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The death of the prison?

Re-thinking Foucault's Discipline and Punish, reflecting on a US student-prisoner dialogue series and key South African debates

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Dr Bronwyn Dworzanowski-Venter

University of Johannesburg

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The death of the prison? Re-thinking Foucault's *Discipline and Punish*, reflecting on a US student-prisoner dialogue series and key South African debates

Bronwyn Dworzanowski-Venter
Post-doctoral research fellow
Centre for Sociological Research, UJ
bronwynd@uj.ac.za

Introduction

My love affair with Michel Foucault began a decade ago, and shows little sign of waning. Reading Foucault ensures a guaranteed mental work-out. Re-reading Foucault provides a means of charting my evolution as a scholar. For these reasons, I often find myself reaching for a volume of his work in order to refresh my intellectual purpose. The state of this affair vexes scholars of a historical, feminist and/ or postcolonial bent. As such, I often find myself in tricky territory for it is this grouping of scholars that I most often seek out, and in whose company I enjoy a fairly similar intellectual quickening. Heated debates usually follow with my role as the 'defender' of all thought Foucauldian seemingly pre-circumscribed. This being said, I am intrigued by his work, but never an apologist. This love affair is based upon more than an infatuation with (as one recent detractor put it) the "Justin Bieber of the social sciences". The implication of this sort of statement is that Michel Foucault's work is best well-noted during one's scholarly adolescence, but is not meant to be in any way lasting. I do not seek to limit scholarly work in this way (with the possible exception of some functionalists that I struggle in vain to find relevance for in the contemporary world).

My reading of Foucault is to regard his work as a platform from which to launch my own thinking on a given subject. Like Foucault, I am concerned with sexuality, the state, normativity and all things biopolitical. As such, it was not shocking to find that I sought out a Foucauldian springboard when grappling with my understanding of a nexus of power, discipline and punishment: the prison. In *Discipline and Punish*, Foucault (1977) makes two pertinent arguments. In the first instance, he traces the evolution of punitive measures from the 'spectacle of the scaffold' (Foucault 1977: 32) (i.e. a very public, intensely physical punishment to serve as an example to others) to the immaterial, or the psycho-spiritual reformation of inmates. This reformative goal was carried out by means of the combination

of 'corrective techniques' with the 'principle of punitive detention' (Foucault 1977: 265). In the second instance, Foucault (1977) aligns the more modern form of punishment (with the goal of reform) to the prison, and argues that prisons are likely to be an *ever-present fixture* in modern society.

It is the second contention that I seek to problematise in this paper, by means of providing a detailed account of Foucault's 'prison' and to juxtapose this with the lived experiences of inmates both locally and abroad. As this piece marks the beginning of my reflections upon the possible 'death of the prison', I make no claims based upon an exhaustive empirical armamentarium. Rather, I have drawn upon three aspects of reality with which I am already familiar. These include: US prisoner-graduate student exchanges in North Carolina, the fairly well-documented case of South African gangster Nongoloza Mathebula [see Van Onselen's (1984) brief, but informative text[1], as well as Johnny Steinberg's *The Number* (2004a) for elaboration], and the virtually unknown case of 'Triple J', a white supremacist gangster and my biological father.

The birth of the prison[2]

In very bald terms, Foucault (1977: 232) assures us that prisons are 'self-evident', capable of being 'transformed', but ever present in that 'one cannot "see" how to replace [them]. It is the detestable solution, which one seems unable to do without '. The fact that criminals were detained prior to the late 18th – early 19th centuries does not change the fact that prisons (in the Foucauldian sense) only emerged as 'technico-disciplinary' in the modern era (i.e. early 1800's) (Foucault 1977: 233). These prisons functioned as more than detention centres that restricted individual freedom. They were focused upon a 'reformatory' function, with the final goal being the 'recoding of existence' of any inmate that was incarcerated (Foucault 1977: 236). The principles that would guide the reformation of convicts include: isolation (reflection and individualised punishment), penal labour (a love

[1] The Van Onselen text was penned in 1984. However, the version used for this paper was a second edition, dated as 2008. Nevertheless, I am of the mind that the text is not markedly different from the 1984 edition. Moreover, the time in which the text was written influences my reading of it. As such, I have chosen to represent the text as the work produced in 1984.

[2] My reading of Foucault for the purpose of this paper is largely shaped by cognisance of his work in *his own words*. I have attempted to present his work in this way so as to convince the reader of the substance of my interpretation of his work. Therefore, there has been no presumption that the possible readers of this work are ignorant of the contents of *Discipline and Punish.* However, should any reader require a reminder or a first taste of Foucault, this means of handling his text may also prove helpful.

for work and order inculcated), and the ability of prison officials to modulate the sentence (inmate conformity to a reformed life may reduce the sentence)(Foucault 1977: 244). In this way, Foucault (1977: 248) argues that a nuanced system of power relations evolves as:

> the carceral apparatus has recourse to three great schemata: the politico-moral schema of individual isolation and hierarchy; the economic model of force applied to compulsory work; the technico-medical model of cure and normalization.

As such, the prison is no longer a place where liberty is removed from a criminal. Rather, it is something more: a penitentiary, and a total institution. 'The theme of the Panopticon – at once surveillance and observation, security and knowledge, individualization and totalization, isolation and transparency – found in the prison its privileged locus of realization' (Foucault 1977: 249). A system of 'total surveillance' thereby came into being and supplanted the imposition of societal will via coercive means. From this it becomes clear that the penitentiary was the site of an application of a 'total' form of discipline. For Foucault, this discipline took multiple forms: the *omni-disciplinarity* of the prison is noted in the precise control over each aspect of the inmate's existence[3]; the *unceasing discipline* of the inmate in a temporal sense; and the *despotic discipline* inherent to 'repressive' prison structures (Foucault 1977: 236).

The 'penitential condition' imbued with these forms of discipline has stood for over 150 years and on this basis Foucault predicts that the longevity thereof is a foregone conclusion (Foucault 1977: 269). It is, therefore, critical to consider the maxims that underpin the penitential condition, for they are the grounds upon which I may begin to apply and assess the validity of the claims that prisons are born, re-born or capable of any sort of "death" in the South African situation.

The seven universal maxims of the good 'penitential condition'

The seven maxims function as a synopsis of Foucault's (1977: 269-270) theses of the penitentiary already set out in this paper. As such they include:

- Principle of *correction*: the 'essential function' of the prison is 'the transformation of the individual's behaviour';

[3] It is in this way that Foucault (1977: 235) relates the prison to other, mainstream, social institutions such as schools, workshops, the army etc.

- Principle of *classification*: 'convicts must be isolated or at least distributed according to the penal gravity of their act, but above all according to age, mental attitude, the technique of correction to be used, the stages of their transformation'
- Principle of the *modulation of penalties*: 'it must be possible to alter the penalties according to the individuality of the convicts' in terms of their status of rehabilitation;
- Principle of *work as obligation and right*: 'work must be one of the essential elements in the transformation and progressive socialisation of convicts';
- Principle of *penitentiary education*: 'the education of the prisoner is for the authorities both an indispensable precaution in the interests of society and an obligation to the prisoner'
- Principle of the *technical supervision* of detention: 'the prison regime must…be supervise and administered by a specialised staff possessing the moral qualities and technical abilities required of educators'
- Principle of *auxiliary institutions*: 'imprisonment must be followed by measures of supervision and assistance until the rehabilitation of the former prisoner is complete'.

The construction of delinquents

'The penitentiary technique and the delinquent are in a sense twin brothers' (Foucault 1977: 255). Delinquents are not aberrant social actors, nor are they criminals in need of reform whilst in the prison as penitentiary. Rather, delinquents are a complex combination of both – or, a 'superimposition' of the 'monster' upon the 'juridical subject rehabilitated by punishment' (Foucault 1977: 256). Rehabilitation involves a scientific element, for the inmate is the 'object of a scientific technique'. This adds a strong aura of legitimacy to the prison as a social control mechanism, and may account for its longevity. '…[T]he grip of the prison on the penal system should not have led to a violent reaction of rejection is no doubt due to many reasons'. One of these is that, in fabricating delinquency, it gave to criminal justice a unitary field of objects, authenticated by the 'sciences', and thus enabled it to function on a general horizon of '"truth"' (Foucault 1977: 256). Delinquents are imprisoned so as to 'bring them, too, under the veil of administrative decency' (Foucault 1977: 263).

Why are delinquents constructed by the very system that seeks to control them? There are two reasons for this, one that rests within the tension between the judiciary and the penitentiary and the other has to do with the construction of docile, reformed convicts. Each of these found elaboration by Michel Foucault.

In the first instance, Foucault strongly believed that judicial actors feel a strong sense of shame when meting out punishment. As such, 'delinquency is the vengeance of the prison upon justice' (Foucault 1977: 255). The prison is galvanised by mechanisms of disciplinary power, and this form of power permeates the entire criminal justice system. Delinquency is a 'parasite' that moves in unison with this power and infects the entire system (Foucault 1977: 256). From this it follows that we must consider the genesis of the delinquent by means of the prisons proper. Foucault (1977: 266) avers that 'prisons cannot fail to produce delinquents' for the following reasons:

a) the isolation and nature of work that characterises the prison experience
b) the application of violence
c) an 'arbitrary power of administration
d) the facilitation of an 'organization of a milieu of delinquents'
   (Foucault 1977: 266-267).

'The carceral system combines in a single figure discourses and architectures, coercive regulations and scientific propositions, real social effects and invincible utopias, programmes for correcting delinquents and mechanisms that reinforce delinquency' (Foucault 1977: 271). Simply put, prisons function to simultaneously create and destroy the delinquent.

The second purpose served by the construction and detention of delinquents is so as to create a sense of control over the criminal 'monster'. Prior to the advent of the penitentiary, criminals would march in chain gangs. When considering a historic account of a mid-19th century French chain gang, Foucault (1977: 261) uncovers the festive and unrepentant atmosphere that accompanied the chain gang of marching prisoners. 'In every town it passed through, the chain gang brought its festival with it; it was a saturnalia of punishment, a penalty turned into a privilege'. In this way, the chain gang was potentially subversive and a posed critical challenge to the status quo. A rapid halt was subsequently put to the chain

gang, and the formal prison was born in the form of a panoptical prison transport carriage. This development heralded the era of the true carceral system within a short period of time.

What we see here in the reasons for the construction and control of delinquency is the tension between the total abasement of the criminal, and the potential lack of control to apply the scientific techniques of reform upon the criminal as object. It is a question of balance. The prison has evolved and has had a sustained presence in so-called 'civilised' societies because it both *mediates* the punishment meted out by judges and an angry public (with a short attention span) and provides us with *the illusion of "humane" control*, supported by legitimate science, over the dangerous delinquent that we do not wish to debase ourselves in punishing.

From this discussion it is highly apparent that the construction, existence, functioning and control of delinquents, is key to Foucault's arguments for continued societal dependence upon them. Moreover, we must note that it is not mere detention that creates or controls the delinquent. Rather it is detention accompanied by the penitentiary technique. As such, the possibility of reform is crucial to the modern prison, as is the delinquent that requires it.

Questioning the power of the penitentiary: the germ of an idea drawn from US student-inmate discussions of Foucault's 'Discipline and Punish'

In a programme run by Michael Hardt and Anne Curtis, Duke University conducted a series of seminars at a nearby prison in North Carolina[4]. A number of scholarly works were read by ten students and ten inmates. Following this, discussions were held. The exchange proved so vibrant that it was continued in the form of letters between the groups. Having read *Discipline and Punish* some years ago, it was not delinquency that came to mind when I came across excerpted sections of these exchanges online. Rather, it was my recollection of the seven maxims that shaped my reading of these excerpts.

For instance, I was struck by the fact that the principles of correction and modulation were somewhat at odds with one another. As an inmate claimed:

> The prisoner is expected to *transform* into an a-sexual being throughout his/her period of incarceration according to written policy; however, homosexuality is not

[4] I have found it impossible to source a reliable date for this series of exchanges as yet.

> only accepted, but in most cases *condoned* by unwritten policy…. It appears as though the administrators view homosexuality as part of 'the carceral' (My emphasis added).

In the Foucauldian sense, the principle of correction is based upon restrictions of liberty. Part of these sorts of limitations regarding freedom and autonomy is the restriction of sexuality and sexual activity within the prison. The prison administrators have modulated the penalty by allowing for a small, but significant, sense of sexual freedom and practice. This is modulation tendency is extended in that prisoners are given sufficient room to negotiate their sexuality in other ways, for example an inmate stated that: "… yes a lot of masturbation goes on in prison. Although it is hindered by lack of privacy, the prisoners collaborate to maximise the times and places of privacy effectively".

It is apparent that at least some prisoners exercise a degree of sexual agency that is based on some form of collective cooperation. However, there is an even stronger perception of autonomy and rehabilitation held by the inmates in this programme. As one prisoner participant avers: "to understand the thought of rehabilitation, you must realize it is not or cannot be a forced procedure. It must be a volunteer modus operandi in order for it to be truly functional".

Perhaps the most powerful comment made by one of the inmates is similarly dismissive of the first maxim, but holds traces of dismissal for the entire Panopticon:

> No one has the ability to control or mentally punish another person, that person is the only one who controls this ability (e.g. by not allowing me to have something, you don't cause harm to me unless I consent I need it. If you take it away and I direct my intent to something else, I'm not in your control, I'm in my own. I make the decision whether I'm going to let this bother me or not.

Should Foucault be confronted with this, he would first have to respond to his own temporal and contextual dislocation, as well as that of his work *Discipline and Punish.* I suspect that his responses may have something to do with the fact that increased 'freedom', in the form of sexual agency reported by these North Carolina prisoners, as opposed to a total isolation, are accounted for by the principle of modulation. Moreover, the agency that inmates feel in possession of, that is to be punished or not to be punished, is a likely figment, for they are in all ways shaped by the pervasive influence and strictures of wider normative society.

I would find myself partially agreeing with the latter, but not at all with the former. We need to problematise the *principle of the modulation of penalties* for it is in this space that a friction is created between the prison and the judiciary. We also know that the application of discipline and the classification of the criminal inmate revolve around this tension (that can only find expression in modulation of sentence). It is in modulation that all of society (which the judiciary in some ways is keen to represent) makes peace with itself and the punishment of the delinquent. While the US example is not contextually bound to our South African penal system (albeit that there are some key similarities), the *principle of modulation* became a tool that I sought to use in grappling with two historical figures drawn from our local context.

Two gangsters named 'Jan': a prism of race, rehabilitation, and the prison gang as 'chain gang'

Nongoloza[5] Mathebula was born in rural Natal in the year 1867. In 1883, he was employed as a gardener, but soon became a skilled groom. In 1886, whilst working as a groom and general helper, a horse was lost and Mathebula was unjustly blamed for the loss by his white employer. Upon failing to locate the missing horse, he faced the loss of two year's wages to replace the animal. Righteously indignant, he made use of a work-related trip to Johannesburg to disappear and begin a new life. In this process he was compelled to assume an alias – and Jan Note (pronounced Nott) was born (Van Onselen 1984).

In 1888, Jan Note found a job as a groom in Turffontein. His employers were white gangsters of the period – better known as 'highwaymen'. As such, Note's criminal education proper began. "Learning from my experiences with these four men how easy it was to get money ... I decided to start a band of robbers of my own" (Van Onselen 1984, 2008 edition: 22). He amassed a criminal band dubbed 'the Regiment of the Hills' – the hills in question were in and around Johannesburg. Jan Note wanted more than a criminal underclass; he created a society, a new slant on the biblical Ninevah, and presided over it as a King who was keenly focused upon two broader goals: 'social justice' and 'resistance' (Van Onselen 1984, 2008 edition: 24). When the men in his regiment contracted venereal diseases that defied cure by traditional means, he instructed his Ninevite men to refrain from female sex partners and to

[5] He was named Mzuzephi Mathebula at birth.

take 'boy wives' in their stead (Van Onselen 1984, 2008 edition: 25). Criminal activities continued and the Ninevite gang gained a reputation as a black force that could 'knock the offending [white] master on the head' (The Star, cited in Van Onselen 1984, 2008 edition: 26).

The Regiment of the Hills was disbanded in 1899 due to the outbreak of the first Anglo-Boer War. Most of the members returned to their homes, while Note and a few trusted soldiers continued with theft activities until they were arrested in November of that same year. He was sentenced to five years imprisonment, but released by the Kruger regime within a few months. After a violent encounter with police in 1900, Note was arrested and convicted on a charge of attempted murder.

Van Onselen (1984: 29) has called the next 14 years of Jan Note's life as an inmate: 'the breaking of the man'. Note entered the prison as the King of the Ninevites, and would leave having worked as a prison warder from 1912-1914. This move, according to Van Onselen (1984: 44) is 'the classic switch familiar to observers of human behaviour in total institutions'[6]. Perhaps this is true. However, I am convinced that this was not a victory for the penitentiary, but a strategic move on the part of Jan Note. In the years 1900 – 1912, Note found it possible to run his reinvigorated Ninevite gang both within and outside of prison walls. He resisted prison officials at every turn, and made attempts to escape. The myth of Nongoloza Mathebula in the hills became entrenched as legend within prison walls.

He bore increasingly harsh reprisals, until a fateful day in 1912 where he provided a lengthly narrative of his life of crime to the Director of Transvaal prisons: Jacob de Villiers Roos. Roos was regarded by Van Onselen (1984: 42) to be a 'subtle' force to be used against the Ninevite leader. Roos was thought to be someone who could persuade Nongoloza to 'loose his footing on the softer ground of sympathy' (Van Onselen 1984: 43-44). Having given in, and being a reformed character, Mathebula would travel to many prisons attempted to disband the Ninevite cells and speak out against his former Ninevite life (Van Onselen 1984).

[6] Jonny Steinberg (2004a: xvi) would concur with Van Onselen here.

What could the 'reformed', broken Nongoloza Mathebula gain from this pretence? I suspect that he could boast three dividends:

- Nongoloza had become an entrenched myth. A myth that he seemingly undermined (but in so doing ensured a legacy still in evidence today, for the 26's, 27's and 28's, notable prison gangs, have strong Ninevite roots. Of these, the 28's have the closest ties to the sexual norms of the original Ninevites) (Steinberg 2004a). An oral record of his Ninevite gang was born. As the stories about Nongoloza 'have been there ever since, the memory of Nongoloza and the paraphernalia and legends of his life [have been] passed down from one generation of prisoners to the next' (Steinberg 2004a: xvi);
- he also ensured that his story was recorded by an influential white prison official. Having carried out some archival research in this period, I have found that the actions of black South Africans when not recorded by white men often become lost. As such, a written record of his life and times now exists, whilst for many of his counterparts no such record can be located;
- he provided the remaining Ninevites, and legacy gangs, with room to exist. The state had seeming control over their former leader as he was meant to reform them. He could, therefore, play a role in the modulation of their sentence as he was to be a tool of their reform and rehabilitation.

Nongoloza Mathebula died in 1948. He committed a number of additional crimes before his death. A reformed character? His own actions indicate that he was not. I believe him to be a strategic reformer. Perhaps in this belief I am overly influenced by my life experience with a white gangster who was born just before the dawn of high Apartheid, around the time that Nongoloza Mathebula, alias Jan Note, died.

Triple J, or Jan Johannes Jacobus, was born in Krugersdorp in 1944. The favourite son of a lower-class white Afrikaner couple, he had advantages beyond his class location. A talented rugby player, he soon amassed acolytes and as a high school boy he was rarely seen about town without a number of devoted 'hangers-on'. Refusing the university education offered by his family, he took a job in banking after matriculation. He married, and had three children whilst becoming a rising star in the agricultural insurance sector. At the age of 29,

this Jan was wealthy, and a part of the Afrikaner elite that were shaping South Africa's economy during high apartheid. As the political currents began to turn in the early 1970's, so did his ambitions. Triple J came into being at this time, and the next 15 years would see the early evolution of his career in white collar crime. Disenchantment with middle-class idyll was the explanation put forward by family and friends. As a member of this band, but more of an outsider-insider, than insider proper, my feeling, as his fourth child, is that his disillusionment was with the state, as opposed to his class status. From an early age, Triple J avoided military conscription. Not from any liberal notion of fair play. Rather, he was totally opposed to making an effort to support an ineffectual Apartheid regime. A strong believer in the supremacy of white folk, and an advocate of racial extermination and genocide, Triple J felt it important to strike a blow at 'white respectability'. The agents of white respectability were the bourgeois English-speaking elite that had embraced him, the landed Afrikaner farmers in his wider family and middle class professionals of his circle. He often told me that he wanted to 'liberate humanity from its own foolishness'.

There is evidence to suggest that whilst in prison in the early 1980s (and he served precious few of his sentences due to his ability to evade physical arrest, or sentencing by using aliases, or his favoured means: the faking of a series of mental illnesses) he was also 'broken' by the state. By his own admission he became an informal 'warder' and a quasi-agent for the South African 'Secret Service'. He was detained at the "Fort" in Johannesburg in the early 1980's as several of his suspended sentences (on fraud-related charges) had come into effect by means of his most recent conviction. At this time, he did not select the role of turn-key or 'spy'. Rather, he chose to enact madness as his defence. The court remanded him to criminal psychiatric detention institution locally known as 'Weskoppies'.

I visited him there, and was struck by the courtesy and respect accorded to him by inmates and warders alike. We met in an open visitor's area, but our table had a festive air. It was not the conventional cold, state-issued table and there were refreshments and chocolates for his children. He was not dressed in the standard clothing of the other inmates (he was a dandy in normal circumstances, and he showed little sign of changing this whilst at Weskoppies). Our meeting time was mysteriously extended and he was allowed to smoke, carrying his usual gold-plated lighter.

Upon leaving Weskoppies (after yet another 'miraculous' restoration of his mental faculties), he returned to his friends in the Afrikaner right-wing movements. He re-married a 'good Afrikaans wife' (as he defined her), and went about his business. During the course of the 1990's, Triple J used his unassailable political position in the Vaal Triangle to run his gem smuggling operation from his farm in the area. The basis of his support for the Boeremag in the early 21st century (a right wing terrorist organisation formed to protect white farmers from alleged black murderers) became apparent to me once I heard that his cousin had been attacked in an attempted 'farm murder'. Triple J was a direct descendant of Osswebrandwag stalwarts. In a present and past sense, he was a natural recruit for the Afrikaner right, and the Boeremag. To the best of my knowledge, he was not implicated in the 2002 Boeremag attacks. However, I am quite certain that he was intimately involved with them for my name appeared on a circulated 'Boeremag' hit list at the end of 2002 following my assumption of duties as a lecturer at the University of the Witwatersrand. I had previously written a paper analysing the AWB as an example of South African fascism. This move, coupled with my teaching at a 'pro-black, communist' institution, clearly incensed Triple J. This is an illustration of his commitment to the political agenda behind his criminal activities as he effectively blocked my personal research into Afrikaner movements at the time.

To the best of my knowledge, Triple J could make no claim to formal employment for the period spanning the early 1980s until his death in 2003. There were no more arrests, despite the fact that he was implicated in African continental gem smuggling in the 1990s and involved with notorious Mafia stalwarts in Salt Lake City. Like Jan Note, this Jan reformed at will, and soon returned to his own way of life when free of detention. Another similarity is that both men had broader political objectives attached to their life of crime. While Triple J's efforts are less known, his right-wing affiliations gave him the opportunity to evade the judiciary and the full force of the penitentiary. His 'gang' did not have the substance or form of Nongoloza's Ninevites, nor was he in control of the Boeremag. His did, however, have a good deal of influence over a large group of right-wing Afrikaners who took part in his criminal activities and also sought to 'emancipate' white South Africans from black rule. More than this, my intimate knowledge of Triple J's life has provided me with a fresh perspective with which to consider Nongoloza Mathebula.

The narratives of these two South African gangsters would have no relevance to this paper but for the inmate-student interactions and the application of the modulation maxim. Just as critical is the Foucauldian analysis of the 'chain gang' in the early years of 19th century France. Foucault recognises that the prison as a total institution can create a collectivity, or potential 'gang' of sorts. However, these two inmate collectivities differ in shape and form. Plainly put, the chain gang debunks detention whilst in public and whilst en route to perform forced labour. The prison collective of inmates facilitates recidivism. This implies an internal path to an extra-carceral life of crime.

It is my contention that the principle of modulation is related to inmate collectivities in the South African past (and, indeed, in the present). South African prison gangs are a means of compensating for the lack of modulation by prison officials for two reasons. In the first instance, we have the historical factor of a racially divided penal system. As on the mine compounds (Breckenridge 1998), prisons for non-white South Africans were policed internally by a hierarchy of older black men. As such, prisons for black South Africans were spaces where the practices of indirect rule (Mamdani 1996) could be applied before and during Apartheid. This was fertile ground for the formation of gangs, and these gangs had strong political imperatives. The best example of this is Nongoloza's Ninevites and 'the gangs derivative of the Ninevites [that] had a presence in almost every prison in the country … by the 1930s' (Steinberg 2004a: xvi). The legacy of the old prison gangs is alive and well, as is evidenced by the Ninevite roots of the present day 28's gang (Steinberg 2004b). This legacy is not that of a simple prison collective. Instead, it is a legacy with elements of the subversive 'chain gang' of unpunishable criminals attached to it.

When coupling the overburdened material conditions of contemporary prison life and the chain gang legacy, I have found it possible to imagine a prison where inmate collectives self-modulate. There is an administrative vacuum in the system, and this is often filled by the prison gang. Jonny Steinberg (2004b) has found that prisoners create their own authority between 4pm and 7am at Pollsmoor prison in the Western Cape. There is a 'skeleton staff' on duty at this time, and the 'number gangs take effective control of life behind locked cell doors' (Steinberg 2004b: 2).

As such, we have now identified a space in which the agency of the inmate – be it the two 'Jans' or their contemporary equivalents can flourish. Moreover, the modulation of sentence is handed over to gang leaders for 15 hours a day. These gangs are not mere inmate collectives, some contain the echoes of Ninevites (-as-a-chain-gang) 'marching songs, which rapidly became famous and were repeated everywhere for a long time after' (Foucault 1977: 261). The chain gang 'inverted the splendours, the order of power and its signs, the forms of pleasure …. Between the criminals and their judges, the day of the great reverse judgement will come …. What the violence of order had driven away would overthrow that order and bring liberty on its return' (Foucault 1977: 262).

Does this mean that we can infer the eventual death of the prison? There is a ghost of a sense that this may be so. Foucault (1977) depicted two forces – the judiciary and the penitentiary. I believe the modulation of penalties to be the most powerful maxim at work in the struggle between these two agencies of social control. Should prisoners be reformed, they will take on a certain character or form. In Foucault's understanding, the modulation of sentence was based upon the extent to which prison officials deemed the inmate 'reformed'. The power of penalty was thus given to the prison administration. Should this administration hand over part of this modulation power to our prison gangs (gangs which Foucault was certain existed, but that could not ever be as powerful as the prison officials as they were given no quarter to become so) – the death of the prison, of the Foucauldian "penitentiary" becomes a possibility.

The death of the prison in South Africa and beyond? Reflections and possibilities

More has been omitted from this paper than I could to dwell upon at this point. There are, for example, several commentaries (Cohen 1978; Tarbet 1978; Prakash 1982; Garland 1986; Simon 1996; Fraser 2003) on Foucault's *Discipline and Punish* as well as academics that question the use of his scholarship by sociologists (Goldstein 1984; O'Neill 1986; Fox 1998). Moreover, there is far more to be drawn from the text itself.

Still, I find it possible to speculate upon the future of the South African penal system in a more focused manner than would have been likely without considering Foucault. In the South African scenario, we know that:

- prisons are overcrowded, characterised by poor health care services, failing physical infrastructure, poor nutrition, gang violence and a general lack of resources (South African Human Rights Commission report, 1998; Dissel 2002; de Vries 2008; Cronje 2009; Morris 2011)
- many prisoners are released by the state, for example: the recent release of 35 000 prisoners (Langlois 2012)
- prisoners are released without a vast amount of auxiliary support (Albertus 2010)
- two trends are common to transitional societies:
    - an increase in crime (Jansen cited in the Stanford University News Service 1992)
    - an increase in state authoritarianism (Jansen cited by the Stanford University News Service 1992).

What this could imply is that while our 'number' / prison gangs grow in strength they are not countered by 'rehabilitative' measures in the social world outside of the prison. The principle of modulation is exercised within the South African prison, allowing gangs to flourish and not to operate as controlled collectives within prison walls. Added to this is the space created for gangs to modulate inmate penalties for long stretches of time each day. Moreover, the state is aligned to inmates by a political legacy and a contemporary service delivery crisis. As such, the state itself exercises an extreme modulation of judicial sentence by releasing prisoners that it regards to be a lesser class of criminals (Langlois 2012). This might have something to do with a sense of authoritarian guilt. The state must allow for imprisonment, whilst attempting the function of just government. What the state cannot allow is any tarring with old brushes. Does the case of Andries Tatane speak to this? Shall this government release still more prisoners for reasons beyond the purely instrumental? These are questions that beg more complex answers than can be given here. We should consider what the state does before attaching motives to the actions uncovered.

What the state openly allows the penitentiary to detain are vast numbers of *those awaiting trial* and this issue has only claimed government attention in 2010 (Ramagaga 2011). As the rectification of the problem will not be immediate, the detention of prisoners awaiting trial is still an important issue. The judiciary oft times operates ineffectually, and the overcrowded prison is similarly problematic. However, the prison still functions to detain, but cannot function to detain them.

As such, modulation becomes more complex, and difficult to carry out for how does a penitentiary function without sufficiently specialised staff, lack of facilities to house inmates, and the complex combination of the judicially 'innocent' crammed in amongst the judicially 'guilty'? Under these conditions, the collective, the prison gang, can not only flourish, but may take in the characteristics of the French 19th century *chain gang*. We have already seen some historical evidence that hints at this sort of conclusion in this paper – two archetypes, racially and temporally divided gangsters have exploited extant cracks in a system to create a sense of the "unpunishable" criminal, who could easily stand at the heart of the chain gang. Nongoloza's Ninevites, reinvented as the 28's, are a testament to this sort of legacy.

An obviously masculinised view of the prison is presented here. Yet, this is not by my design, nor is it my true intellectual intention. Rather, what is important is to note the masculine operation of the prison as penitentiary so as not to obfuscate debates and logics at work. Once I have completed this first, and critical, part of the process (in which I set out my understanding of the penal system) I seek to conduct my own data collection in women's prison environments. This is a move, not to mollify feminists, but one that shall hopefully help me to find the missing female criminal archetypes, highlight the gangs of women that operate in our society, and ascertain the ways in which discipline and punishment were invented and reinvented in South Africa across past and present social tableaux.

I fully intend to make careful use of Foucault's *Discipline and Punish* when engaging in this process. I may have loved him less critically if he had made an attempt to differentiate between the relative significance of his seven maxims. To my mind, the principle of modulation of penalties is a grey area and one that is worthy of grater analysis. Yet, the fact of the matter is however my personal research journey unfolds, Foucault, for all his detractors, has proven himself to be a worthy theoretical and intellectual crush. The prison

is here, globally and in South Africa, and while it functions imperfectly (as ever), it functions still.

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