

HISTORY OF THE PRESENT

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LAW AND SOCIETY

Risk, Insurance, Society

François Ewald was the assistant to Michel Foucault at the Collège de France. He is the author of L'accident nous attend au coin de la rue: les accidents de la circulation, histoire d'un problème (Paris: La Documentation Française, 1982) and L'Etat providence (Paris: Bernard Grasset, 1986), and has published several articles, including "Old Age as a Risk: The Establishment of Retirement Pension Systems in France," in Old Age and the Welfare State, ed. Anne-Marie Guillemard (London: Sage, 1983). Ewald is now at work on a book on the politics of the normal.

AN INTERVIEW WITH FRANÇOIS EWALD CONDUCTED BY PAUL RABINOW WITH KEITH GANDAL

Ewald: *L'Etat providence* is linked to the confluence of three events. First, a personal story: after 1968—which for me as for many others was a sort of little French Revolution—I was assigned a job as a philosophy teacher in a *lycée* in Bruay-en-Artois, a mining town. This was usually considered the worst thing that could befall a Parisian intellectual. But I felt I was fortunate to be able to be among the proletariat, and I don't regret having gone.

While there, I began working on a history of mining companies, and more specifically, a history of employer institutions [*institutions patronales*] within mining companies. I focused on the Bruay company, whose archives I had gone through and knew rather well.

As a result of this, I developed a desire to read the present starting from history. As a result, I published a novel writ-

ten by a worker—an important worker, mind you, because he had been a leader of the CGT after the Liberation.¹ He was among the leaders of the miners in the CGT, which in 1945 was the beacon of the proletariat. Its motto was "Let's roll up our sleeves." It was through the miners that the reconstruction of France was to be accomplished. They really were the symbol of the nineteenth-century proletariat, and represented about 120,000 people—a considerable figure.

This guy, because he represented (or thought he did) a particularly tough and rigorous line, was eventually put on the sidelines of both the CGT and the Communist Party. This is when he wrote a novel about himself, describing how his militant consciousness had been born. I was impressed by it because in a certain way it was very Foucaultian—that is, it showed that for his revolt the dimension of power was essential, and not at all the economic dimension. This is a

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1 A. Theret, *Parole d'ouvrier* (Paris: Bernard Grasset, 1978).

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dimension to which people were very sensitive in 1975. Well, I wrote a rather long preface to situate precisely the revolt, to conjure up the dimension of power, this essential dimension, especially in the case of mining companies.

The second event was also connected to Foucault. Through Daniel Defert, I began to be involved in the study of work accidents. On that occasion, I discovered something no one knew about any more: a French law on work accidents, dating back to 1898. This law seemed to me very peculiar and important, and it allowed me to discover the jurisprudence of work accidents in nineteenth-century France.

HP: And before that you didn't have any particular interest in law?

Ewald: Yes, I did. Law interested me. At the time of the Bruay affair,¹ I even considered studying law—which shows a certain inclination. And maybe it is because of this inclination that I decided to tackle the question of work accidents from the angle of jurisprudence.

I discovered two or three things: I discovered that what people said about nineteenth-century justice was completely false, since all the jurisprudence gathered was systematically a jurisprudence of employer condemnation, and everyone said that justice could always be bought by the bosses. There was at least a difficulty, which invited further study. Things were certainly more complicated than this simplified thesis.

The second thing I discovered was that the law, judgments and sentencing are very appealing philosophically, very subtle. And the third thing which encouraged me to carry on was that I discovered the importance of insurance (yes, I can say that I discovered it) and especially a category that had not been studied at all, not even outlined: the category of risk.

So, rather than continue to concern myself with all these employers' institutions (maybe I already felt that this analysis of power was politically dissatisfying), I decided it would be more interesting to do a genealogy and philosophy of risk.

Finally, the third event linked to this book was that Foucault asked me to come to the Collège de France in 1977. I knew I couldn't work on what he was working on, and at that time he was not working on law. . . . Then later

he developed the political aspect of security, of the security society [*société sécurité*].

HP: He published very little on this subject.

Ewald: In fact, he *said* very little, because he quickly abandoned this subject in order to study government. So I thought it would be a way to follow up. I was concerned with law, and he was concerned with something else: it was all very complementary, and it justified my presence near him. And at the same time, I was not treading on his path.

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Law and Society

After a series of unavoidable delays, *History of the Present* has resumed publication. This issue of the newsletter is devoted to law and society, and is meant to illuminate the connections among juridical and non-juridical discourses and practices. Many of the contributions to this issue are examples of work in progress, and we urge you to share your comments and reactions with the contributors or the newsletter.

We also invite you to contribute reports of your own research, as well as information on organizations, conferences and publications that may interest our readers. Future issues may focus on the politics of development in the Third World, norms and technologies, and medicine and the body.

History of the Present

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1 A sensational court case in 1972, in which an attorney from Bruay-en-Artois was accused of killing a miner's daughter.

The Jurisprudence of Death In the "Bio-Power" State

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BY JONATHAN SIMON

Introduction¹

This spring the United States Supreme Court decided the case of *McCleskey v. Kemp*.² McCleskey, a black man, during the course of robbery killed a white police officer. He was convicted and sentenced to die by a Georgia jury. On appeal McCleskey presented statistical evidence showing that killers of whites were 6% more likely to draw a death sentence in Georgia than killers of blacks. On the basis of this evidence, McCleskey challenged the constitutionality of Georgia's capital punishment system.³ Despite McCleskey's statistics, the Court rejected his claim.

The Court's holding in *McCleskey* marks the end of an experiment in social policy and jurisprudence that the Court launched in 1972.

To see why, it is necessary to appreciate just how striking petitioner McCleskey's claim really was. McCleskey was not objecting to the kinds of murder cases Georgia had statutorily identified as eligible for capital punishment. He was not claiming that his case did not fit in the statutory categories, or that death was a disproportionate punishment for his crime.

McCleskey claimed his rights were violated because other criminals Georgia deemed deserving of capital punishment were not sentenced to die. Decisions as to which convicted killers should die and which should not were, as McCleskey saw it, influenced by race.

We have not always expected the state to account for the statistical patterns that result when it exercises its power to

kill. Until 1972, there were virtually no requirements that the state offer its reasons for executing convicted killers.

In 1972 the Court began to demand that the state, in exercising its power to kill, behave in a manner similar to that required of modern administrative agencies; that is, the Court began to require that the state clearly set forth the rationale on which it based its decisions to act. *McCleskey v. Kemp* marks the abandonment of this effort.

Constitutional law can be seen as a conversation about what makes the exercise of state power rational. Regardless of the outcome in a particular case, the kinds of serious arguments that can be made tell us a lot about the underlying conceptions of what state power is for, and under what conditions its exercise is tolerable in our time.

Capital punishment presents an inevitable problem for a modern state whose power is directed to administration of life.

In this paper we shall use the constitutional conversation about the death penalty to look into the changing rationality of state power. The death penalty is a privileged site for such a view because it was a central ritual of an older form of state power. Capital punishment presents an inevitable problem for a modern state whose power is directed to administration of life.

The difficulties the Supreme Court has experienced in creating a consistent jurisprudence of death come, in part, from the Court's ideological divisions on the matter. But it is structural difficulties within the discourse that have rendered the jurisprudence of death incoherent. This paper is about these structural problems. They can be summarized as follows: the Court has tried to impose a modern understanding of what makes state action rational on an archaic practice. Capital punishment belongs to an under-

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1 The author wishes to thank the following people for their comments on earlier drafts of this paper: Mary Dudziak, Keith Gandal, David Horn, Susan Lehman, Sheldon Messinger, Paul Rabinow, Jerome Skolnick, Jackie Urla, Franklin Zimring. Full responsibility for any errors in the following remains with the author.

2 55 Law Week 4537

3 The statistical evidence also indicated a smaller but statistically significant bias against black killers.

Dangerous Sex

Carole Vance is a medical anthropologist at the Columbia University School of Public Health and co-director of the Institute for the Study of Sex in Society and History in New York. She writes about sex, gender and health, including AIDS in New York and female circumcision in the Middle East. Vance has contributed to many feminist publications, most recently Caught Looking, a collection of feminist articles and art on pornography inspired by the Feminist Anti-Censorship Task Force (F.A.C.T.). She is also the editor of Pleasure and Danger: Exploring Female Sexuality (New York: Routledge & Kegan Paul, 1984).

In the following interview, Ms. Vance discusses her current research on sexual politics and the recent anti-pornography movement in the United States, a subject of intense interest for both feminists and moral conservatives. These debates were brought to national attention in 1986 with the release of the report of the Attorney General's Commission on Pornography. Ms. Vance observed over 300 hours of the "fact-finding" public hearings and executive sessions held by the Commission, conducted interviews with numerous participants, and is now writing a book on sex in American culture.

AN INTERVIEW WITH CAROLE VANCE CONDUCTED BY JACKIE URLA

HP: Could you explain the topic of your research and how this ties in with your previous work?

Vance: My work is always about the same thing, although the subject I look at may be radically different. Essentially, I am interested in how sexuality, health, and body issues are cast in cultural terms and how they form the basis of political mobilizations in some instances, and public policies in others. I really fell into work on the Meese Commission by accident; it wasn't on my research agenda to study this. I was somewhat interested, had read about the Commission in the press, and went to one of its hearings on social science, since that is what I do.

What happened was very much what conservatives say happens to you when you begin to read pornography: I went innocently enough to one hearing, and then I became hooked; it became my addiction. I found the meetings totally gripping. It was as if American culture were on display in that hearing room, albeit a very particular slice of it. Different conceptions of gender and sex were being presented

in that arena, and some went over a lot more successfully than others.

Some commentators, for instance, talk about the Meese Commission as if it were just some kind of buffoonery, hysterically funny: Archie Bunker views porn. That way of looking at it seems mistaken. What we really have to explain is, if this is so ridiculous, why does it work in mobilizing public anxiety about pornography and more generally about sex?

I became interested in understanding how this really works. Some commentators, for instance, talk about the Meese Commission as if it were just some kind of buffoonery, hysterically funny: Archie Bunker views porn. That way of looking at it seems mistaken. What we really have to explain is, if this is so ridiculous, why does it work in mobilizing public anxiety about pornography and more generally about sex? What the Commissioners were very good at doing, in an intuitive way—it was not a pre-planned intellectual strategy—was to play very successfully on traditional symbols in American culture about sex and about men and women. By analyzing the interviews and observational data, I'd like to understand how they do that.

HP: Your methodology is unique in that you are combining ethnographic or observational data with textual data from the report and proceedings in order to study the discourse on pornography. What advantages or new insights do you think are made possible by that combination of methodologies?

Vance: I realized in the course of my first or second hearing that an analysis of just the texts would be limited. It seemed far superior to combine this with observation and interviewing. The material was incredibly rich.

Of course, to notice that the text is limited is not a new observation; all the people who do social construction work on sex and work with texts have said that. The problem is that we use texts because they are available and cheaper to use. It is the "first cut" to look at. After that, there remain a lot of unanswered questions, so you wish you could interview people. If it's 1980 you can, and if it's 1880 you can't.

Looking only at the Meese Commission's final report, the text itself, leads you to a conspiratorial view of culture and

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Notes on the Government of the Social

Giovanna Procacci has worked with Michel Foucault, Robert Castel and Alessandro Pizzorno, and teaches sociology at the University of Milan. She has published articles in I&C, Aut aut, and in the volume Effetto Foucault (Milan: Feltrinelli, 1986), and is now at work on a book, Governing Poverty: The Social Question in France between the Two Revolutions, 1789-1848.

BY GIOVANNA PROCACCI

The notes that follow are meant to suggest elements of discussion around the notion of “government” and its application to the field of the social.

1) The notion of “government” introduces new perspectives in the analysis of power, alternative to those afforded by the juridical philosophy of sovereignty and by analyses focused on institutions. It refers to an “art of government” developed since the sixteenth century, alongside these two major traditions in the analysis of power. Government designates the “direction” of the conduct of individuals and groups, and thus links together the different forms power relations may assume—the government of souls, of the home, and of the State—in contrast to the tendency of the theory of sovereignty to separate out political power.

The notion of government also points to a plurality of elements, forms and goals of power, which cannot be reduced to a description in terms of political regimes or institutions. Instead, this notion opens the way for an analysis in strategic terms, focused on choices of government.

2) These new perspectives have two principal consequences, concerning the place of the subject in the power relation, and the possibility of reintegrating into the analysis of power the gaps [*écarts*] that are created among the different orders of the relation itself.

For Michel Foucault, to govern means “to structure the possible field of action of others.”¹ In government, the power relation is therefore productive of subjectivity, in the

sense that it consists in giving form to action, through which the subject experiences himself/herself. But this giving-form-to-action requires that, at the other end of the relation, there be a heterogeneity of elements—that there be, in sum, liberty of the subject, expressed by the field of possibilities offered to his/her action. Government, as action upon the action of others, is therefore always exercised in a sort of indetermination; there is always something which escapes it on the side of the possibilities of the subject. It is only in this sense that we can claim “there is no power without potential refusal or revolt.”²

Government, as action upon the action of others, is therefore always exercised in a sort of indetermination; there is always something which escapes it on the side of the possibilities of the subject.

If the relation of government is structurally oriented by this reference to a field of possibilities that never ceases to overflow it, the analysis of government cannot be exhausted by an assessment of the “realized effects,” to use the happy formulation of Albert O. Hirschman,³ but must also extend to that which is avoided or lost along the way. The relation of government does not postulate a perfect correspondence among the different orders of the relation—that of discourse, that of practices and that of effects. The mere fact that these do not correspond perfectly becomes rather the center of the question—not in the sense that there is not any rationality, but because every rationality of government is rooted in a range of possibilities, which delineate both its contents and its limits. Every rationality of government is therefore a choice against other possible choices, and must consequently be read in the light of the antagonism of

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1 See “The Subject and Power,” in Hubert L. Dreyfus and Paul Rabinow *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2nd ed. (Chicago: University of Chicago Press, 1983), p. 221. Here, Foucault specifies the value of the relation of government: “Basically power is less a confrontation between two adversaries or the linking of one to the other than a question of government.”

2 Michel Foucault, “Omnes et Singulatim: Towards a Criticism of ‘Political Reason,’” in *The Tanner Lectures on Human Values*, vol. II, ed. Sterling M. McMurrin (Salt Lake City: University of Utah Press, 1981), p. 253.

3 *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton: Princeton University Press, 1977), p. 131. Hirschman analyzes the non-correspondence between the realized effects and the intended but unrealized effects of social decisions, which nevertheless continue to be active or “actively repressed.”

Risk, Insurance, Society

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HP: What was the first thing you did?

Ewald: The first study I did was on work accidents. I did the genealogy of professional risk, or at least an assessment, for the Labor Ministry. When we divided up the work among ourselves, I chose to study the law of 1898. In my report, I took up a certain number of things I had already done on employers' institutions, which I already knew well. I also had had experience with mining disasters, but at another level. The Lens disaster had occurred in 1970, followed by a people's tribunal. I was dealing with silicosis, work-related diseases—we did a lot of things then with doctors. I don't have any regrets about what I did then: I learned how things functioned.

My idea was to do a history of Reason: a history of modern political and juridical Reason . . . centered on the notion of responsibility.

Then after that, I kept as the center of my work the 1898 law and the notion of professional risk. My study has different levels: a sociological level, a juridical level, and a philosophical level. At the sociological level, my idea was to do a history of the welfare state, not in terms of a history of political ideas, but starting from the essential technology of the welfare state, that of insurance. I called it—but maybe this is not very good—the history of “insurance societies,” the formation of insurance societies.

HP: Were you responding to other writers?

Ewald: No, not at all. First of all, in France there were very few things on the welfare state. There was a lot of talk and very little research. The only things that had been written were very ideological. And the few more-developed works dealt with the history of ideas.

HP: The history of legislation?

Ewald: Yes, a kind of history of legislation. There were totally dissatisfying themes like state intervention, and so on—they did not amount to very much.

What interested me was the unity of these three elements: sociology of “insurance societies,” philosophy of law and, well, philosophy of risk. My idea, in short, was to do a history of Reason: a history of modern political and juridical Reason, from the Civil Code of 1804 to the present,

centered on the notion of responsibility, on practices of responsibility. From the accident, one can go back to the problem of responsibility, and then do a history of Reason starting from practices of responsibility.

Social law was a new way of *saying* the law, a new type of *jurisdiction* which was alternative to civil law.

I believe our juridical and political rationality was profoundly transformed at the end of the nineteenth century, and at that moment it broke with the French Revolution. . . . With the appearance of social legislation—not industrial legislation, but a legislation that was called “social”—there was put in place, to use a Foucaultian vocabulary, a new political positivity, which was translated juridically by social law. And social law must not be defined by its focus on work or social security. Social law was a new way of *saying* the law, a new type of *jurisdiction* which was alternative to civil law.

The aim of my book is to show that instead of analyzing the welfare state and its juridical practices as amendments or corrections to the old Civil Code, which they continued and maintained, it is necessary to abandon this negative view, and to realize that this was the beginning of a new juridical and political era, comparable to the Renaissance. A new form of governmentality appeared.

HP: Did you deal with the causes of this rupture as well as its effects upon social and political practices? Were you concerned with causality?

Ewald: I was very much concerned with causality, but perhaps not in the sense you mean. I found my topic overlapped with the history of the working class. And as far as I was concerned, there was nothing left to say about the working classes. Yet if everything had been said, people had still not reached the point where this history had become important. For this history had always been written as a history of the workers' misery—a very sad and unfortunate state of affairs, to be sure, but also a most common one in the history of mankind. Narrowing the workers' struggles to the history of their misery really does not do them justice. Yet this is what had always taken place in history.

By contrast, what I find much more interesting in history is to try to see how the workers' struggle, how the workers' history had a philosophical effect, a truth-effect, how it transformed ways of thinking. All the social causes for these struggles are very well known, at least as far as France

is concerned. One could look at forgotten industrial archives anywhere and find out what is already known. I have every reason to think that nothing particularly new will be discovered. On the other hand, what seemed interesting to me was to try to envisage from the point of view of its truth-effects, the moment at which this history was truly inscribed in History.

HP: But one can tackle the problem in a different way. Rather than talk of causes, one can talk of solutions which arose out of a problematic; they were an answer to something.

Ewald: Yes, and this is how I constructed my tale. I began by trying to analyze responsibility at the beginning of the nineteenth-century—that is, at the time of what is called liberalism. I realized that it was thought that the whole problematic of liberal responsibility was the diagram of a well-ordered society. This was implemented by juridical politics, and then by social security politics, which I have tried to exhibit in all their complexity.

The solution was social insurance — a wholly new way of thinking, a new mode of thought.

This whole political vision [*imaginaire politique*], this political rationality was very quickly called into question by industry. Industry posed problems for countries like France, which in 1800 was not industrialized. As soon as industry arrived, it didn't work; it was dissatisfying. There was pauperism, work accidents, etc. In my opinion, the industrialization of society caused the dislocation of the liberal diagram, of the diagram of responsibility. The Republicans at the end of the nineteenth-century thought they had to formulate a new political vision, which was made necessary by industry. They came to think of themselves as those who were going to provide the framework for an industrial society. And it is through this that the model, the *imaginaire*, of insurance appeared as a solution which could be made universal.

HP: Do you deal with the defeat of France in 1870, and the appearance in Germany of social security laws?

Ewald: I deal with the first very little. Because as far as I am concerned, what was more important than 1870, or even the Commune, was the 1869 strike at Le Creusot.¹ It seems to me that this event was far more serious, because it revealed that the solution to the inadequacies of liberalism—of the primary liberal program—offered by social economy, was no solution at all. In 1867, at the World Fair, Le Creusot was declared to be in a class by itself, and to represent what had to be achieved internationally. And just two years later there were strikes at Le Creusot—that is, there where social economy was supposed to bring peace, it did not bring peace. For me, this was *the* crucial event—especially because more strikes followed at factories where *patronage* was practiced.

HP: Did this model disappear?

Ewald: No, these were practices linked to problems of industry, to problems of personnel training. People realized that these kinds of institutions were not bad, but that the thinking that was linked to them—for example, Le Play's notions of social reform as an alternative mode of government—was not viable. The change affected more the idea that the model for industrial societies was to be found in social economy, than the institutions themselves, which were conserved and at the same time transformed. And the main idea that emerged after the Republic was that a new solution had to be found. This solution had to be an alternative to the old, liberal solution—which everyone rejected, above all the employers—and at the same time an alternative to the solution of social economy.

The solution was social insurance—a wholly new way of thinking, a new mode of thought. In France, this new mode of thought developed around the problem of work accidents. This was not by chance, because the problem of work accidents posed the problem of responsibility, which was the focus of this new reflection.

As far as German laws are concerned, German social security and social insurance laws did not seem relevant to my study. I was out to do a history of Reason, and a comparative study did not seem to make much sense. . . .

What did become clear to me is that Germany was viewed through an institution which appeared in 1889: the international congress on work accidents. At that time, Germany

1 A steel manufacturing plant in Burgundy, built between 1782 and 1785, and transformed into a major industrial complex between 1836 and 1855 by Adolphe and Eugène Schneider.

already had its own system of social insurance. Two things become apparent: all the industrialized countries were faced with the same problem, all the industrialized countries knew they would solve the problem in the same fashion, and yet all the industrialized countries knew they could not resort to the same solution. That is, the social problem intersected political, industrial and cultural problems, such that each country had to find its own solution.

The congresses also reveal practical concerns having to do with competition. If a country embarked on a program of social insurance, it could do so only if all the others did so at the same time. Or else if one country did it first, the others might have feared that it would gain all sorts of advantages, which meant in turn that they could not stay behind. There was a whole interplay of competition.

HP: The idea prevailing in France of lagging behind other countries can be found in a number of spheres. . . .

Ewald: Yes, but it was absolutely general. That is, the Italians thought the same thing, as did the English. They were all in the same situation—this is very interesting. The developments are quite amusing, because Germany was the model. Everyone knew they were going to imitate Germany. But Bismarck had picked up techniques from France, which had accompanied Germany in the early projects and had been quicker to realize them, for historical reasons (we did not have Bismarck, or the problem of unifying an empire).

I followed three practices of the industrial accident: 1) a juridical practice (article 1382 of the 1804 Civil Code, etc.), 2) a practice of *patronage*, and 3) a different kind of employer practice: social insurance. I tried to show the type of rationality each obeyed.

All of this took place at the time of the World Fairs. There was a proliferation of congresses, and the congress was the place for discussions. Every speaker was perfectly aware that the nations were leaving one world and entering another. In these circumstances, it would be misleading to talk of a “German solution,” because there was no other solution but insurance. The fact is that Germany had gone the fastest and the furthest—and was therefore the standard by which other countries measured themselves—but it was not the only one.

French thinking on insurance dates from the eighteenth century, so we cannot say that the French discovered anything in 1898. Napoleon III had a social insurance program he meant to implement as early as 1850. But in 1850 he was not strong enough to realize this program: the liberal dogmas of non-intervention by the State forbade it. And this situation lasted for quite a while.

HP: So you have tried to specify the conditions of possibility of a new way of thinking about responsibility?

Ewald: More accurately, it was a new manner for managing [*gérer*] responsibility: there was the “civilist” manner—in terms of fault—and then the “social” manner—in terms of risk. Social insurance is another instrument for managing responsibility—but not at all the same way of doing it.

HP: In doing this work, what lines did you follow? Which practices?

Ewald: Practices of responsibility. I tried to see what made the work accident a problem, a political problem. How was it that in the nineteenth century the work accident could be seen as something other than a misfortune?

I followed three practices of the industrial accident: 1) a juridical practice (article 1382 of the 1804 Civil Code, etc.), 2) a practice of *patronage*, and 3) a different kind of employer practice: social insurance. I tried to show the type of rationality each obeyed. Thus, for the juridical practice, I tried to show that it obeyed a rationality I earlier called “liberal,” and I asked what gave meaning to the notion of fault. The second thing was to analyze the economy of employer responsibility, because the employers claimed a practice of responsibility. “We are responsible for our workers,” the employers said in the nineteenth century. “We are responsible for their security; we are responsible for their well-being. We are, moreover, solely responsible for them, and will not tolerate anyone else’s assuming this responsibility.” So there was a whole story to be done about that. And then the third archaeological line was the rationality of insurance, the rationality of risk, which is much older, since it dates back to the eighteenth century.

Thus, I followed a genealogical approach, which situates the problem at the intersection of a certain number of practices, and at the same time I tried to show the type of rationality these practices obeyed, in terms of which they were thought and programmed.

I really do not add anything new. My method has been inspired by Foucault, and my only contribution has been to

show that it could prove fertile in a domain he himself did not bring out.

HP: It seems that the same people often crossed this threshold of governmentality. I am thinking, for example, of Cheysson,¹ and the transition from the school of Le Play² to the Musée social.³ It was more or less the same group of people – protestants, industrialists, etc. And the transition was very rational, very well thought out. As you say, it is not something hidden in the archives.

Ewald: Absolutely. At the time of *La Réforme sociale*,⁴ after the Le Creusot strikes, there was a long debate. These people were asking: what are the good institutions? What is the good strategy? Well, they were divided. On the one hand, there were the mining people from Anzin and Bruay. The president of the Compagnie des mines de Bruay, Jules Marmottan, developed a tough employers' line, saying: "Uh, oh. We have made a big mistake, since the cause of these strikes is always the aid funds [*caisses de secours*]. Our big mistake was to make the workers believe they contributed to the aid fund because we withheld their earnings. This is a big mistake, because we give them the illusion that they have *rights*, which is totally wrong. In fact, if we take deductions, it is really only an accounting device. We could give them everything ourselves – it would amount to exactly the same thing – and at least they would lose the illusion that they have rights." This was the Marmottan line, which basically said: "Rights mean war. The fewer rights the better."

The other line was laid out by Cheysson, who was called in by Schneider to become the manager at Le Creusot after the famous strikes. Cheysson believed social economy was perfectly viable. His policy was to be the forerunner of the movement, to be its inspiration.

HP: And to modernize it?

Ewald: And to modernize it, to be the inspiration for the legislative movement, and at the same time to modernize employer practices – absolutely. This was Cheysson's politics.

As far as work accidents are concerned, this is very interesting, because it is Cheysson who, in the French debate, appears as the intellectual leader. But practically, the solution would not be an employer solution. The employers managed to avoid compulsory insurance. They had a sort of liberty of insurance, but this was nevertheless far from what they might have wanted.

From the period immediately following the French Revolution, there were two great modes of political thought. There was the mode of thought we could call "French liberal," which was of course not the same as English liberalism. It was a mode of thinking in terms of Law, a very juridical mode. People wrote codes, and thought that law was going to be, *could* be, a great instrument of regulation.

As early as Saint-Simon we find the term "social law," which would have two lines: one to the right, that of Le Play, and one to the left, which would be occupied by Comte.

And then there were those who said that Law was a practice of a society in crisis, and that a positive society would end the French Revolution, giving rise to another organization. This was the sociological limit, which began with Saint-Simon. As early as Saint-Simon we find the term "social law," which would have two lines: one to the right, that of Le Play, and one to the left, which would be occupied by Comte.

And I would say that neither one won. Because what happened was that politics were re-thought through another type of rationality. And this other type of rationality, which was based on probability, did not come from Comte or Le Play or Saint-Simon, but rather from Laplace or Bernoulli.

HP: It could be said that Le Play's sociology, because it remained so empirical, proved to be more useful than the Comtian line followed by Durkheim. Indeed, the investigations were carried out by Le Play's people and their followers. These were empiricists who really knew the terrain, whereas people like Comte or Durkheim were more concerned with winning over Academia and the like.

1 Emile Cheysson (1836-1910) was an engineer, and director of Le Creusot from 1871 to 1874.

2 Frédéric Le Play (1806-1882) was one of the founders of modern empirical sociology and an influential social reformer.

3 The Musée social was founded in 1894, and served as a consultant for projects of social intervention and reform.

4 A periodical published from 1881 by the followers of Le Play, concerned with sociology and social commentary.

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Ewald: You are perfectly right. To be sure, these were extremely ideological endeavors. There is no doubt that the real sociological work was done by Le Play's school. All the same, Comte had a tremendous influence.

HP: And consequently we can trace several lines. Because Le Play was from the right. But there was certainly a continuity with Halbwachs, and he was from the left.

Ewald: Well, it is true that if we look at Le Play's monographs, they don't show much political bias. Still Le Play's *La Réforme sociale* really was a *right wing* publication. It was in the great tradition of de Bonald.¹ What was new was precisely that Le Play used sociology.

HP: And thus one can link Le Play, in his essence, to the Saint-Simonian movement.

Ewald: Yes, and this poses an interesting problem, as Pierre Rosanvallon has observed. Guizot² was really operating according to the same type of thought as Saint-Simon, a sociological type of thought. His theme was Saint-Simon's theme: to put an end to the French Revolution. So it would be interesting to see how sociology—or at least this type of sociological thought—was pitted against a certain juridical manner (natural right) of thinking about these problems. This is the real history that remains to be written.

HP: Yes, and the interest of Léon Duguit³ and those people was to construct a social domain in which one could intervene. We always concentrate on Durkheim, yet there were more than a few people working on "the social," but on the interior of things, and *not* only in the University. Thus the Musée social was a place where people went to conduct empirical investigations, so that one could intervene with new technologies. And because these technologies were not abstract, it was necessary to construct them on empirical bases.

Ewald: Absolutely.

HP: Do you see other breaks in your history of Reason besides the law of 1898 on work accidents?

Ewald: Well, there were lines of development which were reflected in 1898, and then there was a diffraction. It seems to me that if we take juridical practices as our observation point, we can see a diffusion of practices which organized a type of thought. The big event was industry, and the problems related to industry, but the *imaginaire* which was born on this occasion has never ceased to diffuse itself.

What interests me is that in domains which are *totally* unrelated, problems were resolved in the same way. For example, we can look at the problematic of abnormal people, or the management of populations, or even ecology.

In fact, I studied work relatively little. After the law of 1898 I abandoned the domain of work because it seemed to me that it was more interesting to look at what was happening in other areas. There were practices of responsibility that did not fall under labor law—for example, all the practices of traffic accidents and insurance practices. There was in France in '78 a law on construction insurance—having to do with the responsibility of builders—which was exactly, in a certain manner, the same thing as the law of 1898 on work accidents.

What interests me is that in domains which are *totally* unrelated, problems were resolved in the same way. For example, we can look at the problematic of abnormal people, or the management of populations, or even ecology.

HP: And this is not a metaphysical process.

Ewald: No, not at all. This develops as problems are posed.

HP: In other domains there is certainly the same story, but the practices come much later. Thus, in urban planning, people begin to talk about all of this at roughly the same time, but the real practices do not come until the 1920s. They were blocked by the *conseil social*, and then by the economic crisis, etc. Thus, there is a sort of time lag.

1 Louis de Bonald was a theocrat who clung to a vision of an archaic rural order.

2 François Guizot (1787-1874), a historian and statesman, was minister to Louis-Philippe.

3 A professor of law in Bordeaux from 1886 to 1928, for whom law was only the expression of a historical set of social relationships.

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Ewald: Yes, but I don't see any difficulties with this. Let us say that there are different elements, different historical strata which maintain their own temporality. This time lag can also be seen in the area of insurance. We could say that people knew in 1713, with the publication of *Ars conjectandi* by Daniel Bernoulli, that the calculation of probabilities could serve as an instrument of universal social application. Consequently, in the eighteenth century there were legal applications by Bernoulli (the problem of absenteeism, for example), political applications with Condorcet (the problem of voting) and insurance applications with the first insurance companies.

It seems to me that what characterizes the era we have entered is indeed the idea that social institutions have no essence.

In fact, this is where the analysis becomes very interesting. The challenge is to keep each object in its own logic, its own time, its own extension.

HP: When one starts a project like this there are so many things to explore, so many things to say. And there are rather important methodological questions: how to choose, how to conduct the research, how to move forward with the subject. And since we don't have a corpus of work, each person is like an explorer.

Ewald: As for me, I am in favor of the "brick method," which is in some ways comparable to what Foucault did in *Discipline and Punish*. Everything lies in the way bricks are placed in relation to one another, but each brick must retain its own identity. The act of writing a book is fundamentally the proposal of an articulation.

I think this is a rather Aristotelian method, because it is really centered only on experience. The intellectual methods are very much pragmatist. This is ironic, because with Foucault we have a very powerful thinking machine, while his whole program was precisely to stay very close to experience.

HP: Do you think the governmentality you describe is changing?

Ewald: No, I don't think so.

HP: Consequently, the present crisis is a *small crisis*?

Ewald: Well, the economic crisis may be very grave. But as far as the welfare state is concerned, I think this crisis is a way for the state to extend itself a little more.

As for me, I am in favor of the "brick method," which is in some ways comparable to what Foucault did in *Discipline and Punish*. Everything lies in the way bricks are placed in relation to one another, but each brick must retain its own identity.

First of all, we should not use the term "welfare state," which in France is a polemical term used by liberals to change social practices which are basically beneficial into monsters. In the short term, this term may be satisfying, but from a more serious point of view, it is utterly dissatisfying. It seems to me that what characterizes the era we have entered is indeed the idea that social institutions have no essence. In other words, we have just entered into a government without ideas, which claims not to be linked with any essence. As a result, everything can be modified at any time. As for me, I do not see many crises of this rationality. I see instead a crisis which is linked to the modification of the manner of defining and managing institutions.

HP: You began today by discussing political questions, connected with the history of mines and so on. And you have worked on this project for ten years. Have you seen the political fallout of all that effort? Are there links with political practices?

Ewald: Well, I would really like to have a political effect in the realm of law. On the one hand, I think we need to move beyond from the pseudo-debate in which French philosophy of law finds itself locked: basically, the idea that to move away from liberalism means to move toward totalitarianism. The liberalism/totalitarianism coupling is hopelessly weak.

On the contrary, we are in a period of interventions, of juridical interventions, which if we study them positively are not totalitarian at all. It is true that, like any juridical practices, the practices of social law have their shady areas; they are not answers to everything. Still, we must study them as *positive*, open practices. That's my first point. The debate does not revolve around the inalienable rights of man. We are instead at the beginning of an open phase, that is to say

a phase in which we can no doubt have an effect.

On the other hand, I feel the philosophy of law must be the instrument of a reflection on the politics of law. Let's take the example of what I call the rights of the living [*droits du vivant*]. People have created an illusion, or rather a myth of a juridical lacuna. And it is possible to legislate concerning these matters. However, it is important not so much that the philosopher of law propose the good legislation, but that he or she disclose types of thought, ways of thinking linked to these technical discoveries, these new practices.

HP: Thus the idea of the law group you have organized is to raise new questions, not to give solutions or laws, but to change the very manner of approaching or considering the issues?

Ewald: I believe the role of legal philosophers is not at all to do what jurists do. It is neither to propose norms, nor to comment upon these prior to their application by other jurists. I believe the role of the philosopher of law is, within a given historical climate and in the face of normative productions, to raise the question of law. Consequently, I have asked the question, to what extent are these practices *law*? To what extent are they *still law*?

Legal philosophy must start from two hypotheses. First, that it is perfectly possible to live without law. And secondly, that right [*droit*] must be distinguished from legality [*légalité*]. I don't know whether this distinction can be rendered in English. In French, *droit* is distinguished from *loi posée*. The task is to see how this opposition continues to function in contemporary juridical practices.

Our group on the philosophy of law includes jurists *and* philosophers. It is necessary to have this double expertise in law because we must think about juridical practices, but starting from a philosophical tradition. The role of the philosophers is to disclose how issues raise problems which are problems of thought, of difficulty thinking. They ask how this difficulty can be resolved, translated, and what juridical instruments are required. The philosophers we are dealing with are mostly Canguilhemians, and they know these issues very well, particularly the problematization of life in the Western tradition.

We must try to grasp as precisely as possible what has now reached its most acute stage, and from there ask what type of juridical intervention and instrumentation we are going to look for. And what is the significance of looking for this?

Government of the Social

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strategies which constitutes it. These strategies delineate the possibilities of government, which correspond, in both the relation and the analysis, to the possibilities of the subject.

3) In the relation of government, there is therefore a production of subjectivity, but only on the condition that the action be free. Power and liberty are thus strictly linked, liberty being "a present relation between the governing and the governed," and not a preoccupation reserved to liberal regimes. But precisely because of its link with power, liberty raises a thorny problem, that of the relation between its production and its limitation. This is without a doubt the political problem par excellence, especially for a regime which makes political use of liberty: given the central position it assumes, liberty only becomes more complicated, perpetually in balance among heterogeneous models.

In his reading of liberalism, Foucault proposed an analysis of the contradictions between *homo oeconomicus* and the sovereign individual, the legal subject.¹ These contradictions depend on the different principles which structure the liberty of each subject, and the social uses each makes of these in its respective modes of socialization.

Foucault proposed reading the notion of "civil society" as a governmental technique born from the necessity of creating a social space common to these two subjects. Civil society would thus no longer be opposed to the State, as that which would escape it or resist it. Distinct from the simple political society, to the extent it is identified with a specific technology of government, civil society nevertheless describes a relation of government. It therefore permanently secretes power, at the same time that it produces the social tie [*lien social*].

The notion of "civil society" thus offers another reference for the regulation of the question of liberty and authority, by means other than those borrowed from economy or law, which prove to be partial and insufficient. Between the criterion of interests drawn from the market, and that of rights at the center of the notion of the sovereign individual, the technology inspired by civil society inserts social practices whose goal is to integrate individual interests through "disinterested interests." Civil society thus opens a new field of non-judicial and non-economic social relations, which furnish concrete material for the critique of in-

1 See Colin Gordon, "Foucault en Angleterre," *Critique* 471-472 (1986): 831.

dividualism, and which develop alongside this, over the whole course of the process of formation of modern societies.

But what is this government, which takes as its reference “civil society”? How does it set about to produce a social tie founded on “disinterested interests”? Here we encounter the revolutionary question of the organization of “fraternity,” which has never ceased to shape the theme of liberty, caught in the politically inevitable tension between its production and its limitation.

In order to approach these questions, I wish to examine the art of government oriented toward “civil society” in its first field of political application: the new rationality of poverty as a “social question.”

4) During the *Ancien régime*, poverty was read in terms of mendicancy. Poverty belonged to the varied order of individual destinies: there were those who won and those who lost, those who merited a favorable destiny and those who did not. Thus conceived, poverty presented a problem for society only in the form of public order.

For poverty to become a “social question,” it was necessary that this reading reveal new insufficiencies, and that a new rationality impose itself—a rationality which implicated society in the causes of poverty and in their resolution, and which tied the existence of poverty to the destiny of society itself. What were the conditions of this shift in the rationality of poverty, which erased the figure of the beggar, in order to haunt the social imagination with a new figure, that of modern poverty? And what were the effects of this shift?

Because of specific traits of post-revolutionary France, the poor found themselves to be the counterpart of a representative society legitimated by popular sovereignty, and a society founded on a project of the expansion of wealth. Poverty reintroduced, in effect, the face of social inequality in a political landscape painted in the colors of juridical equality. The center of the problem was less inequality, than the characteristics of the equality that founded the new political system: juridical equality depended on its reference to the universal. This, then, posed a difficult problem: it was necessary to justify inequality on the basis of equality.

Let us take the example of the notion of citizenship, central to all of post-revolutionary political thinking. On the one hand, it expressed the equality established among the orders of the *Ancien régime*—it was, indeed, the only plane on which juridical and universal equality was thinkable. On the other hand, this same notion could not function politically without introducing “functional” distinctions, aimed at disconnecting citizenship as natural right

from citizenship as access to positive rights, without however reproducing the essential distinctions of the past.

However, the inequality that the poor represented could not be apprehended in this manner: the question was less that of regulating their access to positive rights, than that of simply inserting them in the juridical sphere. From the Revolution on, thinking on assistance had to take account of the utterly new problem of the meaning of poverty, once the poor were integrated into the juridical frame of social relations, and became subjects of rights. By reintroducing inequality, the poor did not pose a political problem, in effect, except to the extent that they could only be equal, that they could no longer be excluded as those “touched by misfortune.”

If it was the access of the poor to the juridical sphere *tout court* which had to be regulated, what use could one make of functional distinctions? What could be the social function of poverty? The “functionalist” point of view was unable to furnish a solution, because it was only by disappearing that poverty could play a function vis-a-vis the social body. The *citoyen propriétaire* and the *citoyen capacitaire* became subjects of positive rights because they exercised individually a social function; the poor had to be inscribed in the juridical sphere on the foundation of antisociality. Their integration therefore demanded that they renounce their identity as poor.

The integration of the poor in the juridical sphere was thus used as a means of penetrating and attacking poverty, by introducing a reciprocity of rights and duties. This was at the center of the critique of charity, which was socially “inactive” and blind to every real benefit of social transformation.

Labor seemed the best way to organize reciprocal rights and duties. It was only through access to work that the poor person could acquire the means to render to society that which it gave him in the form of rights. Labor alone seemed able to integrate the poor into a grid of social exchange in which right compensated work, and was no longer characterized by a reference to sovereignty.

However, making public assistance coincide with a labor policy guaranteed by the State proved quickly to be a slippery path: it would lead the State to assume a role as an economic actor, thus contradicting the basic principles of free-market economics. Moreover, this would place the State in a very uncomfortable position of owing its citizens the means of material survival, or of having to assume responsibility for the lack of such means.

The essential elements linked to the analysis of poverty thus ended up by coming together in another register of rationality, which little by little disengaged itself from its

subordination vis-a-vis the economic and the political: the discourse of the social. The government of poverty opened in this manner a theoretical and practical space of intervention in society—intervention which did not take aim at either the economic subject or the legal subject, but rather at what we could call the subject of “civil society.”

5) The space of the social which emerged from the tragedy of urban pauperism in the nineteenth century was thus constituted by a process of progressive autonomization of the problematic of power, away from the juridico-political model of sovereignty, and the institutional model of the State and the market.

The birth of the social cannot be read as the result of a sovereignty that was finally in a position to impose its rights; it was rather born of theoretical and practical work aimed at disconnecting positive rights from their reference to the sovereignty of the moral subject (natural rights), and at using them as practices to install a reciprocity of rights and duties. Nor can the birth of the social be analyzed in terms of the institutional model of the State or the market. Both of these were, in fact, forced to cope with the strategic necessity of the social.

The government of the social was instead born of the effort to provide a technique of government able to address itself simultaneously to the juridical subject and the economic subject. Its own form of government functioned on a principle of redistribution, which was in the first place a redistribution of social identity, much more than a redistribution of economic wealth. At its center, there was the constant production of the “social tie” — that is, surfaces of interaction which delineated a network of social inscriptions for the individual. The individual was thus more and more integrated with practices which implied models of behavior that were directly socialized and socializing, in the sense that “governable” forms of social subjectivity were produced.

The government of poverty opened in this manner a theoretical and practical space of intervention in society — intervention which did not take aim at either the economic subject or the legal subject, but rather at what we could call the subject of “civil society.”

The peculiarity of the government of the social derived, in effect, from this idea: that the social subject was not given

in advance, but was instead the endpoint of a constant exercise, whose practical conditions still had to be created.

The subject thus could not be at the origin of society, neither in the form of an extension of rights, nor of an extension of interests. Between the two there was rather a rupture of continuity, which society alone was able to fill through the production of concrete contents of sociality to which it assigned individuals. But if the social subject was not given in advance, then the contradictions among different subjectivities also became secondary, all linked to this terrain of common practice out of which sociality was produced.

Now let us consider the techniques of production of this “social tie.” Whether techniques of assistance, mutualism, hygiene, education or association, they all referred themselves to a surface other than that delimited by the exercise of sovereignty or the spontaneous play of interests. In fact, all these techniques pointed instead to the insufficiency of economic peace as a means for guaranteeing the stability of the social body, and to the insufficiency of a mechanics of representation. What they had in common was rather the fact of balancing in organized forms of interdependence the regulatory ideas of individual and society, which remained otherwise difficult to arrange. The goal was to reformulate in terms of belonging to the social body—or of “solidarity,” as people would soon say—the divisions that cut across the society of equals.

Let us take the example of mutualism. As Dupin wrote, savings made sense only if it became a mass practice, especially of the popular and working classes.¹ However, the savings associations [*caisses*] were not in a position to realize by themselves the capillary diffusion of the behavior which mass savings required. Such a diffusion could only be realized through practices whose target was the individual. This was the case of the “worker savings booklet” [*livret ouvrier*] and its management by employers. There we see a sort of mutual aid which produced, in the government of the social, individualizing and socializing practices.

The goal of these practices, as we have said, was to organize interdependence. An easily accessible social capital put at the disposition of the *caisses* on the basis of popular savings constituted a large-scale social practice, but one which was situated at the end-point of a practice of individualization such as the “booklet,” which in its turn supported other practices for transforming social comportments.

6) The government of the social, in sum, marked the con-

1 Charles Dupin, *Progrès moraux de la population parisienne depuis l'établissement des Caisses d'Épargne* (Paris, 1842).

vergence of the non-judicial elements of social relations. These elements were organized around a theoretical attempt to provide an alternative to the notions of interest and right – a notion offering criteria for the delimitation of liberty and authority other than economic or juridical criteria.

Expressing the “social question” in terms of a right to work or a right to assistance would amount to placing the State in a position of debt toward society, and at the same time would enlarge the field of individual sovereignty.

The government of the social could not be organized around the notion of *interest* because the “social question” quickly appeared truly ungovernable starting from the egoism of the individual. The attribute of “social” already indicated this: poverty, for example, was a question for the whole of society, and not for any individual in particular. The analysis of poverty instead appealed to those “disinterested interests” we mentioned above: interests oriented toward the collective rather than the individual, and for this reason “disinterested” with respect to the individual.

However, the notion of “disinterested interest” was by itself unable to provide an internal criterion of regulation. Who could be the subject of such an interest? How could one determine the necessary degree of disinterest? One could only refer to an external principle, of an institutional nature, which would define the collective point of view responsible for such an interest. The notion of “disinterested interest” therefore only *displaced* the problem of the delimitation of liberty and authority.

On the other hand, the government of the social also revealed the risks implicit in a reading of social facts in terms of *rights*. Expressing the “social question” in terms of a right to work or a right to assistance would amount to placing the State in a position of debt toward society, and at the same time would enlarge the field of individual sovereignty. This was the image of the State as “banker to the poor” found in the theory of the right to work, a protector-State which would be responsible for social inequality with respect to its citizens.¹ In fact, once inequality was reintroduced into the analysis, it became practically impossible to avoid the displacement of the question of right toward that of “the ability to exercise positive rights,” which

the theory of a right to work effectively implied.²

7) The task of the government of the social was thus organized around a new notion, that of *duty*, which at the same time had to regulate the limits between interest and disinterest, and to replace the right as the basis of social reciprocity. The notion of duty became the central concept regulating the production of the “social tie.” The notion would be elaborated by sociologists from Comte to Durkheim, who made it the key of social solidarity.

Duty is, in fact, a directly social notion. It expresses belonging to collective aggregations, and organizes interdependencies, rather than enlarging the field of the sovereignty and liberties of the individual. Duty does not promote personal attributions, nor does it confer “qualities.” It rather decomposes the individual into a series of subjective experiences, where the subject appears at any moment as only the individual counterpart of a collective experience, whose meaning or forms he/she could never exhaust. Symmetrically, the experience of the subject is itself fragmented, into at least as many moments as the duties ascribed to him/her. These are all partial moments, which can no longer exhaust either the meaning or the forms of the subject.

Duty, in effect, does not have limits, since one does not possess it, like a right, but can only learn it. Duty thus became the matrix of a vast pedagogic project, which the specific rationality of the government of the social brought into play. A “pedagogics of the citizen” aimed at producing the subject of reference for “civil society.” Duty linked each individual to all others through abstract mechanisms of social aggregation, thus breaking the direct confrontation between the individual and the State which the notion of right carried.

Duty, finally, is an operative notion which makes it possible to link the *omnes et singulatim* about which Foucault spoke. If the modern political rationality is characterized by the fact of being at once totalizing and individualizing, the government of the social offers, through the notion of duty, a means of regulating at the same time the production of the social tie and that of an individualizing pedagogy. At the end of this articulation, the government of the social will have played an active role in the passage from a democracy founded on the rights of each to a democracy founded on the duties of everybody toward everybody.

¹ See Louis Blanc, *L'organisation du travail* (Paris, 1848).

² For an analysis of this shift and its consequences see Giovanna Procacci, *Le gouvernement de la misère*, Doctoral Thesis, Paris, 1983.

Dangerous Sex

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history. If you work only with the text, I think you end up reifying it. It's as if everything were overdetermined and produced by that particular text. But when you are on the scene, you see how much the text is the product of politics, pushing and struggling, combative interest groups, diverse personalities and egos. All these things are boiling in a pot. That is what is behind the text.

HP: Also, through direct observation you got a chance to see the visual imagery that the Commission was working with.

Vance: Yes, visual materials were used in a very powerful way, and that doesn't come out in the report.

Many federal agencies took a lesson from Women Against Pornography and presented their own slide shows to the Commission. Sexual images that were unconventional and calculated to be disturbing and anxiety-producing to an average audience (bestiality, defecation, child pornography), were repeatedly shown in order to whip up a frenzy to support a very severe obscenity law. Yet, 95% of pornography on the market is not that "extreme" material. It's basically ordinary heterosexual intercourse, oral sex, etc.—what you find in glossy commercial pornography magazines aimed at heterosexual men. The problem with this strategy is that, once you have whipped up public frenzy, how do you re-direct it against mainstream material?

HP: We know that right-wing moral crusades against pornography are not new, but you have stated elsewhere that the Meese Commission employed new tactics in its attack on pornography by appropriating the rhetoric of social science and feminism.¹ Could you explain how this was done and what some of the effects have been?

Vance: This was actually a very difficult thing for them to do, and I don't think they were entirely successful at it.

You have to remember that the backing and agenda of the Meese Commission were essentially conservative. The Commission was specifically appointed to overturn the report of the 1970 President's Commission, which from a conservative point of view was wildly liberal. The aim of the Meese Commission was to intensify obscenity laws and to increase prosecution of what is now generally regarded as

fairly mainstream material, as well as the more "extreme" material.

The Commissioners intuited, however, that to speak in terms of immorality, sin, lust, and the loss of respect for women would immediately tag them as conservative in the eyes of the general public. So they had to figure out some way to keep their same goals, yet modernize the purpose using a more updated language. They had initially hoped that social science would give them "proof" that pornography caused violence. Of course, social science did nothing of the sort. At best, the available work examines attitudinal effects under very particular conditions, using material that has more to do with aggression than with sexual explicitness.

The real significance of so-called "civil rights" ordinances against pornography is that they would permit state action against a much broader range of sexually explicit material, which obscenity law has never been able to touch.

So the social science findings were a great disappointment to the Chair, who was visibly frustrated that scientists wouldn't give him a "smoking gun" which proved pornography caused violence. There was none. As a result, the Commission had to come up with two different additional criteria with which to judge the harms of pornography. These were really throwbacks to earlier, more moralistic ways of judging harms. One was called "totality of evidence" and the other was called "cultural, moral, and ethical values." Both were subjective, catch-all categories that permitted Commission members to decide that pornography caused "harm" based on the flimsiest evidence or mere personal opinion.

In terms of social science, then, I don't think they did very well, especially since a number of social scientists are now denouncing the way their work was used in the report. I think they did much better with the feminist anti-pornography language. Certain terms generated by that movement have passed into everyday usage among conservatives, although some terms were used before by conservatives. The convergence is interesting. An old term used by both is "the degradation of women." This means very different things to each group, but they don't seem to notice. To the conservatives, lesbian and premarital sex are degrading to

1 Carole S. Vance, "The Meese Commission on the Road," *The Nation* (2-9 August 1986).

women. To the feminist anti-pornography movement, *Playboy* and certain kinds of sex that imply subordination of women are degrading. But other terms, like "harm to women and children" and "violent" pornography are feminist anti-pornography terms that have passed into both mainstream and conservative lexicons. Nevertheless, the Commission totally rejected any of the feminist anti-pornography remedies, such as the civil rights ordinances proposed in Minnesota and Indianapolis. They said that these were unconstitutional because they infringed on the First Amendment. The Commission felt that the feminist anti-pornography argument and purpose were correct, but they would simply be better able to achieve their goals through intensified obscenity laws. Of course, anti-pornography feminists have denounced these laws as having a very bad history for being anti-woman, moralistic, and anti-gay.

HP: How is obscenity defined differently from pornography?

Vance: In popular usage, both terms refer to sexually explicit materials, but only obscenity has a legal meaning. Courts have ruled that obscenity is not protected by First Amendment guarantees of free speech, so anything ruled obscene can be restricted merely because of its content. Pornography, on the other hand, has never been legally defined, and it is protected by the First Amendment.

Sex is always such a special case in our culture.

The real significance of so-called "civil rights" ordinances against pornography is that they would permit state action against a much broader range of sexually explicit material, which obscenity law has never been able to touch. Recent court decisions have established criteria to be used to determine if a sexually explicit text or image is obscene. According to a 1973 case, *Miller v. California*, material is obscene if *all three* of the following criteria are met: 1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest in sex; 2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state or federal law; 3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

It is easy to see that terms like "prurient" or "community standards" require a fair degree of subjective judgement, since they are made anew in each obscenity case by judges and juries in different geographic and cultural locations. Although obscenity prosecutions in the past frequently targeted books and plays, in practice most obscenity prosecu-

tions are now directed against images.

HP: What do you foresee will be the results of this report in terms of legislation, working conditions in the sex industry, and maybe the general climate in which obscenity laws are going to be interpreted?

Vance: It's a mixed bag right now. Were the report's recommendations to be implemented, all 93 of them, it would be extremely severe. On the other hand, the Attorney General has so far only recommended that some of the proposed remedies be carried out, not all of them. Some of the conservative groups are unhappy about this, but whether Meese is going to go further remains to be seen.

I think there is no question that the release of the report and its publicity have already altered people's opinions. This category of "violent" pornography has come into public consciousness as a new and dangerous thing. "Violent" pornography, obviously a very loaded term, means sado-masochistic imagery. "Degrading" pornography, since it is a very subjective term as well, will mean in many prosecutors' minds, gay and lesbian imagery. So we have to understand that all sexually explicit materials are not going to be prosecuted equally. The Commission recommended "prioritized" prosecution, with violent and degrading material to be prosecuted most aggressively.

Finally, I think that the biggest impact so far has been informal. People who are both creating and distributing sexually explicit materials are engaging in a fairly substantial amount of self-censorship. We know this is the case for *Playboy*, *Penthouse*, *Hustler* and other mainstream pornography. The campaign to get 7-Eleven stores and many others to stop distributing these publications has been very successful, and it has had a big impact on *Penthouse*, in particular, whose sales are mostly over the counter rather than by subscription. Other people who are not putting out that kind of mainstream material, small producers and independent artists and writers, will tell you that they are more hesitant about what they put in their magazines, films, and stories. They are worried about prosecution, because they don't have the kind of resources that the big distributors have. While they might win on appeal, getting through the first round could easily cost them ten or twenty thousand dollars. So, they try not to arouse the ire of their local prosecutor. This is especially significant for really small scale artists and innovators, feminists, radicals, gays and lesbians since you can effectively destroy a publication like that by taking them to court on any obscenity charge.

So, the situation is somewhat paradoxical. If you said, on the one hand, that there has been a terrible purge, an in-

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credible repression, I think that would not be accurate. There are differences according to geographic location, but in general, I think that the report has led to severe legal prosecution in some localities but not in others. On the other hand, I think that in terms of informal restrictions and self-censorship, the report has had an enormous impact.

HP: It is also ironic that despite all the talk about how women are being abused in the sex industry, invoking this as one of the harms of pornography, there is no concern with remedying those abuses, only with shutting down pornography.

Vance: Linda Marciano testified at the hearings about abuses she suffered some twenty years ago at the hands of her husband while filming *Deep Throat*. Now, one could as easily say that her experience is an indictment of marriage and spousal abuse, as say it is an indictment about making sexually explicit images. The testimony that the Commission received from prostitutes' rights groups like COYOTE and the U.S. Prostitutes Collective, which gave very concrete suggestions for improving models' release contracts, improving conditions of work, better health and safety conditions, and social security contributions were listened to in stony silence. The Commissioners didn't say a word.

We are now considering applying tests, which we would not think of applying to any other kind of material: if texts cause "undesirable" attitudes, they should be removed.

So, I think that in practicality, they are not interested in improving the real life conditions of women, just in banishing sexually explicit imagery. They are interested in using examples of abuse, which certainly exist, to provide the basis for obscenity prosecution. Prostitutes and sex-worker advocates testified that this tends to drive the industry underground and worsen conditions for women. This is particularly true for the latest scheme devised by the Los Angeles vice squad to treat anyone who makes a sexually explicit film as a pimp or a panderer, and arrest them on laws that are already on the books against pandering. They are also treating anybody who performs in a sexually explicit film as a prostitute; the argument is that the person has received money for sex. So, in Los Angeles, what they have done is to go after the performers—women, mainly—follow them, harass them and their parents, threaten to bust them as prostitutes in order to get them to turn witness against the producers.

HP: You have also noted that the report recommended the formation of citizen action groups that would function almost as "sex spies" in the community. This seems like an unusually frightening degree of surveillance.

Vance: Yes, because this is specifically designed to go after a wide range of sexually explicit material which individual citizens find immoral or offensive, but which no court could ever find obscene. The report not only encourages citizen action groups, it gives them a detailed blueprint in hundreds of pages, suggesting how they might proceed: how to go to a bookstore; how to interrogate the owner about what is in his shop—ditto for video shops, ditto for newspaper stands—how to convey to owners what you don't want them to sell; how to set up pickets and boycotts; how to communicate the results of your surveillance to the police; how to encourage increased obscenity prosecution; how to monitor courts and judges so that they give stiffer sentences. Conservatives have been quite emboldened by their victory with *Playboy*, and some groups have gone after teen music magazines, claiming that "satanic music" and rock-and-roll destroy the moral fiber of our youth. Anybody has the right to boycott for any cause, but once this is sanctioned by a federal advisory commission, and a detailed blueprint is given, this gives a green light to increase the censorship that has already been mounted in many parts of the country.

HP: Do you believe that this anti-pornography crusade is indicative of a new approach or new way of looking at the role of law in social life? That is, as a means of preventing the formation of anti-social attitudes, rather than simply punishing anti-social actions?

Vance: I don't think it is a trend. I think it has specifically to do with sex. Sex is always such a special case in our culture. The hallmark to me is the endless discussion about social science and what the attitudinal studies show. As if, even if it could be proven that certain kinds of pornography caused attitudes that were hostile or unfavorable to women, this would be grounds to ban it. There is a point now where social science has eased into law in the popular imagination. We are now considering applying tests, which we would not think of applying to any other kind of material: if texts cause "undesirable" attitudes, they should be removed. I mean, as a social scientist, it would be great: I would be busy from dawn to dusk testing all kinds of videos, books, and college text books, and god-knows-what-else, for the attitudinal effects they produce and whether they should be permitted. That would be going in an incredibly

totalitarian direction, a direction in which the general population shows no interest, except in the area of sex. People are completely befuddled about sex. This is part of our cultural heritage: sex is seen as so special and so dangerous that somewhat extraordinary measures are called for.

HP: It is almost as if one could say that in this domain law is playing the role of social risk management.

Vance: But on a very attitudinal level. We also need to link this with conservative thinking or fundamentalist thinking about attitudes. There is a point at which their view of human thinking on sex is very close to feminist anti-pornography views. They both read images very literally: the image has only one meaning and it directly determines behavior. This is in contrast to thinking which views human behavior as complex, ambiguous and ambivalent. People think many different things concurrently. They don't enact them all. People engage in fantasies which have a complex relationship to their personal history. People do not generally live out their fantasies, at least few people do. Yet, fundamentalists think that if all negative stimuli could be kept away from adults, and especially children, they would have only "positive" thoughts, and hence "positive" behavior. They completely reject the importance of fantasy life, the unconscious, or the notion that people's thoughts about things are very conflictual. It's as though if no one ever saw pornography, no one would ever have sexual feelings for their parents. It's a very literal campaign. The same with the attempt to control music, or to control kids and school textbooks; these are seen as bad influences which lead to bad behavior.

HP: You have criticized some feminists for coming into a paradoxical alliance with fundamentalists over pornography. Do you see an alternative way of dealing with the fact of male domination in sexual representation without advocating protectionism or censorship?

Vance: Within the past five years there has been an enormous disagreement, even "war" I would say, within the feminist movement about pornography. It started when some feminists began to respond to and disagree with the anti-pornography analysis, arguing that it was overly literal and too simplistic. Pornography is more complex than this. Yes, it is sexist, but so are the Bible and *Good Housekeeping*. Since when have we attempted to deal with sexist imagery by banning it? The ante was raised when Catherine McKinnon and Andrea Dworkin introduced the so-called

"civil rights" anti-pornography ordinances. There, for the first time, what had just been a difference of opinion was suddenly being turned into law. Some feminists who opposed this legislation and approach felt a very strong need to do so publicly. A number of women did and this led to the development of the Feminist Anti-Censorship Task Force chapters in several cities where these ordinances were introduced. So, even though the popular imagination holds the stereotyped view that all feminists are anti-pornography, that is not true anymore at all. This is reflected in a number of books: *Pleasure and Danger*, which includes many of the papers from the Barnard Conference on the Politics of Sexuality; *Women Against Censorship*, edited by Varda Burstyn; and *Caught Looking*.

Fundamentalists think that if all negative stimuli could be kept away from adults, and especially children, they would have only "positive" thoughts, and hence "positive" behavior.

I think that it is right to say that a lot of pornography is sexist. In that way, it is no different from all the other media. Since the beginning of the second wave of feminism, we have all had a very strong interest in criticizing sexism in the media, as well as everywhere else. I think the same methods we have always advocated to combat sexism are adequate: analysis, critique, education, increased consciousness. Banning images we find sexist is so preposterous. Of course, people who want censorship luxuriate in the notion that they will determine what is to go. The truth is that most of us are stopped from advocating that strategy by the realization that we will not be the ones to be the censors. This position would lead us to a world denuded of most cultural products. If we had a magic wand and could get rid of most sexist images in books, there would really not be a lot left. Probably 90% of all cultural production would end up in the trash bin! Apart from finding that a very extreme solution, I think it betrays an allegiance to a concept of cultural change that is false. Images don't literally cause people's actions. Sure they inform them, they influence them, and to some degree they socialize them, but images, like all cultural products, are the products of social structural human action. I think that is the place to begin dealing with working for equality for women, in social structural changes.

HP: So, you mean the family, the State, the economic system. . . .

Vance: Yes. Men learn sexist attitudes and they learn their attitudes towards sex in their homes, long before they ever see a piece of pornography. They learn it from Mom and Dad. So the notion that we will have achieved much by eliminating even what is admittedly sexist pornography is preposterous. There is enough sexism in the home right now to last for another thousand years.

So, I am obviously advocating structural changes and continued political efforts, particularly now that the climate is becoming increasingly conservative. Ann Snitow has argued that in this very difficult time for feminist causes -- the ERA is lost and a lot of other things are under attack -- it is easy to fantasize that if we could just get rid of pornography, everything would be dandy. It's like a magic button, except it is a false one. We need to make continued political efforts. In addition, I think that women need to begin producing their own sexual imagery. Some are already doing that, and I applaud their efforts. I think feminists, in order to be receptive to innovative sexual imagery, need to begin to deal much better with sexuality. We have to acknowledge sexual differences, how terrifying sex is, how upsetting it is to come into contact with somebody who has a different system of imagery, a different set of preferences. We are very handicapped by our own ignorance and lack of vocabulary to even talk about this. It is important for women to back other women's production, because the male distributors are not too keen on this material. They don't understand it. We need to work on all the things that handicap women's ability to even expect that the sex they have will be pleasurable: anti-rape, anti-battery, incest, as well as sex education need to be continued.

The Jurisprudence of Death

continued from page 3

standing fundamentally different from our current conception of what the state is and how it relates to its subjects.

The State and the Power over Life and Death

As soon as power gave itself the function of administering life, its reason for being and the logic of its exercise -- not the awakening of humanitarian feelings -- made it more and more difficult to apply the death penalty. How could power exercise its highest prerogatives by putting people to death, when its main role was to ensure, sustain, and multiply life, to put this life in order? For such a power, execution was at the same time a limit, a scandal, and a contradiction. Hence capital punishment could not be maintained except by invoking less the enormity of the crime itself than the monstrosity of the criminal, his incorrigibility, and the safeguard of society. One had the right to kill those who represented a kind of biological danger to society.¹

During the 1970s historian and philosopher Michel Foucault began to chart a genealogy of the way power is exercised in Western societies. His efforts to discern the logic of the modern welfare state pointed him to a fundamental shift in state power in the eighteenth century.

We are used to thinking of the end of that century, with its rash of democratic revolutions, as a period when the officials who exercised state power changed. On Foucault's account these revolutions marked a further clarification of a shift that began earlier. To Foucault, this shift was much more a matter of *how* state power was exercised, than of who exercised it.

Until the eighteenth century, state power was essentially "deductive": the state focused its efforts on guarding the boundaries of social life from external invasion or internal strife, and on appropriating a portion of the wealth produced therein. The modern state, in contrast, operates within the world of social practices in order to organize, regulate and intensify the productive capacity of the people.

The deductive state established its authority by backing up its commands with the power to kill. State power was validated in highly ritualized public ceremonies.² Modern state power inserts itself through a myriad of infinitesimal

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1 Michel Foucault, *The History of Sexuality, Vol I: An Introduction*, trans. Robert Hurley (New York: Random House, 1978), p. 138.

2 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977), Chapter 1.

regulatory activities that intrude upon the daily lives of its subjects.

The older state, symbolized by the rituals of the scaffold and of war, and sanctified by an ideology of blood, wielded a power over death. The modern state, with its silent paperwork rituals—celebrated in the language of health, safety, and welfare—wields a power over life.¹

“Since the classical age the West has undergone a very profound transformation of these mechanisms of power. ‘Deduction’ has tended to be no longer the major form of power but merely one element among others, working to incite, reinforce, control, monitor, optimize, and organize the forces under it: a power bent on generating forces, making them grow, and ordering them, rather than dedicated to impeding them, making them to submit, or destroying them.” Foucault, *The History of Sexuality*, p. 136.

The twin imperatives of welfare and individual rights do not operate together without friction. The effort to organize a death penalty that is rational in terms of the administrative welfare model, is frustrated by the need to give weight to the individuality of those upon whom it may be exercised.

In light of this focus on life, which Michel Foucault termed “bio-power,” the state’s right to seize and abolish the life of one of its subjects has become more

problematic.² The two great rituals of the deductive state’s power over death, war and capital punishment, remain; what has changed is the manner in which they are justified.

If the state may still call upon its citizens to die in time of war, it is not in the name of their loyalty to the sovereign, but because war must be conducted in order to improve or preserve the social, economic, and biological well-being of the population.³

The punishment of criminals was once justified in terms of answering the assault on the sovereign’s mystical body.⁴ Contemporary discussion of punishment is characterized by another strain. The state punishes criminals in order to manage crime as a social problem.

Bio-Power and Individual Rights

The modern “bio-power” state justifies the exercise of its power in the name of improving the well-being of its subject population. However, this imperative, which we can call *welfare*, does not operate in isolation. For reasons rooted in our own political history, the welfare imperative has been wedded to a second imperative, the preservation of individual rights.

The importance of individual rights in Anglo-American political history extends back before the beginning of anything like a bio-power state. Indeed, when rights of the individual surface as a concept in legal and political thinking it is as a set of limitations on the power of the deductive state. What is the Magna Carta but a statement of the circumstances under which the king can seize (or deduct) life,

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- 1 “The sovereign exercised his right of life only by exercising his right to kill, or by refraining from killing. . . . Perhaps this juridical form must be referred to a historical type of society in which power was exercised mainly as a means of deduction, . . . a right to appropriate a portion of the wealth, a tax of products, goods and services, labor and blood, levied on subjects.
 - 2 The concept of bio-power is discussed by Foucault in *The History of Sexuality*, and in some of the essays in Michel Foucault, *Power/Knowledge*, ed. Colin Gordon (New York: Pantheon, 1980). Also see Michel Foucault, “On Governmentality,” *Ideology and Consciousness* 6 (1979): 5-21. A useful explication can be found in Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2nd ed. (Chicago: University of Chicago Press, 1983).
 - 3 Indeed, the modern state apparatuses of war are uniformly labelled “defense.” Of course, this is a form of propaganda, but it can only be propaganda because its message resonates with fundamental conceptions of what makes state action reasonable.
 - 4 See Ernst H. Kantorowicz, *The King’s Two Bodies* (Princeton: Princeton University Press, 1957).

liberty, and property?¹

The full history of these ideological and political developments is far more involved than the present essay can explore. Suffice it to say here, that while individual rights continue as an imperative within the modern "bio-power" state, their role has changed. Rather than only being a limit to a deductive power, they operate in a positive way to direct the exercise of state power. We call upon the rhetoric of our individual dignity not just to halt the state's actions, but to demand its aid.

Yet the twin imperatives of welfare and individual rights do not operate together without friction. The effort to organize a death penalty that is rational in terms of the administrative welfare model, is frustrated by the need to give weight to the individuality of those upon whom it may be exercised.

The Constitutional Jurisprudence of Death

Until well into our own century, constitutional law was seen as establishing only jurisdictional limits to the operation of state power. The Supreme Court intervened to prevent the states from interfering with the proper powers of the federal government, and on occasion it intervened against the power of both governments to intrude into certain realms of personal liberty.

Rarely, if ever at all, did the Court invoke the Constitution to intervene into *how* the state exercised power. It was as if the rise of constitutional government had not replaced the sovereignty that Kings once enjoyed; rather, it had circumscribed the sphere within which this power operated, while that sphere remained one of sovereign prerogative.

Since the 1930s the Supreme Court has intervened regularly with the aim of policing the rationality of state power in what is unquestionably its proper sphere. Just as the jurists of the sixteenth century set about formulating a rationality proper to the new absolute monarchies that had arisen,² our modern constitutional jurisprudence has become a meta-language of rationality for the "bio-power"/individual rights state.

However the framers may have intended it to work, constitutional law³ has become a privileged location for debating how the twin justifications that make modern state power tolerable are to be balanced with each other, and articulated on the actions of government.

The "Old" Constitutional Jurisprudence of Death

The classical juridical response to state power has been to articulate the limits within which this power may be exercised. This model is expressed in our constitutional jurisprudence of death as late as *McGautha v. California*⁴ in 1971, only a year before the Court's landmark attack on the death penalty in *Furman*.

The petitioners in *McGautha* claimed that the unguided discretion of juries to choose those who should die from among the vastly larger number of persons legally subject to death violated the guarantee of "due process" in the Fourteenth Amendment to the Constitution.

Justice Harlan, writing for the Court, reviewed the history of statutory efforts in England and America to regulate who should receive the death penalty and concluded that it had been a futile effort. Harlan wrote that such control was im-

1 "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him, except by the lawful judgment of his peers and by the law of the land." Section XXXIX Magna Carta (1215).

2 See F. Hinsley, *Sovereignty*, 2nd ed. (Cambridge: Cambridge University Press, 2nd edition 1986).

3 Constitutional law is used here in a broad sense that includes much public law promulgated by Congress, as well as the judge-created, doctrinal law to which the label "constitutional" is more often applied. Academic legal scholarship has drawn a heavy line between these forms of law for a variety of reasons internal to the pedagogical division of labor in law schools. Yet statutory law created by Congress in fulfilling its constitutional functions— for example, regulating commerce and assuring equal protection— shares with judge-made law the function of being a conversation about the rationality of state power. This is all the more true because judges have to interpret what statutory law means. Much of the time this interpretation quickly outstrips available indications of Congressional intent, and concentrates on the same broad questions of what makes state power rational as does judicial interpretation of the Constitution proper.

4 402 U.S. 183

possible.

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.¹

Law, in Harlan's view, can only regulate the finding of guilt which exposes the criminal to the possibility of death. It establishes the limits within which the jury, as the embodiment of the state's sovereignty, has total discretion to distribute mercy and severity.

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life and death in capital cases is offensive to anything in the Constitution.²

In order to convey how distinctive the Court's posture toward the death penalty was, it is useful to contrast the reasoning of *McGautha* with the approach the Court took at the same time toward policing the rationality of administrative agencies. In a case decided the same year as *McGautha*, *Citizens to Preserve Overton Park v. Volpe*, the Court considered what degree of explanation was required to justify a decision to locate a freeway through a park.³ The Court held that the Secretary of Transportation was required to produce evidence of the actual considerations and reasoning process that went into the decision.

The crucial question is why the state is permitted to exercise a power which is so uncontrollable, at precisely that point (protection of human life) where a "bio-power" state is closest to its core purposes?

Overton Park thus required that the substantive rationality of administrative decisions be made public. This publicity

allows a meaningful review of administrative decision-making by courts. Such review is essential to the legitimacy of the modern administrative exercise of state power. In an influential 1975 opinion, Judge Leventhal of the Washington, D.C. Circuit wrote:

Congress has been willing to delegate its legislative powers broadly—and courts have been willing to uphold such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.⁴

The essence of Harlan's view in *McGautha*, by contrast, was that decisions about whether or not to execute people are too complicated to regulate. Accordingly, there is no need to require the state to make its criteria visible or accountable.

It is no doubt accurate that more factors figure into the decision to kill people than to kill trees. The crucial question is why the state is permitted to exercise a power which is so uncontrollable, at precisely that point (protection of human life) where a "bio-power" state is closest to its core purposes?

Furman and the Rationality of Death

The Supreme Court's ruling in *Furman v. Georgia*⁵ is notoriously difficult to analyze. It included nine separate opinions. Five justices voted to reverse the death sentences of petitioners challenging the death-penalty systems in several states. The result was to void all then-existing death-penalty laws in the country.

Two of the five justices, Marshall and Brennan, held that capital punishment should be prohibited altogether. They argued that the Eighth Amendment incorporates an historically changing conception of decency. As the level of civilization in a society rises, certain penal practices become

1 *McGautha*, 402 U.S., at 204

2 *McGautha*, 402 U.S., at 207

3 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) was decided not under the Constitution directly, but under the Administrative Procedures Act, a law passed by Congress in 1946 to govern the practice of the burgeoning administrative apparatus. But the requirements the Court announced in *Overton Park* are not to be found in the language of the act. Like much of constitutional jurisprudence, this case is an example of general principles which the Court finds relevant to the propriety of governmental action.

4 *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C.Cir. 1975), cert. denied 426 U.S. 941 (1976)

5 408 U.S. 238 (1972)

unacceptable. For Marshall and Brennan, that point had been reached for capital punishment by 1972.

Three other justices voted to strike down existing death-penalty laws, but left open the possibility that reform by the states could result in a death-penalty system that would be constitutionally acceptable. In short, they challenged the states to render the exercise of power over life and death more rational.¹

Justice Stewart attacked existing death-penalty laws as arbitrary. He compared the distribution of death sentences to lightning strikes. The evidence showed no basis for differentiating between those few who were sentenced to die, and the many who were not (unless one looked at race, an unacceptable basis).

I simply conclude that the 8th and 14th Amendments cannot tolerate the inflicting of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.²

Justice White argued that the infrequency of the use of the penalty robbed its occasional exercise of any rational utility.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. . . .

At the moment that it ceases realistically to further . . . [penal] purposes, however, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the state would be patently excessive and unusual punishment violative of the 8th Amendment.³

To White, the constitutionality of the death penalty hinged on the ability of the state to structure it as effective social policy. The occasional use of the death penalty rendered it ineffective, and hence unacceptable. Thus it had to be abolished, or reconstituted on a basis that emphasized its ability to benefit society.

Justice Douglas focused his opinion on the issue of race discrimination.

[I]t is cruel and unusual to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.⁴

Douglas was concerned with the role of racism, not simply as an evil in itself, but as evidence of whether or not the death penalty was compatible with modern justifications of state power. If a penalty had become disjointed from the prevailing modes of state rationality, and yet continued to appeal to some traditions in the culture, there was a danger that unpopular classes would be drafted to fulfill a role that could not be abolished, but which could not be generalized to the whole population. The racial bias of the then-existing death-penalty systems indicated to Douglas that capital punishment, as then practiced, was not conforming to the rationality of the modern state.

By commanding that the power over death assume the rationality of the modern administrative power over life (“bio-power”), the Court launched an experiment in the rationalizing power of constitutional law.

All three opinions read the Eighth Amendment as a test of the rationality of state power to punish. More than a prohibition on archaic forms of punishment, the Eighth Amendment was seen to require that the state’s penal power conform to standards of rationality that justify state power more generally. A year after *McGautha* and *Citizens to Preserve Overton Park*, the Supreme Court finally imposed the standard of rationality required for killing trees on the state’s decision to kill a person.

Thus the three crucial swing votes in *Furman* can be read as demanding that the death penalty be rationalized rather than eliminated. By commanding that the power over death assume the rationality of the modern administrative power over life (“bio-power”), the Court launched an experiment

1 While this center of the Court has split apart, the Court has never overruled the basic premise that the states must kill “rationally” if they are to kill at all. As we shall endeavor to show, “rationally” means in a manner compatible with the twin imperatives of security and individual rights.

2 *Furman*, 408 U.S., at 310

3 *Furman*, 408 U.S., at 311

4 *Furman*, 408 U.S., at 313

5 *Furman*, 408 U.S., at 242

in the rationalizing power of constitutional law.

The Court's first opportunity to elaborate further came in a series of 1976 cases reviewing state death-penalty laws drafted, or revised, to conform with *Furman*. In *Gregg v. Georgia*¹, the Court shed light on two issues: what kind of state purposes were allowable, and what sorts of procedures would suffice to assure that those purposes were complied with by the ultimate decision makers.

On the first point, the Court suggested that retribution and deterrence were both acceptable purposes of capital punishment. But it made clear that it would not intervene in the substantive choices over purpose. The effectiveness of capital punishment as a deterrent, for example, was debatable, but this was a debate for legislatures.²

This is similar to the Court's stance in administrative law cases. In decisions like *Citizens to Preserve Overton Park*, the Court required the articulation of reasons, and a demonstration that reasons actually guided decision making, but they did not police the substance of purposes themselves.

On the second issue, the Court highlighted three points. First, states should provide the sentencing authority with adequate information. Secondly, they should create guidelines to channel the decision makers use of information. Thirdly, they should provide for meaningful appellate review.

Gregg is often cited as a retreat from, or even an implicit overruling of, *Furman*. Justice Stewart's plurality opinion, however, re-emphasized the rejection of *McGautha's* skepticism about the possibility of regulating capital punishment.

While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate [citing *McGautha*], the fact is that such standards have been developed. . . . While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death

sentences are not imposed capriciously or in a freakish manner.³

In a pair of cases decided at the same time as *Gregg*, the Court emphasized the individualism side of the twin imperatives of the bio-power state. In *Woodson v. North Carolina* and *Roberts v. Louisiana*⁴ the Court struck down state statutes creating mandatory death penalties for murder under certain circumstances. Justice Stewart in the plurality opinion argued that a mandatory sentence violated the individuality which state power must respect.

A process that accords no significance to relevant facts of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.⁵

Making Death More Rational

The modern imperatives of state power, welfare and individual rights, require that state action be rational *as a system*, not just as discrete commands of the sovereign.⁶ The imperative of welfare treats crime as a social problem, and the crime-fighting power of the state as social defense. The logic of this imperative calls for the state's efforts to be evaluated in aggregate—that is, by changes in the rate of crime. The object of criticism is not the individual sentence, but the system of punishment.

The imperative of respect for individual rights requires the state to treat people as equal moral actors, warranting equal treatment. The demand for equality focuses attention on the way state power is exercised as a system, just as the imperative of security does; for the demand that people be treated equally requires the state to demonstrate how it treats people in comparison with each other.

As applied to the death penalty, the Court's commitment to enforcing both imperatives pointed to three questions. First, what information is available to the factfinder, and to

1 428 U.S. 153 (1976)

2 *Gregg v. Georgia*, 428 U.S., at 185

3 *Gregg*, 428 U.S., at 193-195

4 *Woodson v. North Carolina*, 428 U.S. 280; *Roberts v. Louisiana*, 428 U.S. 325

5 *Woodson*, 428 U.S., at 304

6 This shift from the individual act of power to the system of exercising power is reflected in the development of positivist jurisprudence (the legal philosophy which treats law as the product of the state). The great nineteenth-century positivist jurisprudence of John Austin depicted law as a series of commands by a sovereign. Positivism's contemporary giant, H. L. A. Hart, depicts law as a system of rules. See *The Concept of Law* (Oxford: Oxford University Press, 1961).

what extent do justifiable purposes of state power organize the use of that information? Secondly, do the systems operate so as to provide continuing opportunities for the courts to review the rationality of the system? Finally, how rational must the death penalty systems be, *qua* systems, to pass constitutional muster? In the course of the decade following *Gregg*, *Woodson*, and *Roberts*, the Court answered the first two questions. Just this spring, it answered the third.

Jury Discretion: Darkness on the Edge of Town

What if the jury, after hearing the information brought forth by both the prosecution and defense (and the new post-*Furman* laws allow almost unlimited introduction of evidence by the defense), decided on life imprisonment rather than death because they believed the murder victim was gay, and they therefore didn't feel as much outrage at the crime? Wouldn't such choices, if made with some regularity, place the rationality of the whole system at risk?

If such choices are critical, the logic of *Furman* suggested that some capillary system of regulation had to guide the decision making of the individual jurors to weed out discriminatory choices. The new state capital punishment laws, like the one upheld in *Gregg v. Georgia* (1976) might have been seen as a good start in creating such a capillary system. As more data about how the systems were actually operating became available, the Court might have monitored the level of systemic rationality being achieved, and might have set the direction for further improvement. Instead, in 1983 the Court abandoned the effort to regulate, at the capillary level, the capital punishment choices of juries.¹

In *Zant v. Stephens*² (1978) the petitioner requested a new

sentencing hearing, because the Georgia Supreme Court had struck down as unconstitutionally vague one of the two aggravating factors on which his death sentence had been based.³ The United States Supreme Court took the unusual step of asking the Georgia Supreme Court to clarify the function of aggravating factors in Georgia's death penalty procedure.

Imagining the Georgia death system as a pyramid, the court spoke of three planes. The first separates from all those who have committed homicides those who are guilty of murder, a capital crime. The second separates from all those who have been convicted of committing a capital crime those who by virtue of aggravating factors may be subjected to the jury's choice of life or death.

The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. *There is an absolute discretion in the factfinder to place any given case below the plane and not impose death.*⁴

The Georgia courts, in theory, review this discretion for "passion, prejudice, or any arbitrary factor."⁵ But how can it review the rationality of the jury's choice in that attic chamber of the house of death where absolute discretion reigns? The majority of the United States Supreme Court did not feel it was necessary to make that inquiry before upholding the death sentence.

The dissenters, Justices Marshall and Brennan, somberly concluded that the vision of rationality endorsed by the majority in *Zant* left the death penalty no better than it was in the days before *Furman*.⁶ Is this just hyperbole by two dedicated foes of the death penalty? Even if the aggravating factors in the Georgia statute do not channel discretion all the way down to the ultimate decision, they limit the number of convicted killers exposed to the possibility of

1 For the view of the Court's death jurisprudence as essentially regulatory, see Robert Weisberg's important essay "Deregulating Death" 1983 *Supreme Court Review* 305

2 462 U.S. 862

3 The Georgia death penalty law approved in *Gregg* provides a list of ten aggravating factors. The jury must find at least one applies to the defendant before they may recommend the death penalty. *Criminal Code of Georgia*, Section 26-3102

4 *Zant*, 462 U.S., at 871, (emphasis added).

5 *Zant*, 462 U.S., at 872

6 *Zant*, 462 U.S., at 910-11

capital punishment. Why weren't Justices Marshall and Brennan willing to concede that something had been gained in tightening the circle wherein discretion operates?

Presumably Georgia has accomplished two ends. It has reduced the number of people exposed to death. And it has assured that those who do receive death sentences will belong to categories that the legislature has designated relevant to the ends of a rational social policy.

The first point is an empirical question. After all, the pre-*Furman* death statutes were wide open as to who might be executed, but in decade prior to *Furman* only a small number of people actually were. Once Georgia's system starts rolling it will likely surpass the numbers executed in those times.¹

But the absolute number condemned is not essential. Indeed Justice White, in *Furman*, seemed to invite a more widely used death penalty as the only way to make it rational. More crucial is the question of whether the categories provide an internal rationality to the system. On this point the Georgia system fails. So long as a significant risk exists that the jury is choosing who actually dies based on factors other than those compatible with the statutory purposes, the system is only superficially rational.²

Indeed, the requirement that governmental decisions be based on factors related to statutorily-determined purposes has been the very heart of the Court's review of administrative agencies since *Citizens to Preserve Overton Park v. Volpe*.

To make this finding [i.e. that the administrative decision was lawful] the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.³

The Court in *Overton Park* stayed a decision to locate a freeway through an existing park until the administrative decisionmaker could demonstrate the rationality of her decision by producing evidence of what factors were considered, and of how they were evaluated.

In *Zant* the Court let stand a death sentence even though

it had ample reason to suspect that the decision was made on an impermissible factor—that is, the aggravating factor found unconstitutional by the Georgia Supreme Court.

“Meaningful Appellate Review”: Ghost in the Machine

In the absence of precise controls on the decision making process it might still be possible to assure rationality by carefully monitoring the system's overall output. By looking at the differences between killers condemned to die, and those not condemned, the courts could detect evidence of irrelevant or discriminatory factors at work in the system.

A 1983 case, *Pulley v. Harris*,⁴ squarely presented the Court with the question of whether states must monitor the aggregate pattern of death sentences in order to detect biases. The Court took the occasion to debate more generally how judicial review might help fulfill *Furman*'s requirement of a death penalty in conformity with the modern justifications of state power.

Proportionality in criminal law is usually addressed to the balance between the crime committed and the punishment assigned. As Justice Stevens pointed out in his concurrence in *Pulley*, the post-*Furman* statutes all sought to assure greater proportionality in this sense by specifying the circumstances that would warrant application of the death penalty.

However, the petitioner in *Pulley* argued that *Furman* also stood for a different sense of proportionality: equality as between killers convicted of comparable crimes. This meaning of proportionality entails the concerns for systemic equity discussed above. Harris claimed that there was no significant difference between him and other killers who received life sentences for the same crime.

Justice White, writing for a majority, rejected Harris' claim that California must review death sentences to assure proportionality as between killers. White argued that other aspects of post-*Furman* death penalty systems worked to achieve the sort of proportionality Harris claimed as a right.

1 Delays in execution of capital sentences are caused in part by the multiple stages of state and federal court review of constitutional questions. Such questions tend to affect the sentences of large numbers of prisoners. Thus, the executions of many condemned prisoners are delayed by cases brought by others. Some have characterized the constitutional challenge rejected in *McCleskey v. Kemp*, as the last broad constitutional challenge left. It is too early to decide if this is accurate. If true, it may mean that the rate of executions will begin to accelerate rapidly.

2 The state's purposes are theoretically embodied in the aggravating factors provided in the statute. Once the jury has found that at least one such factor applies, they may recommend death. After *Zant* there is no requirement that this ultimate discretion follow the logic of the state's purpose.

3 *Overton Park*, 401 U.S. 402

4 104 S.Ct. 871

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In his concurrence with the majority, Justice Stevens argued that while proportionality review *per se* is not required, "meaningful appellate review" is.¹ But what makes appellate review meaningful? California provides lists of factors for the jury to consider, but does not require the jury to articulate what factors it has used, or how it has weighted them.

As long as the ultimate decisions are left to a judge or jury the individual case will rarely reveal itself to be based on irrelevant or discriminatory factors. Only statistical monitoring of the aggregate decisions of the system as a whole can provide a basis for policing the rationality of the death penalty.

Justice Brennan pointed out in his *Pulley* dissent that *Gregg*, *Proffitt*, and *Jurek* had all been based on a priori analysis of the new features introduced by the states in their post-*Furman* statutes. The majority opinion in *Pulley* remained at this a priori level. It reviewed the features of California's system and certified its rationality without looking at the actual aggregate record.

As executions occur with more frequency, therefore, the time is fast approaching for the Court to re-examine the death penalty, not simply to ensure the existence of adequate procedural protections, but more importantly to re-evaluate the imposition of the death penalty for the irrationality prohibited by our decision in *Furman*.²

That time finally arrived as the Court considered Warren McCleskey's appeal in the spring of 1987.

Social Science Evidence: Blood on the Tracks

In *McCleskey v. Kemp*,³ the Court was presented for the first time since *Furman* with strong statistical information about the functioning of the death penalty in a state which has had the benefit of considerable federal review.

The Court accepted as given that certain apparent disparities exist in the Georgia system. Among some 200 variables tested against the distribution of death sentences in Georgia, race of the victim and race of the killer had statistically significant effects on decisions over who dies in Georgia.

By rejecting the value of this evidence for making out a constitutional violation, the Court announced its return to the assumptions that guided the *McGautha* decision.

In purely doctrinal terms, Justice Powell's majority opinion takes only baby steps away from the major prin-

ciples of *Furman* and *Gregg*. In order to assess how significant a turn *McCleskey* seems to mark, it is necessary to restate the conception of rationality underlying the Court's jurisprudence of death since 1972, and its relationship to justifications of the modern state's exercise of power.

Modern state power is tolerable only when it aims at securing the welfare of the population, and only when it does so in a manner which respects the dignity of the individual. In *Furman v. Georgia* the Court applied these justifications to the exercise of power over death.

Three important elements figured in *Furman's* demand for a rational death penalty. First, the system had to be evaluated as a system. This entailed the capacity to represent the operation of capital punishment as a system, and a capacity to see into and through the decision-making processes of the system. Secondly, *Furman* linked the constitutionality of the death penalty to the state's success in fashioning penalty systems that could meet these capacities. Thirdly, the Court treated death as a qualitatively different sanction, thus separating it from the rest of criminal sentencing, a field that has largely been immune from constitutional review.

In *McCleskey*, the Court has abandoned all three of these elements.

We saw above that rationality of capital punishment as a system can be approached from two angles. One can assure that the decision-maker considers only those criteria which match the system's purposes. By regulating these capillary decisions the law could prevent external factors from distorting the aggregate product of the system. The other path is to compare each decision to the pattern established by the aggregate of already-decided cases.

In *Zant v. Stephens*, the Court declined to insist that the states provide guidelines to shape decisions all the way down to the micro-level. But the Court presumed that juries were making decisions in line with the purposes of the state's power to punish. In *Pulley v. Harris*, the Court declined to require states to compare each death sentence to the sentences of similarly-situated convicted killers, but the Court argued there that other aspects of the death penalty procedures worked to secure that systemic form of proportionality.

In *McCleskey*, the Court has gone much farther by eliminating altogether the criteria of systemic propor-

1 *Pulley v. Harris*, 104 S.Ct. at 882

2 *Pulley v. Harris*, 104 S.Ct., at 887

3 55 LW 4537

tionality. In his reading of *Furman*, Justice Powell found only the traditional meaning of proportionality.

In *Furman v. Georgia*. . . the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive. Under the statutes at issue in *Furman*, there was no basis for determining in any particular case whether the penalty was proportionate to the crime. . . .¹

Powell effectively separated the systemic inquiry from the basic Eighth Amendment question of arbitrariness.

[A]bsent a showing that the Georgia punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.²

Yet *Furman* altered the relationship of the Eighth Amendment to capital punishment precisely by making the consistency of the system an issue.

Perhaps the most significant departure from the posture of *Furman* is Powell's rejection of the role of statistics in exploring the arbitrariness of the system.

McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do.³

But without statistics as a way to represent the condition of the system, the Court's promise to police the rationality of the system is hollow. Even vigorous review of individual cases is frustrated by the absence of publicity for jury decision-making.

Powell got around the statistical evidence of bias in the Georgia system by asserting that jury decisions may simply be too complicated for even a 200-variable model to encompass. The apparent significance of the variable of victim race might instead be the result of unidentified factors creating statistical white noise.⁴

Justice Brennan in his dissent argued that the admitted limitations of statistical modelling cannot be held against the petitioner's claim without undermining the Court's

ability to enforce the heightened rationality requirements for death decisions it announced in *Furman*.

It is true that every nuance cannot be statistically captured, nor can every individual judgment be plumbed with absolute certainty. Yet the fact that we must always act without the illumination of complete knowledge cannot induce paralysis when we confront what is literally an issue of life and death. Sentencing data, history, and experience all counsel that Georgia has provided insufficient assurance of the heightened rationality we have required in order to take a human life.⁵

The Court has been crippling the ability of the judiciary to enforce a heightened rationality on state capital punishment systems since at least *Zant*. Until *McCleskey*, however, they paid deference to the idea that capital punishment decisions meet that rationality requirement. Powell's opinion rejects the whole idea that the Eighth Amendment requires a tight fit between the state's statutorily expressed purposes for capital punishment and its actual death sentences.

Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to other minority groups, and even to gender . . . such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the⁶ physical attractiveness of the defendant or the victim.

After *McCleskey* it appears constitutionally proper for the state to invest its power to kill in the personal aesthetic judgments of jurors.

What made *Furman* an experiment was its implicit challenge to the states to rationalize the power to kill, or risk losing it. In *McCleskey*, the Court has stated that the rationality required is only that which is feasible: "[T]he Constitution does not place totally unrealistic conditions on [capital punishment's] use."⁷ In effect, the Court has interpreted the death penalty as a permanent fixture of state power.

The final indicator that *McCleskey* is more than another subtle turn from the experiment begun in *Furman*, is the

1 *McCleskey v. Kemp*, 55 LW 4537, 4543

2 *McCleskey*, at 4544

3 *McCleskey*, at 4545

4 *supra*. This is, of course, an explicit return to the assumption in *McGautha v. California* (1971) that death decisions are too complicated to prescribe.

5 *McCleskey*, 55 LW, at 4552

6 *supra*, at 4557

7 *supra*, at 4548

erasure of the line that had been drawn between death and other penalties. As Justice Stewart wrote in *Woodson v. North Carolina*: “[D]eath is a punishment different from all other sanctions in kind rather than degree.”¹ The function of this distinction in terms of constitutional jurisprudence was critical, because powerful obstacles, such as federalism, stand in the way of a federal court’s intervening in the power of the states to punish duly-convicted criminals. On a pragmatic level, *Furman* had to separate death from other punishments. To have recognized the essential similarity between arbitrariness in the distribution of death sentences, and arbitrariness in the distribution of prison sentences, would have committed the Court to a rationalizing process of huge proportions.

Powell’s *McCleskey* opinion abolishes this jurisprudential line between death and other punishments. Powell argued that the effort to eliminate discretion in making death-penalty decisions endangers the norms of criminal justice in general.

McCleskey’s argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system.²

Thus, any effort to rationalize death-penalty decisions is impossible to contain at that particular sanction; it threatens to infect the entire corpus of criminal punishment.

McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.³

In dissent, Justice Brennan reasserted the necessity for the line between death and other penalties.

Even those who believe that society can impose the death penalty in a manner sufficiently rational to justify its continuation must acknowledge that the level of rationality that is considered satisfactory must be *uniquely* high. As a result, the degree of arbitrariness that may be adequate to render the death penalty “cruel and unusual” punishment may not be adequate to invalidate lesser penalties.⁴

It is important to keep in mind that *McCleskey* represents the Court as it can be. Five justices voted to uphold

McCleskey’s sentence, and to allow the jurisprudence of death begun in *Furman* to lapse. Four justices found McCleskey’s statistics compelling evidence that Georgia’s system of capital punishment violated the Constitution.

Surely some will argue that even if the 6% figure attributed by the statisticians to victim race is accurate, it represents an “acceptable level of risk” in a system of decision-making as complicated capital punishment. But given the emphasis placed on eliminating racial discrimination by the Georgia appellate review system, the 6% figure indicates the irresponsible arbitrariness of the core residue of discretion built into the Georgia death penalty system (and that of the other states).

If even this most policed factor is coming through statistically loud and clear, we must suspect that countless other factors—more or less repugnant, but clearly irrelevant to the supposedly rational purposes of capital punishment—are infecting the system.

This ominous white noise (no pun intended) speaks to a deeper problem. Juries and judges cannot make totally rational decisions about who should be put to death. State executions are inherently problematic in a society that defines the legitimacy of state power in terms of facilitating the welfare of the population while respecting the dignity of individuals.

The effort to make the death penalty compatible with the rationality of a “bio-power” state has been frustrated by two factors. Respect for individual dignity means allowing the jury to consider factors peculiar to the specific killer and crime. But these are too numerous and amorphous to specify in advance through statutory factors.

Secondly, the political community is currently unwilling to accept the level of executions that systematic consistency would require. Since we are not willing to kill every murderer who falls into the statutory categories, we are faced with the problem of whom to exclude, and by what principles. Instead of compelling the states to face this problem, the Supreme Court allows them to use jury discretion to limit the numbers without having to justify the reasons.

Conclusion

Without expressly overturning *Furman*, the Court has changed direction. They retain deference to the idea that

1 *Woodson*, 428 U.S., at 403-404

2 *McCleskey*, 55 LW, at 4546

3 *supra*, at 4547

4 *McCleskey*, at 4553

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states must mandate some express criteria to control which killers are exposed to the power over death. Yet such criteria leave the jury free to make that ultimate choice by their own visions of justice.

The Court is abandoning the effort begun in 1972 to bring the state's exercise of power over death in line with the rationality requirements of its administrative power over life.

This jurisprudential story has two distinct implications. The first is a story about death as a form of state power. The second is a story about constitutional law as a check on power. The first carries a message about the limits of our own modernity. The second carries a warning about the dangers of our modern ways of exercising power. While the majority in *McCleskey* in effect abandons the experiment launched in *Furman*, some of the dissenters view the case as an end to the experiment in a different way: a declaration of its failure.

The Court observes that "[the] *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment," which ensure a degree of care in the imposition of the death penalty that can be described only as unique. . . . Notwithstanding these efforts, murder defendants in Georgia with white victims are more than four times as likely to receive the death sentence as are defendants with black victims. . . . *Nothing could convey more powerfully the intractable reality of the death penalty: "that the effort to eliminate the arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether."*¹

Rather than allow the experiment's failure to mark an end to the state's power to kill, the Court is permitting the operation by the state of what is, in effect, a grisly side-show to its basic functions.

Underneath its modernist costume, the death penalty in Georgia, and in other states, is the survival of an archaic organ that fails to reflect the justifications of modern state power.

The Court's retreat from its project of rationalizing death can be seen as part of a broader retreat from the role of constitutional law as a meta-language of "bio-power" rationality.

In place of a critical discussion of the rationality of state

power, a controlling faction of the Court has reintroduced highly formalistic opinions that refuse to look beyond the surface of state power.

In *Washington v. Davis*² (1976), for example, the Court held that establishing violations of Equal Protection required a showing that the state acted "intentionally" to discriminate on the basis of race. The Court held there that statistical evidence that a police department hiring exam disproportionately excluded blacks failed to demonstrate a constitutional violation in the absence of specific evidence that the department intended to discriminate.

Looking at intention rather than effect enshrines the formal face of power, while pulling attention away from the way that power is inserted into the depths of social practices.³ *McCleskey* continues this trend. The formal appearance of rational criteria immunizes the state's power to kill against constitutional challenge.

This is not merely a retreat from "judicial activism," or a reduction in protection for rights. It is an abandonment of the historic role which constitutional law has played since the 1930s in enforcing the imperatives of modern state power.

The jurisprudence of death from *Furman* to *McCleskey* struggled (perhaps awkwardly) to impose the modern rationality of government on a pre-modern organ of state power. The Court began to import the jurisprudence they had developed in administrative law to the regulation of the state's power to kill. The present trend suggests the opposite. Some members of the Court seem bent on importing the formalistic review of the state's power to kill to the review of administrative law.⁴ The Court is addressing the modern forms of state power with pre-modern legal tools.

The modern functions of the state are no longer capable of being controlled by a legal discourse which seeks to enforce merely external limits to the exercise of power. The modern state exercises power deep within the body of social life. The "bio-power" state can only be controlled by a discourse which critically engages it there, along the capillary channels where power touches upon the lives of men and women.

1 *McCleskey*, 55 LW, at 4548, emphasis added.

2 426 U.S. 229

3 See Charles Lawrence, "The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism," *Stanford Law Review* (1987).

4 For an example of this strategy, see Justice Rehnquist's concurrence in *AFL-CIO v. American Petroleum Institute* (1980). Rehnquist wants to replace judicial review of the rationality of agency decision-making with a review that would seek to tighten the sphere within which Congress may delegate power.

Medical Ethics and Criminal Policy

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BY MIREILLE DELMAS-MARTY

The creation by decree (23 February 1983) of the Comité consultatif national d'éthique pour les sciences de la vie et de la santé (National Advisory Committee on Ethics in the Health and Life Sciences) marked the official birth in France of a regulatory network specific to the health and life sciences. This Committee is charged with "advising on the numerous problems raised by research in the fields of biology, medicine, and health, whether these problems concern individuals, social groups, or the entire society." (Art.1)

The Committee is not concerned with either deontology or law, but rather with ethics, or, according to Article 1, with morality.¹ This idea is, of course, not new. The 1947 Nuremberg Declaration has been followed by a series of international directives, and a number of ethics committees have been created in conjunction with various institutions (hospitals, research institutes, universities, professional associations), both in France and in many other Western nations.²

However, the importance assumed by the French National Committee – given its role in organizing annual conferences

on ethics,³ and its intensive advisory activities⁴ – has raised questions about the Committee's relationship to law, both to civil law concerning paternity, and to penal law, which protects the identity of the child and the physical integrity of the individual.

A response to the "uncertainty of jurists faced with the conflicting pluralism of scientific disciplines,"⁵ the Committee is, in fact, an acknowledgement of the impotence of law, the weakness of its methods, and the inappropriateness of its techniques.⁶ At the same time, the Committee is a place for meeting and exchanging information among different groups in civil society (scientists, jurists, theologians, cultural and associational sectors). At its first annual meeting, the Committee described itself as an organ of reflection and a structure for stimulating public debates.⁷

We could therefore see the Committee as a locus for searching for the "consensus" that is presumably preliminary to every formulation of the rule of law. As the President of the Committee made clear in an editorial in the first *Lettre d'information*, the objective is to create a continuous exchange between two main currents: "one which would represent the citizens of the country and their feelings, opinions and aspirations, and another which would be animated by scientists, philosophers, theologians, lawyers, and above all by the Committee itself, which would convey necessary information." The Committee would thus be a locus of legitimacy if the two groups succeeded in the exchange, or a site of legitimation by the elite, if the second group prevailed.

In any case, the need for law remains strong, even if it appears contradictory at times, repressing one practice and legitimizing another. And the State is never far removed, since the National Committee is under the direction of two ministers who, along with the President of the Republic, designate the members. The Committee is thus a para-state entity, which attempts to include civil society without excluding the State.

By reading the first opinions and reports of the Committee, we begin to perceive how, from the point of view of

1 On "the sources of ethics" see D. Thouvenin, *Ethique et droit en matière biomédicale* (1985).

2 See Claire Ambroselli, "Les institutions en question," *Après-demain*, 266 (1984): 5-10.

3 See *Journées annuelles d'éthique, 6-7 décembre 1984; Journées annuelles d'éthique, 6-7 décembre 1985*, brochures published by the Committee.

4 Six reports were delivered between May 1984 and May 1985, and a national consultation was organized on techniques of artificial reproduction. See the *Lettre d'information* 1 (1985): 1.

5 Catherine Labrusse, "Biologie, éthique et droit," forthcoming in *Droit prospectif*.

6 Catherine Labrusse, "Les comités d'éthique médicale en France, quelques témoignages: le point de vue d'un juriste," *Après-demain* 266 (1984): 34-36.

7 See *Journées annuelles d'éthique, 6-7 Décembre 1984*.

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criminal policy, this “mediation” between civil society and the State—or more precisely, between networks of sanctions and networks of integration—could be organized.

For example, the opinion of 13 May 1985, regarding the problems posed by prenatal and perinatal diagnosis, clearly indicates a link with criminal laws on abortion. The laws of 1975 and 1979 decriminalize abortion as long as the legal conditions governing voluntary termination of pregnancy are met. Among these conditions is the existence of “a strong possibility that the child will be afflicted with a grave condition, recognized as incurable at the time of diagnosis.” Now, according to the above-mentioned opinion, “this definition must be confronted with real situations, the appreciation of which must take into account four elements: the degree of uncertainty of the diagnosis, the gravity of the disease, the age at which symptoms will begin to appear, and the effectiveness of the treatment.”

“Given the extreme difficulty of the situations in which those who turn to prenatal diagnosis may find themselves,” the opinion continues, “and given the ethical nature of the questions that may arise, the National Committee on Ethics believes it is necessary to formulate some guidelines for the use and future development of methods of prenatal diagnosis. . . . On the juridical plane, the decision medically to terminate a pregnancy because of congenital defects or genetic disease requires the approval of two doctors—one of whom must be appointed by the Court. The Committee recommends that at least one of the doctors be someone who is competent in these questions, and who belongs to a approved center of pre-natal diagnosis. The same rules should apply to terminations based on diagnosis before the twelfth week of pregnancy.”

Similarly, the Committee’s opinion on “Ethical problems posed by experimenting with new treatments on humans” (October 1984) may help to clarify the definition of negligence which is the basis for the crime of involuntary assault on the physical integrity of the person (Penal Code, Arts. 319, 320). And the prolonged public investigation called for in the opinion on “Ethical problems arising out of methods for artificial reproduction ” (October 1984) may help to clarify the application of code sections on supposititiousness (Art. 345) to mothers who claim children born via artificial techniques, or may lead to the modification of the code by the legislature.

In sum, the National Committee on Ethics represents a

mechanism of exchange between civil society and the State, between social networks of integration and state networks of sanction, which is necessary for the coherence of the liberal model of criminal policy as it becomes increasingly complex. The creation of this advisory committee should be compared to the elaboration in France of new technical entities called “independent administrative authorities.” This ambiguous name indicates both State control (“administrative” authorities) and the self-limitation of that control (“independent” authorities).¹

In sum, the National Committee on Ethics represents a mechanism of exchange between civil society and the State, between social networks of integration and state networks of sanction.

The exchange between civil society and the State is expanding as the structure of the Committee becomes more complex (at once centralized and local). Citizens as well as experts are encouraged to participate in and reflect upon vague and delicate questions which touch criminal policy—either directly, such as the prevention of delinquency, or indirectly, such as the more abstract ethical questions regarding the health and life sciences. Prevention councils, on the one hand, and the Committee on Ethics, on the other, are expressions of these concerns.

* * *

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For information on the activities of the National Ethics Committee, its publications and conferences write to the Centre de Documentation et d’information d’éthique des sciences de la vie et de la santé, 101, rue de Tolbiac, 75654 Paris. The acts of their most recent conference, “La fabrique du corps humain et les droits de l’homme,” will be published by Actes Sud. The Committee’s *Lettre d’information* is available from La Documentation Française, 31 quai Voltaire, 75340 Paris. The cost is 180 F outside France (plus 20 F for airmail).

1 These high authorities include the Commission des opérations de bourse, the Commission de la concurrence, the Commission nationale de l’informatique et des libertés, the Haute Autorité de la communication audiovisuelle, the Commission d’accès aux documents administratifs and the Commission pour la transparence et le pluralisme de la presse.

The Welfare State in France

A Review of François Ewald, *L'Etat providence*
(Paris: Bernard Grasset, 1986)

BY PAUL RABINOW

François Ewald's *L'Etat providence* is dedicated to Michel Foucault and was inspired by a long participation in his seminar on liberalism. It is a demonstration of both the richness of the problematic raised by Foucault, and of the heuristic value of the intellectual tools he forged. An example of what Foucault called "the history of the present," *L'Etat providence* uncovers in methodical but brilliant fashion the structures of our modernity.

On the methodological plane, Ewald's book "disqualifies all those discourses of decline, decadence and degeneration—those easy pronouncements of doom—which are found all too often in the human sciences." For Ewald, philosophy is a dynamic element of the social universe. To do philosophy today cannot be reduced to a history of ideas or social representations, nor to formalisms and moralisms. This means that one must weigh those practices which today constitute our "regime of truth" and trace their genealogy. "Our purpose is to show not only how industrialization has destroyed lives, ancestral ways of existence and the natural environment, but also how it has produced truth."

Politically engaged as both historian and philosopher, Ewald thus shows how industrialization has not only produced alienation and pollution, but also new foundations of truth—new ways for people to identify themselves, to manage the causes of their behavior, and to think about their relationships, their conflicts, their collaborations. In short, it has produced new ways for people to participate in their destiny.

It would be perfectly legitimate to see the publication of *J'accuse* by Zola and the creation of *L'année sociologique* as the outstanding political and intellectual events of 1898. However, Ewald, a bit laconic, announces the central thesis of his book as if it were self-evident: "I discovered on this occasion a significant philosophical event: the law of 9 April 1898 regarding liability for work accidents." This law, which is at the heart of the book, turned on its head the liberal conceptions of individual responsibility, of liberty, of law and of society. This law, which was debated for eighteen years, declared that industrial risks were not accidental risks. With this law, the accident became social. The accident did not have its origins in the dangers of nature, nor in the conduct of individuals: the accident took on

the objectivity of the social, manifesting the social tie as a relation of solidarity and interdependence.

A collection of juridical traits or social instruments, borrowed from other sectors of social reality (maritime laws, probability theories, changes in legal codes, social philosophy, philanthropic apparatuses) were then reinterpreted, reformulated in accordance with a new conception of reality, a new diagram of the relations of power/knowledge. As reality became historical, social and statistical, new political and social responses were called for. The strikes at Le Creusot and at other showcases of enlightened industrialism had demonstrated that the tools of liberal philanthropy, based on a morality of foresight [*prévoyance*] and discipline among the working classes, were no longer adequate. Instead of relying upon individual foresight, the enlightened classes turned to a politics of prevention and collective assumption of risks: "Against penalization is posed prevention, which is none other than individual foresight made obligatory. Henceforth, under the aegis of the social, morality absorbs law and merges with politics. Everything becomes political. The contract of solidarity no longer obeys this juridical regime: it gives the State—now the Welfare State—the object of civil life itself, and assigns it the task of formulating the duties of morality which now govern the most private details of the life of every individual."

Ewald sees in the birth of an "actuarial society" the threshold of our modernity: the Welfare State.

All this gives rise to a new social contract. Since society is only an insurance against the risks engendered by its own development, it achieves its truth when it organizes itself as an insurance apparatus. Social rights employ a new principle of evaluation: the basic value is no longer liberty, but life—everything that is living, everything that is produced, and the potentialities which must be realized. "With social rights, a problematic of liberation succeeds a problematic of liberty." Ewald sees in the birth of an "actuarial society" the threshold of our modernity: the Welfare State.

Ewald's book methodically examines this new, total social fact from several points of view. First, from the point of view of law. He asks: Does the Welfare State signal the end of law? Obviously not, but it carries a new concept of social right, and along with this new dangers, as the principles assumed to be universal are reintegrated in the light of new social problems. But this State also brings with it new possibilities: a social security society, a society of negotiation, with multiform and changing norms.

From a philosophical point of view, Ewald is explicitly nominalist. In contrast to Foucault's insistent Nietzscheism, his position is, in truth, much more comfortable. There is no universal law. There is no solution of continuity in reality, which is social and historical. This historicity may disturb those who seek absolutes. And this is often held up as the central point of the crisis of our modernity. Ewald goes further, asking straight out: What if this crisis is the very means by which the Welfare State reproduces itself?

Ewald's analyses leave open a number of questions. In his desire to lay bare, at all costs, the liberal diagram of power, Ewald underestimates the historical field of force relations. In his wish to call into question our image of liberalism, he does not satisfactorily explain why the laws voted by the Chamber were rarely enforced. And there is perhaps a touch of chauvinism in Ewald's insistence that Napoleon III had proposed social security laws before Bismarck (who actually enforced them), as if Bismarck had not had precursors.

True, there is a Nietzschean genealogist on virtually every page, but without his laughter. The author is himself a member of this Welfare State, in which every risk is covered. Lacking Foucault's extraordinary ability to be both concrete and allusive, Ewald is obliged to be explicit and deductive with regard to his arguments. But arguments there are. *L'Etat providence* offers them in abundance, with clarity and humor—at times deadpan—and with unrelenting intelligence. Is this not the task of today's philosopher?

Foucault and Critical Legal Studies

A Review of Alan Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell of Canada, 1987)

BY JONATHAN SIMON

Inspired in part by the work of Michel Foucault, scholars in the last decade have begun to effect a new kind of research into the nexus between language, power, and practices. This research is markedly different from intellectual history or the sociology of knowledge as these fields have been traditionally constructed. The new research forsakes the search for patterns of effects between discursive formations and power relations, and recognizes instead a fundamental identity between them. The point is not to show that when power calls the tune, discourse has to dance, or

the opposite, but to excavate within specific domains of social practice, the development of the discursive formations that have allowed power to be exercised in certain ways.

This research, which I will call "genealogical," bears an interesting relationship to law. In some ways, law has been the implicit model of how discourse is power. What Foucault, Robert Castel, Jacques Donzelot, and others have shown us about psychology, criminology, Marxism, etc., is how they materially organize social practices and the understanding of the people who inhabit them. In effect, they have demonstrated how the discourses of the human sciences have come to be a sort of law.

Law as a discourse claims to be invested with power, capable of penetrating and organizing social life. While some genealogists have explored specific areas of law—penal, family, etc.—until recently there has been a lack of effort to think through the genealogy of law as a whole.

Law in Hutchinson's view is "world making."

For the last several years Alan Hutchinson of Osgoode Hall Law School at York University in Ontario has been engaged in such a project. His latest book, *Dwelling on the Threshold*, represents the fruit of these years. In a set of loosely connected essays, Hutchinson reveals why law is such a sticky subject for genealogy. It is a discourse of power that calls for interpretation, yet interpretation is at the heart of its exercise of power.

Law in Hutchinson's view is "world making." People find themselves already acting in a world that is interpreted and mapped by legal concepts. Our political efforts to struggle against relations of property, family, or employment contract, find themselves already circumscribed by legal discourse, and penetrated by courts and other legal apparatuses which claim authoritative control over this discourse.

Like other scholars in a loosely assembled grouping known as Critical Legal Studies (CLS), Hutchinson is concerned with the relationship between law and politics. More pointedly, CLS critics have pointed to the artificial boundary between legal discourse and other forms of political speech and struggle as crucial to the maintenance of the dominant force arrangements of contemporary society.

Drawing on recent work in Hermeneutics, Deconstructionist criticism, and especially on the genealogical strategies of Michel Foucault, Hutchinson has sought to explore strategies for undermining this official "difference" between law and politics. His work (and that of CLS as a whole) comes at a time when mainstream legal scholarship seems to have conceded the game.

The 19th-century insistence on a purely autonomous legal realm, where natural legal principles were applied to practical situations by Judges skilled in deducing pre-existing legal answers to novel questions, has been abandoned by most legal scholars. Lately most legal academics take as given the once fearsome battle cry of the Legal Realists: "law is what the judges say it is."

But this open-mindedness on the part of the legal intelligentsia disguises a deep re-entrenchment of the law/politics "difference" behind the mask of pragmatism. The latest and most dangerous development in this line is Law and Economics. Certain legal scholars propose to show that while legal rules aren't of another world, they are functional to society when they are treated as if they were. Judges, it seems, fortuitously find rules that parallel the internal logic of the market. Law is functional because it provides market-compatible answers to questions that for a variety of reasons slip outside of, or even threaten the existence of, markets.

Hutchinson sets out from his reflection on the interpretation of legal discourse to expose the new generation of legal mythologies for what they are: the latest versions of an enlightenment story about the difference between knowledge and politics. Seeking past the boundaries of his own critique, Hutchinson begins the more difficult task of sketching a constructive strategy for appropriating the "world making" powers of law:

Although we cannot move to a narrative ground above or beyond history and politics, we can salvage a space within which individuals can contribute to the constantly changing process of history-making. "Law stories" and other stories have ill-defined edges. Although they often overlap, there are pockets and folds in which the storyline is faint, garbled or ambiguous. Traditional theorizing tries vainly to grout these irrepressible cracks and contradictions. In contrast, we must seek out and inhabit these wrinkles between history's and language's past and their future unfolding. This is essential for the success of any radical restructuring of social and intellectual life.

The Penal and the Social

A Review of David Garland, *Punishment and Welfare: A History of Penal Strategies* (Hants, U.K.: Gower, 1985)

BY JONATHAN SIMON

David Garland, a professor of Law and Criminology at the University of Edinburgh, has written a compelling account

of the development of the modern state in Great Britain at the turn of the 19th century. In a work which both challenges and extends the thesis of Foucault's *Discipline and Punish*, Garland documents the reorganization of the British penal system as a part of broader movement to construct a "social" state in the United Kingdom.

Garland disputes Foucault's argument that penal systems in Western countries became primarily disciplinary early in the 19th century. Despite the spread of the prison in Britain as the primary instrument of punishment, the practice and theory of penalty remained focused on moral censure and deterrence with little effort to individualize or normalize criminals throughout the Victorian era.

In the 1890s however, this order was disrupted by the pressure of political and economic change. With the increase in the economic integration of the country, and the political strength of the working class, British rulers found themselves faced with what came to be called the "social question." In the space of two and a half decades a new set of governmental and private apparatuses were put in place. These practices included techniques for regulating the population like social insurance, unemployment relief, and a network of social work agencies.

At the heart of this new welfare system was a reorganized penal structure. The British penal system as it stood at the beginning of the First World War had become a system of "normalization." The uniform punishments of the Victorian era had been replaced by a much more finely tuned grid of individualizing judgments, which separated out juveniles, inebriates, the mentally ill and defective, and sought to arrange the distribution of bodies in the system so as to achieve both correction and security.

Garland excavates the significance of these changes by analyzing the various discursive strategies that developed out of the political and economic crises of the late 19th century. All of these discourses ranging from social work to eugenics presented a new vision of the relationship between individual and state, and all sought to formulate a program for constructing a "social" state that would directly intervene in the economic, social, and biological processes of civil society.

His comprehensive approach to analyzing the development of these discourses allows Garland to bridge the distance between genealogical research in the tradition of *Discipline and Punish* and a more conventional political history. The focus remains on the ways practices get problematized and transformed. But Garland's approach and the relatively narrower scope of his study allow the strategic action of specific forces to emerge in great detail.

Of Interest to Our Readers

PERIODICALS

Actes: cahiers d'action juridique 54 (Summer 1986): "La gouvernementalité: Foucault hors les murs." Contents: Michel Foucault, "La gouvernementalité"; Pasquale Pasquino, "La problématique du 'gouvernementalité' et de la 'véridiction'"; Michel Foucault, "Face aux gouvernements, les droits de l'homme"; Jonathan Simon, "Foucault in America"; Giorgio Bomio, "L'effetto Foucault"; Heidrun Hesse, "RFA: une réception critique"; G. Bomio, "Michel Foucault: homenaje a un vago y maleante"; Françoise Tulkens, "Généalogie de la défense sociale en Belgique (1880-1914)"; François Boullant, "Compte-rendus"; Daniel Defert, "Centres, cercle, labyrinthe"; François Boullant, "Michel Foucault à hue et à dia"; François Ewald, "Défense et illustration de *L'Etat providence*"; François Boullant, "Que faire du colloque de la CFDT?"; Michel Foucault, "L'expertise psychiatrique"; Pierrette Poncela, "La vérité est de ce monde"; Michelle Perrot, "La leçon des ténèbres: Michel Foucault et la prison"; Guy Casadamont, "Savoir criminologique et pouvoir pénal: par-delà bien et mal"; Pierre Lascoumes, "Le grondement de la bataille"; Guy Casadamont, "Autour de *Surveiller et punir*: entre des pierres d'attente et les points de suspension."

Actes de la Recherche en Sciences Sociales 64 (1986): "Le champ juridique."

Critique 471-472 (August/September 1986): "Michel Foucault: du monde entier." Contents: Alain Jaubert, "Quelques souvenirs de Pierre Boulez"; Jean Piel, "Foucault à Uppsala"; Pierre Macherey, "Aux sources de *l'Histoire de la folie*: une rectification et ses limites"; Jeanette Colombel, "Contrepoints poétiques"; François Ewald, "Une expérience foucauldienne: les principes généraux du droit"; Jürgen Habermas, "Une flèche dans le coeur du temps présent"; Axel Honneth, "Foucault et Adorno: deux formes d'une critique de la modernité"; Wilhelm Miklenitsch, "La pensée de l'épicentrisme"; Colin Gordon, "Foucault en Angleterre"; Hans Sluga, "Foucault à Berkeley: l'auteur et le discours"; Hubert Dreyfus and Paul Rabinow, "Habermas et Foucault: qu'est-ce que l'âge de l'homme?"; Richard Rorty, "Méthode, science sociale et espoir social"; Remo Bodei, "Foucault: pouvoir, politique et maîtrise de soi"; Pier Aldo Rovatti, "D'un lieu risqué du sujet"; Mario Vegetti, "Foucault et les Anciens"; Paul

Veyne, "Le dernier Foucault et sa morale"; Jacques Lagrange, "Les oeuvres de Michel Foucault: une bibliographie."

Economy and Society 15 (February 1986): "Michel Foucault (1926-1984)." Contents include: Colin Gordon, "Question, Ethos, Event: Foucault on Kant"; Michel Foucault, "Kant on Enlightenment and Revolution"; Pasquale Pasquino, "Foucault: The Will to Knowledge"; Mike Gane, "The Form of Foucault."

Le Débat 41 (September/November 1986): "Michel Foucault." Contents: Michel Foucault, "Omnes et singulatim: vers une critique de la raison politique"; Georges Canguilhem, "Sur *l'Histoire de la folie* en tant qu'événement"; Robert Castel, "Les aventures de la pratique"; Jacques Donzelot, "Les mésaventures de la théorie"; François Ewald, "Droit: systèmes et stratégies"; Jürgen Habermas, "Les sciences humaines démasquées par la critique de la raison: Foucault"; Pasquale Pasquino, "La volonté de savoir"; Henri Joly, "Retour aux Grecs"; Maurice Pinguet, "Les années d'apprentissage"; Etienne Burin des Rozières, "Une rencontre à Varsovie"; Michel Fano, "Autour de la musique"; Michel de Certeau, "Le rire de Michel Foucault"; Hélène Cixous, "Cela n'a pas de nom, ce qui se passait"; Jacques Almira, "La reconnaissance d'un écrivain"; Arlette Farge, "Travailler avec Michel Foucault"; Katharina von Bülow, "Contredire est un devoir"; Pierre Boulez and Michel Foucault, "Messieurs, faites vos jeux"; David G. Horn and Jacqueline Urla, "Foucault et les Etats-Unis."

Philosophy and Social Criticism (forthcoming): Special issue on Foucault's works on sexuality.

Political Theory 15 (February 1987): "Foucaultian Politics." Contents include: Tom Keenan, "The 'Paradox' of Knowledge and Power: Reading Foucault on a Bias"; Alexander E. Hooke, "The Order of Others: Is Foucault's Antihumanism against Human Action?"; Gad Horowitz, "The Foucaultian Impasse: No Sex, No Self, No Revolution."

Telos 67 (Spring 1986): "Squaring the Hexagon: Special Issue on French Politics and Culture." Contents include: Richard Wolin, "Foucault's Aesthetic Decisionism"; Maria Daraki, "Foucault's Journey to Greece"; Rebecca Comay, "Excavating the Repressive Hypothesis"; Keith Gandall, "Foucault: Intellectual Work and Politics"; Robert d'Amico, "Going Relativist."

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André Vésale. 1987. *La Fabrique du corps humain*. Foreword by Claire Ambroselli, Anne Fagot-Largeault and Christiane Sinding. Paris: Actes Sud.

Work in Progress

"WAY OF LIFE"

BY KEITH GANDAL

Department of English, University of California, Berkeley

My study is an examination of the familiar notion of "way of life." For many of us in America today, the concept of way of life (or its offspring, "lifestyle") is our primary manner of identifying ourselves: our way of life seems more central to who we are than our class, our religion, our ancestry, our race, our political party, or our ethnic group—all those traditional sources of identity in American life. I want to subject this self-evident notion to historical inquiry: what has this modern conception of a "cultural" reality—in addition to, say, economic, political and moral realities—meant for our understanding of ourselves? What has it meant for ethics? What has it meant for literature?

For many of us in America today, the concept of way of life (or its offspring, "lifestyle") is our primary manner of identifying ourselves: our way of life seems more central to who we are than our class, our religion, our ancestry, our race, our political party, or our ethnic group—all those traditional sources of identity in American life.

Much has been written recently about the decline of a moral tradition in America and the founding of our contemporary society and its literature. Our modern order has been characterized alternatively as capitalist, bureaucratic, technocratic, corporate, narcissistic, and therapeutic, but the picture we get, again and again, is that of a certain moral void at the center of a society that relentlessly attends to our social, psychological and economic ordering. The picture we get also shows a moral void at the center of the common individuals who populate this modern society, as well as reveals a deep experience of alienation among the most sensitive members of that populace, notably our authors. My own project is to complement this recent writing, by challenging one of its basic premises. I would like to entertain the idea that, along with a deterioration of morality at the heart of modern American history, there has

been a no less radical transformation in, what might be

called, the substance of ethics—that part of ourselves and our lives that is subject to ethical consideration.

By attending to the discourses and reform practices aimed at the urban poor in the latter half of the nineteenth century, I am attempting to gage the philosophical stakes of “the new immigration.” How did the influx and the urban lives of immigrants change our notions of what we are, as human beings? How did it change our forms of identity, our relations to ourselves and to others? How did it change our literature? My contention is that, slowly, it became more and more unpopular to conceive of and treat the immigrant poor—and people in general—as beings with passions and moral habits subject to temptation and susceptible to a fall into vice, and it became more and more accepted to think of them instead as beings with specific standards of living and various ways of life subject to a physical and social environment. And some Progressive

Era reformers and immigrant writers recognized that the vital ethical issues of the American poor, issues of their own identity and their relations to others, were not the issues of a traditional morality—sobriety, thrift, industry—but questions concerning a way of life: whether one should adopt the dress, language and manners of one’s new homeland or rather hold onto the old ways, how one should treat those immigrants who have held onto their traditions and those who have Americanized.

I would like to entertain the idea that, along with a deterioration of morality at the heart of modern American history, there has been a no less radical transformation in, what might be called, the substance of ethics—that part of ourselves and our lives that is subject to ethical consideration.

Around the turn of this century, a new understanding of way of life was developed, as the term came to encompass a new set of substantive elements, elements which were once disparate: dress and domestic sanitation, language and living conditions, customs and living standards. The notion of different ways of life, and of a “cultural” determinant to behavior, challenged old ideas of moral responsibility and provided new accounts of human agency—from law courts to social work to novels. This way of thinking provided new forms of identity and new ethical material for conflict and quandary, which have been articulated in our fiction, beginning with literary realism. It also came to have a political currency, came to play a role in various programs and institutions of power, including immigration politics and the

penal system. And there is little doubt about its importance in our present-day lives: today, identification with a way of life—or a lifestyle—is made, not only by those in immigrant communities and subcultural groups, but also by members of the affluent mainstream and even by government officials who would speak for our nation as a whole. On the basis of writings of reformers and fiction by native and immigrant Americans, from the middle of the last century through the beginning of this one, I will trace the genesis and the literary and political effects of this way of thinking that is so central to our self-understanding at present.

Notes on Current Research

Law and the Other: A History of the Mixed (Half-Alien) Jury

Marianne Constable

Jurisprudence and Social Policy Program University of California, Berkeley

Marianne Constable is researching the legal concept of membership in the community as reflected in the construction of English juries from the Middle Ages to the present, and American juries from the colonial period to the present. She is interested in the link which binds the member to the community for the purpose of governance. Looking at the changes in the way members and aliens are defined in law provides a genealogy of our present notions of law, justice, and the other.

The Use of Contracts as a Social Work Technique

David Nelkin

University of London

David Nelkin has been studying the way social workers use contracts with their clients as a technique of control. While the image of contract in legal ideology stresses the idea of an autonomous individual subject, contracts in the social work context operate as a method for discipline and normalization.

Organizations and Conferences

The **Centre Michel Foucault** was founded in Paris in 1986, in order to aid scholars who intend to write on or from the work of Foucault. The main goals of the center are to gather documents and archives, and to facilitate research inspired by Foucault's orientations or methods. The documents—manuscripts, prints, audio and video tapes, translations—are housed at the Bibliothèque du Saulchoir, 43 bis, rue de la Glacière, 75013 Paris. The original board of the Association for the center included Maurice Blanchot, Pierre Boulez, Georges Canguilhem, Gilles Deleuze, Michelle Perrot, Paul Veyne, and the late Goerges Dumèzil.

The Foucault Center is now organizing a conference entitled "**Michel Foucault, Philosophe**" to be held in Paris on 9-11 January 1988. For information, contact the Centre Michel Foucault, 9 rue Marcel Renault, 75017 Paris.

The **French Studies Program** will host a conference on "**Democracy and Difference**," January 23, 24, 1988, at the University of California, Berkeley. This conference will adopt a comparative approach to address such consequences of modernity as racism and sexism, as well as their profound effects on contemporary philosophical and political issues. Social scientists, political activists and journalists from three of the largest democratic states—France, Brazil, and the United States—will discuss how to reconcile egalitarian moral principles and difference, without naturalizing the latter. Participants will aim to transcend some of the well-worn litanies, and to create a forum for new insights and possibilities for action. For more information contact the French Studies Program, 339 Kroeber Hall, University of California, Berkeley, California 94720. (415) 642-2634.

The **French Studies Program** will host a conference on "**Norms and Technologies: In Honor of Georges Canguilhem**," April 1, 2, 1988, at the University of California, Berkeley. The occasion is to honor Georges Canguilhem, the leading French historian of the life sciences, now in his eighty-fourth year. Although his work has provided many of the central concepts for the history of the life sciences and is directly relevant to numerous fields of study in history and the social sciences, he remains relatively unknown in the English-speaking world. The aim of this conference is to bring together distinguished scholars from a number of different fields—philosophy, anthropology, history,

medicine, history of science, law, biology, sociology, urbanism—to carry on an interdisciplinary discussion in the spirit of Canguilhem's work and indicate new directions that have emerged from it. For more information contact the French Studies Program, 339 Kroeber Hall, University of California, Berkeley, California 94720. (415) 642-2634.

The **European Conference of Critical Legal Studies (ECCLS)** was established in 1981, and has organized a series of annual conferences. The 1986 conference was entitled "**Theory and Practice: Feminist Perspectives on Law**," and papers were published in a double issue of the *International Journal of the Sociology of Law* 3-4 (1986). The 1987 conference, held in Paris in April, was devoted to the theme "**Private Order and Legal Order**."

The ECCLS also publishes a newsletter. For membership, subscription and conference information contact Iain Stewart, Department of Sociology and Social Anthropology, University of Hull, Hull HU6 7RX, England.

Al-Haq: Law in the Service of Man is the West Bank affiliate of the International Commission of Jurists, Geneva. A human rights organization, Al-Haq monitors the legal situation in the West Bank, organizes debates and conferences, and operates a law and human rights library. The organization also publishes an informational newsletter. For information, write: Al-Haq, P.O. Box 1413, Ramallah, West Bank - via Israel.

IN THE NEXT ISSUE:

Ian Hacking, "Night Thoughts on Philology"
Alain Corbin, "French Historians and Michel Foucault"
Michel Foucault, excerpts from "Lectures on Parrhesia"
and previously untranslated short works

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