across his writing, that the question of the avoidance of race in and regarding *Discipline and Punish* remains an open question.

11. Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-making in Nineteenth Century America* (1997). Angela Y. Davis, "Rape, Racism, and the Myth of the Black Rapist," *Women, Race & Class* (1981). Khalil Gibran Muhammed, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (2011). Marc Mauer, *Race to Incarcerate: The Sentencing Project*

tic subject of the sentence, an effect that we can observe in the transition between the second and fourth sentences of the above passage. By the fourth sentence, even as he continues to quote passages from *La Phalange*, Foucault in fact seems to be stating his own ideas. Accordingly, I suggest that there is intentionality to Foucault's use of this collaged and disguising format here, given his politically inflammatory and indeed illegal declaration about the political necessity of crime—for "our society," in his present of the 1970s, no less—as well as his further claim that "we" should look to *les Noirs* and prisoners for inspiration. For our purposes here, I want to begin by focusing on the final few sentences of the passage, whose eccentric evocation of "*les Noirs*" also stands out as "virtually" the only mention of African diasporic people in *Discipline and Punish*, already a rarity in Foucault's body of work in general.[10] Initially at least, we might find ourselves *compelled* towards one of two somewhat opposed interpretations of Foucault's passage, articulated here in their extreme forms: (1) this features a racially stereotyping, naturalizing, and romanticizing speculative gesture about Black people and inherent criminality; or (2) this is a proposal for the necessary role of explicit law-breaking in political struggle, expressed from within a revolutionary perspective that takes a *history* and *present* of Black radical struggle as a point of departure, and all for the purpose of applying it to Foucault's political moment.

The conflation of *Blackness* with *crime* has a complex and varying history in the US, taking different shapes and accents across time periods depending on that period's particular economic, political, and cultural arrangement of white supremacy. What has remained consistent, however, has been the effort by elites to impose law and order through racial fear and antagonism, evident in: the economic motives of plantation owners who disparaged the morality of runaway slaves during the eighteenth and early nineteenth centuries; moral panics about the "Black rapist" created among "white" Americans in response to rising economic and electoral power for African American elites in the decades after Emancipation; the racialized statistics used to categorize crime during the first census of 1890; and later in efforts by politicians starting in 1965 to depoliticize the urban riots of the civil rights movement by connecting them to a concept of "criminal deviance" with original roots in nineteenth-century Europe.[11] The relevance and circulation of these racialist tropes in France for an cosmopolitan activist and intellectual like Foucault are difficult to assess. It is however crucial to note that Foucault's distinct use in 1975 of the more progressive/radical term *Noirs*

(Blacks) over the traditional/ mainstream term *Nègres* (Negroes) was clearly a politically intentional choice. Alan Sheridan's egregious mistranslation of *Noirs* as "Negroes" in the only English translation of *Discipline and Punish* available today—in a passage on crime no less—has surely distorted many readers' grasp to the passage (see: Note 8). While one could pursue the question of the meaning of "Blackness" for Foucault further through a close examination of his anti-racist activism, his efforts in defense of African immigrants in France, and so forth, I am here far less interested in fixating on Foucault's personal relationship to his racialized subjectivity—to his self-conceived "whiteness" and racial anxieties—than I am interested in grasping the larger theoretical and political context behind this sharp articulation, which appears to function, at least in part, as a disorienting provocation, to shock and distract the reader's attention away from the rest of the content of the passage and even the sentence itself.[12] Accordingly, momentarily suspending our assessment of the coherence of alternative (1), I rather propose, in line with alternative (2), that the quote is in fact, at least in part, a reference to "the contemporary aesthetics" in the 1970s of the Black Panther Party (BPP), to their underground splinter group the Black Liberation Army which engaged in bank robberies, plane hijackings, and guerrilla ambushes of police, and especially to imprisoned Black Panther Party militant of international fame, George Jackson.[13]

In an October 1968 letter to his partner Daniel Defert, Foucault enthusiastically wrote: "The Black Panther Party is developing a strategic analysis emancipated from the traditions of the Marxist theory of society."[14] If we study BPP history, we can place this simple statement within a historical timeline. In 1968, the BPP was experiencing its greatest growth in membership and had developed into an anti-capitalist, "revolutionary nationalist" organization with an eye towards building international alliances. The BPP's creative approach to mass organizing through a combination of armed militancy, educational infrastructure, and by "serving the people" with resources and social programs was deeply influenced by the political thought of Mao Zedong. For the "New Left" of the US 1960s, Mao's writings were influential for encouraging a turn away from the narrow focus on the industrial "working class" that had framed most Marxist-Leninist thought and practice. Mao's "Analysis of All the Classes in Chinese Society" (1925) assertively characterized the *yóumín* ("floating people")— dispossessed peasants who

Notes

1. Robert Bussard, "The 'Dangerous Class' of Marx and Engels: The Rise of the Idea of the Lumpenproletariat," *History of European Ideas* 8, no. 6 (1987): 675–692.

2. Michel Foucault, *The Punitive Society: Lectures at the Collège de France, 1972–1973*, trans. Graham Burchell (2015).

3. Bernard E. Harcourt, "The '73 Graft: Punishment, Political Economy, and the Genealogy of Morals," Columbia Law School: Public Law Research Paper Group No. 14–485 (2015), 6–9. Mariana Valverde, "Book Reviews: *The Punitive Society*," *British Journal of Criminology* 57 (2017): 238–256. Stuart Elden, *Foucault: The Birth of Power* (2017), 98–9, 106, 147–8. Alex Feldman, "The Genesis of Foucault's Genealogy of Racism: Accumulating Men and Managing Illegalisms," *Foucault Studies* 25 (October 2018): 274–298. Alex Feldman, "Power, labour power and productive force in Foucault's reading of *Capital*," *Philosophy and Social Criticism* 45, no. 3 (2018): 307–333.

4. Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, trans. Graham Burchell (2007). Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, trans. Graham Burchell (2008).

5. Edward W. Said, *The World, the Text, and the Critic* (1983), 245–246.

6. Mark Poster, *The Information Subject* (2013), 35–36. For a closer engagement with this question, see: Barry Smart, "The Politics of Truth and the Problem of Hegemony," *Foucault: A Critical Reader*, ed. David Couzens Hoy (1986).

7. Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (1979). Michel Foucault, *Surveiller et punir* (1975/2004). Despite the strengths and profound historical impact of Sheridan's work, Stuart Elden has convincingly demonstrated the need for an updated and more rigorous translation of the text, covering matters of language and citational problems: Stuart Elden, "Beyond Discipline and Punish: Is it time for a new translation of Foucault's *Surveiller et Punir*?" *Progressive Geographies*, Jan. 22, 2014. Consistent with Graham Burchell's 2015 translation of the *Punitive Society* lectures, I use "illegalism" rather than Sheridan's "illegality."

8. *Discipline*, 289; *Surveiller*, 295–296. I have made extensive edits to Sheridan's translation, which suffers from several syntactic, semantic, and orthographic errors. Perhaps most crucially, I have addressed the mistranslation of *Noirs*—which Sheridan renders as "Negroes"—instead offering "Black people." Sheridan's choice appears oblivious to the clear, political and ethical intentionality reflected in Foucault's avoidance of the distinctly racist yet standard *Nègres*. The terms Negroes/*Nègres* and Blacks/*Noirs* were indeed a point of contestation particularly during the 1970s (as well as during the Haitian Revolution, relevantly for the French context), with the former pair considered racially imposed and the latter considered culturally self-chosen. I here detail the rest of the translation issues in this passage: In the first sentence, I have offered "have gone" rather than Sheridan's "went further than," which more closely resembles the original *ont sans doute été plus loin* and whose connotation implies less distance from the author. I have translated the second sentence more closely than Sheridan's paraphrase offered, and I included the use of the past participle. In the third sentence, I have re-introduced the ambiguity of Foucault's participial phrase "according to them" (*selon eux*) and replaced Sheridan's "although" with "if" (*si*). Sheridan's fourth sentence contains a bla-

tion became unavoidable for him; in his analysis:

> It may so come to be that crime constitutes a political instrument which may eventually be as precious for the liberation of our society as it has been for the emancipation of black people; indeed, will such an emancipation take place without it? "Poison, fire, and sometimes even revolt, attest to the ardent miseries of the social condition" (*La Phalange*, 10 Jan 1837). And the prisoners? Those "most unhappy and oppressed within humanity."[142]

We find then, in Foucault's theorizations, a concern with the various ways that the penal system divides populations—worker from delinquent, political prisoner from common criminal, and biopolitical race from race. The modern prison has been particularly effective in this regard.

Discipline and Punish challenges the foundations of criminal law as it has developed under capitalist modernity. Foucault puts forth a historical account of the techniques used to criminalize life before capitalism, as well as the varied ways that the dispossessed both resisted and capitulated to that criminalization. Much of this intellectual effort was connected to the contentious political moment in which Foucault found himself. Of course, however, his thinking on the poli tics of the illegal continued to change and develop. By the late 1970s, Foucault turned towards a stronger embrace of the legalistic language of rights—though often still in open defense of illegalisms. Like many of Foucault's writings, however, *Discipline and Punish* also conceals. While the intentions of the author remain inaccessible, what is clear is that Foucault's radical call to action came to be largely overlooked, obscured, or set aside. Imbedded within a wide-ranging and layered set of theorizations about the political illegal, spoken through the voice of the Fourierists of the nineteenth century, marked by the flourishes of an inspired militant, and accented by romantic praise for the 'natural' desire for liberation, we may only at best conclude that Foucault's racialized evocation of the "positive" value of crime came to have the ironic effect of distracting from the real fact of Foucault's own illegal, criminal call to break the law.

became part-time workers, bandits, soldiers, robbers, thieves, and sex-workers—as "the most precarious" and thus a potentially "revolutionary force."[15] More uniquely within the US, however, the Black Panther Party combined Maoism with the analyses of Frantz Fanon. Fanon's *Wretched of the Earth* (1961) explicitly argued that the colonized and dispossessed native *lumpenproletariat* were in fact the most revolutionary. For Fanon, this "uprooted" and unemployed "horde of starving" people is always most likely to rebel because they are the least invested, economically and psychologically, in the colonial economy.[16] And so, he reasoned, anti-colonial revolutionaries *must* organize the *lumpenproletariat*, before the colonizer inevitably organizes them against the revolution.[17] In the Panthers' analysis, Black populations in the Americas were comparably colonized, "uprooted," without land, and displaced by the transatlantic slave trade. Recruiting heavily from among the unemployed and criminalized in the inner city, the BPP further argued that the *lumpenproletariat* was not a distinct class but rather the globally expanding "left wing of the proletariat" which would—because of automation and growing underemployment—become the majority, and by necessity take the lead in class struggle against capitalism in the late-twentieth and twenty-first centuries.[18]

The Panthers' analyses continuously changed, and Foucault read their theorizations throughout these shifts, despite the banning of the Black Panther Party newspaper in France.[19] In early 1972, during a public "Discussion with Maoists" about the feasibility of "popular justice" without a "state judicial apparatus," Foucault seems to paraphrase—without mentioning a source—from the official text of the "Ideology of the Black Panther Party." Composed in 1969 by BPP Minister of Information Eldridge Cleaver, it reads:

> One outstanding characteristic of the liberation struggle of Black people in the United States has been that most of the activity has taken place in the streets. This is because, by and large, the rebellions have been spear-headed by Black Lumpen. It is because of Black people's lumpen relationship to the means of production and the institutions of the society that they are unable to manifest their rebellion around those means of production and institutions. ...And when the Lumpen does engage in direct action against the system of oppression, it is often greeted by hoots and howls from the spokesmen of the Working Class in chorus with the mouthpieces of the bourgeoisie.[20]

In the public discussion, describing the French Revolution, Foucault explained:

> For the bourgeoisie the main danger against which it had to be protected, that which had to be avoided at all costs, was armed uprising, was the armed people, was the workers taking to the streets in an assault against the government. They thought they could identify, in the non-proletarianised people, in those common people who rejected the status of proletarians, or in those who were excluded from it, the spearhead of popular rebellion. They therefore provided themselves with a certain number of methods for distancing the proletarianised from the non-proletarianised people.[21]

Not only do we see a very similar analysis with comparable terminology but even the same idiosyncratic use of the term "spearhead," which Foucault and Cleaver each deploy several times in each text. The "spearhead" was in fact a rhetorical trope that BPP co-founder, Minister of Defense, and Chief Theoretician Huey P. Newton developed and expanded upon as a conceptual clarification of the Leninist concept of the vanguard. This image, with culturally Afrocentric connotations, was an attempt by Newton to clarify, in an accessible way, what Marx and then Lenin had termed "adventurism": the tendency of a "revolutionary party" to turn to militant violence in a manner out ahead and "divorced from the masses" and the base of the party—a matter that was being fiercely debated within the BPP in 1971 in particular.[22] At a seminar that Newton presided over at Yale University with psychologist Erik Erikson in February of that year, he stated: "The lumpen proletarians... are the ones who will bring about change, not us alone. A vanguard is like the head of a spear, the thing that goes first. But what really hurts is the butt of the spear, because even though the head makes the necessary entrance, the back part is what penetrates. Without the butt, a spear is nothing but a toothpick."[23] Newton's extended metaphor is ultimately inspired by a single line of Fanon's: "It is within this mass of humanity, this people of the shanty towns, at the core of the *lumpenproletariat*, that the rebellion will find its urban spearhead."[24]

Foucault's thinking on the politics of crime is influenced by several BPP theorists, but by none more so than lifelong prisoner and BPP Field Marshall George Jackson, as scholars have increasingly begun to examine.[25] Jackson, who received a sentence of one-year-to-life for a burglary of $70 from a liquor store when he was twenty years old, became a "Marxist-Leninist-Maoist-Fanonist" while incar-

connected, one line later, with "*les Noirs.*" And yet, if the suggestion is that Black people are somehow 'closer to nature,' it is also the case that the rest of the chapter pursues the Fourierist line of argument—including a praise of "indiscipline," a critique of "civilization," and a valuing of "wildness"—not through the concept of race but rather through the figure of the child.[136] But still, the question remains: who is speaking here? In 1969, Foucault had already addressed the question: "Writing unfolds like a game that invariably goes beyond its own rules and transgresses its limits. In writing, the point is not to manifest or exalt the act of writing, nor is it to pin a subject within language; it is, rather, a question of creating a space into which the writing subject constantly disappears."[137]

Conclusion

Under the cover of anonymous pen in 1971, Foucault and his co-authors praised "the formation of a unified resistance front" among "black and white prisoners" against "the deceptive traps of organized racism" that "the American administration has constantly used to fight the revolutionary movement in the prisons."[138] In "The Masked Assassination," they proclaim that the murder of imprisoned Black Panther George Jackson "was an act of war." And because the accounts provided by prison administrators and "reactionary newspapers" are "war communiqués," so too does "the act of supporting prisoners constitute a form of war."[139] "Jackson has already said it: What is happening in the prisons is war, a war having other fronts in the black ghettos, the army, and the courts."[140] In 1972, Foucault argued that "a rigid racialist ideology" was used in colonial contexts to prevent "the forming of alliances" between criminalized, deported Europeans and colonized, native populations across the world.[141] And in the later 1970s, Foucault develops the theory of biopolitics, a capacious analysis of the structural functioning of modern racism, an account of a transnational yet governmental logic according to which some segments of the social body are actively made to live and others are disallowed from access to life until the point of death. Indeed, the combination of the modern capitalist economy and the laws that protect it has criminalized such a wide swath of the efforts undertaken by African diasporic people and the dispossessed majority of the world to resist our perpetual exposure to death at the dual hands of poverty and law, that some have argued that "Black life" has been rendered nearly altogether impermissible. Perhaps this is why Foucault's prescrip-

stitution of delinquency, that is to say, in the differentiation of illegalisms, in the supervision, colonization and use of certain of these illegalisms by the illegalism of the dominant class."[132]

Specifically concerning the body, however, Foucault in 1975 seems to be inconsistent. In his 1974–75 lectures on *The Abnormal*, delivered after *Discipline and Punish* had already been sent out for publication, Foucault states that notions of "the natural" operate within legal-medical discourse specifically "to facilitate [the] transition from being accused to being convicted."[133] That is, he seems to reject the idea of inherent nature (and thereby, the idea of the repression of natural instinct or desire) as a concept that has been conveniently deployed by the penal system. "[T]he illegalism of desire and the deficiency of the subject" are established by criminology in order "to legitimize in the form of scientific knowledge the extension of the punitive power to something that is not a breach of the law," allowing for the targeting and punishment of individuals who have not committed a "crime" but whose supposedly inherent characteristics make them already "criminal."[134] And yet, if we return to the passage in *Discipline and Punish* with which we opened this essay, we can clearly see that this idea of natural repression is present in the language of the Fourierists who sought to defend crime; and Foucault seems to build his analysis upon theirs, as he 'ventriloquizes':

> The social order dominated by the fatality of its repressive principle continues to kill by way of the executioner or by the prisons those whose robust nature rejects or disdains its prescriptions, those who, too strong to remain enclosed within its tight swaddling-clothes, break from them and tear them to pieces, men who do not wish to remain children" (*La Phalange*, 10 Jan 1837). There is not, therefore, a criminal nature but rather plays of forces which, according to the class to which the individuals belong, will lead them to power or to prison... When it comes down to it, the existence of crime is a fortunate manifestation of an "incompressibility of human nature"; rather than a weakness or an illness, one must see in it an energy that rights itself, a "radiant protest of human individuality" which no doubt gives it, in the eyes of all, its strange power of fascination.[135]

We see clearly that it is not "a criminal nature," but rather "human nature"—or is it "plays of forces" (?)—that manifests, "fortunately," as crime, but apparently only in the Fourierists' words and not in Foucault's. However, one cannot fail to observe, we recall, that this remark about human nature is after all implicitly

cerated, and was murdered by prison guards after a decade inside.[26] In George Jackson's international best-selling book of letters, *Soledad Brother* (1970), Jackson describes the "feeling of being captured" as a feeling that he as "slave can never adjust to."[27] And indeed, in Foucault's personal manuscripts and handwritten notes for his 1972-'73 lectures on *The Punitive Society*, Jackson's name appears with asterisks, next to notes on the historical construction of the "juridico-medical" criminological discourse of "the offender" as a "maladjusted" and "socially dangerous individual."[28] Inspired by the prison-based social movements at the time in the US and in France, Foucault helped found the Prisons Information Group (*Groupe d'information sur les Prisons*, GIP), an activist organization which reported on the lives of prisoners and worked to amplify their accounts of life inside. In November 1971, the GIP devoted a full issue of its publication, *Intolérable*, to George Jackson's political theorizations. In an anonymous essay titled "The Masked Assassination," Foucault and his co-authors show a stronger grasp of the shifts in BPP strategy after 1970—of the Newton-Cleaver split and the development of the "black commune"—than appears in much scholarship on the Panthers in the academy today, scholarship in which "the relationship between military and political actions" is often overlooked.[29] Foucault considered Jackson's reflections as a theorist superior even to his actions as an organizer, and Foucault stated without qualification: "He is the first to carry out a class-based analysis of the prisoners and define their specific role in the revolutionary process," "overturning many commonly accepted ideas in the history of the working-class movement about the population of the prisons."[30] As Joy James and Brady Heiner have more recently begun to show, the development of Foucault's understanding of the prison must be grasped within the lineage of these social movement theorists.[31]

The evidence of Foucault's intellectual engagement with the revolutionary theory produced by the Black Panther Party is extensive. And yet, against the all-too-easy conclusion that Foucault was single-mindedly elevating a racially-fetishized conception of illegalist militancy, it is necessary to recall Foucault's efforts in organizing and writing in defense of a variety of militant leftist groups that emphasized the illegal throughout the 1970s. Foucault regularly attended actions organized by France's largest revolutionary Maoist group, *Gauche Prolétarienne* (1968–1973, Proletarian Left), which explicitly promoted "social banditry" and illegal direct action as a way to provoke state repression and bring

about popular insurrection.[32] Though the group was outlawed in May 1970 by the French government, as late as 1977 Foucault was implicitly referring to himself as a "*gauchiste*."[33] Indeed, *Gauche Prolétarienne*'s continuing underground activism led directly to the formation of Foucault's own splinter group, the Prisons Information Group. As more and more *gauchistes* found themselves imprisoned alongside common prisoners, Foucault's GIP formed in order to intervene in what they saw as a harmful split materializing within the prison. Foucault later explained:

> When Maoists were put in prison, they began, it must be said, by reacting a little like the traditional political groups, that is to say: "We do not want to be assimilated with the criminals of common law, we do not want our image to be mixed with theirs in the opinion of people, and we ask to be treated like political prisoners with the rights of political prisoners." This was, I think, a sort of political mistake that was rather quickly felt; there were discussions on this subject, and it was at this time that we founded our group....[34]

As Jason Demers has explained in "Prison Liberation by Association: Michel Foucault and the George Jackson Atlantic," the GIP sought to function as a "relay" between parts of society, connecting populations that have been historically separated, with the aim to invigorate solidarities and the potential for mass revolt.[35]

Foucault's use of his reputation as a public intellectual to advocate for criminalized militants extended beyond France as well. In 1975, Foucault helped organize a demonstration and press conference in Spain—with the explicit intention of getting arrested—to protest fascist dictator Francisco Franco's planned executions of ten leftist guerrilla militants, including members of the Revolutionary Antifascist Patriotic Front (*Frente Revolucionario Antifascista y Patriota*) and the Basque Country and Freedom Party (*Euskadi Ta Askatasuna*).[36] And, in 1977, Foucault wrote two editorials advocating French asylum for Klaus Croissant, lawyer and associate of the German Red Army Faction (*Rote Armee* Fraktion or RAF, also known as the Baader-Meinhof Gang).[37] Croissant had fled West Germany following the mysterious deaths of three of his RAF clients while they were in prison, rightly fearing that he would be targeted as well. Foucault further argued that France should pardon the two French citizens who had provided Croissant safe haven, one of whom was a GIP activist.[38]

While Foucault's active support for illegal and criminalized organizations and

be brought out first of all in the analysis of a penal system is the nature of the struggles that take place around power in a system. So it is the notion of civil war that must be put at the heart of all these analyses of penality."[126] What we find in Foucault's political thought is an analysis according to which law-breaking of all sorts that occurs across society is contextualized as part of a larger, constant, and perpetual struggle, a *civil war* that occurs underneath the supposed terms of law and order. Foucault's concept of civil war as he develops it throughout the 1970s operates at multiple levels of analysis. It is a more inclusive alternative to the Marxist concept of class struggle, it is a critique of Thomas Hobbes' advocacy of state power through an inversion that redefines "politics itself as a continuation of war," it is an examination of the use of military techniques in the exercise of governance and in capitalist infrastructure, it is an account of how power is exerted down to the level of the body through "plays of forces," and it is also an extension of Foucault's Nietzschean anti-foundationalist account of reality in the terms of the flux of "knowledge-power" and history. But most importantly, it is an explicit call to political action.[127] For this reason, *Discipline and Punish* ends with the instruction that, where we are inclined to see "incarceration," rather "we must hear the distant roar of battle."[128]

Like Foucault, the Fourierists also saw "battle" where we might otherwise see criminal law—or so Foucault tells us: "*La Phalange* analyzes penal dynamics as a confrontation coded by 'civilization,' the great crimes not as monstrosities but as the fatal return and the revolt of what is repressed, the small illegalisms not as the necessary margins of the society but as the central rumble of the battle which unfolds there."[129] In other words, the Fourierists saw "repression" as not just a political matter but also a matter of the body. However, while Foucault agreed that the body is a site of "perpetual battle," it is also well-known that Foucault grappled with and came to reject both the psychological "repressive-hypothesis" and the notion of repressive power more generally.[130] That is, Foucault inventively argued for and emphasized understanding power as a productive force rather than as a one-directional dynamic of domination. He is clear that illegalisms were not "repressed" but instead reorganized to the benefit of capitalism. "In short, penality does not simply 'repress' illegalisms; it 'differentiates' them, it ensures their general 'economy,'...within an overall strategy of illegalisms."[131] This management of illegalisms has historically taken many forms, and, according to Foucault's analysis, police, judges, and prisons "assist as far as they can in the con-

es—from his encrypted remarks about the radical liberation of human societies (Black and otherwise) to his more sustained conceptual constructs—as part of his own quite evident effort to "valorize crime" and to stretch, legitimize, and push "illegalist" politics into public discourse, as an extension of these earlier "lessons." Brazilian scholar Priscila Piazentini Vieira has importantly pointed out that the nineteenth-century Fourierist effort to "destabilize the cut" that alienated workers from delinquents clearly mirrors Foucault's own activist project with the Prisons Information Group, which Foucault described as an effort to "bring together... different social strata which the ruling class has kept apart."[123] More boldly still, Foucault also clearly aimed to close the gap between how common crime and political crime were being understood in his time. In 1972, after his visit to Attica Prison, after describing the imprisoned Maoists who initially conceived of themselves as better than "criminals of common law," he argued:

> If one makes the distinction, if one accepts the difference between political law and common law, that means that fundamentally one recognizes bourgeois morality and law as far as respect for the property of others, respect for traditional moral values, etc., are concerned. The cultural revolution in its widest sense implies that, at least in a society like ours, you no longer make the division between criminals of common law and political criminals. Common law is politics; it is, after all, the bourgeois class that, for political reasons and on a basis of its political power, defined what is called common law.[124]

Foucault's militant, political proposal that the "political criminals" of *Gauche Prolétarienne* and "common law criminals" should be seen as one and the same stands in striking parallel with what appears to be his implicit effort to connect the radicalism of *political illegalism* (political crime) with the everyday reality of *popular illegalisms* (common crime) through the text of *Discipline and Punish*. In his discussion of common crime, Foucault insists on grasping "the profoundly political character both of society's elimination of these people and of those people's attack on society." He ends the Attica interview by quoting *Les Misérables*: "Crime is a *coup d'etat* from below."[125]

By the mid-1970s, Foucault was considerably more nuanced about why he thought that common crime should be grasped as a political matter. In 1973, he put it clearly: "I do not mean that I will consider so-called common delinquency and political crime as absolutely equivalent. What I mean is that what has to

social movements is clear across the breadth of biographical writing on his life, his biographers have often editorialized on these matters and repeatedly rendered his efforts in support of these groups as exceptional or uncharacteristic.[39] This strange dynamic is perhaps in part due to the excessive reliance by Foucault's most prominent biographers upon the personal diaries of Claude Mauriac—due to a lack of other sources—for details about Foucault's life during those particularly militant early 1970s.[40] Mauriac was a close friend of Foucault's and journaled about their interactions during this period, but he also had centrist-to-liberal political views and had prior served as personal secretary to President Charles de Gaulle, facts that likely skewed his understanding of the overall coherence of Foucault's radical activism. In addition to the difficulty that many have encountered in trying to grasp the logic underlying Foucault's activism while he lived in Europe, the currently existing accounts of the careful and particular ways that Foucault supported illegal and criminalized social movements in Tunisia, Brazil, and Iran have not been fully integrated into mainstream interpretations of his political thought either. And only very recently has the scholarship on Foucault's internationalist activism begun to be produced with suitable rigor.[41] In the case of Brazil in particular, recent research has revealed the extent of Foucault's work in support of student movements and his collaborations with anarchist presses during the military dictatorship (1964–1985).[42] His activity remained strategically concealed, however, given the frequent state murders of public intellectuals. The writings of Brazilian scholars Priscila Piazentini Vieira, Edson Passetti, and Heliana de Barros Conde Rodrigues in particular offer valuable theoretical interventions, including radical critiques of law, inspired by in part by Foucault's thought and practice.

I have devoted considerable space to these details because they function as indispensable historical context for grasping the import of Foucault's innovative thinking about the politics of the illegal. His studies of French Maoist and Black Panther Party theory and practice were deeply influential to the formation of his political thought. Just as important, though, was the work of the French and British Marxist historians of the time whose research clearly framed Foucault's approach to understanding the criminalization of common theft during the beginnings of capitalism.

2. The Historical Criminalization of Popular Illegalisms

"People's history" is a way to use records to tell the past from the vantage point of the common people, "from below" rather than from the viewpoint of elites. Perhaps fittingly, the history of the scholarly field of "people's history" has itself been commonly characterized by frequent borrowings and "pilferings."

In France, the development of this fundamentally Marxist approach to telling history was perhaps most influenced by George Lefebvre's description of the revolutionary *mentalité* of the French peasantry in his 1924 dissertation, *Les paysans du Nord pendant la Révolution française* (The Northern Peasants during the French Revolution).[43] His idea of examining "collective mentalities" was freely taken up by the *Annales* School, whose scholars started using the phrase of "social history" and then "history seen from below," as founder Lucien Febvre put it.[44] In *Discipline and Punish*, Foucault cites "social histories" on popular crime produced by Annales scholars Pierre Chaunu and Emmanuel Le Roy Ladurie.[45] And, across both *Discipline and Punish* and *The Punitive Society* lectures, Foucault cites and borrows (without citing) from histories of rural peasant rebellion and revolution produced by French historians directly inspired by Lefebvre, such as Paul Bois, Octave Festy, and Maurice Agulhon.[46] Most of *Discipline and Punish*, however, does not focus on rural struggles per se, but instead on those struggles that occurred when these displaced rural peasants migrated into the rapidly industrializing cities. Accordingly, even though the history that Foucault constructs is mostly French, his categories of analysis were more influenced by British historians who had been examining the urban situation through their studies of marketplace mobs, conspiratorial labor unions, and the creation of the new industrial "working class." And so we find, in Foucault's lecture notes and in footnotes to *Discipline and Punish* that have been obscured or removed in Sheridan's translation, considerable evidence of Foucault thinking along with and also borrowing from those British historians who themselves borrowed the phrase "history from below."[47] Foucault cites Eric Hobsbawm's *Bandits* (1969), he secretly debates with E. P. Thompson's *The Making of the English Working Class* (1961) and "The Moral Economy of the English Crowd in the Eighteenth Century" (1971), and he imitates George Rudé's study of the British Gordon Riots (1956).[48]

These British historians varied, however, in their interpretations of the political importance of the struggles engaged in by these new arrivals in the cities.

laws, and some political movements were criminalized and forced into illegalist culture by state repression.[118]

Foucault traces not just historical practices, however, but also conscious efforts to contest the meaning of the illegal in the nineteenth century. It is thus in relation to such histories that Foucault's *extensive* engagement with the utopian socialist writings of the journal *La Phalange*— which he quotes more than any other text in *Discipline* and with which we began this essay—must be understood. He places *La Phalange* alongside a variety of worker newspapers from the same era to illustrate how the meaning of "crime" was being grappled with by the population. "The workers' newspapers often proposed a political analysis of criminality" that turned the tables on the moralism of the "bourgeoisie," instead accusing the "exploiters"—those "who literally starve and murder" workers—of "'physical degeneracy' and 'moral decay.'"[119] The Fourierists, however, "no doubt have gone further than all the others," Foucault argues, and they and the anarchist movement both played a significant role in combatting the splitting of "the poorer classes"[120]:

> The lessons of *La Phalange* were not quite wasted. They found an echo when, in the second half of the nineteenth century, taking the penal apparatus as their point of attack, the anarchists posed the political problem of delinquency; when they thought to recognize in it the most militant rejection of the law; when they tried not so much to heroize the revolt of the delinquents as to disentangle delinquency from the bourgeois legalism and illegalism that had colonized it; when they wished to re-establish or constitute the political unity of popular illegalisms.[121]

Within the scope of a single sentence, Foucault strives to address the most resonant shortcomings of nineteenth-century anarchist movements—their romanticization of the criminal and of criminality—by insisting that such movements were perhaps at their most discerning not when they sought to elevate law-breaking but when they sought to normalize it, and, through those efforts, simultaneously confronted the conceptual foundations of modern law under capitalism by linking to a larger, popular range of "illegalist" struggle. "And we can say that the strength of anarchist ideology is linked to the persistence and rigor of this illegalist consciousness and practice in the working class—a persistence and rigor that neither parliamentary nor trade union legality succeeded in absorbing."[122]

Comparably, we can understand Foucault's own research and rhetorical choic-

was a topic of debate among *gauchistes* in post-1968 France and internationally. In a 1972 discussion titled "Illegalism and Ultra-Leftism" held between philosopher Jean-Paul Sartre, Maoist Benny Levy (alias Pierre Victor), and journalist co-founder of *Libération Philippe Gavi, each an associate of Foucault's*, they discuss the prospects for "expanding the field of opposition between legitimacy and legality"— between popular norms and the state's law—after the clashes of May 1968.[111] Gavi offers: "If it doesn't want to be cut off from the people every movement is obliged, at one time or another, to sink its roots in a fertilizer of ambiguous alienating ideas of a dual nature."[112] I propose that, by stretching the word *illégalisme* to counterintuitively include popular practices of law-breaking that were morally grounded in the legitimacy of custom and tradition, Foucault was himself in fact engaging in such a political and discursive project. In this way, *Discipline and Punish* may be situated within a historical tradition of similar efforts.

In *Discipline and Punish*, Ch. 4, Sec. 2, "Illegalisms and Delinquency," Foucault is particularly attentive to historical shifts in how illegalisms were conceived and practiced, when they contracted and when they spread, when they were "inserted in a general political outlook," and when they were "diverted."[113] He sums up his historical account: "There was a threefold diffusion of popular illegalisms at the turn of the century (quite apart from a quantitative extension that is problematic and still uncalculated)."[114] The first, "the political dimension of illegalisms," "developed" in two ways: it consisted of originally "localized practices" of tax refusal and robbery of "hoarded goods" that "were able during the Revolution to lead to directly political struggles," and it also consisted of "political movements" that were already "explicitly based on existing forms of illegalisms," such as "illegal associations" of workers which led "to political revolution."[115] The second consisted of social movements against new regulations, especially among peasants who through experience found their very ways of life already in opposition to law, and thus participated in "struggles in which those struggling knew that they were confronting both the law and the class that had imposed it."[116] The third developed as effective forms of "popular agitation" came to be criminalized through laws that "threw to the other side of the law many individuals, who, in other conditions, would not have gone over to specialized criminality," groups whose increasingly violent practices in turn escalated to "political brigandage."[117] In sum, some illegalisms became incorporated into revolutionary projects, some "social struggles" developed out of the need to challenge particular

These people had been recently dispossessed and displaced, pushed off of communal lands by the new enclosures of private property, and they struggled to sustain themselves through a variety of means, with only a partial relationship to regular wage labor. For orthodox Communist Party member Eric Hobsbawm, most of the ways that early worker associations, outlaw organizations, and social bandits contested for power and pursued their interests were inadequate, "pre-political," and, at best, "'reformist' rather than revolutionary."[49] While it is true that these social movements against early capitalism bore little resemblance to the idealized worker's organizations that defined Hobsbawm's communist standards, E. P. Thompson's approach was considerably more generous. Focusing on the less organized form of the "crowd" while nonetheless trying to grasp its structural tendencies, Thompson argued that marketplace riots were a significant form of class struggle through which the urban poor fought to determine their access to resources. Thompson's research explained how, rather than just looting from merchants, angry crowds often used the threat of violence to forcibly "'set the price' of provisions at the popular level" that they dictated, creating new norms.[50] Because the "popular ethic" authorized "direct action by the crowd," merchants were forced to capitulate to what Thompson termed the "*moral* economy," a moral standard that existed in opposition to the laws imposed by the new capitalist order.[51] Most importantly, Thompson's research points out the counter-intuitive fact that these law-breaking and riotous crowds nonetheless insisted on the belief that they were defending traditional rights and customs that had been in place "since time immemorial."[52]

As Bernard Harcourt has pointed out, Michel Foucault was a devoted reader of Thompson's work, and *Discipline and Punish* reflects this influence.[53] I identify here two key ways that Foucault drew from but also explicitly departed from Thompsonian concepts. First: because Foucault was trying to figure out what form of class struggle motivated elites to develop the modern prison, he disagreed with Thompson that the actions of the mobs were the inspiration:

> Actually, it seems to me that the mechanism that brought about the formation of this punitive system is, in a sense, deeper and broader than that of the simple control of the seditious mobs. What had to be controlled, what the bourgeoisie demanded that the State apparatus control through the penitentiary system, is a deeper and more constant phenomenon of which sedition is only a particular case: *lower-class or popular illegalism*.[54]

Foucault identified that Thompson made the mistake of devoting excessive attention to the highly visible spectacle of the mob and thus overlooked more widespread and diffuse forms of class struggle. Second: Foucault's concept of popular illegalisms bears an undeniable resemblance to E. P. Thompson's concept of moral economy: they are both focused on identifying the law-like force of customary, normative practices and beliefs among the masses.[55] Ultimately, both theorists seem to emphasize grasping the continuum that exists connecting the moral, the social, and the economic in order to assess the political impact of these resistant practices.[56] The biggest difference is that while E. P. Thompson's term highlights how the crowds saw their actions as lawful, Foucault's term highlights that elites saw the same actions as unlawful.

Foucault used the term illegalism to refer to the range of non-legal but normative activities that all members of society engage in. For Foucault, the circulation of illegalisms constituted basic social relations since from at least the time of the "feudal" *ancien régime*. Illegalisms are not just law-breaking: "systematic illegalism" is a "mode of functioning of the whole society," and a "modus vivendi" (way of life) which includes sets of de facto tolerated practices—an "illegalism of rights"—which are exercised by each "strata."[57]

> [U]nder the [old] regime, each of the different social strata had its margin of tolerated illegalism: the non-application of the rule, the non-observance of the innumerable edicts or ordinances were a condition of the political and economic functioning of society. …Illegalism was so deeply rooted and so necessary to the life of each social stratum, that it had in a sense its own coherence and economy.[58]

This normative balance was at the same time grounded in an antagonistic interplay. According to Foucault, the "least-favored strata" managed to maintain their "rights" to illegal activity "by force or by obstinacy," and attempts by elites to decrease the "space of tolerance" "provoked popular disturbances."[59] Accordingly, the potentially political character of illegalisms is already structured into how Foucault conceptualized them: "[F]rom fiscal illegalisms to customs illegalism, to smuggling, to looting, to the armed struggle against the government's taxation agents, then against the soldiers themselves and finally, to rebellion, there was a continuity in which it was difficult to mark the frontiers."[60]

Perhaps anticipating the critique that illegalisms might be interpreted as

Foucault insists on the importance of grasping the historical manipulation of the "lumpen" and "delinquents" in their particular historical contexts, understanding that their marginalization and criminalization reflects a comprehensive project that serves a political purpose within a larger matrix of struggle, and recognizing that other sections of the *proletariat* have at various points been recruited to aid in those efforts, too. Foucault's intervention seeks to address the militant young Marx's error of analysis, errors whose repercussions on social movement organizing have continued on to today.

4. "Re-establishing the Political Unity of Popular Illegalisms"

In the original French *Surveiller et punir*, the word *illégalisme* appears 127 times. By comparison, *surveiller* and *surveillance* appear a combined 173 times. That amounts to three appearances of *illégalisme* for every four appearances of *surveiller*/*surveillance*. In recent discussions of the term, *illégalisme* has been referred to as a neologism; this interpretation unfortunately dehistoricizes Foucault's appropriation of what was in fact a late-nineteenth-century French anarchist term.[108] The word *illégalisme* traditionally refers to explicit forms of law-breaking engaged in by anarchist, communist, and socialist radicals either for "revolutionary" expropriation of resources, for propaganda, or for individualist political ends. Most infamously, illegalist groups in early-twentieth-century France, Italy, Belgium and Switzerland engaged in bank robberies as part of their political practice, with some acquiring legendary status in popular French culture in particular.[109] In the *Anarchist Encyclopedia*, compiled and edited in 1934 by French anarchist Sébastien Faure as part of a political project to create an "anarchist synthesis" uniting various factions, the term *illégalisme* receives a detailed treatment. The fifth and final "synthesizing" entry diverges from the standard, individualistic definition and instead emphasizes a more populist conceptualization that appears to overlap with Foucault's: "But if illegalism from below, undermines here and there the fundamentals or the prestige of property… if it gains some confused and circumspect sympathy in the process… it is that secret revenge of the humble against the masters and the monopolists. This illegalism is linked, for the masses, to externally rebellious action against the regime and established things…"[110]

As discussed in Section 1, the strategic role of social banditry and illegalism

was occurring on the ground at the time. Marx wrote *The Eighteenth Brumaire* immediately after Napoleon III came to power, drawing from reports in France that worker-led movements failed to gain power during the revolution in part because unemployed young men were hired to attack them. In an interview after the publication of *Discipline*, Foucault explained: "everyone knows that Napoleon III was able to seize power only with the help of a group consisting, at least on its lower levels, of common-law criminals. One only needs to see the workers' fear and hatred of criminals during the nineteenth century to understand that the criminals were being used against them, in social and political struggles, as agents of surveillance and infiltration, preventing and breaking strikes, and so forth."[103]

Foucault's use of *The Eighteenth Brumaire* as evidence of a historical discourse stands in sharp contrast to his genuine reliance on Marx's *Capital Vol. 1* to inspire and conceptually inform his analysis of both the disciplining of the working class and the criminalization of vagabonds and paupers.[104] Importantly, by the time that Marx writes *Capital*, Marx's own approach on these questions had become more rigorous and nuanced, and he less often invoked the demeaning connotations of the word *lumpen*. Instead, Marx refers to "a free and rightless (*vogelfrei*) proletariat" who did not become an "industrial working class" but are nonetheless "the fathers of the present working class."[105] In this vein, Marx's vitriolic dismissal a dozen years earlier of this particularly oppressed subset of the population might be better understood as reflective of the analytical near-sightedness of an impassioned militant immediately after a failed revolution. Furthermore, as Robert Bussard has convincingly argued, the young Marx was also reflecting the social bigotries and biases of his time—mimicking prejudicial notions that in fact disparaged all dispossessed people (employed and unemployed alike)—even though later Marxists have granted Marx's earlier view on the *lumpen* a kind of abstract, transhistorical importance.[106] On this last matter, Foucault is quite clear:

> This production of the delinquent and its investment by the penal apparatus must be taken for what they are: not results acquired once and for all, but tactics that shift according to how closely they reach their target. [...] It has been a long and arduous undertaking. It has involved the use of the general principles of the 'moralization' of the poorer classes ...the acquisition of what might be called a basic legalism, which was indispensable from the time when custom was replaced by the system of the [Civil] Code....[107]

"merely" individual acts of resistance, Foucault also used the term "infra-power" to describe the *collective* force—from below— of popular illegalisms.[61] According to his analysis, even before the industrial revolution occurred, the "reciprocal interplay" between the spectacular sovereign power of the monarchy from above on one hand, and its "correlative" yet less-than-visible "infra-power" of peasant illegalisms from below on the other hand, manifested as a clash between two sides.[62] Foucault lifts his term from French historian Maurice Agulhon, who used the word "*infrapolitique*" to describe forms of everyday pilfering and theft among the peasantry that were considered customary but would sometimes lead to more antagonistic clashes.[63] Both Foucault's "infra-power" and Agulhon's "infrapolitique" have, in turn, influenced the much more well-known concept of "infrapolitics" as developed by contemporary anarchist political scientist James C. Scott.[64] In *Domination and the Arts of Resistance*, Scott describes "infrapolitics" as the everyday ways that people resist political domination and test the limits of authority, including the material practices of "theft, pilfering, feigned ignorance, shirking or careless labor, footdragging," etc.[65] Compatibly with Agulhon's and Scott's terms, we can see that Foucault's notion of "infra-power" tries to account for how political effects arise before they become visible as political. Foucault's theory then is that the prison arose in response to and within this space of conflict:

> In short, penal reform was born at the point of junction between the struggle against the super-power of the sovereign and that against the infra-power of acquired and tolerated illegalisms. And if penal reform was anything more than the temporary result of a purely circumstantial encounter, it was because, between this super-power and this infra-power, a whole network of relations was being formed.[66]

Eventually, the balanced antagonism and "equilibrium of tolerance" that "had maintained the illegalisms of different social strata side by side," is disturbed, rearranged, and redefined during the development of capitalism.[67]

A cornerstone of Foucault's argument in *Discipline* is that, under monarchy, exercises of state power like public torture were spectacular and carried symbolic force, but were uneven, inconsistent, and porous as far as the "actual" (technical) application of the law. For this reason, the "field of illegalisms" also became the space and condition of possibility for the historical formation of the bourgeoisie, which, Foucault argued, was able to grow as a class by operating within the gaps

in the uneven power of monarchical state sovereignty.[68] The economic power that the bourgeoisie developed through the black market in commodities from the colonies, piracy, and the smuggling of goods (which also benefited the "poorer classes") eventually enabled the bourgeoisie to take political power and then establish new laws to protect those new gains.[69] "Practicing fraud and escaping the law will therefore have two new forms: making the law and, by status, escaping it. Legislative power is thus profoundly linked, in the bourgeoisie, to the practice of illegalism."[70] As Foucault explains, the very laws that redefined property relations to the advantage of some classes and to the detriment of others, and even the parliaments that pass them, are themselves "bourgeois illegalisms."[71]

The new laws that established private property, enclosed the commons, and displaced the peasantry also had the effect of criminalizing a wide range of what had prior been acceptable peasant behaviors, such as the taking of food from orchards, the collection of fallen timber, and other kinds of common land use. As the dispossessed moved to the cities, they carried their rural norms with them and then found that their casual theft was even more severely criminalized in the cities:

> And this illegalism, while resented by the bourgeoisie where the ownership of land was concerned, was intolerable in commercial and industrial ownership: the development of the ports the appearance of great warehouses in which merchandise was stored, the organization of huge workshops (with considerable quantities of raw materials, tools and manufactured articles, which belonged to the entrepreneurs and which were difficult to supervise), also required a severe repression of illegalism.[72]

Citing heavily from records of losses by theft occurring in London's ports, warehouses, and factories, Foucault comes to a crucial insight: the immediate proximity of this new class of workers to the newly accumulated commodities and infrastructural investments of the bourgeoisie—which were now literally "in the hands" of the workers on a daily basis—exposed bourgeois wealth to theft *in a historically distinct way*, in a way that prior land-owning aristocrats had not been exposed to.[73] "Every worker was a possible predator."[74] The response was the public hanging of thousands of thieves across Europe.[75]

Because the sites of these public hangings often turned into riots, as Foucault goes on to explain, the technology of the prison with its isolating architecture was developed, individuating, separating, and alienating the newly criminalized

concedes that the non-workers—those he refers to as "non-proletarianised plebs" because they were either unable or unwilling to take up waged work—also stand to be criticized.[98]

On this latter point especially, much ink has been spilled. Famously, Karl Marx vilified this subset of the poor, characterized them as a "decayed" *lumpenproletariat*, and regarded them as "social scum" easily turned into a "bribed tool" of elites.[99] Interestingly, in Foucault's public discussion with Maoists, he seems to intentionally avoid using this nineteenth-century slur, even though his interlocutor Benny Levy uses it several times.[100] This pattern continues for Foucault in *Discipline and Punish* where the term in fact *never* appears. In addition, Foucault utters the word just once in his lectures on *The Punitive Society*, as a syntactic appositive—in an instructive list of other comparable terms, defining them as the "the unemployed proletariat."[101] I propose that the conspicuous absence of the term in Foucault's writing might be better understood by examining the lone reference in *Discipline* to history's most infamous polemic against the *lumpen*: Marx's *The Eighteenth Brumaire of Napoleon Bonaparte*. In *Discipline and Punish*, Foucault uses Marx's text not as theory but rather treats it as archival material—*as evidence of a discourse*—in support of a historical argument about how and why the French working class during the 1840s in particular internalized moralistic "bourgeois" ideas about "delinquents":

> The political use of delinquents—as informers and agents provocateurs—was a fact well before the nineteenth century. But, after the Revolution, this practice acquired quite different dimensions: the infiltration of political parties and workers' associations, the recruitment of thugs against strikers and rioters, the organization of a sub-police—working directly with the legal police and capable if necessary of becoming a sort of parallel army—a whole extra-legal functioning of power was partly assured by the mass of reserve labour constituted by the delinquents: a clandestine police force and standby army at the disposal of the state. It seems that, in France, it was around the Revolution of 1848 and Louis Napoleon's seizure of power that these practices reached their height (Marx, *Eighteenth Brumaire…*, 63–65). Delinquency, solidified by a penal system centered upon the prison, thus represents a diversion of illegalism for the illicit circuits of profit and power of the dominant class.[102]

Foucault uses Marx's most famous text on the "lumpenproletariat" not for its theoretical analysis, but as a historical primary source, for what it tells us about what

and the state and the equivalence between (attacks on) persons and (attacks on) property—a conflation is soon achieved between the urban workplace thief and the roaming group of vagabonds, producing the singular figure of the anti-social, criminal "monster."

This process was not absolute, however, and Foucault explains that resistance and class struggle occurred throughout. "The role" that the "penal system plays" is to disrupt the forms of solidarity that naturally developed among the masses against the new political economy and its laws:

> The solidarity of a whole section of the population with those we would call petty offenders—vagrants, false beggars, the indigent poor, pickpockets, receivers and dealers in stolen goods—was constantly expressed: resistance to police searches, the pursuits of informers, attacks on [police] watchmen or inspectors provide abundant evidence of this. And it was breaking up this solidarity that was becoming the aim of penal and police repression.[93]

Foucault argues that the "breaking up" of solidarities reaches a peak in France in the middle of the nineteenth century: "the early 1840s... was a period of economic crisis, a period of workers' agitation and a period, too, in which the opposition between the worker and the delinquent was beginning to crystallize."[94] Specifically, he explains, it was a goal of elites to create an enduring split: "Erecting the barrier to separate delinquents from all the lower strata of the population from which they sprang and with which they remained linked has been a difficult task, especially no doubt in urban milieux."[95] In his 1972 "Discussion with Maoists," he puts his analysis in more orthodox Marxist terms: "This judicial apparatus has had specific ideological effects on each of the dominated classes, and there is in particular a proletarian ideology into which certain bourgeois ideas—about what is just and what unjust, about theft, property, crime and criminals—have infiltrated. This does not mean that the non-proletarianized plebs have remained unsullied and resolute."[96] While arguing that the "judicial apparatus" is the primary cause of the "breaking up" of solidarities, Foucault also lays some blame at the feet of the newly formed "working class" for internalizing "bourgeois" ideas about private property. Later, he clarifies that, to protect themselves from criminalization, the "working class" was "obliged to recreate for themselves a sort of moral puritanism that was for them a necessary condition for survival," and soon became "a part of the proletariat's daily ideology."[97] At the same time though, he

masses from the non-criminalized masses.[76] In the process, according to the new discourses around criminality, these now *criminalized* illegalisms also came to be depicted as a lower-class-only phenomenon—even as they continued to be "mode of functioning of the whole society." The urban poor came to be depicted as inherently "monstrous" and "antisocial," termed the "dangerous classes" by what would become the first modern criminologists.[77] Foucault uses the term "delinquent" to refer to the individual who has been discursively produced by processes of criminalization, imprisonment, and definitively "split" from the rest of "the lower strata."[78] It is necessary to emphasize here then that any analysis of *Discipline* that fails to distinguish between non-criminalized and criminalized illegalisms is in effect reproducing the discourse that Foucault struggles extensively to identify and critique. That is, one cannot properly understand *Discipline and Punish* while conflating *illegalisms* with *crime*.

In an interview conducted soon after his visit to Attica Prison in April 1972, less than a year after the famous uprising there, Foucault proclaimed: "The problem is, then, to find out what role capitalist society has its penal system play, what is the aim that is sought, and what effects are produced...? What is their place in the economic process, what is their importance in the exercise and the maintenance of power? What is their role in the class struggle?"[79] In sum, a central aim of *Discipline and Punish* is to make clear that the criminalization and punishment of these customary practices, first through mass hangings and then more effectively through the prison and the production of the delinquent, was part of a "class struggle" waged by elites against newly dispossessed populations during the European development of capitalism. In this sense then, *Discipline and Punish* must be grasped as an account of some of the earliest social movements in Europe against capitalism. These movements included: the spontaneous self-activity of dispossessed and proletarianized populations through the tactics of theft and escape, the new forms of social organization that developed to support these tactics inside and outside of the workplace, and the cultural struggles among the poor to come to terms with new understandings of penal law. These cultural struggles would result in part in a splitting of the "lower strata" into opposing groups, but also eventually brought about the conscious and intentional embrace of "illegalist" practices and ideas.

3. Vagabondage, Splitting the Strata, and Marx's Lumpenproletariat

In Foucault's analysis, which is quite arguably an account of the internal colonization of Europe, the enclosure of communal lands and new regimes of private property not only commodified space and natural resources but also created mass dispossession and exacerbated the growth of transient and migrant populations who came be to characterized as distinctly *other*. Analyzing seventeenth and eighteenth-century French law and commentaries from the period, Foucault concludes that the greatest anxieties among elites concerned the lives and practices of vagrants, or "vagabonds."[80] Even worse than the workplace thief who stole goods from the warehouse was the wandering vagrant who refused the new capitalist regime of work by skipping out and "stealing" the "potential" commodification of their own labor: "illegalism of dissipation" is thus "a way of stealing the *condition* of profit."[81] Being not just non-productive but "anti-productive," the vagabond who lacks a master, lacks civil status, and avoids work in effect "steals" their own body from capitalism: "anything that may steal it from use by capital will be considered as that infra-legal illegalism, that great immorality" that "starts below, before the law."[82] Vagabondage is thus "the general matrix of crime that contains eminently all other forms of delinquency."[83]

Elite efforts to enslave or exterminate vagabonds encountered resistance, however: "Vagabondage, with all that it entailed in plunder, aggravated theft, and occasional murder, provided a welcome environment, to the unemployed, to workers who had left their employers in irregular circumstances, to domestic servants who had some reason to flee their masters, to ill-treated apprentices, to deserting soldiers, [and] to all those who wished to escape the press-gang" and other forms of forced labor.[84] One way that vagabonds protected themselves was by forming collectively into what elites called "gangs of malefactors." The roots of the word "malefactor" translate literally into "evil doer." Gangs receive a condensed discussion in *Discipline* (relative to that in *The Punitive Society* lectures) but are important to its historical arc because these groups draw the most intense forms of state repression, even as their actual impact on the ground decreased. Foucault notes: "Whereas the historians of today observe a diminution in the great gangs of malefactors, [Physiocrat] Le Trosne saw them roaming the French countryside like swarms of locusts."[85] Depictions of gangs also serve as the basis for a se-

ries of tropes—the monstrous, the animal, the uncivilized—which inform the modern discourse of the "criminal" that is then imposed onto all "social enemies," all those who are said to break the "social contract."[86] Ultimately, Foucault describes vagabondage on the whole as "a type of shared life, a social group that appears as a counter-society," a mode of social existence that finds itself at odds with modernizing, capitalist Europe.[87]

At the same time, as the new "working class" became incorporated into modernity, the tension between them and gangs of vagabonds becomes sharpened. Foucault cites from Hobsbawm's historical observations that "social bandits" who fail to maintain popular social legitimacy do not last long:[88]

> Hence an ambiguity in popular attitudes: on the one hand, the criminal—especially when he happened to be a smuggler or a peasant who had fled from the exactions of a master—having benefited from a spontaneous wave of sympathy: his acts of violence were seen as descending directly from old struggles. On the other hand, a man who, under cover of an illegalism accepted by the population, committed crimes at the expense of this population, the vagrant beggar, for example, who robbed and murdered, easily became the object of a special hate: he had redirected onto the least favored an illegalism that had been integrated into their conditions of existence.[89]

Eventually, however, this same "special hate" against the "criminal" came to be redirected back onto *all* the masses, to the benefit of elites, through the power of the penal state. Tensions and antagonisms that had previously been hashed out internally among the lower classes get taken up, magnified, and managed through the penal system. In *Discipline* and in *Punitive Society*, Foucault discusses how *lettres de cachet* were a way that citizens of high social status could invoke police powers to criminalize their neighbors.[90] Ultimately, under capitalist modernity, all those who engage in everyday illegalism may be redefined as the 'criminal' who supposedly attacks all of society. "While the eighteenth-century delinquent who practiced fraud and smuggling was not a social enemy, inasmuch as he enabled the system to function, the delinquent at the *end* of the century *is* defined as a social enemy."[91] What's more, as a member of society, one supposedly consents to and affirms one's own punishment, a contradiction that Foucault questions and attacks at length.[92] Through a series of symbolic political identities that are culturally foundational to modern liberalism—the equivalence between society