INDISCIPLINE, PUNISHMENT, GENDER AND RACE: EXAMINING DISCIPLINE AND PUNISH IN THE CONTEXT OF THE PRISON SYSTEMS OF THE UNITED STATES, AND ENGLAND AND WALES

by

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Abstract

This dissertation explores how the changing philosophy and practices of criminal punishment in the United States, England and Wales reflect broader techniques and relations of power in these societies. Two questions motivate this research: firstly, the extent to which Michel Foucault’s account of power and the prison is applicable now; and secondly, whether Foucault's later work provides an adequate conceptual framework for theorizing the aspects of power that he either overlooks or inadequately addresses in *Discipline and Punish*. I identify three trends in criminal justice over recent decades that challenge Foucault's account of penalty: sharply rising incarceration rates, prison privatization, and the racialized and gendered nature of prison populations. I argue that although Foucault's concept of disciplinary power remains applicable, a fuller understanding of contemporary penalty requires an analysis of how race and gender are constituted through biopower, and of how neoliberalism has shaped penal policy and contributed to greater socioeconomic inequality.

Although I conclude that Foucault's theorization of power and the prison in *Discipline and Punish* is inadequate in light of the racialized and gendered nature of power relations in both historical and contemporary criminal justice systems, I draw on his later work to re-theorize power and inequality. I argue that Foucault's analysis of sex, sexuality, and race provides a valuable conceptual framework that generates important insights, particularly through the concepts of biopower and state racism. However, I critique aspects of Foucault's later work, arguing that his analysis of race is inattentive to the inter-relation of race, class and capitalism; that his analysis of sex and sexuality overlooks the question of gender; and that his account of neoliberalism is more descriptive than analytical. I therefore combine the conceptual framework provided by Foucault with insights from feminist theory, queer theory and critical race theory to show how racialized, gendered and sexed identities become constituted within institutions such as the prison. My conclusion is that criminal justice and prison systems serve to construct and reinforce racialized and gendered identities, and thereby contribute to racialized and gendered inequalities that extend far beyond the prison system.
Preface

Some of these research conclusions have already been published in the following article:

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Chapter One: Introduction

Overview

This research project addresses two broad questions about Foucault's work and its relevance to the techniques and relations of power in contemporary America, and England and Wales. The first research question is most simply expressed as follows: to what extent is Foucault's account of power and the prison in *Discipline and Punish* persuasive today? The test of persuasiveness is threefold: firstly, whether Foucault's (1995) analysis is empirically plausible in a minimal sense; secondly, whether it provides important insights about power and penalty, and; thirdly, the degree to which Foucault's analysis captures all of the important features of power relations in these prison systems. My conclusion, briefly stated, is that Foucault's (1995) account is empirically plausible and generates some important insights, but that there are crucial features of power relations around punishment that Foucault does not adequately address in *Discipline and Punish*. In particular, Foucault's account of penalty entirely overlooks racialized and gendered over/under-representation amongst prisoners and thus fails to consider how disciplinary power relates to race and gender, and provides inadequate analysis of the impact of class and capitalism.

My second research question builds on the first, by considering whether applying the insights of Foucault's (1980b, 1990, 2003, 2007 & 2008) later work generates a persuasive account of the techniques and relations of power in the United States, and England and Wales. Although Foucault (1995) ignores the subjects of race, sex, sexuality, and neoliberalism in *Discipline and Punish*, he explores all these issues in his subsequent books and/or his lectures at the Collège de France. I will therefore consider whether the conceptual framework provided in Foucault's later works is sufficient to develop a persuasive theorization of the aspects of power
that he either overlooks or inadequately addresses in Discipline and Punish. The test of persuasiveness here is twofold: firstly, whether Foucault's work on race, sex, sexuality, and neoliberalism provides valuable insights about power and penalty, and; secondly, the extent to which Foucault's conceptual framework captures the important aspects of how race, gender, class and capitalism relate to penality. Here, my conclusion is that Foucault's later work provides valuable insights about both race and gender, particularly through the concept of biopower, which shows how racialized and sexed categories and identities are constructed. However, I argue that it is necessary to reject and/or modify elements of Foucault's (1980b, 1990, 2003, 2007, & 2008) conceptual framework in order to understand contemporary power relations in the United States, and England and Wales, particularly in relation to socioeconomic inequality and neoliberalism.

In this dissertation I will argue that while Foucault's (1980b & 1990) account of sex and sexuality shows the constructedness of binary sex categories, it overlooks the techniques of power involved in creating gendered identities and inequalities, and the relationship between gender and sex. Similarly, Foucault's (2003) analysis of race provides the useful concepts of biopower and state racism, but fails to explore the crucial links between race, class and capitalism. I conclude that Foucault's (2007 & 2008) account of neoliberalism and neoliberal techniques of government is flawed, because it fails to identify the tensions within neoliberal theory, the coercive aspects of neoliberalism, and the normative implications of neoliberal economic policies. Although Foucault's later work certainly generates insights that help to understand the power relations around race and sex, and to a lesser extent also around neoliberalism, there are important aspects of contemporary power relations that Foucault does
not capture. I will therefore draw on feminist theory, queer theory, critical race theory, and Marxist theory to amend and supplement the conceptual framework provided by Foucault.

My case studies for addressing these two questions are the prison systems of the United States, and England and Wales, and to a lesser extent the broader criminal justice systems of these countries, including the police and courts. The significance of this project lies in the fact that Foucault (1995) uses close analysis of the prison to identify and critique disciplinary power, which he argues was exemplified in the prison, but then became widespread and central to modern government. Foucault's analysis of the prison is therefore a way of generating a critical theory of power dynamics in society as a whole — the prison is a case study that enables him to develop a broader theory. In particular, Foucault regards criminal punishment as exemplifying the way that different techniques have worked upon the body, and it enables him to develop an account of how disciplinary power constitutes the subject, or as Foucault puts it: "The soul is the effect and instrument of a political anatomy; the soul is the prison of the body" (1995, 30). If Foucault's analysis of the prison is flawed, or is no longer applicable, then it calls into question the relevance and persuasiveness of his analysis of disciplinary power, docile bodies, and of the self.

My research follows Foucault's approach by focusing on the prison, but using it as a case study to generate critical insights about the techniques and relations of power in contemporary societies. Like Foucault, I will be paying attention to the ways that power works through and upon the body, to how power shapes the identities of subjects, and to how penal policy and

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1 The reason I use the term 'England and Wales' instead of United Kingdom (UK), or Great Britain, is that there are three distinct legal systems within the UK, with their own criminal laws, courts, and penal institutions. Although England and Wales are two distinct nations within the UK, they are a single jurisdiction for the purposes of criminal justice and share criminal law, a court system, and a penal system. In contrast, both Scotland and Northern Ireland are distinct jurisdictions, with their own criminal law, courts, and penal systems. In this research I will be analysing the criminal justice and prison systems in England and Wales, but will not be considering Scotland or Northern Ireland. Since England and Wales is a single jurisdiction, reports and data about policing and imprisonment refer to 'England and Wales' as a unit.
philosophy relates to broader political ideologies and forms of governance. My decision to use the prison as my case study is shaped both by Foucault's choice of case study, and by other theoretical and empirical research that identifies the prison as a key institution in producing forms of identity and inequality, particularly in relation to race.

There are three major reasons for selecting the United States, and England and Wales as my cases. The first reason is that both these states are important in the historical origin and development of the prison, and provide many of the examples of prison regimes discussed by Foucault in *Discipline and Punish*. The most important example Foucault (1995) uses to demonstrate the nature of disciplinary power is Jeremy Bentham’s design for the Panopticon, which Bentham wrote and proposed to build in England. However, Foucault (1995) also discusses the philosophy and practices of several American prisons, including the Walnut Street Prison in Philadelphia (123-6), Auburn prison in New York (238), and Cherry Hill prison (also known as Eastern State Penitentiary) in Philadelphia (239). Given that Foucault’s account of the historical development of the modern prison draws heavily on examples from the English and American prison systems, it seems appropriate to use these cases.

The second reason for choosing to analyze prisons in the United States, and England and Wales, is that these cases provide a good basis for comparison, since they have both notable similarities (including the trend of penal punitiveness, and racial over/under-representation amongst prisoners) and interesting differences (e.g. the US has a far higher incarceration rate). Moreover, I believe there is particular advantage to analyzing the American prison system in a comparative manner, because many detailed studies of the US prison system tend to presume American exceptionalism and do not consider punishment in other jurisdictions. I hope that this comparative approach will help to distinguish the impact of the specific American history,
policies, political and socioeconomic context from broader dynamics around power and penalty, such as the impact of neoliberalism. The third reason for choosing the US, and England and Wales as my case studies is that there is a substantial body of literature about the history of prisons and about the contemporary criminal justice and prison systems, including issues such as trends in sentencing, and racialized biases in policing and punishment. By analysing this pre-existing empirical research it is possible to develop theoretical insights with respect to the power dynamics in the English and Welsh, and American prison systems.

I begin in this chapter by exploring the nature and purpose of Foucault's genealogical method, and then briefly outlining Foucault's (1995) arguments in *Discipline and Punish*. In Chapter Two, I assess the persuasiveness of Foucault's (1995) historical account of power and the prison by analyzing a range of alternative historical accounts of punishment, including various critiques of Foucault's account. I argue that Foucault's (1995) argument meets the test of basic empirical plausibility, and that it generates important insights, but that there are key aspects of power relations around criminalization and punishment that he does not consider. I conclude that Foucault's (1995) genealogical analysis is partially undermined by its failure to take account of the important role of race and gender in penality, and to explore the implications of this for prevailing techniques of power.

In the remaining chapters I analyze the extent to which Foucault's (1995) account of power and the prison is relevant and persuasive in regard to the contemporary prison systems of the United States, and England and Wales, and consider whether Foucault's later work adequately captures the power dynamics around race, gender, and class. In Chapter Three I identify two major trends in these prison systems over the last thirty years that challenge Foucault's (1995) account of power and the prison: the punitive trend in penal policy, which has
produced less rehabilitative prison regimes, rising prison populations and incarceration rates; and prison privatization. I explore the normative implications of these two trends, arguing that both trends are linked to the rise of neoliberalism, and that while Foucault's account of the disciplinary prison is less relevant than it was during the 1970s, his insights about disciplinary power remain applicable. In Chapter Four I consider the significance of neoliberalism for our understanding of contemporary techniques of power, particularly in relation to penality. Here I argue that Foucault's (2008) account of neoliberalism lacks the critical impetus and insights provided by much of his other work, and that he overlooks tensions within neoliberal theory, particularly between neoliberal policies on welfare and criminal justice. I conclude that neoliberal policies have increased socioeconomic inequality, and have changed the governance of the poor through welfare cuts and the expansion of policing and imprisonment, none of which are adequately addressed by Foucault.

In Chapter Five I draw on Foucault's (1980b, 1990 & 2003) work on sex, sexuality and race, particularly the concept of biopower, and combine it with insights from feminist theory, queer theory and critical race theory in order to develop an account of how sex, gender and racial identities are constituted. This conceptual framework is then used to analyze dynamics of power around race, ethnicity and imprisonment in Chapter Six. I argue that the contemporary English and Welsh, and American criminal justice and prison systems play a major role in constructing racialized identities and inequalities, through practices such as racial profiling by police and the huge over-representation of many racialized and ethnic minorities in prison populations. Lastly, in Chapter Seven I explore the construction of sex and gender identities through prison regimes, with particular attention to the policies and practices around transgender prisoners. I conclude that binary sex and gender identities are constructed through a combination
of sovereignty, discipline and biopower, and that there are complex intersections between racialized and gendered power relations that mean prison regimes have a particular impact on some groups, such as young, poor, Black men. Lastly, in Chapter Eight I offer tentative observations about the future direction of penal philosophy and policy in the United States, and in England and Wales, and draw together the key points of my analysis throughout this dissertation.

In assessing Foucault's (1995) account of power and the prison I have sought to distinguish the question of whether Foucault provides a persuasive historical analysis of penality (which I explore in Chapter Two) from the question of whether his analysis is persuasive and relevant now. My reason for distinguishing these two questions is that Foucault's (1995) analysis of penality was written during the 1970s, and the power dynamics around criminal punishment now may be very different. In order to understand the importance of separating these questions, it is instructive to consider Fred Alford’s (2000) article about Foucault and prison regimes. Alford sets out to analyze whether Foucault provides a compelling account of power and the prison, but proceeds to assess the persuasiveness of Foucault's account of the prison solely against contemporary American prison regimes. The conclusion Alford reaches is that Foucault’s analysis of power and the prison is wrong, because the American prisons that Alford examines do not resemble Foucault’s account of the disciplinary prison with its use of surveillance, bodily regimentation, and the timetable.

There are two major methodological problems with Alford’s (2000) response to Foucault's work, and these problems largely invalidate his conclusions. Firstly, Alford seems to overlook the fact that Discipline and Punish is "a history of the present" (Foucault, 1995, 30-31) written during the early 1970s. This context is significant, because differences between what
Foucault argues and what Alford observes may reflect changes in prison regimes over time, and not errors in Foucault's analysis. Secondly, Alford misinterprets Foucault's argument in *Discipline and Punish* by treating it as a descriptive account of practices within the prison, instead of as a critical analysis of power relations. I will briefly discuss both of these methodological problems, suggest how Alford could have avoided them, and indicate how I will attempt to avoid such methodological difficulties in my own analysis.

Foucault (1995) develops his account of disciplinary power through a genealogical analysis that draws out important continuities and discontinuities between the eighteenth and nineteenth centuries and Foucault’s present during the 1970s. Not only does Foucault (1995) never claim that his analysis applies beyond his own context, he also (1980a) strongly criticizes methodological approaches that assume historical continuity. Instead, the genealogical methodology that Foucault favoured and uses in *Discipline and Punish* is based on drawing out the continuities and discontinuities between one’s own historical context and prior periods. Since Alford (2000) does not explore the continuities and discontinuities in penalty, he cannot use observations about contemporary American prisons to conclude that Foucault is 'wrong' - it may simply be that things have changed. To judge whether Foucault’s (1995) analysis of power and the prison is ‘wrong’ as opposed to outdated, one would need to assess Foucault's account in relation to the historical periods that he analyzes. This need to address the same historical context as that used by Foucault is why I begin by assessing the persuasiveness of his account of power and the prison in reference to eighteenth and nineteenth century criminal punishment in England and America.

The second difficulty with Alford’s (2000) analysis is that he — like some of the counter-revisionist critics of Foucault discussed in Chapter Two — treats Foucault’s (1995)
account as a description of prison regimes. Alford therefore presumes that any inaccuracies in this descriptive account automatically undermine Foucault's analysis of disciplinary power. This is a significant mis-interpretation, because Foucault's (1995) account is a genealogical analysis of power, not an exhaustive description of historical prison regimes. Foucault (1995) discusses those practices within the prison that he believes are important to understanding the functioning of disciplinary power, such as the prison’s spatial organization and the regimentation of activities. Conversely, Foucault (1995) does not mention other aspects of prison regimes such as the food or bedding, presumably on the grounds that detailing these prison practices would not contribute to his analysis of power. Given that factual accuracy — which Foucault does not believe to be possible in a neutral or objective sense — is not the point of Foucault's analysis, it is not necessarily a problem if his account of historical prison regimes is incomplete or inaccurate about minor aspects of prison regimes. Whether or not one is justified in criticizing Foucault for ignoring the details of a prison regime therefore depends on whether a persuasive case is made that those details are important to understanding broader relations and techniques of power. Moreover, one of the major issues that Foucault's (1995) analysis raises is about the nature of truth, and the relationship between truth and disciplinary power, so Alford begs the question by assuming that there are neutral facts about prison regimes against which Foucault's account can be assessed.

Nonetheless, it is clear that ‘factual’ accuracy is at least somewhat relevant to our assessments of whether or not Foucault's account is persuasive. Given that Foucault develops his argument about the rise of disciplinary power by tracing changes in criminal punishment, it is also important that his arguments about penalty pass a minimal test of empirical plausibility. For example, Foucault’s (1995) conclusions would also be undermined if his source materials
for *Discipline and Punish* were found to be fakes and not genuine historical documents, because his analysis would therefore fail as a genealogy. However, as I will explore in more detail in the next chapter, the success of Foucault's argument does not rest on the factual accuracy or inaccuracy of his account of specific historical prison regimes, as Dreyfus and Rabinow (1983) explain succinctly:

> There is obviously no simple appeal to the facts involved in evaluating Foucault’s historical theses...Most of these historians have simply misunderstood his argument and hence even their minor factual corrections are simply beside the point. (1983, 126)

These problems with Alford’s (2000) analysis are instructive because they caution against making hasty or misguided ‘critiques’ based on minor empirical details, and against the idea that *our* present should be read through Foucault’s history of *his* present.

**Understanding Genealogy**

In analysing *Discipline and Punish*, and specifically in considering whether Foucault’s (1995) arguments regarding the prison and the nature of power are persuasive, it is necessary to have a clear understanding of the text’s subject matter and methodology. I will therefore begin by exploring the following questions: is *Discipline and Punish* a history, what kind of history, and a history of what? The obvious starting point for this enquiry is the book’s introduction where Foucault uses a range of different terms to explain his project, beginning with the statement that:

> This book is intended as a correlative history of the modern soul and of a new power to judge: a genealogy of the present scientifico-legal complex from which the power to judge derives its bases, justifications and rules, from which it extends its effects and by which it masks its exorbitant singularity. (1995, 23).

However, Foucault describes his project rather differently a few pages later, stating:
That punishment in general and the prison in particular belong to a political technology of the body is a lesson that I have learnt not so much from history as from the present… What was at issue was not whether the prison environment was too harsh or too aseptic, too primitive or too efficient, but its very materiality as an instrument and vector of power…I would like to write a history of this prison, with all the political investments of the body that it gathers together in its closed architecture. Why? Simply because I am interested in the past? No, if one means writing a history of the past in terms of the present. *Yes, if one means writing a history of the present.* (1995, 30-31, emphasis added)

The latter statement diverges from the former both by referring to prisons, architecture and the body instead of to souls and judgement, and by describing Foucault’s historical project as "writing the history of the present" rather than using the term genealogy. Neither the term genealogy nor this phrase "history of the present" is particularly transparent, so both require some exposition. In particular, it is important to understand whether the use of genealogy in *Discipline and Punish* is intended as critique of truths regarding punishment, power and the subject, or as the articulation of an alternative, critical truth claim. The distinction between these two positions is an epistemological one, but it has important implications for how we interpret and respond to Foucault's work. The Marxist ideology critique developed by theorists such as Gramsci (1971) and Althusser (2001) holds that the objective truth about capitalist society is concealed by ideology, which causes workers to have false consciousness and thereby promotes the interests of the capitalist class. Marxist theory thus suggests that if the real, objective truths about capitalism and workers' interests are revealed, then capitalist hegemony will be replaced by a true understanding. In contrast, Foucault's (1995) analysis is intended to disrupt and undermine prevailing truths about penalty, but is not founded on the idea of an underlying objective truth, and may not seek to establish an alternative 'truth'. In short, Foucault's task may not be to replace one set of truths about the prison with another set, but to problematize the very idea of truth.
This question of how genealogy relates to knowledge is central to the objections raised against Foucault’s work by scholars such as Jurgen Habermas (1994a & 1994b) who accuses Foucault of lacking normative justification for his claims, and of contradicting himself by both rejecting the notion of truth and making truth claims. Foucault (2000g) has responded by rejecting the binary logic presupposed by Habermas’s insistence that one either is, or is not, making claims to truth and reason, stating "It’s senseless to refer to "reason" as the contrary entity to nonreason… Such a trial would trap us into playing the arbitrary and boring part of either the rationalist or the nonrationalist" (299). In "Critical Theory/Intellectual History" Foucault (1994a) expands on this theme, explaining that he is working towards "an endless, multiple bifurcation" of reason (118) and stating:

I am not prepared to identify reason with the totality of rational forms which have come to dominate – at any given moment, in our own era and even very recently – in types of knowledge, forms of technique and modalities of government or domination…for me, no given form of rationality is actually reason. (125)

This question of whether genealogy involves some form of truth claim as well as critique is therefore central to debates about Foucault’s work in political theory, as well as to understanding his account of power and the prison.

The usual reference point for academics seeking an understanding of Foucault’s concept of genealogy is the essay "Nietzsche, Genealogy, History" which was published in 1971, implying that Foucault wrote the essay either concurrently with or in close proximity to his work on Discipline and Punish. In this essay, Foucault (1980a) pieces together Nietzsche’s views about the historical technique of genealogy in texts such as The Genealogy of Morals, and explores the nature of genealogy by contrasting it to traditional history. Foucault (1980a) makes seven lengthy observations about genealogy in this essay, beginning with the claim that genealogy is a documentary process that examines the details and specificity of events in order
to undermine the teleology of traditional history. Secondly, Foucault explains that genealogy is intended "to dispel the chimeras of the origin" (1980a, 144) that obfuscate the nature of history by presuming continuity rather than recognizing historical change, inconsistency and the constructed nature of truth. Both Foucault’s (1980a) third and fourth observations follow from his second, since his rejection of the notion of the "origin" requires him to provide a different basis for the study of history. Here, Foucault argues that genealogy studies "descent" (1980a, 145) in order to show that the past consisted of a series of fissures, contradictions and accidents, and that descent is inscribed in the body since the body is marked by past experience. Foucault’s fourth observation is that genealogy studies "emergence" (1980a, 148) in order to understand the interplay of forces that produce different versions of human rules regarding law, morality et cetera.

Foucault directly addresses the relationship between genealogy and knowledge in his fifth observation in "Nietzsche, Genealogy, History," stating that genealogy is oppositional and aimed at destabilizing the notions of the self, body and historical events that traditional history portrays. Here, Foucault (1980a) deploys the elegant phrase that "knowledge is not made for understanding; it is made for cutting" (154), and rephrases this insight by stating that genealogy is "a curative science" (156). Foucault (1980a) then explains more precisely how genealogy inverts the principles of traditional history by becoming an "effective" (154) history that studies events at their most unique, analyzes subjects closest to it, such as the body, and affirms "knowledge as perspective" (156). In contrast, traditional history stresses the continuity of events, prefers to analyze events at a distance and tries to conceal its perspective and context (Foucault, 1980a). Foucault’s sixth observation follows from his fifth insofar as he argues that traditional history’s claim to objectivity means that history will retain "suprahistorical" (1980,
160) elements unless genealogy is used to negate history. Foucault’s final observation consists of the claim that genealogy has three uses: parody, which turns genealogy against reality; dissociation, which turns genealogy against the notion of continuous identity; and a sacrificial deployment of genealogy against truth.

Although "Nietzsche, Genealogy, History" is an important and interesting essay, it should not be the sole reference point for understanding Foucault’s conception of genealogy. One reason to look beyond this essay is that Foucault’s focus in "Nietzsche, Genealogy, History" appears to be the articulation of Nietzsche’s concept of genealogy rather than a statement of his own conception, and we should not presume that the two are identical\(^2\). Moreover, Foucault discusses genealogy at some length in other texts, and his other accounts of genealogy sit in some tension with that expressed in "Nietzsche, Genealogy, History". For instance, in the 1975-6 Collège de France Lectures, Foucault proposes a ‘provisional’ definition of genealogy as follows:

We can give the name genealogy to this coupling together of scholarly erudition and local memories, which allows us to constitute a historical knowledge of struggles and to make use of that knowledge in contemporary tactics. That can, then, serve as a provisional definition of the genealogies I have been trying to trace with you over the last few years. (2003, 8)

This definition is far more concise than the earlier explanation in "Nietzsche, Genealogy, History," and places more stress on the contemporary, political significance of genealogy. It is because genealogy is concerned with developing knowledge that explains and disrupts dominant

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\(^2\) While Foucault does not explicitly state that he is describing Nietzsche’s concept of genealogy, he does explain genealogy with almost exclusive reference to Nietzsche’s work and ideas. This focus on Nietzsche is apparent in his analysis of Nietzsche’s use of language (Foucault, 1980, 140-142) and in his attention to Nietzsche’s inconsistent opinions regarding the use of critical history (Foucault, 1980, 164). Interestingly, the word ‘I’ is only used within quotations in "Nietzsche, Genealogy, History", suggesting the absence of the explicit authorial voice present elsewhere in Foucault’s work, for instance in *Discipline and Punish* (Foucault, 1995, 7, 24, 30, 31 etc.), and regularly in his Collège de France lectures.
forms of knowledge, events and conceptions of the self, that Foucault refers to *Discipline and Punish* as a ‘history of the present’.

This ‘provisional’ definition of genealogy builds upon Foucault’s other claims in the 1975-6 lectures, where he characterizes detailed, local, historical information and forms of previously disqualified perspectives (e.g. psychiatric patients) as "subjugated knowledges" (2003, 7). Lest this seem very un-Foucaultian (whatever that might mean about someone who proclaimed the death of the author) Foucault goes on to explain that genealogical claims to knowledge are quite different from other knowledge claims. Foucault’s distinction between genealogy and other knowledges is made partially on the grounds of using different techniques, but largely on the grounds of their different stances in relation to what Marxists often — and Foucault occasionally, for instance in the essay "Truth & Power" (2000b, 133) — refer to as hegemony:

Genealogies are, quite specifically, antisciences. It is not that they demand the lyrical right to be ignorant, and not that they reject knowledge or invoke or celebrate some immediate experience that has yet to be captured by knowledge. That is not what they are about. They are about the insurrection of knowledges. Not so much against the contents, methods or concepts of a science; this is above all, primarily, an insurrection against the centralizing power-effects that are bound up with the institutionalization and working of any scientific discourse organized in a society such as ours (Foucault, 2003, 9).

It is significant that Foucault repeatedly uses the term ‘knowledge’ to describe genealogy in the 1975-6 Collège de France lectures, which seems in tension with his earlier (1980) account of genealogy as deployed against claims to truth and useful for cutting not understanding. Foucault's (2003) later articulation of genealogy suggests that it involves knowledge claims that contest and disrupt dominant discourses, most particularly ‘scientific’ discourses, rather than a critique intended to destabilize knowledge – a subtle but significant distinction. This raises the obvious question of why Foucault would be entitled to make a claim to knowledge where others
are not so entitled. One possible answer is that the genealogical truth claims are justifiable because they are strategic and counter-hegemonic, disrupting existing formations of power and knowledge through the ‘insurrection of knowledges’ (Foucault, 2003, 9). This explanation is inadequate, because it does not explain how Foucault’s claims escape the power-knowledge scheme for which he criticizes the human sciences. Further, if one were to justify knowledge claims purely on the grounds that they were counter-hegemonic, this could lead to the justification of repressive, not liberatory, knowledge claims which is one of the charges Fraser (1995) levels at Foucault in "Michel Foucault: A ‘Young Conservative’?".

A more plausible answer to the question of why Foucault would be entitled to make knowledge claims can be found in his methodological approach, for instance his use of archaeology. Indeed, Foucault states in the same Collège de France lecture:

Archaeology is the method specific to the analysis of local discursivities, and genealogy is the tactic which, once it has described these local discursivities, brings into play the desubjugated knowledges that have been released into them. That just about sums up the overall project. (2003, 10-11)

What, therefore, is archaeology, how does it relate to genealogy, and why would it justify one in making claims regarding truth? Foucault’s use of archaeology predates Discipline and Punish, since it is the main topic of The Archaeology of Knowledge, and is the technique implicitly used in his earlier studies, The History of Madness and Birth of the Clinic. There is not a single, handy definition of archaeology in The Archaeology of Knowledge; instead, as in "Nietzsche, Genealogy, History", Foucault outlines the concept in terms of what it is not. In this case, Foucault (1972) explains archaeology as being the analysis of historical discourses, which it studies in their specificity and differences, i.e. without tracing continuity or progression. Foucault (1972) also states that archaeology rejects discursive analysis in terms of oeuvre or author because one should not pre-categorize the discursive context in which something is read.
Instead, Foucault (1972) puts particular emphasis on the fact that archaeology does not try to recapture the origin or restore what was thought in the past: "It is not a return to the innermost secret of the origin; it is the systematic description of a discourse-object" (140).

From an epistemological perspective, the significance of archaeology is that it aids an understanding of discourse by showing how meanings change over time, the discursive-formation in which a discourse existed, and the rules that shaped what could be said and found true within that discursive formation. It is sometimes claimed (Dreyfus & Rabinow, 1983, 50; Macey, 1993, 200-2) that Foucault originally intended that archaeology would provide an exterior or ‘scientific’ perspective for the analysis of discourse, and at times Foucault’s (1972) claims in *The Archaeology of Knowledge* imply such a view. Such a view of archaeology as scientific analysis of discourse is untenable, because one cannot categorize and study discourses without engaging with their meaning to some extent, thereby making it impossible to stand outside of discourse (Dreyfus & Rabinow, 1983, 88). However, even if archaeology fails as a science, it may provide some degree of distance and critical perspective towards present hegemonic understandings, because it highlights the changes in meaning and truth over time, and therefore shows the historical contingency and constructedness of what is seen as true in any given context. Whether or not Foucault believed in the possibility of an exterior perspective in the study of discourse, he did not adhere to such a view by the time that he started using genealogy and as such the issue is not important here. For the purpose of understanding how it relates to genealogy, it is sufficient to note that archaeology is a technique for providing highly detailed, systematic and historical accounts of discourse in order to distance oneself from current discourses.
This account of archaeology clearly overlaps with genealogy, because the disruptive claims of genealogy rest upon a detailed analysis of the forms of historical discourse and the constructed nature of truth (Foucault, 1980a & 2003). Further, Foucault (2003) explains that genealogy enables one to make knowledge claims because it is both strategic and archaeological: archaeology demonstrates the constructed nature of truth and unearths subjugated knowledges, which enables genealogy to develop a critical account of the present. Several prominent commentators support such an interpretation of Foucault’s methodology, including Dreyfus and Rabinow (1983) who claim that archaeology has a "purifying role" (106) within genealogy by enabling Foucault to recognize the constructed and discontinuous nature of discourse. Similarly, Dean (1994) argues that archaeology is a necessary component in genealogy because it makes possible analysis that is both critically detached from and involved with the present:

The roles of genealogy and archaeology appear complementary, the latter performing analyses that are a necessary condition of the former. If, from the perspective of the production of a knowledge of discursive formations, archaeology remains the indispensable methodology, from the practical polemical and strategic perspective of the use of historical analysis, genealogy holds the key. However, beyond the language of complementarity, genealogy is clearly dominant. It connects the empirical analyses revealed to concerns activated in the light of contemporary struggles. (34)

Referring back to Foucault’s phrase at the start of Discipline and Punish, Dean terms the combination of genealogy and archaeology a "history of the present" (1994, 35).

Nonetheless, the concept of archaeology articulated by Foucault (1972) in The Archaeology of Knowledge may not be equivalent to the detailed, historical component of genealogical analysis. This distinction may be important, because while the former approach focuses on discourse, the latter approach pays close attention to the relationship between discursive and non-discursive structures, such as the construction of the subject through
discipline acting on the body (Foucault, 1995). Notably, Foucault’s genealogical analyses in
*Discipline and Punish* and *The History of Sexuality* both trace the ways in which subjects are
produced by techniques of power that work upon the body, and therefore appear distinct from
the archaeological focus on language. The importance of the construction of the subject is
emphasized in Foucault’s (2000b) account of genealogy in the interview "Truth and Power," in
which he states:

> One has to dispense with the constituent subject, to get rid of the subject itself, that’s to
say, to arrive at an analysis that can account for the constitution of the subject within a
historical framework. And this is what I would call genealogy, that is, a form of history
that can account for the constitution of knowledges, discourses, domains of objects, and
so on, without having to make reference to a subject that is either transcendental in
relation to the field of events or runs in its empty sameness throughout the course of
history. (118)

This articulation of genealogy explains the concept as providing a means to dispense with the
notion of either a fixed or historically relative subject, in favour of an account that shows how
the subject is constructed by configurations of power and knowledge.

This analysis of genealogy shows that there are clear continuities between the various
definitions and explanations that Foucault provides, including the fact that genealogy uses
detailed, historical analysis, that it both presumes and demonstrates the constructed nature of the
subject, and that there is a strong critical impetus. Nonetheless, there is an apparent
contradiction between the vision of genealogy as operating in opposition to truth as claimed in
"Nietzsche, Genealogy, History", and of genealogy as a form of knowledge as stated in the
1975-6 lectures. Here, it is necessary to differentiate between the notion of a single, unitary
‘truth’ and a broader terrain of knowledge, which includes partial, contested and situated
knowledges. Without wanting to overstate the significance of this issue, it appears that by the
1975-6 lectures Foucault’s (2003) explanation of genealogy is clearly distinct from a
Nietzschean approach of rejecting and undermining truth. Instead, Foucault (2003) articulates a position of rejecting scientific discourses and any centralization of truth, whilst supporting the project of forging critical understandings of oneself and of the present. On such an understanding, Foucault employs genealogy in order to make partial, situated and strategic truth claims that act as counterpoint to existing truths, whilst simultaneously showing how the current configuration of power-knowledge emerged and how alternatives were quashed.

Both these accounts of genealogy retain a critical intent regarding science and dominant structures of power and knowledge, suggesting that Foucault has modified rather than abandoned Nietzsche’s thought and methodology. This is consistent with several other interpretations of Foucault, including William Connolly’s (1988) description of him as a "Left-Nietzschean" (189) and Leslie Thiele’s (1990) claim that Foucault makes a "selective adaptation" (923) of Nietzsche that celebrates agonism, resistance and otherness. An explanation for this modification of Nietzsche’s view on truth is offered by Thomas Dumm (2002), who argues that Foucault is committed to a much more expansive politics than the Nietzschean position of elitism, and that this necessitates overtly political and strategic analyses:

‘What is our truth?’ is the most important question informing the structure and substance of *Discipline and Punish*. Moreover, in contradistinction to Nietzsche, Foucault wants that question to be asked by ordinary citizens as well as critical intellectuals. The book is intended for a wide audience by design...Foucault is more concerned to seek the widespread engagement of those who have been marginalized by the normalizing forces of the modern era. (2002, 73-4)

Dumm (2002) thus suggests that by developing situated and oppositional truth claims instead of rejecting the notion of truth or knowledge, Foucault is modifying Nietzsche’s methodological approach to suit a more inclusive and democratic form of critical politics.

These questions regarding Foucault’s claims to knowledge and reason are at the heart of longstanding and intractable disputes about how to interpret and categorize Foucault’s ideas, and
I do not claim to have resolved the epistemological questions around Foucault's work or to have presented one ‘true’ reading of Foucault. Instead, I have merely tried to clarify the conceptions of genealogy that Foucault articulated at different times and in different texts, and to identify reasons to favour one articulation over another. Insofar as it is necessary to choose between Foucault’s conceptions of genealogy in order to analyze *Discipline and Punish*, I believe it is preferable to adopt the version articulated in the 1975-6 Lectures rather than that outlined in "Nietzsche, Genealogy, History".

Although many commentators on Foucault treat "Nietzsche, Genealogy, History" as the definitive account of genealogy, I believe that the articulation of genealogy in the 1975-6 lectures is more compatible with Foucault’s other statements about knowledge and truth, including the essay "Truth & Power" and the 1978 "Interview with Michel Foucault." Foucault's (2003) account of genealogy also seems more consistent with his account of the inter-relation of power and knowledge in the introduction to *Discipline and Punish*, which suggests that altering power relations inevitably involves the articulation of counter-hegemonic or subjugated knowledges:

> We should admit that power produces knowledge… that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. (1995, 27)

Although Foucault’s various articulations of genealogy certainly complicate the task of interpreting his work, he cautions readers not to expect consistency: "Do not ask who I am and do not ask me to remain the same: leave it to our bureaucrats and our police to see that our papers are in order" (1971, 17).

This account of genealogy as a combination of historical subjugated knowledges and contemporary political strategy allows us to return to the questions posed earlier: whether
Discipline and Punish is a history, what kind of history, and a history of what? The genealogical nature of Discipline and Punish answers the first two questions since it shows that while Discipline and Punish is a historical analysis, it is an unusual form of history since it is attentive to discontinuities, and denaturalizes current institutions instead of providing a causal explanation of their origins. Further, the fact that genealogy is deliberately concerned with providing critical, strategic analysis of contemporary events means it functions as a ‘history of the present’. Genealogy is therefore significantly different from conventional causal histories, which, Foucault would argue, are situated in their presents but serve to buttress existing configurations of knowledge and power. However, the genealogical nature of Discipline and Punish does not answer the final question posed above: ‘a history of what?’

The answer to this last question is not simple or singular, as evidenced by the fact that Foucault (1995) provides at least two different explanations in the introduction to Discipline and Punish: "a correlative history of the modern soul and of a new power to judge" (23) and "a history of this prison" (31-2). The key to understanding this dual answer is explained in the interview "Questions of Method", where Foucault explains: "I was aiming to write a history not of the prison as an institution, but of the practice of imprisonment" (2000e, 225). In this interview, Foucault stresses that the book is a study of the rationality of the prison and thus is concerned with power formations, political technologies, the nature of the subject, and the interconnection of power and knowledge. The study of the practice of imprisonment requires one to undertake the broader project of analysing the modern soul and the power to judge: Discipline and Punish is simultaneously and inextricably a historical study of the prison, of the subject, and of power. Foucault’s arguments in Discipline and Punish will be discussed later in this chapter, but first it is useful to understand the ‘present’ in and about which Foucault was
writing. Although Foucault’s ‘present’ is often ignored in considering his genealogical analysis, it is important because "writing a history of the present means writing a history in the present; self-consciously writing in a field of power relations and political struggle" (Roth, 1981, 43).

*Discipline and Punish* was published in France in 1975, and was written during the six year period since the publication of *The Archaeology of Knowledge* in 1969. The book seems to have been shaped both by Foucault’s intellectual endeavours and by his considerable involvement in political activism on issues of criminal justice and prisons. The most direct political influence on the text may have been Foucault’s participation in the Group d’Information sur les Prisons (GIP) during 1971 and 1972, which worked to raise the visibility of prisons as a political issue and to publicize the concerns of prisoners. Foucault’s biographers Eribon (1991) and Macey (1993) each devote a chapter to discussing Foucault’s extensive work with the GIP, and Eribon sees a lot of continuity between the concerns of the group and Foucault’s later analysis in *Discipline and Punish* (229). While the GIP’s activities cannot be detailed here, their activism focused on gathering and publicizing information about prisoners’ experiences in order to discredit the criminal justice institutions, as the group’s first pamphlet states:

> The GIP does not propose to speak in the name of prisoners in various prisons: it proposes, on the contrary, to provide them with the possibility of speaking themselves… we hope that prisoners may be able to say what it is that is intolerable for them in the system of penal repression. (Eribon, 1991, 227)

Foucault was also involved in criminal justice issues outside GIP, including his arrest at a protest in December 1972 over the murder of Algerian-born Mohammed Diad by French police (Macey, 1993, 313). One can also infer that Foucault was interested in prison issues outside France, because the George Jackson case in America was discussed in the GIP’s third pamphlet (Eribon, 1991, 228) and Foucault visited Attica prison in New York during April 1972.
(Macey, 1993, 238). Significantly, this visit took place barely six months after the infamous Attica riots in which the prisoners rebelled against terrible prison conditions, and where thirty-nine people were killed when State Troopers retook control of the prison from the (predominantly Black and Hispanic) prisoners (Benjamin & Rappaport, 1974).

It is also clear that Foucault’s political activism predates the GIP, since he protested the arrest, detention and torture of leftist political activists and students in Tunisia, where Foucault was appointed at the University of Tunis from 1966 to 1968. Macey (1993, 205) details some of Foucault’s activities in support of the Tunisian student protestors, including hiding a printing press used for illegal pamphlets and financing the legal defence of the students. Macey (1993) and Eribon (1991) concur that by late 1968 Foucault felt it was unsafe to remain in Tunisia and thus returned to France, where he accepted a post at a new, experimental university at Vincennes. Foucault continued to be heavily involved with leftist student activism and was arrested in support of Vincennes students during January 1969 – only days after beginning the job (Macey, 1993). Eribon (1991) concludes of Foucault’s activity during this period: "From the alembic at Vincennes emerged an enraged philosopher, one who intervened on every front, whether in action or reflection. In 1969 Foucault began to embody the very figure of the militant intellectual." (210)

Although prisons were comparatively high profile issues in France during the early 1970s, not least due to the work of the GIP and media coverage of the Attica riots, it is also worth noting the broader political context in which Foucault found himself. Foucault was not in France during the student riots of 1968, but the riots had a profound impact upon the political and intellectual climate to which he returned. Following the events of 1968, assorted leftist groups were involved in French political activism, including the French Communist Party (PCF)
and a range of Maoist and Leninist groups. Eribon (1991) and Macey (1993) both describe Foucault as cooperating with these leftist groups as some times, whilst opposing many of their ideas such as the concept of a people’s court. The record, therefore, shows that Foucault’s political and intellectual activities positioned him in tension with the French government and with many in the political and intellectual left, despite taking up some causes in common with leftist figures or groups. Foucault's (1995) critical analysis of penalty in *Discipline and Punish* is therefore underpinned both by his earlier academic work, and by his various political activities, including his activism on criminal justice issues in Tunisia and in France.

**Analysing *Discipline and Punish***

In *Discipline and Punish*, Foucault (1995) traces the development of techniques and institutions of discipline during the period from the late eighteenth to mid-nineteenth century. While the chronology of the text is clearly defined, the geographical scope is more uncertain: Foucault is attentive to developments in France, but also draws on texts, ideas and institutions elsewhere, particularly England and America. Foucault pays detailed attention to the development of the prison, but his real focus is on the changing nature and techniques of power, and on identifying the roots of the new disciplinary power in Enlightenment conceptions of knowledge and the self. Three eras of punishment are identified by Foucault, or more precisely two eras in which distinct forms of punishment were employed and a period of indeterminacy in between. Foucault begins with an account of criminal justice during the ancien regime in France, where legal power and judgement were derived from the sovereign, and the ‘truth’ of criminality was revealed on the accused’s body by means of torture. In this period both

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3 Foucault (1995) judges that the transition from the ancien regime to discipline in prisons was complete when the Mettray penitentiary was constructed in 1840 (293).
investigation and punishment were aimed directly at the body of the accused, and Foucault uses the execution of Damiens to illustrate the publicity and physical brutality of punishment (1995, 3-5). Nonetheless, law and punishment were highly inconsistent since the sovereign power over punishment included powers of appointment or removal for judges, to suspend or alter court decisions, and the right to grant clemency (Foucault, 1995, 80).

The second era outlined by Foucault (1995) is a period during the late eighteenth century, during which public execution was criticized for being excessive and irregular, and various alternative punishments were proposed. Simultaneously, Foucault identifies socioeconomic changes due to the decline of a feudal class system and the development of a propertied middle class that sought to regularize the poor and to control property crime effectively (1995, 83-8). Foucault believes there was a complex relationship between changing penalty and these socioeconomic factors, stating:

The shift from a criminality of blood to a criminality of fraud forms part of a whole complex mechanism, embracing the development of production, the increase of wealth, a higher juridical and moral value placed on property relations, stricter methods of surveillance, a tighter partitioning of the population, more efficient techniques of locating and obtaining information: the shift in illegal practices is correlative with an extension and a refinement of punitive practices. (77)

Foucault notes that the alternative punishments proposed by reformers such as Beccaria were certain, rational, efficient and had calculable consequences, arguing that their intent was "not to punish less, but to punish better" (1995, 82). However, given the wide range of suggested penalties, Foucault regards the prison’s prompt emergence as the dominant punishment as "surprising" (1995, 117). This claim that the prison’s rise as the major form of punishment was uncertain and contingent is important to Foucault’s genealogy, since the identification of historical alternatives serves to de-naturalize the prison. Foucault then describes early prisons in
England and America to show how they attempted to control and transform the behaviour of prisoners, and thus began the "development of knowledge of individuals" (1995, 125).

The third era identified in *Discipline and Punish* is that of disciplinary power, which produces ‘docile bodies’ and thus shapes the minds of subjects through the performance and assessment of minutely detailed activities. Foucault (1995) devotes considerable attention to identifying and describing disciplinary techniques, which include control of people’s spatial organization, activity, time, and their separation from or combination with others (149-169). Discipline also involves the production of knowledge about the subject through assessment and normalization, which lead to the internalization of these norms and assessment by the disciplinary subject. Foucault therefore argues that the individualized modern subject comes into being through disciplinary power.

Later in the text, Foucault (1995) describes discipline more simply as consisting of two central principles: "hierarchical observation and normalizing judgement" (192) which are combined in the form of the examination. Here, the Panopticon is introduced as the exemplar of disciplinary power, because it combines the enclosure of prisoners in individual cells with constant visibility and uncertainty regarding whether one is currently being watched. The Panopticon, Foucault concludes, is not merely an architectural plan but "the diagram of a mechanism of power reduced to its ideal form…a figure of political technology that may and must be detached from any specific use" (1995, 205). This constant threat of surveillance is important, because it is the reason inmates internalize disciplinary norms and therefore become self-disciplined, i.e. discipline becomes self-imposed as the result of surveillance.

Foucault (1995) states that three specific practices came to dominate disciplinary prison regimes: isolation (either through silence or solitary confinement), work, and adjustment of the
penalty to the individual i.e. individuation (237-256). While Foucault argues that the intent of the prison was corrective, he claims that prisons necessarily fail to correct and that this failure is built into their ideology since it justifies the intensification and expansion of discipline:

For a century and a half the prison had always been offered as its own remedy: the reactivation of the penitentiary techniques as the only means of overcoming their perpetual failure; the realization of the corrective project as the only method of overcoming the impossibility of implementing it. (1995, 268)

Foucault concludes that prisons both transform their occupants into ‘delinquents’ through the necessary failure of normalization, and produce delinquency in the wider society by marking out ex-prisoners and their families, and by making prisoners’ families destitute, thereby creating a sub-culture of poverty, criminality and recidivism (1995, 264-272). As such, Foucault rejects the notion that the purpose of the prison is to control crime, claiming that its real benefit is to subject the population and dominate sections of it: "the differential administration of illegalities through the mediation of penalty forms part of those mechanisms of domination" (1995, 272). Finally, Foucault describes the extension of discipline throughout society, to form a network of disciplinary institutions (including schools, hospitals, mental asylums etc.), surveillance and normalization which he terms "the carceral archipelago" (1995, 301).

The conclusion of Foucault's (1995) analysis is that imprisonment has the same effect regardless of whether the regime is purportedly punitive or rehabilitative: the prison always and inevitably fails to reform inmates, or to reduce crime (268). Since there is no neutral or objective definition of what constitutes crime, or of what constitutes deviant behaviour, the meanings of crime and deviance are constructed through the criminal justice system and disciplinary institutions. The prison differentiates inmates from the rest of the population by marking them out as delinquents, and prisoners are released to face increased surveillance, restrictions on their movement, and difficulty in finding work, all of which make them likely to be re-convicted and
returned to prison. The necessary failure of the prison thus serves to continually justify the exercise, intensification, and extension of disciplinary power. Penalty is thus revealed to be a way of exercising power and producing truth by differentiating between legality and illegality, acceptable and unacceptable behaviours, normal and abnormal subjects. Towards the end of *Discipline and Punish* Foucault makes explicit its continuity with his earlier work on medicine, stating "the social enemy was transformed into a deviant, who brought with him the multiple danger of disorder, crime and madness" (1995, 299-300).

Foucault's (1995) analysis in *Discipline and Punish* therefore combines an account of changes in penalty during the late eighteenth and early nineteenth century with analysis of changing techniques of power, and of how disciplinary power operates in modern society. In the next chapter I will evaluate Foucault's (1995) claims about power and the prison by considering alternative historical accounts of late eighteenth and early nineteenth century punishment in England and America, including criticisms of Foucault's argument. I will therefore be surveying the historical literature about criminal punishment to see whether other historical accounts of the history of punishment support or challenge Foucault's (1995) account of power and the prison.
Chapter Two: Histories of the Prison - Assessing the Literature

Overview

In this chapter I will provide a broad literature review that surveys and analyzes the scholarly literature about the history of punishment. In order to assess the persuasiveness of Foucault's historical account of power and the prison, I compare his analysis with alternative accounts of the history of criminal punishment, and particularly prisons, in America, and England\(^4\). I evaluate whether these historical accounts of penality are consistent with Foucault's arguments in *Discipline and Punish*, and where they are inconsistent with Foucault's (1995) account I assess which is more persuasive. The intention of this analysis is to assess the theoretical contributions made by alternative approaches to the history of punishment, and other normative accounts of the power relations involved in criminal justice. The conclusions I reach in this chapter will therefore inform my own analysis of contemporary power relations around criminal punishment in the later chapters of this dissertation, including most notably, the importance of race and gender in shaping forms of criminal punishment.

The literature discussed here examines the period that Foucault (1995) identifies as the birth of the prison, from the late eighteenth century to the mid nineteenth century, and focuses on the criminal justice systems in England and the United States. However, I do not pretend to discuss all of the literature which examines the history of punishment in these countries and period, which is extensive and beyond the scope of this research project. Instead I have chosen a selection of the works published on this subject, which present a variety of perspectives and

\(^4\) As stated in Chapter One, the case studies for this thesis are the criminal justice and prison systems in the United States, and England and Wales. In the present day England and Wales is a single jurisdiction for the purposes of criminal justice, and therefore all reports and data about crime rates, policing, imprisonment etc. refer to 'England and Wales' as a unit. In contrast, the historical literature surveyed in this chapter discusses the history of criminal punishment in England, but tends to make no mention of Wales. My literature survey in this chapter therefore considers accounts of the history of criminal punishment in England (i.e. excluding Wales), and the United States.
yield insights about the possible flaws and strengths in Foucault's account of power and the prison. The literature considered represents a range of theoretical approaches and empirical cases (England and/or the United States, and sometimes also other European states), so for clarity I have divided this literature into three thematic categories. I examine the literature in each of these categories in turn, but will refer across the categories when necessary to identify a similarity or disagreement between these works.

The first category is Marxist-inspired analyses, which focus on how forms of criminal punishment relate to the labour market, control of the working class, and underlying socioeconomic structures. In this category I consider the analyses provided by Rusche and Kirchheimer (1967), Ignatieff (1978), Melossi and Pavarini (1981) and Hirsch (1992). There is considerable variation in the works I have grouped as Marxist-inspired, from the fairly narrow economic approach of Rusche and Kirchheimer, to Ignatieff's broader analysis of social, political and economic forces, to Melossi and Pavarini's attempts to combine Foucaultian and Marxist conceptual approaches. The label of 'Marxist-inspired' is therefore meant only to indicate a broad overlap between these works in their account of the influences on and purpose of criminal punishment, and not to obscure or minimize the differences between them. There are also two Marxist-inspired historical analyses that I do not explore in this category: the works of Colvin (1997) and Davis (1998; 2003), both of whom analyze class alongside race and gender and are therefore discussed in the following category. I will argue that there is significant overlap between Foucault's account and Melossi and Pavarini's (1981) work, but that many of their claims are already present in his analysis. However, Foucault's genealogical approach is in tension with the causal histories provided by most of these scholars, and his account of power is
incompatible with that of the more economically focused analyses, such as the work of Rusche and Kirchheimer (1967).

The second thematic category is scholarship that analyzes race and/or gender in relation to criminal punishment, by exploring how race and gender relate to the rates at which one is criminalized and punished, the forms of that punishment, and the ends that this punishment serves. In this category I consider the analyses by Freedman (1981), Rafter (1990), Zedner (1991), Colvin (1997) and Davis (1998; 2003). Again there is considerable variation between these analyses and the accounts of power in relation to criminal justice that are presented, but all of them argue that either gender, race, or both were important determinants of the forms and purpose of criminal punishment. While Freedman (1981) and Zedner (1991) only consider how gender related to punishment, analyses of the roles of both race and gender are provided by Rafter (1990), Colvin (1997) and Davis (1998; 2003). Here I will argue that the analyses of gender and punishment extend Foucault's analysis, but are largely consistent with his claims about the constitution of the subject through disciplinary power. The scholarship around race and punishment poses more of a challenge to Foucault's argument, because of the interconnection of race, class, and labour exploitation, particularly in penal slavery.

analysis that challenges Foucault's account of the Panopticon. Lastly I discuss Ignatieff’s (1981) rebuttal of such counter-revisionist critiques, and Foucault's own response to such criticisms.

There are three inter-related grounds on which these historical analyses implicitly or explicitly challenge Foucault's analysis of power and the prison. Firstly, some of these analyses challenge Foucault's (1995) account on the grounds of factual accuracy but do not present an alternative account of power and the prison, which is the usual approach taken by counter-revisionist critics. Secondly, some of these historical analyses challenge Foucault's (1995) arguments on the grounds of completeness, for instance by arguing that Foucault ignores the important racialized and gendered dimensions of power in relation to criminal punishment. Thirdly, a number of these analyses propose an alternative account of power relations around criminal punishment that they argue better fits the empirical facts and/or captures more about the nature of power than Foucault's (1995) analysis. The Marxist-inspired analyses of the history of criminal punishment fall into this final category, as do some of the analyses in terms of race and/or gender.

Challenges to Foucault's (1995) argument on the grounds of factual accuracy largely fail, because they do not directly address Foucault's account of power and therefore tend to criticize him on points of detail that are tangential to his main argument. As a result, most of the counter-revisionist critiques of Foucault (1995) are not persuasive. Challenges to Foucault (1995) on the grounds that his account of penalities is incomplete are more successful, and are most persuasive when their argument has important implications for techniques and relations of power. In particular, there are several compelling analyses that show how the English and/or American criminal justice systems both worked through and played a significant role in creating race and gender identities and inequalities, and these analyses identify racialized and gendered power
dynamics in criminal punishment that Foucault (1995) did not discuss. Interestingly, these analyses of race, gender and punishment also link to Marxist-inspired analyses, by identifying class-specific gender roles, such as middle class norms of femininity, and the exploitation of Black labour in penal slavery and the Convict Lease system. Although some of the arguments about gender and punishment are partially consistent with Foucault's (1995) account, the analyses of race and labour exploitation fundamentally challenge his account of the transition, forms and use of criminal punishment, and its broader significance for power relations.

Many of the challenges to Foucault (1995) proposing an alternative account of power are Marxist-inspired, and the success of these analyses is mixed. Some, such as Rusche and Kirchheimer (1967) present arguments that are economically determinist and therefore unconvincing, while others such as Melossi and Pavarini (1981) and Hirsch (1992) bring out important aspects of the ideological links between capitalism and the prison. There is some overlap between Foucault's (1995) arguments and Marxist-inspired accounts of punishment, which broadly agree about the timing of changes in criminal penalties, and identify strict disciplinary rules and work as part of prison regimes. However, these Marxist-inspired accounts clash with Foucault (1995) over the relationship between capitalism, prison regimes and disciplinary power, and make persuasive arguments about the influence of the profit motive on some forms of punishment, from the Convict Lease system to Bentham's plan for the Panopticon. In particular, Melossi and Pavarini (1981), Hirsch (1992) and Semple (1993) make a good case that disciplinary techniques were shaped by the rise of industrial capitalism and the need to constitute productive workers.
Marxist-Inspired Analyses

Rusche and Kirchheimer’s book *Punishment & Social Structure* provides a Marxist historical narrative of criminal punishment, from medieval Europe to the 1930s in Europe and America. Rusche and Kirchheimer’s (1967) theoretical approach is based on Marxist analysis and the critical theory of the Frankfurt School, and their overarching argument is that the form and function of criminal punishment is determined by socioeconomic structures, particularly economic factors such as the labour market. Rusche and Kirchheimer's work is regularly claimed (Garland, 1990; Howe, 1994) to be the work that initiated the historical study of the practices, determinants and significance of criminal punishment, instead of focusing solely on contemporary forms of punishment. Although the book was originally published in 1938 it received little attention until its republication in 1967, and this edition is mentioned by Foucault (1995) who credits Rusche and Kirchheimer with the important insight that punishment is not merely repressive but has "a whole series of positive and useful effects" (24). Foucault's acknowledgment of the influence of Rusche and Kirchheimer's work on his own thinking makes it particularly interesting to explore this work in relation to *Discipline and Punish*.

*Punishment and Social Structure* has two distinct parts, because chapters two through eight were written by Georg Rusche in Germany, and the remainder was written later by Otto Kirchheimer in the United States. Although Rusche and Kirchheimer analyze a range of countries and historical periods, the common thread is their argument that criminal punishment is largely socioeconomically determined and often serves the purpose of class control. Like Foucault (1995), Rusche (1967) identifies a trend towards the use of imprisonment during the late eighteenth century, but Rusche attributes this change to the profit motive: both in the narrow sense of making prisons profitable through forced labour, and in the wider sense of contributing
to a mercantilist society. Although Rusche (1967) notes that Enlightenment ideals influenced penal philosophy, he claims these efforts only succeeded during the late eighteenth century because "humanitarian principles coincided with the economic necessities of the time" (84).

Rusche's account of prison regimes during the late eighteenth and nineteenth centuries also differs substantially from Foucault's analysis. Rusche (1967) argues that prison conditions were determined by the principle of ‘less eligibility’, which stated that prisoners should have a living standard below that of the poorest free men (94). The combination of less eligibility and punitive work, such as the treadwheel, was intended to deter crime by ensuring that prison conditions were extremely unpleasant (122). However, Rusche notes that the bare subsistence conditions of the working class undermined less eligibility and therefore the goal of deterrence, because it was impossible for prisoners to have a lower standard of living than the working class without dying as a result. Rusche therefore views the prison in the context of the industrial revolution and working class poverty, arguing both that imprisonment was part of a broader effort to control the working class, and that prison conditions were determined by working class living conditions.

Rusche then analyzes punishment in America during the nineteenth century, and draws on economic motives to explain differences between prevailing European and American prison regimes. Rusche (1967) argues that in Europe there was no shortage of labour and hence prison regimes centred on solitary confinement and the effort to deter crime (133). In contrast, the labour shortage in the United States provided an incentive for prison regimes that would enable profitable industries, making the Auburn system of silent, congregate work more popular in America than prison regimes based on solitary confinement (Rusche, 1967). Lastly, Kirchheimer (1967) provides a thematic overview, arguing that while rising living conditions for the working
class during the late nineteenth century produced a more rehabilitative approach to punishment. Prisons nonetheless remained ineffective at reforming criminals.

Rusche and Kirchheimer's (1967) account of the history of punishment differs from Foucault's (1995) arguments in several key respects. Firstly, there is an obvious methodological difference between the causal explanations provided by Rusche and Kirchheimer and Foucault's genealogical approach that emphasizes discontinuity and historical contingency in order to denaturalize the prison. Secondly, whereas Foucault argues that punishments were focused on the body during the eighteenth century, through torture and execution, Rusche argues that punishments such as transportation were more common than capital penalties. Thirdly, Rusche and Kirchheimer's accounts of nineteenth century prison regimes in both Europe and America diverge from Foucault's account of the disciplinary prison. Rusche's account of English prisons contradicts Foucault's account by identifying the punitive and deterrent nature of prison regimes, and his account of American prisons contradicts Foucault by identifying prison regimes based on congregate work to extract profit. These disagreements about prison regimes are significant because they relate to the function of the prison and the forms of power exercised in relation to criminal justice. Rusche and Kirchheimer's analysis therefore challenges Foucault's account of sovereign power during the eighteenth century, his account of the disciplinary prison during the mid nineteenth century, and his account of power more broadly.

Although Rusche and Kirchheimer (1967) provide an interesting critical analysis of the prison, their argument is weakened by its over-reliance on economic explanations. Rusche’s explanation of the rise of imprisonment as driven by the profit motive is unconvincing given the considerable cost of imprisonment and the epidemic disease risks posed by late eighteenth century prisons. Similarly, Rusche's account of punishment in America relies on the assumption...
that prison industries were profitable, but this claim is refuted by Rothman (1971) who argues that few prisons made a profit from their industries. By privileging economic explanations for changes and forms of punishment over other factors such as prevailing ideas and social norms, Rusche and Kirchheimer (1967) provide an account of the history of criminal punishment that appears partial and over-simplistic.

A number of the themes of Rusche and Kirchheimer’s (1967) analysis are taken up in Michael Ignatieff’s (1978) book *A Just Measure of Pain*, which analyzes the development of the penitentiary in England from 1770 to 1850. Although Ignatieff follows Rusche and Kirchheimer in arguing that criminal punishment served the purpose of providing social control over the working classes, he is attentive to the ideological origins and significance of the prison. Similarly, Ignatieff agrees with Rusche and Kirchheimer that transportation was the most common punishment during the late eighteenth century, with capital punishment being reserved for the most serious crimes. Although Ignatieff identifies an increase in the use of imprisonment in the early nineteenth century, as Foucault (1995) describes, he attributes this to the ending of transportation to America after the War of Independence and the resultant need for a new criminal penalty (82). However, Ignatieff (1978) argues that the new penal theory was based on the ideas of John Howard, not Bentham, and on broader concerns about social disorder in an increasingly urban, industrial society:

> The penitentiary, in other words, was more than a functional response to a specific institutional crisis. It exerted a hold over men’s imaginations because it represented in a microcosm the hierarchical, obedient and godly social order, which they felt was coming apart around them (85)

Ignatieff (1978) describes Bentham’s plan for a prison based on continual surveillance, but he observes that Bentham planned to run the Panopticon for profit as a private contractor, which led Parliament to reject the proposal (110-113). Ignatieff's account of of Bentham's plans
for the Panopticon therefore emphasizes very different things to Foucault's (1995) analysis: that the Panopticon was intended to be privately run and to generate profit, and that as a result it was never built. Bentham's intention to profit from the Panopticon challenges Foucault's account of the disciplinary prison as not motivated by profit, seems to support Marxist accounts of the prison and provides a precedent for present-day prison privatization. Ignatieff also echoes Rusche and Kirchheimer’s (1967) account of the punitive conditions in English prisons that were intended to deter crime, including a bad diet and use of the treadwheel. This harsh prison discipline is explained with reference to the labour market, as Ignatieff argues that low wages and rising crime led to a harsh prison regime in an attempt to maintain social hierarchy and stability (179). Although Ignatieff acknowledges that a strict new prison regime was introduced with the intent of reforming prisoners, he notes that these regimes were highly unpopular with prisoners and were criticized as cruel by some contemporaries. Ignatieff (1978) therefore concludes that although people became convinced that prisons should rehabilitate, prisons nonetheless failed to reform criminals and served a punitive and deterrent purpose (209-210).

A third important Marxist-influenced analysis is Hirsch’s (1992) book *The Rise of the Penitentiary*, which considers prisons in the context of forced labour and traces the roots of American prison regime to the workhouse. Hirsch argues that efforts to reform criminals drew on earlier theories that idleness could be cured by forcing people to work and thereby to develop good habits (14-15), and that this philosophy underlay the Auburn system of silent, congregate work. Hirsch thus follows Rusche and Kircheimer (1967) by linking the development of the prison to forced labour, but rejects their explanation in terms of the profit motive in favour of the view that the institutions shared similar ideas about the roots of poverty in idleness.
Hirsch (1992) then compares the penitentiary with slavery in America, arguing that there were many points of similarity because both involved isolation from the general population, confinement, forced labour, and subordination to others (71). Hirsch notes that both slaves and penitentiary inmates were viewed as "prone to criminality" (1992, 73) and that slavery and the prison were combined in the Convict Lease System. However, whereas prisons aimed merely to recoup their costs, Hirsch notes that slavery and the Southern Convict Lease system were highly profitable and therefore more heavily driven by economic motives (95-96). Moreover, Hirsch (1992) notes that the penitentiary involved only a temporary loss of citizen’s rights and provided some education, unlike slavery and the Convict Lease system. By considering criminal punishment in the Southern US, Hirsch (1992) presents a broader analysis than many other Marxist-inspired theories of punishment and begins to explore the links between criminalization, race, and labour exploitation.

The final Marxist-influenced analysis of the prison is Dario Melossi and Massimo Pavarini’s (1981) book *The Prison and the Factory*, which combines attention to class and the labour market with a Foucaultian account of disciplinary power. Melossi and Pavarini (1981) argue that capitalism led to the development of prisons, which in turn used disciplinary techniques to turn criminals into productive workers. The book is divided into two parts: the first two chapters, written by Melossi, focus on penal policy in Europe; while Pavarini’s three chapters discuss penal policy in the US. Like Rusche and Kirchheimer (1967) and Ignatieff (1978), Melossi argues that European penal policy was shaped by the transition to an industrial economy, and by labour market trends. However, like Hirsch (1992), Melossi (1981) pays particular attention to the workhouse, which he describes as "disciplinary training for capitalist production" (21) and views as the origin of the modern prison. Melossi (1981) shows the
Foucaultian influence on his analysis by diverging from Marxist explanations of the prison in terms of exploitation of labour or deterrence of crime, instead arguing that prison labour was intended to constitute labour-power via bodily regulation.

Pavarini (1981) argues that penal policy in nineteenth century America was shaped by the labour market, because the poor were viewed as lazy and/or deviant, and hence in need of forced labour. The popularity of the Auburn system of silent, collective work is therefore explained in terms of the need to create efficient and disciplined workers, and Pavarini (1981) describes prisons as factories "producing proletarians, not commodities." (114-5). This claim is then expanded to argue that the prison is an institution of class hegemony, and that the identification of criminals with poverty and idleness meant that propertylessness came to be regarded as virtually equivalent to criminality (148-149). Pavarini (1981) therefore provides an account of punishment in terms of ideas about work, poverty and human nature, instead of relying on narrowly economic explanations.

Melossi and Pavarini (1981) explore the possible overlap between Marxist analysis and Foucault's account of disciplinary power and the constitution of the subject, producing an interesting analysis that avoids the economic reductionism of Rusche and Kirchheimer (1967). The authors tease out the implications of Foucault’s rather opaque statements regarding class, capitalism and the ‘dangerous classes’, and identify some overlap between Foucault's account of the prison and Marxist claims, but it is doubtful how much Melossi and Pavarini (1981) add to Foucault’s analysis. For instance, Foucault (1995) argues that the self-evidence of prison as a penalty derived partly from the existence of wage-labour (232), and that the prison might serve to produce disciplined workers for an industrial economy (242). It therefore seems that many of Melossi and Pavarini's (1981) claims are already present, implicitly or explicitly, in Foucault’s
work. Moreover, there are aspects of Melossi and Pavarini’s (1981) analysis that Foucault would clearly reject, including the claim that the development of industrial capitalism determined the form of the prison, and their inattention to the link between disciplinary power and the human sciences.

While Rusche and Kirchheimer's (1967) accounts of English and American prison regimes are unconvincingly reductionist, it is significant that forced labour was a component of most prison regimes. It is also noteworthy that the potential to profit from convicts’ labour contributed to the preference in Northern US states for prison regimes based on silent, congregate work instead of solitary confinement (Hirsch, 1992; Colvin, 1997). Melossi and Pavarini (1981) attempt to combine this attention to work and the influence of capitalism on prison regimes with a Foucaultian account of disciplinary power, and argue that work within the prison was designed to produce disciplined workers. Marxist-influenced analyses therefore produce a range of accounts of how capitalism and class relate to penality, and there is greater conflict between Foucault's account and economically focused analyses such as Rusche and Kirchheimer (1967) than with the accounts that pay more attention to ideas, such as Melossi and Pavarini (1981).

Foucault (1995) briefly explores the relationship between capitalism and disciplinary power in *Discipline and Punish*, arguing that discipline enabled capitalism because the "body becomes a useful force only if it is both a productive body and a subjected body" (25-6). Although Foucault acknowledges that labour was a part of prison regimes, he attributes this to the disciplinary effects of work on the subject, and not to the profit motive. However, by tracing the rise of the prison to Enlightenment notions of science and the human subject, not to economic factors or capitalist ideology, Foucault rejects the central theme of Marxist-inspired
analyses of criminal punishment. Foucault's analysis also has a different methodological basis than these Marxist-inspired accounts, because Foucault provides a genealogy and not a causal history. Foucault (2000f) expands on his understanding of the relationship between capitalism and disciplinary power in the lectures "Truth and Juridical Forms", in which he argues that industrial society required disciplinary techniques for extracting time and for "converting people’s bodies into labour power" (2000f, 82). Foucault (1995) therefore seems to invert Rusche and Kirchheimer's (1967) argument by claiming that the disciplinary power exercised in institutions such as prisons enabled the development of industrial capitalism, instead of being determined by it.

Foucault provides further detail about the distinctions between his account and Marxist-inspired analysis of the prison in the 1983 interview "What is called punishing". Here, Foucault (2000d) argues that one can distinguish the aim of something from its result, and the use to which it is put, and that where the use of an institution diverges from the initial aims there may be a reconfiguration to take account of this new use:

They are results that are adapted to different uses, and these uses are rationalized – organized, in any case – in terms of new ends...This game is quite capable of solidifying an institution and I think that the prison has been solidified, in spite of all the criticism that was made, because several strategies belonging to different groups have converged on that particular site. (386)

This reasoning disconnects the eventual strategic function of a form of criminal punishment from the reasons why that penalty was introduced, and the purpose it was intended to serve. This interview clarifies how Foucault's (1995) genealogical account of the prison co-exists with his argument that prisons construct delinquency and enable the intensification of discipline over poor and marginalized populations, making it clear that Foucault is not arguing that the prison was originally intended to serve this purpose.
The overlap between Foucault's (1995) account of prison discipline and Marxist-inspired arguments about the development of a productive workforce may stem from earlier Marxist historical analysis about industrial productivity and discipline. EP Thompson’s (1967) article "Time, Work-Discipline and Industrial Capitalism" pre-dates *Discipline and Punish* by several years, and argues that industrial capitalism required synchronization and a ‘time orientation’ amongst workers, which were instilled through education. Thompson (1967) claims that workers internalized this discipline and the new conception of time, and gradually came to use this time orientation for resistance against their employers:

The first generation of factory workers were taught by their masters the importance of time; the second generation formed their short-time committees in the ten-hour movement; the third generation struck for overtime or time-and-a-half. They had accepted the categories of their employers and learned to fight back within them. They had learned their lesson, that time is money, only too well. (86)

It is not surprising that Marxist historians should observe changes in conceptions of time and behaviour due to wage labour and industrialization, but it is interesting that Foucault (1995) echoes Thompson's language of ‘discipline’, regularity and synchronization. Although Thompson’s (1967) argument may be consistent with Foucault’s emphasis on the roots of discipline in the human sciences, Thompson suggests that the desire for profit shaped disciplinary practices – a claim that Foucault would likely reject. Foucault (1995) would probably also reject the idea that one can exercise resistance by internalizing disciplinary techniques and turning them against one's employer, instead of by challenging those techniques. There is therefore considerable agreement between Foucault and Thompson about the techniques of micro-power used to create disciplined subjects and about the approximate era of the changes, if not about the underlying cause and broader significance of discipline for power relations.
Although there is significant disagreement between these Marxist-influenced analyses and Foucault's (1995) account of power and the prison, the question of deciding which theoretical approach is more persuasive is not an easy task. This task is complicated by the fact that some of the most persuasive Marxist-influenced accounts of the prison also involve analysis of race and/or gender, and therefore speak to the incompleteness of Foucault’s account in persuasive ways. In particular, Foucault's (1995) account ignores penal slavery and the Convict Lease system in America (Colvin, 1997; Davis, 1998 & 2003) both of which suggest that forms of punishment were driven by the profit motive and by ideas about race.

The Marxist account is also persuasive to the extent that Foucault (1995) ignores the normative implications of Bentham's plan to run the Panopticon for profit and the basis of its design on an earlier design for a factory, as Semple (1993) points out. Foucault (1995) thus seems to understate the significance of the profit motive in determining forms of punishment, at least in some jurisdictions and during some periods, and may be underplaying the extent to which industrial capitalism contributed to the development of disciplinary techniques. Although Foucault's (1995) certainly generates important insights, particularly about the internalization of discipline and the connections between power and knowledge, there are important power dynamics around capitalism, labour exploitation and penalty that are not captured in Foucault's account. I will return to this question of the persuasiveness of Marxist-inspired accounts of the history of punishment and the implications of such arguments for understanding power relations at the end of this chapter, after assessing the analyses of race and/or gender, and counter-revisionist analyses.
Analyses of Gender and/or Race

Freedman’s book *Their Sisters’ Keepers* is a study of American reformatories between 1820 and 1920, which were women's penal institutions intended to provide moral and sexual reform. Although the reformatories were intended to ‘help’ women and not to punish or coerce, Freedman (1981) claims that in practice reformatories were punitive. Freedman notes that these institutions were designed for convicts considered capable of reform, and that the criminals sent to reformatories consequently tended to be young, White women who had committed minor offences (79). These early-nineteenth century reformatory regimes were strongly gendered and modelled on a domestic, feminine environment, including the use of communal ‘cottages’ instead of individual cells (Freedman, 1981, 76).

There is some overlap between this analysis and that of Foucault, since Freedman describes institutions that used the control of activity and space with the intent of reforming inmates. However, Freedman focuses on the good intentions of prison reformers whilst failing to analyze the effects of their work or the power relations involved. There is also little attention to class or race in Freedman’s analysis of the prison reformers, prisoners or institutional regimes, resulting in a rather over-simplified portrayal of the relationship between gender and punishment. Further, Freedman’s work suffers from an unacknowledged bias in case selection, since she draws almost exclusively on historical material from Indiana, Massachusetts, and New York where she admits that reformatory movements were strongest. As a result, Freedman only considers women’s imprisonment in those states where reformatories were least penal and most attentive to ideals such as education, producing a partial and rather skewed account of women’s punishment in nineteenth century America.
Nicole Rafter’s (1990) book *Partial Justice* fills many of the gaps in Freedman’s analysis, since she analyzes a wider range of American states and penal institutions, including reformatories, women’s prisons, labor camps, and penal slavery. Crucially, Rafter (1990) employs a critical approach to women’s incarceration, explaining that the treatment of women in the criminal justice system reflected battles over gender definition, which was strongly shaped by class and race, and that reformatories were used to impose a particular version of femininity:

The reformatories institutionalised bourgeois standards for female propriety, making it possible to "correct" women for moral offences for which adult men were not sent to state penal institutions… For these reasons, the women’s reformatory served special, female specific functions with regard to social class and social control. (158)

Rafter (1990) argues that women’s reformatories instilled middle class norms of femininity, and believes that they were partially successful in imposing these norms, despite the restrictions that this placed on the work that women could pursue. The deeply gendered nature of penal regimes and conceptions of appropriate behaviour leads Rafter (1990) to conclude that women were subject to more severe punishment and greater social control than men, including discipline of their moral and sexual conduct (36).

Rafter (1990) also examines how class and race shaped women’s treatment within the criminal justice system, noting that in some Southern states racially targeted institutions such as the Convict Lease system were used to exploit prisoners’ labour (150). Even outside the South, Rafter (1990) notes that race impacted on women's treatment, because official judgements about a convict’s capability to reform depended upon that person’s race, age, and previous offences, meaning that:

Black women were overrepresented in the populations of custodial institutions and "impure" reformatories like that of Ohio owing to three factors: overt racism, covert discrimination, and higher rates of offending by black than white women for some serious crimes. (134)
This analysis therefore demonstrates how ideas about gender, race and class determined the nature of penal regimes, which institutions a convict was sent to, and whether someone was seen as capable of reform. Rafter's (1990) analysis also links the trends in women's criminal punishment to broader gender politics, by showing how women's reformatories sought to teach inmates middle class feminine norms, from sexual propriety to domesticity (158). While Rafter's analysis is broadly consistent with Foucault's account of how detailed disciplinary norms constitute the subject, and about the attempts to normalize criminals, she extends this approach to show the gendered nature of discipline and how it constitutes normatively gendered subjects.

Lucia Zedner's (1991) analysis of punishment in England during the mid nineteenth century confirms Rafter's (1990) account of how middle class ideals of femininity shaped views about women, crime and punishment. However, while Rafter (1990) suggests that American women's reformatories sought to rehabilitate prisoners, Zedner (1991) argues that Victorian ideals about women's moral superiority meant that female prisoners were stigmatized more than men (30). Despite feminist efforts to characterize female criminals as victims who were capable of reform, Zedner (1991) states that in England "criminal women were portrayed as sunk beyond redemption and certainly beyond the supposedly reformatory powers of the prison" (43). Zedner (1991) also contests Foucault's account of the disciplinary prison, arguing that the vast majority of women imprisoned in the nineteenth century served short sentences in local prisons that were never intended to be reformatory (132). Nonetheless, Zedner (1991) notes that regimes in convict prisons varied by gender, because the work given to female prisoners was based around an ideal of domestic femininity, and that both schooling and religion were more important components of prison discipline for women than for men (197).
This account of female prisoners as beyond reformation and as being largely placed in non-rehabilitative local prisons challenges Foucault's (1995) account of penality, but Zedner (1991) also advances an explicit critique of Foucault:

In Foucault’s analysis the prison becomes a conceptual apparatus for the imposition of a discipline which extends throughout the whole social body. Endowed with total power, it knows no exceptions, failings or inconsistencies; it has no need for change. Once reformed, the prison is, he implied, immutable. In Foucault’s work the reality of continuing administrative chaos and human error is lost. His cavalier treatment of evidence, the gap between his idealized account and the reality of nineteenth century prisons, and, above all, his failure to account for change over time combine to restrict the value of his work for historians. (95)

These criticisms of Foucault position Zedner as one of the counter-revisionist historians of criminal punishment, and such arguments will be considered in more detail later in the chapter. However, even if Zedner's claims about the theory and practice of punishment are essentially correct, it is not clear that this undermines Foucault’s account of penality or disciplinary power. Despite arguing that criminal women were constructed as beyond reformation and often sent to local jails, Zedner (1991) acknowledges that convict prisons for women were rehabilitative, albeit in different ways than men's convict prisons (183). Although Zedner’s account of the gendering of prison regimes is valuable, she lacks Rafter’s (1990) critical scope and fails to recognize that specific gendered identities were being constructed – not merely represented – in penal discourse and institutions. Instead of refuting Foucault's (1995) arguments about the constitution of the subject through discipline, Zedner largely ignores his theoretical claims.

A more powerful critical analysis of gender and criminal punishment is provided by Angela Davis (1998 & 2003), who combines Marxism, feminism and attention to race in her analysis of punishment in America. Davis (1998) argues that Foucault's account of power is undermined by the fact that he ignores the impact of race and slavery upon the history of punishment. Davis (1998) states that American prison regimes were deeply gendered, producing
substantial differences between the institutional practices applied to men and to women. Moreover, Davis (1998) argues that punishments oriented at the ‘soul’ were not applied to Blacks, and therefore criticizes Foucault’s account of criminal punishment in terms of disciplinary power:

If, as Foucault insists, the locus of the new European mode of punishment shifted from the body to the soul, black slaves in the US were largely perceived as lacking the soul that might be shaped and transformed by punishment…As white men acquired the right to be punished in ways that acknowledged their equality and the racialised universality of liberty, the punishment of black slaves was corporal, concrete and particular. (1998, 99)

Davis (1998) also insists that the exploitation of convicts' labour was an important determinant of criminal justice in America, particularly the criminalization of free Blacks during the Postbellum era in order to facilitate penal slavery and the Convict Lease system. Finally, Davis (1998) refutes Foucault’s argument about the cessation of cruelty and torture as punishment, identifying the continuation of cruelty and bodily punishment towards Black convicts in the South.

These arguments are further developed in Davis's book *Are Prisons Obsolete?* where she argues that race has historically been important to conceptions of criminality and cites Frederick Douglass’s observation of the tendency to "impute crime to color" (Davis, 2003, 30). Like Rusche and Kirchheimer (1967), Davis (2003) believes that the labour supply shapes the forms of criminal punishment, and she argues that this drove the introduction of Black Codes (which criminalized behaviour for Blacks that was legal for Whites) and the Convict Lease System in the American South (28-29). Davis also draws parallels between the Convict Lease System and prison privatization in the twenty-first century, since both are sexist, racist, and exploit prisoners for profit. Davis (1998; 2003) thus challenges Foucault's account of the transition from penalty based on sovereign power to one based on disciplinary power, his account of the disciplinary
prison, and his broader arguments about disciplinary power in society. Davis (1998; 2003) makes a convincing case that Foucault's analysis of criminal punishment is incomplete, both because the prison is only part of the power dynamics around criminalization and punishment in America, and because criminal justice cannot be fully understood without analysing race and gender. Although Davis's (1998; 2003) claims about gendered prison regimes are probably consistent with Foucault's (1995) analysis, her arguments about the role of capitalism and labour markets in determining criminal justice institutions are not.

The last analysis of race, gender and punishment is Mark Colvin’s (1997) book *Penitentiaries, Reformatories, and Chain Gangs*, which examines the insights provided by a range of theoretical approaches to the history of punishment. Although Colvin argues that Foucault is correct that human sciences and the desire for internal control shaped the penitentiary, he argues that the civilizing and humanitarian intent of reformers was more important than the desire to discipline prisoners. Nonetheless, Colvin (1997) claims that prisons "served as a mechanism of class control" (80) and that a Marxist perspective explains the popularity of the Auburn system of silent collective work over regimes based on solitary confinement, because the former facilitated prison industries. On the subject of women’s punishment in the Northern US, Colvin (1997) observes that the transformation in the punishment of women accompanied changing accounts of ideal femininity. Colvin argues that the development of women’s reformatories is best understood through a Foucaultian framework and that Foucault’s account of discipline is a more accurate account of women’s prisons than of men’s:

The early reformatories for women can be seen as a series of experiments in which new technologies of power were first tested and developed...The point of the reformatory was to create self-control so that inmates would ‘do right without compulsion,’ the goal emphasized by Foucault in his discussion of penal discipline. (1997, 191)
Colvin (1997) also considers punishment in the South, arguing that the Convict Lease System provides the best case for a Marxist analysis of punishment, but that it was facilitated by racism including "'scientific’ racial doctrines that promoted linkages between heredity, race and crime" (249). Although Colvin provides an interesting comparative analysis of different explanations of punishment, and makes the plausible claim that these differing explanations tend to fit different examples of penal institutions, his account lacks overall theoretical coherence. Colvin makes no effort to resolve the theoretical clashes between the Foucaultian, Marxist and humanitarian ‘good intentions’ accounts of nineteenth century punishment, which is problematic given the clear tensions between these accounts. As a result, Colvin's work functions more as a literature review than as an analysis of power in relation to criminal punishment.

These analyses about gender and/or race in regard to criminal punishment demonstrate that Foucault's analysis of power and the prison is incomplete because he does not consider how ideas about criminality, appropriate punishment, and therefore penal regimes are shaped by race and gender. Given that Foucault (1995) does not discuss gender in *Discipline and Punish* it is difficult to say whether or not these analyses of the gendering of punishment are consistent with his analysis, but there is no obvious inconsistency and Foucault did not argue that discipline and penalty were not gendered. Some of these analyses seem consistent with Foucault’s account of disciplinary power, for instance Colvin’s (1997) claim that women’s reformatories exemplified the disciplinary regime, while others such as Davis's (1998; 2003) analysis undermine Foucault's arguments about the nature of power in relation to criminal punishment. Moreover, Colvin (1997), Rafter (1990), and Zedner (1991) all argue that penal institutions were used as a means to discipline women into particular, middle class ideals of domestic femininity, which suggests that gendered identity formed part of the constitution of the subject that Foucault argues
occurred through discipline. These analyses of the gendered nature of discipline in prison regimes therefore extend and deepen Foucault's (1995) account of how subjects are constituted, and of the uses of imprisonment. The question of whether these arguments about the gendered nature of disciplinary power and the constitution of gender identities are consistent with Foucault's (1980b & 1990) analysis in *Herculine Barbin* and *The History of Sexuality* will be considered in Chapter 5.

The issue of race in regard to punishment is potentially more disruptive to Foucault’s analysis, because several of the historians discussed argue that interconnections of race, class and criminality were central to power relations around punishment in America. The accounts of penal slavery and the Convict Lease system in Southern states provided by Davis (1998 & 2003), Colvin (1997) and Hirsch (1992) make it clear that one cannot separate the issues of race and exploitation of labour in nineteenth century punishment. Moreover, Rafter (1991) argues that even in Northern states non-disciplinary forms of punishment were targeted at those racialized as non-White, because they were viewed as less capable of reformation. While there is little attention to race in the historical literature about English prisons, it is clear that ideas about race and colonialism have shaped conceptions of the subject and of social order, including discourses and practices about gender and sexuality.

Foucault's (1995) inattention to race in *Discipline and Punish* is even more problematic given that his work is a history of the present, and race was clearly an important factor in criminal justice and punishment in France during the 1970s – as demonstrated by Foucault’s own political activism. Foucault (1974) also acknowledged in the interview "Michel Foucault on Attica" that race is salient to American prisons, and observed the substantial over-representation of Black men during his 1972 visit to Attica prison (157). The lack of reference to race in
Discipline and Punish is odd given Foucault's awareness of the racialized dimension of criminal justice, and undermines the text as a critical diagnosis of power relations in his present. However, Foucault (2003) analyses race in the 1975-6 Collège de France lectures, where he develops the concept of biopower, and I explore the insights provided by this analysis in Chapters 5 and 6. The question of whether attention to race requires the modification or rejection of Foucault’s (1995) account of power and the prison will be explored in these chapters in more detail.

Foucaultian, and Counter-Revisionist Analyses

In this section I discuss two broadly Foucaultian accounts of the nature and development of disciplinary power in the prison, three counter-revisionist accounts that involve critiques of Foucault, and Ignatieff’s (1981) rejection of such counter-revisionist critiques. The first Foucaultian argument is by Thomas Dumm (1987) who assesses the critiques of Foucault’s account of the prison and argues that counter-revisionist objections on the grounds of empirical detail miss the point, because Foucault’s (1995) focus is on disciplinary power rather than prisons per se. Dumm (1987) then outlines the disagreement between Foucault and Marxist accounts of power, claiming that disciplinary power is consistent with the exploitation of labour identified by Marxists:

Foucault in Discipline and Punish thus decentred Marx, rearranging the order of the relationship between Marx’s most fundamental categories of value and production. This rearrangement was designed to show the importance of production in regard to power and knowledge even as it asserted that Marx was mistaken to make the struggle between labor and capital so central…What thus emerges, at least in this reading of Discipline and Punish, is a remarkably specific analysis of the operations of power at a level below that recognized by Marxist politics. These operations are compatible with but different from those of Marxist exploitation. (53)
This passage is carefully phrased and does not state that Foucault’s analysis of power is compatible with Marxist analysis, but Dumm does suggest that disciplinary power regarding the constitution of the subject could co-exist with exploitation of labour.

Dumm then presents his own historical analysis, arguing that the American Revolution and introduction of democracy drove the rise of the prison, because disciplinary techniques were required to produce responsible, self-governing citizens. Since Tocqueville visited both the Auburn and Pennsylvania prisons, Dumm turns to him for insight on the relationship between democracy and penal discipline. While the Pennsylvania system consisted of solitary confinement and aimed at deep moral reform through contemplation, the Auburn system involved silent congregate work under constant observation and intended merely to teach good habits of behaviour (Dumm, 1987, 117-118). Dumm therefore regards the debate about prison regimes as a fundamental dispute over what sort of citizen should be produced, and concludes that the popularity of the Auburn system privileges obedience over autonomy. Dumm (1987) draws a parallel between this trend in prison regimes and Tocqueville’s arguments about the triumph of democratic despotism over liberty, concluding:

The petty rules, the intricate procedure, the schedules, and finally the silence were born of an expressed desire on the part of responsible citizens to make responsible citizens out of others. Thus democratic despotism is born…Tocqueville came to the United States to study the prison, and left to write Democracy in America. No irony need be made of that coincidence, nor should anyone be surprised. After all, the penitentiary was the ideal liberal democratic institution. (140)

By arguing that disciplinary power is necessary for democracy, Dumm (1987) links the prison to Enlightenment notions of the rational individual in a manner that is similar to Foucault’s account of the link between liberal political philosophy and discipline (139).

The other Foucaultian analysis is Meranze’s (1996) book Laboratories of Virtue, which analyzes Philadelphia from 1760 to 1835, using local detail to demonstrate the development and
extension of disciplinary power. Meranze (1996) begins by observing that the initial replacement for public, bodily punishment after American independence (at least in Philadelphia) was not the prison, but a system of public, penal labor that begun in 1786 (55). This use of labor as a means of punishment was intended to combine deterrence with reform through public shame and the inculcation of habits of work; a rationale similar to that behind the penitentiary (Meranze, 1996, 80). However, Meranze (1996) notes that the system of public labor led to "disarray and violence" (87), and was quickly abandoned in favour of imprisonment. Eastern State Penitentiary, the exemplar of the regime of solitary confinement in the US, was in Philadelphia and so Meranze devotes considerable attention to this prison regime and its broader impact. Meranze (1996) argues that Eastern State employed a strategy of spatial control to counter the problem of inmates corrupting one another, but also used labour as a key component of penal theory and practice (187). Meranze also observes that similar disciplinary techniques were later introduced across the city, from town planning, to Refuges for children, to Madgalens for prostitutes, all in an effort to regulate working class life (289).

Meranze (1996) argues that these forms of discipline were "deeply gendered" (282), and argues that the extension of discipline beyond the prison demonstrates the intent to enforce gender and class control. This account of the development of discipline in the penitentiary and its extension to other social institutions and city spaces supports Foucault’s (1995) claims about the spread and intensification of disciplinary power. Meranze's analysis also backs up Foucault’s (1995) claim that imprisonment was not the initial or inevitable successor to corporal punishments, and that liberal political philosophy both masked and required new, more insidious, forms of power. However, Meranze combines these Foucaultian insights with
consideration of class and gender to show that subjects were constituted according to middle
class norms of masculinity and femininity, and therefore extends Foucault's analysis.

There have been a number of counter-revisionist\(^5\) accounts of the history of the prison,
but given the repetitive nature of this literature I will discuss only three: the work of William
Forsythe (1987) and Alyson Brown (2003), both of whom provide broad analyses, and Janet
Semple's (1993) analysis of Bentham’s plans for the Panopticon. Although I have categorized
these thinkers as distinctly ‘counter-revisionist’, there are several points of overlap between
these accounts and some of the analyses considered earlier, especially between Brown (2003),
Forsythe (1987) and Zedner (1991) all of whom focus on the patchy nature of the reforms that
Foucault describes. There is also a common theme between Semple (1993) and Ignatieff (1978),
both of whom observe that Bentham intended the Panopticon to be run by a private contractor
and that this was a major reason behind Parliament’s rejection of his plan. Further, Ignatieff
(1978), Forsythe (1987) and Brown (2003) agree that the prison was used for explicit
punishment and not only for rehabilitation, indicating that the divide between revisionist and
counter-revisionist histories of the prison is a matter of degree and not a clear bifurcation.

Brown (2003) analyzes prisons in England from 1850 to 1920, and challenges Foucault's
room for resistance amongst prisoners, whereas records of prison disturbances and riots show
the presence of resistance and the only partial success of discipline. Secondly, Brown (2003)
argues that Foucault’s claims apply primarily to convict prisons and are much less convincing in

\(^5\) Discipline and Punish is one of a number of histories of criminal punishment that historians label as 'revisionist',
because it critically re-examines and challenges the earlier orthodoxy about the history of punishment (e.g. liberal
narratives of progress). Counter-revisionist analyses of the history of punishment are those that have challenged and
refuted central claims made by the revisionist historians.
regard to local prisons⁶, where disciplinary regimes were undermined by incompetent staff, overcrowding and disciplinary problems amongst prisoners (70). Brown (2003) therefore follows Zedner (1991) in arguing that during the mid nineteenth century local prisons were varied and less rehabilitative in intent than convict prisons. Thirdly, Brown identifies a trend away from reforming prisoners and back to severe, physical punishment in convict prisons from the mid-1860s to the mid-1890s, as a result of prison riots and a loss of public confidence in rehabilitation. Brown (2003) concludes that these new, punitive regimes constituted physical cruelty, because they involved a poor diet, hard labour, and severe punishment for prisoners who misbehaved (92), including the use of handcuffs, leg irons, and sometimes electric shocks or burns.

Brown's (2003) first objection to Foucault's (1995) account seems to rest on a misunderstanding of Discipline and Punish, which as a genealogy was primarily intended to critically analyze the techniques and rationality of power, rather than to describe penal theory or practices. However, Brown does raise the point that – for all Foucault’s (2003) talk about subjugated knowledges – his analysis of the prison is based on the records of prison designers and administrators, and does not draw on the experiences of prisoners who were subjected to discipline. Brown's second claim repeats Zedner's (1991) argument that local prisons in England during the mid nineteenth century did not aim to rehabilitate prisoners, but this does not really address Foucault's (1995) claims about the nature of power. The third claim advanced by Brown, that after 1860 prisons became punitive and involved physical cruelty, is perhaps the most significant because it challenges Foucault's (1995) account of the replacement of violent, sovereign power by disciplinary power. Nonetheless, Brown identifies a return of rehabilitative

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⁶ Until the end of the nineteenth century there were two different levels of government running prisons in England. Convict prisons were run by the national government and held prisoners on longer sentences. Local prisons were run by the local government, and held offenders who were imprisoned before trial and those on short sentences.
approaches to punishment during the late 1890s, and does not advance her own account of power and penalty, so her criticisms of Foucault (1995) largely miss their target.

Brown's (2003) second and third critiques of Foucault (1995) are also advanced by Forsythe (1987), who accepts Foucault's broad account of changing forms of punishment, but adds caveats about the slow and imperfect process of transformation in prison regimes. Forsythe does not address questions about the broader social function and significance of the prison as an institution, nor about gender or class biases, and concludes by counselling against oversimplification of the history of the prison. Both Brown (2003) and Forsythe (1987) therefore criticize Foucault's analysis of the prison based on an interpretation of Discipline and Punish and an approach towards history that Foucault does not share, and as a result their criticisms do not respond to the key points of Foucault's analysis.

The final counter-revisionist analysis is provided by Janet Semple (1993) who challenges Foucault’s (1995) account of Jeremy Bentham's plans for the Panopticon. Foucault (1995) describes the Panopticon as based on constant surveillance of inmates who were kept in solitary confinement and refers to it as "the diagram of a mechanism of power reduced to its ideal form" (205). In contrast, Semple (1993) argues that the Panopticon was designed to be a contractor-run and profitable institution, stating that "in the panopticon writing, at least, Jeremy Bentham is the forerunner of the application of modern free-market ideology" (34). Semple (1993) explains that the design drew heavily on Samuel Bentham’s (brother of Jeremy) design for a Russian factory based on continual surveillance (100), and that the architectural principle of constant surveillance therefore begun as a plan to increase the productivity of workers. Semple (1993) also states that Bentham did not advocate longterm silent or solitary confinement, since he believed prisoners’ work would produce both individual reform and profit.
for the governor. Although Bentham planned multi-layered observation (Semple, 1993, 140), allowing the public to observe the Panopticon and thereby preventing cruelty, Parliament rejected Bentham’s plan due to fears about the risk of prisoner abuse (Semple, 1993, 274). Semple concludes, in an apparent attack on Foucault:

The panopticon is not a paradigm of government or society but a harbinger of humane competence, a light leading through the darkness of error and superstition to a new heaven and a new earth. It would also have made Jeremy Bentham a very rich man (1993, 232).

Semple’s (1993) account suggests that Foucault misrepresents the techniques and relations of power involved in the Panopticon in several respects. Firstly, it seems that the rationality of the market and exploitation of workers was built into the design of the Panopticon, which leads Semple to regard Bentham as the forerunner to neoliberal ideas about privatization. Secondly, Semple explains that the public would have had access to the Panopticon and hence surveillance would have been used over the guards and governor rather than simply over prisoners as Foucault (1995) suggests. This multi-layered observation implies a different, and perhaps more democratic, model of power than Foucault's account of normalization through surveillance and assessment by unobserved authority figures. Finally, Semple joins Ignatieff (1978) in noting that Bentham's plan for the Panopticon was rejected by Parliament, and therefore the prison was never built, which raises questions about whether it is appropriate for Foucault to use the Panopticon as the exemplar of the disciplinary prison.

It is rather unclear what conclusions one should draw about the nature of power from Semple's arguments about Bentham's plans for the Panopticon, because Semple does not offer an alternative account of power and the prison. On the one hand, Semple's account of Bentham's aim to profit from running the Panopticon bolsters Marxist-inspired arguments about the significance of the profit motive in shaping penalty. On the other hand, Parliament rejected
Bentham's plan because they were concerned about a private contractor building and running a prison for profit. The rejection of Bentham's plan on this grounds suggests that although the profit motive may have shaped penal theories, it did not directly shape penal practices in late eighteenth and early nineteenth century England. However, combining Semple's (1993) analysis with Thompson's (1967) arguments about the use of discipline to develop productive workers suggests that capitalism had a major influence on the development of disciplinary techniques. Arguably, the origin of Jeremy Bentham's ideas about constant surveillance suggests that discipline did not develop in the prison, as Foucault (1995) suggests, but instead in the factory.

The analyses by Semple, Dumm (1987) and Meranze (1996), like that of Melossi and Pavarini (1981), hint at a degree of overlap between Foucault's (1995) account of power, and Marxist-inspired analyses that highlight the significance of class and labour exploitation in shaping penality. Dumm (1987) argues that disciplinary power can coexist with the exploitation of labour, and if there is no necessary inconsistency between these aims and techniques then some prison regimes might have used work both as a disciplinary technique and to generate income. Dumm's (1987) analysis therefore offers a way to combine Foucault's conception of disciplinary power with Semple's (1993) argument that Jeremy Bentham planned to profit from the panopticon, and with both Semple's and Thompson's (1967) claims that disciplinary techniques were used in factories. If discipline and the capitalist exploitation of labour can coexist then many disputes about the origin, causes, and uses of penal regimes become a matter of differing emphasis, instead of requiring one to reject one explanation in favour of another. What this suggests is that Bentham's design for the panopticon can be understood both as a mechanism of disciplinary power, as Foucault (1995) argues, and as a means of generating profit, as Ignatieff (1978) and Semple (1993) emphasize.
Moreover, Meranze (1996) both follows Foucault (1995) in regarding disciplinary power as being based on the human sciences and liberal political philosophy, and argues that disciplinary norms were strongly shaped by class and were intended to control the working class. This provides a point of overlap between Ignatieff’s (1987) Marxist-inspired arguments about the prison serving the function of class control, and Foucault's (1995) emphasis on normalization, by implying that the disciplinary normalization described by Foucault may have aligned with capitalist ideology. Nonetheless, there are clearly cases where the goals of class control, the exploitation of labour, and disciplinary power did not co-exist, and here it is important to take into account the intersections between gender and race, which shaped beliefs about who was capable of being disciplined. The analyses by Hirsch (1992), Davis (1993 & 2003), Colvin (1997) stress that the convict lease system in the Southern US was based on the exploitation of convicts’s labour and maintenance of racialized inequality, not upon any ideal of disciplinary normalization. Further, Rafter (1990) argues that even in Northern states Black women were regarded as less likely to be capable of reform than White women, and were therefore sent to penal institutions with less rehabilitative regimes. The most productive analytical approach therefore seems to be to draw insights from Foucault's (1995) account of penalty in terms of disciplinary power, from Marxist-inspired analyses that are attentive to the direct and indirect impact of capitalism in shaping penal regimes, and from analyses attentive to race and gender.

Ignatieff (1981) responds to early counter-revisionist critiques in an article published several years after his own account of penal reform in England. Ignatieff (1981) notes that he (1978) and Foucault (1995) agree on the overall trends in punishment: a reduction in punishment involving public infliction of pain, the use of imprisonment as the pre-eminent
penalty for serious offences, and the imposition of strict rules in the new prisons. Then Ignatieff rejects the counter-revisionist accusation that he and Foucault exaggerated the transition from traditional law to rationality and discipline, arguing that their claims about the changes in punishment are essentially correct. Ignatieff (1981) also refutes the criticism that his and Foucault's accounts describe changing penal theory rather than actual practice, on the grounds that even changes in ideology rather than practices require analysis and explanation (164).

These disagreements about the history of the prison reveal a fundamental dispute over the nature and meaning of history. Whereas Dumm (1987) and Meranze (1996) present critical historical accounts that support Foucault's analysis of disciplinary power, Brown (2003) and Forsythe (1987) focus on the details of prison regimes and challenge the empirical accuracy of Foucault's (1995) account. There are two major difficulties with this counter-revisionist approach taken by Forsythe (1987), Brown (2003), Zedner (1991) and to a lesser extent Semple (1993). Firstly, these counter-revisionist critics judge Foucault's (1995) historical analysis according to criteria of whether or not he provides an accurate description of changes in prison regimes, which is not the primary purpose of *Discipline and Punish*. Foucault (1995) states clearly that his work is a genealogy, and hence it provides a historical account that critically analyzes forms of power and denaturalizes them by showing how history could have been different. Foucault (1995) therefore does not share a methodology focused on causal explanation, and indeed explicitly criticizes such accounts of history on the grounds that they portray existing institutions and forms of power as historically inevitable.

The second difficulty with these counter-revisionist analyses is that they tend not to provide an alternative account of the broad trends in criminal punishment or the power relations
involved, and therefore the criticisms come across as nitpicking and not as the basis for a fundamentally different account of penality. This point is made by Ignatieff (1981) and eloquently expressed by Phillips (1983) who observes that:

Rather than offer alternative theoretical contributions to those of the ‘revisionists’, most of the contributors to that volume [Bailey ‘81] simply take refuge in a detailed but sterile empiricism, as if this somehow refuted larger theoretical overviews. They quote details, gleaned from the sources, to show that events and personalities were more complex than can be easily accommodated within the large ‘revisionist’ patterns. But this is to abdicate the historian’s true function…To explain events as simply ‘one damned thing after another’ is unsatisfactory history at any time. (68)

Given the substantial overlap between Foucault's (1995) account of the broad changes in criminal punishment and multiple other historical accounts, including the counter-revisionist histories produced by Brown (2003) and Forsythe (1987), it appears that Foucault’s arguments pass the test of empirical plausibility. Nonetheless, those who favour an approach to history based on ‘detailed but sterile empiricism’ will no doubt continue to find Foucault’s account of power and the prison unsatisfactory.

Foucault responded to critiques made by unnamed but presumably counter-revisionist historians in the 1978 interview ‘Questions of Method’, explaining that he provides a fragmentary analysis and not claims about the totality of punishment (2000e, 205). Foucault (2000e) defends his genealogical approach and states that his intent is to disrupt the self-evidence of the prison and to analyze its rationality:

If I had wanted to describe ‘real life’ in the prisons, I indeed wouldn’t have gone to Bentham. But the fact that this real life isn’t the same as theoreticians’ schemes doesn’t entail that these schemes are therefore utopian, imaginary, and so on…These programs induce a whole range of effects in the real (which isn’t of course the same as saying that they take the place of the real): they crystallize into institutions, they inform individual behaviour, they act as grids for the perception and evaluation of things…They are fragments of reality that induce such particular effects in the real. (233)
Foucault (2000e) thus acknowledges that his account of changes in punishment does not correspond exactly to actual practice, but argues that his intent was to identify and critique the rationality of the prison that influenced and motivated these practices.

Foucault (2000e) then turns the criticisms of counter-revisionists against them, claiming that the disillusionment over the failure of the prison reveals a disciplinary rationality: "If the prisons were seen to have failed, if criminals were perceived as incorrigible…it’s precisely because this type of programming didn’t remain a utopia" (233). This claim is interesting, since it both supports Foucault’s (1995) claims regarding the significance of the disciplinary prison, and acknowledges public loss of faith in the institution’s efficacy – a point that may sit in tension with his earlier claim that the prison "had always been offered as its own remedy" (1995, 268). Temporary crises of confidence in the possibility of reforming prisoners may help to explain the persistence of severe prison regimes and deterrence that Brown (2003) and Forsythe (1987) identify. I will consider the rise of less disciplinary and more severe penal theories and practices in the late twentieth and early twenty-first centuries in the following chapter.

The remaining chapters of my thesis draw on the alternative theoretical accounts of power and punishment discussed in this chapter in order to explore contemporary power relations around criminal punishment in the United States, and England and Wales. In Chapter Three, I analyze the recent trends towards more severe penal regimes and prison privatization, which picks up on the themes of Semple's (1993) account of Bentham's plan to run the Panopticon for profit as a private contractor. My analysis in Chapter Three also discusses the use of prisoners' labour to produce good or services for corporations, which connects to the Marxist-inspired analyses of the exploitation of prisoners' labour discussed in this chapter. In Chapters Five and Six I analyze the constitution of racialized identities and inequalities through the
criminal justice and prison systems, drawing on Colvin's (1997) and Davis's (2003) insights about the way criminal punishment is racialized, and its contribution of penalty to racialized inequality in America. Finally, in Chapters Five and Seven I discuss the constitution of gender identities, and draw on Rafter's (1991) insights about the gendered nature of discipline and the attempt to instil normative ideals of femininity amongst women prisoners. Many of the alternative historical accounts in this chapter therefore include theoretical analyses of penalty that generate insights about the techniques and dynamics of power in the contemporary prison systems of the United States, and England and Wales.
Overview, and Notes on the Use of Statistics

In Chapter Two I surveyed the historical literature on criminal punishment in England and America, and identified three broad conceptual approaches that challenge Foucault’s account of power and the prison: Marxist-inspired analyses, analyses of race and/or gender, and counter-revisionist analyses. In this chapter I test the questions these analyses raised about Foucault’s account of punishment against the empirical realities of contemporary penal policy and prisons in America, and England and Wales. I identify two major empirical trends in criminal punishment in the thirty years since *Discipline and Punish* was published, and consider the implications these trends have for our understanding of power in relation to criminal punishment: firstly, the rise in both prison populations and incarceration rates; and secondly, the introduction and expansion of privately-operated prisons.

I use literature and data about the prison systems in America, and England and Wales to explore these two empirical trends, and assess whether they are consistent with Foucault's account of power and penalty, or whether they lend credence to alternative accounts such as those described in the previous chapter. My analysis of the normative significance of these trends includes a critical examination of Nancy Fraser's (2003) argument about the decline of disciplinary power, the changing role of the prison, and the replacement of disciplinary normalization of criminals by repression. Although I share Fraser's view that prison privatization and increased penal severity are significant, I argue that her account of the change in techniques of power is over-simplistic and mischaracterizes Foucault's (1995) account of disciplinary power.
These two trends of prison privatization and rising incarceration rates mean that the power dynamics around criminal punishment have altered significantly since the publication of *Discipline and Punish* during the mid 1970s. The recent practice of prison privatization means that there is a ‘new’ profit motive involved in incarceration in both England and Wales, and the United States, and the existence of such a profit motive lends support to Marxist accounts of penalty as involving the exploitation of those being punished, and of economic influences on criminal justice policy. Whereas Foucault (1995) argued that prison regimes sought to produce disciplined subjects and not profit, I argue that the economic exploitation of prisoners cannot be so easily dismissed in the era of prison privatization. Further, there has been a punitive shift in penal philosophy and policies in both England and Wales, and the US, including longer prison sentences and more restrictive use of parole, which has driven the rising prison populations and incarceration rates. This recent punitive trend lends some credence to counter-revisionist analyses that have questioned whether the institution of the prison is characterized by disciplinary normalization. I conclude that contemporary penal philosophies and regimes are less rehabilitative than they were during the 1970s, but argue that discipline continues to play an important role in the English and American criminal justice and prison systems.

Before tackling these subjects it is necessary to address a methodological and epistemological issue about the use of empirical data and literature. One of the central themes of Foucault’s work is the interconnection of power and knowledge, and thus the impossibility of ‘neutral’ or ‘objective’ perspectives. On the one hand, Foucault’s analyses of the prison, madness and sexuality seem to suggest that one should reject and counter claims of official or scientific truth. On the other hand, Foucault (2003) seems to favour the articulation of strategic, oppositional truth claims, and this critical stance underlies his genealogical method. In some
cases there is no tension between Foucault's support for strategic critiques and his opposition to scientific and hegemonic forms of knowledge, but it is unclear whether these positions are always consistent. For example, the use of official statistics about prison populations might facilitate an analysis of racial bias in the criminal justice system, or a critique that too many people are imprisoned. If there are situations in which one might mobilize scientific or official truths in order to better articulate a counter-hegemonic perspective, then should it be done? To put the question differently, does Foucault's support for strategic, critical truth claims outweigh his opposition to forms of official or scientific knowledge?

The best indication of how Foucault might answer this question is found in the interview "Truth and Power" where he advances a number of 'propositions' about truth and the attitude intellectuals should take towards it:

'Truth' is to be understood as a system of ordered procedures for the production, regulation, distribution, circulation, and operation of statements. 'Truth' is linked in a circular relation with systems of power that produce and sustain it, and to effects of power which is induces and which extend it – a regime of truth…The essential political question for the intellectual is not to criticize the ideological contents supposedly linked to science, or to ensure that his own scientific practice is accompanied by a correct ideology, but that of ascertaining the possibility of constituting a new politics of truth. The problem is not changing people's consciousnesses – or what's in their heads – but the political, economic, institutional regime of the production of truth. (Foucault, 2000b, 132-3)

My reading of this passage and of "Truth and Power" as a whole is that Foucault favoured a change in the conditions whereby a system of truth is produced, and not that he had an over-riding objection to particular claims or forms of 'evidence'. In some cases scientific truth claims can and have been mobilized in a counter-hegemonic manner, for instance Anne Fausto-Sterling's (2000a) use of biological knowledge regarding organs, genes and hormones to argue that binary sexual categories are not natural. Given that political, social and economic disputes
are frequently reflected within scientific discourse (i.e. 'science' itself is often deeply divided), there is no necessary connection between hegemony and any given scientific claim or statement.

However, there is a further problem with the data I will be using in this chapter, because much of our knowledge regarding criminal justice – and especially about prison populations – relies on official reports and statistics. Analysing trends in prisoner numbers, arrest rates, and levels of crime reported to the police means relying on data that is produced, collated, analyzed and published by agencies of the state. It would be naive to believe that such official figures are not influenced by the prevailing ideological framework, institutions and even the political aims of past or present state authorities. The questions posed and the categories used in compiling statistics create biases that cannot be removed by later interpreting the figures in the light of a critical perspective. For example, if the statistical categories presume binary sexes and the resultant data categorizes everyone as either 'male' or 'female', then later reinterpreting the flawed data will not remove the bias introduced by the erasure of people who identify outside these binary sex categories.

The feminist sociologist Dorothy Smith (1990) therefore warns that official statistics constitute a self-reinforcing "ideology circle" (94) that may be more resilient and less visible than the ideological nature of other forms of knowledge. As such, there is cause for scepticism about whether analysis using such official statistics can do anything other than reinforce existing power relationships, particularly since such figures deploy the notions of hierarchical observation and objectivity that Foucault views as inherently elitist and by implication hegemonic. To complicate matters even more, Foucault (1990; 2003) shows that statistical knowledge and its use in the management of populations are characteristic techniques of
biopower, so using this statistical information may make one complicit in this form of governance.

Despite all these concerns, Foucault's (2000b) comments about the need to advance counter-hegemonic truth claims and political judgement provide the best argument that the use of official statistics should depend on strategic decisions about how best to challenge prevailing relations of power and knowledge. In this case, I think that a strategic judgement indicates that one should use official data regarding prison populations, arrest rates etc. because official figures are often the only source of information about important criminal justice indicators. Gathering independent information about prisoners is particularly difficult because security procedures in prisons create restrictions on the access provided to researchers, and because the authorities may not give permission for such access. There are also important ethical concerns about conducting research in prisons, because prisoners are a vulnerable population with impaired autonomy and privacy, high incidences of mental health problems, and high rates of learning disabilities. Foucault's involvement during the 1970s with the Group d’Information sur les Prisons (Eribon, 1991; Macey, 1993) shows that he was aware of such difficulties in collecting information about imprisonment, and of the political role and consequences of this exclusion of observers. Although valuable sociological research about prisons and prisoners has been conducted despite these limitations, large-scale research such as analyses of trends in national prison populations inevitably relies on official data. Nonetheless, researchers can and have used this official data to criticize prevailing policies and practices, for instance by arguing that punishment is too severe, that rising incarceration rates are an costly and ineffective way to reduce crime, and to point to broader social problems such as racialized biases and socioeconomic inequality.
In some cases, the availability or unavailability of statistics about a particular subject depends on the outcome of political battles to make the criminal justice system more accountable and/or to render biases or inequities more visible. One example is the collection and publication of data about the race or ethnicity of people that the police stop and search in the UK, and in the past this data has demonstrated the existence of 'racial profiling' for drug and terrorism offences (UK Ministry of Justice, 2007, 31-34). In contrast, there is no systematic collection of data about the race or ethnicity of those searched by police in the US, and as a result it is more difficult to substantiate accusations of racial profiling by police. However, analysis of longterm trends in the incarceration rate in America is enabled by the publication of annual reports that provide both the numbers of people imprisoned and the incarceration rate (i.e. the number of prisoners per 100,000 population). In the UK, such analysis of trends in the incarceration rate is more difficult, because the government figures usually specify the prison population but not the incarceration rate. The information that is provided or withheld about aspects of the criminal justice system therefore has political causes and consequences, enabling or hampering particular truth claims.

Despite my concerns about the biases and occlusions within official criminal justice statistics, I believe that the advantages of using this data outweigh the disadvantages. Using official statistics about prison populations enables many critiques of existing power relations, and allows one to critically analyze how hierarchical knowledge links to criminalization and imprisonment. While Foucault (2003) observes that the use of statistics is part of the exercise of biopower and contributes to the production of racialized categories, the history of racialized struggles in the US and UK suggest that statistics about racialized or ethnic biases can also be valuable to challenge racialized discrimination and inequity. Similarly, scientific analysis has
provided valuable critiques of contemporary penal policy, particularly in areas such as sentencing and drug addiction (Caulkins et al, 1997; Tonry, 2004; Ribeaud, 2004; Muir, 2008). While Foucault's work demonstrates that we should be careful what we wish for in terms of defining what counts as evidence, expertise or truth, the opposition of many 'experts' to the recent punitive trend suggests that scientific knowledge is not necessarily hegemonic in regard to penal policy. My task in the remaining chapters is to understand the nature of contemporary penality, its techniques of power and accompanying regime of truth.

**Rising Prison Populations and Incarceration Rates**

The first trend in penal policy considered here is the rise in prison populations and incarceration rates (i.e. the number of prisoners per 100,000 population) in the United States, and England and Wales. Between 1980 and 2009, the total US prison population increased almost fourfold, while the federal prison population increased over sevenfold, greatly exceeding both population growth and any rises in crime (Bureau of Justice Statistics, 1981, 2; 2010b, 1). By 2009, America had a prison incarceration rate of 502 per 100,000 residents (Bureau of Justice Statistics, 2010b, 1) and an incarceration rate for prison and jail inmates of 748 per 100,000 (Bureau of Justice Statistics, 2010c, 2). The rising prison population began later in England and Wales, but the population in custody increased 85 percent between 1990 and December 2009 (UK Home Office, 1991, 2; HM Prison Service, 2009, 6). According to the World Prison Population List the United States has the highest incarceration rate in the world at 756 prison and jail inmates per 100,000 residents, and the incarceration rate in England and Wales exceeded both population growth and any rises in crime.

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7 The increase was 390%, from a total prison population of 329,122 in 1980 to 1,613,740, in 2009.
8 The increase was 754%, from a federal prison population of 24,363 in 1980 to 208,118 in 2009.
Wales of 153 prison and jail inmates per 100,000 residents is far above that of comparable European states such as France or Germany (Walmsley, 2009, 5).

Given that there have not been corresponding increases in crime (Blumstein & Beck, 1995; Caplow & Simon, 1999; Millie et al, 2003; Mauer, 2006; Tonry, 2010), analysts regard the rising incarceration rates in England and America as evidence of greater severity in criminal punishment. This trend towards harsher sentences over the past thirty years has been described using terms such as "the new punitiveness" (Pratt et al, 2005, 128) and the "new culture of crime control" (Garland, 2001, 175). Baker and Roberts (2005) explain that the ‘new punitiveness’ consists of "a moral stance that criminals should suffer through enduring ‘hard treatment’ and being afforded lesser rights than their victims, with a ‘common sense’ conviction that harsh punishment deters crime" (Baker & Roberts, 2005, 128). The recent trend of longer sentences (as shall be discussed in detail shortly) and resultant rise in incarceration rates therefore reflects a change in both penal policy and philosophy during the past three decades. Moreover, the rise in prisoner numbers as a result of more punitive sentencing has often led to overcrowding in prisons, thereby causing prison conditions to deteriorate and often reducing prisoners' access to rehabilitative programs such as education and drug or alcohol treatment programs. Changes in English and American penal regimes therefore reflect both deliberate changes in policy, and unintended consequences such as the impact of widespread prison overcrowding.

Incarceration rates in America have been rising since the 1970s, when there were major changes in the theory and practice of punishment. In the early 1970s penal policy in the US was characterized by indeterminate sentencing based on a rehabilitative penal philosophy, which allowed for individualized punishment and gave a lot of discretion to judges and parole boards (Tonry, 2005). This approach of individual assessment and penal institutions with the putative
goal of normalization is reflected in Foucault's (1995) account of disciplinary power, and specifically the disciplinary prison. However, by the mid 1970s this penal policy was widely criticized, including concerns about arbitrariness, racialized sentencing disparities, and a loss of confidence in the efficacy and normative justification of efforts to rehabilitate criminals (Tonry, 2005). Between 1975 and 1980 there was an overhaul of sentencing policy across the US, in which indeterminate sentencing was replaced by determinate sentences that often included mandatory minimum terms (Tonry, 2005). The political momentum for this change came from an unlikely coalition of critics of the previous system, including civil liberties and prisoners' rights activists, opponents of the medicalized rehabilitation model, and Republicans seeking tougher sentences (Tonry, 2005). Garland (2001) also argues that Foucault's (1995) critical analysis of the prison contributed — probably inadvertently — to the shift away from rehabilitation, and towards a more punitive approach. This shift towards more severe sentences continued in many US jurisdictions during the 1980s and 1990s, and included 'three strikes' laws such as Proposition 184 passed in California in 1994.

One of the major reasons for the rise in prisoner numbers in the US since the 1970s is more intensive policing and harsher sentences for drug offences, often referred to as the 'War on Drugs'. Between 1980 and 1996 the incarceration rate for drug offences in US state prisons rose from under 15 inmates per 100,000 adults to 148 inmates per 100,000 adults – nearly a tenfold increase (Blumstein and Beck, 1999). To put this figure into perspective, the proportion of the American adult population incarcerated in state prisons during 1996 for drug offences was significantly higher than the total incarceration rates (i.e. for all offences) recorded in England and Wales, or in Canada, and was almost 65 per cent higher than the total incarceration rate in
Drug offences are measured in terms of arrest rates, so Blumstein and Beck (1999) cannot tell whether there was a rise in drug offences as well as more intensive policing and severe punishment. However, Mauer (2006) cites evidence from the Household Survey on Drug Abuse indicating that drug use declined significantly from 1979 to 2000, and thus argues that arrests and incarceration for drugs soared despite falling drug use.

Sentences for other crimes in the United States also became significantly more severe from the late 1970s onwards. The time served in prison for offences such as murder, burglary, robbery and sexual assault in the US increased due to the imposition of longer sentences (including mandatory minimum terms), restricted use of parole, and fewer pardons (Blumstein and Beck, 1999, 35). Although some forms of crime rose during the 1980s, such as motor vehicle theft (Bureau of Justice Statistics, 1998), Blumstein and Beck (1999) attribute the growth in American incarceration rates for non-drug offences to more severe sanctions and not rising crime:

For offences other than drugs, approximately 40 percent of the growth in incarceration in state prisons is accounted for by increases in decisions to incarcerate and approximately 60 percent of the growth by increases in the time served by those sent to prison. (1999, 54)

Similarly, Blumstein and Beck (1999) conclude that the increase in incarceration rates for federal prisons reflects a combination of "increases in both commitment rates and, more

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10 According to Walmsley (1999) England and Wales had 125 prisoners per 100,000 adult population, Canada had 115 prisoners per 100,000 adult population, and France had 90 prisoners per 100,000 population. Walmsley explains that these figures rely on estimates of the adult population in each state and have been rounded to the nearest five "in order to avoid a spurious appearance of precision" (1999, 1). These recorded incarceration rates may not be for the year of 1996, because Walmsley (1999) states that his figures refer to dates between 1994 and 1998.
strongly, in time served" (52). In short, Blumstein and Beck's (1999) conclusion is that the rise in US prison populations and incarceration rates reflects a punitive trend in criminal justice policy, not an increase in crime rates.

The imposition of more severe criminal penalties and the resultant rise in the prison population in England and Wales began during the 1990s, under the Conservative Home Secretary Michael Howard, who adopted the slogan 'prison works' (Coyle, 2003). The penal philosophy introduced by Howard involved the belief that there should be greater use of prison sentences, and that prisons conditions should be punitive, i.e. "that the experience of imprisonment should be unpleasant" (Coyle, 2003, 14). The New Labour governments from 1997 to 2010 continued this punitive trend by adopting a populist 'tough on crime' stance. Between 1991 and 2001 the adult custody rate\(^{11}\) rose by 65 percent, and the custody rates for some offences more than doubled (Millie et al, 2003, 372). Over the same period, there was a 139 percent increase in the prison receptions for sentences under a year, and a 62 percent increase in sentences from 4 years to life (Millie et al, 2003, 373). Millie et al (2003) therefore conclude that:

The main reasons for the rise in the prison population are that sentencers are sending a higher proportion of offenders to prison and that when they use custody they are passing longer sentences. (375).

This punitive trend also involved the use of life sentences for a wider range of crimes, with the result that between 1990 and 2002 the number of life-sentenced prisoners in England and Wales increased by 66 per cent\(^{12}\) (Coyle, 2003, 74).

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\(^{11}\) The adult custody rate is the proportion of those aged 21 or older who were sent from court to immediate custody. The adult custody rate for all courts in England and Wales increased from 17% to 28% between 1991 and 2001 (Millie et al, 2003, 372).

\(^{12}\) The increase was from 3095 life-sentenced prisoners in 1990 to 5150 in 2002 (Coyle, 2003, 74)
There has been less attention to the contribution of drug offences towards rising incarceration rates in England and Wales than in the United States, but Millie et al (2003) identify "a large increase in the number of convictions for drug offences" (371) between 1991 and 2001, despite a general pattern of falling crime. They note that legislative changes have introduced harsher penalties for some drug offences, and that there has been a more punitive attitude amongst sentencers and the general public, but do not rule out the possibility that drug crime also rose over this period (Millie at al, 376-380). More severe punishment for drug offences thus explains much of the increase in prisoner numbers in the United States from 1980 to 1996, and some of the increase in prisoner numbers in England and Wales between 1991 and 2001.

The New Labour government in the UK also expanded the range of criminalized behaviour through their support for tactics such as zero tolerance policing, and through the introduction of the Anti-Social Behaviour Order (ASBO). ASBOs were introduced in 1998 as a new penalty for behaviour such as public drunkenness, graffiti, begging, loitering, and verbal harassment (Fitzgibbon, 2007). Although an ASBO is not itself a criminal penalty and is similar to a civil injunction, breaching an ASBO is a criminal offence and can result in up to five years imprisonment (Tonry, 2010). The use of ASBOs has been criticized as ineffective, due to the high rates of breach, and as part of a strategy of "pre-emptive criminalisation" (Fitzgibbon, 2007, 130) of those deemed most likely to commit crimes, particularly disadvantaged young people. In his review of criminal justice policy under New Labour, Tonry (2010) argues that ASBOs are illiberal, have "increased public discontent and fostered intolerance" (399), and are almost certainly ineffective because "there is no credible evidence that their use increased public confidence or decreased the prevalence of antisocial behaviour or public anxiety about it" (390).
Given this punitive trend in criminal justice policy in both the United States and in England and Wales, is Foucault's account of penality in terms of disciplinary power still relevant? On the one hand, the shift from rehabilitation to penal philosophies of deterrence, retribution, and/or incapacitation means that Foucault's (1995) account of the disciplinary prison seems more similar to early 1970s penal philosophy than to contemporary penal theory or practices. Whereas rehabilitation targets those who are currently imprisoned, deterrence is aimed both at preventing recidivism among current prisoners, and more importantly at deterring others from committing crimes. While Foucault stresses that disciplinary power targets individual prisoners, and indeed constructs the individual, penal policy based on deterrence targets the broader population. Moreover, while rehabilitation requires close surveillance and assessment of prisoners, which Foucault describes as "hierarchical observation, normalizing judgement, and their combination...the examination" (1995, 170), prison regimes based on deterrence, incapacitation and/or retribution do not require close monitoring of prisoners' behaviour. To the extent that the punitive trend in penal philosophy and sentencing policy have translated into changes in prison regimes, one would expect disciplinary power to play a far less significant role in contemporary prisons than in prisons during the 1970s. Garland (2001) reaches a similar conclusion, arguing that contemporary prisons are more explicitly about "exclusion and control" (177) than was the case in the 1970s.

On the other hand, rehabilitative institutions such as probation, parole, and educational provision within prisons continue to exist in both the United States and in England and Wales (Garland, 2001). There have also been innovations that take a more rehabilitative approach to punishment, including the introduction of state Drug Courts in the US to provide treatment for non-violent drug offenders. Although there is less emphasis on rehabilitation now than during
the 1970s, there are still efforts to normalize criminals through education, drug treatment, counselling etc. (Coyle, 2005). Moreover, the changes in prison regimes may be far less significant than the change in penal philosophy implies, and may be more the product of overcrowding, cost-cutting and/or prison privatization than of the decline of the rehabilitative ideal. As I will discuss in later chapters, the racialized and gendered nature of prison populations is also important, because the punitive trend has had a disproportionate impact on those groups who are more likely to be imprisoned. To understand how the rise in prison populations and incarceration rates have changed power relations around criminal punishment, one needs to take into account the direct and indirect consequences of the carceral boom, and the broader socioeconomic and political context, including neoliberalism. Later in this chapter, and in Chapter Four, I will explore how neoliberalism relates to the change in penal philosophy and policies, and to techniques and relations of power – key to this dimension of penal philosophy is the trend towards the privatization of prisons.

Prison Privatization

The second trend explored in this chapter is prison privatization. Privately run prisons operated for profit were introduced in the US during the late 1980s, and in England and Wales during the mid 1990s, although, as noted in the previous chapter, Jeremy Bentham proposed the idea in the early nineteenth century. In December 2009, 129,336 prisoners were held in privately operated federal or state prisons in the US and constituted 8 percent of the overall prison population (Bureau of Justice Statistics, 2010b, 9). There are privately operated prisons in the federal prison system and in 32 of the American state prison systems, while in each of New Mexico, Montana, Alaska, Vermont, Hawaii, and Idaho over a quarter of prisoners were held in
private facilities in 2009 (Bureau of Justice Statistics, 2009, 34). In England and Wales during May 2010 there were eleven contractor-run prisons that held a total of around 9,618 prisoners or 11.3 percent of the prison population — the highest proportion of prisoners in private facilities of any state in Europe (Prison Reform Trust, 2010, 56). Although the proportion of prisoners held in privately run prisons in the US, and in England and Wales, is relatively small, this trend is more significant than those figures would imply. As I discussed in the last chapter, the presence and role of the profit motive in prisons is conceptually significant because it is central to the disagreements between Foucault and Marxist theorists about the power relations involved in criminal punishment. Moreover, as I will explain later in this chapter, the introduction of contractor-run prisons has altered the ethos and practices in publicly-run prisons, including through the process of market testing whereby private contractors and the public sector compete on grounds of cost to determine who will run a prison.

The first contract for a privately run prison in the United States was awarded by the state of Texas in 1988, and the practice was quickly adopted by other jurisdictions (Harding, 2001). The growing prison population (described in the first part of this chapter) led to overcrowding and deteriorating prison conditions, which prompted legal challenges, and as a result by 1988 the prison systems of thirty-nine states were under court supervisory orders or consent decrees (Harding, 2001). The practical advantage of introducing contractor-run prisons was that it enabled states to expand their prison capacity whilst spreading the cost over a longer time-frame, through a contract with the private provider who would design, build, manage and run the facility (Harding, 2001; Hallett, 2006). Moreover, prison privatization fit with neoliberal ideology since it promised to reduce the size of the state, introduce competition in the provision of services, and therefore potentially reduce the cost per prisoner. Prison privatization thus
appealed to American politicians for both practical and ideological reasons, and contributed to the carceral boom by enabling prison populations to rise without necessitating short-term government spending on new infrastructure.

The introduction of prison privatization in England and Wales was driven by a similar combination of practical and ideological reasons. Prison privatization was consistent with the neoliberal policies of privatization pursued by Conservative governments since the early 1980s, and it was promoted by the influential free market think-tank the Adam Smith Foundation (Cavadino & Dignan, 2003). As was the case in the US, privately run prisons enabled the provision of extra places in an overcrowded prison system while deferring much of the cost, but Harding (2001) argues that the UK government also hoped to weaken the prison staff unions and thus reduce wage levels. Contractor-run prisons also promised to distance politicians from problems in the prison system, such as the high profile breakout of three prisoners from Parkhurst maximum-security prison in 1995 (Coyle, 2003). Prison privatization may also have gained momentum as a result of close links between Conservative politicians, former prison service employees, senior civil servants, and companies interested in the prison sector (Cavadino & Dignan, 2006).

The New Labour governments from 1997 to 2010 expanded the use of privately operated prisons in order to minimize the short-term cost to the government of the rising prisoner numbers discussed earlier (Coyle, 2003). However, the introduction of privately run prisons has also led to changes in the ethos and practices of publicly run prisons in the UK, and has therefore had an impact on the prison system as a whole. The introduction of market thinking through prison privatization means that "value for money" has become one of the central principles of the public prison service in England and Wales (HM Prison Service, 2008, 7).
Decisions about who will run an existing prison or receive the contract for a new prison are made through a process of competitive bidding (also known as market testing), whereby the proposals of private contractors are weighed against those from the public sector (UK Home Office, 2006). The effects of competition are supposed to reduce costs and improve prison regimes, but Cavadino and Dignan (2006) express doubt that there have been cost savings, and note the public sector has sometimes been excluded from bidding for a prison contract. It is unclear whether there has been an improvement in the cost-effectiveness of prisons in England and Wales, and, therefore, whether neoliberal claims about efficiency through competition have born out in practice. Moreover, evidence provided in a Parliamentary written answer in 2007 suggests that for most categories of prison in the UK the cost per place in a privately run prison was significantly higher than that in a public prison (Prison Reform Trust, 2010).

Many concerns have been raised about privately run prisons, particularly the risk that profit maximization leads to unacceptably low expenditure on staff, healthcare etc., resulting in sub-standard or unsafe conditions for prisoners (Sinden, 2003). Some evidence suggests that in America, and England and Wales privately operated prisons have lower staff to prisoner ratios than public prisons, and that the relatively low wages produce high staff turnover, inexperience and difficulty in maintaining order (Sinden, 2003; Prison Reform Trust, 2010). There is particular concern that cost-cutting has produced sub-standard prison conditions in some American states, because many contracts for privately run prisons specify that the cost must be significantly lower than for public prisons, and prison conditions are not rigorously monitored (Harding, 2003). At a state level privately run prisons in America also provide fewer educational programs than public prisons, because a smaller percentage of privately run prisons offer educational programs, and the range of programs available is narrower in privately run
This inferior provision of educational programs to prisoners in privately run facilities is a significant failing, particularly in light of the low educational achievement of prisoners and their consequently restricted opportunities for legal employment. Prison privatization has therefore had an impact on prison regimes, potentially making prisons less safe and reducing prisoners' access to rehabilitative programs.

While the criticisms of prison privatization often relate to the incentive to maximize profits by providing inadequate services, there is a deeper concern that the introduction of a profit motive in criminal punishment may distort policymaking. Both Davis (2003) and Hallett (2006) argue that the private prison industry is a clear beneficiary of increased incarceration and therefore has a direct interest in promoting the continuation and expansion of imprisonment. This financial interest in carceral expansion remains even if regulation and monitoring ensures that private prisons provide a service that is equivalent to, or better than, that of state facilities. Although there are standards of probity during the formal procurement process for prison contracts, there are often concerns about undue influence during the periods before or after this formal process (Harding, 2001). Prison contractors have sought to influence politicians through lobbying and political donations, and in some cases prison corporations have been directly linked to Republican politicians (Hallett, 2006). There have also been cases in the UK and US where public officials involved in awarding a contract have subsequently gone to work for the bidder, introducing a conflict of interest (Harding, 2001).

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13 According to the Bureau of Justice Statistics (2003), all federal prisons provided education programs in the period from 1995 to 2000, but there were differences in the provision of educational programs in state prisons: in 1995 educational programs were provided by 88% of public prisons and 72% of private prisons, and in 2000 by 91% of public prisons and 88% of private prisons (4). Moreover, public prisons generally offer a wider range of educational programs than is provided in privately run facilities: in 2000 basic adult education was provided in 80.4% of state public prisons as compared with 61.6% of private prisons; secondary education was provided in 83.6% of state public prisons versus 70.7% of private ones; and special education was available in 39.6% of state public prisons versus 21.9% of private ones (Bureau of Justice Statistics, 2003, 4).
In addition to the obvious profit motive involved in privately run prisons there are other financial incentives in incarceration, including companies who market goods or services to prisons. Davis (2003) argues that in America "public prisons have become so thoroughly saturated with the profit-producing products and services of private corporations that the distinction is not as meaningful as one might think" (100). Another profit motive exists for companies who use prisoner labour, because prisoners are paid exceptionally low wages, receive no benefits and are legally prohibited from unionizing, making them a cheap captive labour force that offers the opportunity for huge profits (Davis, 2003; Price, 2003). It is also important to recognize that the people employed in the public prison system and privately run prisons have a financial interest in criminal punishment and therefore seek to influence policymaking (Christie, 2000). The existence of multiple profit motives towards imprisonment leads Price (2003) to identify a circular relationship of prison expansion:

An increase in the number of convicts in convict labor programs leads to more income to prisons, which equals more profit from prison labor, which results in a trend to privatize prisons, which leads back to the beginning of the cycle: more convicts. (153)

The Relationship Between Punitiveness and Privatization

There are good reasons to view rising incarceration rates and prison privatization as inter-connected, and in both England and Wales, and the US the shift towards privately run prisons accompanied the introduction of more punitive sentencing and rising prisoner numbers. Nonetheless, I am doubtful about Price's (2003) argument that the profit motive of private corporations involved in the prison industry has driven rising prisoner numbers. In the US the beginning of a punitive trend with attendant rising incarceration rates pre-dated prison privatization by a decade, so prison privatization clearly did not begin the trend towards greater penal severity. On the contrary, in both England and America rising prisoner numbers and
serious overcrowding in existing prisons were major reasons behind the introduction of privately run prisons (as discussed earlier).

However, prison privatization has contributed to carceral expansion insofar as the use of private prison contractors offered the ability to add extra prisoner spaces faster and at less short-term economic cost than would have been the case for new public prisons. Current incarceration rates might well be lower if American politicians in the 1980s and British politicians in the 1990s had been forced to choose between rising incarceration rates and high short-term expenditure on building new prisons, instead of deferring much of the cost by introducing private contractors. Prison privatization has therefore enabled the continuation of an existing trend of rising prisoner numbers and incarceration rates, which were caused by greater penal severity. My analysis therefore suggests that the punitive trend contributed to the introduction of prison privatization, but that private prison contractors have both benefited from and enabled the punitive trend. It also seems likely that private prison corporations would lobby against policies that would reduce or remove the need for their services, and therefore pose an obstacle to the reduction of incarceration rates (Davis, 2003; Hallett, 2006).

In the course of this chapter I have argued that both greater penal severity and prison privatization raise questions about the contemporary relevance of Foucault's (1995) account of power and the prison. Rising prison populations and incarceration rates are the product of a punitive shift in penal philosophy and policy, which means that both prison regimes and the broader penal system are less rehabilitative than in the past. Whereas Foucault characterized the prison as an institution aimed at disciplinary normalization, some commentators have suggested that contemporary prison regimes focus on simply containing the ever-increasing prison population and that this undermines Foucault’s thesis (Garland, 2001). Similarly, the
introduction of privately operated prisons challenges Foucault's account of the prison, including prison work, as concerned with disciplining subjects and not with profit. In both cases, however, these trends are not necessarily directly opposed to Foucault’s theory of discipline as some critics suppose. Foucault's argument that prisons play an important role in constituting the subject is largely correct in my view and I explore it in great detail in later chapters with regard to race and gender, but there is no reason to believe that such disciplinary power is inconsistent with the profit motive in criminal punishment.

Similarly, while I agree with Davis's (2003) argument that the contemporary US prison system allows the unjust exploitation of prisoners for profit, I believe that the profit motive is one amongst many reasons for prison privatization, and that its influence on carceral expansion is probably slight and indirect. While these two trends of prison privatization and carceral expansion suggest that Foucault's (1995) account of penalty is less relevant now than it was thirty years ago, they do not mean that his analysis is irrelevant. Although Foucault's analysis in *Discipline and Punish* is about criminal punishment, he uses prisons as a case study to generate broader insights about power in modern society. Despite the changes in penalty, it is possible that Foucault's analysis of disciplinary power remains as relevant as ever to other social institutions and processes, such as the education system, or social work.

Moreover, Foucault provides insights about the interconnection of power and knowledge, the operation of subtle techniques of power upon the body, and the constitution of the subject, all of which have applicability for political theory and many other fields of study. Even if Foucault's analysis of the prison was wholly outdated — and, as I have explained above, it is not — then it would still be possible to use elements of Foucault's theoretical framework to analyze power dynamics that he does not discuss in *Discipline and Punish*, as I do in my
analysis of race and gender in Chapters Five, Six, and Seven. In the remaining chapters of this thesis I will argue that Foucault's account of disciplinary power continues to generate valuable insights both about contemporary criminal justice systems, and about contemporary techniques of power more broadly.

Responding to Fraser's "From Discipline to Flexibilization?"

One of the most prominent critiques of Foucault's work in recent years is provided by Nancy Fraser (2003), and her arguments merit attention here. There are two reasons why it is important to consider Fraser's analysis: firstly, because her topic is similar to my own, insofar as she assesses the extent to which Foucault's account of disciplinary power is still relevant given the socioeconomic changes over the past thirty years. The second reason for discussing Fraser's argument is that she explicitly (albeit briefly) discusses the normative significance of changes in criminal justice policy and prisons.

Fraser argues that Foucault's account of disciplinary power is outdated because it presumes three empirical facts that are no longer true: the national organization of social regulation; the non-marketized nature of social regulation through the Keynesian welfare state; and the subjectifying and individualizing logic of disciplinary self-regulation. In particular, Fraser contends that the rehabilitative approach to punishment has been replaced by explicit repression through more intensive policing and imprisonment, particularly of poor, racialized communities (2003, 166). Fraser therefore interprets the punitive trend in criminal justice as evidence that repression has replaced the disciplinary prison described by Foucault, and as an indication of the broader changes in techniques of power as a result of neoliberalism. I share Fraser's view that neoliberalism had an impact on penal policy and broader techniques and
relations of power (a topic I discuss in depth in Chapter Four), but she is wrong about the end of the disciplinary power and the rise of repression. Under close scrutiny both Fraser's empirical and theoretical analysis fails to hold up, because she oversimplifies the empirical trends over the past three decades, and fails to provide sufficient justification for her theoretical conclusions.

The first problem with Fraser's (2003) analysis is the slippage between disciplinary power and the concept of "fordist regulation" (160). Fraser develops the concept of fordist regulation in the attempt to combine Foucault's account of disciplinary power with a Marxist materialist analysis, and her claim that disciplinary power is outdated rests on her claims regarding the death of fordist regulation. However Fraser does not demonstrate that Foucault's concept of discipline and her concept of fordist regulation are consistent with one another, let alone equivalent. Fraser's failure to show that disciplinary power equates to fordist regulation means that she sets up a straw-man argument in place of Foucault's (1995) analysis, and then attacks the straw man by arguing that its account of society and modern techniques of power are outdated.

Given Fraser's (2003) claim that fordist regulation requires that social regulation is nationally organized, non-marketized, and involves a Keynesian welfare state, it seems implausible that fordist regulation is equivalent to disciplinary power. As Thomas Lemke (2003) points out, Foucault traced disciplinary power to the early nineteenth century, and therefore it long predates the welfare state. Further, the local and capillary nature of disciplinary power (Foucault, 1995, 27) means that social regulation does not have to be organized at the national level. In fact, the historical literature analyzed in the previous chapter shows that nineteenth century prison regimes were shaped by changing configurations of national, state and local governments (Forsythe, 1987; Meranze, 1996; Colvin, 1997; Brown, 2003). Foucault (2007)
himself notes these complex relations between city governance and other levels of political authority in *Security, Territory, Population*, where he makes it clear that he does not presume power is organized around a national government. Lastly, Foucault (2007) developed the concept of governmentality precisely in order to theorize the decentralized exercise of power through political economy, and he argued that the techniques of governmentality and discipline co-existed and reinforced one another (107-8). All of this suggests that Fraser (2003) is wrong in her belief that a shift away from the national organization of social regulation or the welfare state necessarily involves a decline or cessation of disciplinary power.

However, if one makes the charitable assumption that Fraser is capable of demonstrating satisfactorily that discipline is equivalent to fordist regulation, then we are left with the task of assessing her claims about the replacement of discipline by new forms of power. I will briefly assess whether Fraser's (2003) first two empirical claims are applicable to contemporary criminal justice: that social regulation is no longer "socially concentrated within a national frame" (163), and that social regulation is increasingly marketized. I will then analyze Fraser's account of the change in penal policy, and her claim that the punitive trend means that disciplinary techniques have been replaced by repressive modes of power in criminal punishment.

Criminal justice is an area that remains under national jurisdiction and policymaking is primarily determined by domestic political and administrative pressures. Criminal justice policy therefore varies considerably between nation states, including substantial differences in what activities are criminalized, the penalties that are imposed for a given offence, the numbers and proportion of people incarcerated, and in prison regimes. Some indication of the scope of this variation in criminal justice policy is provided by the *World Prison Population List*, which
shows that in 2008 Norwegian incarceration rates were only one eleventh of those in America, and that Icelandic incarceration rates were only one eighteenth of American levels\textsuperscript{14} (Walmsley, 2009, 3-5). It is also instructive to contrast the American figure of 756 prison and jail inmates per 100,000 population with the Canadian figure of 116 prison and jail inmates per 100,000 population (Walmsley, 2009, 3) despite the cultural similarities, and economic integration under NAFTA. While incarceration rates are undoubtedly a blunt instrument for indicating variations in criminal justice or penal policy, such variations provide cause to doubt that Fraser's claim about the globalization of social regulation is accurate in regard to criminal justice policy.

One area in which it could be argued that penal policy is becoming more globalized is through international agreements about the treatment of prisoners. Although several such international agreements exist, they have limited efficacy because they may be disregarded by national courts and officials; for example, American officials and courts have failed to apply the UN Standard Minimum Rules for the Treatment of Prisoners within the US prison system (King, 1999). International institutions have had more impact on penal policy within Europe, since cases brought under the European Convention on Human Rights have led to changes in prison policies and conditions in England and Wales (Coyle, 2003). Although there is some evidence that supra-national institutions within Europe have influenced criminal justice policy, the transfer of powers is certainly not sufficient to warrant Fraser's claim about the loss of national responsibility for social regulation.

Fraser’s (2003) second empirical claim is much more persuasive in regard to penal policy, because privatization and market thinking have been introduced in the English and

\textsuperscript{14} The World Prison Population List compares the numbers and incarceration rates of prison and jail inmates (i.e. those detained either before or after sentencing) internationally, instead of solely counting prisoners (i.e. those detained after sentencing). The Norwegian incarceration rate was 66 prison and jail inmates per 100,000 population, the Icelandic incarceration rate was 40 prison and jail inmates per 100,000 population, and the American incarceration rate was 738 prison and jail inmates per 100,000 population (Walmsley, 2009, 3-5).
Welsh, and American prison systems (as I discussed earlier). However, Fraser does not adequately explain or justify her claim that the spread of privatization indicates the decline of disciplinary power. Fraser's belief that marketization is incompatible with disciplinary power may stem from her assumption that discipline occurs through a centralized state, but as I argued earlier this assumption is contradicted by Foucault's (1995) account of discipline as capillary. Alternatively, Fraser's claim that marketization indicates a decline in disciplinary power may be based on the belief that post-fordist social regulation is less focused on the individual, and thus involves less disciplinary self-regulation. If Fraser's view is that contemporary social regulation does not target the individual, then her position clashes with other analyses of neoliberal techniques of government. Notably, both Rose (1996; 1999) and Cruikshank (1999) show how neoliberal techniques of government have increased personal responsibility and self-discipline, and hence the use and internalization of disciplinary norms has continued despite neoliberal reforms. This question of neoliberal techniques of power is explored in more detail in Chapter Four.

Fraser's third claim is that the use of disciplinary techniques to reform criminals has declined and has been at least partially replaced by straightforward repression. It is somewhat difficult to evaluate Fraser's (2003) claim about "the return of repression" (166) because she does not explain what she means by 'repression', how it works, why it has occurred, or what techniques it involves. It is unclear whether Fraser's use of the term 'repression' refers to the use of violence and coercion, to the economic aspects of the contemporary prison regimes such as the for-profit incarceration of those from poor communities, to a combination of these things, or to something else altogether. The best indication of what Fraser means by repression is in the
contrasts she draws between the American prison system and Foucault's account of power and the prison:

In the US, accordingly, some observers posit the transformation of the social state into a "prison industrial complex," where incarceration of male minority youth becomes the favoured policy on unemployment. The prisons in question, moreover, have little in common with the humanist panopticons described by Foucault. Their management often subcontracted to for-profit corporations, they are less laboratories of self-reflection than hotbeds of racialized and and sexualized violence – of rape, exploitation, corruption, untreated HIV, murderous gangs, and murderous guards. If such prisons epitomize one aspect of postfordism, it is one that no longer works through individual self-governance. Here, rather, we encounter the return of repression, if not the return of the repressed. (2003, 166)

In this passage, Fraser discusses the three empirical trends in prison regimes that I have identified in America, and England and Wales: increased punitiveness; the introduction of privately operated for-profit prisons; and the gendered and racialized nature of power and penalty. I agree with Fraser that these trends raise questions about the extent to which Foucault's account of disciplinary power adequately captures power relations in the US criminal justice system. Moreover, I share Fraser's (2003) concerns about prison privatization and her criticisms of the "racialised and sexualised violence" (166) within contemporary prisons. Nevertheless, these deeply troubling features of imprisonment in America do not justify the over-simplistic conclusion that individual self-discipline and normalization has been replaced by 'repression'.

Fraser (2003) is appropriately critical of the prevalence of sexual assault in the American prison system, but I think she is wrong to interpret sexual violence within prisons as simply a generalized form of repression. As I discuss in Chapter Seven, sexual assault is often targeted at prisoners who are gender-nonconforming or perceived as effeminate, and is therefore connected to disciplinary power through the constitution of sexed and gendered identities. The practice of sexual assault in American prisons is therefore linked to the internalization and enforcement of
gendered disciplinary norms, particularly around hegemonic masculinity. Once again, this suggests that Foucault’s (1995) theory is not inconsistent with the trends observed by Fraser, and that the extension of Foucault's work can generate new insights about contemporary forms of power. Similarly, I argue in Chapter Six that the over-representation of Black men in American prisons indicates that the US criminal justice and prison systems are playing key roles in constructing racialized identities and inequalities through biopower. These power dynamics around the constitution of gendered and racialized subjects are overlooked in Fraser's (2003) characterization of prisons as simply repressive.

Fraser (2003) is right to suggest that the end of efforts to rehabilitate criminals would challenge Foucault's account of penality in which the prison is institutionally defined by the intent to reform subjects:

One thing is clear: the prison was not at first a deprivation of liberty to which a technical function of correction was later added; it was from the outset a form of ‘legal detention’ entrusted with an additional corrective task…Penal imprisonment from the beginning of the nineteenth century covered both the deprivation of liberty and the technical transformation of individuals. (Foucault, 1995, 233)

However, she is wrong to suggest that disciplinary normalization has been completely rejected in favour of punishing and containing inmates. As I argued earlier in this chapter, there are still rehabilitative institutions and practices within the English and American criminal justice systems, including parole, probation, and educational and vocational programs within prisons. Although prison regimes vary according to factors such as the security classification of the inmates, the definitive disciplinary techniques of "hierarchical observation, normalizing judgement and their combination" (Foucault, 1995, 170) persist in many prisons in America, and England and Wales. Prisons usually involve extensive surveillance of prisoners, and most inmates are required to follow detailed rules of conduct, a strict timetable, and prescribed
patterns of spatial distribution (Morris, 1998) — all of which are disciplinary techniques identified by Foucault (1995). Penal policy and philosophy have therefore become more punitive over the past thirty years, but they are not wholly punitive, meaning that disciplinary techniques now coexist with other techniques of power.

Fraser's (2003) account of American prisons as characterized by repression is more than an argument about changing prison regimes — it is a direct challenge to Foucault's crucial insight about the productive nature of power. Attention to the productive and not merely repressive aspects of power involved in criminal punishment is what Foucault (1995) describes as the first rule of his analysis in *Discipline and Punish*:

1. Do not concentrate the study of punitive mechanisms on their 'repressive' effects alone, on their 'punishment' aspects alone, but situate them in a whole series of their possible positive effects, even if these seem marginal at first. As a consequence, regard punishment as a complex social function. (23)

Fraser's focus on the repressive aspects of power is therefore a challenge both to Foucault's analysis of the prison, and to his broader account of power as constitutive of the subject. As I shall argue in later chapters, the English and American criminal justice and prison systems play an important role in constituting sexed, gendered, and racialized identities, both through discipline and through the exercise of biopower. By ignoring Foucault's account of power as productive, Fraser therefore overlooks many of the techniques and dynamics of power in contemporary criminal justice systems.

Finally, Fraser's analysis seems to make an erroneous assumption about the historical succession of different modes of power, for instance the replacement of the disciplinary prison by the repressive prison. Although Foucault (1995) suggests in *Discipline and Punish* that sovereign power was succeeded by disciplinary power, he amends this argument in the 1977-8 Collège de France lectures:
The idea of government as a government of population makes the problem of the foundation of sovereignty even more acute...and it makes the need to develop the disciplines even more acute...So we should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society of discipline by a society, say, of government. In fact we have a triangle: sovereignty, discipline, and governmental management. (2007, 107)

Foucault's (2007) account of the co-existence and inter-action of multiple techniques of power suggests that there are strategic combinations of different techniques and apparatuses of power, not simply the replacement of one dominant form of power by another. I draw on Foucault's (2007) model of a triangle between the three forms of power to analyze contemporary power relations in regard to criminal punishment.

Shifting the framework of analysis to the 'triangle' of sovereign power, disciplinary power, and governmentality makes it possible to critically analyze the deployment of multiple techniques of power, instead of having a rather sterile academic debate about whether or not contemporary prisons are disciplinary. Moreover, by analysing the combination of multiple techniques of power one is better able to explore dynamics around race and gender, both in prison regimes and more broadly in English and American societies. Although Fraser observes the racial and gendered disproportionality of prison populations she does not explicitly relate these phenomena to her critiques of Foucault, nor to her identification of new forms of power under neoliberalism. In the following chapters I will analyze power relations around race, gender and criminal justice, drawing on Foucault's work around sex, sexuality, and race, and on queer theory, feminist theory, and critical race analysis.

However, before considering the issues of race and gender it is first necessary to provide a closer analysis of neoliberalism in order to understand how changing penal policy relates to the wider ideological and political context over the past thirty years. This requires a definition of neoliberalism, an analysis of neoliberal approaches to crime, and a brief account of the social,
political and economic consequences of neoliberal reforms. In the next chapter, I use Foucault's analysis of neoliberalism in the 1979 Collège de France lectures, *The Birth of Biopolitics*, as a starting point for exploring neoliberal theory. I argue that Foucault (2008) fails to identify the tensions in neoliberal theory, particularly around criminal justice policy, and that he does not provide a critical perspective on neoliberalism. I then consider the analyses of neoliberal techniques of power provided by other scholars working in a Foucaultian conceptual framework, and the more economically focused analysis of David Harvey. This analysis of neoliberalism will explore the ideological basis for the punitive trend and prison privatization, and lay the foundation for the analysis of race and criminal justice in later chapters.
Overview

In the previous chapter I analyzed two trends in penal policy in the United States, and England and Wales that have altered techniques and relations of power: prison privatization, and the rise in prison populations and incarceration rates. I argued that although disciplinary power persists in English and American prisons, these trends indicate that contemporary criminal punishment is less focused on disciplinary normalization than Foucault (1995) argues, and that profit incentives and market thinking play a greater role than Foucault's analysis suggests. However, neoliberal ideas contributed to the introduction of prison privatization and greater punitiveness, so a full understanding of the normative significance of these trends requires closer attention to neoliberalism. In this chapter I analyze neoliberal theory, the techniques of power used in neoliberal government, and particularly neoliberal philosophies and policies that relate — directly or indirectly — to criminal punishment. I begin by briefly outlining Foucault's (2008; 2009) understanding of neoliberalism, and then critically assess both Foucault's account of neoliberal theory and the concepts he develops to analyze it, notably that of governmentality. I also consider how Foucault's (2009) account of neoliberal government compares to the analyses provided by a number of subsequent theorists working within a Foucaultian conceptual framework, along with a Marxist analysis of neoliberalism provided by David Harvey (2005).

In this chapter, I hope to show that while Foucault's (2007; 2008) analysis provides a useful description of a large body of neoliberal theory, and generates some insights about neoliberal techniques of power, there are four major problems with his account of neoliberalism. Firstly, Foucault (2008) fails to identify the tensions within neoliberal theory, for instance between cost-effectiveness and the neoliberal account of the state. I argue that the logic of
neoliberal theory demonstrates that social and economic policies such as welfare cuts will undermine neoliberal policies on crime, and that neoliberal criminal justice policies may be more influenced by neoliberal conceptions of the state and the subject than by concerns about efficacy or cost-effectiveness. I conclude that Foucault's (2008) inattention to the conflicting impulses within neoliberal thought leads him to mischaracterize neoliberalism, and particularly neoliberal approaches to criminal justice.

The second major problem with Foucault's (2007; 2008) account of neoliberalism is that he overlooks the coercive aspects of neoliberal government, while overemphasizing the freedom of the subject. Despite Foucault's (2007) account of the co-existence and inter-relation of governmentality, disciplinary power, and sovereign power, Foucault's (2008) analysis of neoliberalism does not explore the strategic combination of these multiple forms of power. Moreover, while Foucault's (2007) concept of governmentality is useful for showing how power works through subjects' freedom, I suggest that it lacks the critical impetus and insights that would challenge and denaturalize neoliberal forms of power. I argue that Foucault (2008) provides a largely uncritical account of neoliberalism that repeats neoliberal claims about freedom and choice, whilst ignoring the coercive implications of neoliberal theory, including the expansion of policing and imprisonment.

The third problem with Foucault's (2007; 2008) analysis is that he ignores the economic dimensions of neoliberalism and their normative implications. The neoliberal theory described by Foucault (2008) outlines a policy programme that includes minimal welfare provision, the privatization of risks such as illness and unemployment, and a tax system that does not promote redistribution in favour of the poor. This neoliberal social and economic policy can be expected to cause increased socioeconomic inequality and poverty, but Foucault (2008) ignores these
issues. I argue that understanding neoliberal techniques of power requires a synthesis of post-structuralist analysis, including Foucault's insights about the combination of sovereign power, discipline and governmentality, with Marxist analysis of the economic aspects of neoliberalism, such as the work of David Harvey. Lastly, Foucault's analysis of neoliberalism — like his account of disciplinary power — does not draw out power relations around race or gender. I argue that a fuller understanding of neoliberal techniques and relations of power, particularly in relation to criminal justice, requires attention to race and gender. These issues of race and gender are explored in Chapters Five, Six and Seven, where I draw on Foucault's (2003) account of biopower, and his (2007) account of the multiple mutually-reinforcing techniques of power.

Foucault on Governmentality and Neoliberalism

Since this dissertation examines Foucault's analysis of modern techniques of power, it is logical to begin a discussion of neoliberalism with Foucault's own comments about it. Foucault devotes the 1978-9 Collège de France lectures to the subject of neoliberalism, and in the 1977-8 lectures he introduces the concept of governmentality, which is a form of power that works through the market and economic knowledge. Both of these lectures were unpublished until recently, with the exception of the fourth of the 1977-8 Collège de France lectures which was published in English translation under the titles "On governmentality" (Foucault, 1979) and "Governmentality" (Foucault, 1991). This single lecture about governmentality and Gordon's (1991) essay on the subject have shaped much of the subsequent interest in this concept amongst

15 The 1977-8 Collège de France lectures were published in French in 2004 and in English translation in 2007, while the 1978-9 Collège de France lectures were published in French in 2004 and in English translation in 2008.

16 This was delivered by Foucault on February 1st 1979 (2007, 87)
Anglophone academics. A body of secondary literature has developed around Foucault's concept of governmentality, much of which uses governmentality as a framework for understanding contemporary techniques of neoliberal government such as privatization, reduced welfare provision and a focus on managing risk (Burchell, 1996; O'Malley, 1996; Rose, 1996; Rose, 1999). Now that English translations of Foucault's 1977-8 and 1978-9 Collège de France lectures are available, it is possible to compare Foucault's own analysis of neoliberalism with the work of these later scholars who use a Foucaultian conceptual vocabulary.

Foucault's discussion of neoliberal approaches to government begins in the 1977-8 Collège de France lectures published under the title *Security, Territory, Population*. In these lectures Foucault (2007) provides an account of the historical emergence and functioning of governmentality, which he describes as targeting the population, working through apparatuses of security, and using political economy as its form of knowledge. Foucault argues that in France government through security began in the eighteenth century, and that it changed both the techniques and the objectives of government. Government through security targets the population as a whole, as opposed to individuals, works through subjects' freedom, and through supposedly natural processes such as the free market. Security was applied to criminal justice through the use of statistical and probabilistic assessment of risks, costs, and efficacy, in the attempt to reach ″socially and economically acceptable″ levels of criminality (Foucault, 2007, 6). This security approach to criminality operates through voluntarism and self-interest, and is therefore distinct from sovereign power, and from the disciplinary approach of ″surveillance and correction″ (Foucault, 2007, 6). Government through security involves a minimum of active

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17 For example, Nikolas Rose (1999) cites the published lecture 'Governmentality' as "the best introduction" (3) to the concept and lists Colin Gordon's (1991) essay as one of the four other recommended texts.
governmental intervention, but like disciplinary power it still aims to create normative subjects — albeit through different techniques.

Foucault then presents an account of historical transitions between different forms of power, modifying his earlier (1995) claim about the replacement of sovereign power by disciplinary power in criminal punishment:

There is not a series of successive elements, the appearance of the new causing the earlier ones to disappear...In reality you have a series of complex edifices in which, of course, the techniques themselves change and are perfected, or anyway become more complicated, but in which what above all changes is the dominant characteristic, or more exactly, the system of correlation between juridico-legal mechanisms, disciplinary mechanisms, and mechanisms of security. (2007, 8)

This account of multiple techniques of power, as opposed to the wholesale replacement of one form of power by another, could be seen as a concession to those who argue that the historical changes in punishment were more complex and incomplete than Foucault suggests in *Discipline and Punish* (Forsythe, 1987; Brown, 2003). However, this statement about the transition between different techniques of power does not undermine Foucault's critical diagnosis of the nature of disciplinary power, it merely suggests that discipline co-existed with other techniques. Whether or not Foucault (2007) is making a concession to his critics, this account of historical change enables him to identify the emergence and growing use of governmental management without implying that discipline has ceased.

Foucault (2007) argues that disciplinary power continued even after governmental management through security became important, and claims that discipline "was never more important or more valued than when the attempt was made to manage the population" (107). It is shortly after this claim (made in the fourth lecture of the 1977-8 series, previously published as 'Governmentality') that Foucault makes the important and much-cited argument about the inter-connection of different forms of power, stating:
We should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society of discipline by a society, say, of government. In fact we have a triangle: sovereignty, discipline, and governmental management, which has the population as its main target and apparatuses of security as its essential mechanism. (2007, 107-8)

Most of the remaining 1977-8 lectures focus on the historical forms of government that preceded security, but in the final lecture Foucault returns to the subject of governmentality and emphasizes that it operates through "natural phenomena of economic processes or processes intrinsic to the population" (2007, 353). Foucault's observations about laissez faire economics and governing through the freedom of subjects provide the conclusion of the 1977-8 lectures and flow almost seamlessly into the subject of the following year's lectures: neoliberalism.

In the 1978-9 Collège de France lectures published under the title *The Birth of Biopolitics*, Foucault (2008) begins by outlining liberal forms of government, which he links both to political economy and to a principle of internal restrictions or "how not to govern too much" (13). Foucault (2008) argues that during the 1970s there was a "crisis of liberalism" (69) because the Keynesian welfare institutions introduced to prevent a reduction in freedom actually curtailed freedom. Here, Foucault reiterates his (1995) argument that liberalism is intimately connected to the disciplines, and provides the example of Bentham's belief that the panopticon would both reform prisoners and ensure the productivity of workers, thereby generating profit (2008, 67). The interconnection of liberalism and discipline suggests that effective resistance against disciplinary techniques may disrupt liberalism, which Foucault confirms by describing the revolt against disciplinary power as part of the crisis of liberalism in the late 1970s.

Foucault (2008) goes on to discuss the rise of neoliberalism, which he divides into two main forms: the German Ordoliberals, and the American neoliberals led by the Chicago School. Foucault traces German neoliberal thought to the period after the Second World War and the
Nazi regime, arguing that the Ordoliberals associated Keynesianism and state economic planning with state expansion and a corresponding loss of freedom in a manner similar to — though far less extensive than — Nazism. In the course of this analysis Foucault (2008) observes that there is no "autonomous socialist governmentality" (92) thus implying that socialism relies on existing liberal techniques of government, including discipline, and cannot resolve the current crisis of liberalism. The Ordoliberal reaction against the Keynesian state prompted the development of a new logic for the relationship between the state, the economy and the market (Foucault, 2008). While there are similarities between the Ordoliberal framework and earlier liberal economic theory propounded by the likes of Adam Smith, Ordoliberalism calls for a greater role for the market, creating "a state under the supervision of a market rather than a market supervised by the state" (Foucault, 2008, 116).

The Ordoliberals also rejected the classic laissez-faire approach in favour of a government that actively facilitates the conditions for market competition, leading Foucault (2008) to conclude that "government intervention is no less dense, frequent, active and continuous than in any other system" (145). This is an interesting observation, but unfortunately Foucault does not expand upon it by explaining how neoliberal government intervention works, or the degree to which it works directly upon individuals as opposed to indirectly, for example through policies applied to businesses. According to Foucault (2008), German neoliberal thought thus favours government intervention to create appropriate economic policies for business and to encourage the development of enterprising individuals. This principle of the government enabling instead of restraining or counter-balancing the market requires a new form of social policy that does not attempt to equalize incomes, provide full employment or guarantee individuals against risks (Foucault, 2008).
Foucault pauses in this analysis to observe that the critics of the Ordoliberals have largely mis-identified the nature of neoliberalism and the techniques of power that it involves. Here, Foucault (2008) repeats his claim that neoliberalism is not the re-activation of classical liberal economic theory, and further observes that it is not merely market relations or intensified administrative intervention in the guise of market freedom. These barbed remarks about the tendency of critics to oversimplify help to clarify Foucault's belief that neoliberalism is a distinct rationality and assemblage of power that requires dedicated analysis. Foucault (2008) also identifies the influence of German neoliberal thought amongst the contemporary French political elite, noting the influence of neoliberal ideas on social policy around illness, unemployment et cetera. This explicit acknowledgement of the salience of neoliberalism in France at the time of the lecture strongly suggests that Foucault intended his analysis to be of political — and not merely academic or conceptual — interest and significance.

Foucault (2008) then discusses the American neoliberalism of the Chicago School. Like neoliberal thought in Germany, Foucault sees American neoliberalism as essentially reactive and argues that it developed as a critical response to the New Deal, state planning of the economy during the Second World War, and government programs around poverty reduction and education. Foucault identifies two aspects of American neoliberalism that are distinct from German approaches: the attention to ‘human capital’ or the productive power of the individual; and the tendency to generalize economic logic throughout the social body. This latter characteristic of American neoliberalism leads to the application of economic thinking to criminality and law enforcement through assessments of the costs of delinquency, courts and punishment (Foucault, 2008). I will return to this issue of neoliberal approaches to criminal justice shortly.
Although Foucault regards German and American neoliberalism as historically and theoretically distinct, both approaches oppose Keynesianism, advocate government intervention to promote a competitive market, and treat ‘economic man’ as a premise and a goal of policy. This concept of the rational, self-interested and entrepreneurial economic man, or what Foucault (2008) refers to as "homo oeconomicus" (270), is important because neoliberal techniques of government are shaped by their conception of the subject. According to neoliberal theory, economic man is both the subject of freedom and "eminently governable" through the manipulation of his/her environment and incentives (Foucault, 2008, 270). Foucault argues that while neoliberals share Adam Smith's belief that knowledge of the whole economy is beyond the capacity of the state, they depart from Smith by emphasizing the rationality of individual actors within this process. Neoliberal thought thus views individuals as knowable, but identifies "an essential incompatibility between the non-totalizable multiplicity of economic subjects of interest and the totalizing unity of the juridical sovereign" (Foucault, 2008, 282). This gap between knowable individuals and the un-knowable complexity of the whole economy is the reason for using governmentality to harness the freedom of individuals.

Neoliberal policies therefore attempt "the strategic reprogramming of individuals’ activity" (Foucault, 2008, 223) by harnessing the freedom of subject, presumably through practices such as the individual empowerment programs identified by Barbara Cruikshank (1999). Foucault (2008) depicts neoliberal social policy as being centred on the privatization and individualization of risk via a system of insurance that shifts the burden of provision for illness or old age onto individuals, instead of society or the state. The combination of this privatization

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18 In economics, the rationality of an agent is defined in a very limited and specific way. Put simply, a rational agent in economics is one who is self-interested, has clear preferences, and acts based on calculations about how to maximize his/her utility or wellbeing. This thin definition of rationality and of the agent in economics is distinct from broader debates about reason, madness and individual behaviour in fields such as psychology and sociology.
of risk and the opposition to a planned or state controlled economy means that neoliberal thought favours minimal efforts to alleviate poverty, and holds that welfare support should be focused on those unable to support themselves, such as the seriously disabled (Foucault, 2008, 143).

Foucault then outlines the neoliberal account of criminality, drawing on Gary Becker’s (1968) economic analysis of crime as an activity based on rational self-interest, and contrasting this with his own (1995) account of criminals as delinquents:

The criminal is nothing other than absolutely anyone whomsoever. The criminal, any person, is treated only as anyone who invests in an action, expects a profit from it, and who accepts the risk of a loss. (Foucault, 2008, 253)

If crime is viewed as the product of a cost-benefit calculus by rational economic agents, then it follows logically that one should be able to engineer a socially acceptable level of crime by increasing the cost and/or reducing the benefits of criminal behaviour. Neoliberal thinking thus suggests that crime rates would fall if law enforcement were expanded and intensified, because this would increase the severity of the penalty and/or the likelihood of being punished, thus altering the cost-benefit analysis of criminals (Foucault, 2008). This increased law enforcement could take various forms including an increase in the quality and quantity of policing, more rapid prosecutions, and/or more severe sentences.

Within this economic conceptualization of crime, the efficacy of deterrence would depend on the certainty of punishment, and thus be affected by changes in the extent to which an individual's punishment could be modified by officials such as prison officers (Foucault, 2008, 254-5). It then follows that reductions in the discretion of criminal justice officials, such as the use of determinate sentences and mandatory minimum terms, should make punishment more certain and thus make deterrence more effective. This logic of deterrence suggests that the
individualized discipline described by Foucault (1995) in *Discipline and Punish* would be somewhat ineffective at reducing crime, because the length and severity of imprisonment is dependent on officials' evaluation of the offender and is therefore uncertain.

Foucault (2008) then turns to a more obscure topic: the elasticity of crime. In economic parlance, elasticity is a measure of how much one variable changes in response to a change in another variable, for instance how an increase in the price of a newspaper alters its sales. Elasticity relates to criminal justice insofar as shifts in the likelihood and/or the severity of punishment change the supply of crime by altering the cost-benefit calculus of potential criminals. If crime (or at an individual level, the propensity of someone to commit criminal acts) is relatively inelastic then more certain and severe punishment will only produce small reductions in the crime rate. Alternatively, if the supply of crime is highly elastic then an increase in the level of policing or the severity of punishment will greatly reduce crime rates.

Foucault (2008) suggests that the economic logic behind neoliberalism requires an understanding of the varying elasticities for different types of crime and between different offenders because "the supply of crime is not indefinitely or uniformly elastic" (255). Foucault also observes that drug use amongst addicts is highly inelastic because "the addict will want to find his commodity and will be prepared to pay any price for it" (2008, 257) even if this involves committing other crimes in order to fund drug purchases. The relative inelasticity of consumption amongst drug addicts means that efforts to prohibit drug sales or increase drug costs will not significantly reduce consumption among existing users and hence severe penalties for addictive drugs are not an effective means of crime reduction (Foucault, 2008, 257).

Foucault describes neoliberal theory in terms of governmentality, as a form of government that works through economic knowledge, through the natural process of the market,
and through using incentives to shape the behaviour of individuals. Foucault (2008) repeatedly stresses that the neoliberal rationality of government is one of "self-limitation" (17), which means that neoliberalism is defined as much by how and what neoliberalism does not govern (for instance the lack of efforts to reduce socioeconomic inequality), as by what and how it does govern. One of the few areas where Foucault provides a detailed account of the neoliberal approach to a policy area is criminal justice, and he seems to apply the framework of governmentality to penal policy, by explaining how deterrence works through the freedom of subjects and by stressing cost-efficiency.

Perhaps the most interesting part of Foucault's analysis is his observations about the neoliberal conception of the subject as economic man, which operates as both the premise and the goal of neoliberal policy. Economic man is a premise insofar as neoliberal theory assumes that people behave as rational and self-interested individuals, but it is a goal because this behaviour is what makes people intelligible and manipulable, as Foucault (2008) explains:

Economic behaviour is the grid of intelligibility one will adopt on the behaviour of a new individual. It also means that the individual becomes governmentalizable, that power gets a hold on him to the extent, and only to the extent, that he is a *homo oeconomicus*. (252)

This statement is important, because it shows that the neoliberal techniques of government only work if the neoliberal conception of the subject is accurate. If people do not behave like rational economic agents then the incentives and disincentives targeted at individual behaviour will fail to yield their desired results, and governing through the freedom of subjects is likely to be ineffective. The self-limitation at the heart of neoliberal government therefore relies on having the right sort of subjects — people whose behaviour, if not their thinking, approximates that of homo oeconomicus.
What Foucault (2008) does not analyze in these lectures, and indeed explicitly states does not interest him, is the actual processes of neoliberal government:

I have not studied and do not want to study the development of real governmental practice by determining the particular situations it deals with, the problems raised, the tactics chosen, the instruments employed, forged, or remodeled, and so forth.

(2)

Although both Foucault's (1995) account of penality and his (2008) analysis of neoliberalism focus on theory and not actual practices, it is notable that his approach to governmentality is far less specific and critical. Whereas *Discipline and Punish* reveals the operation of micropower, there is no equivalent focus on the fine details of neoliberal forms of power. Similarly, where Foucault (1995) distinguishes between the logic of the disciplinary prison and its actual use in terms of constructing delinquency, he (2008) makes no distinction between the logic of neoliberalism and its effects or use. Foucault (2008) therefore describes and summarizes neoliberal theory in some detail, but without the critical analysis that typifies most of his other work.

**Analysing Foucault's Account of Neoliberalism**

The largely uncritical portrayal of neoliberalism in the 1978-9 lectures has been noted by several Foucault scholars, including Colin Gordon (1991) who observed that Foucault’s discussion of neoliberalism suggests "a sense of (albeit value neutral) intellectual attraction and esteem" (6). Similarly, Mitchell Dean (2007) concludes that "it is apparent that he [Foucault] approaches the discussion of liberalism and neoliberalism with openness and generosity..." (86). Hamann (2009) goes further, suggesting that Foucault’s (2008) sympathetic account of neoliberal subjectivity in terms of autonomy in the 1979 lectures is connected to his later work on practices of the self, and concludes that in this regard Foucault is a "somewhat naive
advocate of neoliberalism" (48). The historian Michael Behrent (2009) shares the view that Foucault (2008) seems to be in favour of neoliberalism, and justifies this position by putting Foucault's remarks into historical and political context.

According to Behrent, Foucault's sympathy for neoliberalism in the 1978-9 lectures expresses both an intellectual attraction to a set of new ideas, and a timely and intentionally political intervention on a subject that was current amongst the French elite. Behrent argues that on an intellectual level Foucault was drawn to neoliberal theory because it shared his critique of state authoritarianism, and a non-humanist conception of the subject. On a more political level, Behrent (2009) suggests that Foucault’s comments on neoliberalism should be read in the context of French politics, including Foucault’s longstanding criticisms of academic Marxism, his opposition to the traditional policies of the Socialist Party, and his support for the 'Second Left' (553). Behrent's analysis therefore suggests that Foucault’s sympathy for neoliberalism is certainly not ‘value neutral’ as Gordon (1991) suggests — instead, Foucault's uncritical account of neoliberal theory in the 1978-9 Collège de France lectures was motivated both by political strategy, and philosophical affinity. It therefore seems possible that Foucault was blinded to the flaws and inconsistencies within neoliberal thought by the points of overlap between his philosophical approach and neoliberalism, and by his longstanding scepticism towards socialism and class-based analyses.

1. Tensions within neoliberalism

Regardless of Foucault's motivation in selecting the topic for his lectures, there are several problems with his (2008) discussion of neoliberalism, the first of which is that he ignores the tensions within neoliberal theory. Scholars such as David Harvey (2005) have identified many tensions within neoliberal thought, and exploring all of these is beyond the
scope of my project. Instead, I will focus on one obvious and important tension that Foucault (2008) overlooks, which results from the connection between neoliberal policies of reduced welfare provision, and neoliberal approaches to crime. The neoliberal conception of the subject as a rational economic agent means that criminality and welfare provision are interconnected, because people choose between the available options. If potential criminals behave in a rational, self-interested manner using cost-benefit analyses, then changes in welfare provision, employment levels, wage rates, tax regimes et cetera will alter crime rates. If the motive for committing a crime is financial\(^19\) then, ceteris parabus, the poor will find lucrative crimes more appealing as a result of reduced welfare provision and the cessation of redistribution to promote income equality. If welfare cuts are accompanied by rising unemployment and/or a less progressive system of taxation for employment\(^20\) income then crime will be even more appealing in comparison to the alternatives, and logically the crime rate should rise.

I do not believe that the neoliberal account of ‘economic man’ adequately captures the complexities of individual or social behaviour, and as such I am not arguing that this posited relationship between crime and welfare provision is necessarily accurate. However, the interconnection of crime with welfare provision, employment rates and other aspects of economic policy is a logical consequence of the neoliberal thinking that Foucault (2008) describes. This link between neoliberal approaches to crime and welfare means that neoliberal policies can be expected to have two contradictory effects on the crime rate. On the one hand, neoliberal criminal justice policies will take measures to increase the costs of crime that ceteris parabus would reduce crime rates. On the other hand, neoliberal socioeconomic policies such as welfare

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\(^{19}\) The motivation for many, though certainly not all, forms of crime is at least partially financial, including thefts, prostitution, drug dealing and thereby much of the violence and gang activity associated with drug sales.

\(^{20}\) A progressive tax system is one that taxes those earning high incomes at a greater rate than those earning low incomes; in contrast, a regressive tax system is one where the tax rates are higher for those on low incomes than for high-earners.
cuts are likely to make lucrative crimes more appealing — or even necessary for survival — for those individuals, families and communities affected.

The introduction of neoliberal social and economic policies therefore breaches the ceteris parabus assumptions of neoliberal crime policy, i.e. the changes in welfare, wages, taxes et cetera mean that all other things are not being held constant. If both sets of neoliberal policies are introduced then it is plausible – even likely – that much of the government expenditure 'saved' through welfare cuts and privatization schemes will be spent on law enforcement. Moreover, the logic of ‘economic man’ and rational criminality suggests that some of this increased spending to deter crime will merely be offsetting the increased relative appeal of crime caused by the welfare cuts. It is even possible that the increased spending on law enforcement might exceed the money 'saved' through welfare cuts, in which case neoliberal policies on crime and welfare could lead to a rise in the overall level of government spending. Although Foucault (2008) provides a lengthy explanation of the neoliberal approach to punishment, he completely overlooks this problem and its normative implications.

The neoliberal philosophy described by Foucault (2008) thus proposes to shift government spending on poor communities away from welfare support and towards policing, prosecution and incarceration, but it is not clear that either state spending or crime will fall as a result. Foucault's (2008) failure to mention the connections between poverty, employment, welfare provision and crime may reflect neoliberal thinkers' reluctance to acknowledge the logical implications of their own theories, or it might reflect some other motivation on Foucault’s part. However, the omission of this obvious and crucial point suggests that Foucault is both insufficiently rigorous in analysing the internal logic of neoliberalism, and that he fails to consider the likely effects of neoliberal policies. This is a significant omission, because this
punitive approach towards governing the poor challenges the neoliberal rationality of
government, which claims to be based on a principle of self-restriction, individual autonomy,
cost-efficiency et cetera.

These tensions within neoliberal theory suggest that neoliberal approaches to criminal
justice policy are deeply flawed — and perhaps doomed to failure — whether or not the broader
neoliberal social and economic policies succeed in constituting people as rational, self-interested
and entrepreneurial. If neoliberal social policies do not succeed then people will not behave like
rational, self-interested agents, and the attempt to deter crime through harsher penalties will
therefore fail. However, if neoliberal social and economic policies do succeed in shaping
people's behaviour along the lines of homo oeconomicus, then the welfare cuts and the cessation
of redistribution will make crime relatively more appealing to these rational, self-interested
agents. Either way, it seems likely that the neoliberal approach to social and criminal justice
policy that Foucault (2008) describes is essentially self-defeating.

Foucault's (2008) inattention to the links between property ownership, inequality and
criminal justice in the 1978-9 Collège de France lectures contrasts to his earlier (1995)
observations about the interconnection of these issues. In Discipline and Punish, Foucault
(1995) notes that criminal punishment relates to socioeconomic inequality, and identifies the
bourgeoisie's concern for protection of property as a key part of the historical context around
changes in punishment during the eighteenth century. Foucault (1995) also observes economic
aspects within 1970s penality, stating that "Delinquency, controlled illegality is an agent for the
illegality of dominant groups…the existence of a legal prohibition creates around it a field of
illegal practices, which one manages to supervise, while extracting from it an illicit
profit" (281-2). Given Foucault's (1995) observations about punishment, property, dominant
groups and profit, it is odd that he ignores the same issues in the 1978-9 lectures, which were delivered only four years after the publication of *Discipline and Punish*.

The difficulties with Foucault’s account of neoliberalism are particularly clear if one considers empirical research about the deterrence-based criminal justice policies introduced over the last thirty years. If, as Foucault (2008) suggests, neoliberal criminal justice policy were based on evidence about cost-effectiveness and the varying elasticities of crime then it would target crimes where deterrence is effective, whilst tolerating relatively inelastic offences like drug use. In fact, American criminal justice policy over the past thirty years has done precisely the opposite: massively expanding policing and imprisonment for drugs, despite the high cost of these policies and their inefficacy for reducing crime (Western, 2006; Mauer, 2006). Moreover the combination of high incarceration rates and reduced welfare provision has exacerbated poverty and familial breakdown amongst disadvantaged urban communities, thus creating the conditions that encourage criminality whilst removing other sources of income (Western, 2006). The deterrence-based approach to criminal justice in recent decades thus fails the short-term economic or utility calculus, whilst contributing to social conditions that tend to increase crime in the longer term.

The inefficacy of deterrence for drug crime that Foucault (2008) notes has been confirmed by a Federal Judicial Center (1994) study on the effects of lengthy mandatory minimum terms for drug offences. The Federal Judicial Center found that neither crime nor drug availability fell as a result of the introduction of mandatory minimum terms for drug offences, and explained this according to the logic of rational agents:

To be deterred, offenders must stop to weigh the costs and benefits, be aware of the penalties, find those penalties intolerable, and have other attractive options. Even if some potential offenders are deterred, drug trafficking will not be curtailed is there are other
persons willing to take the place of convicted offenders. This appears to be true in the profitable drug business. (1994, 11)

Research also suggests that drug treatment programs are more effective and far more cost-effective than increased policing and incarceration (Federal Judicial Center, 1994; Caulkins et al, 1997). Moreover, medically supervised provision of heroin to addicts may be even more effective than regular drug treatment at reducing illegal drug dependence and associated crime (Ribeaud, 2004). Given Foucault’s (2008) claim that neoliberal policymaking is based on cost-effectiveness, why did the Reagan, Bush, and Clinton administrations in the US, and the Major, Blair, and Brown governments in the UK all use ineffective deterrence-based policies towards drug crime?

One explanation for the divergence between Foucault's (2008) account of neoliberal approaches to criminal justice and recent policies towards drug crime is that these policies do not reflect neoliberal penal philosophy. Although Foucault explains that neoliberal penal philosophy favours a deterrence-based approach with severe and certain punishment, which is consistent with the punitive trend discussed in the previous chapter, there may have been additional influences on penal policy. Garland (2001) argues that the introduction of longer sentences and mandatory minimum terms is the result of the combination of neoliberal and neoconservative approaches, which overlapped to produce an ethos of "economic freedom and social control" (100). While neoliberalism suggests the need for rationalization, cost-effectiveness, a small state and a view of offenders as rational actors, neoconservatives favour greater social control via increased policing, imprisonment and the stigmatization of offenders as morally evil (Garland, 2001). Although there are tensions between neoliberalism and neoconservatism over the size and role of the state, Garland argues that in practice they combined politically to produce a consensus in favour of greater incarceration of the poor.
The implication of Garland's (2001) argument is that neoliberal concerns about the high cost and low cost-effectiveness of a punitive approach to drug crime may have been set aside as a result of neoconservative enthusiasm for greater social control. If Garland is right, then one would expect the tensions between neoliberal and neoconservative approaches to criminal justice to become more visible over time as the continuing rise of prison populations makes punitiveness increasingly expensive. One might also expect that political tensions over the high levels of expenditure on law enforcement would become more pronounced if high prison populations coincided with a serious economic recession or budgetary crisis. For example, a 2008 article in *The Economist* argues that the budgetary crises in New York and California are partially due to the very high levels of criminal justice expenditure, and are therefore the product of poor judgement by politicians.\(^\text{21}\)

There is some evidence that American policymakers and criminal justice officials have indeed adopted a less punitive approach in response to the recent recession, because the total number of prisoners held in state prisons fell during 2009 — the first reduction in this population for 27 years (Bureau of Justice Statistics, 2010b, 2). The reductions in state prison populations were particularly pronounced in Michigan, California and New York, each of which had over 1500 fewer people imprisoned during 2009 than 2008 (Bureau of Justice Statistics, 2010b, 2). Moreover, the total (i.e. federal and state) imprisonment rate in the US fell slightly in both 2008 and 2009, and now stands at 502 prisoners per 100,000 population as

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\(^{22}\) The total number of prisoners held in US state prisons fell by 0.2% or 2857 prisoners from December 2008 to December 2009, but an increase in the number of federal prisoners meant that the total population in federal and state prisons in the US increased by 0.2% — the smallest rise in the past decade (Bureau of Justice Statistics, 2010b, 1-2).
compared with 506 prisoners per 100,000 population in 2007\(^2\) (Bureau of Justice Statistics, 2010b, 1). According to the Pew Center (2010), the desire to reduce spending has been one of the major driving forces for this change in policies. The temporary alliance between neoliberals and neoconservatives over greater penal severity that Garland (2001) identifies may therefore be breaking up in the face of the inhospitable economic climate following the 2008 recession, and the resultant state and federal budget deficits.

However, it is important to recognize that the tensions between punitiveness and cost-efficiency arise within neoliberal theory, and not only between neoliberal and neoconservative approaches to criminal justice. Although deterrence-based approaches to drug crime are not effective or cost-effective, they do have the benefit of being consistent with the neoliberal conception of the subject, and with neoliberal ideas about the role of the state. Neoliberal accounts of the state argue that it should provide only minimal welfare support for the poor, but regard law enforcement as part of the necessary and legitimate function of the state. Law enforcement is one of the few functions that virtually all social and political theorists believe the state should pursue, even libertarians such as Robert Nozick who argued for a minimal or "night watchman state" (Nozick, 1974, 24). Conversely, the neoliberal preference for a small state and privatization of risk is difficult to reconcile with the universal provision of drug treatment and mental health care that would provide a more cost-effective way of dealing with drug addiction and associated crime. In short, the neoliberal account of the appropriate role and scope of the state privileges law enforcement over healthcare and welfare provision as a means for responding to problems of drug crime.

\(^2\) In 2008 and 2009 the total number of prisoners rose, but the incarceration fell (Bureau of Justice Statistics, 2010b, 1-2). This means that in both those years the American population grew at a faster rate than the prison population.
Similarly, a deterrence-based approach to drug policy fits with the neoliberal conception of the subject. Understanding why deterrence is not effective for drug crimes would require a more nuanced understanding of subjectivity as embodied, and rooted in a socioeconomic context. In contrast, neoliberal theory regards the rational, autonomous and self-interested subject, which Foucault (2009) terms "homo oeconomicus" (252) as a both a premise and a goal of social policy, which means it privileges policies that centre on this economic conception of the subject. Wendy Brown (2005) captures this prescriptiveness in the neoliberal account of the subject, stating that "neoliberalism involves a normative rather than ontological claim about the pervasiveness of economic rationality and it advocates the institution building, policies and discourse development appropriate to such a claim" (40). If proponents of neoliberalism claim not merely that people behave rationally but that they ought to behave rationally, not that deterrence works but that it should work, then the failure of policies based on the assumption of rational individualism can be used to justify a re-intensification of those efforts. Just as Foucault (1995) observes that the prison's failure to normalize inmates leads to the continual "reactivation of the penitentiary techniques" (268), the failure of deterrence-based approaches to crime may lead to the introduction of increasingly severe penalties.

Neoliberalism therefore produces a punitive, deterrence-based approach to crime, including drug crime, both because of the economic logic of deterrence, and because non-punitive responses rooted in an understanding of the socioeconomic origins of crime are unthinkable within a neoliberal conceptual framework. The policies that follow from neoliberal conceptions of the state and the subject are not necessarily rational according to other principles that neoliberalism purports to uphold, such as cost-effectiveness, but the tensions within neoliberal theory make it necessary to prioritize some principles over others. This contradiction
within neoliberalism is not confined to criminal justice policy, because Burchell (1996) identifies similar tensions in neoliberal policies on education, which he describes as:

A paradoxical situation where the conduct of government is rationalized and justified in terms of liberal principles of economic government, but where it is quite possible to argue that it is failing completely and causing poor economic performance at high socio-political cost (26).

By failing to critically analyze the neoliberal theory he describes, Foucault (2008) overlooks the tensions within neoliberal thought, and the consequences of these tensions for neoliberal government and techniques of power.

2. Governmentality, and coercion

The second difficulty with Foucault's (2008) account of neoliberalism is that he overlooks the coercive aspects of neoliberalism, while presenting an analysis in terms of governmentality that does not challenge or denaturalize neoliberal techniques of power. In the 1977-8 lectures, Foucault (2007) emphasizes that governmentality works through freedom: "the insertion of freedom within governmentality...as an element that has become indispensable to governmentality itself. Henceforth, a condition of governing well is that freedom, or certain forms of freedom, are really respected" (353). In the following year's lectures, Foucault (2008) shows how neoliberalism uses governmentality through the expansion of market rationality, and the use of incentives to shape the behaviour of subjects by harnessing their freedom. However, while Foucault (2007) argues that governmentality, discipline and sovereign power co-exist and reinforce one another, his analysis of neoliberalism in the 1978-9 lectures does not explore this inter-relationship. Instead, Foucault's (2008) account of neoliberalism focuses on governmentality to the exclusion of other techniques of power, and in the process overlooks the coercive implications of the neoliberal philosophies and policies he describes.
The concept of governmentality provides valuable insights into neoliberalism by showing how power works through subjects' freedom, particularly in relation to neoliberal reforms around choice and individual responsibility. However, Foucault's (2008) analysis of neoliberalism using the concept of governmentality largely has the effect of describing neoliberalism in its own terms, through a language of freedom, choice, limited government, and efficiency. As a result, Foucault's (2008) account of neoliberal techniques of power does not challenge or denaturalize neoliberalism, but instead seems to repeat and reinforce the ideological claims made by neoliberal theory. Whereas Foucault's (1995) analysis of disciplinary power makes subtle techniques of power visible and therefore open to resistance, no equivalent unmasking of neoliberal forms of power is apparent in the 1978-9 Collège de France lectures. Similarly, while Foucault (1995) differentiates between the logic of disciplinary power and its actual consequences, in which the failure of disciplinary normalization justifies the re-intensification of discipline, he makes no distinction between the logic of neoliberalism and its effects. Foucault (2008) therefore repeats neoliberal claims about freedom, autonomy, and minimal government, but does not pose the question of whether these claims are bourn out, or whether they serve to justify the further intensification of power.

As discussed above, criminal justice policy is an example of Foucault's (2008) failure to critically analyze the logic of neoliberalism, and to distinguish between the claims of neoliberal theory versus the consequences of neoliberal government. The use of coercion is clearly implied in Foucault's (2008) account of neoliberal crime policies, which involve the imposition of severe and certain punishment to deter people from committing offences. This neoliberal penal philosophy translates into policies of more intensive policing and longer, mandatory prison sentences, but Foucault (2008) does not analyze the normative implications of these policies.
Foucault's (2008) account of neoliberalism therefore emphasizes freedom — both of the market and of the subject — whilst skirting over the fact that coercion has been intensified through more severe criminal punishment.

Foucault's (2008) failure to consider the coercive aspects of neoliberalism is particularly problematic given the interconnection of crime and welfare policies explained above, whereby the logical consequence of welfare cuts is to undermine the deterrent effect of neoliberal crime policies. The combination of welfare cuts and more punitive criminal justice policy thus means that state spending is diverted from welfare provision to policing and prisons, without necessarily reducing crime. The overall effect of neoliberal crime and welfare policies is therefore a more coercive approach towards poor and marginalized people, who receive less welfare support but are subject to more intensive policing and harsher penalties for crime. This coercive aspect of neoliberalism has been bourn out the punitive trend in criminal justice policy in both the UK and US, as I explored in Chapter Three. If as Foucault (2007, 2008) suggests neoliberalism has involved a shift towards governmentality, then it has been accompanied by the increased use of coercion towards segments of the population.

This coercive element in neoliberalism has been noted by several scholars working within a Foucaultian conceptual framework. Mitchell Dean (1999) argues that neoliberal governmentality should be seen as only one of several different techniques of power used in contemporary societies, including the use of disciplinary power, and of coercive sovereign power towards welfare dependants and the criminalized. Similarly, Thomas Dumm (2000) argues that high incarceration rates are evidence of a new understanding of freedom as security that "allows for there to be a strategic use of the rhetoric of freedom to intensify control over
The use of coercion in neoliberal government is also noted by Nikolas Rose (1999), who states:

The undoubted persistence and salience of coercive tactics — in the policing of the inner cities and the urban poor, in the surveillance and control of political dissidence, and of course in the various international adventures of advanced liberal nations — must also, today, be justified as the price necessary for the maintenance of freedom. (10)

Although both Dean (1999) and Dumm (2000) seek to challenge and denaturalize neoliberal techniques of power, including the coercion they identify, Rose's (1999) analysis does not seem to share this critical impetus. In a later work, Dean (2007) comments that "Rose seems to endorse the relatively benign character of liberalism...There is a narrowing of the relationship between the normativity of liberal conception of government and the analysis offered by governmentality studies." (86)

The lack of critique of neoliberalism in much of the governmentality literature has also been noted by Jacques Donzelot (2008) who argues that analyses focused on the concept of governmentality have tended to produce descriptions of social technologies, but not political engagement or critique. Although Donzelot (2008) does not implicate Foucault in this criticism, he suggests that the subsequent governmentality literature has been inadequate, asking, "does this political ambivalence in the notion of governmentality not condemn it to serving an ideological function, determined by political circumstance?" (56). Given that Foucault's (2007, 2008) discussion of governmentality does not seem to generate critical insights that denaturalize or disrupt neoliberalism, and that the same problem afflicts much of the later governmentality literature, it seems possible that the problem lies with the concept of governmentality.

Whereas Foucault's concept of genealogy is inherently critical and involves "the insurrection of knowledges" (2000b, 133), as discussed in Chapter One, the concept of governmentality is not defined in opposition to prevailing forms of power and knowledge. As a
result, analyses based on governmentality may fail to provide critical purchase or insights about prevailing techniques of power. For example, analyses based on governmentality tend not to capture issues of inequality or marginalization, and more specifically do not tend to address the issues of sex, sexuality and race that Foucault raises in his discussions of biopower (1990, 2003). This is not to say that analyses using the concept of governmentality can never provide critical insights, but it seems possible — indeed likely — that the concept of governmentality is not designed to be critical, and is therefore far less conducive to critique than genealogy is. In short, governmentality, unlike genealogy, is not "made for cutting" (Foucault, 1980a, 154). As I will discuss in the next section, there are also questions over whether the concept of governmentality can illuminate the economic aspects of neoliberal techniques of power.

3. Economic aspects of power

Not only does Foucault (2008) overlook the tensions between neoliberal policies on welfare and crime, and the coercive aspects of neoliberal crime policies, he also fails to provide a critical analysis of economic power under neoliberalism. Neoliberal policies such as welfare cuts, the privatization of risk, and the cessation of redistribution towards the poor can be expected to increase socioeconomic inequality and poverty. Moreover, such policies may also alter the demographic composition of the poor, for instance contributing to the over-representation of children, the elderly, the disabled, or female-headed households amongst the poor. Foucault's (2008) silence about the connections between neoliberalism, poverty and socioeconomic inequality, and his seemingly uncritical description of neoliberal economic theory around efficiency, cost-effectiveness et cetera seem to be in tension with the critical approach and interest in marginalized groups that is characteristic of his genealogical analyses.
Foucault's inattention to economic forms of power is noted by Tellman (2009) who suggests that Foucault's reluctance to engage with issues of economy is a product of his longstanding struggle with Marxism, but argues that it is a betrayal of the critical impulses usually found within Foucault’s thought:

A more typical Foucauldian approach would commence to undo the invisibility of the economy and the market as an invisible "telescope" and "information-machine". This would mean rendering visible the market’s own "machine of seeing", rather than seeing like the unseen market itself (22).

Tellman argues that Foucault's inattention to economic power extends to his concept of governmentality, which is conceptualized in a way that challenges the traditional concept of the state and makes visible the broader operation of governmental reason, but renders the economy invisible. As a result, Tellman (2009) believes that Foucault re-articulates the liberal view of the economy that serves to justify the limited state because "within this discursive construction, the market becomes the sole site legitimately producing this knowledge of the whole. The invisibility of the market and the construction of its epistemological authority go hand in hand" (22).

While the concept of governmentality clearly has limitations, I am unconvinced by Tellman's (2009) claim that it renders economic forms of power invisible. One benefit of governmentality is that it is well suited to analysing the techniques of power involved in the privatization of functions and agencies that were previously the domain of the public sector. The perspective of governmentality suggests that such privatization is not a reduction in government, but instead evidences governance at greater remove by introducing markets and market thinking in order to promote an ideology of autonomy and choice. Analyses in terms of governmentality also show that autonomous and marketized behaviour is created amongst subjects and organizations, rather than being a reversion to a ‘natural’ state of competitive market activity.
(Burchell, 1996). This creation of marketized behaviour is clearly visible in prison privatization, where the free market arguments for efficiency through free competition are ill suited because two or three companies dominate the market and the ‘consumers’ are not freely purchasing a product. Instead, prisoners are incarcerated against their will and as a result of the actions of multiple state agencies, which creates a problematic three-way relationship between prison contractors, prisoners and the state:

At the very least there may well be a conflict of interest between the needs and desires of the parties to this triadic relationship, which underlies the importance of not accepting at face value the free-market rhetoric that is usually used in support of prison privatization. (Cadavino & Dignan, 2006, 67).

These incentives lead to a situation whereby the state seeks to promote competition and cut its own costs, and the contractors seek market domination and profit maximization, but both may lose focus on the quality of the service and its value-for-money.

Although the above example demonstrates that it is possible to use the concept of governmentality to generate insights about economic power under neoliberalism, the economic aspects of neoliberalism have been neglected by many of the scholars using a Foucaultian conceptual framework (Gordon, 1991; Rose, 1999; Dean, 1999; Dumm, 2000). Instead, analyses of the economic impact of neoliberalism have tended to take place amongst economists, and amongst political and social theorists who draw on a Marxist conceptual framework, such as the work of Angela Davis (2003) and David Harvey (2005). One of the major findings of scholars interested in the economic implications of neoliberal policies has been a significant rise in income inequality in the UK and US over the past thirty years, which is attributable in large part to neoliberal policies on welfare, taxation, privatization et cetera.

The GINI co-efficient is a simple and widely used measure of income inequality and applying this measure to US census figures suggests that from 1978 to 2005 there was a
significant and continuous increase in income inequality amongst American households, from a GINI co-efficient of 0.402 to 0.469. The richest households have benefited disproportionately from this shift in income distribution, since the top 10% of households received one third of the income during the 1970s, but nearly one half of the income by 2006 (Piketty & Saez, 2006). Piketty and Saez (2006) show that much of the increase in income share amongst the top decile is accounted for by changes in the top 1% of households, whose income in the US ranged from "about 8 percent during the 1960s and 1970s, and back to almost 17 percent by 2000" (201). Breaking down these figures even further shows that the income share of the top 0.1% of households in the US has tripled since the 1970s, and they received over 7% of the income share by 1998 (Piketty & Saez, 2006, 202-3).

The UK has experienced a similar trend towards greater income inequality and large gains for the richest, with a rise in the GINI co-efficient from 0.25 in 1979 to 0.34 by the early 1990s (Brewer, Sibieta & Wren-Lewis, 2008, 2-3). Since the early 1990s the UK’s GINI co-efficient has fluctuated between 0.33 and 0.35, and there has been a small but statistically significant rise in inequality despite the poverty reduction programs of New Labour governments since 1997 (Brewer, Sibieta & Wren-Lewis, 2008). The increase in inequality in the UK is largely explained by the sharp increase in the earnings of the top 10% of individuals during the 1980s and in the years since. Brewer, Sibieta and Wren-Lewis (2008) therefore

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25 The income share of the top 0.1% of households in the US rose from around 2% in 1978 to over 7% in 1998, while the income share of the top 0.1% of households in the UK rose from around 1% in 1978 to over 3% in 1998. (Figure 3, Piketty & Saez, 2006, 203).

26 The increase from 0.33 in 1997 to 0.35 in 2008 reflects a small, but apparently significant, increase in income inequality under New Labour (Brewer, Sibieta & Wren-Lewis, 2008, 3).

27 From 1996-7 to 2004-5 the average annual real income growth for the top 10% of individuals was over 2% each year, while the top 1% of individuals gained on average over 3% a year, and the top 0.1% gained on average 4% a year (Brewer, Sibieta & Wren-Lewis, 2008, 20).
conclude that the historically high income inequality in the UK has occurred because "those on high incomes (about the top 10%) have seen still faster income growth and the very poor (about the poorest 15%) have seen weak income growth" (30). Since the UK figures are for individuals rather than households, it is possible to see that in 2004-5 men comprised over 70% of the top decile of earners and over 90% of the top 0.1% of earners (Brewer, Sibieta & Wren-Lewis, 2008, 14). Given that only slightly over 50% of taxpayers were male during the same period, this suggests that the disproportionate gains of top earners may have contributed to gender discrepancies in earnings.

A comparative perspective on income inequality shows that there has been "a sudden rise of top wages in Anglo-Saxon countries since the 1970s" (Atkinson and Piketty, 2007, 11) whilst top income shares in mainland Europe have remained fairly stable. These changes in the UK and US can be clearly traced to neoliberal policies such as reduced tax rates for high earners in the UK and US during the 1980s (Atkinson, 2007; Piketty & Saez, 2007), and in America the reduction in tax rates for dividend income in 2003 (Piketty & Saez, 2007). Although income inequality and wealth concentration have risen in both the UK and US, the changes over the past three decades are especially pronounced in America. Piketty and Saez (2007) calculate that if one excludes all transfers such as pensions and welfare then the incomes of the bottom 99% of US households stagnated from 1973 to 2003, whilst the real incomes of the top 1% more than doubled (174). Given the clear links that analysts draw between growing income inequality, wealth concentration and the neoliberal economic policies pursued in the UK and US, Foucault’s failure to consider socioeconomic inequality means that he neglected an important aspect of neoliberalism.
An analysis of neoliberalism that focuses on the economic aspects of power is provided by David Harvey (2005), who proceeds from a broadly Marxist perspective, or what a recent reviewer termed "Marxian metatheory" (Johnston, 2008, 946). However, it is necessary to provide two important caveats before comparing Harvey's (2005) analysis of neoliberalism to Foucault's (2008) account: firstly, they are writing in very different contexts, and secondly, they are analysing slightly different things. In the 1978-9 lectures Foucault (2008) provides an account of a political and economic theory that was rising in significance in France (and beyond), but was not yet dominant. In contrast, Harvey’s (2005) account of neoliberalism was written during a period in which neoliberalism was one of the leading ideologies and forms of government in the US and internationally, if not the hegemonic ideology. This difference in context is important both for its implications for critique based on disrupting dominant power relations, and because the two theorists have different examples and experiences of neoliberalism to draw on. Whereas Harvey analyzes the ‘history’ thusfar of neoliberal theory and practice, Foucault's discussion is confined to neoliberal theory because most of the practice of neoliberal government post-dated his lectures. When compared to Foucault’s bold effort at conceptualizing an emerging theory of government, Harvey has the benefit of hindsight and evidence about the actual historical impact of neoliberal policies.

Harvey's overall argument is that neoliberal ideology has used claims about freedom to construct popular support for policies that have reconfigured class relations to increase inequality and benefit the rich, whilst sacrificing broader ideals of freedom. Significantly, Harvey (2005) both identifies tensions within neoliberal theory, and argues that in practice neoliberal theory has tended to be disregarded when it contradicts the best interests of capital:

We can, therefore, interpret neoliberalization as either a utopian project to revitalize a theoretical design for the reorganization of international capitalism or as a political
project to re-establish the conditions for capital accumulation and to restore the power of
economic elites. In what follows I shall argue that the second of these objectives has in
practice dominated… The theoretical utopianism of neoliberal argument has, I conclude,
primarily worked as a system of justification and legitimation for whatever needed to be
done to achieve this goal. (2005, 19)

Whereas Foucault (2008) seems to presume that neoliberal theory is internally consistent, the
strength of Harvey's analysis is his reluctance to oversimplify what neoliberalism *is*. Instead,
Harvey shows that the task of defining neoliberalism is complicated by deep-seated
disagreements amongst economists about subjects such as the consequences of unregulated
markets and of state intervention to restrict the market.28

Harvey (2005) identifies tensions within neoliberal thought on subjects such as
monopoly and market failure, and argues that neoliberal rhetoric about efficiency and 'free'
markets is misleading to the point of being "either innocently utopian or a deliberate
obfuscation" (68). These theoretical disagreements between economists are the reason for
Harvey's uncertainty about whether neoliberal economic arguments are misleading by accident
or design: neoliberal thinkers may genuinely believe punitive sentencing will deter criminals
and reduce crime, or more sinister motives may be at work. However, Harvey is less interested
in the intentions of neoliberal policymakers than in determining what the effects of neoliberal
governance have been, just as Foucault (1995) distinguishes between the intentions and results
of the disciplinary prison. Regardless of what the intentions of neoliberal theorists and
policymakers were, Harvey argues that the overall consequence of their policies has been a
redistribution of wealth and power towards the rich, and a weakening of democracy and non-
economic forms of freedom.

28 For key examples of this disagreement one can contrast Adam Smith's arguments about the invisible hand and
need for the state to refrain from market intervention, with Karl Marx's account of the development of monopolies
over time and the resultant poverty and economic crises. The disagreement between neoclassical (or in other words
neoliberal) and Keynesian economists in the present day continues to reflect some of the differences between
Smith's and Marx's accounts of the relationship between the state and the economy.
Despite the different contexts in which Foucault (2008) and Harvey (2005) were writing and their methodological differences, I believe that it is valuable to draw on aspects of both analyses. While Foucault overlooks the tensions within neoliberal theory and the economic aspects of power, Harvey's analysis focuses on these issues. Moreover, whereas Foucault’s account seems to biased in favour of neoliberal ideas, Harvey is strongly critical of neoliberalism as a political and economic project. However, the flaws I have identified in Foucault's (2007, 2008) analysis of neoliberalism do not invalidate his account of how power works upon and through the subject, including through the combination of sovereign power, discipline and governmentality. In order to understand of contemporary forms of power in relation to criminal justice, I believe it is necessary to draw on aspects of both Foucault's and Harvey's accounts of neoliberalism and its associated techniques of power. In the chapters that follow I will be drawing on Foucault's work to analyze how the UK and US prison systems constitute people as particular types of subjects, and drawing on Harvey's insights about the heightening of economic inequality as a result of neoliberal policies.

Both Foucault's (2008) and Harvey's (2005) analyses of neoliberalism help to show the causes and significance of the trends discussed in Chapter Three. The punitive trend in penal policy, which has produced large rises in the English and American prison populations and incarceration rates, should therefore be understood in the context of the neoliberal conception of the subject as rational, self-interested, economic man. However, changes in penal policy also need to be understood in the broader context of neoliberal social and economic policies, including welfare cuts, and a tax system more favourable to the rich. In this context, it becomes clear not only that the prison has become less disciplinary over the last thirty years, as I argued in the previous chapter, but that government strategies and spending on poor and marginalized
populations have shifted from welfare provision towards increased policing and imprisonment. The neoliberal philosophy of choice, autonomy, and minimal government described by Foucault (2008) has therefore produced rising socioeconomic inequality and incarceration rates.

Similarly, this broader analysis of neoliberalism provides useful context for understanding the trend of prison privatization, and its relationship to rising prison populations. I argued in Chapter Three that prison privatization did not begin the punitive trend, but that it enabled this trend by reducing the infrastructure costs associated with rising incarceration rates. Foucault's (2008) account of neoliberalism and neoliberal governmentality helps to show that prison privatization is part of a broader political strategy of governing indirectly and through the market, in the hope of achieving greater efficiency through competition. Moreover, Harvey's (2005) analysis exposes the way that such privatization initiatives redistribute wealth towards the rich by boosting shareholder revenue and transferring public assets into private ownership. The introduction of contractor-run prisons thus enabled private prison providers to profit from prisoners, but is only one part of a wider political and economic strategy that has contributed to increased socioeconomic inequality, and in many cases to reduced democratic accountability over state services and institutions. Neoliberalism has had a significant impact on the English and Welsh, and American prison systems through the punitive trend and prison privatization, but the sheer scale of incarceration in recent years also means that these prison systems have major implications for neoliberal governance.

Although Harvey's (2005) analysis of neoliberalism corrects some of the failings of Foucault's (2008) account, there are issues that both theorists neglect. In particular, the issues of gender, race and ethnicity are ignored by Harvey and Foucault (both in the 1978-9 lectures and in much of his other work including Discipline and Punish) and I will now turn to these
subjects. In the next chapter I explore the theoretical literature around sex, gender, race, and ethnicity, drawing on Foucault’s analysis of these subjects, and more recent work in feminist theory, queer theory, and critical race theory. In Chapter Six I apply this conceptual framework around race and ethnicity to the English and Welsh, and American criminal justice systems, and argue that practices of policing and imprisonment play a major role in constructing racialized identities and in contributing to racialized inequality. In Chapter Seven I analyze issues of sex and gender in the prison systems of the US and England and Wales, arguing that these prison systems contribute to the construction of normative sex and gender identities, to the marginalization of gender-nonconforming people, and to the development of aggressive forms of masculinity.
Chapter Five: Theory of Sex, Gender and Race

Overview

Having argued in Chapter Two that the literature on the history of criminal punishment in England and America shows the importance of race and gender in shaping penal theory and practices, the next three chapters of my dissertation will focus on contemporary power dynamics around race and gender. In this chapter I develop a theoretical account of how sex, gender, and race are constituted, and in Chapters Six and Seven I will use this theory to explore the prison systems of America, and England and Wales. Several themes from the earlier chapters of the dissertation will be continued and further developed in the course of my analysis of race and gender. In Chapter Three I argued that the trends of increased penal severity and prison privatization suggest that disciplinary normalization plays a less significant role in the current English and Welsh, and American prison systems than was the case during the 1970s, but I suggested that discipline contributes to the construction of sexed and gendered identities. In this chapter I discuss how disciplinary power links to gender identities, and in Chapter Seven I will show how prison regimes constitute masculinity and femininity through a combination of disciplinary power, sovereign power, and biopower.

Further, in Chapter Four I argued that neoliberalism has lead to an increase in socioeconomic inequality, and to a shift in the governance of the poor, in which there is reduced welfare provision and increased use of coercion through policing and imprisonment. In this chapter I explore the constitution of race through biopower and briefly address the interconnection between race and class. Then in Chapter Six I analyze the disproportionately high incarceration rates for racialized and ethnic minorities in the United States, and England and Wales, arguing that the racialized biases in these criminal justice systems plays a major role
in constructing racialized identities and inequalities. I conclude that changes to criminal justice policy as a result of neoliberalism have had an impact not only on the governance of crime and poverty, but on the governance of race.

The purpose of this chapter is to briefly outline, analyze, and synthesize the theoretical literature about race and gender in order to develop a theoretical framework for analysing the racialized and gendered power dynamics in the prison systems of the United States, and England and Wales. In the first part of the chapter I draw on feminist theory, queer theory and Foucault's account of the construction of sex and sexuality, to develop an account of the constitution of sex, gender and sexuality. I also use the concept of somatechnics, which highlights the ways in which subjects use technology to shape their body in accordance with their self-image, including by using practices such as diet, exercise, and surgery to alter their body in accordance with norms of masculinity or femininity. In the second part of the chapter I draw on Foucault's account of the construction of race through biopower, and on contemporary theories about race including Omi and Winant's (1994) account of racialization. I outline the theoretical debates about the use of racialized language and categories, and argue that in America there is evidence of a double standard whereby explicit racialized criteria are used in policy areas that increase racialized inequality (e.g. policing), but not in policy areas that reduce racialized inequality (e.g. employment and education).

After analysing the theoretical literature about both gender and race, I combine these accounts to argue that neither sex, nor race, are natural or pre-existing ways of categorizing bodies. Given that there is no unmediated or wholly objective access to the body, I argue that ways of categorizing human bodies — whether they consist of genetic variation that is interpreted in racialized terms, or the interpretation of sex in terms of two, three, or five
categories — are always shaped by discourse and power. I therefore criticize attempts to compare the bodily 'realness' or 'constructedness' of sex and race, arguing that this establishes a false dichotomy that serves to erase and marginalize transgender and intersex people of colour. Instead, I call attention to how multiple relations of power interact, including in relation to bodily difference.

I use Foucault's (1990; 2003) analysis of sex, and of race, as starting points for my analysis and draw on his accounts of biopower and state racism. However, my analysis suggests that Foucault's theoretical frameworks around both sex and race are inadequate and I therefore amend, supplement and reject parts of Foucault's analysis. I critique Foucault for his inattention in *Discipline and Punish* to how penalty is shaped by sex, gender and race, which leads him to largely overlook the gendered — and to a lesser extent racialized — nature of disciplinary power. I also criticize Foucault’s interpretation of Herculine Barbin as a narrative about the advantages of non-identity, and argue that he is too quick to equate resistance to hegemonic forms of sex and sexuality with the refusal of labels. Although Foucault’s account of race provides insights about biopower and state racism, his focus on violence leads him to neglect the way that capitalism, exploitation and class have historically often been — and to a lesser extent still are — entwined with race. I then suggest that Foucault (2003) uses the term 'state racism' in two different senses, and argue that the broader sense (which encompasses civic exclusion and an increased risk of death) is more useful than the narrow sense that focuses on violence (Foucault, 2003). Finally, I argue that an adequate theoretical understanding of race and gender requires one to take an intersectional approach by exploring the overlap and inter-relation of race, class, sex, gender and sexuality.
Part of the challenge in analysing sex, gender and race lies in the choice of terminology, which inevitably has political implications. I discuss the question of what terminology is most appropriate for analysing race in the second part of this chapter, and argue that it is preferable to refer to racialized instead of racial identities. However, there is no satisfactory answer to the question of what terminology should be used to discuss sex and gender. In this chapter I will make a distinction between sex and gender insofar as sex conventionally refers to bodily difference in organs, chromosomes, hormones etc. whereas gender conventionally refers to differences in social behaviour and roles. I am not suggesting that there is a clear distinction between sex and gender — on the contrary, I argue that our interpretation of bodies as falling into binary sexes is shaped by beliefs about binary gender categories. However, I will use the terms sex and gender to explore Foucault's work around sex and sexuality, and the responses to Foucault from gender theorists, because it is difficult to understand and analyze this literature without beginning from the conventional distinction between these concepts. At points in this chapter and the following two chapters when it is not necessary to make a distinction between the bodily organs, hormones etc. and social norms I will refer to 'sex/gender' in order to indicate that these concepts are not distinct.

Sex and Gender

Male pronouns are used throughout the English translation of *Discipline and Punish*\(^{29}\), which suggests that disciplinary subjects and those responsible for conducting surveillance and

\(^{29}\) The question of gendered language is more complex in the original French *Surveiller et Punir*, because several of the key terms used by Foucault are feminine, including 'la discipline' (discipline), 'la prison' (prison) and 'la délinquance' (crime). Analysing the gendered implications of the French language in general, or specifically in *Surveiller et Punir* is beyond the scope of this dissertation. However, the terms homme and hommes (man and men) are used far more frequently than femme and femmes (woman and/or wife, women and/or wives), which suggests that Foucault's subjects of analysis are presumptively male. A search of *Surveiller et Punir* (1975) using Googlebooks reveals that the word 'homme' is used on 41 pages in the book and 'hommes' on 61 pages, whereas 'femme' is used on 6 pages, and 'femmes' on only 5 pages.
assessment are presumptively male. Nonetheless, Foucault (1995) makes no comment about the
sex or gender of prisoners, and does not consider how penalty or discipline relate to
masculinity. Later, Foucault engages at length with issues of sex and sexuality in the first
volume of The History of Sexuality, and his commentary to the memoirs of Herculine Barbin,
published under the self-explanatory title Herculine Barbin: Being the Recently Discovered
Memoirs of a Nineteenth-Century French Hermaphrodite. Although Foucault's later work
analyzed the constitution of sex and sexuality, and he even argued that disciplinary power
contributed to the construction of sexuality (Foucault, 1990), he did not explore how the
criminal justice system and the prison discipline or construct certain kinds of sexuality and
sexed bodies.

Foucault's (1995) inattention to sex and gender in Discipline and Punish is problematic
for two reasons: firstly, because nineteenth century penal philosophies and practices were
extremely gendered and indicated the gendered nature of power in these institutions, as I
discussed in Chapter Two. According to many historians, gender was extremely important in
understanding criminal punishment, because ideas about criminality, deviant behaviour and
appropriate punishment were shaped by normative gender ideals (Freedman, 1981; Rafter, 1990;
Zedner, 1991; Meranze, 1996; Colvin, 1997). Secondly, and more importantly given the
genealogical nature of Foucault's analysis, by ignoring gender in Discipline and Punish he
overlooks the possibility that disciplinary power might be deeply, even irreducibly, gendered.
Foucault's (1995) inattention to the sex or gender of prisoners and to how discipline links to
gender might therefore lead him to mis-identify the techniques and relations of power. A number
of feminist theorists have indeed criticized Foucault for ignoring women and for neglecting
gender in his work (Hartsock, 1996; McNay, 1992), although others defend Foucault's analysis and draw heavily on his later accounts of the constitution of sex and sexuality (McLaren, 2002).

Given that Foucault encountered Herculine Barbin’s memoirs while researching *The History of Sexuality* it is unsurprising that there is considerable overlap between these texts. Herculine Barbin’s narrative begins with her/his education in a girls’ boarding school, and later experiences of teaching in a similar school where s/he developed a romantic relationship with Sara, the daughter of the school’s owner (Foucault, 1980b). After people grew suspicious of Herculine’s relationship with Sara, Herculine confessed the relationship and her/his concerns about her/his body to a prominent priest, leading to a medical examination. The doctor who performed this examination concluded that Herculine was more male than female, advised her/him to pursue a legal change of sex, and informed Herculine’s employer who fired her/him. After this revelation of her/his "true sex" (Foucault, 1980b, 122), Herculine was prevented from contacting Sara, adopted a male identity and moved to Paris, where s/he was unhappy, unable to find work and eventually committed suicide.

Throughout the memoirs Herculine avoids reference to her/himself in sexed or gendered language and Herculine’s self-identified sex and/or gender identities are therefore unclear. The closest indications of how Herculine may have interpreted herself/himself are the reports that Sara referred to her/him using masculine qualifiers (Foucault, 1980b, 58), but we are not told whether or not Herculine assented to this practice. Despite the fact that Herculine does not

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30 It is very difficult to know what pronoun to use in reference to a gender-variant person whose self-identified gender and pronoun preferences are unknown. Since Herculine Barbin was what we now call 'intersex' and Herculine's narrative does not contain a self-identified sex or gender, neither male nor female pronoun seem appropriate. I considered using a gender neutral pronoun such as 'ze' in reference to Herculine, but such pronouns often carry a connotation of a sex or gender identity outside of the male-female binary, and risk retroactively imposing an interpretation of Herculine's gender and/or sex. Given the lack of a self-identification by Herculine and the fact that Herculine was legally classified first as female and later as male, I have chosen to refer to Herculine by 's/he' and 'her/his' since this captures the legal change of sex and gender that is central to Herculine's narrative. While this is an imperfect solution, particularly given that 's/he' and 'her/him' are often considered offensive terms when applied to transgender people, I think it is the 'least worst' way of referring to Herculine given the available pronouns in English.
provide a self-identification, Foucault projects an identification — or more accurately a lack of identification — on to the narrative:

What she evokes in her past is the happy limbo of a non-identity, which was paradoxically protected by the life of those closed, narrow, and intimate societies where one has the strange happiness, which is at the same time obligatory and forbidden, of being acquainted with only one sex. (Foucault, 1980b, xiii)

This interpretation by Foucault (1980b) is highly problematic, because Herculine never states that s/he considered herself not to have an identity, nor that s/he was 'happy' about a lack of identity, and Foucault provides no evidence to support his reading. Foucault (1980b) imposes his own meaning onto Herculine's body and narrative, and it is not clear what makes Foucault's exercise of power in interpreting Herculine any more legitimate than that of the doctors and priests.

Foucault’s introduction to *Herculine Barbin* also discusses the relationship between sex and truth that is the central theme of *The History of Sexuality*, commenting that "at the bottom of sex, there is truth" (Foucault, 1980b, xi). Notably, the institutions that produce sex, sexuality and truth in Herculine Barbin’s story are the same as those identified by Foucault in volume 1 of *The History of Sexuality*, namely the medical profession and the Catholic Church. Foucault’s central argument in *The History of Sexuality* is that what we understand as sexuality and as sex are not natural, but rather are categories that come into being through discourse, i.e. through power and truth. This insight about the constructed nature of sexuality leads Foucault (1990) to reject the idea that there are natural, biological categories of sex, i.e. of male and female. Instead, Foucault (1990) argues that the concept of sex is a "fictitious unity" (154) of anatomy and sensations that is the product of discourses of sexuality. Since sexuality emerged during the nineteenth century as a privileged site for truth about the self, particularly in the Catholic practice of confession, Foucault (1990) rejects the idea that power operates to repress sexuality. Instead, he argues that
sexuality is produced both through medical discourses and the requirement that people should talk about it, and connects sexuality to broader strategies of power through the concepts of disciplinary power and of "bio-power" (Foucault, 1990, 140).

Biopower involves knowledge of and government over the population as an entity, through means such as the measurement and regulation of birth and death rates, life expectancies, disease etc. (Foucault, 1990). According to Foucault (1990), sexuality is uniquely important because it is located at the intersection of biopolitical governance of the population, and disciplinary power, which he describes as "an anatamo-politics of the human body" (139). The importance of sexuality as a target for biopower stems from its role in the reproduction and health of the population, while it is a target for discipline because sexuality relates to the anatomical regulation and normalization of the body, and thereby of the subject. Foucault’s (1990) claims about the overlap of discipline and biopower in constituting sex and sexuality thus reiterate his (2007) argument in the 1977-8 Collège de France lectures that different forms of power co-exist and support one another. Therefore while Foucault (1995) does not consider the link between sex and discipline in Discipline and Punish, he states in The History of Sexuality (1990) that disciplinary power is part of the constitution of sex.

If one puts Foucault's (1980b, 1990 & 1995) analyses in Discipline and Punish, The History of Sexuality and Herculine Barbin together, the common thread is that our understandings of bodies are not natural or outside power, but rather are shaped by discourses and techniques of power. Disciplinary techniques work on the body through the spatial distribution of subjects, the control of activity through means such as timetables, the imposition of minutely detailed exercises, and the threat of continuous surveillance and assessment (Foucault, 1995). In addition, biopower operates to collect information about and to regulate the
life of the population as a whole\textsuperscript{31}. Biopower and discipline overlap to construct normative
heterosexuality and the accompanying ideas of sexual intercourse, and of binary biological
sexes that are defined in terms of genitals. The use of discipline and biopower to construct and
naturalize binary categories of biological sex therefore erases the existence of
‘hermaphrodites’ (now termed intersex people) such as Herculine.

What Foucault does not explicitly discuss is how sex and sexuality relate to the prison,
and how sex relates to gender, i.e. how conceptions of binary, biological sexes of male and
female relate to masculinity and femininity, and the accompanying categories of men and
women. Given Foucault’s (1995) arguments about the minutely detailed norms involved in the
exercise of disciplinary power in institutions such as prisons and schools, and his claim that
discipline is linked to the constitution of sex and sexuality, is seems to follow that prisons and
schools construct binary sexes and normative heterosexuality. One way that disciplinary
institutions might construct sex and sexuality is by spatially distributing their subjects according
to sexed identities, e.g. by segregating male and female subjects, or by pairing them with the
opposite sex. Another way discipline might construct sex and sexuality is by assessing
individuals against sexed and heterosexualized norms of appearance and behaviour until
subjects internalize these norms and become self-disciplining. At this point another problem
becomes apparent with Foucault’s (1980b) interpretation of Herculine’s life as a student and
then teacher in an all-girls environment as an experience of "non-identity" (xiii), because this
contradicts the idea that discipline imposes sexed and heterosexualized norms. If Herculine was
both subject to and later imposed disciplinary rules within an all-girls school, an institution that
by definition has employed the disciplinary technique of spatially organizing subjects by sex,
then surely it follows that her life was shaped by sexed and/or gendered disciplinary norms? However Herculine chose to identify it would therefore have been in the context of sex-segregation, her/his experiences of feminine disciplinary norms within the school, and later of masculine disciplinary norms once Herculine was classified as male.

The 'missing link' in Foucault's work about the connection between the detailed techniques of disciplinary power described in *Discipline and Punish* and the constitution of sex and sexuality is explored by Sandra Lee Bartky (1988). Whereas Foucault focuses on the constitution of sex by way of ideas about sexuality and genitalia, Bartky avoids the subject of genitalia and focuses on how gender identities are constructed through bodily practices. Bartky's (1988) central argument is that femininity is constructed precisely through "those disciplinary practices that produce a body which in gesture and appearance is recognizably feminine" (64). Bartky provides numerous examples of sex and/or gender-specific disciplinary practices, from diet and exercise, to the differences in how men and women walk and sit, to practices of depilation and skincare, to cosmetics and hair styling. The multiplicity of rules about women’s appearance and the media circulation of images of the ‘perfect’ woman’s body make the ‘norms’ of femininity largely unachievable, or, as Bartky (1988) states bluntly:

> The disciplinary project of femininity is a "setup": it requires such radical and extensive measures of bodily transformation that virtually every woman who gives herself to it is destined in some degree to fail. Thus a measure of shame is added to a woman’s sense that the body she inhabits is deficient: she ought to take better care of herself. (71)

Bartky’s conclusion is that the excessively detailed rules of femininity, and the sanctions for breaking them, mean that women are subject to greater bodily discipline than men — in short, women’s bodies are rendered more docile.

Bartky (1988) explores what she sees as the gendered disciplinary norms of the contemporary US, and therefore these norms are not applicable to Herculine's context in
nineteenth century France. However, one could imagine a historical analysis that would outline the gendered and heterosexualized disciplinary norms that applied in Herculine's context, from the girls boarding schools in which s/he studied and taught to her/his later experiences seeking work in Paris. By reading Herculine's narrative with attention to the gendered and heterosexualized disciplinary norms of her/his historical context, one would develop a greater understanding of the norms that Herculine and her/his lover Sara were conforming to and/or resisting, and of what a masculine or feminine identification would have meant. Such an analysis would help us to understand the implications of Herculine’s concern that her/his hips are insufficiently curvy, and her/his body is too hairy, in relation to the gendered norms of Herculine's context. If Herculine is indeed self-disciplining her/himself according to sexed and gendered norms, then Foucault's (1980b) interpretation of Herculine's narrative in terms of non-identity misses the point by failing to recognize these exercises of power. Any attempt to interpret Herculine's identity — or lack thereof — is problematic because of the exercise of power involved, as I argued earlier, but it is important that our theoretical account of power acknowledges that sexed, gendered and heterosexualized norms are a background presence in Herculine's narrative.

Whether or not one accepts Bartky's (1988) claim that women are disciplined more than men, as opposed to simply being disciplined differently to men, her analysis helps to show how minutely detailed disciplinary norms relate to the construction of sex, gender and sexuality. Part of what is interesting about Bartky's analysis is that there is no clear distinction between sex and gender in many of the examples she provides about the normalization and disciplining of the body. For example, the presence or absence of hair in particular parts of the body is related both to conceptions of binary biological sex (via hormones that promote the development of
secondary sexual characteristics such as beard growth) and to gender, i.e. socially constructed norms about the ways that one inhabits and modifies a given body. Although Bartky (1988) does not explore this issue about the relationship between sex and gender, or between what is innate versus what is modifiable about the body, her analysis hints at it by stating that the norms of femininity are unachievable — one's 'natural' body is incompatible with the ideal.

Whereas Bartky (1988) focuses on the construction of femininity, Bob Connell (1987) analyzes the constitution of masculinity. Connell uses the Gramscian concept of hegemony, or ideological dominance backed up by force, to identify hegemonic masculinity, i.e. a dominant masculinity that is maintained by prevailing beliefs, and by the threat of violence. Connell (1987) argues that hegemonic masculinity is constructed both in opposition to femininity — of which there is no hegemonic version, because femininity is subordinated — and to subordinated masculinities, and that it is produced by the state in institutions such as the military, police and prisons. Since the characteristics of soldiers and policemen are very similar to those of the criminals, and the dynamics of coercion, hierarchy and repression overlap, "the state both institutionalizes hegemonic masculinity and expends great energy in controlling it" (Connell, 1987, 128). Connell (1987) does not provide the kind of detailed analysis of how masculinity operates upon the body that Bartky (1988) provides in relation to femininity, although arguably such disciplinary practices of hegemonic masculinity are precisely what Foucault (1995) describes in *Discipline and Punish*. However, Connell hints at these disciplinary practices by explaining that gendered power relations and a masculine self-identity are involved in how the body is used in work and sexual relations, including the size, shape, posture and ways of moving:

The social definition of men as holders of power is translated not only into mental body-images and fantasies, but into muscle tensions, posture, the feel and texture of the body.
This is one of the main ways in which the power of men becomes ‘naturalized’, i.e. seen as part of the order of nature. (1987, 85)

Although Bartky (1988) and Connell (1987) advance Foucault's argument by exploring the constitution of femininity and masculinity respectively, there is an unresolved question about the relationship between sex and gender. If, as Foucault (1990) argues, sex and sexuality are constructs and the binary sex categories of male and female are not natural, then where does gender come in? Foucault's work invalidates theories that treat sex as the natural, pre-discursive basis of socially constructed gender identities, but gives us no alternative account of gender or how it relates to sex. Here, it is useful to draw on the work of contemporary queer theorists such as Anne Fausto-Sterling and Judith Butler, both of whom build on Foucault's account of the constructed nature of sex and sexuality. Fausto-Sterling (1993) suggests that we replace the current two categories of biological sex with five categories and creates three new categories to describe people who are neither straightforwardly male nor straightforwardly female: ferms, herms, and merms. Fausto-Sterling's (1993 & 2000b) argument is that the two sex model mis-represents the variation in bodies and erases the existence of intersex people at the level of discourse, leading doctors to perform non-consensual genital surgery on intersex children in order to normalize their sex — often without even consulting their parents. The proposal that we re-classify sex demonstrates the biologically arbitrary nature of the two sex schema, and subverts the idea of definitive sex categories or objective biological knowledge, thus opening the way for people to accept a greater range of bodies and gender expression.

Butler (1993 & 1999) also argues that the existence of intersex people shows that binary categories of biological sex are not a natural or pre-discursive, but she develops this claim by arguing that binary sex categories are instead are a product of binary categories of gender:
If the immutable character of sex is contested, perhaps this construct called ‘sex’ is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all. (Butler, 1999, 10-11)

Having rejected the distinction between sex and gender, Butler (1999) develops an account of gender as performative, i.e. not as a property or identity that one possesses, but as an iterative practice that brings into existence what it purports to represent. This performative account of gender therefore suggests that gender is something you do and not something you are: masculinity and femininity are practices that only give the impression of being a pre-existing identity. Butler then turns to Foucault’s (1990) critique of the repressive hypothesis or the ‘incest taboo’ and its role in gender formation according to psychoanalytic theory. Butler contends that the incest taboo presumes heterosexuality, but that since heterosexuality is a construct, gender identification is therefore based on the prohibition of homosexuality: "gender identity appears primarily to be the internalization of a prohibition that proves formative of identity" (1999, 81).

The conclusion of Butler’s (1999) work is that we only ever have access to a "culturally constructed body" (119) and that the impression of natural bodies and sex categories is therefore an effect of power. Butler calls for us to resist and disrupt "the compulsory order of sex/gender/desire" (1999, 9) by showing the performativity of gender and the fictive nature of sex, for example through parody. Although Butler makes a convincing argument that binary, biological sex categories are the product of binary conceptions of gender, her analysis largely fails to take account of the physical materiality of the body and therefore portrays the subject as sexed, gendered, and yet strangely disembodied. Butler (1993) even goes so far as to claim that the body is materialized through power and discourse, which reduce bodies to ‘docile’ constructs. Whereas Foucault (1990) proposes to resolve the restrictive constructions of sex and sexuality
by seeking "a new economy of bodies and pleasures" (159), Butler (1993, 1999) ignores the existence of nerve cells and blood vessels, physical capabilities and restrictions. While I share Butler's belief that our understandings of the body are shaped by discourse, her seeming refusal to acknowledge that bodies are nonetheless physical leads her to ignore the ways in which sex, gender and sexuality are lived by embodied subjects.

Butler's (1993, 1999) inattention to the body is both theoretically and politically problematic, because she does not explain how agency, resistance and self-expression can be exercised through the body, except through parody. This means that Butler's (1993, 1999) theory has little to say about the many transgender and intersex people who are struggling to articulate a chosen identity that falls outside "the compulsory order of sex/gender/desire" (1999, 9) and for whom a Nietzschean politics of disruption may be unhelpful, or even insulting. For example, a transgender person seeking gender-confirming healthcare may not appreciate a queer politics that seems to privilege parody over autonomy in sex and/or gender self-expression. For such a person, Foucault's (1990) opposition to the exercise of power through medical discourse, and his (1980b) privileging of 'non-identity' may be similarly unhelpful. Intersex people may also object to the way that examples of intersex people are used to make a point about sex, gender and sexuality, and the Intersex Society of North America argues that: "Physicians, researchers, and gender theorists should stop using people with intersex conditions in 'nature/nurture' experiments or debates."32 In her later work Butler (2004) attempts to respond to issues facing transgender and intersex people by articulating a project of seeking greater autonomy, broader choices of one’s gender, and opposition to "the unwarranted legislation of identity" (7). The

question that this phrase raises, and that Butler (2004) does not answer, is what would constitute the warranted legislation of identity and whose authority would establish such a warrant.

Theorizing the experiences of transgender and intersex people requires a conceptual framework to understand the exercise of agency in relation to the body, as well as how sex, gender and sexuality are constructed through discipline and biopower. For this, I turn to the concept of "somatechnics", which describes technologies that shape and modify the body, such as piercings, tattoos, cosmetic surgery, and practices such as exercise and diet (Sullivan, 2007). While transgender people might use hormones or surgeries to confirm their self-identified gender (Sullivan, 2007), others might use body building or tattooing to confirm their masculinity, or seek liposuction or breast implants to achieve an ideal of femininity. The concept of somatechnics shows that the shape, features and appearance of our bodies are not immutable, but are consciously modified by the subject in ways that range from relatively unusual surgeries, to everyday practices such as 'working out' and 'watching one’s weight’. Although gender is performative, one’s body imposes restrictions on what gender — and other — identities can be performatively enacted and recognized. As such, both normatively gendered and gender-variant people use somatechnics to modify their bodies in ways that enable and confirm their self-identified gender. Sex is therefore constructed by gender in two senses: both through the gendered and heterosexualized interpretative framework that is applied to a given body, and in the somatechnic modification of the body in accordance with gendered norms.

My theoretical account of sex and gender combines aspects from several of these arguments to understand binary sexes as the product of binary gender categories and normative heterosexuality, but as also being constructed through biopower and discipline. Biopower constructs sex by categorizing everyone as either male or female and using these categories to
administer populations, including through the national census and in prison statistics. Disciplinary power constitutes normatively gendered subjects through gendered rules and norms, both in institutional contexts such as schools, and more broadly in society where people impose gendered disciplinary norms onto themselves and onto other people. Norms therefore play a central role in the constitution of sex/gender identities, ranging from the norms around sex (for instance about what constitutes normative male or female genitals for an infant), to the innumerable gendered norms around behaviour and appearance. Since disciplinary norms are internalized by the subjects to whom they are applied (Foucault, 1995), people assess themselves according to these norms of sex and gender, and behave in ways that confirm their self-identified sex/gender identity, including by engaging in somatechnic modification of their bodies. Sex/gender norms are therefore reflected in multiple ways, ranging from formal institutional rules (e.g. about appropriate clothing in a men's or women's prison) to informal institutional and social practices (e.g. gendered body language) to the ways that individuals self-identify and express themselves. The details of institutional rules and norms often reveal the construction of normative sex and gender, and in the next chapter I analyze the construction of sex and gender in the English and American prison systems and the problems this creates for gender-variant people.

People therefore express themselves in ways that confirm with or resist gendered norms, including by modifying their bodies through somatechnics. These forms of self-expression through somatechnics include the use of bodybuilding to conform to an image of hegemonic masculinity, dieting to reach an ideal of femininity, and transgender people who seek hormone treatment and/or surgery to confirm their gender self-identification. Many subjects internalize binary sex and gender identities and the associated gender norms, but others resist these norms.
by adopting a gender-variant identity and may seek to modify their body to confirm that identity. Although binary sex and gender identities are constructed and naturalized through biopower and discipline, subjects nonetheless exercise self-expression, including over their bodies. Although the exercise of biopower and disciplinary power categorizes and disciplines subjects into binary sex and gender identities, there is also room for subjects to make choices about their sex and gender self-expression. If there is any over-riding conclusion one can draw it is the need for acceptance of a greater range of sex and gender self-expression, including by respecting people's self-identification instead of categorizing them according to a pre-existing scheme of sex or gender.

Although it is probably evident by this point, it is worth pausing to note that the categories of transgender and intersex are themselves constructed and have political implications. The word ‘transgender’ is conventionally understood as an umbrella term referring to a range of non-normative gender identities, including those who choose to present as or identify with a gender and/or sex that differs from the identity they were assigned at birth and those who identify with neither of the normative gender categories, e.g. as genderqueer. Transgender is therefore a broad category that includes cross-dressers and drag kings / queens, those who reject binary sex and gender identities, and transsexuals who identify with a sex other than that assigned at birth and may seek medical treatment to alter their physical sex. Recently, the term ‘cisgender’ has come into use as a way of referring to non-transgender people who self-identify with the normative gender identity that they were assigned at birth (Green, 2006). There are a number of other terms for referring to people whose sex and gender identity do not match, or who identify outside a man/woman gender binary, including gender-variant and gender-nonconforming, and antonyms include gender-conforming and normatively-gendered. The term
'intersex' is also broad, and refers to people who are born with a body that does not fit conventional definitions of male or female. Although 'intersex' is sometimes used as a medical term for those with non-normative genitals, it is also used by activists such as the Intersex Society of North America, and is a self-identification for some people.

The question of how to theorize gender variance is inseparable from questions about how to express oneself and organize politically, so Butler's (1993, 1999 & 2004) and Foucault’s (1990) accounts of the interconnection between sex and sexuality conflict with other political agendas and theoretical approaches. Some transgender people object to work that regards sex and gender as dis-associable from sexuality and have established the field of transgender studies, which seeks to disrupt normative understandings of sex, gender and the body, but treats sexuality as distinct. Susan Stryker (2006) provides a provocative justification of this stance in the introduction to a recent collection on transgender studies, asking "Why was the entire discussion of ‘gender diversity’ subsumed within a discussion of sexual desire — as if the only reason to express gender was to signal the mode of one’s attractions and availabilities to potential sex partners?" (1). The work of Butler and Foucault has also been challenged from the opposite direction, by gays and lesbians (although arguably more of the former than the latter) who seek to bracket issues of gender-variance from political debates over sexuality. In his ethnography of transgender, David Valentine (2007) makes a compelling case that the category of transgender brackets gender from sexual identification and thus benefits the ‘mainstream’ gay and lesbian activists behind movements such as same-sex marriage:

For all the resistance to ‘inclusion’, mainstream gay and lesbian organizations have come to depend on transgender...because transgender incorporates, and thereby removes from the category ‘gay’ (and in different ways from the category ‘lesbian’), gender-variant behaviour or identities. That is, not only does transgender provide a foil against which ‘gay’ — implicitly white, middle class, respectable, private, dependable, and most deeply, male — can define itself but it allows any gender variant behaviour — even from
those who identify as gay — increasingly to be moved into the category transgender. (202)

The inescapably political nature of this theoretical debate adds to the difficulty of finding an appropriate terminology for referring to issues of sex, gender and sexuality. One option is to refer to sex/gender, but this seems to wrongly imply that sex and gender are identical and therefore elides the question of the body and somatechnics. Referring to sex/gender also suggests that sexuality is distinct, which is contrary to the work of Foucault and Butler, whereas Butler’s reference to "sex/gender/desire" (1999, 9) suggests that sex and gender are inherently inseparable from sexuality and is therefore rejected by many transgender scholars. Perhaps the least contentious terminology is "the sex/gender problematic" (Cealey Harrison and Hood-Williams, 2002, 27), which indicates that the relationship between sex and gender is under debate, but that the conventional distinction between the concepts acts as a limitation on thought. Given the contested nature of these identities and terms, I suspect that the best approach is to acknowledge the disagreement, and seek to be open and accountable about the reasons and implications behind one's choice of language.

**Race**

Foucault’s analysis of race occurs in the 1975-6 Collège de France lectures, published under the title *Society Must be Defended*. The focus of these lectures is on considering power and politics in terms of war, or as Foucault suggests: "we can invert Clausewitz’s proposition and say that politics is the continuation of war as other means" (2003, 15). For the most part, Foucault is not referring to war in a metaphorical sense, but defines it in terms of the actuality of physical force and violence. This definition of war is particularly clear in his discussion of Hobbes’s *Leviathan*, where Foucault argues that the mere threat of violence from individuals is
not a state of war but rather "a sort of unending diplomacy between rivals who are naturally equal" (2003, 92). This subject leads Foucault to the subject of race, because he identifies race as one of the themes that emerged in seventeenth and eighteenth century European political discourse, specifically around the English civil war and French revolution. Although Foucault (2003) discusses race in different geographical and historical context than many studies of race33, he is intentionally departing from and disrupting the common understanding of the term. By focusing on the idea of multiple races within Europe, Foucault (2003) diverges from the focus on Blackness that is common in much theoretical work about race. The strength of Foucault's (2003) account is that it highlights that race is a political and historical construct, not a form of natural or biological difference, by showing that prevailing categories of race and their political significance have changed over time.

Foucault (2003) argues that in both England and France the idea of race developed during the seventeenth century, and identifies three different arguments from the English civil war that linked political authority to race, specifically the distinction between Normans and Saxons. At one extreme is the monarch’s view that the Norman conquest of the Saxons legitimates absolutism. At the opposite extreme is the Levellers’ view that the Norman conquest was illegitimate and hence the legal apparatus should be abolished. In between these positions lies the Parliamentarians’ view that William the Conqueror was the legitimate king but as Harold’s heir and not by conquest, meaning that the crown was bound to Saxon laws and could not be absolutist. Foucault (2003) likewise explores how arguments about political authority in France were expressed in terms of racial origin, explaining that race emerged as a means of

33 Although much of the contemporary literature about race focuses on different geographical contexts (e.g. ideas of race in America) and/or on people of colour, Foucault (2003) is not alone in identifying a historical discourse of races within nineteenth century Europe. The historical construction of multiple European races is explored by some critical race scholars of race and Whiteness, such as Baum (2008).
describing divisions between European peoples, and that it is linked to arguments about war, invasions and political power. Foucault also argues that the idea of race is connected to the concepts of nation and class, stating that by the late eighteenth century there were three tactics for making divisions within a population: the nation, which centred around language; class, based on political economy; and race, which combined history and biology.

These historical analyses form most of the material covered in the 1975-6 lectures, but the final lecture is more theoretical and focuses on the subject of "state racism" (Foucault, 2003, 239). According to Foucault (2003), state racism was invented in the nineteenth century as a way of justifying the continuation of sovereign power, which he explains as "the right to take life or let live" (241) i.e. the right over death. The timing of state racism is explained by the rise of disciplinary power and biopower, both of which operate by subtly regulating the ways that people live. Here, Foucault (2003) introduces the concept of biopolitics, or biopower, that he discussed in *The History of Sexuality* (1990), and again makes a distinction between the "anatamo-politics" (2003, 243) of disciplinary power and the use of biopower over a population through statistical knowledge about birth rates, hygiene etc. Foucault’s central argument is that state racism develops to resolve the tension between sovereignty and biopower, because the former is founded on killing whereas the latter seeks to manage and prolong life. This tension is resolved because state racism subdivides the population into races, and creates a relationship of war between those races such that the success of one group requires the destruction of another (Foucault, 2003). Race and state racism therefore provide the solution of how states can continue exercising sovereign power in a modern era:

Racism justifies the death-function in the economy of biopower by appealing to the principle that the death of others makes one biologically stronger insofar as one is a member of a race or population...So racism is bound up with the working of a state that
is obliged to use race, the elimination of races and the purification of the race, to exercise its sovereign power. (Foucault, 2003, 258)

Just as the focus in the earlier lectures was on historical wars and politics within Europe, Foucault’s focus during the final lecture is on dynamics of state racism within Europe — and more specifically Nazism. Although Foucault (2003) stresses earlier in the lectures that war refers only to physical force, he provides a much broader definition in his discussion of state racism:

When I say "killing", I obviously do not mean simply murder as such, but also every form of indirect murder: the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on (256).

Two different meanings of state racism therefore emerge in the lectures, based on different meanings of 'killing' and 'war'. The narrow sense of state racism refers only to the use of violence and killing towards racially defined groups, whereas the wider sense of state racism encompasses both indirect, probabilistic means of harming racially defined groups and forms of political exclusion and marginalization. The distinction between these two senses of state racism is significant, because it hints at the use of different techniques of power. Whereas literal murder involves the application of sovereign power to individuals, indirect murder might operate more subtly over a whole racially defined population through means such as the provision of inadequate food or sanitation. The meaning and application of the concept of state racism therefore depends on which sense of the term is used, and a far greater number of states exercise state racism in the broad sense than in the narrow sense.

Foucault (2003) also comments on the relationship between categories of race and biology, arguing that scientific claims about biological difference were made about many issues during the nineteenth century, including madness, class and criminality. The implication of
Foucault's argument is that the association between race and biological concepts of evolution or genetics is only one part of a wider nineteenth century tendency to understand phenomena in biological terms. Foucault therefore denaturalizes race by presenting it as one amongst many socially and historically constructed categories, rather than seeing the claims about biological difference as a distinction between race and other socially constructed concepts. It is in the context of this discussion that Foucault provides one of the very few mentions of war outside Europe that occurs in *Society Must Be Defended*, stating that racism operated as a way of justifying genocidal colonization (2003, 257).

Foucault concludes the 1975-6 lectures by linking state racism to socialism and socialist states, arguing that capitalist societies define the enemy of society in class terms, whereas socialism requires the definition of an enemy in terms of race. While Foucault claims that state racism happens in many states and never suggests that it is incompatible with capitalism, he does not explore any examples of state racism in capitalist states and strongly implies that state racism is less likely to occur under capitalism. Moreover, Foucault (2003) repeatedly states that class and race are not only distinct concepts, but are alternative ways of defining an enemy and thereby justifying sovereignty: "Race struggle and class struggle became, at the end of the nineteenth century, the two great schemata that were used to identify the phenomenon of war and the relationship of force within political society" (19).

The advantage of Foucault's analysis of race in *Society Must Be Defended* is that he denaturalizes and destabilizes the concept of race by providing an account of its historical birth and changes in meaning that challenges many common assumptions. However, the major disadvantage is that by confining his historical analysis to European states Foucault (2003) ignores the dynamics between European and non-European states, thereby implying that
colonialism was marginal to the development of race, and not central or constitutive (Hanssen, 2000). This decision to ignore the colonial context leads Foucault to overlook the racialized exclusions in much seventeenth century political thought, and therefore to mis-characterize much of this political theory. For example, Foucault (2003) regards Hobbes’s account of the state of nature as non-racial, and contrasts it with the Levellers and Diggers arguments about the Norman conquest, which Foucault views as clearly racial. What Foucault's (2003) analysis fails to consider is that racialized exclusions may be implicit in supposedly universalistic accounts of human nature and the social contract, as Goldberg (1994) argues. A compelling account of the racialized exclusions within social contract theory, including Hobbes, has been provided by Charles Mills (1997) who argues that the social contract was accompanied by a racial contract that ensured the subjugation and exploitation of non-Europeans.

If Foucault had not turned immediately from Hobbes to the Levellers, then in Locke's social contract theory he would have found an even clearer instance of the state and society being defined in distinction to non-European others — specifically the aboriginal peoples of North America. Locke suggests both that America is representative of the pre-history of European societies, and that colonization of North America is justified because aboriginal societies do not constitute political states with defined borders (Parekh, 1995; Arneil, 1996). Although Locke does not use biological categories of race that would label aboriginal individuals as inherently inferior to European individuals, he regards aboriginal societies as inferior, backward and uncivilized (Parekh, 1995; Arneil, 1996). Locke also refers to North American aboriginal peoples as support for his arguments about private property and the enclosure of land, in which he justifies the development of capitalism (Pateman & Mills, 2007). All of this suggests that it is impossible to separate Locke’s political and economic theory from
the colonial context in which he was writing, even if Locke had not personally been a colonial administrator and appointee to the Board of Trade (Laslett, 1969; Dunn, 1969; Arneil, 1996). Although the themes of race and colonization are more overt in Locke's theory than in Hobbes's, the ideas of both theorists were influenced by prevailing ideas about colonialism and the inferiority of non-European others.

This brief discussion of Hobbes and Locke illustrates three important points where Foucault's account of race seems to be flawed. Firstly, Europe and the ‘West’ have long defined themselves in relation to non-European constitutive others (Said, 1979), and hence non-Europeans are more central to Western political thought than Foucault's analysis suggests. The limited scope of Foucault's analysis leads him to ignore important aspects of seventeenth and eighteenth century European politico-historical thought, and perhaps to mis-interpret the historical origins and functioning of the concept of race. Secondly, while Foucault focuses on the links between socialism and race, particularly Nazi Germany, he ignores the connections between race and liberalism. By considering Hobbes’s social contract theory in the broader context of liberal political thought such as the work of Locke and Mill, one can see how the rational individual is defined in opposition to others who are viewed as non-rational, such as women and non-Whites (Pateman, 1988; Mills 1997; Pateman & Mills, 2007). Such critical analyses of liberalism also show that European societies are defined in opposition to colonial others whose ways of life are rejected for being non-individualistic (Parekh, 1995; Arneil, 1996). The historical links between race and liberalism are connected to my third point, which is that Foucault ignores the ways in which race has historically been linked to capitalism and exploitation.
Foucault (2003) suggests that race and class operate as alternative logics for the development of a political enemy, and implies that racism is more prevalent and more deeply rooted in socialist societies than in capitalist societies. What Foucault overlooks is that race has often been linked to the exploitation of labour, capitalism, and colonialism (Mills, 1997), all of which Goldberg (1997) argues happened "in virtue of racialized discourse" (53). Foucault's presentation of race and class as alternatives, and not as inter-connected, is therefore achieved through his failure to acknowledge the brutal exploitation and extraction of profit that often accompanied racialization. Since capitalism developed in the context of — and to a large extent directly through — colonial exploitation of the bodies and property of those who were racialized as non-White, the concept of race is linked to labour and wealth in both Western political theory and practise, and not solely to death and violence as Foucault (2003) suggests. Moreover, in some cases economic incentives shape the association between race and killing, for instance in the Atlantic slave trade, and the high mortality rates during penal slavery in America (Davis, 2003).

A further critique levelled at Foucault (2003) is that he risks losing the specificity of the concept of race because he portrays it as one amongst many categories used to distinguish between groups in Europe. This charge is made by Hanssen (2000), who suggests that Foucault is too quick to assume that race "operated simply as a grid for gauging the mechanisms of shifting power relations" (142), and fails to differentiate it from concepts such as class and the nation. Hanssen is right that Foucault’s analysis does not always show how the concept of race differs from the nation, and that Foucault's analysis would be stronger if his account of race was based on a broader historical and geographical perspective. However, a lack of conceptual clarity about what race means may be inevitable given Foucault’s (2003) central argument that
race is a wholly constructed category that has been applied in a range of ways in different contexts. Foucault does not define race in biological terms precisely because his point is that racism invents races, and that race was not defined in terms of biology until the nineteenth century. By showing that the origin of race as a category pre-dated its definition in biological terms, Foucault makes it clear that attacks on racial science will not necessarily uproot the concept of race or prevent racism. Nonetheless, it would be helpful if Foucault provided a clearer account of how biological conceptions of race related to the other changes he has identified during the nineteenth century, including the rise of disciplinary power, and biopower around sexuality.

This emphasis on the constructed nature of race is a major theme in contemporary critical race theory, although scholars have tended both to emphasize that race is historically constructed and therefore somewhat fluid, and to differentiate race from concepts such as ethnicity and nationality. To explain how race is constructed, Michael Omi and Howard Winant (1994) developed the concept of racial formation, also known as racialization, which they define as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed" (55). This theory of racial formation is loosely based on Marxist accounts of the relationship between structure and ideology, and on Gramsci’s concept of hegemony, but Omi and Winant (1994) emphasize that ideology shapes structural relations as well as vice versa:

We believe it is crucial to disrupt the fixity of these positions by simultaneously arguing that ideological beliefs have structural consequences, and that social structures give rise to beliefs. Racial ideology and social structure, therefore, mutually shape the nature of racism in a complex, dialectical and overdetermined manner. (74)

Omi and Winant (1994) provide a brief historical account of the changes in racial formation in the United States, arguing that the state has been both a key actor and site for racial conflict. During the 1980s Omi and Winant (1994) argue that there was a Conservative move to link race
with crime and welfare dependence, and that by the 1990s neoliberalism and the attack on welfare was hegemonic. These political changes shifted the focus of racial politics from groups to individuals, and downplayed the significance of race and racialized discrimination, making racism more difficult to identify and discuss than it was in the mid twentieth century (Omi and Winant, 1994).

Winant (1994) further develops this argument, claiming that it has become so widely accepted that race is socially constructed that many people now dismiss race as insignificant or regard all efforts to discuss race as evidence of racism, and concludes that:

The main task facing racial theory today, in fact, is no longer to critique the seemingly "natural" or "commonsense" concept of race...Rather, the central task is to focus attention on the continuing significance and changing meaning of race. It is to argue against the recent discovery of the illusory nature of race... (11, emphasis in the original)

Similarly, Goldberg (2002) uses the concept of racial formation to identify several types of racial states, including "raceless states" (200) where the state disallows the use of racialized criteria regardless of whether those criteria are being used to increase or reduce racialized inequality. This formalized commitment not to use racialized criteria serves to silence discussions of racialized inequality and therefore to shift racially charged issues out of the reach of public policy (Goldberg, 2009). Both Winant (1994) and Goldberg (2002 & 2009) therefore suggest that official opposition to racialized discrimination can co-exist with continued racialized inequality, and moreover that official racelessness can hinder efforts to identify and remedy such inequality.

These theoretical debates about how one should discuss race reflect different assessments of the best political strategy for challenging racialized inequalities. The idea that "race may be real, but it is also a construct" (Winant, 1994, 38) is liable to be seen by many people as contradictory or incoherent, but critical race theorists have sought to resolve this
communicative challenge by referring to ‘racialized’ identities instead of ‘racial’ identities. However, objections have been raised to the language of racialization, including Paul Gilroy's (2000) call for people to stop using the category of race and cease "all racializing and raciological thought" (40) on the grounds that in the UK and US biological racism has been largely replaced by forms of cultural racism. Similarly, Paul Taylor (2004) argues that the meaning of ‘race’ has already been redefined to refer to a social and historical construct instead of a biological category, and therefore "our theories should reflect our usage" (87).

A comprehensive analysis of the meaning of race in the UK and US is beyond the scope of this thesis, although I will briefly discuss the racialized and ethnic categories used in the official censuses in Chapter Six. However, a good reason to believe that the biological understanding of race persists is found in the 2005 decision of the US American Food and Drug Administration to approve the heart failure drug ‘BiDil’ for use only amongst Black patients34. The BiDil case is the first time any medical drug has been approved only for use in a specific racialized group, and is indicative of the continued tendency for the scientific and medical community to analyze genetics along racialized lines (Tutton, 2007). This case suggests that Taylor (2004) and Gilroy (2000) are wrong to believe that the contemporary meaning of race refers solely to cultural and not biological criteria, and that their proposed political strategies may be misconceived. Taylor's (2004) call to refer to 'race' and not 'racialization' risks re-affirming biological conceptions of race, for instance race as genetic difference. Further, both Gilroy's (2000) proposal to cease making any references to race or racialization, and Winant's (1994) suggestion that it is no longer necessary to demonstrate the constructedness of race

34 The FDA news release about their decision is available online at http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2005/ucm108445.htm (retrieved on Nov 2nd).
would seem to leave biological conceptions of race unchallenged, and thus risk allowing them to gain further credence.

Moreover, Gilroy’s (2000) proposal to abandon any references to race or racialization threatens to remove our ability to identify and challenge racialized inequalities. Following Gilroy’s suggestion would mean that no figures would be available about the racialized composition of the English or American prison populations, as is currently the case in French prisons (Bosworth, 2004). The decision not to publish statistics about the racialized and ethnic composition of prison populations could easily reproduce the inattention to racialized inequality that exists in France (Bosworth, 2004), and make it harder to hold states accountable for the disproportionate incarceration of racialized groups. It therefore seems over-optimistic of Gilroy (2000) to believe that racism and racialized inequality will disappear if we cease to talk about race or racialization. The longstanding and deep-rooted nature of racialized inequality, and the difficulty of tackling a problem that one cannot name, suggest the need to continue employing the language of racialization as part of political efforts.

I argued in Chapter Two that the decision about whether or not to use official statistics should depend on strategic decisions about how best to challenge prevailing relations of power and knowledge, and similarly the decision about whether and when to use racialized categories depends on strategic judgements about how to challenge and correct racialized inequality. Unfortunately, those who benefit from racialized inequality also seem to make such strategic judgements, which leads them to favour the selective use of racialized categories and criteria. In some cases this had produced a legal and political double standard, whereby explicit racialized criteria are used in policy areas that increase racialized inequality, but are prohibited in policy areas that reduce racialized inequality. Three ballot initiatives exemplify this double standard...
about the use of racialized categories and criteria: the successful 1996 ballot Proposition 209 in California, the unsuccessful 2003 ballot Proposition 54 in California, and the successful 2006 ballot Proposition 2 in Michigan.

Proposition 209, termed the California Civil Rights Initiative by its proponents, prohibited the government from using criteria based on "race, sex, color, ethnicity, or national origin" for the purposes of public education, public employment, and public contracts. This initiative had the effect of removing affirmative action programs for racial and ethnic minorities, but did not alter existing bans on sex discrimination or prevent affirmative action programs on other grounds such as class. Proposition 54, termed the Racial Privacy Initiative by its proponents, sought to substantially extend the provisions of Proposition 209 by preventing state and local governments from classifying people according to race, ethnicity, national origin, or colour. Like Proposition 209, Proposition 54 applied these provisions in public education, employment and contracting, but would have extended this prohibition to "persons subject to other operations of government unless Legislature finds compelling state interest, authorizes by two-thirds of each house, and Governor approves", with the exceptions of law enforcement, medical records and prisons. If Proposition 54 had passed it would have prevented statistical data from being compiled about the numbers and proportions of racialized and ethnic minorities in public employment, education, and other government operations, thus preventing diversity monitoring as well as affirmative action programs.

Lastly, Proposition 2, titled the Michigan Civil Rights Initiative, prohibited the use of criteria based on sex, race, ethnicity, national origin or colour by any public college, university

35 The full text of Proposition 209 is available at http://vote96.sos.ca.gov/Vote96/html/BP/209text.htm, and a detailed legal analysis of it is available at http://www2.law.ucla.edu/volokh/ccri.htm#I.

or school district for the purposes of employment or education37. The content and consequences of Proposition 2 in Michigan were therefore similar to that of Proposition 209 in California. In all three of the ballot initiatives I have discussed there is either an implicit or explicit double standard about the use of racialized classifications and/or criteria. The use of racialized classification and criteria in education and employment underlies practices of diversity monitoring and affirmative action designed to reduce racialized inequality, and thus the prohibition of racialized classification and/or criteria in these areas prevents such affirmative action programs. In contrast, the use of racialized categories and criteria in law enforcement not only enables police to create a racialized description for a specific crime suspect, but also underlies practices of racial profiling that subject visible minorities to much higher search rates by police. Although racialized and/or ethnic identity are relevant for a handful of diseases where certain population groups are at higher risk, the widespread used of such categories in medicine risks re-inscribing a notion of biological races.

The implication of these three ballot initiatives is that racial profiling by police and medical research into biological racial difference are legitimate uses of racialized classifications and criteria, whereas diversity monitoring or affirmative action in employment or education are illegitimate uses of racialized classifications and criteria. These ballot initiatives thus oppose differential treatment based on race or ethnicity in policy areas where it reduces inequality, but condone differential treatment in criminal justice, where racial profiling and disproportionately high incarceration rates for racialized and ethnic minorities exacerbate racialized inequality. Instead of suggesting a trend towards official racelessness, these ballot initiatives suggest the existence of a double standard whereby racialized criteria are being selectively used to facilitate

37 The full text of Proposition 2 is available at http://www.civilrights.org/equal-opportunity/michigan/proposal_text.html
racialized inequality and White privilege. One of the most important challenges facing contemporary race theorists may therefore be to identify and challenge the double standard whereby affirmative action programs are undermined, while racialized criteria continue to be deployed in those policy areas and institutions that exacerbate racialized inequalities.

The most important conclusion to draw from these political and theoretical disputes about the use of racial classifications and language is the need to be attentive to the context in which claims about race or racialization are made, and the likely consequences of these articulations. Although racialized classifications can contribute to racialization, ideas about race are not only produced through biopower, but are also part of the way that subjects make sense of the world and forms of socioeconomic inequality. The removal of racialized classifications will not therefore necessarily mean the end of racialized identities, because these identities are strengthened by racialized socioeconomic inequality (Blum, 2002) and not merely by discourses around race. For example, if we stopped using racialized and ethnic categories to monitor prison populations in the United States, and England and Wales, then this might remove our ability to identify the over/under-representation of racialized and ethnic groups amongst prisoners, but leave the reasons for that over/under-representation untouched. An adequate response to the over/under-representation of particular racialized and ethnic groups amongst prisoners thus requires more than a change in language, and would likely involve ending racial profiling by police, and tackling broader racialized and ethnic inequalities linked to socioeconomic disadvantage and criminalization. I will explore race and criminal justice in detail in the next chapter, including analysis of multiple racialized and ethnic groups such as Native Americans, Latino/Hispanics and Arab-Americans, as well as inequalities between those racialized as Black and as White.
Although Foucault (2003) ignores the relationship between race and class, the interconnection of race and class are important in regard to criminal justice, and to neoliberal policy changes over recent decades. The relationship between race and class varies with context, and it is only possible to provide a very brief exploration of the subject here. However, many analyses of race identify a link between being racialized as non-White and labour exploitation (Mills, 1997; Pateman & Mills, 2007), particularly in relation to chattel slavery, penal slavery, and ongoing economic disadvantage of Black people in America (Gilroy, 1995; King, 1995; Davis, 2003; King & Smith, 2005). During the early and mid twentieth century in both the US and UK those racialized as non-White tended to occupy lower class positions as a result of widespread discrimination in employment, education, including discrimination by many state institutions (King, 1995; Hall et al, 1978; Cole, 2003). This leads Hall (1980) to conclude that "race is thus, also, the modality in which class is ‘lived’, the medium through which class relations are experienced, the form in which it is appropriated and ‘fought through’" (341).

However, Hall (1980) cautions against two competing tendencies in theorizing race: of reducing race to class, or reducing it to culture. Hall (1980) considers both these approaches insufficient, arguing that economic class and culture are inter-related through hegemony, but that the relationship between them varies between societies. The implication of Hall's (1980) analysis is that race and class are deeply entangled in some societies, and that inequality cannot be remedied either by working to abolish class inequality alone, or by working against the sociological account of race alone. Although Foucault's (2003) account of race and biopower addresses the cultural aspect of race by seeking to denaturalize the idea of biological races, he ignores the links between race and class inequality. I find Hall’s (1980) arguments convincing, and this broad use of the concept of hegemony that combines attention to both cultural factors
and economics has been adopted by many scholars of race including Omi and Winant (1994) and Hill Collins (2004).

Over recent decades the relationship between race and class has grown more complicated due to increasing inequality within racialized groups, such as the rise of the Black middle class (Winant, 2004). Despite this, there is a persistent gap in male unemployment rates, where Black men in America are twice as likely to be unemployed as Whites, and are disproportionately affected by layoffs during recessions (McArdle, 2009). In the UK, White British men experience far lower unemployment rates than men from other racialized and ethnic groups, being less than half as likely to be unemployed as Black African or Bangladeshi men, and only one-third as likely to be unemployed as Black Caribbean men (Equality and Human Rights Commission, 2008). There are also substantial pay gaps according to gender, racialized identity and ethnicity in the UK, since the average pay of Black African men and Bangladeshi women is almost 18% lower than the average for White men, while the pay of Bangladeshi men and Black African women is almost 21% lower than that of White men (Equality and Human Rights Commission, 2008).

Recent literature about race and class in the US has also looked beyond income and employment to consider factors such as wealth, where "the sedimentation of racial inequality" (Oliver & Shapiro, 2006, 52) has produced a major disparity between Blacks and Whites. Since the possession of wealth enables access to university education, bank loans etc., it may be a more important indicator of economic position than income (Avery & Rendall, 2002).

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38 The picture with female unemployment rates is more complex, since higher rates of employment amongst women may indicate that women are forced to work out of racialized and/or economic disadvantage, whereas differences in male unemployment rates may suggest barriers such as lack of education and/or discrimination by employers. This topic is touched upon in the discussion of intersectionality later in this chapter.

39 The unemployment rate for White British men is 4.2%, as compared with 11.4% for Bangladeshi men, 9.5% for Black African men, and 12.2% for Black Caribbean men (Equality and Human Rights Commission, 2008, 88)
The existence of widespread housing segregation along racialized lines in the US has contributed to wealth gaps, in which Blacks tend to live in poorer areas than Whites, experience less appreciation in home values, and have more difficulty obtaining mortgages (Oliver & Shapiro, 2006). Since Whites are more likely to inherit wealth than are Blacks, and commonly inherit more wealth, past patterns of racialized inequality continue to have contemporary significance (Avery & Rendall, 2002). There are also wealth gaps for Latino/as in the US, who on average are better off than Blacks, but worse off than non-Latino/a Whites (McArdle, 2009). These patterns of race and ethnicity are particularly stark amongst the poor, where "thirty-two percent of Black households had zero or negative net worth in 2002, as did 26 percent of Latino households and 13 percent of white households" (Grant-Thomas, 2009, 4). I will return to this issue of race, ethnicity and poverty in the next chapter when discussing how the over-representation of some racialized and ethnic groups amongst prisoners affects those individuals, families and communities.

Intersectionality

I have analyzed both sex/gender and race at some length in this chapter but it is also critically important to consider the relationships between these identities and power relations. This subject has been explored in the literature on intersectionality, which stresses the complex ways that people are positioned by multiple structures of power. The concept of intersectionality originates in Black feminist thought, since prevailing approaches that focused on either race or gender failed to consider the experiences of women of colour, hence the collection entitled: *All the Women are White, All the Blacks are Men* (Hull, Scott & Smith, 1982). Crenshaw (1989) develops intersectionality as an alternative to the over-simplistic ‘additive’ approach, arguing
that "the intersectional experience is greater than the sum of racism and sexism...the entire framework...must be rethought and recast" (140). This intersectional approach has not only highlighted the ways in which women of colour face multiple, interacting forms of disadvantage, but has also redefined some of the problems under analysis, for instance in Hill Collins’s (1998) call for a broader and more critically-informed definition of violence.

The intersectionality literature cautions that scholars must not treat race and sex as mutually exclusive frames of analysis, but instead should be attentive to their inter-relation and to "exposing the under-theorized experiences of doubly-marginalized subjects" (Nash, 2008, 5). It is therefore problematic that some theorists have sought to contrast race with sex and/or gender as though the socially constructed nature of one category was established by virtue of the biological facticity and ‘realness’ of the other. For example, Omi and Winant (1994) state that:

Race is a concept which signifies and symbolises social conflicts and interests by referring to different types of human bodies…In contrast to the other major distinction of this type, that of gender, there is no biological basis for distinguishing among human groups along the lines of race. (55)

Not only do Omi and Winant (1994) fail to explain how they understand the relationship between sex and gender, they also seem to implicitly justify existing gender relations as based on an underlying natural category of sex — a position that is extremely problematic, both politically and theoretically.

At a theoretical level, Omi and Winant (1994) risk undermining their argument about race by making over-simplistic and unconvincing claims about the biological basis of binary sex/gender identities, which other scholars have repeatedly been shown to be constructed (Foucault, 1980b & 1990; Butler, 1993 & 1999; Fausto-Sterling, 1993 & 2000). Politically, Omi and Winant (1994) both erase the existence of people of transgender and intersex people of colour, and set up a false opposition between queer and transgender activists versus critical race
theory. This erasure of transgender and intersex people of colour is particularly worrisome given their multiple intersecting disadvantages, which mean that trans people of colour often face discrimination and marginalization both in communities of colour, and in queer or transgender communities (Valentine, 2007). Omi and Winant (1994) therefore risk further marginalizing and stigmatizing some of the most disadvantaged people of colour in America.

A far more productive stance than Omi and Winant’s (1994) position is provided by Warnke (2001) who summarizes:

Race and sex are thought to differ because there is no biological basis for distinctions of race, while sex furnishes the biological basis for differences between males and females...Yet if assumptions about gender drive the distinction of sexes, sex is less inborn than interpretive (129-130).

This position views both race and binary sex/gender categories as socially and historically constructed, and avoids establishing an opposition between critical race theory and queer or transgender theory. The importance of combining these perspectives is demonstrated by the recent case of the Black South African runner Caster Semenya, whose gold medal at the World Championships was called into question after doubts were raised about whether she is biologically female. The International Association of Athletics Federations (IAAF) announced an investigation and conducted medical tests to establish Semenya’s sex, prompting the President of Athletics South Africa (ASA) Leonard Chuene to accuse the IAAF of racism. The dispute over Caster Semenya's sex prompted a huge amount of media attention, and some media sources reported that Semenya is intersex.

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In much of the discussion and media coverage of Caster Semenya issues of gender expression were not distinguished from biological issues of genitalia, chromosomes or hormones, and these issues were further confused after Semenya had a feminine 'makeover' and photo-shoot for a South African magazine. This failure to distinguish between someone's body and their gender self-identification and expression is reminiscent of the case of Herculine Barbin, and led to intense media scrutiny of Semenya’s medical details, personal history and gender presentation. There has undoubtedly been both racism and sexism around the case of Caster Semenya, including the application of racialized ideals of femininity, but the underlying reason for this dispute is the insistence on dividing everyone into binary sex and gender categories. Although the IAAF investigation decided that Semenya could continue competing in women's athletics\textsuperscript{43}, other women have been excluded from competitive sport on the grounds of failing a gender test. For example, both the Spanish hurdler Maria Patino (Fausto Sterling, 2000a) and the Indian runner Santhi Soundararajan\textsuperscript{44} were excluded from competition in women's athletics after failing a gender test, and both have been designated as intersex. It seems unlikely that Caster Semenya is the last person of colour who will encounter problems with the division of all competitive athletes into binary sex and gender identities, and there are numerous transgender and intersex people of colour who face discrimination but do not make the headlines. Given this, I think it is important to use an intersectional analysis of how multiple forms of power interact, instead of comparing the 'realness' of sex and race on the basis of a false sex/gender binary.

In the following two chapters I will use the preceding theoretical analysis of racialization, gender and intersectionality as a framework for analyzing how the criminal justice


\textsuperscript{44} See http://news.bbc.co.uk/2/hi/world/south_asia/6188775.stm retrieved May 20th 2010.
systems in the United States, and England and Wales, contribute to the construction of racialized identities and to binary sex/gender identities. In Chapter Six I will argue that racialization occurs through practices such as the classification of prisoners in terms of race in official statistics, racial profiling by police, and over-representation of some racialized groups amongst prisoners. Moreover, I apply the concept of 'state racism' (Foucault, 2003) to the English and Welsh, and American criminal justice and prison systems, and will argue that these institutions are exercising state racism in both the broad and narrow senses identified in this chapter. In Chapter Seven I will then argue that the UK and US prison systems are helping to construct sexed and gendered identities by dividing prisoners into categories of male and female. The constitution of sexed and gendered identities occurs in rules about placement in prisons, in official statistics, though gendered rules about personal appearance and conduct, and in prison policies towards transgender prisoners, including the forms of medical care that are provided or refused. Finally, I will use this theoretical analysis to identify examples of the complex intersections between race and sex, gender and sexuality in prisons, particularly the construction of Black masculinity in American prisons.
Chapter Six: The Constitution of Race in Prison Systems

Overview

The previous chapter investigated theoretically how sex, gender and racialized identities are constructed, including through discipline and biopower. This chapter draws on empirical and theoretical literature to analyze the contemporary power dynamics around race, ethnicity and imprisonment in the US, and England and Wales. I draw on Foucault's (1990; 2003) account of biopower to argue that official statistics such as the census and prison population figures are part of the exercise of biopower to constitute sex and race. I also argue that state violence is exercised in the criminal justice systems in both the US, and in England and Wales, and that the victims are disproportionately racialized and ethnic minorities. Institutions such as the police and prisons therefore both contribute to the construction of racialized and gender identities, and subject particular groups within the population to an increased risk of state violence and death — what Foucault terms "state racism" (2003, 239).

Although I use elements of Foucault's conceptual framework and believe that his work generates important insights about power, I challenge some of Foucault's ideas and seek to amend others. I have argued in previous chapters that Foucault's analysis is undermined by his inattention to economic forms of power and to the coercive aspects of neoliberalism. Understanding contemporary power dynamics around race and imprisonment requires one to consider the links between race, class and poverty, the economic impact of imprisonment, and

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45 There are various ways of calculating the disproportionality of police searches and prison populations, depending on what the demographic composition of prisoners is compared to. Bowling and Phillips (2007) explain that prison populations have been compared to the resident population, the 'available population' (e.g. the people on the streets in an area), the estimated crime rates broken down by ethnicity, and hit rates (i.e. the proportion of stop and searches that result in an arrest). Bowling and Phillips (2007) assess each of these ways of measuring disproportionality and conclude that "the most robust measure of disproportionality in police stop/search powers...is the per capita stop/search rate" (952). In my analysis, I will be assessing the disproportionality of both prison populations and police searches in relation to the resident population, and (where the figures are available) the per capita incarceration and stop/search rates.
how neoliberalism has contributed to carceral expansion. In order to provide an adequate theoretical account of power and the prison, it is therefore necessary to move beyond the conceptual framework provided by Foucault. I contend that contemporary prisons both reflect and contribute to socioeconomic inequality, and that the high incarceration rates for some racialized minorities, particularly in the US, mean that imprisonment is contributing to racialized inequality. I will begin by analysing how the criminal justice and prison systems in America, and England and Wales, produce one particular racial category and identity, that of Blackness, before expanding my analysis to consider Native Americans, Hispanics, and Arab Americans in the US, and Muslim and Asian communities in England and Wales.

The central insight provided by Foucault’s work on biopower is that categories of race, sex and sexuality are the product of power and dominant regimes of truth, and hence the use of such categories reinforce the racialized and gendered identities through which power works. In my discussion of critical race theory I argued that it is preferable to use the language of racialization, but that the need to identify and challenge inequalities makes it important to continue referring to racialized categories. However, there is always a risk that using racialized categories in the attempt to highlight and challenge racialized inequality might reinforce racialized power relations instead of disrupting them and therefore prove counter-productive, as Gilroy (2000) argues. This risk is particularly acute in discussions of criminal justice because of the historical "conflation of blackness and criminality" (Wacquant, 2005, 129) and continued association of crime with many groups racialized as non-White. Emphasizing the high

46 What I will not discuss in this chapter is the constitution of sex and gender categories and identities in American, and English and Welsh prisons, or intersections between gender and race. This is not because I believe that race and sex/gender are separable; on the contrary, race and sex/gender intersect in complex ways with each other, and with other identities and forms of power. I will analyze some of the intersections between race, class, ethnicity and religion in this chapter, and in the next chapter I will consider the intersections between race and sex/gender, particularly in relation to Black masculinity. The decision to bracket sex/gender in this discussion of race is driven by the desire to outline some of the already complex dynamics around race, ethnicity, and class, before going on to analyze the further intersections between sex, gender and race.
incarceration rates for young Black men may therefore re-affirm and solidify the association between Blackness and criminality, even if these high incarceration rates are being critiqued. In particular, analyses that treat race only as a cause of differentiated treatment, rather than also as an effect, risk re-affirming the existence of race as a pre-existing and implicitly biological category.

Given these concerns, the choice of whether or not to use statistics about race and incarceration, as discussed earlier in Chapter 5, depends on strategic decisions based on prevailing relations of power and knowledge. Here, one can be guided by the often-cited comment from Foucault that:

My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper-pessimistic activism. (1984, 343)

Adopting this spirit of ‘hyper-pessimistic activism’ requires one to make judgements about the least dangerous course of action in a given historical and political environment. In the context of criminal justice, researchers have very limited direct access to prisoners for reasons ranging from security to ethical concerns about the privacy and vulnerability of inmates. Moreover, the sheer scale of the American, and English and Welsh prison systems makes it impossible for researchers to compile information about the number and demographic composition of prisoners held nationally. These constraints would severely limit the scope of any analyses of these prison systems that did not use official statistics or to secondary literature based on those statistics. Given this, I believe it is preferable to make use of official figures about prisoners, including the race and sex of those prisoners, whilst attempting to minimize the ‘danger’ posed by these forms of knowledge.
As I have already argued in Chapters Three and Five, one way of reducing the danger of official statistics is to be attentive to the way that these categories of race, sex etc. are defined and constructed, and to the political consequences of these categories. As I will explain in more detail below, official reports about the prison populations in America, and in England and Wales employ categories of sex, race and ethnicity as defined by the relevant national census. The political implications of the prevailing categories are often complex, because they allow one to demonstrate the extent of under/over-representation of some groups (e.g. the over-representation of Blacks when compared to Whites), whilst erasing other types of identity (e.g. Arab-Americans). While some uses of racialized categories contribute to racialized inequality, for instance the use of racial profiling by police, in other cases the erasure of identities makes it difficult to prove or mobilize against patterns of discrimination. Although the official reports about race and incarceration present one form of truth, there is an extent to which one can read them against the grain by showing what is lost in these figures, and by demonstrating that statistics construct what they purport to merely represent.

Biopower and the Construction of Blackness

Official reports about prisons in both the United States, and in England and Wales use the categories of race and/or ethnicity defined by their respective censuses — at least, in principle. In practice the situation is more complex, because both these censuses use more categories of race and/or ethnicity than are found in annual prison statistics. The categories employed to monitor prison populations in the United States, and England and Wales also raise questions about the meanings of race and ethnicity, and the distinctions between them, which I will touch upon later. The categories used in England and Wales differ substantially from those
used in the US, but both employ racialized categories of Black and White, and in both cases there are very pronounced racial and/or ethnic disparities in incarceration rates, particularly between Blacks and Whites.

On the 2000 US Census there were fourteen categories of race, plus the option to identify as "Some Other Race" (US Census Bureau, 2001, 1). Respondents were asked to "mark one or more races" (US Census Bureau, 2001, 1) and nearly seven million Americans, constituting 2.4% of the population, identified themselves as having two or more races\(^\text{47}\) (US Census Bureau, 2001, 3). The answers are grouped into six main categories of race: "White", "Black or African American", "American Indian and Alaska Native", "Asian", "Native Hawaiian and Other Pacific Islander" and "Two or More Races", again plus "Some Other Race"\(^\text{48}\) (US Census Bureau, 2001, 2). There are also two main categories of ethnicity: "Spanish, Hispanic or Latino" and "not Spanish, Hispanic or Latino"\(^\text{49}\) (US Census Bureau, 2001, 1). Although the US Census Bureau's position is that "the federal government considers race and Hispanic origin to be two separate and distinct concepts" (US Census Bureau, 2001, 1), the Bureau of Justice Statistics usually lists prisoner numbers in terms of Black, White, and Hispanic or Latino (e.g. Bureau of Justice Statistics, 2007, 6-8). The representation of prisoner demographics in official reports therefore often presents Hispanic ethnicity as an alternative to racial identification as Black, White, or Other, rather than as an ethnic identification that is distinct from race and/or can overlap with racialized identities.

\(^{47}\) Although there has been political and academic debate over those who identify as Mixed race or multiracial (Hochschild & Weaver, 2010), there was no "Mixed race" category in the 2000 census.

\(^{48}\) While there are six main categories of race according to the US Census Bureau (2001) two of these have multiple sub-categories that were included on the 2000 census. The main category "Asian" was composed of six sub-categories on the 2000 census, and the main category "Native Hawaiian and Other Pacific Islander" was composed of four sub-categories (US Census Bureau, 2001, 1-2).

\(^{49}\) The ethnic category of "Spanish, Hispanic or Latino" is constituted of four sub-categories: "Mexican, Mexican American, Chicano"; "Puerto Rican", "Cuban", and "other Spanish/Hispanic/Latino" (US Census Bureau, 2001, 1)
The 2001 Census in England and Wales used sixteen categories that it identifies as ethnicity, which are grouped into five main categories: "White," "Mixed," "Asian or Asian British," "Black or Black British" and "Chinese or other ethnicity" (UK Ministry of Justice, 2007). The sixteen census categories include additional detail about ethnicity and/or national origin, for example the "Asian or Asian British" category is subdivided into "Indian," "Pakistani," "Bangladeshi," and "other Asian." The racialized categories 'Black' and 'White' are therefore used alongside and in combination with categories of ethnicity or geographical origin, suggesting a lack of clear distinction between the concepts of race and ethnicity. Annual prison reports provide information about only the five main categories of ethnicity, not the full sixteen. However, police practices of recording the ethnicity of those whom they search or arrest have not always matched the census categories. Since 1996 it has been mandatory for all police forces in England and Wales to conduct ethnic minority monitoring, but prior to 2003 this was based on "the police officer's visual perception of the ethnic appearance of the suspect/victim, using four categories (White, Black, Asian and Other)" (UK Home Office, 2007, 4). Since 2003 police have recorded ethnicity according to individuals' self-identification within the 'sixteen plus one' categories defined by the 2001 Census.

Although both censuses employ the categories of 'Black' and 'White', the meanings of these terms vary across national contexts and have changed significantly over time. These variations in meaning occur because race is socially constructed, and hence "whiteness and non-whiteness have been historically contingent and mutable social forms" (Price, 2010, 155). Both the inclusion of questions about race and/or ethnicity, and the precise racialized or ethnic categories used in any given census therefore reflect historically grounded political struggles about the meaning of race, citizenship and belonging. Although the interests of the state have
shaped the use of racial and ethnic categories in the British and American censuses, in recent decades minority groups have lobbied for the inclusion of specific categories in the hope of facilitating anti-discrimination efforts (Kertzer & Arel, 2002). The use of census data in relation to racialized inequality makes it clear that an exercise of state power around race occurs whether or not racialized categories are used in the census: the refusal to count race in France is as much a contribution to racialized politics as the counting of race in the US. Although the state constructs race through many institutions and processes, the reliance on census data in many areas of policy makes the census important for the construction of group identities. In order to highlight the variation in the meanings of 'Black' and 'White' and the political struggles over the use of racial and ethnic categories in the American and British censuses, it is necessary to provide a brief history of these censuses.

National censuses in the US have included a question about race since the first census in 1790 — the year Congress passed legislation restricting rights of naturalization and citizenship amongst immigrants to "free white persons" (Jacobson, 1999). The use of racialized categories in the US census was therefore linked from the outset to the task of defining the citizen body, which involved excluding non-Whites from citizenship (Kertzer & Arel, 2002). By 1850, changes in ‘racial science’ lead to the introduction of the 'mulatto' category to record those with mixed White and Black ancestry (Nobles, 2002). The category of 'mulatto' was discontinued in the 1930 census due to concerns about the accuracy of recording, and instead the census adopted the 'one drop rule' of classifying people as Black if they had any Black ancestry (Nobles, 2002). The meaning of Blackness in the US census therefore altered over time, depending on the political motivations of those in authority and prevailing scientific views about race. In the 1960s the role of the US census altered again, because reforms such as the Civil Rights Act 1964
and Voting Rights Act 1965 introduced the use of census data for the purposes of anti-discrimination, and because changing immigration policy led to demographic shifts. Further changes to the census occurred in the 1970s, including the introduction of racialized categories for Asian and Pacific Islanders, and the addition of an ethnic category for Latinos and Hispanics (Kertzer & Arel, 2002; Nobles, 2002).

In contrast, efforts to include questions about race and ethnicity in the UK census begun during the 1970s and were justified by the claim that the census data would contribute to anti-discrimination efforts. The British government tried to introduce questions about ethnicity in the 1981 census, but struggled to find categories that were satisfactory to both government and minority communities (Kertzer & Arel, 2002). Although some ethnic minority organizations supported the inclusion of an ethnicity question, several others mounted a public campaign encouraging people not to answer the ethnicity question, and as a result the question was omitted from the 1981 census and delayed until 1991 (Brown, 2009). Over the period of this dispute about race, ethnicity and the UK census there were changes in the usage and meaning of the term 'Black'. During the 1970s the term 'Black' was applied in the UK to African, Caribbean and South Asian people on the grounds of their shared experiences with colonialism and racism, and hence race was conceptualized around a Black-White binary. By the late 1980s this inclusive meaning of Black was being replaced by a narrower use of the term that did not include South Asians (Lewis & Phoenix, 2004). Today there is still some contestation over the meaning of 'Black' in the UK, which is used in the broad sense by some organizations, including the Black Police Officers Association, while the 2001 census presents Blackness and Asian ethnicity as distinct.
The differences in racialized and ethnic categories and meanings between the US and UK mean that comparisons between the racialized and ethnic composition of prison populations in the US and those in England and Wales are necessarily inexact\(^{50}\). However, figures about the racialized and ethnic composition of prison populations provide valuable information about which groups are over/under-represented amongst prisoners, and facilitates analysis of the causes and consequences of this disproportionality. In 2009 the American male prison population was 39% Black, 21% Latino / Hispanic and 33% White (Bureau of Justice Statistics, 2010b, 27). One in every 33 Black men aged 30 to 34 was in prison during 2009, and ratios of incarceration rates show that Black men were 6.4 times more likely to be imprisoned than White men\(^{51}\).

The American female prison population is also racially disproportionate, although to a lesser extent, since the approximately 100,000 women imprisoned in 2009 were 27% Black, 17% Latino/Hispanic, and 49% White (Bureau of Justice Statistics, 2009, 27). Incarceration rates indicate that in 2009 Black women were 2.8 times more likely to be imprisoned than White women\(^{52}\). While the racial disproportionality amongst male prisoners in the US has lessened since 2000 (when Black men were 7.7 times more likely to be imprisoned than White men) this reflects a substantial rise in White incarceration rates as well as a reduction in proportion of Black men who are imprisoned\(^{53}\) (Bureau of Justice Statistics, 2009, 27).

\(^{50}\) For example, it would be difficult to compare the racialized composition of American prison populations in the early twentieth century with those in the late twentieth century, because of changes both in the categories used and in the meanings of those categories.

\(^{51}\) In 2009 the incarceration rate for non-Hispanic White men was 487 per 100,000, whereas the rate for non-Hispanic Black men was 3,119 per 100,000 (Bureau of Justice Statistics, 2009, 27-8)

\(^{52}\) In 2009 the incarceration rate for non-Hispanic White women was 50 per 100,000, whereas the rate for non-Hispanic Black women was 142 per 100,000 (Bureau of Justice Statistics, 2009, 28).

\(^{53}\) From 2000 to 2009 the incarceration rates for White men rose from 449 per 100,000 to 487 per 100,000, while the incarceration rates for Black men fell from 3457 per 100,000 to 3119 per 100,000 (Bureau of Justice Statistics, 2009, 28).
In England and Wales during 2009, 26.7% of male prisoners and 27.2% of female prisoners self-identified as being from Black and Minority Ethnic (BME) groups (UK Ministry of Justice, 2010b, Table S5.03). Given that the 2001 census found that only 7.9% of the UK population were BME\(^{54}\), Black and ethnic minority people are substantially over-represented in the prison population. By far the largest group of the BME prisoners were Black, constituting 14.3% of male prisoners and 17.1% of female prisoners (UK Ministry of Justice, 2010b, Table S5.03), which is a massive over-representation given that in the 2001 census only 2% of the population were Black\(^{55}\). The incarceration rates for different racial and ethnic groups in England and Wales in 2009 are not available\(^{56}\), but in 2006 Black British nationals were imprisoned at a rate 5.6 times than that of White nationals\(^{57}\). The racial disproportionality is even more pronounced for the foreign nationals, since 65% of the men and 70% of the women were BME, and 34% of the men and 46% of the women were Black\(^{58}\). In 2009 Black foreign nationals constituted 10% of the total female prison population in England and Wales\(^{59}\), which may be attributable to the intensive policing and imprisonment of drug mules who are often poor women from countries such as Jamaica (Sudbury, 2005).


\(^{56}\) In June 2010 a statement was issued explaining that a simplified version of the race and criminal justice statistics reports and supplementary statistical tables would be issued from now onwards, providing "the same range of detailed information as previous years" (Ministry of Justice, 2010c, 1). When comparing the figures provided about prison populations in 2006 (Ministry of Justice, 2007) with that provided about prison populations in 2008/9 (Ministry of Justice, 2010a & 2010b) it becomes clear that this statement is at best misleading, and at worst untrue - the most recent report omits a range of important information. I have emailed the Ministry of Justice pointing out that their recent report does not provide estimated incarceration rates by race and gender for 2008/9 and requesting that they provide me with that information.

\(^{57}\) Calculations made on basis of figures in UK Ministry of Justice, 2007a, 87

\(^{58}\) Calculations made on basis of figures in UK Ministry of Justice, 2010b, Table S5.03.

\(^{59}\) Calculations made on basis of figures in UK Ministry of Justice, 2010b, Table S5.03.
The politics around race in the UK are different from those in the US for reasons including different patterns of migration, legal structures, demographic makeup, structures of racialized class inequality, and the legacies of slavery and colonialism. However, there is a common theme in the association of Blackness with criminality, which may stem from the historical legacy of ‘racial science’ that identified Blackness with negative characteristics including low intelligence and a tendency to violence (Philips & Bowling, 2002). The prominent nineteenth century criminologist Cesare Lombroso linked race and crime, arguing that non-Whites were prone to delinquency (Philips & Bowling, 2002). A number of scholars have analyzed the association between crime and Blackness during the twentieth century, in both the UK and US. Weaver (2007) argues that in the US some Southern politicians responded to the civil rights movement by portraying civil rights protests as violent, or even by criminalizing such protests. The increasingly punitive criminal justice policy introduced in America from the 1970s onwards is therefore part of what Weaver (2007) describes as a "frontlash" against efforts to promote racial equality. A similar argument is made by Murakawa (2008), although she argues that moves to equate racial order with law and order began in the post-war period.

Phillips and Bowling (2002) argue that in the British context, the poor relationship between police and the Black community during the 1970s and 1980s contributed to the perception of Black criminality because aggressive policing provoked public protests and disorder. In addition, Hall et al (1978) argue that biased media representation and fears about crime lead to the creation of 'Folk Devils' as a figure of fear, which in the 1970s occurred with the image of young, unemployed Black men as muggers. Although Hall et al (1978) hold the
British press and politicians partially responsible, they note that the fear of mugging and image of racial minority muggers originated in the US and was transferred to the UK\(^{60}\).

The empirical literature identifies multiple causes of the over-representation of racialized minorities amongst prison populations in the US, and in England and Wales, including discrimination by police, biases in the prosecution and court process, and the varying rates at which different socioeconomic and racialized groups engage in criminalized behaviour (Tonry, 2004; Coyle, 2005; Harcourt, 2006; Mauer, 2006). Discussing this extensive empirical literature and assessing the extent to which different factors contribute to racialized over/under representation amongst prisoners — a highly contested topic — is beyond the scope of my research, but I will discuss some of the factors that may have contributed to the racialized biases in prison populations. In particular, I will outline the evidence of racialized biases by police, which both Harcourt (2006) and Mauer (2006) suggest is a major contributor to racialized over/under-representation amongst prisoners.

In both the US, and England and Wales it is likely that the disproportionately high incarceration rates of Black men and women are at least partially the result of racial profiling by police. In England and Wales during 2008/9 15% of stop and searches carried out by police under the Police and Criminal Evidence Act 1984 (PACE) were on Blacks (UK Ministry of Justice, 2010b, 8), making Blacks almost eight times more likely to be searched than Whites\(^{61}\). The most recent annual report on race and the criminal justice system does not provide the reasons for searches under PACE\(^{62}\), but previous reports showed that Blacks were

\(^{60}\) Over recent decades globalization has contributed to the spread of ideas about crime and penal policy from America to the UK, both through the media (e.g. television and internet news), and by accelerating the direct transfer of ideas between policymakers (Baker & Roberts, 2005)

\(^{61}\) Calculation based on figures provided in UK Ministry of Justice, 2010b, 8, Table A.

\(^{62}\) See footnote 56.
disproportionately likely to be searched for drugs: in 2005/6 50% of PACE searches on Blacks were for drugs, as opposed to 39% of searches on Whites (UK Ministry of Justice, 2007, 31). Bowling and Phillips (2007) regard many of these searches as illegal, because the police often do not have the 'reasonable suspicion' required by law, and the Race Relations (Amendment) Act 2000 stipulates that: "it is unlawful for a police officer to discriminate in carrying out any of his or her functions" (Bowling and Phillips, 2007, 941). Given that Black people are targeted for drug searches, it is unsurprising that a high proportion of Blacks were imprisoned for drug offences: 32% of Black prisoners as compared with 13% of Whites.

National data is not available about race and police searches in the US, which hampers efforts to investigate whether or not widespread racial profiling takes place. This lack of national data undoubtedly has political implications since it conceals the existence of any widespread racialized biases, hinders comparisons between police forces, and makes it difficult to challenge suspected incidents of racial profiling. However, there are unofficial calculations about the extent of racial profiling in the US, and Mauer (2006) cites figures showing that in 2000 Blacks represented 12% of current drug users but 32% of arrests for drug possession (162). Not only are those arrested for drug offences disproportionately Black, but drug offenders face long sentences due to the penal severity and mandatory minimum terms introduced in the War on Drugs. Blumstein and Beck (1999) calculate that 33% of the growth in the total US prison population between 1980 and 1996 was due to increased numbers of drug offenders (22), and that "drug offences were the major contributors to the increases for women and Blacks" (23).

The combination of racial profiling for drugs and severe punishment for drug offences probably explains much of the overall racial disparity in the US prison population (Mauer, 2006, 63

63 Figures from UK Ministry of Justice, 2007, 88. Figures for 2009 are not available; see footnote 56.
160; Morris, 1995, 215). Nonetheless, neither the rise in overall incarceration rates nor the racial disproportionality of the US prison population can be explained purely by reference to the 'War on Drugs'. Blumstein and Beck's (1999) calculations indicate that 67% of the growth in the total US prison population was not attributable to changes in drug policy, and that the racial disparity was the product of changes in sentencing patterns for multiple offences, including robbery, murder, and drug crimes.\(^{64}\)

The use of racial profiling by police raises the important question of whose judgement determines someone's race or ethnicity within contemporary criminal justice systems, because people's self-identification may clash with the way they are perceived by others. Given the disproportionality of police searches and issues such as implicit bias, one's likelihood of being incarcerated is affected by how other people perceive one's race, ethnicity, religion, and sex/gender. The British government acknowledges the role of police perceptions by stating that stop and searches were particularly common for "people of Asian and Black ethnic appearance" (UK Ministry of Justice, 2007, 25). The fatal shooting in 2005 of Brazilian Jean Charles de Menezes who was mistakenly identified as an Ethiopian terrorist suggests that misidentification can have very serious consequences, particularly in relation to surveillance and police violence. This clash between self-identification and the identity assigned by others produces a discrepancy between the census categories used to track prison populations, and the racialized or ethnic categories that operate implicitly within criminal justice systems.

Racialized biases by police are sometimes deliberate, for instance when policing strategies target racial or ethnic minority communities (Harcourt, 2006), but people also have

\(^{64}\) Blumstein and Beck (1999) calculate that while 36% of the growth in Blacks prisoner numbers between 1980 and 1996 was attributable to drug offenses, 12% was attributable to Robbery and 11% to Murder (25).
unconscious biases. Psychology research has identified ‘implicit bias’ \(^{65}\) in the unconscious associations that people draw between concepts, including unconscious biases around race and gender. Implicit biases are based on cultural associations and attitudes that are transmitted by the media, one's peers, etc., and they shape people's perceptions and interpretation of events. Implicit bias exists for general positive and negative characteristics, and in relation to specific stereotypes such as the tendency to associative Blackness with crime and danger:

People are likely to misidentify objects seen for a split second in the presence of Black men as deadly weapons rather than innocuous tools; however, they are more likely to misidentify the same objects seen in the presence of White men as innocuous tools rather than as deadly weapons... The biasing influence of implicit racial stereotypes on weapon misidentification occurs even when people have the conscious goal to avoid using racial stereotypes to make their judgments, and it occurs regardless of participants’ own race (Dasgupta, 2009, 100)

Implicit biases often contradict people's conscious beliefs, so one can have an implicit association between Blackness and crime even if one consciously believes that there is no link between race and crime (Dasgupta, 2009).

Implicit bias has direct relevance to issues of race and policing, because it suggests that practices such as disproportionately searching Black men for drugs or weapons may be shaped by implicit associations between Blackness and crime. For example, the tendency to over-predict whether Black men are armed probably contributes to the use of excessive force by police against Black men. The US Bureau of Justice Statistics (2001) reports that in 1998 Blacks were killed by police at four times the rate of Whites, but this bias has lessened over time — in 1978 they were killed at eight times the rate for Whites (iii). Significantly, this 2001 report only includes 'justifiable' homicides by police, explaining that "the killing of a felon by police is considered justified when it is done to prevent death or serious injury to the officer or another

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\(^{65}\) For sample tests and links to recent research, see the Harvard Implicit Bias Project website at [https://implicit.harvard.edu/implicit/demo/](https://implicit.harvard.edu/implicit/demo/).
person" (Bureau of Justice Statistics, 2001, 1). The absence of any similar study of 'unjustified' homicides means that there is no complete record of the numbers or racial composition of deaths at the hands of American police. However, a report by Amnesty International (1999) concluded that "in jurisdictions across the USA, the overwhelming number of victims of police brutality, unjustified shootings and deaths in custody are members of racial or ethnic minorities" (7).

There also seems to be a racialized bias in deaths at the hands of police in England and Wales, and in 2008/9 alone there were 15 deaths in or following police custody, of which 5 were BME individuals, three of whom were Black (UK Ministry of Justice, 2010b, Table S5.09). Between 1998/9 and 2008/9 there were a total of 333 deaths in or following police custody and 15% of the deceased were BME, of whom 7% were Black (Independent Police Complaints Commission, 2010b, vi). Although the most common primary cause of death was "natural causes", this was the cause of death for a lower proportion of BME individuals than Whites, and the proportion of BME people who died from reasons relating to their restraint by police was twice as high as for Whites (Independent Police Complaints Commission, 2010b, 19). Damningly, the Independent Police Complaints Commission (2010b) conclude that "over one-third of cases in which a Black detainee died occurred in circumstances in which police actions may have been a factor...this compared with only 4% of cases where the detainee was White" (2).

Not only are racialized and ethnic minorities more likely to die in police custody or after contact with police, but the official investigations into their deaths are frequently inadequate. Dyson & Boswell (2006) identify ten cases in which the British or American authorities used sickle cell anemia as an excuse for unexplained deaths of people of African-Caribbean descent. They argue that this constitutes "the misuse of genetics to explain/excuse the deaths of Black
males in custody" (Dyson & Boswell, 2006, 21) and that it serves to draw attention away from justified concerns about racism, police misconduct and the inadequacy of medical care in custody. The pattern identified by Dyson & Boswell (2006) is an example of the double-standard I identified in Chapter 5, whereby discourses about race are used to naturalize racial inequality even as the use of explicit racial criteria to alleviate inequality is undermined. The claim that unexplained racialized minority deaths in custody are due to natural, genetic differences demonstrates both the continued resonance of biological conceptions of race, and the reluctance of UK and US authorities to acknowledge racism in criminal justice.

Concerns have also been raised about the inadequacy of police efforts to protect racialized and ethnic minorities from racially motivated assault, and to investigate such attacks (Phillips & Bowling, 2002). In the UK, concerns about this issue lead to an official enquiry after the police failed to adequately investigate the murder of the Black teenager Stephen Lawrence. The Stephen Lawrence Inquiry found that the Metropolitan Police were guilty of "institutional racism" (Macpherson, 1999, section 6.45) and called for extensive reforms, including better training and more diversity amongst police officers. A decade later, research based on the experiences of Black police officers across England and Wales suggests that there is continued racism within the police, but that discrimination has become more covert (Holdaway & O'Neill, 2007). Nonetheless, BME people are less satisfied with the police, and make a disproportionately high number of complaints. In 2008/9 14% of complaints about police were from BME individuals, of which 7% were from Blacks, making Black people more than three times as likely to register a complaint than Whites (Ministry of Justice, 2010c, Table S5.07). The Metropolitan Police received 5,807 complaints in 2008/9 (more than twice the number recorded

66 The Metropolitan Police are responsible for policing most of London, which has a very large, diverse population and contains many of the most important political and economic institutions in the UK. The Metropolitan Police also largely directs anti-terrorism policing efforts across England and Wales.
against any other force) and 17% of those were from Blacks, as compared with 30% from Whites, and 44% of cases where the complainant's ethnicity was not recorded (Ministry of Justice, 2010c, Table S5.07).

This evidence suggests that the criminal justice systems in the United States, and England and Wales are using biopower to construct racialized categories and identities, and exercising violence towards specific racialized groups, particularly Blacks. This fits with Foucault's (2003) analysis of "state racism" (239) in which the state constructs race in order to justify the exercise of sovereign power against racially defined enemies. The over-representation of racialized minorities amongst those killed by police is a clear example of state killing, but as I discussed in Chapter Five Foucault (2003) provides a broad account of what constitutes killing in reference to state racism:

When I say "killing," I obviously do not mean simply murder as such, but also every form of indirect murder: exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on (256).

Incarceration itself constitutes a form of killing in this broader sense, because it carries an increased risk of death due to infectious diseases such as HIV and tuberculosis that are prevalent amongst prisoners, and due to the risk of violence (Morris, 1998, Coyle, 2005). In some cases, problems such as prison overcrowding and poor mental health treatment also lead to high rates of self-harm and suicide attempts amongst prisoners (Coyle, 2005.)

Moreover, imprisonment is a form of expulsion from political and civic life, which is highlighted by the ineligibility of prisoners to vote in elections in America or in England and Wales, and by the fact that many former prisoners in the US are ineligible to vote due to felony disenfranchisement. The research and advocacy organization The Sentencing Project estimates that 5.3 million Americans are prohibited from voting as a result of felony disenfranchisement,
and that around 13% of Black men are ineligible to vote as a result.\textsuperscript{67} The scale and racial disproportionality of felony disenfranchisement in America means that it not only affects individuals, but hinders the political participation and mobilization of Black communities (Wacquant, 2005; Mauer, 2006). In addition, many convicts in America are excluded from state social aid such as welfare payments, food stamps, disability support, public housing, and the Pell Grants that provide funding for university education (Wacquant, 2005). These problems often affect the families of prisoners, who may be excluded from welfare or housing, face an increased risk of disease, or suffer familial breakup as a result of a parent's imprisonment. The increased risk of death and political exclusion involved in imprisonment therefore indirectly extends to the poor, racialized minority communities who are incarcerated at disproportionately high rates.

Although Foucault (2003) mentions political and civic exclusion in his account of state racism, he does not mention class and economics despite their clear relevance to issues of health and well-being. Numerous Marxist-inspired histories of the prison (Rusche & Kirchheimer, 1967; Ignatief, 1978; Melossi & Pavarini, 1981) have stressed the importance of poverty and class to understanding power dynamics around criminal justice, arguing that criminalization and imprisonment are part of the techniques of class control. Even Foucault (1995) acknowledges that the change in forms of punishment was linked to changing patterns of crime and property ownership in the eighteenth and nineteenth centuries that constituted "a new severity towards the poor" (77), and argues that the disciplinary prison constituted delinquents and differentiated them from the masses of the poor. Foucault (1995) displays a keen awareness that laws tend to represent the perspectives of those wielding power, but his analysis is inadequate because he

\textsuperscript{67} Information retrieved from The Sentencing Project website \url{http://www.sentencingproject.org/template/page.cfm?id=133} on March 9th 2010.
ignores the criminalization of the poor through prohibitions on begging and homelessness (Christie, 2000), and the criminalization of traditional practices of colonized populations, such as hunting and fishing (Ross, 1998).

This connection between poverty and crime is critically important to the current situation, because poor and disadvantaged people are more likely to engage in criminalized behaviour, be convicted of crimes, and be imprisoned (Coyle, 2005). Research has shown that 67% of prisoners in England and Wales were unemployed before imprisonment, as compared with 5% of the general population, and that 32% of prisoners were homeless before imprisonment, as compared with 0.9% of the general population (Prison Reform Trust, 2010, 20). Prisoners also have low levels of literacy, numeracy, and educational attainment, many were excluded from school, and a disproportionately high number were taken into care as children (Prison Reform Trust, 2010, 20). This suggests that the lack of access to jobs, housing, and good-quality education have a major impact on whether or not someone commits criminal offences, and further research has shown that ex-prisoners who are unemployed and/or homeless upon release are more likely to reoffend (Prison Reform Trust, 2010, 19).

In Chapter Five I briefly discussed the interconnection between race and class, including trends such as higher unemployment rates and lower income amongst racialized and ethnic minorities. Given the strong links between crime and disadvantage, this link between race and class suggests that there may also be some link between race and crime. Here, one must be careful not to attribute the hugely disproportionate incarceration rates of racialized and ethnic minorities simply to higher crime rates, and thereby overlook all the biases and inequities in contemporary criminal justice systems. Nonetheless, even if there were not longstanding tendencies to associate race with crime, then the association between poverty, criminalization
and imprisonment would be likely to produce racially disproportionate prison populations if those racialized as non-White were over-represented amongst the poor. Since imprisonment greatly restricts one’s ability to earn, thereby impoverishing the individual and often their family, this can create vicious circles of poverty and imprisonment. The economic harm caused by imprisonment is exacerbated if, as is case in the US, former prisoners are excluded from state aid such as welfare payments.

The existence of vicious cycles of poverty and imprisonment is confirmed by research into the impact of incarceration on employment and earnings. Imprisonment substantially reduces people’s longterm future earning prospects, due to the combination of stigma, the erosion of human capital such as job skills, and the loss of social capital (Western, 2002). Prisons therefore contribute to socioeconomic inequality and, given the high incarceration rates of Blacks in the US, to racialized socioeconomic inequality: "Incarceration is estimated to have increased wage inequality...between blacks and whites by 8 to 9 percent" (Western, 2002, 540). Black incarceration rates in the US are so high that they have created a stigma around under-educated Black men that depresses the earnings of the entire group (Western 2002), and have made imprisonment part of the ‘life course’ for young, poor, Black men (Pettit & Western, 2004). Black men who were in their mid-thirties during the late 1990s were almost twice as likely to have been in prison as to have a BA, while White men were ten times more likely to hold this degree than to have been imprisoned (Pettit & Western, 2004, 164). In the US, where incarceration rates are far higher than in the England and Wales — and indeed higher than the rates recorded anywhere else in the world — imprisonment has a widespread and systemic impact on social inequality and on racialized inequality.
Foucault (1995 & 2008) not only pays minimal attention to poverty in relation to imprisonment, but his (2003) account of state racism does not provide any analysis of race in relation to capitalism, let alone neoliberalism. This is an enormous conceptual problem because as I argued in previous chapters, neoliberalism is connected to greater penal severity. Neoliberal policies combining welfare cuts with more intensive policing and longer prison sentences have shifted both state spending and governance of the poor towards the criminal justice system. Neoliberalism has therefore legitimized coercive forms of state intervention through the criminal justice system, which increases socioeconomic inequality, while forms of state intervention designed to reduce inequality are delegitimized.

Moreover, the neoliberal account of the subject that Foucault (2008) seems to defend, as discussed in Chapter Four, denies the socially-rooted nature of human identity and thus attacks the notion of group identities that underlies affirmative action programs. Simultaneously, the shift towards governmentality and risk management has promoted the use of policing strategies that target racial or ethnic minorities and/or deprived neighbourhoods that are perceived as high risk (O'Malley, 1996; Harcourt, 2006). The result is a double-standard about the use of explicit racialized criteria, which are deemed inappropriate for the use of affirmative action in education, employment etc. whilst being deemed appropriate for racial profiling in criminal justice. Neoliberalism has therefore contributed to greater socioeconomic inequality, and promoted racialized inequality by shifting the governance of the poor through more racially egalitarian state aid to racially-discriminatory policing and imprisonment. Neoliberalism has not only altered the governance of the poor but also — albeit more covertly — altered the governance of race.
This link between neoliberalism and racialized inequality is not a coincidence, because neoliberal policies have been facilitated by existing prejudices around race, poverty and crime. Welfare cuts in the US were enabled partially by the characterization of welfare recipients as Black (Goldberg, 2009), and as lazy, undeserving and potentially fraudulent, therefore justifying restrictions on welfare programs (Cruikshank, 1999). Both Democrat and Republican politicians drew on racially coded arguments and racist stereotypes to gain popular support for neoliberal policies (Weaver, 2007). The characterization of poor Blacks as more likely to be criminal and thus in need of surveillance and punishment is therefore linked to the neoliberal attack on redistribution and the welfare state. Although there has been less overt use of racist stereotypes to build support for neoliberal policies in the UK, accounts of racialized inner city violence have been used to justify increased police surveillance and more punitive sentencing (Hall et al, 1978). If the prison systems in America, and England and Wales are exercising state racism — and I have argued that the gross racial disproportionality and increased risk of literal and political death for prisoners means that they are — then neoliberal policies have intensified this state racism. Neoliberalism has thus both contributed to racialized inequality, and has been facilitated by existing prejudices around race, poverty and crime, creating an inter-relationship that Goldberg (2009) describes as "racially driven neoliberalisms and neoliberally fueled racisms" (viii).

Race, Ethnicity and Incarceration

Power dynamics around race and criminal justice in both America, and England and Wales, are more complex and multidimensional than is captured in my analysis of how imprisonment shapes the contemporary construction of Blackness. The importance of taking a
broader analytical lens on issues of race and incarceration can be demonstrated by the differences between the proportion of prisoners in the US during 2009 who were Black, and the proportion who were not racialized or ethnic minorities. In addition to the 39% of male prisoners identified as Black, this latter group also includes 21% identified as Hispanic or Latino, and the 7% of prisoners whose race is not specified, which includes "American Indians, Alaska Natives, Native Hawaiians, other Pacific Islanders, and persons identifying two or more races" (Ministry of Justice, 2010b, 27). A total of 67% of male prisoners in 2009 and 51% of female prisoners were not non-Hispanic Whites, which means that the majority of prisoners in America were either racialized minorities, members of a Latino/a and/or Hispanic ethnic group that is at least partially racialized (as I will explore below), or both (e.g. Hispanics who identify as Black). Although some of these racialized and ethnic minorities are over-represented in the American prison population (e.g. American Indians), others do not seem to be over-represented (e.g. Asians)\textsuperscript{68}.

When one considers the high incarceration rates of Hispanics, Blacks, and aboriginal people in the US it becomes clear that the criminal justice system disproportionately impacts multiple racialized and ethnic minority groups. Although Blacks have the highest incarceration rates, the connections between race, criminalization and imprisonment are not restricted to Black people, but extend to other groups who are constructed as non-White. The significant under-representation of Whites amongst prisoners in the US suggests that the criminal justice system is playing a key role in maintaining White privilege, ranging from relative freedom from

\textsuperscript{68} In addition to the fact that the Bureau of Justice Statistics does not provide figures for the numbers or proportion of prisoners who are Asian, there is very little literature about Asian Americans and imprisonment. However, in the 2000 census 3.6\% of the US population identified as Asian (US Census Bureau, 2001, 3), and in 2006 only 3.7\% of the prison population were "Asian, American Indian or Alaska Native, and Native Hawaiian or other Pacific Islander" (Bureau of Justice Statistics, 2007a, 7). It is therefore possible to deduce that Asian Americans are - at minimum - not significantly over-represented amongst the prison population, and may even have been under-represented.
police surveillance and searches, to the lack of stigma and economic disadvantage associated with imprisonment.

To understand the complex and overlapping logics of power around multiple racialized and ethnic groups in America, it is useful to draw on Andrea Smith's (2006) account of the three pillars of racism. Smith (2006) identifies three types of racism in the US: racism towards aboriginal peoples based on genocide and colonialism, racism towards non-European immigrants based on Orientalism and colonialism, and racism towards Blacks based on slavery and capitalism. A fuller account of the power dynamics around race and incarceration in America therefore requires me to consider aboriginal people, and forms of ethnic identity, including Latino/as and Hispanics. Moreover, Smith's (2006) attention to race and Orientalism highlights the need to analyze the ways in which Muslims and Arab-Americans have been targeted for increased surveillance and detention since the terrorist attacks of 9/11. Although power dynamics around race and ethnicity in England and Wales are very different from those in the US, Orientalism and Islamophobia have been evident in the anti-terrorism efforts employed in both countries. I will briefly discuss each of these issues, beginning with aboriginal peoples in America, moving on to Latino/as and Hispanics, Arab-Americans, and finally discussing Muslims in the UK.

As mentioned in my discussion of Blackness, racial and ethnic classifications are used inconsistently in official reports about prisons. The American Bureau of Justice Statistics usually lists prisoner numbers in terms of Black, White, Hispanic and Other (e.g. Bureau of Justice Statistics, 2010b, 31). This presentation of figures about the race of prisoners erases the existence of Native Americans, who are either part of the ‘Other’ category in Bureau of Justice reports (e.g. Bureau of Justice Statistics, 2007a, 7) or are omitted in the breakdown of prisoners.
by race and ethnicity (e.g. Bureau of Justice Statistics, 2010b, 28). This representation is consistent with the racist logic of genocide identified by Smith (2006) in which Native Americans are presented as having disappeared in order to implicitly justify colonial occupation and appropriation of their land. Moreover, the literal marking of aboriginal peoples as the 'Other' against which the racial categories of White and Black are defined exemplifies a process of Othering whereby colonized peoples are defined in a way that both stigmatizes them and constitutes the identity of the colonizers (Spivak, 1988).

An exception to this practice of overlooking aboriginal peoples or categorizing them as 'Other' in Bureau of Justice reports is the report "American Indians and Crime", which estimates that 2.4% of those entering federal prisons in 2001 were American Indians (Bureau of Justice Statistics, 2004, 21). According to this report, the majority of American Indian prisoners were imprisoned for violent offences, and 16% of those entering federal prisons for violent crimes were Indians (Bureau of Justice Statistics, 2004, 21). While this report specifically addresses the presence of aboriginal people in the American criminal justice system, it provides a biased and incomplete account because it ignores the ongoing role of colonialism in the state's power to make laws and punish wrongdoers. This report also reinforces the stereotype of aboriginal people as violent, while failing to explain both the jurisdictional issues that lead aboriginal people to be over-represented in federal prisons, and link between socioeconomic deprivation and criminalization. For more thorough analyses of aboriginal peoples and the American criminal justice system one must turn to the work of aboriginal scholars such as Luana Ross (1998) and Stormy Ogden (2005).

Ross (1998) explains that the regulation of Indian Country in the US represents a chaotic combination of state law and federal law, both of which over-ride aboriginal sovereignty by
taking on the power to define, judge and punish criminal behaviour. Ross (1998) stresses that
the legal jurisdiction for an offence depends on the crime, the location and the race of the
individual involved. The US legal system therefore creates double standards whereby Natives in
Indian Country fall under severe federal law, whereas non-Natives committing the same crime
in the same place would fall under the jurisdiction of less severe state law (Ross, 1998).
Moreover, non-Natives who commit crimes on aboriginal reserves escape tribal prosecution,
which means that they often do not face any kind of law enforcement (Ross, 1998, 19). These
jurisdictional issues mean that aboriginal people in America are often punished more severely
than non-aboriginal people who have committed the same crimes. Given this context, the over-
representation of Native Americans amongst those held in federal prisons for committing violent
crimes at least in part reflects biases in the organization of the US criminal justice system itself.

These issues of jurisdiction and sovereignty are also crucial in understanding what
constitutes a criminal act, because many Natives are imprisoned due to the criminalization of
traditional hunting, fishing or subsistence gathering practices that are covered by treaties
(Ogden, 2005)\(^\text{69}\). It is therefore important to view questions of bias against aboriginal people in
the broader context of the colonial legal system, which is founded on the denial of aboriginal
sovereignty, often does not acknowledge the legitimacy of traditional Native practices, and may
ignore treaties:

Acknowledgement of the fact that law (a Euro-American construct) itself, and the
administration of law, is biased against certain categories of people is crucial…The
number of jailed Natives is a chilling indication – a reminder that, because deviance is
socially constructed, crime statistics exhibit discretion in defining and apprehending
criminals. (Ross, 1998, 89)

\(^{69}\) Unfortunately, both the general unavailability of data about Native Americans in official reports and the colonial
system of criminal law make it impossible to provide figures for the numbers or proportions of Native Americans
imprisoned for participating in traditional practices.
This association between aboriginal people and lawlessness or criminality through the figure of the 'savage' is in some ways similar to the negative associations with Blackness. As is the case with disproportionate police surveillance towards Black communities, this association between aboriginal peoples and criminality is linked to closer scrutiny by police, and a presumption of guilt.

Given the criminalization of traditional aboriginal practices, which Ogden (2005) regards as equivalent to the criminalization and destruction of aboriginal culture, it is unsurprising that aboriginal people are over-represented amongst American prisoners. Ross (1998) cites figures from 1995 showing that Natives constituted 2.9% of prisoners in America (89), which is almost double the 1.5% of the population who self-identified as American Indian or Alaskan Native in the 2000 Census (US Census Bureau, 2006, 2). In some states Natives represent far higher proportions of the prison population: 33% in Alaska, 24% in South Dakota and 17% in Montana, in each case a proportion far higher than their presence in the state population (Ross, 1998, 89). Ogden (2005) goes further, estimating "on any given day, one in twenty-five Native Americans are under the jurisdiction of the criminal justice system" (57).

Both Ross (1998) and Ogden (2005) also identify problems of the poor treatment of aboriginal people within American prisons, and argue that aboriginal women face particularly acute problems. They argue that aboriginal prisoners face racism from prison staff, the threat or actuality of parental rights being terminated, the lack of culturally appropriate counselling, and illegal restrictions upon the ability of Native prisoners to practice their religion. Native women prisoners may be particularly subjected to these forms of cultural abuse, since they often lack access to facilities that are available to male prisoners in the same state, such as a Sweat Lodge (Ross, 1998, 138). Through the critical lenses provided by Ogden (2005) and Ross (1998), the
representation of aboriginal people in the government report "American Indians and Crime" reinforces the portrayal of Native Americans as prone to violence and lawlessness, while erasing state violence and the connection between colonialism and criminalization.

The US Census Bureau categories used to classify prisoners include multiple categories of race, but only two main categories of ethnicity: "Spanish/ Hispanic/ Latino" and "not Spanish/ Hispanic/ Latino" (US Census Bureau, 2001, 1). As I argued earlier in this chapter, Bureau of Justice reports tend to present racialized categories and Latino/Hispanic ethnic identification as if they were mutually exclusive, despite despite US Census Bureau guidelines to the contrary. In 2009, 21% of the male prison population in America was Hispanic (Bureau of Justice Statistics, 2010b, 27) and incarceration rates for Hispanic men were 2.4 times those of non-Hispanic White men70. Hispanic women were also imprisoned at a disproportionately high rates, comprising 17% of the approximately 100,000 women imprisoned in 2009 (Bureau of Justice Statistics, 2010b, 27), and their incarceration rate was 1.5 times that of non-Hispanic White women71. I have already discussed how high Black incarceration rates have increased racialized inequality between Blacks and Whites; the disproportionately high incarceration rates of Hispanics have similarly contributed to social inequality between Hispanics and Whites. According to Western (2002), wage inequality between Hispanics and non-Hispanic Whites would be 12.2% lower without incarceration, meaning that high Hispanic incarceration rates are having a significant impact on overall ethnic inequality.

The inconsistency between the way Latino/as and Hispanics are represented in the Census compared with Bureau of Justice reports is indicative of the theoretical complexity and

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70 The incarceration rate for non-Hispanic White men was 487 per 100,000 in 2009, whereas the rate for Hispanic or Latino men was 1,193 per 1000,000. (Bureau of Justice Statistics, 2010b, 28)

71 The incarceration rate for non-Hispanic White women was 50 per 100,000 in 2006, whereas the rate for Hispanic or Latina woman was 74 per 100,000. (Bureau of Justice Statistics, 2010b, 28)
ambiguity surrounding the concepts of race and ethnicity. The traditional distinction between race and ethnicity drawn by Weber is that ethnic groups are defined in terms of customs such as language, food, religion etc., while racial groups are defined in terms of inherited characteristics of descent (Banton, 2008). However, there are decades of scholarship demonstrating that racial categories are constructed and refer not to biological or inherited differences, but to ideas and discourses about biological or inherited difference. Moreover, some contemporary race theorists such as Gilroy (2000) have called for a rejection of the concept of race and greater attention to Black culture, which is reminiscent of Weber's account of ethnicity. The extent to which race and ethnicity are actually distinct concepts is therefore debatable, although a thorough analysis of this issue is beyond the scope of my dissertation.

The conceptual distinction between race and ethnicity is further complicated by the differences between the experiences of ethnicity amongst those who are White in comparison to those racialized as non-White, and there can be ambiguity where an ethnic identity is partly racialized. In America Whiteness has been historically associated with privilege, and some immigrant groups during the nineteenth and twentieth centuries sought recognition as White in order to gain socioeconomic status, which may have altered their experiences of ethnic identity. Winant (1994) argues that Whites are often able to choose whether or not to identify with an ethnic group in a given context, and sometimes even between ethnic groups, whereas non-Whites may face restricted options of ethnic identification or may have an ethnic identity imputed to them. This is particularly relevant for analysis of Latino/as and Hispanics in the US for whom race and ethnicity seem to be inter-connected, both in terms of their self-identification and the way they are perceived by others.
In the 2000 census 48% of Hispanics identified as White, while 42% identified as "other" in terms of racialized identity (US Census Bureau, 2001, 10). Given that only 0.2% of non-Hispanics self-identified only as "some other race" (US Census Bureau, 2001, 10), the fact that 42% of Hispanics did so suggests that the Hispanic population feels ill-at-ease with the prevailing racial categories. Moreover, the likelihood that a Latino/a or Hispanic person will identify as White is linked to their class: those who identify as White tend to be wealthier than those identifying as Black or other (Gomez, 2009). This suggests both that the racial identification of Latino/as and Hispanics is complex, and that Whiteness is strongly associated with a privileged economic status. Gomez (2009) concludes that: "The category 'white' has a different meaning for Latinos and encompasses more than just a racial classification. It symbolizes a position in society that includes a mejoramiento or ‘betterment of conditions’" (153). In addition, many non-Hispanic Americans perceive Hispanics as non-White, leading Blum (2002) to conclude that Latino/as or Hispanics are "a panethnic group that is viewed (by both ingroup and outgroup) as partially racialized" (154).

This brief analysis of aboriginal people and Hispanics in the US prison system demonstrates the importance of considering colonialism in relation to power dynamics around race and ethnicity, again an issue that Foucault overlooked in his analysis of both the prison and state racism. Native Americans are imprisoned within a legal system that has imposed colonial laws and institutions upon them, including ideas about what constitutes crime and appropriate punishment. Colonialism and the use of coercive state power around border control also shapes the experiences of Americans who are constructed as the 'wrong kind' of immigrants, including many Latino/as and Hispanics. Although analysis of immigration is beyond the scope of this project, it is important to recognize that coercive law enforcement around immigration targets
some racialized and ethnic minority communities in the US. In 2009 jail jurisdictions in the US held over 24,200 inmates for the US Immigration and Customs Enforcement (ICE), many of whom will have been from Mexico or Central America (Bureau of Justice Statistics, 2010d, 1). Given that ICE operates outside the conventional criminal justice system, figures for the incarceration of Latino/as and Hispanics within American prisons and jails may understate the extent to which they are targeted for surveillance and detained by law enforcement agencies.

A different problem is faced by Middle Eastern or Arab-Americans, who the US Census Bureau classifies as White but have been subject to profiling from US law enforcement agencies since the terrorist attacks of September 11th 2001 (Hassan, 2002; Cainkar, 2008). On the 2000 census 1.2 million Americans, or 0.4% of the US population, reported themselves as having Arab ancestry (US Census Bureau, 2003). However, the prevailing categories for classifying race and ethnicity render Middle Eastern and Arab Americans invisible in most official reports, including figures about prison populations, which makes it impossible to analyze their incarceration rates. Despite the official classification of Middle Eastern and Arab Americans as White, since 9/11 they have often been represented as visibly different in media reports, and law enforcement agencies have used profiling towards those or are or look Arab, including under the Patriot Act (Hassan, 2002; Winant, 2004; Naber, 2008). There is therefore a tension between the census classification of Middle Eastern and Arab Americans as non-Hispanic Whites, and their representation and treatment post-9/11 as 'Other' in terms of race, ethnicity and/or religion. Although not all Middle Eastern or Arab Americans are Muslim, and not all Muslims in America are Middle Eastern or Arab, discourses since 9/11 have tended to identify Middle Eastern and Arab Americans with Islam and to construct them as a potential threat.
The combination of profiling for Arab and Middle Eastern men and their classification as White may have contributed to the falling disparity between Black and White incarceration rates since 2001. Between 2000 and 2006 the Bureau of Justice records that the proportion of White prisoners rose from 32.7% to 35.1%, and the proportion of Black prisoners correspondingly fell from 42.4% to 37.5% (Bureau of Justice Statistics, 2007, 7). The lack of clear information makes it difficult to draw any firm conclusions, but this rise in the proportion of White prisoners might partially reflect rising incarceration rates of Middle Eastern or Arab-Americans, rather than a turn away from law enforcement that targets racial and ethnic minorities. By 2009, the proportion of White prisoners had fallen back to 33% while the proportions of Black and Hispanic prisoners rose again (to 39% and 21% respectively), and it is unclear whether this reflects any changes in incarceration rates of Middle Eastern or Arab-Americans.

Profiling those who are or ‘look’ Arab is also absent from prison statistics because many of these people have been handled outside the conventional legal system, through secret immigration hearings, deportations, and detention facilities such as Guantanamo Bay (Hassan, 2002). In the weeks following 9/11 over a thousand people were detained, many of whom were Arab or Muslim (Hassan, 2002), and thousands more have been deported since (Cainkar, 2006). Media portrayals and public perception of Muslims have also shifted since 9/11, and there are allegations of profiling of Muslims as part of anti-terrorism efforts (Winant, 2004; Naber, 2008). However, since the US authorities do not provide information about the religion of prisoners it is not possible to analyze Muslim incarceration rates.

The treatment of Arab-Americans in recent years has led some to argue that Arab-Americans are being racialized as non-White even though their difference is being defined in
cultural, not biological, terms (Naber, 2008; Jamal, 2008; Cainkar, 2008). The construction of difference regarding Arab-Americans is linked to American foreign policy and is therefore different from the discourses and practices of racialization experienced by Blacks and Native Americans. The stereotypical figure of the ‘terrorist’ is defined in terms of visible difference that is gendered and racialized, including skin colour, modes of dress, and beardedness for men. Cainkar (2008) concludes that this combination of visible difference and official Whiteness makes Arab-Americans doubly disadvantaged because they are "excluded from whiteness and from mainstream recognition as people of color. They are still officially white and ineligible for affirmative action" (49).

Whereas the 2000 US Census features categories of race and ethnicity, the 2001 Census in England and Wales employed categories of ethnicity that seem to encompass race and nationality. This classification is justified on the basis that:

Since ethnicity is a multi-faceted and changing phenomenon, various possible ways of measuring ethnic groups are available and have been used over time. These include country of birth, nationality, language spoken at home, parents' country of birth in conjunction with country of birth, skin colour, national / geographical origin, racial group and religion. What seems to be generally accepted, however, is that ethnicity includes all these aspects, and others, in combination. (UK National Statistics, 2003, 12)

Both the specific categories used in England and Wales and the decision to employ categories of ethnicity instead of, or in addition to, racialized categories reflects the history around race and ethnicity in the UK. Post-war patterns of immigration in the UK involved large numbers of former colonial subjects who were defined in both racial and ethnic terms (Cole, 2003), and hence debates over immigration and multiculturalism are conducted in terms of ethnicity whilst often assuming that many ethnic minorities are non-White (Nederveen Pieterse, 2002). In contrast, in the US, ethnic categories served in the early twentieth century as a means of recognizing the distinctiveness of groups of European immigrants, whilst incorporating them...
into a racial identity as White (Omi & Winant, 1986). The way that these histories shape prevailing racial and ethnic classifications further complicate theoretical questions around race and ethnicity, and suggests the need for caution in making comparisons between national contexts.

The statistics about ethnicity and criminal justice in England and Wales make it clear that Blacks are not the only group who are incarcerated at disproportionately high rates, or who face profiling from police. In 2009 Asians constituted 7.4% of male prisoners and 3% of female prisoners (UK Ministry of Justice, 2010b, Table S5.03), although they were 4% of the population in England and Wales according to the 2001 census\textsuperscript{72}. Asians also constituted 8.8% of those stopped and searched by police in 2008/9, making them more than twice as likely to be searched as Whites (UK Ministry of Justice, 2010a, 8). The report for 2008/9 does not provide the reasons for police searches (UK Ministry of Justice, 2010a & 2010b), but the figures for 2005/6 show that the proportion of police searches for drugs was higher for Asians than for any other ethnic group\textsuperscript{73}. People of mixed ethnic identification also seem to be incarcerated at disproportionately high rates, since they made up 3.4% of male prisoners and 3.9% of female prisoners in 2006 (UK Ministry of Justice, 2007, 89) despite being only 1.2% of the population in the 2001 census\textsuperscript{74}. Again this over-representation amongst prisoners is likely to be at least partially the result of the police searching the group at disproportionately high rates, because people of mixed ethnic identification constituted 2.8% of those stopped and searched by police, making them over twice as likely to be searched as Whites (UK Ministry of Justice, 2010a, 8).

\textsuperscript{72} Figures from the National Statistics Online website \url{http://www.statistics.gov.uk/CCI/nugget.asp?ID=273}, retrieved on Feb 26th 2010.

\textsuperscript{73} In 2005/6 58% of searches on those of Asian appearance were for drugs, as compared with 50% of searches on Blacks, and 39% on Whites (UK Ministry of Justice, 2007, 31).

\textsuperscript{74} Figures from the National Statistics Online website \url{http://www.statistics.gov.uk/CCI/nugget.asp?ID=273}, retrieved on Feb 26th 2010.
Muslims also seem to be substantially over-represented amongst prisoners in England and Wales, and constitute a rising proportion of prisoners. In 2001 Muslims constituted only 6.5% of prisoners, a proportion that had been stable for several years, but by 2006 they were 10.6% of prisoners in England and Wales\(^{75}\) — a substantial over-representation given that the 2001 Census recorded 2.7% of the population as Muslim. According to a publication by the Directorate of High Security in the Prison Service, Muslim gangs were causing problems at Whitemoor Prison where almost a third of prisoners are Muslim\(^{76}\). This report states that the "very high Muslim population" in the prison caused "anxiety and apprehension amongst some staff" (Directorate of High Security in the Prison Service, 2008, 5) and alleges that:

> There were now more drugs, gangs and terrorists...Staff appeared frightened to talk to prisoners in the Segregation Unit for fear of racial complaints, they also appeared fearful of Cat As, terrorists and potential hostage taking. There is an overall concern that Muslim prisoners are taking control. (Directorate of High Security in the Prison Service, 11)

This report about Whitemoor Prison is startling, not least because it suggests that the prison service was inadequately prepared for the influx of Muslim prisoners as a result of anti-terrorism legislation and profiling by police.

Foreign policy, specifically the wars in Iraq, Afghanistan, and global 'war on terror', therefore seems to have influenced domestic law enforcement in England and Wales, just as it has in the US. In both cases, Muslim residents have become suspect as a result of colonial wars, and government authorities have sough to justify this suspicion with reference to the threat of terrorism and suicide bombers. The politics around race, ethnicity, and religion in England and

\(^{75}\) Figures taken from UK Ministry of Justice, 2007a, 126. Figures about the religious affiliation of prisoners in 2009 are not available (UK Ministry of Justice, 1010a & 2010b); see footnote 56 for details.

\(^{76}\) The report was obtained by the Howard League for Penal Reform using a Freedom of Information request and is available at their website [http://www.howardleague.org/index.php?id=623](http://www.howardleague.org/index.php?id=623). There was considerable media coverage after the publication of the report’s contents by the Howard League, e.g. [http://news.bbc.co.uk/2/hi/uk_news/7419857.stm](http://news.bbc.co.uk/2/hi/uk_news/7419857.stm). Both retrieved 6th June 2008.
Wales are therefore shaped both by the history of British colonialism, and by what Gregory (2004) terms 'the colonial present'. This targeting of Muslims in anti-terrorism efforts in the UK has raised concerns amongst human rights activists, and the organization Liberty alleges:

Police powers have been used disproportionately against the Muslim population in the UK…All of those detained indefinitely have been Muslim men. The way in which anti-terror powers are being used has lead to feeling of isolation amongst many of the 1.6 million Muslims in the UK. There is disillusionment with the government which, rather than protecting them from this backlash, is effectively criminalising them as a community. (2004, 3)

The 2004 Liberty report argues that the suspicion and criminalization of Muslims is damaging to the relationship between the Muslim community and authorities, impedes the gathering of good intelligence, and may encourage extremism. These observations are both prescient and poignant, given that the report was published a year before the July 7th 2005 London bombings in which over fifty people were killed. Since the bombings police anti-terrorism efforts have intensified, and Muslims have continued to be the focus of suspicion and surveillance.

Police discretion about who they search was substantially increased by the 2000 Terrorism Act which, unlike other stop and search provisions in UK law, gives the police the power to conduct searches without ‘reasonable cause’ to believe that the person has committed an offence. The 2000 Act allows for such searches on the grounds of terrorism provided that they are undertaken within a defined area for which prior authorization has been given, and this authorization expires after 28 days. In practice, such searches have been authorized since 2000 for almost all of London because "an authorisation for the entire Metropolitan Police District had been continuously renewed in a 'rolling programme' since the powers were first granted" (Gillan & Quinton v the United Kingdom, 2009).
These stops and searches for terrorism have been used disproportionately towards those who are Black and Asian\textsuperscript{77}. In 2008/9 there were 197,008 searches conducted for terrorism and 34.4\% of those searched did not identify as White, of whom 16.4\% were Asian and 12.7\% were Black\textsuperscript{78}. The majority of terrorism searches occurred in London, where both the Metropolitan Police and City of London Police show clear racial biases in who they searched\textsuperscript{79}. Although several hundred thousand searches occurred under the 2000 Terrorism Act there were only 1,471 arrests for terrorism between September 2001 and March 2008, of which a mere 23\% were charged with a terrorism related offence \textsuperscript{80}. During 2008/9 there were a total of 1,233 arrests resulting from terrorism searches, so fewer than one in 150 searches lead to an arrest for any offence (Ministry of Justice, 2010b, Table S3.06a 0809).

The 2000 Terrorism Act has attracted criticism for providing a broad definition of terrorism that criminalizes those involved in many ethnic minority political organizations, and for the powers of search and arrest that it grants. Given that under 1\% of those searched under the 2000 Act are arrested, Pantazis and Pemberton (2009) argue that the searches are ineffective at finding terrorists, damage relations between the police and Muslim communities, and may contribute to radicalization and thereby inadvertently promote terrorism. A recent European Court of Human Rights judgement also challenged the stop and search powers provided under the Terrorism Act, ruling that they breached the right to privacy under Article 8 of the European

\textsuperscript{77} Although the police are required to collect information about the self-identified ethnicity of everyone they stop and search, information is not provided about religion and it is therefore impossible to know what proportion of those searched are Muslim.

\textsuperscript{78} Figures calculated from data in UK Ministry of Justice, 2010b, Table S3.06a 0809

\textsuperscript{79} In 2008/9 the ethnic appearances of people searched by the City of London Police under the Terrorism Act were 13.3\% Asian and 10.9\% Black, while those searched by the Metropolitan Police were 16.9\% Asian and 13.2\% Black. Figures calculated from data in UK Ministry of Justice, 2010b, Table S3.06a 0809.

Convention on Human Rights. *Gillian and Quinton v the United Kingdom* found that the wide discretion granted to police in conducting searches for terrorism was open to arbitrary or discriminatory use:

In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration...The available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics. (2009, paragraph 85)

A recent report by the Institute of Race Relations (2010) also criticizes anti-terrorism policing for constructing all Muslims as suspects. In particular, they criticize the way funding for the PREVENT strategy was automatically assigned to any area with over 2000 Muslims, with the funding made proportional to the number of Muslims instead of a response to local conditions (Institute of Race Relations, 2010). The use of Census statistics about religion to guide local policing strategies is a clear example of biopower, and suggests that Muslims as a group are being conceptualized as potentially violent and in need of surveillance. There is also evidence of "the embedding of counter-terrorism police officers within the delivery of other social services" (Institute of Race Relations, 2010, 77) as teachers and social workers face pressures to provide intelligence to police. The National Association of Muslim Police echo these criticisms, arguing that these anti-terrorist strategies stigmatize Muslims, contribute to Islamophobia, and under-estimate other terrorist threats, such as the extreme right.

The characterization of Muslims as posing a threat of violence in both police anti-terrorism strategies and the report about Whitemoor prison is typical of what Edward Said

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81 The NAMP Memorandum to the House of Commons Select Committee on 'Preventing Violent Extremism' was retrieved from [http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcouncil/memo/previex/m7102.htm](http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcouncil/memo/previex/m7102.htm) on Jan 25th 2010.
(1979) identified as Orientalism. In his highly influential analysis, Said (1979) argues that the association of Muslims with violence is a remnant of Crusades-era Christian thought that became central to later Western colonial discourse, producing "the great European fear of Islam" (254). The representation of Arab Americans in the US, and of Muslims in both the UK and US, as actual or potential terrorists therefore draws on longstanding Orientalist tropes of Muslims and Arabs as less civilized or pre-modern, inferior and menacing. The incarceration of Muslim prisoners as part of national and international campaigns against terrorism marks the intersection between the fields of enquiry of Said and Foucault. While Said (1979) acknowledges his debt to Foucault, he has also criticizes Foucault’s Eurocentrism (Racevski, 2005) and his failure to acknowledge the dependence of Western knowledge on "imperialist ideology and colonial practice" (cited in Chuaqui, 2005, 105). Recent practices of terrorist profiling and discourses about the threat posed by Muslims suggest that Orientalism continues in the American, and English and Welsh criminal justice systems, including at the level of official policy.

Conclusion

In both the United States, and England and Wales, Whites are under-represented in prisons while multiple ethnic minorities and/or non-White racialized groups are substantially over-represented. Blacks have the highest incarceration rates and in both countries Black men are imprisoned at around six times the rate of White men, so it is therefore not surprising that most of the literature about race and prisons focuses on this group. To complicate matters, however, not all groups racialized as non-White are over-represented amongst prisoners: neither Asians in the US, nor Chinese people in England and Wales are over-represented in their
respective prison populations. Moreover, other groups for whom figures are not available, such as Arab Americans, may be over-represented. Despite the inconsistencies in official categories of race and ethnicity, a clear pattern emerges: ethnic minorities and those racialized as non-White tend to be greatly over-represented in prisons, and therefore the negative consequences of imprisonment attach disproportionately to those groups. This over-representation amongst prisoners seems to be at least partially the result of disproportionate surveillance, because racialized and ethnic minorities are targeted for police searches, particularly for drugs and terrorism. The War on Drugs and the more recent War on Terror have therefore involved the suspicion and incarceration large numbers of racialized and ethnic minorities, with seemingly little concern about whether these biases were just. Regardless of the intention, the effect of these policies has been to create stigma, social divisions and economic disadvantage amongst the communities affected.

Drawing on Foucault's (1990; 2003) account of biopower, I argue that the police and prisons contribute to the construction of racialized identities, and that they exercise state racism in Foucault’s broad sense of the phrase by subjecting particular racialized groups to an increased risk of death. The criminal justice system constructs race in several senses: firstly in the sense outlined by Foucault (2003) around biopower and the construction of distinct categories within the population through statistics. However, criminal justice systems also give meaning to the racialized categories that are created, for instance by associating Whiteness with low incarceration rates, and relative freedom from suspicion and police surveillance. In contrast, Blacks are likely to be targeted for police surveillance, particularly for drugs, and the high incarceration rates of Blacks contribute to the association of Blackness with criminality. These biases in policing and incarceration therefore shape racialized associations and stereotypes,
increase the salience of racialized divisions, and variously shape the life chances of racialized and ethnic individuals and communities.

While there are similarities between the American, and English and Welsh prison systems regarding the racialized biases in policing and imprisonment, the scale of the US prison system and the exceptionally high incarceration rates for young, Black men set it apart. The sociologist Loic Wacquant describes the prison as "the pre-eminent institution for signifying and enforcing Blackness, much as slavery was during the first three centuries of US history" (2001, 119), and I share his belief that the prison is an important race-making institution. Although England and Wales has far lower incarceration rates than the US, the significance of prisons and policing upon racialization and the meaning attached to ethnic and religious identities is growing due to carceral expansion. However, a great many social and governmental institutions contribute to the construction of racialized identities, from the Census, to the education system, to the labour market, to spatial divisions such as racially segregated neighbourhoods.

The criminal justice system and prisons are therefore part of a network of processes and institutions that produce racialized categories, identities and inequalities. Although this echoes Foucault's (1995) account of the prison as part of a "carceral network" (305), I reject Foucault's argument that the specificity of the prison is lost as a result. Instead, I believe that the prison is distinguished by operating as the ultimate marker of disadvantage or, as Coyle (2005) observes, "In most countries one can discover which are the marginalized groups in society by analysing the prison population." (60). I have already argued that imprisonment contributes to the political and economic marginalization of prisoners, their families, and their communities, but prison populations also reflect patterns of socioeconomic disadvantage and exclusion. By failing to consider the demographics of prisoners, Foucault (1995) overlooks the use of biopower in
criminal justice and the insights about race, gender, class and power to be gleaned from such study.

My analysis suggests that power relations around race are more complex than those outlined by Foucault (2003), because race has been historically entwined with class, ethnicity, religion and colonialism, and these dynamics continue to overlap, for example in the construction of terrorist suspects. Although Foucault's (2003) account of biopower and state racism provides insights into how racial categories relate to statistics and to the use of state violence, he largely ignores the impact of international power dynamics on the construction of domestic populations. A more complete analysis of power relations around race would therefore need to be grounded in a considerably less Eurocentric account of history than that provided by Foucault, and would need to extend beyond the criminal justice system to consider areas such as immigration. Lastly, race intersects with sex/gender in important ways, which I will explore in the following chapter.
Chapter Seven: The Constitution of Sex/Gender in Prison Systems

Overview

This chapter explores the construction of sex and gender in the criminal justice systems, and more specifically the prison systems, of the United States, and England and Wales, drawing on the theory around sex, gender and sexuality outlined in Chapter Five, and on empirical literature and data. As I argued in Chapter Five, sex/gender and race are constituted in myriad ways through multiple techniques of power, and there are complex intersections between sex/gender, race and ethnicity. An exhaustive analysis of how prisons relate to all these intersectional identities is beyond the scope of this thesis, so I will illuminate these power dynamics by exploring two dimensions of the construction of sex/gender within prisons: the management of transgender people\textsuperscript{82}, and the constitution of Black masculinity. In the first part of this chapter I analyze the policies and practices towards transgender prisoners, which highlights how binary sex/gender categories of male/female, man/woman and masculinity/femininity are constructed in English and Welsh, and American prison regimes. The second part of this chapter explores the intersections of race with sex/gender in the prison systems of the United States, and England and Wales, with particular attention to the most incarcerated group: Black men. I will argue that criminalization and imprisonment are shaping forms of racialized masculinity, and that the extremely high incarceration rates in the US for young, impoverished Black men contribute to a form of aggressive hyper-masculinity that is at odds with what Mutua (2006) describes as "progressive black masculinities" (xiv).

\textsuperscript{82} As explained in Chapter Five, the term transgender is an umbrella term that refers to a range of people with non-normative gender identification, including (but not limited to) those who identify with a sex/gender identity other than that assigned at birth, those who identify outside binary categories of sex/gender, cross-dressers, and drag kings or queens.
My overall argument in this chapter is that criminal justice and prison systems contribute to the construction of sex/gender identities, and to inequalities that work upon and through those identities. As I have already argued in reference to race, the categorization of prisoners in official statistics is an exercise of biopower that constructs and naturalizes forms of identity: in this case the idea of binary sexes and/or genders. I also draw on Foucault's (2007) account of the overlap between multiple forms of power in the form of "a triangle: sovereignty, discipline, and governmental management" (107-8), as discussed in Chapter Four. I will show how prisoners' sex and gender identities are constructed using a combination of biopower, discipline and sovereign power, and argue that these techniques of power operate in a mutually-reinforcing way to constitute and enforce normative sex/gender identities. In the latter part of this chapter, I will also explore the overlap between the way that the English and Welsh, and American criminal justice systems construct racialized identities through biopower, and the role of the prison in constituting sex/gender identities.

The categorization of prisoners as male or female and their placement in separate men's and women's prisons is an exercise of biopower that enforces and naturalizes binary sex/gender identities, while erasing the existence of transgender and intersex people. Moreover, sex-segregated prisons enable the imposition of gendered disciplinary rules and norms that construct particular kinds of normative masculinity and femininity. The operation of biopower to categorize prisoners as male or female is therefore a pre-requisite for sex segregation, and for the exercise of gendered disciplinary power that reinforces the binary sex/gender categories and identities that biopower works upon and through. These normative sex and gender identities are

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83 In Chapter Five I provide a detailed account of the concepts of sex and gender, and the relationship between them. As a reminder of that argument: sex is conventionally seen as referring to biological differences in sex organs, hormones, genes etc. while gender is conventionally seen as referring to socially constructed differences in modes of dress, behaviour etc. In much of my analysis I use the term sex/gender to indicate that categories of sex and gender are entwined and not independent, because the idea of binary sex is a product of binary gender categories that are used to interpret bodily difference.
also enforced through sovereign power due to the threat or actuality of physical violence towards gender-variant people, including sexual assault. I also use the concept of somatechnics (explained in Chapter Five) to show how people's bodies are modified in relation to normative ideals of sex and gender, including through the use of exercise, hormones, and surgery. I conclude that the American and English prison systems contribute to the somatechnic transformation of prisoners bodies, through means such as the rules about physical appearance, and the provision (or lack thereof) of gender-confirming healthcare. This somatechnic transformation of the body is not reducible to the techniques of power identified by Foucault, but it overlaps with how discipline, biopower and sovereign power construct and reinforce sex/gender identities.

My analysis of the construction of sex and gender in prisons focuses on transgender people — a group that is erased in official reports and statistics, and whose perspectives exemplify what Foucault terms "subjugated knowledges" (2003, 7). Even if there are only a small number of transgender people in prison — and the numbers are unknown — this issue is important because it reveals a great deal about the gender politics in the prison systems of the US, and England and Wales, and the broader societies. By focusing on transgender people one can learn how sex and gender are defined, whether they are seen as binaries or existing along a spectrum, fixed or changeable, and what processes are deemed necessary to change one's sex and/or gender in a given jurisdiction. Centring an analysis on transgender people also highlights the subtle (or, sometimes, not so subtle) gendered norms within a society, including assumptions about body shape, appearance, dress, and the somatechnic practices deemed appropriate to obtain that bodily appearance. Attention to the experiences of transgender prisoners therefore reveals the sex/gender categories and gender norms that govern all prisoners, but which are
denaturalized and therefore made more visible when applied to transgender and gender-variant prisoners than when applied to cisgender\textsuperscript{84} and normatively-gendered inmates. By analysing transgender prisoners I therefore hope to bring attention not only to a disadvantaged group that has been ignored in much of the literature about prisons, but also to generate insights about the construction of sex and gender more broadly.

Analysing the policies and practices towards transgender prisoners in the US and England and Wales requires me to briefly address the broader policy frameworks that have major implications for transgender people. I will discuss three policy areas that have a major impact on transgender people in the UK and US: legal rights for transgender people, gender recognition policies, and access to gender-confirming healthcare. Sometimes transgender people are explicitly mentioned in government policies or regulations, but in other cases a policy or law has important implications for transgender people but does not mention them explicitly. I will briefly compare and contrast the approaches taken in each of these policy areas, show how these policies interact, and explain what consequences they have for transgender people who are imprisoned. My analysis reveals that the approach towards transgender prisoners in England and Wales differs substantially from that in the US due to differences in three policy areas. In the UK transgender people are a protected group by law, there is a process for comprehensive gender recognition, and all citizens have access to gender-confirming healthcare (including genital surgeries) through the NHS. By contrast, in the US transgender people are not an explicitly protected group in most jurisdictions, there is no process for comprehensive gender recognition, and many people lack access to gender-confirming healthcare (especially genital surgeries). The interaction between these three policy areas means that transgender people in the

\textsuperscript{84} As explained in Chapter Five, the term cisgender refers to someone who is not transgendered, i.e. whose self-identification matches the sex/gender identity that they were assigned at birth.
UK are much more likely to have their self-identified gender recognized by criminal justice agencies than is the case for transgender people in the US. The American prison system therefore plays a different role in the construction of sex/gender identities and inequalities than the prison system in England and Wales.

Sex, Gender and Imprisonment

The official censuses in both the UK and the US use binary sex/gender categories — they do not seem to differentiate between sex and gender — and do not collect information about gender-nonconfirming people, for example, those who identify as transgender or intersex. The binary sex/gender categories employed in the census are also used for statistics about prison populations, and thus there is no official data about gender-nonconfirming prisoners. According to official reports, 7% of prisoners in the United States during 2009 were female and 93% of prisoners were male. In England and Wales during 2009, official figures state that 5% of prisoners were female and 95% were male. Whereas official figures about the race and ethnicity of prisoners state that the self-identified race or ethnicity of prisoners was recorded, no similar explanation about the practices of categorization is provided for sex/gender. Official reports therefore do not make it clear whether the sex/gender recorded for a prisoner is based on self-identification, or whether a sex or gender is assigned to prisoners by criminal justice agencies and officials. In practice, the sex/gender identity recorded for a prisoner is not based on his/her self-identification, but instead depends on the gender recognition policy in that jurisdiction. This question of who determines one's sex/gender identity is important because the

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85 In 2009 there were 1,500,278 male prisoners and 113,462 female prisoners (Bureau of Justice Statistics, 2010b, 17-18).

86 In 2009 there were 79, 972 male prisoners and 4,259 female prisoners (HM Prison Service, 2009, 8)
sex/gender assigned to many gender-variant people by criminal justice agencies differs from their self-identified sex/gender, and I explore this issue of gender recognition policy for prisoners in detail later in the chapter.

Binary sex/gender categories are not only used to classify prisoners in official reports and statistics, but also to determine the facility in which a prisoner is placed. Unlike most institutions in English and American societies, prisons employ strict policies of sex-segregation by placing inmates in separate men’s and women’s prisons, or occasionally a distinct, self-enclosed women’s block within a larger men’s prison. The segregation of prisoners according to binary categories of sex/gender creates serious problems for transgender and intersex people, who may not identify with either of the binary sex or gender categories, or who may be placed in a facility that does not match their self-identified sex/gender. As discussed in Chapter Five, this classification of the population into binary sex categories of male and female is an exercise of biopower that constructs and naturalizes binary sex categories while rendering gender-variant people invisible. Like discipline, biopower works partially through internal adoption by the subjects, and hence the identities that biopower constructs can be central to subjects’ self-understanding (Hall, 1980; Bosworth, 1999; Goldberg, 2002). Biopower therefore contributes to the construction of normative sex and gender identities that match the self-identification of many cisgender and gender-conforming people, whilst erasing the identities of transgender and gender-variant people. While the use of racialized categories in the UK and US censuses both contributes to the construction of racialized identities and facilitates the measurements of some forms of racialized inequality, the use of binary sex/gender categories makes it hard to assess inequalities for transgender and intersex people.
The current practices of sex/gender classification mean that we do not know how many transgender and intersex people there are in the UK or US, nor the numbers or proportions of gender-variant people who are imprisoned. Nonetheless, research by academics, trans activists, and the Equality and Human Rights Commission in the UK has gone some way towards investigating how imprisonment impacts transgender people. I will begin by briefly exploring the broader equality provisions for transgender people, gender recognition policies, and access to gender-confirming healthcare in the UK and US, and explain how these three policy areas impact transgender prisoners. I then explore gendered disciplinary norms and the use of violence against gender-variant people, arguing that normative femininity and masculinity are constructed in prisons through the combination of biopower, discipline and sovereign power.

1. Transgender people in the UK

Transgender people are one of the groups explicitly protected from discrimination under UK law, and also under EU law (Equality and Human Right Commission, 2009). Although intersex people do not have explicit legal protection from discrimination\(^{87}\), discrimination against someone for being intersex might be covered under the broader provisions that prevent discrimination on grounds of sex or on gender reassignment.\(^{88}\) The UK also has comprehensive gender recognition, i.e. a single process for changing one's legally-recognized sex/gender identity, under the 2004 Gender Recognition Act. The 2004 Act creates Gender Recognition Panels composed of medical practitioners and lawyers whose purpose is to evaluate the

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\(^{87}\) The Equality and Human Rights Commission state on their website that they recommended a number of amendments to the 2010 Equalities Bill, including a broader definitions of transgender that would extend protection to intersex people. Retrieved from [http://www.equalityhumanrights.com/fairer-britain/trans-inequalities-reviewed/our-current-trans-work/](http://www.equalityhumanrights.com/fairer-britain/trans-inequalities-reviewed/our-current-trans-work/) on May 19th 2010. This proposed amendment about the definition of transgender was not part of the 2010 Equalities Act.

\(^{88}\) A letter from the UK Government Equalities Office dated May 6th 2010 states that while the 2010 Equalities Act does not explicitly protect intersex people, "the Act will provide protection to intersex people if they are directly discriminated against because of one of the protected characteristics - such as sex, gender reassignment or disability". Retrieved from [http://oiaustralia.com/reply-uk-government-equalities-office-intersex-exclusion-equality-act-2010/](http://oiaustralia.com/reply-uk-government-equalities-office-intersex-exclusion-equality-act-2010/) on May 19th 2010.
applications made by transgender people seeking a legal change in their gender. Anyone over eighteen is eligible to apply for a Gender Recognition Certificate based on "living in the other gender" or having formally changed their gender in a territory outside the UK (Gender Recognition Act, 2004). After receiving a Gender Recognition Certificate people will be recognized and treated as belonging to their newly-recognized gender by virtually all institutions within the UK, including the criminal justice system. A prisoner with a Gender Recognition Certificate would therefore be placed in an institution for their newly-recognized gender, i.e. a male-to-female transgender person would be placed in a women’s prison, and a female-to-male transgender person in a men’s prison.

In order to receive a Gender Recognition Certificate, an applicant must be found by a Gender Recognition Panel to have met four criteria. These criteria are: 1) a diagnosis with gender dysphoria; 2) documentation from two medical professionals outlining the diagnosis and treatment for gender dysphoria; 3) having lived under their self-identified gender for at least the past two years; and 4) that the applicant "intends to continue to live in the acquired gender until death" (Gender Recognition Act, 2004). The 2004 Act does not stipulate what kind of treatment for gender dysphoria will be regarded as sufficient, instead leaving this issue open to the judgement of the panelists. It is therefore unclear whether a Gender Recognition Panel would require evidence of gender-confirming surgery in order to grant a certificate, whether hormone treatment would be regarded as sufficient, or if a certificate could be granted without any bodily interventions being provided as treatment for gender dysphoria.

The result of receiving a Gender Recognition Certificate is explained in an oddly-worded section of the legislation, which states:

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89 The 2004 Act specifies a few exceptions to this principle of treating those who receive Gender Recognition Certificates as belonging to their newly-recognized gender, one of which is competition in "gender-affected sport" (Gender Recognition Act, 2004, section 19).

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Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman). (Gender Recognition Act, 2004)

Unlike the rest of the Act, this provision refers not only to someone’s "gender" but to one's "sex", although it then seems to conflate sex and gender by referring to sex as "that of a man" or "of a woman". There is some debate about what this passage implies about the relationship between sex and gender, and therefore about the implications of the 2004 Act for gender politics (Sharpe, 2007, Jeffreys, 2008). However, those who receive a Certificate will be granted government identification stating their newly-recognized gender, including a re-issued birth certificate. All applicants for Gender Recognition Certificates are also protected from having their medical or gender history disclosed, except to other government officials for specified reasons such as "preventing or investigating crime" (Gender Recognition Act, 2004, section 22).

The decision not to impose a standard of surgical intervention as the criteria for a change in one’s legally recognized gender makes the 2004 Act more inclusive than the policies in many other jurisdictions, and has lead to calls for similar legislation in the US (Allen, 2008). Given that transgender people have differing preferences about their bodies, and that treatments such as surgery and hormone therapy are not medically appropriate for all transgender people, gender recognition policies that require surgical intervention exclude some transgender people. Accordingly, some transgender people in the UK are unable to obtain formal recognition of their self-identified gender under the provisions of the 2004 Act, and therefore would not have their self-identified gender recognized by government institutions such as prisons. Those ineligible for a Gender Recognition Certificate include: everyone under eighteen; people who self-identify outside of a man-woman gender binary; those who do not understand their gender identity as fixed or stable; anyone who has not lived in their self-identified gender for at least two years;
and anyone who refuses medicalization and/or a diagnosis of gender dysphoria. The fact that not all transgender people are eligible for a Gender Recognition Certificate creates what the Equality and Human Rights Commission describe as "a hierarchy of rights of trans people" (2009, 6), with those in possession of a Gender Recognition Certificates at the top of this hierarchy.

The uncertainty about what forms of medical treatment will be required by the Gender Recognition Panels also means that some transgender people might be refused a Certificate if they were unwilling or unable to undergo specific treatments. During the parliamentary debates on the 2004 Act the government demonstrated an expectation that surgery would usually be involved and stated that those who had not undergone surgery would need to explain this decision to the Panel when making the application (Sharpe, 2007). The government's expectation that most people should have surgery before receiving a Gender Recognition Certificate also hints at a conflation of sex and gender amongst the framers of the 2004 Act. In practice, it is unclear whether or not Gender Recognition Panels have adopted the approach of expecting applicants to have had surgery, or what surgeries they would regard as sufficient.

Although some transgender people may not wish to have gender-confirming surgery or may object to medicalization, virtually all transgender people in the UK should have access to gender-confirming healthcare if they want it. The National Health Service (NHS) provides universal healthcare to all UK citizens (and, in practice, to many non-citizens who are resident in the UK) and is free at the point of use. The treatment available to transgender people under the NHS includes mental health services, hormone treatment, and gender-confirming surgeries such as genital surgeries. Nonetheless, there are problems with healthcare provision for transgender people in the UK, including discrimination against transgender patients by some
doctors, healthcare staff who lack knowledge about transgender issues, and long waits for treatment (Equality and Human Rights Commission, 2009).

How a transgender prisoner is classified and placed within the UK criminal justice system therefore depends on whether or not they have a Gender Recognition Certificate, and this partially depends on their gender expression and medical treatment. Transgender prisoners with a Gender Recognition Certificate should be placed in a facility with prisoners of the sex/gender stated in that certificate. In contrast, transgender prisoners without a Gender Recognition Certificate are likely to be categorized and placed in a facility according to their birth sex and not their self-identification. The fact that UK prisons are segregated according to binary sex/gender categories means that any transgender prisoner who did not identify within a male/female : man/woman binary would be classified and placed in a facility that did not match their self-identification. Further, there are likely to be problems for transgender people who are in the process of transitioning from one sex/gender to another, because it is difficult to have a gender expression that conflicts with the facility in which one is placed, e.g. in maintaining a gender expression as a man if one is in a women's prison. Prisoners also have more restricted access to gender-confirming healthcare, especially surgeries, than other UK residents (Whittle & Stephens, 2001). Transgender people who are placed in a prison that conflicts with their self-identification may face a range of problems, discrimination and abuse from other inmates or guards, and difficulties in maintaining their gender expression given the rules about dress and appearance (Whittle & Stephens, 2001).

The policy of sex segregation in prisons therefore makes it difficult to decide where to place many transgender prisoners, as exemplified in a recent case of a transgender prisoner in
Scotland. The inmate, known as 'Prisoner A', was a transgender women who had already received a Gender Recognition Certificate stating her female sex/gender, but had been placed in a men's prison. Prisoner A had limited ability to express her female gender identity due to rules prohibiting her from wearing skirts or makeup, and was therefore denied gender-confirming surgery because the doctors insisted she must live in her self-identified gender as a pre-requisite for surgery. To further complicate matters, Prisoner A was serving a sentence for manslaughter and attempted rape, and therefore prison staff might conclude that placing her in a women's prison would pose a threat to the safety of other female prisoners. This case diverges from the general approach of classifying and placing transgender prisoners based on their legally-recognized sex/gender, because Prisoner A was placed in a men's prison despite having a Gender Recognition Certificate stating that she was female. This case suggests that in practice the facility a transgender prisoner is placed in is not solely determined by whether or not they have a Gender Recognition Certificate, and that there continues to be discretion in placement policies.

Based on the single case of Prisoner A it is impossible to judge whether there are contradictions within the gender recognition and placement policies in the UK, or whether this is an unique exception from the gender recognition and placement policies for transgender prisoners as a result of Prisoner A's history of violence and the possible threat to other prisoners. The safety of prisoners is a hugely important concern and the threat posed by any prisoner towards other inmates should clearly be taken into account when making prison placement decisions. However, if the decision to place Prisoner A in a men's prison was based on concerns

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90 Scotland has its own prison system, so this case falls outside the scope of my analysis of the prison system in England and Wales. However, Scotland and by extension Scottish prisons are governed by essentially the same human rights and gender recognition legislation as in England and Wales, so very similar cases could occur in England and Wales.

about the threat that Prisoner A might pose to female prisoners and not on Prisoner A's sex/ gender, then this seems like an unwarranted conflation of issues of rape and violence with gender recognition for transgender people. As I discuss at some length later in this chapter, physical and sexual assaults occur towards both male and female prisoners, and hence concerns about the safety of prisoners should be central to all prisons. Moreover, if there is a legitimate concern about the threat posed by a prisoner then this would be more appropriately reflected in the security classification and supervision of the prisoner than in the gender recognition and placement policies. It is also worth noting that opponents to gender recognition policies based on self-identification (e.g. in bathrooms and homeless shelters) have often raised concerns that male to female transgender people might assault women, and these fears have not been borne out (Dean, 2008). While the need to ensure the safety of female inmates is an important obligation for the prison service, this does not remove or override the obligation to comply with UK and EU law regarding the rights of transgender prisoners.

Nonetheless, the impact of the 2004 Act on gender recognition policies in prisons is clear if one compares the current system to the policies that were in place for transgender prisoners in England and Wales beforehand:

A pre-operative transsexual will usually be placed initially in a prison appropriate [sic] to their birth gender. However, decisions about the location of such prisoners will normally be reached in the light of all circumstances, including the most obvious physical characteristics and the anticipated reaction of other prisoners... Post-operative transsexual prisoners are, where possible, allocated to an establishment for prisoners of their new gender (Home Office, 2000, 14).

This suggests that the previous gender recognition policy distinguished between transgender people who had undergone gender-confirming surgery on their genitalia and those who had not, with the former generally being placed in a facility according to their birth sex and the latter being placed according to their acquired sex/gender. However, the further criteria of "obvious
physical characteristics" and "anticipated reaction of other prisoners" adds considerable ambiguity and suggests that a prisoner’s placement might have depended on whether they ‘passed’ as their self-identified gender, i.e. how they were perceived by others, regardless of whether or not they had undergone surgery (Home Office, 2000, 14). This policy was further complicated by a double standard by which male-to-female transgender prisoners were treated differently than female-to-males:

There may also be problems in placing a male-to-female transsexual person in a female establishment, where she may not be accepted by other prisoners, many of whom may have suffered violent or sexual abuse from men. (Home Office, 2000, 14)

Prior to the 2004 Act, the gender recognition and placement policies in English prisons therefore lacked clarity and consistency, making the system confusing and open to abuse.

The lack of clear or consistent policies about how to determine someone's sex/gender for the purpose of prison placement prior to the 2004 Gender Recognition Act is indicative of how biopower naturalizes the identities it constructs. The effectiveness of biopower stems from the way it creates bodies of knowledge that portray binary sexes as natural and self-evident, instead of as constructs shaped by beliefs around gender and sexuality. The absence of clear rules about the placement of gender-nonconforming prisoners is therefore a product of biopower, because it reflects the assumption that sex/gender is binary, that sex and gender always match (i.e. masculine gender accompanies male sex, and feminine gender accompanies female sex), and that everyone falls clearly into one or the other sex/gender. Whereas the lack of clear rules about gender recognition both reflects and contributes to the naturalization of binary sex/gender categories, the introduction of an explicit gender recognition policy through the 2004 Act makes the constructedness of binary sex/gender more visible.
2. Transgender people in the US

The legal situation for transgender people in America is considerably more complicated than in the UK. There is currently no federal legislation in the US that explicitly prohibits discrimination against transgender people, although there have been repeated efforts to introduce protection, e.g. through an Employment Non-Discrimination Act. There is legislation banning discrimination based on gender identity and expression in thirteen American states, plus the District of Columbia, and in a further 109 cities or counties, including New York City, Chicago, and Detroit. While transgender people therefore do not have explicit legal protection from discrimination in the majority of US states, there is a body of case law in which discrimination against a transgender individual has been found to violate legislation prohibiting sex discrimination. For example, in Smith v. City of Salem (2004) the Court of Appeals for the Sixth Circuit ruled that transgender people are protected under the prohibition of discrimination based on sex in Title VII of the 1964 Civil Rights Act.

There is no comprehensive gender recognition policy in the US, so the policies vary between jurisdictions and even between different institutions within a jurisdiction. The most inclusive gender recognition policies categorize people according to their self-identified gender and would therefore place a self-identified woman in a women’s facility regardless of her medical history. Although such policies based on self-identification are unusual, they are used by a handful of institutions including homeless shelters in New York City and San Francisco (Dean, 2008). More commonly, institutions will only recognize a sex/gender identity that differs

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94 The ruling in Smith v City of Salem is online at http://www.gendertree.com/Smith%20V%20Salem%20Ohio.htm retrieved May 18th.
from the one assigned at birth if the individual provides evidence of a medical diagnosis and
gender-confirming treatment. In most US states the Department for Motor Vehicles (DMV) will
reclassify someone’s sex/gender if provided with medical documentation stating that gender-
confirming surgery has taken place, although the surgery required varies by state (Dean, 2008). The most restrictive policies towards transgender people stipulate that the sex/gender that
someone was assigned at birth can never be formally changed, and this approach is taken by
most US prisons (Dean, 2008). An alternative approach used by some state prison authorities,
such as Arkansas, is to use someone's genitalia as the criteria for determining their sex/gender
(Tarzwell, 2006).

The theoretical implications of a gender recognition policy based on genitalia are very
different from those of a policy based on an unchangeable birth sex, because the former suggests
that someone's sex and gender can be changed by medical intervention, whereas the latter
suggests that sex and gender are immutable. Although both these approaches assume that one's
sex and gender identity 'match' (i.e. that a sex identity as male means one has a gender identity
as a man), a policy based on genitalia is less restrictive than a policy based on birth sex because
it leaves open the possibility of having one's self-identified gender recognized after undergoing
genital surgery. In practice, however, the two policies overlap because the sex assigned to a
child at birth is almost always based on genitalia, and the majority of transgender people in the
US do not undergo genital surgery. The relatively small proportion of transgender people in the
US who undergo genital surgery is related in large part to the system of healthcare provision.

Healthcare in the US is paid for by a combination of private insurers, the state in the
form of Medicare and Medicaid, and directly by users, and much of it is provided on a for-profit
basis. However, Americans with health insurance are likely to have restricted access to gender-
confirming treatments, and particularly to expensive treatment such as genital surgeries, which are not covered by Medicaid or by most private insurers (Dean, 2008). A substantial number of people in the US have neither private health insurance nor government provision, and the US Census Bureau (2010) estimates that 50.7 million Americans, or 16.7% of the population, were without health insurance in 2009 (22). Although the recent federal healthcare reform will expand the number of people with healthcare insurance, many of the provisions do not come into force until 2014, and the insurance provided seems likely to provide restricted access to gender-confirming healthcare.

Given that health insurance is both expensive and frequently provided by employers, transgender people may lack insurance as a result of employment discrimination, and hence the absence of explicit non-discrimination provisions for transgender people contributes indirectly to the difficulty in accessing gender-confirming healthcare. Barriers to employment for transgender people may be particularly acute for higher status jobs that tend to involve more restrictive norms around dress and gender presentation, meaning that gender-variant people are often restricted to poorly-paid and insecure work. Identity documentation is a further barrier to legal employment, because someone's documentation may not match their self-identified sex/gender and would therefore ‘out’ them as transgender to a potential employer. Even transgender people who possess some identity documents (e.g. a driver’s licence) that match their self-identified gender have encountered problems in recent years, because the Department of Homeland Security has been cross-referencing records between different federal and state agencies (Dean, 2008). People whose recorded gender identity varied across the records have been registered as 'no matches', and as a result some transgender people have lost their driving licenses and/or been outed to employers by letters identifying a conflict in their recorded gender
identity (Dean, 2008). The efforts to centralize and standardize records about sex/gender identity, and by implication gender recognition policies, have therefore worked to the detriment of many transgender people in the US.

The difficulties in obtaining legal work and/or the high cost of gender-confirming healthcare lead some transgender people to engage in illegal activity and so-called ‘survival crimes’ such as prostitution. Police officers often assume that transgender women are prostitutes, which can lead to excessive surveillance, harassment and invasive searches (Sylvia Riviera Law Project, 2007) and transgender people have been arrested for using what a police officer deemed to be the 'wrong' washroom. Transgender people may also be at a greater risk of homelessness, because many facilities are segregated by sex/gender and therefore mis-categorize or exclude transgender people (Tarzwell, 2006; Dean, 2008). Further, transgender youths frequently face harassment, rejection or abuse from their families or peers, making them more likely to drop out of school or run away from home (Marksamer, 2008). The cumulative disadvantages faced by transgender people in the US mean that "as a group, transgender and gender-nonconforming people are disproportionately poor, homeless, criminalized and imprisoned" (Sylvia Riviera Law Project, 2007, 11).

The policies and practices towards transgender prisoners in the US are a product of these broader policies around legal rights for transgender people, gender recognition policies and access to gender-confirming healthcare. Many American prisons employ a policy of categorizing people according to their birth sex, and hence would not recognize a transgender person's self-identification regardless of the gender-confirming treatment they undertook. In

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95 No figures seem to be available for the numbers of proportion of US prisons that employ a gender recognition policy based on birth sex, as compared with genitalia, or indeed with any other gender recognition policy. This is likely the result of the large numbers of prison jurisdictions in the US and the unwritten gender recognition policies in place in many prisons (Dean, 2008).
principle, prison jurisdictions that use a genitalia-based gender recognition policy would categorize and place some transgender prisoners in a manner consistent with their self-identification. However, since the vast majority of transgender people in the US do not undergo genital surgeries, very few transgender prisoners are likely to benefit from a genitalia-based placement policy. The result of these sex segregation and gender recognition policies in prisons is that almost all transgender prisoners in the US are likely to be categorized and placed in a facility that conflicts with their self-identification. Moreover, there are probably a higher proportion of transgender people incarcerated in the US than is the case in the UK, for reasons that include the lack of explicit legal protections for transgender people in most US jurisdictions, and differences in healthcare and welfare provision.

Transgender prisoners in the US, like those in the UK, face restricted access to gender-confirming healthcare. Although all prisoners are entitled to be provided with healthcare, the overall health of prisoners is often poor and the care provided is often inadequate (Morris, 1998; Sylvia Rivera Law Project, 2007). Transgender prisoners may be refused hormone treatment unless they had a diagnosis with Gender Identity Disorder and a prescription for hormones prior to being incarcerated, so any prisoners who were taking hormones without a prescription will have their hormone treatment ended (Sylvia Rivera Law Project, 2007). Transgender people who do not have a prior diagnosis may be denied access to a specialist who could diagnose Gender Identity Disorder and/or may be denied hormone treatment. Even those prisoners who are provided with hormones are often given the wrong doses, or have their hormone treatment disrupted or suspended (Tarzwell, 2006; Sylvia Rivera Law Project, 2007). Transgender prisoners in the US are also refused access to gender-confirming surgery, which causes dangerous situations because some transgender people attempt surgery on themselves (e.g.
castrating oneself with a razor) or attempt suicide (Tarzwell, 2006). The refusal to provide gender-confirming treatment to many transgender prisoners, and the use of gender recognition policies based on birth sex or genitalia, suggests that American prisons are enforcing a particularly rigid idea of binary sexes.

3. Enforcing sex/gender in prisons

Both the American and English prison systems use binary sex/gender categories to classify prisoners, but they use very different gender recognition policies reflecting different understandings of the relationship between gender identity and the body. In the US, prisons employ gender recognition policies based either on birth sex or on genitalia, which suggests a belief that bodies are naturally and identifiably either male or female, and that gender identities are determined by one's biological sex. These gender recognition policies based on birth sex or genitalia make it unclear how the US prison system would classify an intersex person such as Herculine Barbin (discussed at length in Chapter Five), although that classification would presumably be based on an interpretation of one's body and not one's self-identification. In contrast, the gender recognition policies applied in English and Welsh prisons are based on the 2004 Gender Recognition Act, which employs binary sex/gender categories but does not make any reference to genitalia. Instead, the 2004 Act uses criteria based on someone's gender expression (i.e. lived gender), a medical diagnosis with gender dysphoria and unspecified medical treatment. Although intersex people are not explicitly protected in UK law and it is therefore unclear how an intersex person such as Herculine Barbin would be classified, the emphasis on gender expression and not genitalia in the 2004 Act suggests that the gender expression would be considered important in establishing their identity.
While the gender recognition policies employed in both English and American prisons depend on medical judgements about sex/gender, the policies differ in their understandings of how one's body and genitals relate to one's gender. Whereas the policy in the US prioritizes genitalia over someone's gender expression and self-identification, the UK policy prioritizes gender expression over genitalia, which leads Sharpe (2007) to conclude that "the Gender Recognition Act would appear to sever the link between sexed status and the physical body" (37). The lack of specified bodily interventions necessary for gender reclassification in the 2004 Act effectively mean that sex has been treated as an issue that follows from one's gender identification as a man or woman, rather than sex being read off the body (e.g. in terms of genitalia or hormones). In contrast, the approach taken in US prisons defines prisoners in terms of their birth sex (which is almost always based on genitals) or their genitalia, and then attributes a corresponding gender identity. Both prison systems employ binary categories of sex and gender, and reflect the ideological commitment that someone's sex and gender identity should 'match', i.e. that a male sex means a masculine gender identity, and a female sex means a feminine gender identity. While a transgender prisoner in the UK could potentially acquire a Gender Recognition Certificate and be placed in a facility for prisoners of that gender, in the US genital surgery would be a necessary — but not necessarily a sufficient — criteria for having one's self-identified sex/gender recognized by the prison system.

Both the English and American prison systems also construct sex/gender through their provision of and/or refusal to provide prisoners with access to technologies that shape the body. In Chapter Five I argued that the concept of somatechnics shows how subjects consciously mould their bodies through a range of technologies, including exercise, diet, surgery, and tattooing. Analysing the provision of gender-confirming healthcare in both the UK and US
shows that the bodily expression of sex/gender is an area of contestation where subjects may struggle against the medical profession, insurers, or the state in order to access such technologies. While prisoners seek to express their identities through somatechnics, prison regimes impose restrictions on the bodily technologies available to prisoners, making technologies such as physical exercise readily available, while other technologies are unavailable. The decision to provide or refuse gender-confirming treatment such as hormones or surgery to a transgender prisoner contributes to the discursive construction of sex and gender, but it also shapes that person's body in ways that affects their bodily sex/gender expression. In short, the policies and practices towards transgender prisoners do not simply alter what sex or gender a given body is categorized as belonging to, but also physically alter that body in relation to sexed and gendered norms. Sex/gender are therefore 'constructed' in two senses: the discourses around sex and gender are social and historical constructs through which bodily variation is interpreted, and bodies are shaped with various technologies and practices in ways that relate to sexed and gendered norms.

The concept of somatechnics highlights the fact that the refusal of gender-confirming healthcare to transgender prisoners is a significant restriction on their autonomy and self-expression. Obviously prisoners have limited autonomy over their own bodily expression and movement anyway — in many ways these restrictions are what define imprisonment and make it punitive — but it is particularly problematic to deny prisoners the ability to express an identity that is integral to their self-understanding and everyday life. Given the requirement to provide all prisoners with medical care, it seems unjustifiable to make an exception for gender-confirming treatment, especially given the risks that transgender prisoners undergo when seeking alternative ways to transform their bodies, e.g. bootleg hormones or by attempting
surgery on themselves. The refusal of gender-confirming treatment therefore introduces an additional punishment for transgender prisoners as it constitutes what Butler terms "the unwarranted legislation of identity" (2004, 7). The limited provision of gender-confirming healthcare to prisoners is therefore one of the ways that the English and American prisons construct sex/gender identities, and it predictably provokes resistance from transgender prisoners. The case of Prisoner A discussed earlier, in which gender-confirming surgery was refused because the prisoner could not live as a woman in a men's prison, also demonstrates that gender-confirming treatment may depend on gender expression, and upon gendered disciplinary rules and norms.

The use of binary sex/gender categories and sex-segregation of prisoners also contributes to the construction and enforcement of normative masculinity and femininity, because men’s and women’s prisons employ different rules and norms. This gendered discipline occurs both through the formal regulations about conduct that are enforced by prison officials, and through informal norms or practices that are imposed by guards and prisoners. The operation of discipline within prisons is therefore more multi-directional than Foucault's (1995) discussion of the panopticon suggests, because discipline is imposed onto prisoners by guards, by other prisoners, and by themselves. As Bartky (1988) argues in relation to femininity and Connell (1987) argues in relation to masculinity, gendered discipline operates both through the norms imposed by others and by subjects internalizing these gendered norms. The sex/gender identities assigned by the criminal justice system tend to match the self-identification of normatively gendered prisoners, who often internalize and self-impose gendered disciplinary norms. However, the intersectional nature of prisoners' identities and existence of competing ideals of gender (e.g. passive versus active ideals of femininity) mean that even normatively gendered
prisoners may resist some of the gendered rules and norms within a prison (Bosworth, 1999). Transgender prisoners often experience difficulties with the gendered norms imposed by prison authorities and by other inmates, and may resist gendered disciplinary norms that conflict with their self-identification.

Many analyses of women’s imprisonment observe that "women are disciplined in constricting gender-specific ways" (Howe, 1994, 131) and identify ways that women’s prisons attempt to instil feminine norms. For example, women’s prisons tend to provide education programs and work opportunities that focus on traditionally feminine skills or occupations, such as hairdressing, cleaning and cooking (Bosworth, 1999). Even the counselling and recreational programs provided to women prisoners may be focused on traditionally feminine activities or concerns, such as beauty, sewing, and flower arranging, and therefore have little to offer prisoners who reject traditional ideals of femininity (Bosworth, 1999). Prisoners are only allowed limited clothing, and are likely to be refused clothing that conflicts with the gendered norms of the facility in which they are held, e.g. feminine underwear would not be allowed in a men's prison regardless of the self-identified gender of an inmate (Sylvia Rivera Law Project, 2007). Different rules for physical appearance in men’s and women’s prisons also reinforce cultural gender stereotypes about jewellery, facial hair, fingernails, use of make-up etc. (Sylvia Rivera Law Project, 2007). Bosworth (1999) concludes that all of these gendered rules and practices mean that "femininity was, therefore, both the goal and the form of women's imprisonment" (104).

Guards report higher rates of infractions in women’s prisons than in men’s prisons, which suggests that female prisoners are either subject to a more restrictive disciplinary regime and/or are more resistant to the imposition of discipline (Howe, 1994; Bosworth, 1999).
higher rates of disciplinary violations in women's prisons could be seen to confirm Bartky's (1988) claim that the intensive disciplinary norms of femininity mean that women are subject to greater bodily discipline than men. Given that Connell (1987) outlines the multiple, detailed norms of bodily discipline involved in hegemonic masculinity and the high cost of violating these norms, I am unconvinced by Bartky's (1988) claim that women are subject to more discipline than men. Instead, Bosworth (1999) argues that the high rate of disciplinary infractions in women's prisons is the result of tensions between competing ideals of femininity, because prison regimes encourage traditional "passive feminine behaviour" (1999, 104, emphasis in the original) that conflicts with the values of many prisoners and thereby provokes resistance. The norms about appearance and conduct within a prison are shaped by factors such as ethnicity, race and class as well as gender (Bosworth, 1999), and prisoners who are deemed to have broken these norms may be shunned, harassed, or assaulted by other prisoners. Bosworth's (1999) analysis therefore highlights the multiple and sometimes conflicting disciplinary norms within prisons.

Despite the fact that the vast majority of prisoners are men, there has been less attention in the academic literature to how masculinity is constructed in prisons. This inattention to masculinity in much of the literature may partially stem from an unspoken bias in the conventional view of prisoners, itself possibly the result of historical tendency to construct deviant men as criminals and deviant women as mad (Howe, 1994; Davis, 2003), and from the fact that the vast majority of prisoners are male. If prisoners as a group are presumptively male — and they are treated as such in much of the literature about prisons in America, and in England and Wales — then the connection between masculinity and the prison is viewed as
normal and therefore escapes analysis\textsuperscript{96}. However, Connell's (1987) account of hegemonic masculinity (outlined in Chapter Five) seems applicable to men's prisons, and Connell argues that the prison is a site for both enforcing and seeking to restrain hegemonic masculinity. Recent studies have also suggested that the gender norms in many American prisons are exaggerated forms of the hegemonic masculinity identified by Connell (1987), which have been termed 'toxic masculinity':

Toxic masculinity is the constellation of regressive male traits that serve to foster domination, devaluation of women, homophobia, and wanton violence...In prison, toxic masculinity is exaggerated. It erupts in fights on the prison yard, assaults on officers, the ugly phenomenon of prison rape (Kupers, 2005, 714)

Although the toxic masculinity that Kupers observes in American prisons is historically and culturally specific, it is not surprising that it has developed within men’s prisons given that the majority of violent crimes are committed by men, and that men who commit violent acts are most likely to be incarcerated. However, the punitive turn in recent decades has probably exacerbated the tendency towards toxic masculinity within prisons due to overcrowding, the reduction in rehabilitative programs such as education, and severe sentencing policies that have sent non-violent offenders to prisoners containing violent inmates (Sabo, Kupers & London, 2001). The punitive turn in penal policy described in Chapter Three exacerbates the problem of violence in American society, because prisons that are over-crowded with young men from deprived backgrounds often instil a form of masculinity that is aggressively violent, sexist, homophobic, and often racist. 'Tough on crime' policies have thereby contributed to the spread of toxic masculinity within men’s prisons in America, and within communities whose young men are incarcerated at high rates.

\textsuperscript{96} This is a possible explanation for Foucault's (1995) inattention to gender and the prison in \textit{Discipline and Punish}. 

The imposition of gendered rules and norms therefore affects all prisoners (and the communities to which they return), not only those who are transgender, because it contributes to the construction of normative masculinity and femininity. Female prisoners are often disadvantaged by these gender norms, which tends to mean that they are offered a narrower range of vocational training than is offered to male prisoners, therefore hindering their employment prospects upon release and reinforcing gendered divisions in the labour market. However, male prisoners are also constrained and harmed by these gender norms, because the toxic masculinity within many prisons puts them at high risk of being attacked and does not equip them for healthy social and familial relationships upon release (Sabo, Kupers & London, 2001). Toxic masculinity, like hegemonic masculinity more broadly, therefore works upon and through binary conceptions of sex/gender, by encouraging normative sex/gender identification and expression, and by establishing a hierarchy in which masculinity is privileged over femininity. The American and English prison systems therefore contribute to the construction of normative gendered identities amongst prisoners, to the erasure and marginalization of transgender and intersex prisoners, and to wider gendered inequalities — all of which have implications for power relations far beyond prison walls.

The enforcement of normative masculinity and femininity in prisons is also linked to sex and sexuality, both conceptually through what Butler (1999) terms "the compulsory order of sex/gender/desire" (9), and in terms of lived experience due to the way that hegemonic masculinity is defined in terms of heterosexuality and male dominance of females. In some American prisons toxic masculinity means that aggression, sexual dominance and penetration are associated with a high status in the prison hierarchy, whereas those who are weaker, younger, less aggressive, gay, or perceived as feminine are low status and targets for sexual
assault (Sabo, Kupers & London, 2001, Peek, 2004). Since the dominant form of masculinity involves homophobia, devaluation of women, sexual dominance, and violence, a prisoner can often establish his own masculinity by raping another prisoner, and the person who is assaulted is viewed as feminized and subordinate. The high incidences of HIV and Hepatitis C amongst prison populations (Morris, 1998) and the non-availability of condoms in most prisons (due to the fact that sex is against the rules) mean that both rape and consensual sex expose prisoners to serious health risks.

Once some prisoners within an institution adopt this form of toxic masculinity there is strong tendency for other inmates to adopt similarly violent and threatening behaviour, because acting differently is likely to be perceived as weakness and make one vulnerable to attack. Male prisoners therefore seek to establish an identity as dominant and dangerous in order to be safe from violence and sexual assault, and may use somatechnics to help establish a dominant masculine identity, e.g. increasing their physical strength through body-building. Toxic masculinity can therefore become self-perpetuating within the culture of men's prisons, and contributes both to the discursive construction of prisoners' identities and to the somatechnic transformation of prisoners' bodies in relation to masculine norms. The threat of violence and rape also encourages prisoners to form relationships with one another, either for mutual protection (e.g. through a gang), or dependent relationships in which someone agrees to be sexually submissive to one prisoner in return for protection from other prisoners.

Female and transgender prisoners are also subject to sexual harassment and assaults, sometimes from other inmates and sometimes from guards. Female prisoners report high rates of sexual assault by male guards, and the use of strip searches and internal cavity searches is described by Davis (2003) as "an everyday routine in women's prisons that verges on sexual
Transgender activists and lawyers identify high rates of verbal, physical and sexual assaults against transgender prisoners in the US, and the use of frequent, unwarranted and coercive strip searches (Peek, 2004; Tarzwell, 2006; Sylvia Rivera Law Project, 2007). Transgender prisoners are particularly at risk within American men’s prisons, where being perceived as feminine places one at the bottom of the prison hierarchy and makes one particularly vulnerable to rape (Sylvia Rivera Law Project, 2007; Peek, 2004). Although some transgender prisoners are placed in protective custody to safeguard them from other prisoners, this isolation is often experienced as punitive, prevents participation in vocational and recreation programs, and can make people more vulnerable to abuse from guards (Tarzwell, 2006; Sylvia Rivera Law Project, 2007).

The threat or actuality of violence towards female prisoners, transgender prisoners, and male prisoners who are perceived as weak or effeminate means that masculinity and femininity are being enforced through sovereign power as well as through discipline and biopower. This threat of violence within prisons therefore creates a strong incentive towards normative sex/gender expression amongst prisoners, as well as contributing to toxic masculinity. The sex/gender dichotomy is therefore constructed through a combination of biopower, discipline, and sovereign power. The population is divided into binary categories of male and female through biopower, particularly through official statistics. Disciplinary rules then use and reinforce this distinction between male and female prisoners by imposing sex segregation (the spatial distribution of prisoners) and by imposing a range of gendered norms and practices on individuals, from clothing to vocational training. Finally, sovereign power contributes to the construction of normative sex and gender identities and to establishment of hegemonic masculinity through the subordination of women, men who are perceived as weak or effeminate,
gay, lesbian, bisexual and transgender people. These multiple techniques of power seem to be mutually reinforcing, working upon and through each other to constitute sex/gender identities, and contributing to sex/gender inequalities.

The English and American prison systems are therefore not simply administering subjects who have natural or predetermined sex/gender identities, but are contributing to the construction of sex/gender identities just as they are contributing to the construction of racialized identities. The fact that both prisons systems employ policies of sex-segregation and impose gender-specific rules and norms on these segregated prison populations means that the regulation of sex/gender identities in prisons is more restrictive than that in most other contemporary institutions, such as schools, hospitals and workplaces. In particular, the gender recognition policies in the US prison system seem to be trying to enforce a binary conception of sex/gender defined in terms of genitalia, which is a more inflexible understanding of sex/gender identity than those employed by most other American institutions (Dean, 2007). The segregation of prisoners according to binary sexes, gendered disciplinary norms and rules, and violence towards gender-variant prisoners suggest that the regulation of sex/gender in prisons in both English and Welsh, and American prisons is more restrictive than the sex/gender regulation generally found outside the prison systems in these countries. The regulation of sex/gender in prisons shapes the beliefs, behaviour, and perhaps the identity of many prisoners, but the eventual release of most prisoners means that these changes have an impact beyond the prison walls. Prisoners' families and communities with high incarceration rates are likely to be particularly affected, but the gendered rules and norms in prisons may also be disseminated through representations in popular culture (e.g. the American television show *The Wire*). If prisons in the US, and in England and Wales, are playing a distinct role in the construction of
sex/gender identities, then changes in criminal punishment will have implications for the governance of gender in these societies.

In Chapter Four I argued that neoliberalism has involved a change in the governance of poverty, from welfare provision towards increasingly coercive measures focused on policing and imprisonment, and in Chapter Six I argued that there has been a corresponding change in the governance of race. The substantial increases in the number of proportion of people imprisoned over the past three decades also mean that more people are subject to the restrictive sex/gender regulation within prisons. There have obviously been many wide-reaching social changes in over the past thirty years, including shifting gender norms, and I am therefore not suggesting that the regulation of sex/gender identities has become more restrictive over this period. On the contrary, there are compelling reasons to believe that the regulation of sex and gender is less restrictive, including due to the legislative and social changes achieved by feminist and GLBTQ activists. However, if prisons employ more restrictive sex/gender regulation than most other contemporary institutions — and I have argued that they do — then ceteris paribus an increase in incarceration rates will indicate the increasing reach of more restrictive regulation of sex/gender. Rising incarceration rates may therefore have broader consequences for the constitution of sex/gender in contemporary societies, particularly amongst the communities whose members are incarcerated at the highest rates: young, poor, Black men.

**Intersectionality and Black Masculinity**

Given that the concept of intersectionality came to prominence partially through the work of the American legal scholar Kimberle Crenshaw (1989) it is not surprising that much of the literature on intersectionality involves critical analysis of the US criminal justice system.
Much of the literature on intersectionality is written by Black feminists and focuses on the ways that Black women are marginalized in multiple ways by the power relations around race and gender. Analyses of criminal justice from an explicitly intersectional perspective include Crenshaw's (1991) study of the "differential protection that Black and White women receive" (1277) from violence, and Collins's (1998) analysis of how race and gender interact to legitimize certain types of violence. Many other analyses of criminal justice have been written by women of colour who explore the experiences of multiply marginalized subjects without explicitly locating themselves in the intersectionality literature, including the work of Joy James (1996), Luana Ross (1998), Angela Davis (2003) and Julia Sudbury (2005). Analyses that are situated in the experiences of women of colour have made huge contributions to the theoretical literature about race and gender, and to empirical scholarship around criminal justice.

However, there is some uncertainty about the meaning of intersectionality, which Jennifer Nash (2008) frames as "the question of whether all identities are intersectional or whether only multiply marginalized subjects have an intersectional identity" (9). Although Nash (2008) raises an interesting question, I believe that her focus on intersectionality theory at the expense of intersectional methodologies leads her to overstate the tension between these two interpretations of intersectionality. The idea that everyone is positioned in relation to multiple axes of power in no way invalidates the view that important insights are generated by focusing on the experiences of multiply marginalized individuals or groups, and Nash (2008) herself notes Crenshaw (1991) expresses both of these ideas. Moreover, the narrow sense of intersectionality identified by Nash (2008) seems to require that one knows which groups are multiply marginalized prior to conducting the analysis — a problematic assumption because a group that is multiply marginalized in one context might be partially privileged in another.
Intersectional methodologies therefore tend to proceed by carefully analysing groups who are situated differently in regard to race and gender, because "each group reflects a distinctive constellation of victimization, access to positions of authority, patterns of beneficiary status and traditions of resistance" (Collins, 1998, 935). I am therefore adopting the broader sense of intersectionality identified by Nash (2008) in order to analyze how different subjects are positioned in relation to multiple, interacting relations of power.

The availability of figures about the incarceration rates of women and men of different ethnic and racial identifications in the US prison system makes it possible to look at how race and gender interact in the likelihood of imprisonment amongst different groups. Unfortunately, there are no equivalent figures for the prison system in England and Wales, and I have therefore not been able to analyze the interaction between sex/gender, race and ethnicity for these prisoners. In the previous chapter I discussed the disproportionately high incarceration rates of Black and Latino/Hispanic populations, but a more complex picture emerges around the intersections between race and gender. The literature on intersectionality stresses that race and gender identities are not additive, but that there is "an interactive, mutually constitutive relationship between these categories" (Hancock, 2007, 67), and the interactive rather than additive nature of these categories and identities is clear in the prison statistics.

Overall, the female incarceration rate in America during 2006 was 68 per 100,000 as compared with a male incarceration rate of 943 per 100,000, meaning that men were incarcerated at 13.9 times the rate of women (Bureau of Justice Statistics, 2007, 7-8). However, analysing race and gender simultaneously shows that White men were 9.7 times more likely to 

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97 I have not been able to find statistics that break down the incarceration rates for racial and ethnic groups in the UK by sex/gender, and the most recent Ministry of Justice (2010b) report does not even provide incarceration rates for different racial and ethnic groups. The unavailability of these figures seriously hampers analysis of racial, ethnic and sex/gender disproportionality of prison populations in England and Wales, and largely prevents intersectional analysis of how these dynamics interact.
be incarcerated than White women\(^98\), Latino/Hispanic men were 16.1 times more likely to be incarcerated than Latina/Hispanic women\(^99\), and Black men were 22 times more likely to be incarcerated than Black women\(^100\) (Bureau of Justice Statistics, 2010b, 28). Perhaps the most startling thing about breaking down the incarceration rates by race and gender is the discrepancy between the incarceration rates of the most and least imprisoned groups: Black men are 62.4 times more likely to be imprisoned than White women (Bureau of Justice Statistics, 2010b, 28). An even more dramatic disparity in incarceration rates becomes apparent if one also takes into account age, because in 2009 Black men from 30 to 34 were \(3861\) times more likely to be imprisoned than White women of 65 or older\(^101\). These variations in the incarceration rates of different groups would probably be far larger still if official data was available about the class background of prisoners.

These figures show a clear gender effect, because men of all racialized and ethnic identifications are imprisoned at a higher rate than women of all racialized and ethnic identifications, and the lowest male incarceration rate is more than three times the highest female incarceration rate\(^102\). However, the incarceration rates discussed above demonstrate that there is no simple gender discrepancy, because the discrepancies between male and female

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\(^98\) In 2009 the incarceration rate for non-Hispanic White men was 487 per 100,000 (Bureau of Justice Statistics, 2010b, 28) whereas the incarceration rate for non-Hispanic White women was 50 per 100,000 (Bureau of Justice Statistics, 2010b, 28).

\(^99\) In 2009 the incarceration rate for Hispanic men was 1193 per 100,000 (Bureau of Justice Statistics, 2010b, 28) whereas the incarceration rate for Hispanic women was 74 per 100,000 (Bureau of Justice Statistics, 2010b, 28).

\(^100\) In 2009 the incarceration rate for non-Hispanic Black men was 3119 per 100,000 (Bureau of Justice Statistics, 2010b, 28) whereas the incarceration rate for non-Hispanic Black women was 142 per 100,000 (Bureau of Justice Statistics, 2010b, 28).

\(^101\) In 2009 the incarceration rate for White women 65 or older was 2 per 100,000, whereas the rate for Black men from 30 to 34 was 7721 per 100,000. (Bureau of Justice Statistics, 2010b, 28)

\(^102\) Taking into account race, ethnicity, and gender, the lowest male incarceration rate is for White men at 487 per 100,000, as compared with the highest female incarceration rate for Black women at 142 per 100,000 (Bureau of Justice Statistics, 2010b, 28).
incarceration rates vary between different racialized and ethnic groups. Similarly, there is no simple discrepancy between Black and White incarceration rates, because Black men were 6.4 times more likely to be imprisoned than White men\textsuperscript{103}, whereas Black women were only 2.8 times more likely to be imprisoned than White women\textsuperscript{104} (Bureau of Justice Statistics, 2010b, 28). This makes it clear that there is no straightforward gender effect that makes men x times more likely to be imprisoned than women, nor any straightforward race or ethnicity effect that makes Black people x times more likely to be incarcerated than White people — instead, race and gender are interacting with one another.

Interestingly, these figures show that the highest gender discrepancy occurs in the racialized group with the highest incarceration rates amongst both men and women: the Black population. Moreover, the positions of privilege and disadvantage in these statistics diverge from those in many other intersectional analyses: White women are multiply advantaged in respect of their low incarceration rates, while Black men are multiply disadvantaged in respect of their high incarceration rates. Angela Davis (2001) therefore rightly concludes that:

> Although black men are not the only population vulnerable to this exploitation, the overwhelming numbers of black men imprisoned in the United States makes them by far the most threatened members of our society when it comes to the new enslavement being implemented through the prison system. (43)

Analysing incarceration rates provides insights about which groups are marginalized or privileged in a society, because imprisonment is an indicator of disadvantage, as Coyle (2005) succinctly explains: "in most countries one can discover which are the marginalized groups in society by analysing the prison population" (60). Given that imprisonment involves stigma,

\textsuperscript{103} In 2009 the incarceration rate for White men was 487 per 100,000, whereas the rate for Black men was 3,119 per 100,000 (Bureau of Justice Statistics, 2010b, 28)

\textsuperscript{104} In 2009 the incarceration rate for White women was 50 per 100,000, whereas the rate for Black women was 142 per 100,000 (Bureau of Justice Statistics, 2010b, 28)
ineligibility to vote, and has a major impact on one's life chances including by reducing one's employment prospects and earning potential (as discussed in Chapter Six), incarceration also conveys additional disadvantage. However, imprisonment is clearly not the only thing that indicates or conveys disadvantage, so incarceration rates alone do not indicate which group is most or least privileged in society. Given carceral expansion and the massive scale of the American prison system, I believe there is good reason to believe that those groups who are imprisoned at the highest rates are disadvantaged, but they may also be privileged in respect of other institutions and power relations. For example, Black men may be a multiply marginalized group in the context of criminal justice, but partially privileged in another context (e.g. in the family, in political office, and/or in male-dominated professions).

The broader historical context is also pertinent to the ways that different groups are positioned in relation to the criminal justice system, and this is evident in America. bell hooks (1981) outlines how in the antebellum period arguments about sexuality and crime were used to construct ideas about racial difference and inferiority, creating "the myth of the 'bad' sexually loose black women and the myth of the black male rapist" (60). This historical context means that Black men and White women occupy very different positions in relation to the criminal justice system, because White women have been constructed as potential victims in need of protection by the state, whereas Black men have been historically constructed as threats. In recent decades feminist campaigns for tougher penalties for rape and domestic violence have contributed towards the punitive trend in criminal justice, such as mandatory minimum terms, and therefore bear some responsibility for the shift towards carceral expansion and the warehousing of young Black men (Gottschalk, 2006). The low incarceration rates of White women and the high incarceration rates of Black men are therefore not accidental, but are a
reflection of a particular history and construction of criminality in which the interests of these
two groups have sometimes been seen as opposed.

All of this suggests that there is a dynamic around imprisonment and racialized
masculinity, especially Black masculinity, in America that is not explicable by analysing race
and gender separately. Instead, it is necessary to combine analysis of class, race, and sex/gender,
whose interactions are distinct from the sum of their parts, and these insights must be
understood in the context of neoliberalism. I have argued in previous chapters that neoliberal
policies have introduced a more punitive approach towards the government of poverty, and that
this has had a substantial racial bias due both to existing racialized inequality and to racial
profiling by police, particularly for drug offences. Moreover, the historical tendency to construct
deviant men as criminal while deviant women are more likely to be constructed as mentally ill
(Davis, 2003) brings a higher proportion of men than women into contact with the criminal
justice system. Class, race, gender and neoliberal policies have therefore combined to make
impoverished Black men particularly likely to be imprisoned, whilst incarceration rates have
soared.

Earlier in this chapter I discussed how the hierarchical and aggressive environment
within men's prisons in America has contributed to the development of 'toxic masculinity' that
involves aggression, violence, homophobia, and domination of women. Intensive policing,
racial profiling, and the punitive trend in sentencing policy means that in many poor Black
communities a high proportion of young men have served time in prison and been exposed to
this ethos of ‘toxic masculinity’. As explained earlier in the chapter, there is a strong pressure for
prisoners to adopt this form of aggressive masculinity in order to minimize their own risk of
being assaulted. Most prisoners are eventually released back to their communities and families,
and the extremely high incarceration rates of young, impoverished Black men means that there are high numbers of ex-prisoners in some poor Black communities. The presence of threatening individuals and gangs within a community can lead this highly-aggressive, sexist and homophobic masculinity to spread amongst other young men, as Patricia Hill Collins (2004) explains:

Given this social context, it will be extremely difficult to convince Black men that they should renounce aggression and violence. In a predatory climate created by prison, street, and some elements of Black youth culture, being perceived as ‘weak’ could get you killed. (211)

Hill Collins (2004) argues that criminal justice policy and cultural factors such as the ‘thug’ image marketed through hiphop music have contributed to the ethos of aggression, homophobia and sexual dominance becoming the dominant form of Black masculinity. Imprisonment has therefore become both a cause and an effect of the spread of aggressive forms of masculinity amongst young, poor Black men in America, creating a vicious circle. This association of young Black men with violence and crime also creates a harmful stigma for the group as a whole, as John Calmore (2006) puts it: "This is the weight of race that anonymous black males must carry — it is the burden of proving that they are decent human beings." (138). The question of how to encourage non-violent and non-sexist forms of masculinity, including what a recent collection terms "progressive black masculinities" (Mutua, 2006) is not a simple one. Part of the answer lies in challenging forms of hegemonic and toxic masculinity, and many Black feminists have focused their attention on this area by calling for Black men to adopt more egalitarian, non-violent forms of masculinity (hooks, 1983; Hill Collins, 2004). However, it is perhaps even more important to change the broader structural and institutional context in which racialized and gendered identities are constructed.
I have already argued that the American criminal justice and prison systems contribute to toxic masculinity and to constructing racialized identities, including the association between Blackness and crime. Moreover, analyses by Angela Harris (2000) and Patricia Hill Collins (1998) have argued persuasively that the American criminal justice system exercises violence that is directed towards racialized and ethnic minorities, towards women, and towards GLBTQ people. This analysis of the gendered violence exercised on behalf of the state fits with Connell's (1987) account of hegemonic masculinity, in which he argues that highly hierarchical and aggressive forms of masculinity are adopted by criminals, and by the police, armed forces etc. Broadening the lens of what is regarded as problematic forms of violence and of masculinity enables us to see the parallels between the violent behaviour of police and prison guards, and the violent behaviour of the criminals and prisoners, as Harris (2000) argues: "Street gangs and elite police squads are bitter enemies, but they are also united in a kind of masculine community" (793). If the people notionally enforcing the law adopt much the same ethos of aggressive hyper-masculinity as those who are criminalized then it seems clear that the solution to masculine violence does not lie in ever-intensifying policing and incarceration. This conclusion is shared by the leading criminal justice scholars Zimring and Hawkins (1996), who argue that punitive criminal justice policies have failed to reduce the high rates of violence in America, and that "'getting tough' on crime in general is inadequate as an anti-violence strategy" (72).

A more productive approach to problems of toxic masculinity and violence might involve the provision of better education, healthcare (including mental health and drug treatment), welfare support, housing, and employment opportunities to impoverished Black communities. Such changes would require a reversal of many of the neoliberal policies
introduced over the past three decades, which have led to increasing socioeconomic inequality, high rates of unemployment and low aspirations in many poor, Black communities — trends that are conducive to crime (Western, 2006). A 2007 report by the Home Affairs Committee in the UK House of Commons takes a similar approach by arguing that "social exclusion is the primary cause" (2007, 29) of the over-representation of Black youths in the criminal justice system, and calling for better efforts to address poverty, educational underachievement, and unemployment. As I already discussed in Chapter Six, poverty is associated with criminalization and imprisonment, and prison conveys additional stigma and economic disadvantage that can lead to a vicious cycle of poverty and imprisonment. In contrast, the provision of better education, job opportunities, healthcare etc. would improve the socioeconomic status of poor Black communities, thus reducing the likelihood of criminalization, imprisonment, and exposure to the ethos of toxic masculinity that is prevalent in prisons. A reversal of the neoliberal policies that shifted the governance of the poor (discussed in Chapter Four), and of race (discussed in Chapter Six) would therefore help to create a social context for young, impoverished Black men that is more conducive to "progressive black masculinities" (Mutua, 2006).
Chapter Eight: Conclusion

Summary

In the first chapter of this dissertation I set out two research questions: firstly, to what extent is Foucault's (1995) account of power and the prison persuasive and relevant today; and secondly, does applying the insights of Foucault's later work generate a convincing account of power in the prison systems of the United States, and England and Wales? I begun in Chapter One by briefly exploring Foucault's genealogical methodology, and outlining his central claims in Discipline and Punish. My analysis of the persuasiveness of Foucault's (1995) account of power and the prison begun in Chapter Two, where I provided a literature survey that compared Foucault's account with a variety of alternative analyses of the history of punishment. I argued that critiques of Foucault on the grounds of factual accuracy about minor aspects of prison regimes miss the point of his genealogical analysis, which is to provide a critical account of techniques of power. However, my literature survey highlighted several issues that Foucault overlooks, and that have important implications for understanding power relations: the roles of race, gender, class and capitalism. Whereas Foucault's (1995) account ignores gender and race, other scholars have shown that both were important to penality, for instance by shaping the disciplinary norms in prisons, and by determining who was or was not regarded as capable of becoming a disciplined subject. I also explored historical analyses that highlighted the role of class and capitalism, arguing that there are points of overlap between Foucaultian and Marxist-inspired accounts of penality, and that disciplinary power sometimes co-existed with class norms, the profit motive, and the exploitation of convicts' labour.

My analysis of the relevance and persuasiveness of Foucault's account of penality in relation to the contemporary prison systems of the United States, and England and Wales, began
in Chapter Three. I identified two trends over the last thirty years that challenge Foucault's account of power and the prison: increased punitiveness, which has produced less rehabilitative prison regimes, rising prison populations and incarceration rates; and prison privatization. The punitive trend has meant that both penal philosophy and policies have become less rehabilitative, and hence disciplinary normalization is less central to penality than it was in the past. Moreover, the trend of prison privatization means that there is a profit motive in criminal punishment that echoes the Marxist-inspired historical analyses discussed in Chapter Two, since private corporations make money from building and running prisons, and from prisoners' labour. I concluded that these two trends mean that Foucault's account of power and the prison is less relevant to contemporary prisons in the United States, and England and Wales, than it was in the 1970s, but that disciplinary power and normalization continue to exist in these penal systems.

In Chapter Four I explored the broader political and philosophical changes that contributed both to prison privatization and to greater punitiveness, by analysing the relationship between neoliberalism and changing penal policy. Here, I provided a brief description and critical analysis of Foucault's (2007 & 2008) accounts of neoliberalism and neoliberal techniques of power, arguing that Foucault puts forward a largely descriptive account of neoliberalism that does not denaturalize or challenge neoliberal forms of power and knowledge. My analysis identified major tensions within the neoliberal theory described by Foucault (2008), particularly between neoliberal policies on welfare and criminal justice, and suggested that neoliberal crime policies have been shaped more by the neoliberal conception of the subject and the appropriate role of the state than by concerns about efficacy or cost-effectiveness. I therefore critiqued Foucault's (2008) account of neoliberalism for overlooking the tensions within neoliberal theory, the coercive aspects of neoliberalism, and the economic aspects of neoliberal
forms of power, such as increasing socioeconomic inequality. I concluded that while Foucault (2007) provides a useful account of the multiple, over-lapping techniques of power, a more complete understanding of neoliberal techniques and relations of power is achieved by supplementing and modifying his conceptual framework with more critical and economically-focused analysis of neoliberalism, such as the work of David Harvey (2005).

My analysis of race and gender begun in Chapter Five, where I synthesized the key theoretical literature about race and gender, and assessed the contribution that Foucault's later work makes to understanding these power dynamics. I analysed Foucault's (1980b & 1990) accounts of the construction of sex and sexuality through biopower, and combined these insights with recent work from feminist theory and queer theory in order to develop an account of how sex and gender are constructed. I also considered Foucault's (2003) account of the construction and function of categories of race, in which he again uses the concept of biopower, and introduces the concept of state racism. My analysis suggested that Foucault (2003) uses the term 'state racism' in two different senses, and I argued that the broad sense encompassing civic exclusion and an increased risk of death is more useful than the narrow sense of state racism, which focuses on violence. Although I argued that Foucault's (2003) analysis is valuable because it demonstrates the constructedness of race, I concluded that his focus on the relationship between race and violence leads him to ignore the links between race, class and capitalism. I then combined my theoretical accounts of the constitution of sex/gender and race, arguing that these categories are all constructed through techniques of power and prevailing forms of knowledge, and that theorists should not set up a false dichotomy between the 'realness' of sex and the constructedness of race. Instead, I suggested that an adequate theorization of
power relations around sex/gender and race requires an intersectional approach that is attentive to how multiple relations of power overlap and interact.

In Chapters Six and Seven I used the theoretical framework outlined in Chapter Five to analyze the racialized and gendered power dynamics in the criminal justice and prison systems of the United States, and England and Wales. My analysis in Chapter Six explored the normative significance of racialized and ethnic over/under-representation amongst prisoners. Here, I drew on Foucault's (2003) account of biopower to argue that official statistics such as the census and prison population figures contribute to the construction of racialized categories, identities and inequalities. I also argued that the criminal justice and prison systems in America, and in England and Wales, exercise "state racism" (Foucault, 2003, 239), in both the broad and narrow senses of the term that I identified in Chapter Five. These criminal justice systems exercise state racism in the narrow sense by subjecting some racially defined groups, particularly Black people, to higher rates of state violence and death, for instance through killings by police. Moreover, both these criminal justice systems exercise state racism in the broader sense implied by Foucault (2003, 256) of exposing someone to a higher risk of death, or civic exclusion, for instance through the increased risk of death from the infectious diseases that are prevalent amongst prisoners, and the ineligibility of prisoners to vote.

Although Foucault's (2003) conceptual framework provided valuable insights abut race in relation to the American, and English and Welsh, criminal justice and prison systems, I argued that an adequate theorization of these techniques and dynamics of power requires one to go beyond the conceptual framework provided by Foucault. In particular, Foucault's (1980b, 1990, 2003, 2007 & 2008) later work does not provide a theoretical basis for analysing the links between race, class and poverty, the economic impact of imprisonment, or the ways in which
neoliberalism has contributed to carceral expansion. I argued that racialized biases in these criminal justice and prison systems both reflect and contribute to racialized socioeconomic inequality in the broader societies, and to the maintenance of white privilege, and therefore that race and class are strongly interconnected. Further, I suggested that neoliberal policies of welfare cuts and carceral expansion have an impact not only on the governance of crime and poverty (as argued in Chapter Four), but on the governance of race.

In Chapter Seven I explored the power dynamics around sex/gender in the criminal justice and prison systems in America, and England and Wales. I drew on Foucault's (2007) account of "a triangle: sovereignty, discipline, and governmental management" (107-8) to argue that the sex and gender identities of prisoners are constructed through a combination of biopower, discipline and sovereign power. Biopower serves to construct binary sex/gender identities by classifying prisoners as male or female, and disciplinary power uses this classification to segregate prisoners by sex/gender and enforce gendered disciplinary norms, for instance about clothing and appearance. Sovereign power also contributes to constituting and enforcing normative sex/gender identities, because gender-nonconforming people are at an increased risk of violence — especially in American men's prisons, where prisoners who are perceived as effeminate are often assaulted. I also considered the intersection between race and sex/gender, arguing that the high rates of criminalization and imprisonment amongst Black men make them multiply marginalized in relation to criminal justice. Lastly, I concluded that the disproportionately high incarceration rates for some racialized and ethnic minority men are shaping forms of racialized masculinity, and contributing to a form of aggressive hyper-masculinity amongst young, impoverished Black men that is at odds with what Mutua (2006) describes as "progressive black masculinities" (xiv).
The answer to the first question posed in my introduction is therefore twofold. Firstly, the changes in penal philosophy and practices over the past three decades mean that Foucault's analysis of the disciplinary prison is less relevant and persuasive than it was during the 1970s, but not wholly irrelevant. The trends of greater punitiveness and prison privatization suggest that the disciplinary normalization identified by Foucault is operating alongside other power dynamics, including the (re)introduction of a profit motive in criminal punishment. Secondly, while *Discipline and Punish* alone provides important insights about the productive nature of power, about disciplinary techniques, and about the constitution of the subject, it ignores the issues of gender and race. Although Foucault (1995) acknowledges that the poor are disproportionately criminalized and imprisoned, and shows how imprisonment contributes to stigma and marginalization, he is insufficiently attentive to the question of which groups are imprisoned, how those identities are constructed, and what function the incarceration of these groups serves. This omission is important, because prison populations are highly disproportionate along gendered and racialized lines, and prisons play a significant role in constituting racialized and gendered identities, which contribute to inequalities in society as a whole. Foucault's (1995) inattention to race, gender, and the intersections between them therefore undermines his analysis both as a 'history of the present' in the 1970s, and in relation to contemporary penality. Although Foucault's account of disciplinary power helps to explain how gendered identities are constituted, as I argued in Chapters Five and Seven, these insights are most valuable when combined with his later work.

The second question motivating this dissertation is whether the conceptual framework provided by Foucault's (1980b, 1990, 2003, 2007, & 2008) later work provides the basis for a persuasive theorization of power in relation to contemporary prison regimes, and here the
answer is more complex. As I argued in Chapters Five, Six, and Seven, Foucault's accounts of the constitution of sex, sexuality and race generate important insights about racialized and gendered power dynamics, both in the prison systems of America, and England and Wales, and in these societies more broadly. In particular, Foucault's (1990 & 2003) concept of biopower serves to denaturalize categories of race and sex, and to highlight the ways the population is governed through the categorization of bodies, and through statistical knowledge. Foucault's (2007) account of the "triangle: sovereignty, discipline, and governmental management" (107) is also valuable, because it shows how different techniques of power that employ different forms of knowledge can overlap and reinforce one another, as I argue occurs in the constitution of normative sex/gender identities. Moreover, Foucault's (1980b) attention to how intersex people such as Herculine Barbin problematize binary categories of sex provides useful insights about the constructed nature of sex, and about the methodologies appropriate to critically analyzing power around sex. It is undoubtedly the case that the concepts and ideas in Foucault's later work generate important insights about the ways that sex and race are constituted through biopower, discipline, and sovereign power, and about the ways that racialized categories serve to enable and legitimize state violence.

Nonetheless, important aspects of the power dynamics in contemporary criminal justice and prison systems cannot be understood through a combination of Foucault's (1995) analysis in *Discipline and Punish*, and his later work (1980b, 1990, 2003, 2007, & 2008). Three issues stand out as being inadequately addressed by Foucault: the relationship between sex, sexuality, and gender; the relationship between race, class and capitalism; and the normative implications of neoliberalism. As I argued in Chapter Five, Foucault's (1980b & 1990) account of sex and sexuality ignores the issue of gender, and it is therefore necessary to supplement his work with
insights from feminist and queer theorists, such as Judith Butler. My analysis of the constitution of sex/gender in Chapters Five and Seven therefore draws on Foucault's conceptual framework whilst modifying and/or supplements parts of it, for instance by challenging Foucault's (1980b) reading of Herculine Barbin as a narrative about non-identity, and by adopting the concept of somatechnics to show how subjects shape their bodies in relation to sexed and gendered norms. Similarly, Foucault's (2003) analysis of race focuses on the relationship between race and violence, but overlooks the relationship between race, socioeconomic inequality, capitalism, and the exploitation of labour. Here, there are clear tensions between Foucault's (2003, 2007 & 2008) reluctance to analyze power dynamics in terms of class and my argument that race and class are intertwined, and that the prison constitutes racialized identities and inequalities partially through forms of socioeconomic inequality such as employment rates, income and wealth. The question of how to theorize race is also closely linked to the final problem with Foucault's analysis — his inadequate theorization of neoliberalism.

As I argued in Chapter Four, Foucault's (2007 & 2008) account of neoliberal philosophy and techniques of governance lacks the critical impetus and insights of his other work, particularly his genealogical analyses. Whereas *Discipline and Punish* denaturalizes and critiques disciplinary power, Foucault's analysis of neoliberalism in the 1978-9 College de France lectures describes neoliberalism in its own terms, by emphasizing themes of rationality, freedom, choice and individual agency. Foucault (2008) therefore fails to expose the tensions within neoliberal theory, the coercive implications of neoliberal policies on criminal justice, and the increase in socioeconomic inequality that results from neoliberal policies such as privatization and welfare cuts. These failings in Foucault's account of neoliberalism are significant, because neoliberalism has had a major impact on penal philosophy and policies over
the past three decades in both the United States, and in England and Wales. As I argued in Chapter Four, neoliberal policies have lead to a shift in state spending and the governance of the poor from welfare provision to increased policing and incarceration, and have driven both rising incarceration rates and prison privatization. Moreover, the existence of racial profiling by police and the stark racial over/under-representation amongst prisoners mean that neoliberalism has altered the governance of race, because the shift from racially-egalitarian state aid to racially-discriminatory policing and imprisonment has contributed to racialized inequality. Neoliberal policies have therefore intensified the exercise of state racism through the American, and English and Welsh, criminal justice systems. Similarly, neoliberal policies have altered the governance of gender and the constitution of racialized masculinity in America, by bringing a vastly disproportionate number of young, impoverished Black men into prisons that encourage aggressive, sexist and homophobic forms of masculinity. These insights about contemporary power dynamics in criminal punishment depend on the use of an analytical framework that is attentive to the intersections between race, class and gender, and that challenges neoliberal forms of power and knowledge.

In 'What is Called "Punishing"?' Foucault (2004d) distinguishes the aim and rationality of a system from the uses to which it is later put, and a similar distinction can be made about the last three decades of penal policy. Whatever the intentions of those who contributed to neoliberal policies and the punitive turn in criminal punishment, the consequences have included the construction of racialized identities through policing targeted at racialized minorities, the hyper-incarceration of young, black men, and the reinforcement of white privilege. The construction of binary sex/gender identities and of normative masculinity and femininity within prison regimes has also contributed to male dominance, the marginalization of
gender-variant people, and the spread of 'toxic masculinity'. While high incarceration rates have
further impoverished the disadvantaged racialized minority communities that are incarcerated at
the highest rates, they have benefited the investors in private prisons and companies that use
prisoner labour. Moreover, the neoliberal policies of privatization, welfare cuts, tax cuts for the
rich, and increasingly punitive governance of the poor, have redistributed wealth from the poor
and middle classes to the very rich. The uses of the criminal justice and prison systems in
America, and in England and Wales, are myriad and reveal a great deal about broader power
relations in these societies, but cannot be adequately understood within a Foucaultian conceptual
framework.

Future Directions in Penal Policy

A great deal has happened during the six years I have spent writing this dissertation, including the 2008-9 recession and changes of government in both the UK and US, and there is reason to believe that these developments are having an impact upon both criminal justice policy and the exercise of power through prison systems. In November 2008 President Barack Obama was elected, and the Democrats took control of both the House of Representatives and the Senate, meaning that for the first time in decades the Democratic Party held the Presidency and both houses of Congress. Then in May 2010 the UK general election produced a coalition government between the Conservative and Liberal Democrat parties, and the Labour party that had been in government since 1997 became the official opposition. Both of these changes in government have produced shifts in penal policy and philosophy, which have implications for the power dynamics I have identified in this thesis. Most importantly it seems as though the trend of increased punitiveness and carceral expansion discussed in Chapters Three and Four
may have peaked in both the United States, and in England and Wales. I will briefly outline the key shifts in criminal justice policy first in the United States, and then in England and Wales, and consider the normative significance of these changes.

During the past two years there have been three noteworthy changes in penality in the United States: firstly, the fall in both state prison populations and the overall US incarceration rate in 2009; secondly, the change in federal drug sentencing for crack cocaine introduced in the summer of 2010; and thirdly, the new approach to penal policy promoted by some Republicans in early 2011. All three of these developments deviate from the punitive trend described in Chapter Three, which involved more severe sentences, less rehabilitative penal philosophy and regimes, rising prison populations and incarceration rates. These developments are disjointed parts of a far larger and more complex picture of American penal policy, so their significance should not be overstated, but all three suggest that in America there may be a shift away from punitiveness and towards lower incarceration rates, reduction in state spending on criminal punishment, a slight reduction in racialized disparities in incarceration, and perhaps — most tentatively — a more rehabilitative approach.

As I discussed briefly in Chapter Four, the figures for 2009 show that the state prison population in the United States fell for the first time in 27 years, and that prisoner numbers fell in twenty-four states (Bureau of Justice Statistics, 2010b, 2). This reduction in the number of state prisoners was caused by lower prison admissions (i.e. fewer people being sent to prison), which itself "was led by the decline in the number of parole violators admitted to state prison" (Bureau of Justice Statistics, 2010b, 5). The number of new court commitments to state prison in 2009 also fell, and had been declining since 2006 (Bureau of Justice Statistics, 2010b, 5). Although the total number of prisoners rose by 0.2% during 2009, because the increase in the
number of federal prisoners offset the reduction in state prisoners, the rate of growth was far lower than in previous years. It is also notable that the total imprisonment rate in America has been declining since 2007\textsuperscript{105}. The federal nature of the US criminal justice system means that any overall trend in prison populations is the cumulative effect of many changes at state and local levels, so it is difficult to make generalizations about the reasons for these changes. However, the Pew Center (2010) attributes the change in policy direction partially to financial pressure on state budgets, arguing that "states began to realize they could effectively reduce their prison populations, and save public funds, without sacrificing public safety" (3). The Pew Center (2010) tentatively suggest that the decline in state prison populations might continue, citing reasons including new technology for supervision, the development of better risk assessment, more use of cost-benefit analysis, and continued budget pressures (6).

The second recent change in American penal policy concerns federal policies towards drug crime. Under the Obama administration the emphasis of federal drug strategy has shifted slightly, from the punitive approach of the 'war on drugs' that has dominated since the late 1970s, to an approach that emphasizes the importance of prevention, medical care, and evidence-based policy, in addition to criminal punishment\textsuperscript{106}. The clearest example of this change is the 2010 Fair Sentencing Act, which reduced the sentences for crimes involving crack cocaine. Previously, under the terms of the 1986 Anti-Drug Abuse Act, there was a disparity of 100:1 between the amount of crack cocaine and the amount of powder cocaine required to trigger a mandatory minimum term in prison (Mauer, 2006). The 2010 Act increased the amount

\textsuperscript{105} In 2007 there were 506 prisoners per 100,000 population in 2007, whereas in 2009 there were 502 prisoners per 100,000 population (Bureau of Justice Statistics, 2010b, 1)

of crack cocaine necessary to incur a mandatory minimum term in prison, therefore reducing the
disparity between the severity of punishment for crack cocaine as opposed to powder cocaine.
Given that a large majority of those arrested for possession of crack cocaine are Black, whereas
those in possession of powder cocaine are often White, the 2010 Act reduces the previous
racialized disparity whereby the sentences for drug possession were more severe for Black
offenders than for Whites (Mauer, 2006).

The 2010 Fair Sentencing Act can be expected to have three effects. Firstly, it will reduce
the numbers of people sent to prison for possession of crack cocaine and may reduce the length
of their sentences. Ceteris parabus, this is likely to slightly reduce the prison population and
incarceration rate, and the US Congressional Budget Office (2010) estimate that the bill will
"decrease the prison population by 1,550 person-years over the 2011-15 period" (2). Secondly,
this projected fall in the prison population will lead to a decrease in federal spending on criminal
punishment, and the US Congressional Budget Office (2010) states that:

According to the Bureau of Prisons, a decrease in the federal prison population of this
magnitude would save about $27,000 per person per year for avoided incarceration time.
CBO estimated that...would total $42 million over the 2011-2015 period. (2)

Thirdly, this legislation is likely to alter the racialized composition of the prison population and
the racialized disparities in incarceration rates, as a result of reducing the severity of punishment
for a crime where the vast majority of those convicted are Black. The provisions of the Fair
Sentencing Act therefore go some way towards addressing concerns about the unfair and
disproportionate punishment of Blacks for drug crimes in the US, whilst also reducing prison
populations and government spending.

The third noteworthy recent development in America is not a change in policy, but a shift
in the political climate around criminal punishment: the Right on Crime campaign to reform
penal policy. This campaign is organized by the conservative think-thank the Texas Public Policy Foundation, and involves a number of well-known Republicans, including Newt Gingrich, Grover Norquist, and the former federal 'Drug Czar' William J. Bennett. The Right on Crime (2011) statement of principles emphasizes the importance of smaller government, lower spending, and greater cost-efficiency, stating "Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending" (1). The Right on Crime statement of principles also acknowledges that prison sentences can be counter-productive for low-risk offenders, and suggests the use of more cost-effective punishments such as community service and fines, the latter of which would be used as a penalty and provide restitution to victims. The launch of the Right on Crime Campaign was accompanied by a Washington Post article by Newt Gingrich and Pat Nolan, in which they "urge conservative legislators to lead the way" in reducing prison populations and state spending\textsuperscript{107}.

The Right on Crime campaign is significant for at least two reasons: firstly, it indicates a movement for less punitive penal policy amongst Republicans and the political right; and secondly, it shows that neoliberal ideology is being used to justify very different penal policies to those imposed in the past three decades. The Right on Crime campaign is politically significant, because the punitive trend in criminal justice policies originated amongst Republican politicians and was later taken up by Democrats, such as the Clinton administration, who feared being portrayed as 'soft on crime'. A shift in direction amongst rightwing politicians and commentators in the US might therefore enable or encourage Democrats to adopt less punitive stances on penal policy, and could lead to bipartisan support for reducing the prison population. Secondly, this is significant in ideological terms, because the Right on Crime campaign

\textsuperscript{107} The article "Prison reform: A smart way for states to save money and lives" is dated Jan 7th 2011. Retrieved from \url{http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html} on Jan 16th 2011.
explicitly link their support for less punitive sentencing and lower prison populations to beliefs about individualism, the free market, and a small state, i.e. to neoliberal political and economic principles.

My analysis of neoliberal approaches to criminal justice in Chapter Four identified tensions within neoliberal ideology: on the one hand neoliberalism favours cost-efficiency, efficacy, and a small state, but on the other hand the neoliberal conception of the subject and the appropriate role of the state privilege law enforcement over welfare provision or healthcare. I also discussed Garland's (2001) argument that a temporary alliance in favour of greater penal severity developed between neoliberalism and neoconservatism. What the recent Right on Crime campaign suggests is that the alliance that existed between neoliberalism and neoconservatism over criminal justice policy for much of the past thirty years may be breaking up. Moreover, the policies favoured by the Right on Crime campaign suggest that its supporters have decided that neoliberal values of low taxation, low government spending and cost-efficiency are more important than the neoliberal conception of the subject as homo oeconomicus and accompanying approach of deterring crime through punitive sentences. The tensions within neoliberal theory on criminal justice policy are therefore being resolved in a different way, by privileging cost-efficiency and lower spending over the neoliberal conception of the subject, instead of vice versa as in the past.

In England and Wales there is evidence of a new direction in penal policy under the Conservative and Liberal Democrat coalition government, and these policies are being driven by the Justice Secretary Kenneth Clarke. The new government's proposals for reform of criminal punishment have been outlined in a recent green paper entitled "Breaking the Cycle: Effective
Punishment, Rehabilitation and Sentencing of Offenders”\textsuperscript{108}. This green paper is lengthy and contains a great many proposals, so I will only outline and analyze the overall direction of changes. Three themes in particular stand out in this green paper: an increased emphasis on rehabilitation and reducing recidivism, described as a "rehabilitation revolution" (Ministry of Justice, 2010d, 1); greater decentralization; and a focus on reducing spending on criminal justice and improving cost-efficiency. These three themes are interconnected in the green paper, and fit into a broader coalition government agenda of spending cuts, decentralization, and privatization of state agencies and services.

The most notable change in direction between the penal policies of the previous Labour government and the coalition proposals outlined in the 2010 green paper is on the subject of rehabilitation. Here, the coalition government argues that the focus should be on improving public safety and crime rates through reducing the re-offending rates of criminals, instead of through tougher sentences and an ever-increasing prison population. The rehabilitative approach outlined in the green paper has two parts: firstly, the reduced use of prison sentences; and secondly, a change in prison regimes. The coalition proposes to reduce the use of prison sentences by altering sentencing policies and the range of available penalties, including by providing better drug and alcohol treatment, and diverting mentally ill offenders into the healthcare system. The proposed new penalties include 'tougher' community sentences (Ministry of Justice, 2010d, 9) such as "electronically monitored curfew" (17) using electronic tagging, increased emphasis on offenders doing unpaid work in the community (18), and greater use of fines, including to make reparation to victims (20). The coalition also proposes to reform prison regimes and make them more rehabilitative, stating "we are developing a new type of prison —

\textsuperscript{108} A green paper is a tentative document outlining government proposals, and setting out questions for public consultation. The proposals outlined in a green paper are often modified or abandoned, and therefore the final policies introduced by a government may differ considerably from those in the green paper.
the working prison” (Ministry of Justice, 2010d, 15). The green paper emphasizes the importance of prisoners working hard in order to use their time productively and to develop job skills, and calls for greater discipline in prison regimes, including more activity, a timetable, and ideally a forty-hour work week. The government also proposes to channel some of the wages earned through prisoners' work into providing victim supports services, and therefore provide reparation to victims of crime and their communities.

The themes of decentralization and cost-efficiency are largely entwined in the green paper, through the proposal to introduce a "payment by results" (Ministry of Justice, 2010d, 38) model for the rehabilitation of offenders. The central idea of this model is that centrally-organized services for offenders, such as probation, will be replaced by services provided by a combination of public providers, private for-profit providers, charities, and community groups, who will be paid according to their success in reducing reoffending. This scheme is strongly reminiscent of Jeremy Bentham's plans for the panopticon (described in Chapter Two), whereby he would have been paid according to his success in rehabilitating offenders so that they did not commit any further crimes. The philosophy behind this scheme seems to be largely neoliberal, since the green paper argues that the existence of competition between different providers will lead to innovation, and thereby to greater success and efficiency in rehabilitating criminals. These payment by results schemes will be organized at a local level, and the green paper states that one of the central principles is "greater local accountability" (Ministry of Justice, 2010d, 43), which may lead to considerable variation and inconsistency across England and Wales. Interestingly, pilot schemes for the 'payment by results' system were approved under the previous Labour government, so the coalition government has embraced and expanded an existing policy, instead of introducing an entirely new one.
The payment by results approach is one of several proposals in the green paper that seems to be at least partially financially-motivated, and intended to ensure greater cost-efficiency in criminal punishment. As I discussed in Chapters Three and Four, the punitive trend in recent decades led to rising prison populations and incarceration rates, and thereby to substantial increases in government spending on criminal justice, which was largely not cost-effective. The UK coalition government's proposals to make greater use of community sentences and send fewer offenders to prison are likely to reduce government spending on criminal punishment, because non-custodial sentences tend to be less expensive and more cost-effective as a means of crime prevention for minor offences. The proposal to make greater use of fines as a penalty also fits into a framework of reducing government spending on criminal justice, and arguably the proposals around financial reparations for victims are part of the same impulse, since it might enable the government to reduce its spending on victim compensation and support services. Other proposals to reduce spending in the green paper include more use of unpaid volunteers, and changes in the court system, including closing some courts, and streamlining rules and procedures.

The penal philosophy and policies outlined in the green paper mark a significant shift away from the punitive trend that I described and analysed in Chapter Three, but incorporates much of the neoliberal philosophy discussed in Chapter Four, including the focus on cost-efficiency, competition, and privatization. Perhaps the most interesting thing about these proposals is the combination of new ideas and technology, such as electronically monitored curfews, with ideas that were prevalent in the eighteenth century, such as the idea that criminals can be reformed through strict discipline and hard work. The proposals outlined in the green paper are provisional and it is unclear whether the suggested changes to prison regimes will be
implemented, but the government's call for "a structured and disciplined environment" (Ministry of Justice, 2010d, 14) in prisons echoes Foucault's (1995) account of the disciplinary prison. Although it is far too early to judge the impact of these proposals, it seems as though the privatization of penal institution and services is being expanded, while the punitive trend that prevailed in England and Wales over the past fifteen years may be waning and might be replaced by a more rehabilitative approach.

My brief analysis of the recent shifts in penal philosophy and/or policies in the United States, and England and Wales, reveals a striking degree of overlap. In both cases there is a shift towards reducing incarceration rates that is at least partially motivated by the desire to reduce state spending on criminal justice, and is supported by some figures on the political right (Conservatives in the UK, and Republicans in the US). Moreover, in both cases this desire to reduce state spending on criminal punishment seems to be leading to a resurgence of the language of rehabilitation amongst politicians, and to schemes that propose to reduce reoffending through means such as providing drug treatment. It is also interesting that in both the United States, and England and Wales, politicians are seeking to promote direct financial reparations from offenders to victims, thereby conceptualizing punishment and victimhood in monetary terms. In both cases politicians are seeking to differentiate themselves from the punitiveness and carceral expansion of recent decades, but are continuing to use neoliberal language of the small state, cost-efficiency, and privatization. Although these changes hint at a significant alteration in penal philosophy and policies, these new approaches are largely being justified in terms of neoliberal ideology. The inconsistencies and failures of previous neoliberal approaches to criminal justice have therefore led not to the rejection of neoliberal ideology amongst politicians, but to neoliberal theory being identified with a different set of policies.
Nonetheless, the overlap between these two cases should not be overstated, particularly since the 2010 Fair Sentencing Act in the US is likely to reduce racialized over/under-representation amongst prisoners, whereas the coalition government has no similar plans to address racialized or ethnic disparities in the English and Welsh criminal justice system.

Given that greater punitiveness has contributed to a more coercive approach to governing the poor, to racialized socioeconomic inequality, to white privilege, and to the spread of 'toxic masculinity' amongst communities with the highest incarceration rates, is a reversal of the punitive trend a positive development? On the one hand, reversing carceral expansion would mean that fewer people were exposed to the negative consequences of imprisonment, such as political and socioeconomic marginalization, and toxic masculinity. On the other hand, the question of whether these changes should be welcomed depends on what sort of new system is introduced, what techniques and dynamics of power it involves, and what uses it serves. Here, my analysis here is purely provisional and speculative, but I would suggest that there are at least two reasons to be sceptical about the benefits of the recent changes. Firstly, as I discussed in Chapter Four, neoliberalism has tended to increase socioeconomic inequality and concentrate wealth, and the extension of privatization through the 'payment by results' scheme in England and Wales seems likely to exacerbate this trend. Secondly, and perhaps even more importantly, Foucault's (1995) analysis cautions us to be wary of claims about rehabilitation, and to be attentive to the differences between the purported function of an institution and its actual effects. If there is a resurgence of rehabilitation in America, and/or in England and Wales, then Foucault's (1995) analysis may become more relevant than it has been in recent decades, and the question of how to combine Foucault's insights with a critique of neoliberal techniques of power may become even more acute.
Questions for Future Research

Inevitably, the broad scope of this dissertation precludes a comprehensive analysis of the prison systems in the United States, or in England and Wales, let alone of their broader criminal justice systems or societies. Almost every issue touched upon in my research could have been explored in more depth, and as a result there are a great many issues that deserve further examination in future research. One of the major issues that I could not explore in this dissertation was the extent to which Foucault's (1995) account of penality applies to young offenders in the United States, and in England and Wales. In both cases, young offenders tend to be handled by separate institutions within the criminal justice system, and this frequently involves a different set of penal philosophy and practices. A promising direction for future research would be to explore recent trends in penal philosophy and policies around young offenders, compare these trends to the changes in criminal punishment for adults, and assess the significance of these changes for views about children, criminality and rehabilitation. Such an analysis could also consider the intersections between race, ethnicity, and sex/gender for young offenders, and provide a closer analysis of the factors that make some young people more likely to be criminalized than others, such as family abuse, exclusion from school, and homelessness. Although an analysis of this kind could yield valuable insights about the inter-generational transmission of socioeconomic inequality, and about the role of penal institutions in relation to other disciplinary institutions, this was unfortunately beyond the scope of my dissertation.

Another issue I was unable to address is the extent of variation in adult prison regimes with both the United States, and England and Wales, and the extent to which these different prison regimes fit with Foucault's (1995) account of the disciplinary prison. My research analysed the prison by focusing on the demographics of prisoners and the ways that their
identities were constructed and/or challenged by the criminal justice and prison systems, instead of exploring the categorization of prisoners as low, medium, or high risk, and the different prison regimes associated with these security classifications. Closer research into the security classification of prisoners is probably better suited to a criminologist than to a political theorist, but it would be interesting to see the changes in security classification of prisoners over the past three decades, and the intersections between sex/gender, race, ethnicity, and religion in shaping which prisoners were considered to be most 'dangerous'. Although my analysis in Chapter Seven discussed some of the differences between the policies and practices in men's and women's prisons, this is another issue that could be explored in far greater depth and detail. Again, a close analysis of the gendered rules, norms and practices in prison regimes is a subject where political theorists may not be best qualified to conduct primary research. My hope is that future scholars in fields such as sociology and criminology will undertake further research into the constitution of masculinity and femininity in prisons, and especially to the intersections between sex/gender, race and ethnicity.

Similarly, the racialized and ethnic dynamics in both the United States, and in England and Wales, deserve to be examined in far more depth and detail than was possible in the course of this dissertation. Although I considered the theoretical and empirical literature on these subjects in Chapters Five and Six, I would have liked to provide a closer analysis of the historical and legal construction of racial and ethnic categories, including the differences in the meanings of categories White, Black and Asian between these two countries. Another issue that I was only able to briefly discuss was the intersection between race, ethnicity, and class, and a closer analysis of the relationships between incarceration rates and the different socioeconomic positions of racialized and ethnic minorities is likely to be a promising direction for future
research. Originally, I also hoped to discuss the spatial power dynamics around race, including an analysis of Loic Wacquant's (2001) account of the links between the prison and the ghetto, but it quickly became clear that this issue could not be adequately addressed given the constraints of my PhD dissertation. In future research, I hope to pay more attention to the spatial dimensions of power dynamics around race, ethnicity, and sex/gender, particularly in relation to policing strategies and the impact of neoliberalism.

Other interesting lines of enquiry were not explored in this dissertation due to a lack of official data and prior research. One such issue is the relationship between Asian-Americans and the criminal justice system, where official reports by the Bureau of Justice Statistics do not list the numbers or proportions of Asian-Americans incarcerated, and there is very little discussion of the contemporary criminalization and imprisonment of Asian-Americans in the scholarly literature. As my committee member Bruce Baum pointed out, a closer examination of the relationship between Asian-Americans and the criminal justice system might provide valuable insights into the intersections between race and class, and to how the perception of Asian-Americans as a 'model minority' might affect their treatment by police. Although this is a fascinating question that deserves to be addressed in future research, the current lack of primary research and restricted scope of my dissertation made it impossible for me to adequately address the subject here. Similarly, I would have liked to provide more analysis of the role of religion in the criminal justice systems of the United States, and England and Wales, and particularly of whether the numbers, proportion, and treatment of Muslim prisoners in America has changed since 9/11. Although official figures are available about the religious composition of the prison population in England and Wales, there is no official data about the religion of prisoners in the US, which hinders such analysis.
Another important area that was beyond the scope of my research is the relationship between the criminal justice and prison systems, and other government agencies and social institutions. In Chapter Six I briefly touch on the subject of law enforcement around immigration, and the relationship between immigration policies and the criminalization of ethnic and racialized minorities in both the United States, and in England and Wales is an important topic that would repay further analysis. Similarly, the relationship between foreign policy and criminal justice policy deserves far greater attention than I was able to give it in this dissertation, particularly in relation to international and domestic anti-terrorism strategies, including extra-judicial detention. Although my analysis in Chapter Six briefly considers this issue in relation to the policing and imprisonment of Arab-Americans and Muslims in the US, and of Muslims, Blacks and Asians in England and Wales, I hope that other scholars will explore this issue in more depth. The continuing debates about the appropriate strategies for policing, trials, and detention of terrorist suspects in both the UK and the US, and the continuing existence of the American-run detention facility at Guantanamo Bay suggest that these issues will continue to be both current and important for years to come.
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