



# Foucault, prison, and human rights: A dialectic of theory and criminal justice reform

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## Abstract

Michel Foucault's advocacy toward penal reform in France differed from his theories. Although Foucault is associated with the prison abolition movement, he also proposed more humane prisons. The article reframes Foucauldian theory through a dialectic with the theories of Marc Ancel, a prominent figure in the emergence of liberal sentencing norms in France. Ancel and Foucault were contemporaries whose legacies are intertwined. Ancel defended more benevolent prisons where experts would rehabilitate offenders. This evokes exactly what *Discipline and Punish* cast as an insidious strategy of social control. In reality, Foucault and Ancel converged in intriguing ways. The dialectic offers another perspective on Foucault, whose theories have fostered skepticism about the possibility of progress. While mass incarceration's rise in the United States may evoke a Foucauldian dystopia, the relative development of human rights and dignity in European punishment reflects aspirations that Foucault embraced as an activist concerned about fatalistic interpretations of his theories.

## Keywords

comparative criminology, comparative law, criminal justice, criminal law, death penalty, Foucault, human rights, penal reform, prison, punishment

## Introduction

When Michel Foucault published *Discipline and Punish* in 1975, he offered a penetrating reassessment of criminal justice's historical evolution. Rejecting the notion of progress since the Enlightenment, the French philosopher depicted the emergence of modern

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prisons and rehabilitation systems as insidious means of repressive social control. The vulnerable classes were now purportedly incarcerated for their own good. Reforming prisons was a futile, two-century-long endeavor. Foucault's theories have had a huge impact on criminal justice scholarship in the English-speaking world, particularly in the United States (Garland, 1990: 131; Harcourt, 2020: *passim*; Whitman, 2003: 5). It is therefore striking that scholarship has neglected key debates over Foucauldian theory in France and Foucault's own activism toward prison reform, which could stand in sharp contrast with his theories.

This article examines interviews where Foucault expressed belief in the capacity of prisons to treat people humanely, whereas *Discipline and Punish* never proposes reforms for the problems it describes. As David Garland (1990: 173) notes, "it is written as if its author were 'outside' of power and outside of society as well". Others have depicted Foucault as a nihilist (Maier-Katkin, 2003). Be that as it may, Foucault was not a philosopher confined to an ivory tower, as he also was an activist involved in diverse initiatives to assist prisoners (Harcourt, 2013, 2020; Miller, 1993). A peaceful protest outside a prison even led Foucault to be arrested and struck by a hostile policeman (Foucault, 1971b). While French liberals criticized Foucault in his lifetime for promoting an "anti-reformist" activism (Thibaud, 1979: 4–5), we will see that his proposals encompassed pragmatic reforms for more humane prisons.

To better understand Foucault, this article contrasts his perspective with that of Marc Ancel, an influential French scholar who argued that prisons have the capacity to rehabilitate and humanize prisoners. Foucault (1926–1984) and Ancel (1902–1990) were contemporaries. Ancel is often identified with the development of progressive or liberal values in modern French criminal justice (Badinter, 1990; Lazerges, 2005). Ancel's scholarship was well respected internationally, too (Hood, 1974; Sellin, 1966), as illustrated by overlooked citations to his work in key death-penalty cases before the US Supreme Court (Amsterdam, 1972; Ancel, 1962a, 1962b; Goldberg, 1963). Ancel's penal philosophy reflected a conception of individuality and liberal democracy rooted in the Enlightenment.

Ancel is sometimes pitted against Foucault (Dreyfus, 2010), whose theories Ancel (1981) tended to disagree with. Ancel's writings were translated into several languages, thereby representing his influence beyond France. His most prominent work is a book adapted into English as *Social Defence: A Modern Approach to Criminal Problems*, although its French subtitle is more revealing of Ancel's humanistic outlook: *La Défense sociale nouvelle: Un mouvement de politique criminelle humaniste*.<sup>1</sup> At first glance, Ancel's defense of more humane prisons that would use experts to evaluate and treat offenders was precisely what Foucault denounced in *Discipline and Punish*. In reality, we will document how Foucault's activism drew him closer to the likes of Ancel.

Our back-and-forth between Ancel and Foucault follows a dialectic framework: the-sis-antithesis-synthesis.<sup>2</sup> The thesis is Ancel's theory on the humanization of criminal punishment since the Enlightenment, including gradual reforms toward modern principles of rehabilitation and human rights. The antithesis is Foucault's theory of the prison as a means of insidious social control rationalized by humanism and rehabilitation. The synthesis is the mutual convergence of Ancel and Foucault toward one another. Indeed, both lines of thought are partly reconcilable. As an activist Foucault advocated for

prisoners' human rights, just as Ancel came to recognize the validity of Foucauldian critiques of his earlier proposals advocating preventive imprisonment in the name of rehabilitation (Dreyfus, 2010). While scholars have explored the broader tensions between Foucault's actions and his theories on subjectivity, sovereignty, and beyond (Golder, 2015), a dialectic opposing Foucault and Ancel provides original perspectives on criminal justice's evolution.

In particular, Foucault has inspired the development of radical theories skeptical of the possibility of progress in the face of oppressive power structures, such as class and race (Bakan and Dua, 2014; Lacroix and Pranchère, 2018). This is especially relevant to ongoing US debates given the advent of theories positing that systemic racism in American criminal justice is immutable. As Trevor Gardner (2020) has suggested, this may be a self-fulfilling prophecy. A bleak perspective is nonetheless understandable considering the extraordinary regression of American justice with the rise of mass incarceration to virtually world-record levels since the 1980s, besides its retention of capital punishment when all other Western democracies have abolished it (Jouet, 2017, 2019). Whereas the United States has provided fertile ground for Foucauldian skepticism toward progress, modern Europe may likewise inspire pessimism due to the persistence of harsh sentencing and systemic racism (e.g. Barker, 2013; Chantraine, 2010; Garland, 2002; Reiter et al., 2018; Terrio, 2009), compounded by a repressive synergy between criminal and immigration law (Bosworth, 2019).

These troubling dimensions should not eclipse encouraging developments. In recent years, the European Court of Human Rights abolished life without parole in its seminal *Vinter* decision<sup>3</sup> and the Council of Europe (2006: 109) inched toward Foucauldian perspectives on how prison is inherently oppressive, regardless of benevolent aspirations. American scholars commonly ignore such promising developments in Europe, which could offer guidance to tackle mass incarceration (Jouet, 2019). Despite his image as a nihilist, Foucault would likely have supported these modern European reforms given his call to end permanent punishments (1981a: 1025–1026) and the marginalization of prisoners (1971d: 1099).

This article's thesis is not that *Discipline and Punish* has been fundamentally misread. Some have presented thoughtful arguments to this effect (e.g. O'Malley and Valverde, 2014), yet the article casts doubt on the existence of a one "true" reading of Foucault. Even though Foucault protested against certain readings of *Discipline and Punish* (e.g. Foucault, 1978a), he conceded that he should not "impose" a particular interpretation of his writings (Foucault, 1972a).<sup>4</sup> Foucault is amenable to competing understandings not only because he theorized myriad subjects, but also because he operated in distinct social settings and adopted diverse roles as a scholar and activist.

Instead of reinterpreting *Discipline and Punish*, this article analyzes how Foucault grappled with the tensions between theoretical scholarship and practical reform. In his final years, Foucault appeared concerned that his theories could help cement the status quo. "[S]ome were surprised by the fact that [my] reflection on the prison did not immediately take the form of proposals to improve their functioning", he recalled (1984a: 1508). Foucault felt he was misinterpreted as saying: "In the end, no means of punishment work" or "Anyhow, every punishment system will be catastrophic; there's nothing to do, whatever you do, it will be bad" (1984a: 1511).

This article therefore brings Michel Foucault into a posthumous dialogue with his contemporary Marc Ancel to illuminate whether advocacy toward penal reform is reconcilable with a radical critique of the criminal justice system. Both figures struggled with the application of their theories and prospects for reform. For example, Foucault (1972b, 1978b) highlighted that Sweden and Japan had much more humane prisons than France in ways that seemed inconsistent with his bleak, dystopian theories on imprisonment. Meanwhile Ancel came to terms with how imprisonment's dire shortcomings undercut his more hopeful theories. In our dialogue, Ancel and Foucault approached imprisonment from opposite premises but eventually found common ground.

This article is structured as follows.<sup>5</sup> First, we explore Marc Ancel's influential theory on criminal justice's gradual humanistic evolution, which provides a stepping stone to revisit *Discipline and Punish*. Second, we turn to Foucauldian theory's suspicion toward the humanistic outlook Ancel defended. Third, Foucault's activism reveals how he pragmatically converged toward Ancel's position by advocating more humane prisons. Fourth, we consider how Foucault's critique likewise appeared to influence Ancel by leading him to disavow some of his optimistic views on imprisonment. Finally, these two prominent figures' perspectives ultimately shed light on the evolution of criminal justice, dignity, and human rights in the West.

## **An influential perspective on the gradual humanization of punishment**

Marc Ancel "exercised a greater influence than any penologist in his age". This praise is from Robert Badinter (1990: 1102–1103), the most prominent French jurist of modern times. After a storied career as an anti-death-penalty defense counsel, Badinter led France's abolition of capital punishment in 1981 as Minister of Justice. According to Badinter, Ancel's scholarship heavily contributed to this gradual humanization of criminal law. Many scholars similarly praised Ancel for blending "pragmatic and humanistic" sensibilities (Lazerges, 2005: 166). Ancel had collaborated with leading figures of his day like Leon Radzinowicz, the British criminologist (Hood, 1974), who wrote a foreword in the 1965 English translation of Ancel's book *La Défense sociale nouvelle*. The latter was generally well received, reflecting Ancel's international standing (Sellin, 1966). Whereas Foucault avoided prescribing solutions in *Discipline and Punish*, Ancel incorporated practical recommendations in his theoretical scholarship.

Ancel's pragmatism may have stemmed from his dual role as a scholar and judge on the Court of Cassation, a French high court. Alongside his judicial duties, his passion for criminal justice led to numerous publications and activities. Illustratively, Ancel crafted a study on the abolition of the death penalty for the United Nations. Justice Arthur Goldberg of the US Supreme Court cited it in a groundbreaking memorandum inviting his colleagues to consider the constitutionality of capital punishment for the first time (Ancel, 1962a; Goldberg, 1963). Ancel authored another report on the issue for the Council of Europe. Anthony Amsterdam, the leading American abolitionist, subsequently cited it before the Supreme Court in a companion case to *Furman v. Georgia*—the historic decision that temporarily abolished capital punishment in 1972 (Amsterdam, 1972; Ancel, 1962b).

Ancel was an heir to the “social defense” movement born in 19th-century Europe. It focused on crime prevention by drawing on expertise to assess offenders’ dangerousness and incapacitate them as needed (Gerber and McAnany, 1972). But Ancel advocated a “new social defense” because he placed greater emphasis on rehabilitation and envisioned “the defense of human rights, the protection of the human being and therefore the passionate search for a criminal justice policy of a humanistic kind, in the strongest sense of the word [*humaniste*]” (1981: 7). “New social defense” may thus be a misnomer because Ancel’s theory truly was “penal humanism” (Sizaire, 2017: 263).

Ancel’s perspective did not arise *ex nihilo*. He credited Renaissance and Enlightenment humanism as a source of his new social defense theory (1981: 51–56). European penal systems rooted in religious traditionalism and absolute monarchy gradually came to be replaced by liberal and secular principles. In the 19th and early 20th centuries, this initially gave way to “neo-classical doctrines” with a technical, positivist focus on the application of the law to an offense. Deploing an “excess” of “legalism”, Ancel (1981: 72, 203–204, 312) faulted these doctrines for disregarding “the human person” by treating offenders as “objects” instead of “subjects”.

Yet the Enlightenment did not simply foster legalism, but also a shift toward more humane punishments, as demonstrated by the rise of anti-death-penalty movements in Europe and North America (Jouet, forthcoming 2022). Insofar as these shifts marked emerging sensibilities against harshness, as Durkheim (1900) and many argued, Ancel was among the actors hoping to carry this movement into modernity.

In Ancel’s eyes, the individual must be at the heart of criminal justice. He differentiated his theory from “dogma” like positivism deterministically imputing crime to biological traits (1981: 77). Emphasizing “free will”, Ancel was even skeptical about classifying “habitual offenders, occasional offenders, and passionate offenders”. “Research on these classifications is probably legitimate and useful scientifically”, he wrote, “but, for the new social defense, the act is above all the expression of an individual personality in a given situation” (1981: 186).

Ancel’s reification of individualism reflected wider social shifts. A parallel is palpable between the historic shift toward individualized punishment with humane aspirations and the societal shift that saw the individual gain importance in 19th-century intellectual life. For instance, Søren Kierkegaard blamed Hegel for painting a rigid and systematic vision of history ignoring individual agency. According to Kierkegaard (1846: 121), Hegel even forgot he was a human being. Whether justified or not,<sup>6</sup> this accusation mirrored Ancel’s (1981: 184) claim that criminal law in the 19th and early 20th centuries had come “to forget that the offender is a man”. While it may seem like existentialist philosophy and humanistic penal reform belong to distinct universes, in the history of ideas they lend themselves to analogies given their defense of the individual’s worth. Just as the penal system should not be a machinery judging individuals without assessing their circumstances, history should not be perceived as a colossal mechanism rendering individual choice meaningless.

Such individualistic claims enable us to analogize Ancel’s concerns to those of existentialists like Søren Kierkegaard or Jean-Paul Sartre, as well as Albert Camus, who distanced himself from existentialism despite sharing aspects of its outlook (Camus, 1946). In fact, Ancel (1981: 287–288) approvingly cited Camus’s essay *The Rebel* (1951) when

calling for “a new conscience” of the “value of human life”. Camus’s influence in Ancel’s epoch is corroborated by *Reflections on the Guillotine* (1957), an impactful anti-death-penalty essay. In addition to citing Ancel, Anthony Amsterdam, the prominent American abolitionist, emphatically cited Camus’s essay when challenging the death penalty as a “cruel and unusual”, substantively inhumane punishment before the US Supreme Court in 1972 (Amsterdam, 1972). Law & Literature is often understood as a field exploring literary themes in the law and vice versa (Stern, 2014), yet literature also offers a window into the genealogy of ideas that have influenced criminal law and its actors.

Figures like Camus and Amsterdam further exemplify how Ancel belonged to a wider reform movement with humanistic aspirations, which stemmed partly from Enlightenment ideals (Jouet, forthcoming 2022). At first glance, the radical critique that Michel Foucault offered in *Discipline and Punish*’s repudiated this movement by painting Enlightenment humanism as an insidious means of legitimizing penal control. Upon closer scrutiny, however, we will see in subsequent sections below that Foucault converged with this humanistic reform movement in light of the positions he took as an activist, which could diverge from his theories.

Still, Ancel’s outlook appeared more hopeful than the pessimism, if not nihilism (Maier-Katkin, 2003), perceptible in Foucault’s writings. But Ancel’s conception of progress was not synonymous with a naive or utopian aspiration to create a crimeless society. His idealism was counterbalanced with a lucidity evoking Camus’s *Myth of Sisyphus* (1942a), which called for accepting the disappointing realities of an “absurd” world in order to pragmatically face them. Tellingly, Ancel (1981: 287) referred to an “absurd . . . human condition” when citing Camus’s *The Rebel*. Ancel depicted crime as “a human fact” and “social problem” that a reductive “legal machinery” cannot comprehend. Mere retribution would likewise be blind. The new social defense “does not have the goal of instituting an *absolute* justice, exactly proportional to the abstract evil perpetrated or intended” (1981: 182, emphasis in original). Ancel deemed that *lex talionis* reflected a senseless metaphysical morality aiming to equate the sentence precisely with the crime. He further underlined that deviant behavior is inevitable and that the public “should recognize and accept” this (1981: 182, 184, 267). Ancel’s humanism thus went hand in hand with pragmatism.

Even though individualistic and humanistic conceptions of justice materialized several centuries earlier (Garland, 1990), Ancel emphasized their development after the Second World War. The first international congress of social defense occurred in San Remo in 1947, soon followed by the creation of the International Society of Social Defence and a UN social defense section. The Council of Europe kept on this track (Ancel, 1981: 15, 32, 258). The movement’s opponents “feared that sociologists, criminologists, and psychiatrists would usurp the role of judges and place their sciences over the rule of law”, as Patricia O’Brien (1998: 196) observed. Ultimately, “Social Defense stood as a marker of the general postwar emphasis on individual treatment and social protection” (1998: 196).

Ancel became a leading figure of this movement aspiring to a “socio-humanistic” criminal justice policy protecting “human dignity” (1981: 34). Channeling the polyvalence of Enlightenment thought, he wanted criminal law to embrace “all the sciences of man” (1981: 36). Multidisciplinary should outstrip narrow legalism: “The criminalist



feels today that he cannot be simply a jurist” (1981: 18). His holism comprised a profound internationalism and comparatism. Because dignity is a norm rooted in the intrinsic worth of each human being in the abstract (Bioy, 2010; Cassia, 2016; Kateb, 2011), an aspiration toward “universalism” naturally was at the heart of Ancel’s vision (1981: 36).

Ancel’s optimism toward the evolution of Western criminal justice had not anticipated developments like intensifying tensions over systemic racism. Nor had Ancel foreseen modern dimensions of American exceptionalism, including the rise of mass incarceration in the United States since the 1980s (Jouet, 2017). To the contrary, when the last edition of *La Défense sociale nouvelle* appeared in 1981, Ancel (1981: 125) was convinced that jurists face “human and social problems that, in the current state of [Western] civilization, tend to arise everywhere nearly in the same manner”. Ancel seems to have further underestimated the indifference, ambivalence or hostility toward international standards among numerous American officials and citizens (Ignatieff, 2005; Jouet, 2017).

If Ancel did not anticipate these modern developments, he was keenly aware that rehabilitation was already under attack in his lifetime (Dreyfus, 2010). The sustained challenge did not solely come from conservatives who accused his humanistic model of naive leniency toward criminals. The attack equally came from the left and was largely spearheaded by Michel Foucault.

## From Ancel’s pragmatic optimism to Foucault’s pragmatic pessimism

Foucault’s growing focus on criminal punishment in the 1970s with *The Punitive Society* lectures (1972–1973) and *Discipline and Punish* (1975) may be interpreted as the culmination of a radical leftist critique of penalty that gained ground in the 1960s (Garland, 2002: 65–67). This section describes how Foucauldian theory’s visceral pessimism challenged the influential, optimistic outlook that Ancel had offered in *La Défense sociale nouvelle*.

*Discipline and Punish* was released in 1975, after the first (1954) and second edition (1966) of Ancel’s book. By the third edition (1981), Ancel was mindful that Foucault and fellow iconoclasts had undercut his theories. Ancel (1981: 260) consequently defended himself against a “critical criminology” equating prisoner rehabilitation with “oppression and subjugation”. Among these stood “labeling theory” and its view that crime is just a social construct: “[T]he offender is only an offender because he is deemed so through a labeling process” (1981: 118). “Radical criminology” likewise gained traction in the United States during the 1960s civil rights and antiwar movements, leading to the idea that “the criminal act is essentially a refusal of the social order established by the ruling classes” (1981: 118–119). Most importantly, Ancel (1981: 260) added that these critics “find themselves in agreement with Mr. Foucault to conclude that, after the subjugation of the body under the ancient system, the supposedly reformed system oversees the subjugation of the soul”.

Seeking to rebut Foucault’s influential theory, Ancel (1981: 117) mentions him when stressing “the influence of an ideology derived from Marxism” permeating critiques of criminal justice. To Ancel (1981: 328–329), Foucault’s views reflected:

ideological assumptions according to which it is possible to build, instead of the present (capitalist) society, a society where men, free and equal, could behave in a spontaneous manner, which would make disappear at the same time marginalization, deviance, and criminality.

Ancel suggested that the critics' priority then becomes to "stand against 'the ideology of rehabilitation'" (1981: 328–329). By the late 1970s, Foucault's followers had actually begun challenging Ancel's theories on these grounds (Dreyfus, 2010: 185–188, 192).

*Discipline and Punish* had certainly repudiated Ancel's prominent theory, albeit between the lines, as Foucault did not cite Ancel. In Foucault's eyes, penalty had not evolved toward greater humanity since the Enlightenment. At most the change was cosmetic, a ruse to hide a sophisticated apparatus of repression under which the lower classes were purportedly incarcerated for their own good in the name of illusory rehabilitation. Changing social conditions no longer tolerated flagrant corporal punishment like the agony inflicted on the regicide Damiens in 1757, with which Foucault memorably begins *Discipline and Punish*. Hence, the ruling classes strategized more insidious means of control with the birth of modern prisons and their depersonalized, routinized, and regimented ways of overseeing the lower classes in an allegedly benevolent, humanistic spirit.

The evolution toward individualized punishment, which Ancel celebrated, represented to Foucault a new technology of power. Psychiatrists, psychologists, and other experts would strategically evaluate the character of those thrust into the penal machinery. Foucault was not alone in expressing such concerns. In *The Stranger*, Camus (1942b) notably painted a law less focused on the crime than the criminal's character. The defense counsel of Meursault, the antihero who committed murder days after his mother's funeral, reveals his exasperation: "Come now, is my client on trial for [coldly] burying his mother or for killing a man?" The prosecutor replies that:

only someone with the naiveté of his esteemed colleague could fail to appreciate that between these two sets of facts existed a profound, fundamental, and tragic relationship. "Indeed," he loudly exclaimed, "I accuse this man of burying his mother with crime in his heart!"

(1942b: 96)

If the humanist Camus depicted criminal law as an intrusive and repressive apparatus, Foucault was far more iconoclastic in *Discipline and Punish*, casting humanism as nothing more than a means of legitimizing power.

The psychological or psychiatric evaluation of prisoners helps us tie *Discipline and Punish* to Foucault's wider corpus. As Bernard Harcourt (2020: 113) notes, the prison "produces a truth about the delinquent", offering a parallel with Foucault's Louvain lectures (1981c) on how the medieval religious practice of extracting avowals from wrongdoers influenced penalty.

To Foucault, the development of modern individualism discussed above was not synonymous with growing liberty, but with the state's domination of the individual (Ferry and Renaut, 1985). Critics found he depicted "a kind of Whig history in reverse—a history, in spite of itself, of The Rise of Unfreedom" (Geertz, 1978).



Diverse thinkers have comparably equated the idea of progress since the Enlightenment with a *discours de légitimation*—a rhetoric aiming to rationalize social injustice. Echoing the incredulity of contemporary French intellectuals toward such metanarratives (Lyotard, 1979; Sartre, 1965), Foucault became the key philosopher of skepticism toward progress in the penal sphere. As such, *Discipline and Punish* implicitly dismissed Ancel and explicitly dismissed Émile Durkheim, who had authored another leading theory on the gradual humanization of punishment (Durkheim, 1900; Foucault, 1975: 23).

Ancel's aforementioned critique of Foucault was therefore not disinterested. In the third edition of *La Défense sociale nouvelle* he sought to respond to diverse critics, some of whom accused him of "communism" for being excessively liberal, whereas others equated him with "American capitalism" for being insufficiently radical (1981: 304). After all, Ancel wrote during the Cold War in a climate where many expected thinkers to pick a side. Ancel evoked this context when suggesting that Foucault was on the far-left of the political spectrum and that his philosophy had Marxist roots (1981: 117, 328–329). Foucault's words after visiting Attica, the infamous American prison, tended to exemplify Ancel's observation. Foucault had then insisted that "the problem is, then, to find out what role capitalism has in its penal system play", including "in the class struggle". He added that the distinction between ordinary and political prisoners was illusory (1972c: 28, 31–32). In fact, the detention of Maoist comrades had drawn Foucault toward prisoners' rights in France and led him to become a founder of the *Groupe d'information des prisons*, an activist group discussed below, before crafting *Discipline and Punish* (Miller, 1993).

While Foucault's perception of capitalism informed his views on punishment (De Giorgi, 2006; Harcourt, 2011, 2013), his ties to Marxism (or Maoism) were more complex than Ancel intimated. Foucault had largely charted his own path after being a member of the Communist Party earlier in life. He ultimately became a vocal critic of Soviet totalitarianism (Miller, 1993).

In any event, the radicalism of *Discipline and Punish* is unquestionable. While its theory is sophisticated in drawing upon multifaceted elements, it may be described as a monism: the tendency to interpret all events through one single principle. As Lacroix and Pranchère (2018: 54) put it, "[w]hat Foucault shows us is that the struggle against domination is never-ending, since every human relationship is a relationship based on power". Garland (1990: 162) offers a similar assessment: "We are invited to approach the study of penal institutions on the assumption that everything that occurs there is fundamentally oriented to the enhancement of control and the maximization of regulatory power".

Conversely, interpreting *Discipline and Punish* through Foucault's broader corpus cautions against a monism insofar as his multifaceted writings lacked an absolute "coherence" or "general theory" (Harcourt, 2020: 242). According to O'Malley and Valverde (2014: 323), criminal-justice scholars have misunderstood Foucault as painting a modernity where "discipline reigns supreme" through imprisonment and surveillance. Whereas Foucault distanced himself from Marxism, this misinterpretation allegedly reflected Marx's enduring influence in leading many scholars to replace "class" with "power" and "discipline" in their Foucauldian frameworks (O'Malley and Valverde, 2014: 317). O'Malley and Valverde (2014: 325) thoughtfully argue that *Discipline and Punish* is best understood in the context of Foucault's wider corpus, such as his "Governmentality" essay (1978c) that revealed how "non-disciplinary forms of power" were "at least as

significant". In "Governmentality" Foucault indeed depicted a gradual universalization of government as a societal system since the 16th century, from the paternalistic household to demography, the economy, and beyond. Foucault (1978c: 654) tied this to the rise of prisons, as discipline gained value when society focused on "managing the population". Foucault equally suggested that the ruse of power is not being repressive but productive (Cooper, 1994). From this angle, *Discipline and Punish* may not have meant that penal repression is inescapable because government power is the overarching question.

Nevertheless, a single "true" interpretation of Foucault's wide-ranging corpus does not necessarily exist. In a second French preface to a reprint of *Madness and Civilization* (1972a), Foucault recognized that authors cannot be the "master[s]" of their books or "impose" an interpretation.

While diverse scholars have criticized *Discipline and Punish* for providing insufficient historical evidence (Garland, 1990; Léonard, 1980), its monism may be its main shortcoming because it hardly admits that punishment may have any purpose besides strategic social control. As Garland (1990: 163) observes, penal policy has historically had "a variety of ends" that have at times proved contradictory, such as "justice, economy, vengeance, forgiveness, charity, evangelism, and so on".

Insofar as Foucault's model fails as "a general theory or interpretation", it is redeemed if used as "a heuristic device" to assess key issues and dynamics—"a new way of thinking" about criminal punishment (Garland, 1990: 163). Foucault himself said so, as late in his life he insisted that he had "no pretense to totality", underlining: "I do not want to universalize what I say". He explained that his ideas were an invitation to debate and rethink criminal justice, rather than "dogmatic declarations to accept categorically" (1978a: 41). Hence, Foucauldian theory can serve as a lens to critically assess whether human rights, dignity, and rehabilitation are merely means of rationalizing oppression.

## **The contradictory perspectives of Foucault as philosopher and activist**

This section explores how Foucault's activism toward prison reform at times stood in sharp contrast with his theoretical scholarship. His advocacy suggested a belief that efforts to treat prisoners more humanely were not necessarily futile, leading him to converge with the perspective of liberal scholars like Ancel in ways that have garnered scant attention.

Foucault became a key actor in a pivotal period of penal history. In the 1960s and 1970s, the rehabilitative model faced mounting criticism in the West. Conservatives deemed it downright ineffective and excessively lenient, thereby promoting the so-called "nothing works" mindset and a more repressive approach (Garland, 2002). Another form of iconoclasm was found on the radical left, which perceived rehabilitation as a way of rationalizing incarceration, as described earlier. *Discipline and Punish* primarily discussed penalty in France but encompassed comparative elements. Its claims were amenable to application in other Western societies, including the United States, where Foucault found a sizeable audience (Miller, 1993).

As Foucault gained global recognition, he came under fire from French liberals. They included Robert Badinter, then a prominent anti-death-penalty lawyer, who denounced

Foucault's critique of rehabilitation. To Badinter, rehabilitation had severe flaws but marked progress over past punishments (Foucault, 1977). Similarly, Paul Thibaud (1979: 4–5) blamed Foucault for promoting an “anti-reformist activism”. This criticism was a reaction to Foucault's role as a co-founder of the *Groupe d'information des prisons* (GIP), an organization aiming to empower prisoners and document their predicament. Thibaud (1979: 4–5) deplored that Foucault's “fascination for theory” had undermined the GIP by leading activists to “criticize ahead of time the idea of reforms” assumed to only perpetuate an inherently repressive system. Indeed, the GIP (1971: 1063) insisted that its “investigations [into prison conditions] do not aim to improve, soften, [or] make more bearable an oppressive power”.

Foucault (1980) answered Thibaud that the GIP proposed no reforms because it focused on enabling prisoners to express themselves. Comparable criticism had previously led Foucault (1978a: 53–54) to stress that the object of scholarship is not to propose solutions, but “be an instrument for those who struggle, resist and who no longer want what there is”. “Critique” is not a statement of what the law should be: “It is not a step in a program. It is a challenge to what exists” (1978a: 53–54).

In reality, Foucault's radicality did not prevent him from supporting concrete reforms. At the GIP he documented the troubles of French criminal justice, the overrepresentation of the poor, discrimination against immigrants and those marginalized in the *banlieues* (poor suburbs), overcrowding in small cells, cold, hunger, and beatings by guards (1971a). He notably envisioned legal remedies, such as stronger rights and alternatives to incarceration, from public service to forms of probation (1971a, 1981b). The GIP (1971) further demanded the abolition of criminal records since they serve to repress more harshly. Operating in a period when France experienced a rise in sociolegal activism (Israël, 2020), the GIP may have fostered a more transparent and accountable penal system (Welch, 2011).

In an interview strikingly at odds with *Discipline and Punish's* thesis, Foucault (1971c: 1075) admitted: “I think we need a full reform of the [penal] code, a profound reform. We need a new Beccaria”, thereby recognizing the worth of the Enlightenment philosopher who spearheaded the drive toward more humane and rational punishments (Beccaria, 1764). Yet nothing in *Discipline and Punish* or *The Punitive Society*, for that matter, suggests that Beccaria made any valuable contribution to criminal justice's evolution.

Foucault (1972b: 1164) did not wish for observers to contrast his theories and his activism in the present fashion: “I would like that no link be made between my theoretical work and my work for the [GIP]. I mean it. But there is probably a link”. A link maybe, a contradiction surely.

Indeed, Foucault's activism toward reform seems paradoxical given that in *Discipline and Punish* he insisted that reforming prisons was a futile, longstanding debate: “Prison ‘reform’ is virtually contemporary with the prison itself. It constitutes, as it were, its programme” (1975: 234). This is among the most powerful parts of Foucault's book because it documents reform's chronic failure for over two centuries:

Prisons do not diminish the crime rate . . . Detention causes recidivism; those leaving prison have more chance than before of going back to it . . . The prison cannot fail to produce

delinquents. It does so by the very type of existence that it imposes on its inmates: whether they are isolated in cells or whether they are given useless work, for which they will find no employment.

(1975: 265–266)

Reformers react by advocating better institutions, treatment, and rehabilitation: “Word for word, from one century to the other, the same fundamental propositions are repeated” (1975: 270). Despite the strength of this criticism, Foucault himself chose to advocate for prison reform.

Given *Discipline and Punish*’s tenor, one may have thought that as an activist Foucault would simply urge prison abolition. Although this was partly his aspiration (1972b, 1978b) and prison abolitionists have drawn upon Foucauldian theory (Zurn and Dilts, 2016), Foucault also stated otherwise and instead called for more humane prisons. Consider this separate interview:

[T]here *exist* better prisons than in France. In Sweden, fifteen years ago, on the road from Uppsala to Stockholm, I saw an institution the equivalent of a very comfortable French school building. The problem isn’t model prison or prison abolition. Nowadays, in our system, marginalization is created by the prison. This marginalization will not disappear automatically by abolishing the prison. Society would simply institute another means.

(1972b: 1172, emphasis in original)

This interview is again remarkable because, if one were to apply Foucault’s own theory in *Discipline and Punish*, Swedish prisons would just be a more sophisticated means of insidious social control under which the lower classes are purportedly incarcerated for their own good. Instead, Foucault appeared less suspicious of the motives of Swedish authorities than French authorities, as he seemed to believe that Scandinavian justice was capable of humanity.

Foucault thereafter continued to express ideas in tension with *Discipline and Punish*’s thesis. Traveling in Japan, he visited local prisons and deemed them “not only an improvement, a progress, but a veritable mutation” that could help inspire European penalty (1978b: 534–535).

Later in life Foucault advocated for “human rights”, such as for refugees, and praised Amnesty International (Foucault, 1984b). Ben Golder finds this shift did not mark an abandonment of Foucault’s past concerns. It was a “critical”, “ambivalent” “appropriation of rights discourse” to “reshape relations of power” (Golder, 2015: 6). Bernard Harcourt (2020: 31) adds that Foucault had long aspired “to live the relationship between theory and praxis”, as exemplified by his involvement in the GIP. Others suggest a normative evolution in Foucault’s final years (Lacroix and Pranchère, 2018), when he drew closer to figures like Robert Badinter, the aforementioned architect of France’s abolition of capital punishment and an heir to Ancel (Miller, 1993; Perrot, 1996). Badinter went from anti-death-penalty lawyer to a member of President François Mitterrand’s Socialist government, whose election interrupted years of conservative or centrist rule. Foucault (1984a: 1510) then praised Badinter as “the best Minister of Justice we have had in decades”.

Obscuring this development, Foucauldian theory became influential in leftist movements criticizing or repudiating human rights as a means of oppression (Lacroix and Pranchère, 2018: 53–54, 245). After all, Foucault (1971d: 1094–95) had challenged “humanism” as a norm through which the bourgeoisie legitimized its rule. Some actually identify Foucault among the catalysts of an “anti-humanist” philosophy surrounding May 1968, France’s major left-wing protest movement. This radical philosophy did not merely denounce naive faith in progress, it repudiated the Enlightenment, allegedly fostering cynicism or nihilism (Ferry and Renaut, 1985).

Jean-Paul Sartre, a fellow radical with whom Foucault had a tense relationship, despite finding common ground in protesting together for prisoners’ rights (Foucault, 1972b; Miller, 1993), likewise critiqued “humanism” as a bourgeois morality. Sartre (1965: 61) thereby proposed analyzing social norms from “the point of view of the most underprivileged”. This concept helps us understand why Foucault as an activist took different stances than as a scholar.

Foucault wrote *Discipline and Punish* partly because of his concern about prisoners’ predicament. The book offers a radical critique of their repression but avoids prescribing solutions. Conversely, as an activist Foucault sought to transcend theory by advocating practical solutions to improve prisons. This effectively brought him closer to liberal thinkers like Ancel who pragmatically incorporated concrete reform proposals in their theoretical scholarship. While Foucault (1972b) wished that observers would not contrast his scholarship with his activism, the two necessarily bore a relationship.

According to Cecile Brich (2008), hagiographic accounts of Foucault’s activities eclipse how the GIP did not merely enable prisoners to spontaneously express themselves. Rather, Foucault and his colleagues sought to orient and influence the prisoners’ discourse. That may be unremarkable insofar as few causes lack leaders. Yet it reveals how pragmatic considerations shaped Foucault’s involvement in the GIP. The notion of enabling prisoners to speak as “subjects” may also have been inconsistent with Foucauldian theory’s profound skepticism about the existence of an individual, autonomous subject with agency (Brich, 2008: 44; Ferry and Renaut, 1985: 41–45, 138–164).

As Pierre Bourdieu (1996) observed, Foucault may have contradicted himself at times but this did not mean that he was disingenuous or incoherent. To Bourdieu, Foucault instead operated in various spheres that led him to address distinct audiences or take diverse positions.

From this angle, it is possible to reconcile the conflict between Ancel and Foucault. To an extent, Ancel sought to put in theory what Foucault sought to do in practice. Indeed, Ancel’s theory suggested a path toward reforming institutions and humanizing prisoners. Notwithstanding his downright skepticism about this possibility in *Discipline and Punish*, this is partly what Foucault demanded as an activist. This has powerful implications for Foucault’s legacy and debates over modern criminal justice, from theory to reform.

## Reconciling conflicting theories

Intriguingly, the legacies of Marc Ancel and Michel Foucault are intertwined. Although *Discipline and Punish* was a theoretical work devoid of reform recommendations, it had

a practical impact in checking certain liberals' overly optimistic view of imprisonment. Foucauldian critiques thus plausibly contributed to Ancel reconsidering his proposals rationalizing the incarceration of vulnerable people for treatment (Dreyfus, 2010). Just as Foucault's work as an activist drew him closer to Ancel's theory on penal reform, Ancel would converge with Foucault.

In the third edition (1981) of *La Défense sociale nouvelle*, Ancel disavowed proposals in the first (1954) and second (1966) editions of his book. Back then Ancel had suggested support for preventive detention against insanity, vagrancy, beggary, prostitution, drug addiction, alcoholism, and even sloth as socially dangerous statuses (Ancel, 1954: 150–154, 1966: 267–272, cf. 275–281). Even though Ancel recommended restrictions on these measures, Bruno Dreyfus (2010: 172) underlines that “these restrictions appear quite meager given the proposed revolution” toward the criminalization of statuses, not acts. The revolution never came, however, as France essentially did not adopt these proposals.<sup>7</sup>

Ancel's movement still appeared to inspire Foucault's scholarship or, at least, mirror his target. Foreshadowing the benevolent incarceration later denounced in *Discipline and Punish*, Ancel argued in the first edition of his book that the new social defense aspires to bring offenders to “a socially free and conscious life”. “[The approach] is, in its spirit, non-repressive, because it never uses punishment for itself or to inflict suffering on the offender” (1954: 154–155).

Beginning from the premise of a benevolent government, an early French review of Ancel's book expressed support for the aforesaid preventive measures for socially dangerous statuses (Herzog, 1957). The sole English translation of Ancel's book featured these proposals (1965: 168–172). Several reviewers spotted the glaring civil liberties problem with preventive detention of predictable offenders (Rothstein, 1966; Ward, 1967), whereas others praised separate dimensions of Ancel's scholarship without raising this issue (Sellin, 1966). While these illiberal proposals differed from Ancel's typically liberal or humanistic ideas, they effectively vindicated Foucault's suspicion of well-intentioned reformers.

Ancel ultimately appeared receptive to such criticism. In his book's third and final edition, he scrapped these proposals, reaffirmed his attachment to the principle of “legality”, and expressed his “instinctive defiance toward any regime of administrative detention based on safety or preventive detention *ante delictum*” (1981: 188, cf. 233). He equally offered a *mea culpa* in a footnote recognizing that earlier editions of his book created a “risk of opening dangerous possibilities” (1981: 235 n75). Dreyfus (2010: 174, 185–188, 192) finds it difficult to know why Ancel switched course but notes that Foucault's disciples had vigorously criticized Ancel's theories in the 1970s. This included a roundtable where Foucault was present as others hyperbolically lambasted Ancel for proposing an oppressive penal system under which psychologists and psychiatrists would dominate sentencing. One of the participants, a leading psychiatrist, responded to Foucault's peers that “[t]hese concepts that bother you were invented in *The New Social Defense* with the aim of a better individualization of punishment”. Both he and a defense counsel cautioned that psychiatrists actually were very rarely involved in French criminal trials (Foucault, 1974: 1539–1541).

Nowadays, critics have further accused Ancel of laying the groundwork for the most illiberal reform in modern French criminal law—the *loi de rétention de sûreté* passed under conservative President Nicolas Sarkozy in 2008 (Danet, 2008; Dreyfus, 2010;



Wyvekens, 2010). This controversial legislation applies to persons convicted of various violent or sexual crimes, from murder to pedophilia, determined to present a high risk of recidivism due to a mental disorder. It allows their detention past the end of their prison sentences for additional treatment until deemed no longer dangerous.<sup>8</sup> The law followed the political and media outcry to the case of Francis Evrard, who raped a little boy shortly after being released from prison (Dreyfus, 2010). Sarkozy (2007) proposed these reforms in a speech calling for recidivist “madmen” and “predators” like Evrard to be locked up indefinitely in a medical institution after their sentences. This initiative reflected how Sarkozy, a mainstream conservative who leaned far-right on crime and immigration, had long accused the penal establishment of ineptitude and leniency.

Numerous jurists denounced the legislation as a regression defying fundamental principles of criminal law (Commission Cotte, 2015; Contrôleur général, 2015; Dreyfus, 2010; Wyvekens, 2010). The French Constitutional Court nonetheless upheld it, partly on the ground that it was not a criminal punishment since it aimed to treat deranged persons.<sup>9</sup> Its reasoning evoked an analogous US Supreme Court precedent on the continuous detention of a man who had completed his prison term for pedophilia. By a 5–4 vote, the Justices deemed this a “civil” measure, not a “criminal” one, exempting it from constitutional safeguards.<sup>10</sup> The European Court of Human Rights (ECHR) adopted a similar reasoning when upholding a section of the 2008 French legislation,<sup>11</sup> thereby deviating from a decision invalidating an analogous German law.<sup>12</sup>

This France–USA–ECHR convergence reveals how judges are prepared to indefinitely detain persons perceived as dangerously insane. Indefinite detention in a secure mental facility is akin to imprisonment, but labels like “criminal”/“civil” and “punishment”/“treatment” enable judges to circumvent the constraints of traditional criminal law. Still, the existence of such legislation in diverse Western societies further casts doubt on allegations that Ancel spearheaded this shift.

How do such preventive or indefinite detention schemes relate to Foucauldian theory? One nexus is the role of psychiatrists and fellow experts. Foucault (1975) depicted experts as key actors in an insidious system of penal control. They evaluate the personality of defendants and prisoners. They provide technical knowledge justifying incarceration for rehabilitation or mental treatment. Similarly, under the illiberal preventive detention measures that Ancel initially proposed, experts had a role in assessing offenders’ personality and predicting future dangerousness (Ancel, 1954, 1966; Dreyfus, 2010).

Thus, some claim that Ancel influenced Sarkozy’s repressive legislation (Danet, 2008), although this is doubtful (Dreyfus, 2010; Sizaïre, 2017; Wyvekens, 2010). Sarkozy (2007) endorsed the permanent incapacitation, vilification, and dehumanization of “predators”, whereas Ancel’s career focused on defending prisoners’ human rights and opportunity for rehabilitation so that they may reenter society. Interestingly, Ancel can be a foil for opposite critiques of French penalty nowadays. While some blame Ancel for punitive shifts, conservative politicians have misrepresented Ancel as a “Marxist” who promoted soft-on-crime policies (Sizaïre, 2017: 262).

Despite the considerable attention to the *loi de rétention de sûreté* in the French legal debate, its impact has been relatively minor so far. According to a 2015 study (Contrôleur général, 2015), five persons were detained under the law. To be sure, this number may rise starting in 2023, when the law will begin fully applying to people having spent at least 15 years in prison (Commission Cotte, 2015: 52). At present, the French Constitutional

Court's statement that the law should apply only under "exceptional" circumstances seems accurate.<sup>13</sup> Evidence thus casts doubt on the notion that the *loi de rétention de sûreté* heralded a dystopian, ultra-repressive shift in France embodying Foucauldian theory.

## Neither dystopia nor utopia

The development of human rights and dignity as sentencing norms in modern Europe (Jouet, 2019) has profound implications for *Discipline and Punish's* dystopian dimensions. Its monist focus on social control suggested that, while strategies may vary, any modern penal system aspires to insidiously oppress vulnerable classes. Yet, we saw that Foucault did not necessarily believe this, as illustrated by his praise of Swedish and Japanese prisons (1972b, 1978b).

Foucault was convinced that transforming justice would entail no longer marginalizing prisoners. One goal of the GIP consequently was to challenge the moralistic dichotomy between "the innocent and the guilty" that legitimizes repression (1971d: 1099). As France abolished capital punishment in 1981, Foucault (1981a: 1025) welcomed this step but cautioned: "The real dividing line, among penal systems, is not between those that include the death penalty and the other ones; it divides those who admit permanent sentences and those that reject them".

In 2013, Europe partly crossed this line by abolishing life without in parole as an inherent violation of human rights rooted in dignity. The ECHR's landmark *Vinter* decision was the logical conclusion of Europe's abolition of capital punishment, an analogous sentence. *Vinter* reasoned that prisoners must not be reduced to their worst act and eliminated from society. Rather, a "right to hope" entails a meaningful opportunity to reenter society based on one's rehabilitation. Unlike in the United States, where it has been normalized, life without parole was already unlawful or rare in most European nations before *Vinter* (Jouet, 2019).

Additional developments inch toward Foucault's aspirations. Soon after *Discipline and Punish's* publication, it sparked a debate among French criminal justice practitioners, including correctional officials, about how to make prisons less oppressive. But punitiveness's resurgence in France soon impeded reform (Perrot, 1996: 152–154). Foucauldian critique has arguably had a greater impact elsewhere in Europe. The European Prison Rules from the Council of Europe—the leading human rights body on the Continent—appear to acknowledge some of Foucault's criticism. Consider this striking concession:

A few individuals may be changed for the better by their experiences in prison, but they will always be a small minority and it can be argued that such change comes about despite the prison environment rather than because of it. . . . In the words of the Swedish prison and probation service (KVV): "There is an unavoidable, built-in contradiction between society's motives for locking away a person and the desire to, at the same time, rehabilitate him to a normal life. Prison shall therefore be formed so as to promote an inmate's readjustment to society and to work against the harmful effects of the deprivation of liberty".

(Council of Europe, 2006: 109)

Although Foucault theorized that penalty evolved toward intrinsically insidious oppression, the Council seemed relatively transparent about the contradictions, limitations, and hardships of prisons, including those centered on rehabilitation. Naturally, the European Prison Rules are aspirations that are not always implemented. Even in Scandinavian nations reputed for mild punishments, sentences can have oppressive dimensions (Barker, 2013; Reiter et al., 2018). Still, Scandinavia draws much closer to human rights than nations like France, whose prisons are among Europe's most ruthless (Chantraine, 2010).

While punitiveness has worsened in Europe in certain areas, such as immigration detention (Bosworth, 2019), a comparison with the United States demonstrates that unrelenting harshness has not become the norm throughout the West. Notwithstanding penal populism's impact in nations like France, the United Kingdom, and Canada, their incarceration rates remain roughly five to six times lower than the United States, which has the highest rate worldwide (Doob and Webster, 2016; Jouet, 2019; World Prison Brief, 2020). America's mass incarceration phenomenon offers a heuristic to gauge the resilience of human rights, dignity, and rehabilitation in other Western democracies, many of which diverge from the modern US model and its mercilessness (Jouet, 2019).

## Conclusion

*Discipline and Punish* appeared to announce a dystopia—a world evolving toward more and more insidious oppression. A benevolent discourse would strategically legitimize social control. Progress would be illusory and reform futile. Such ideas could only serve to perpetuate a repressive structure. Foucault has thus often appeared as a philosopher of the impossible. However, by juxtaposing his theoretical writings and activism, we see another Foucault, perhaps even a philosopher of the possible.

Late in life, Foucault warned against fatalistic interpretations of his scholarship. He had not theorized why “there's nothing to do” (1984a: 1511). He instead called for a radically different system, perhaps even including rehabilitation, but not necessarily given his enduring skepticism of incarceration (1984a: 1513–1514). The European Court of Human Rights and Council of Europe may be evolving in this direction, although their opposition to lengthy sentences is far from the end of imprisonment. While Europe has avoided US-style mass incarceration partly due to the development of humanistic sentencing principles, the failure and inhumanity of imprisonment remains a chronic issue there and beyond.

Marc Ancel likewise struggled with this question. Pragmatism led him to recognize the limitations of his humanistic and rehabilitative conception of imprisonment. He conceded that he had “never pretended that all offenders could be ‘re-socialized’” but that “the effort of social reinsertion can in principle be attempted for everyone” (1981: 267). Ancel's reaction may be understood as a claim of “implementation failure”, rather than “theory failure” (Garland, 2002: 20). If rehabilitation commonly failed, it was because the authorities did not implement it adequately, maintaining a repressive approach despite officially endorsing rehabilitation (Ancel, 1981: 260–265, 274–275). Ancel thus defended *genuine* rehabilitation and human rights. Foucault's critical lens helps us realize how this may be an elusive aspiration that could perpetuate the status quo. Still, our

dialectic has demonstrated how Foucault's pragmatism also drew him toward the rationale of implementation failure. Transcending the fatalistic aura of *Discipline and Punish*, Foucault advocated systemic reforms to treat prisoners more humanely.

Humanistic sentencing reforms have at times reflected a vicious circle (Dreyfus, 2010: 195–96). Paradoxically, criminal law has long both generated human rights violations and human rights norms to remedy these very violations, as illustrated by the adoption and abolition of life without parole in Europe. Genuine human rights may never be within reach, leading some to depict them as utopianism (Moyn, 2010). Yet prisoners may need human rights precisely because utopia is impossible.

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## Notes

1. Only a single English translation of Ancel's book exists (1965), whereas its French version was edited three times (1954, 1966, 1981).
2. The concept of dialectic has diverse understandings and is not used here in a narrowly Hegelian sense (Maybee, 2020).
3. *Vinter and Others v. United Kingdom*, ECHR, July 9, 2013.
4. All French translations are my own.
5. Parts of the article draw on the author's unpublished PhD dissertation, *Les droits de l'homme en France et aux États-Unis: La dialectique des convergences et des divergences*, defended at Université Paris 1 Panthéon-Sorbonne on 19 June 2019.
6. "Hegel's theory of the subject" aspired to "self-realization" and "Hegel's *Geist* [Spirit]" provided "the conceptual groundwork for all the modern views called 'existentialist,' from Kierkegaard to Sartre" (Taylor, 1979: 16, 29).
7. Across the Atlantic, the US Supreme Court also held that criminalizing drug addiction is unconstitutional because it is not an act but a "status". *Robinson v. California*, 370 US 660 (1962).
8. Loi no. 2008-174 relative à la rétention de sûreté.
9. Conseil constitutionnel, no. 2008-562 DC, 21 February 2008.
10. *Kansas v. Hendricks*, 521 US 346 (1997).
11. *Berland v. France*, ECHR, 3 September 2015, ¶¶ 40–47.
12. *M. v. Germany*, ECHR, 17 December 2009, ¶¶ 124–137.
13. Conseil constitutionnel, no. 2008-562 DC, 21 February 2008, ¶ 18.

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