

Chapter 7

Needling the Sovereign

“The point is to make what you see as uneventful as possible” (*Sarasota Herald-Tribune*, March 3, 2000, ZB). So said C. J. Drake, spokesperson for the Florida Department of Corrections, shortly after that state completed its first two executions by lethal injection. But how exactly does one render an event “uneventful,” an occurrence that never altogether happens? To answer that question, consider the criteria John Lofland recommends that we employ in assessing the “dramaturgy” of different ways of inflicting capital punishment. Nine elements, he suggests, are relevant: “the *reliability* of the technique, the temporal *duration* of lethal application; the amount and kind of *noise* it makes; the amount of *pain* it inflicts; the amount and kind of *sound* it elicits from the condemned; the amount and kind of bodily *mutilation* the technique causes; the amount of *movement* by the condemned it produces; the *visibility* of the condemned during and after application; and the amount and kind of *odors* associated with the technique” (1977, 309). If, Lofland continues, one wishes to heighten the spectacular quality of an execution and, in doing so, make “inescapably clear the existential fact that a human being is being killed,” the technique employed “should be highly unreliable and ineffective, take a long time to work, make a great deal of noise, mutilate the body, and inflict terrible pain, causing the condemned to cry out in anguish and struggle strongly to resist—all of which actions are highly visible to witnesses and accompanied by noxious and abundant odors” (1977, 310). Death by lethal injection falls short when measured by any of these criteria; and it is for precisely that reason that Mr. Drake, had he been asked, would no doubt have praised this method in virtue of its “humanity.” What he said instead was perhaps still more telling: “We’re definitely trying to make the process as clinical as possible” (*Sarasota Herald-Tribune*, March 3, 2000, ZB).

In several of the preceding chapters, I suggested that the practice of capital punishment articulates certain dilemmas of the liberal state in America. In this, the first section of this final chapter, I will maintain what I do not believe to be so, that is, that lethal injection, as heir to various transitional technologies (e.g., electrocution and lethal gas), successfully overcomes those same dilemmas. Before making that case, however, it is well to review the particulars of this way of killing. Although considered as early as 1888, when it was rejected by New York in favor of electrocution, lethal injection was not adopted by any state as a method of execution until 1977. That Oklahoma did so directly on the heels of the Supreme Court decision in *Gregg v. Georgia* (428 U.S. 153 [1976]), which authorized states to resume the practice of capital punishment after the brief hiatus mandated by *Furman v. Georgia* (408 U.S. 238 [1972]), hints that its adoption may have had little to do with humanitarian concerns, but much to do with identifying a method that would temper opposition to the death penalty and reduce if not eliminate court challenges by the condemned.¹ Given its relative success in both regards, it should come as no surprise to learn that, with the exception of Alabama and Nebraska, every state currently committed to the death penalty, as well as the federal government and the U.S. military, now specifies lethal injection as its default method of execution. Nor should it come as a surprise to learn that, of the 364 executions conducted in the United States between January 8, 1997, and July 17, 2001, only 23 employed means other than lethal injection.

While lethal injection protocols differ somewhat from state to state, that employed by Arizona is not atypical (see Dayan 1997, 42–43). In that state, at some point during the day prior to the execution proper, medical personnel examine the condemned in order to assess his or her physical condition and, more specifically, the accessibility of veins. Blood is then drawn in order to detect any illegal substance, which might compromise the effectiveness of the drugs to be administered, or any communicable disease, which might endanger the members of the execution team. After the inmate is moved by the Restraint Team to the holding cell adjacent to the death chamber, the members of the Special Operations Team inspect the lethal injection apparatus, inventory the chemicals, and conduct a practice session. As the designated execution time approaches, the condemned is placed on a gurney, where two-inch-wide leather straps are used to lash down each leg at three sepa-

rate points, each arm at two places, and, finally, stomach and chest. (A protective helmet is available should an inmate begin to beat his or her head against the table before being rendered insensate.) Catheter needles are then inserted into each forearm, the second as a backup should the first become clogged, and intravenous tubes are attached to these needles. It is through one of these two pathways that a sequence of three drugs is administered, at a signal from the superintendent, by a person who, hidden behind a door equipped with a one-way mirror, operates the syringe system. The first, 100 cubic centimeters of sodium pentothal, renders the condemned unconscious; the second, 150 cubic centimeters of Pavulon, paralyzes respiratory muscles and so causes suffocation; and the third, 150 cubic centimeters of potassium chloride, causes cardiac arrest by inducing violent fibrillation of the heart. Barring complications, introduction of these three substances takes less than a minute; and, in two to four minutes following the final injection, the inmate is dead.

Far more completely than any of its predecessors does lethal injection achieve the "utopia of judicial reticence," which, according to Foucault (1979, 10), is required by the liberal state. Shortly after Texas, in 1982, became the first state to execute a death row inmate using this new method, officials in New Jersey commissioned Fred Leuchter, proprietor of Execution Equipment and Support, to fashion a device that would minimize human and maximize machine involvement in the lethal injection process and, in so doing, respond to qualms expressed by the state's medical community about its possible complicity in acts of official killing. To accomplish that end, Leuchter replaced the manual pull knobs of older devices with automatic counterparts; and, in order to meet the statutory requirement that "the procedures and equipment . . . be designed to insure that the identity of the person actually inflicting the lethal substance is unknown even to the person himself" (New Jersey Code of Criminal Justice, Title 2C:49-3[b]), he installed a set of duplicate controls as well as a computer program that designates which of the two sets activates the flow of lethal chemicals, but then erases this "choice" from its memory immediately thereafter. The net result is a system that eliminates virtually all possibility of error while simultaneously perfecting the mechanisms that enable the dispersion and denial of responsibility for dealing death. That this remarkable achievement coheres with the legitimation imperatives of

liberal law can be suggested by extrapolating to lethal injection what Foucault said of the guillotine: Through this means, the state takes life "almost without touching the body, just as prison deprives of liberty or a fine reduces wealth. It is intended to apply the law not so much to a real body capable of pain as to a juridical subject, the possessor, among other rights, of the right to exist. It had to have the abstraction of the law itself" (1979, 13).

So conceived, it is at least arguable that this way of killing resolves one of the key dilemmas explored in several different guises in earlier chapters, that is, the troublesome role of the human body in contemporary capital punishment. The hangman's noose, recall, is a metonymical object in the sense that its oval tacitly refers to the neck it is to circumscribe; and all too often, as we have seen, that act of encircling produces a corpse bearing telltale traces of the harm it has suffered. The lethal injection apparatus, like the noose, is a technological objectification of the human capacity to harm one another; but, unlike the noose, it is one whose structure does not gesture toward a specific body part that, in being hurt, is to serve as the proximate cause of death. Leaving no mark on the body's surface, doing its work behind a wall of flesh that is as opaque as that surrounding any penitentiary, the needle consummates the privatization of capital punishment. Moreover, because the administration of sodium pentothal, assisted by multiple leather straps, prevents the body from expressing whatever pain it might feel, and because we are not conceptually well equipped to identify as violence injury that does not occasion visible suffering, the accomplishment of death via the injection of therapeutic drugs invites its construction in terms of the discourse of humanitarianism. The continued plausibility of that discourse requires precisely the sort of body generated by lethal injection, one that does not writhe uncontrollably, that does not emit unseemly noises, that does not jettison nasty fluids, whether blood, or semen, or urine. Were the body to do any of these things during execution, as is all too common when other methods are employed, it would invite this event's construction in terms of the discourse of barbarism.

If Charles Campbell posed a dilemma for the regime of capital punishment in America because the instrumentality of his death, a noose, appeared anachronistic, lethal injection solves that problem in virtue of the needle's consistency with the legitimation requirements of a state bent on perfect rationalization of its means of violence. If West-

ley Allan Dodd posed a dilemma for the regime of capital punishment in America because his corpse retained visible signs of the violence done to his person, lethal injection solves that problem by rendering the body of the executed an unblemished page that says nothing. If Allen Lee Davis posed a dilemma for the regime of capital punishment in America because the blood that pooled on his white shirt testified to the pain he may have endured, lethal injection solves that problem by insuring immediate loss of consciousness and so an inability to feel anything. Even the dilemma posed by Karla Faye Tucker, whose identity as a woman highlighted the violence of capital punishment, was less problematic than it otherwise would have been because her death by lethal injection tempered the horror that would have been engendered had she been hanged, gassed, shot, or electrocuted. If these cruder instrumentalities of violence appear too reminiscent of those employed by Campbell (a kitchen knife), Dodd (a hunting knife and a rope), Davis (a gun), and Tucker (a pickax), lethal injection is sufficiently unique to sustain the state's categorical distinction between criminal homicides and executions mandated by law.

Perhaps, in light of these considerations, we should now conclude that lethal injection does indeed resolve the principal dilemmas reviewed in the previous chapters. Or perhaps not. Perhaps, in the very act of overcoming certain predicaments, execution by this means simultaneously creates others. Perhaps, as I argue in this chapter, the very success of lethal injection is at one and the same time the cause of its failure.

To sustain this claim, I begin by establishing a more comprehensive context than that provided by the proximate history of lethal injection and its adoption. That context has two dimensions. The first concerns the modern liberal state's assumption of responsibility for the provision of popular welfare in addition to that of external as well as internal security; and the second concerns the rationalization and hence the medicalization of death in modern liberal regimes. Woven together, these conditions suggest certain contradictory imperatives confronting the late liberal state in America, contradictions that are encapsulated in the oxymoronic quest for a "humane execution." To illustrate how these contradictions have surfaced within the judicial realm, I briefly review *Heckler v. Chaney* (470 U.S. 821 [1985]), which is one of the more telling death penalty cases to arise in the post-*Gregg*

era. Finally, I indicate why I am persuaded that execution by lethal injection cannot successfully satisfy the late liberal state's various imperatives and, in particular, its need to present itself as sovereign monopolist over the means of legitimate violence.

From Sword to Sustenance

In chapter 2, I suggested that reform of the conduct of hangings, between the late sixteenth and late nineteenth centuries, was one means by which the early modern and modern state in England dissociated itself from what in time comes to be known in liberal discourse as the private sphere, thereby consolidating its claim to stand as exclusive representative of the affairs of the nation as a whole. As such, the noose is one element of a larger package that includes, among other things, the creation of a common coinage, the securing of well-demarcated national borders, the institutionalization of a uniform system of taxation, and the replacement of amateur constables by professional police officers. Recall also that, in making this argument, I suggested that this state should be understood in modified Weberian terms. That is, while endorsing Weber's representation of the state as an institutional complex seeking to secure and sustain its claim to a monopoly over the means of legitimate force, I also argued that, in order to avoid reification, this construction should be understood as a relational *effect* constituted by the combined working of various state-creating mechanisms, several of which I have cited here.

Although I remain persuaded that this neo-Weberian account is helpful in making sense of the emerging liberal state during the period reviewed in chapter 2, I am also convinced by Nikolas Rose's claim that the utility of its categories is limited by their historical specificity:

As we enter the twenty-first century, many of the conventional ways of analysing politics and power seem obsolescent. They were forged in the period when the boundaries of the nation state seemed to set the natural frame for political systems, and when geo-politics seemed inevitably to be conducted in terms of alliances and conflicts amongst national states. They took their model of political power from an idea of the state formed in nineteenth-century philosophical and constitutional discourse. This

imagined a centralized body within any nation, a collective actor with a monopoly of the legitimate use of force in a demarcated territory. This apparent monopoly of force was presumed to underpin the unique capacity of the state to make general and binding laws and rules across its territory. It also seemed to imply that all other legitimate authority was implicitly or explicitly authorized by the power of the state. (1999, 1)

If these “ways of analysing politics and power” are no longer entirely adequate, for reasons I suggest later in this section, where might we go in order to remedy their incapacities? In chapter 2, I turned to Weber in order to counter Foucault’s animus toward the state, and hence to law, as worthwhile objects of theoretical inquiry. I now want to turn to Foucault in order to remedy the inability of Weberian categories to capture in a sufficiently nuanced way the problematics of governance in late liberal regimes, which, at least in the context of the United States, includes the problem that is capital punishment.

In the final chapter of the introductory volume to *The History of Sexuality* (1980a), Foucault argues that prior to the seventeenth century the defining privilege of sovereignty within European absolutist monarchical regimes was the right to “decide life and death” (135). Deriving originally from the unrestricted authority of the head of the Roman family to dispose of the lives of children and slaves as he saw fit, the scope of this claim was gradually delimited via political struggles aimed at designating the circumstances in which it could legitimately be exercised: specifically, when it proved necessary to send subjects to war on behalf of the state’s preservation or when it proved necessary to punish those who transgressed against the sovereign’s authority. The right to decide life and death, so construed, was “dis-symmetrical” in the following sense:

The sovereign exercised his right of life only by exercising his right to kill, or by refraining from killing; he evidenced his power over life only through the death he was capable of requiring. The right which was formulated as the “power of life and death” was in reality the right to take life or let live. Its symbol, after all, was the sword. Perhaps this juridical form must be referred to a historical type of society in which power was exercised mainly as a means of

deduction (*prélèvement*), a subtraction mechanism, a right to appropriate a portion of the wealth, a tax of products, goods and services, labor and blood, levied on the subjects. Power in this instance was essentially a right of seizure: of things, time, bodies, and ultimately life itself; it culminated in the privilege to seize hold of life in order to suppress it. (136)

Within absolutist regimes, on this understanding, the biological existence of human beings was regarded as an “inaccessible substrate” (142) that became an object of political concern only when the sovereign found it necessary to jeopardize or destroy it or, alternatively, to confiscate some measure of the goods produced in order to sustain it. Under most other circumstances, the body and its imperatives, as well as their “natural” home, the household, were deemed beyond the scope of premeditated political intervention.

In early modern Europe, this conception of political rule began to be displaced (but not eliminated), as the concerns of the *oikos* became those of the national household (the economy), and as management of the economy emerged as a target of deliberate political policy. Unlike the politics of “deduction,” which concerned subjects for whom the ultimate expression of sovereignty was death, this new sort of political rule was one that was “bent on generating forces, making them grow, and ordering them, rather than one dedicated to impeding them, making them submit, or destroying them” (Foucault 1980a, 136). In the sixteenth and seventeenth centuries, however, this project was constrained by the relative absence of effective agencies of political administration as well as by retention of the model of the patriarchal household in thinking about the relationship between monarchical power and the economy. Only around the middle of the eighteenth century, Foucault contends, as the concept of population came to supplant the metaphor of the household, did the achievement of significant political intervention in economic affairs, predicated primarily on the burgeoning science of statistics, become a realizable goal:

The perspective of population, the reality accorded to specific phenomena of population, render possible the final elimination of the model of the family and the recentring of the notion of economy. Whereas statistics had previously worked within the administra-

tive frame and thus in terms of the functioning of sovereignty, it now gradually reveals that population has its own regularities, its own rate of deaths and diseases, its cycles of scarcity, etc.; statistics shows also that the domain of population involves a range of intrinsic, aggregate effects, phenomena that are irreducible to those of the family, such as epidemics, endemic levels of mortality, ascending spirals of labour and wealth; lastly it shows that, through its shifts, customs, activities, etc., population has specific economic effects: statistics, by making it possible to quantify these specific phenomena of population, also shows that this specificity is irreducible to the dimension of the family. (Foucault 1991a, 99)

The manifestations of rule directed specifically toward a nation's population, according to Foucault, were twofold. The first and earlier of the two is what he, in *The History of Sexuality* calls "an *anatomo-politics of the human body*" (1980a, 139), which appears to be roughly congruent with what he, in *Discipline and Punish*, calls "disciplinary power" (1979, 170). Largely but not entirely explicable in terms of capitalism's need for a compliant labor force, anatomo-political power is "centered on the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls" (Foucault 1980a, 139). The institutional loci of such power include, but are not limited to, public schools, army barracks, factories, and penitentiaries; and its epistemic conditions include, but are not limited to, competitive examinations, military training manuals, time and motion studies, and the science of criminology.

The second manifestation of this new form of rule, which Foucault in *The History of Sexuality* calls "a *bio-politics of the population*," focuses not on the body as machine, but "on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary" (1980a, 139). Its mundane techniques, sometimes originating in the state, but never confined to it, include population control efforts, public sanitation strategies, vaccination programs, and the regulation of working conditions (which, of course, may be at odds with the productivity-maximizing strategies of anatomo-politics); and its

epistemic conditions include, but are not limited to, census data and actuarial tables, analyses of migration and immigration patterns, disease-tracking studies, and unemployment statistics. In sum, whereas the absolutist regimes of early modern Europe sought, above all else, to secure the sovereign's territorial grip through irregular but awesome displays of might, whether directed outward or inward, their modern liberal counterparts endeavored to govern their populations on a continuous rather than an exceptional basis, and that with the aim of maximizing the nation's well-being, whether that be construed in terms of aggregate wealth or collective health.

This analysis of the project of political rule in modern liberal states is productively complicated when Foucault, aiming to loosen the grip of categories that remain dictated by the model of sovereignty, rehabilitates and then reworks an archaic sense of the term *government*:²

The word must be allowed the very broad meaning which it had in the sixteenth century. "Government" did not refer only to political structures or the management of states; rather it designates the way in which the conduct of individuals or states might be directed: the government of children, of souls, of communities, of families, of the sick. It did not cover only the legitimately constituted forms of political or economic subjection, but also modes of action, more or less considered, which were designed to act upon the possibilities of action of other people. To govern, in this sense, is to structure the possible field of action of others. (1982, 221)

By calling into question narrower constructions of this term, which confine its sense to deliberately organized and constitutionally authorized formal institutions, Foucault's concept of "governmentality" subverts liberalism's sharp dissociation of the official from the unofficial, the public from the private, state from society, each of which is crucial to the intelligibility of the Weberian account of the state qua formal monopolist over the means of legitimate violence. Because that account remains wedded to the view that the sovereign command, issued by the state in the form of law and backed by the threat of force, is political power's privileged form, it cannot adequately capture the diverse ways biopolitical and anatomo-political modes of governance are deployed and dispersed throughout the body politic.

To commend the theoretical perspective suggested, albeit more cryptically than completely, by Foucault's later work is not to deny the importance of the state. Given the access of formally invested officials to substantial institutional resources as well as to a unique claim to authority, the state remains a key pivot point within the larger project of rule. But it is to say that what we call the "state" should be situated on the more comprehensive field of political relations indicated by the term *governmentality*. And it is to say that the aim of inquiry, following Rose, should be to explore the "spatially scattered points where the constitutional, fiscal, organizational and judicial powers of the state connect with endeavours to manage economic life, the health and habits of the population, the civility of the masses and so forth" (1999, 18).³ And, finally, consistent with my modified Weberianism, it is to say that we should ask how that state, although constituted by its situation on this larger field, sometimes comes to be discursively coded as monopolist over the means of legitimate violence and hence as an autonomous entity explicable in terms of liberalism's disjunctions between official and unofficial, public and private, state and society.

If, as the concept of *governmentality* recommends, we direct our attention to the proliferation of alliances between state and nonstate bearers of expertise and authority aimed at regulating the conduct of diverse populations in light of various conceptions of welfare, we should also inquire into the mechanisms that sustain and shape these linkages and, of particular interest here, the law. On the one hand, because Foucault sometimes seems unable to imagine law as anything other than a juridical prohibition backed by the threat of force, he occasionally seems to suggest that the emergence of a regime of *governmentality* precludes its very existence.⁴ On the other hand, and more productively, Foucault sometimes suggests that the question we should ask is not whether law remains a significant vehicle for the exercise of power, but rather how it becomes implicated in anatomo- and biopolitical modalities of power within a regime of *governmentality*. For example, the operation of certain technologies of anatomo-political power, such as the multiple but generally unseen devices that now measure productivity within the capitalist workplace, presupposes a cluster of legal enactments that guarantees private ownership of these instrumentalities, that specifies who does and does not have authorized access to the results generated by their use, and that regulates the

conditions under which dismissals on the basis of these results can and cannot be challenged. Here, rather than disappearing, law helps to constitute the workings of anatomo-political power. By the same token, certain technologies of biopolitical power, such as the actuarial tables employed by insurance companies to determine their health plans, are afforded a shape they would not otherwise have by various statutory enactments, including those that subsidize prescription drugs for the elderly, that define what does and does not count as "medical" treatment, that mandate coverage for the uninsured, and so on. Here, to quote Foucault, the "judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory" (1980a, 144).

With this last claim, although he does not say so in so many words, Foucault effectively implies that just as we are well advised to situate the state on the broader field designated by the category of governmentality, so too are we well advised to locate law within the broader complex specified by the category of "regulation" (see Hunt and Wickham 1996). This perspective acknowledges that the workings of anatomo- and biopolitical power are never exhausted by the imperatives of law. But, at the same time, it recognizes that the progressive juridification of social life means that law is ever more bound up with the task of exercising control over or, alternatively, of exempting from control various domains. This is not to suggest that law is the predominant factor in coordinating formally extrapolitical domains, either internally or in relation to one another. Nor, however, is it to say that law is merely a fossilized remnant of a premodern past or, as Foucault occasionally appears to suggest, a simple ideological encoding of existing relations of power.⁵ None of these caricatures adequately grasps the way in which law, especially as it is informed by various sorts of non-legal knowledge and expertise (e.g., the medical, the psychiatric, and the criminological), now assumes the character of a hybrid. As an uneven assemblage that cannot be reductively identified with any of its parts (e.g., statutes, administrative regulations, agents of enforcement, judicial opinions, courtrooms and penitentiaries, etc.), and as those parts become more deeply invested in the regulation of formally non-political domains (e.g., banking transactions, medicine, domestic relations, product safety, restaurant sanitation, welfare entitlement), law is itself "governmentalized" (see Rose and Valverde 1998).

What implications does Foucault's analysis of the historical trans-

formation of the liberal state and its law harbor for our understanding of the politics of capital punishment, especially when conducted by means of lethal injection?⁶ I will address this question directly in subsequent sections of this chapter. Here let me simply indicate that how we answer this question will turn, in large part, on how we think about the relationship between old and new. When Foucault is inclined to insist on a categorical opposition between the regime of sovereignty, on the one hand, and the regime of anatomico-/biopolitics, on the other, he appears to suggest that the latter has altogether supplanted the former, rendering the notion of sovereignty irrelevant to an understanding of contemporary politics. At other times, and again in a more productive vein, Foucault suggests that, however awkwardly, the orders of sovereignty, anatomico-, and biopolitics now coexist in a triangulated relationship on the field of governmentality.⁷ Were we to elaborate the terms of this geometrical metaphor, he continues,

maybe we could even, albeit in a very global, rough and inexact fashion, reconstruct in this manner the great forms and economies of power in the West. First of all, the state of justice, born in the feudal type of territorial regime which corresponds to a society of laws—either customs or written laws—involving a whole reciprocal play of obligation and litigation; second, the administrative state, born in the territoriality of national boundaries in the fifteenth and sixteenth centuries and corresponding to a society of regulation and discipline; and finally a governmental state, essentially defined no longer in terms of its territoriality, of its surface area, but in terms of the mass of its population with its volume and density, and indeed with the territory over which it is distributed, although this figures here only as one among its component elements. (1991a, 104)

Whatever its value in helping us get a conceptual handle on the competing imperatives and hence the internally fractured character of the late liberal state, the metaphor of triangulation is not unproblematic (as I suspect Foucault would be the first to concede). For example, by assigning each of these “economies of power” to a distinct side of this triangle, this metaphor directs attention away from the way each is now at least partly constitutive of the others. While the dilemma posed by capital punishment via lethal injection might be understood as a

function of a relatively straightforward contradiction between the claims of sovereignty (death) and those of biopolitics (life), it is still better understood when we ask how each of these elements (leaving aside the economy of anatomo-politics) is transformed when situated within a regime of governmentality. In the next section, accordingly, I ask about the rationalization of death within that regime, which involves a repudiation of certain premodern understandings of the relationship between life and its end, and it is in terms of this more general context that I will then locate my consideration of state-sponsored killing by means of lethal injection.

Rationalizing Death

In his history of attitudes toward death in the West, Philippe Ariès (1974) suggests that in premodern orders dying was regarded first and foremost as a matter of fate. As such, it might be lamented because of its inexorability, or perhaps welcomed as a necessary condition of entry into the hereafter; but never was it considered something that might be subject to deliberate intervention in an effort to cheat or, still better, defeat the grim reaper. This posture of resignation, Ariès argues, was reinforced by death's profound ordinariness, by its standing as an event, which, although cruel in its unpredictability, was etched into the seams of everyday existence.

However, by the end of the eighteenth century, if not before, for many, mortality had become not a given, but a scandal. Mocking the Enlightenment fantasy of humanity's capacity to subject the world and its events to rational mastery, death comes to stand as a vexing reminder of that which resists and, indeed, eludes the project of perfect control and so the quest for unfettered autonomy. That status goes a long way toward explaining death's rationalization, which is first and foremost a matter of its medicalization, which in turn goes a long way toward explaining its governmentalization.

To begin to elaborate these connections, consider the following: When confronted by death today, rather than appeal to an undifferentiated category of fate or to the inescapable fact of mortality, more typically we ask about its specific cause or causes. Furthermore, because we believe that at least in principle all causes can be determined through scientific inquiry, and because we believe that at least in principle all causes, once known, are subject to technical intervention, we

ever more come to believe that at least in principle all causes of death can be forestalled, if not reversed. Death, in other words, is ever more understood by analogy to an ailment. Just as illness is taken to be a departure from the normal condition of health, so too is death taken to be a violation, an abortion that cuts short what otherwise should or might be life without end.

On this modernist construction, the easy opposition between life and death is unsettled, as the latter becomes a brooding presence within the former, a threat that must be staved off through deployment of whatever means are currently available. As such, suggests Zygmunt Bauman, in a metaphor that is much to my liking:

Death has been turned from a hangman into a prison guard. . . . Death does not come now at the end of life; it is there from the start, calling for constant surveillance and forbidding even a momentary relaxation of vigil. Death is watching (and is to be watched) when we work, eat, love, rest. Through its many deputies, death presides over life. Fighting death may stay meaningless, but fighting the *causes* of dying turns into the meaning of life. . . . Eschatology has been successfully dissolved into technology. (1992, 140–41)

The tragic nature of this project becomes apparent, Bauman explains, when we consider its implications for our understanding of the human body. On the one hand, as a necessary if perhaps unfortunate condition of the consciousness that seeks to free itself from the constraint of all causality, the body is that which must be kept alive. On the other hand, and simultaneously, it is the source of the mortality that must in time foil that same emancipatory project: “A paradox indeed—and the seat of perhaps the deepest and most hopeless of ambivalences: in the struggle aimed at the survival of the body, the would-be survivors meet the selfsame body as the arch-enemy” (36).

When the meaning of life is defined in terms of defeating death—in terms of identifying and, to the extent possible, outwitting its various causes—conduct quickly becomes implicated in a tangled web of rationalized controls. Bauman again:

The language of survival is an *instrumental* language, meant to serve and guide instrumental *action*. It is a language of *means* and

ends; of actions that derive their meaning from the ends they serve, and their reason from serving the ends well. This language can accommodate the phenomenon of death only the way it accommodates all other elements of instrumentalized life: as an object of practice, of an informed, targeted and focused effort. As a specific event, with a specific and avoidable cause: an event which enters the vision, the realm of the meaningful, only through *the task of prompting or preventing it*, of making it happen or not allowing it to happen. (1992, 130)

The fact of mortality thus becomes not a cause for resignation, but an endless spur to anxious action: "Keeping fit, taking exercise, 'balancing the diet,' eating fibres and not eating fat, avoiding smokers or fighting the pollution of drinking water are all feasible tasks, tasks that can be performed and that redefine the unmanageable problem (or, rather, non-problem) of death (which one can do nothing about) as a series of utterly manageable problems (which one can do something about; indeed, which one can do a lot about)" (130). So construed, the rationalization of death, which involves mapping it onto an epistemological space that is occupied by named objects and known events, as well as linking it to a network of techniques whose efficacy may be precisely assessed, ideally in quantitative terms, is principally a matter of its medicalization. To state the obvious, the contemporary hegemony of medicine and its categories in making sense of mortality, and hence of securing health in order to prolong life, entails enormous deference to the authority of physicians. To state what is not quite so obvious, as a result of the medical profession's role in regulating the conditions under which death typically occurs, as well as specifying the criteria that distinguish the living from the dead, what was once a "natural" event ever more assumes the form of an "artificial" construction of its discursive practices.

If premodern death was a public event, not simply in the sense that it was an everyday occurrence, whether caused by violence, accident, or the cumulative burdens of embodiment, but also in the sense that it was interpretable in terms of shared structures of ritualized meaning, typically religious in orientation, medicalized death within late liberal regimes is in certain respects a fundamentally private affair. That this is so, it is worth noting, testifies to the kernel of truth embedded in the

Weberian representation of the modern state as an institutional complex that can credibly sustain its claim to monopolistic control over the means of legitimate violence. As those who are not afforded this luxury perhaps understand best, it is precisely because that state has now secured a high degree of internal pacification, and so reduced the amount of unregulated and unpunished extrastate violence, that those in positions of relative privilege can entertain the prospect of a peaceful death in private, whether taking place within a home, a hospital, a nursing home, or some other cloistered site deemed suitable for this event. In addition, and as Thomas Hobbes was perhaps the first to grasp, the secular discourse of survival is essentially a privatizing language, one that reduces the import of death to the termination of a discrete individual's biological existence and so renders it ever more difficult to interpret in communally meaningful ways. Given this construction, it is no surprise that wholesale privatization, the spatial and psychological sequestering of the dying and dead, is now our primary response to this embarrassing reminder of the limits of instrumental control; and, if that is so, then perhaps the removal of capital punishment behind penitentiary walls is well understood as but one more sign of our acute anxiety in the face of death.

On the basis of considerations of this sort, Bauman concludes: "Death is now that thoroughly private ending of that thoroughly private affair called life" (1992, 130). Foucault comes to much the same conclusion when he suggests that "death is power's limit, the moment that escapes it; death becomes the most secret aspect of existence, the most 'private'" (1980a, 138). But this representation, as Foucault should have been the first to recognize, is in large measure a romantic illusion. The representation of death as an essentially private phenomenon obscures the way it, in response to the imperatives of rationalization, has become altogether caught up within the regime of governmentality. That category invites us to ask how medical authorities, practices, professional associations, and codes of conduct have been joined to state authorities, programs, administrative regulations, and formal statutes in the constitution of what Foucault aptly designated the "juridico-medical complex" (1996, 197). That complex, to cite but a few examples, includes the finely reticulated relationship between law and medicine in certifying the fact of death, in dictating the form and content of living wills, in regulating the operation of morgues, in dictating

the allocation of scarce organs for transplant purposes, in analyzing DNA evidence during homicide trials, in governing the conduct of fetal tissue research, in determining when life support may or may not be withdrawn, in disposing of embryos after sperm or egg donors have died, and so forth and so on.

The precise shape assumed by the juridico-medical complex at any given moment in time is never entirely settled, and so the potential for disruption of the politics of death is never altogether absent. To illustrate with an example that is of indirect but real relevance to the issue of capital punishment, especially when conducted by means of lethal injection, consider one of the more controversial contemporary manifestations of death's rationalization: physician-assisted (or, still more controversially, physician-administered) suicide.⁸ Like execution by lethal injection, physician-assisted suicide is located within what Michael Davis calls "the shadow country of medicine" (1995, 44). To the extent that it implicates the art of healing in the art of killing, physician-assisted suicide troubles the distinction between private doctor and public executioner, and so threatens the medical profession's collective self-definition. It is not surprising, therefore, that the Council on Ethical and Judicial Affairs of the American Medical Association, in response to this border threat, has condemned physician-assisted suicide on the grounds that it "is fundamentally incompatible with the physician's role as healer" (E-2.211); or that the AMA's House of Delegates has adopted a resolution opposing all bills aimed at legalizing this practice (H-270.965). What is less immediately apparent, though, is the way physician-assisted suicide undermines the liberal state's Weberian self-representation and, more particularly, its construction of the appropriate relationship between political power and death. Should physicians be authorized to kill with impunity, albeit within a structure of statutory and administrative constraints, they will be afforded a prerogative that challenges the liberal state's claim to monopolistic control over the authority to take life. To be sure, the exercise of that monopoly has always been qualified, for example, by the law's acknowledgment of various affirmative defenses for what would otherwise be considered homicides (e.g., killing in self-defense). But it is one thing for the state to tolerate such killings in extraordinary circumstances on the grounds that its law enforcement officers cannot always fulfill their prescribed duties. It is quite another for the state to cede some portion of its monopoly to ostensibly private agents, first, by

decriminalizing suicide and, second, by authorizing others to do what, till now, the executioner alone has been permitted. If the identity of that state is significantly bound up with its authority to define the terms upon which persons die, then legally authorized physician-assisted suicide may intimate that state's democratic reconfiguration; or, alternatively, it may prove to be nothing more than another instance of neo-conservative reprivatization, one that enhances the prerogatives of the medical profession while doing little to advance the cause of individual autonomy (see Tierney 1997). Either way, the politicization of this issue indicates the increasing untenability of an unvarnished Weberian representation of the liberal state as an institutional complex whose claim to sovereignty is given formal articulation via a code of laws backed by monopolistic control over the means of legitimate violence; and that, as the remaining sections of this chapter suggest, bears important implications for how we think about another manifestation of the unsettled juridico-medical complex in contemporary America: execution by lethal injection.

Doctor/Executioner

In his concurring opinion in *Furman v. Georgia* (408 U.S. 238, [1972]), Justice Brennan claimed that capital punishment is "different" because, in comparison to other forms, it is "unusual in its pain, in its finality, and in its enormity" (287–89). This contention presupposes a particular understanding of the death penalty and of the state that imposes it. Were Justice Brennan pressed to articulate that understanding, most likely he would say that capital punishment is the ultimate expression of the state's singular authority to punish those who violate the law's commands, and that it is precisely because it is exceptional in this sense that its application must be governed by a specially designed set of rigorous procedural safeguards. No doubt, there is some truth to this reading, one that effectively interprets the death penalty through reference to the side of Foucault's triangle bearing the label *sovereignty*. But, precisely because this understanding is in fact one-sided, precisely because it presupposes the adequacy of a Weberian construction of the state that is now deeply problematic, should it alone be employed to make sense of execution by lethal injection, we will find ourselves ill-equipped to grasp its distinguishing features and dilemmas.

Each of the two immediately preceding sections of this chapter

identifies a dimension of the more comprehensive context within which I mean to situate lethal injection. In the first, with the help of Foucault's triangle, I offered a more complex account of the imperatives of the late liberal state than that presupposed by Brennan; and, in the second, I offered an exploration of death's rationalization in contemporary liberal regimes. Together, these conditions suggest that execution by this means might be understood not as a new means of asserting the state's sovereign authority to take life, but rather as an instance of rationalized death on the more comprehensive field of political relations specified by the term *governmentality*. When thus considered, our attention is directed to the constellation of state and extrastate techniques, knowledges, regulations, authorities, and forms of conduct that comprise this practice; and that in turn directs our attention, as it did when we considered death more generally, to this method's medicalization.

But what exactly does it mean to say that execution by lethal injection is a medicalized procedure? This question is thornier than one might at first suspect. As I indicated in this chapter's introduction, in 1888, a commission created by the governor of New York considered lethal injection as an alternative to hanging, but ultimately rejected this method in favor of electrocution. It did so on the grounds that the syringe "is so associated with the practice of medicine, and as a legitimate means of alleviating human suffering, that it is hardly deemed advisable to urge its application for the purposes of legal executions" (*Report of the New York State Commission 1888*, 75).⁹ Yet many of the statutes that presently prescribe this method explicitly state, in an effort to disavow what seemed so obvious to the members of the 1888 commission, that execution by lethal injection is not a medical procedure; and, in order to render this representation credible, most of these same statutes authorize pharmacists to dispense drugs to penitentiary officials absent the prescription that would be required were it in fact such a procedure.¹⁰ It might appear that this statutory legerdemain is refuted by this method's deployment of chemicals customarily employed in conjunction with the arts of healing; its reliance on specific forms of medical knowledge (e.g., in extrapolating from the maximum safe dose to one that will kill with certainty but without inducing unwanted side-effects); the participation in some states of medically trained personnel in setting the intravenous lines through which these

chemicals will be introduced (or, in some cases, in performing surgical incisions in order to expose a suitable vein); the adoption of instrumentalities conventionally associated with the practice of medicine (e.g., syringes, catheters, IV drip stands, and hospital gurneys); and, finally, the performance of lethal injections in settings that often are visually indistinguishable from those in which surgery is performed (e.g., in the infirmary of the Missouri state penitentiary). Yet, in opposition to this evidence, we should recall that the American Medical Association, again in an effort to police the borders that secure its collective self-definition, has sought to distance itself from a procedure that would appear to mandate its members' involvement should it be deemed medical, specifically, by exhorting them to refrain from "participation" (although it does permit them to "certify" death, provided that its declaration is announced by another).¹¹ To the extent that this exhortation produces its desired results, which is not always the case, perhaps we should conclude, following Michael Davis (1995), that execution by lethal injection is no more of a medical procedure than execution by firing squad is a military procedure (46).

What these competing reflections indicate is that, as is the case with physician-assisted suicide, and as one would expect in an era of governmentality, execution by lethal injection is a profoundly ambiguous phenomenon. The characterization of what counts as a medical procedure is always at least partly up for grabs and, as such, always potentially a subject of political conflict as different constituencies seek to expand or constrict what falls within or without its borders. On the one hand, the state has an interest in medicalizing capital punishment as fully as possible since it thereby assumes the character of a depoliticized humanitarian (non)event, a painless matter of putting someone "to sleep." However, when execution by this means takes on the trappings of a medical procedure, but is not in fact performed by physicians, as is typically the case today, the state opens itself to charges of incompetence when those not professionally trained are authorized to perform it.¹² On the other hand, the medical profession has an obvious interest in resisting the conscription of its members for this purpose. However, when execution by this means takes on the trappings of a medical procedure, but is not in fact performed by physicians, the medical profession opens itself to the charge of violating its own code of ethics by depriving the condemned of the expertise that might in fact

render this procedure “humane” (see Hsieh 1989 and Haines 1989). Considered together, these conundrums suggest that execution by lethal injection, again much like physician-assisted suicide, manifests the unsettled character of the border separating state and nonstate agencies, claims to authority, and modes of expertise. In this instance, that instability serves to confuse the conventional antinomy between healing and harming, which in turn destabilizes the distinction between the state’s biopolitical and punitive functions. How that destabilization opens up novel ways of challenging the legality of capital punishment by lethal injection, ways that are unlikely to be appreciated adequately so long as this method is understood as simply another means of validating the state’s monopoly over the means of legitimate violence, is the subject of the next section.

“Safe and Effective” Executions

A specifically legal manifestation of the late liberal state’s destabilization as a result of its governmentalization and, more specifically, emergence of the juridico-medical complex can be seen in one of the more eccentric death penalty cases to emerge in the post-*Gregg* era. Demonstrating the infinite ingenuity of the American legal profession, in the final weeks of 1980, attorneys acting on behalf of Larry Chaney and Doyle Skillern, death row inmates in Oklahoma and Texas, submitted a petition to the Food and Drug Administration. In it, Chaney and Skillern alleged that because use of the drugs required for an execution by lethal injection may “result in agonizingly slow and painful deaths that are far more barbaric than those caused by the more traditional means of execution” (quoted in *New York Times*, January 8, 1981, A13), especially when administered by untrained penitentiary personnel, the FDA was legally bound to prohibit their employment for this purpose.¹³ More specifically, they stated that employment of barbiturates and paralytics for the purpose of inflicting a death sentence violates the “new drug” as well as the “misbranding” provisions of the Food, Drug, and Cosmetics Act (FDCA) of 1982. To make the first of these two claims, they argued that these drugs qualify as new because lethal injection is not a use for which they had been deemed “safe and effective”; and, in support of this reading of the term *new*, they noted that the FDA had employed much the same logic in affirming its authority

to regulate drugs administered to prison inmates in experimental clinical investigations as well as those employed by veterinarians to put infirm and diseased animals to death. To make the second of its two claims, the petitioners pointed out that the FDCA prohibits the introduction into interstate commerce of an approved drug for a purpose not designated in its labeling information; and, on the basis of this contention, they requested that the FDA require that warning labels be affixed to these drugs in order to safeguard against their misuse and, more precisely, to indicate that they are “not approved for use as a means of execution, are not considered safe and effective as a means of execution, and should not be used as a means of execution” (quoted in *New York Times*, January 8, 1981, A13). In closing, Cheney and Skillern petitioned the FDA, consistent with its mandate to take appropriate action whenever the use of a drug endangers public health, to “adopt a policy and procedure for the seizure and condemnation from prisons or state departments of correction of drugs which are destined or held for use as a means of execution,” and to seek criminal prosecution of prison officials and others in the chain of distribution, including manufacturers, wholesalers, retailers, and pharmacists, who “knowingly buy, possess or use drugs for the unapproved use of lethal injection” (*Chaney v. Heckler*, 718 F.2d. 1174 [1983], 1178).

These claims were denied review by the Food and Drug Administration on the ground that its jurisdiction does not extend to regulation of the drugs in question when employed in conjunction with the performance of a lethal injection. In defending this reaffirmation of the boundary demarcating the state’s punitive from its biopolitical imperatives, and apparently without deliberate irony, the FDA claimed that employment of the drugs required for an execution by lethal injection falls within a recognized exception to the FDCA’s coverage, known as the “practice of medicine” exemption. Adopted to prevent governmental interference with the treatment of patients by physicians, as when an approved drug proves effective in treating a condition not specified in its original labeling information, the FDA claimed that the use of drugs by state officials to kill persons effectively falls within this same category. Moreover, the FDA contended, the use of drugs for the purpose of lethal injection does not pose a danger to public health, first, because the number of persons affected is limited to those convicted of capital crimes and sentenced to death; and, second, because no duly

authorized statutory enactment that furthers a legitimate state purpose can, as a matter of law, pose such a danger to the public.

In an effort to force the FDA to take action, and now joined by six additional inmates, in September 1981, Chaney and Skillern filed suit in U.S. District Court for the District of Columbia.¹⁴ One year later, that court granted summary judgment in favor of the FDA on the grounds that its decision not to undertake investigative or enforcement proceedings was not subject to judicial review. That ruling was vacated in October 1983 by a divided panel of the U.S. Court of Appeals, which held that the agency's refusal to consider the petitioners' claims was "arbitrary, capricious, and without authority of law": "We do not understand," wrote Judge J. Skelly Wright on behalf of a two-to-one majority, "how the Commissioner [of the FDA] can assert legal authority to regulate drugs used in both state-licensed clinical investigations and state-licensed veterinary practices and not assert, with equal confidence, authority to regulate drugs used in state-licensed capital punishment practices" (*Chaney v. Heckler* [1983], 1189). If the unapproved use of approved drugs in these other two contexts threatens public health, as the FDA had maintained in the past, it is irrational to conclude that the use of drugs to kill persons does not do the same. Additionally, Wright argued, the FDA's refusal to act may implicate the constitutional rights of the condemned and, more specifically, their right to an execution that is not cruel. While it is no doubt true that the FDA is "refusing to exercise enforcement discretion because it does not wish to become embroiled in an issue so morally and constitutionally troubling as the death penalty" (*Chaney v. Heckler* [1983], 1191–92), such inaction is impermissible if it deprives the condemned of the FDA's expert judgment regarding the safety and effectiveness of the drugs employed in lethal injection; and that is all the more so if the agency's refusal has the effect of making it more difficult for those sentenced to death to sustain a direct challenge to this method on Eighth Amendment grounds. For these reasons, the court remanded the case to the district court and directed it to require the FDA to fulfill its statutory responsibilities.

In his dissenting opinion, Antonin Scalia argued that the FDA's discretionary authority is sufficiently broad to warrant its refusal to initiate investigative and enforcement proceedings, and he criticized his peers on the bench for their conversion of "a law designed to protect consumers against drugs that are unsafe or ineffective for their repre-

sented use into a law not only permitting but mandating federal supervision of the manner of state executions" (*Chaney v. Heckler* [1983], 1191). Leaving aside these considerations of federalism, Scalia went on, the majority's solicitude for those sentenced to die by this method is misplaced:

[T]he public health interest at issue is not widespread death or permanent disability, but (at most) a risk of temporary pain to a relatively small number of individuals (200, which the majority swells to 1,100 by including prisoners under sentence of death in states that have *not* adopted lethal injection statutes). Moreover, it is not a matter of pain versus no pain, but rather pain of one sort substituted for pain of another—and in all likelihood substitution of a lesser pain, since that is the principal purpose of the lethal injection statutes. (*Chaney v. Heckler* [1983], 1196–97)

Two years later, in 1985, after eight executions by lethal injection had already been conducted, Scalia's opinion prevailed when the United States Supreme Court, in a unanimous decision, reversed the ruling of the appeals court. Writing for the Court, Justice Rehnquist elected not to address the question of whether the drugs used in lethal injection are subject to FDA regulation, and he left equally unexplored the question of this method's constitutionality. Instead, he predicated the Court's decision exclusively on the unreviewability of the FDA's refusal to initiate investigative or enforcement proceedings absent a clear indication of congressional intent to circumscribe its discretion as well as the provision of meaningful standards for defining the limits of that discretion.

Heckler v. Chaney (470 U.S. 821 [1985]) has had considerable impact on subsequent cases dealing with judicial review of administrative agencies, but very little on capital punishment jurisprudence. Although insignificant in this regard, I have reviewed it here because it illustrates my contention that the dilemma of capital punishment within the late liberal state, especially when administered by lethal injection, cannot be understood adequately so long as this practice is regarded simply as an expression of that state's sovereign power to exact the supreme sacrifice from its members. The conditions of this case's possibility include the situation of that state on the contested field of governmentality, the emergence on this field of a juridico-medical complex, and the resulting

confusion of the late liberal state's punitive and welfare responsibilities. While this case's perplexities were no doubt lost on Doyle Skillern, who was executed by lethal injection one month after this case was argued before the Supreme Court but two months preceding its decision, *Heckler* author clearly sensed that its terms induce a sort of jurisprudential astigmatism: "We granted certiorari to review the implausible result that the FDA is required to exercise its enforcement power to ensure that States only use drugs that are 'safe and effective' for human execution" (*Heckler v. Chaney* [1985], 827). The counterintuitive result to which Rehnquist alludes appears to censure a specific way of taking life because, in doing so, it may harm them; and that in turn is the premise of the contention that the administrative agency authorized to protect persons from dangerous drugs also be required to certify their capacity to kill reliably.¹⁵

What Chaney and Skillern sought to do was not so much to contest the ultimate manifestation of state power, but rather to hoist the state with its own petard by highlighting the contradiction between that power and its assumed obligation to cultivate the conditions of collective well-being. Were Foucault to read this case (or, rather, were it to be read by the Foucault who sometimes insists that the regime of anato-mo-biopolitics has altogether displaced that of sovereignty), he might well contend that the collision that results is a function of the opposition between old and new, which in turn entails a representation of the death penalty, no matter how inflicted, as an atavistic remnant of a vanished era:

As soon as power gave itself the function of administering life, its reason for being and the logic of its exercise—and 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. (Foucault 1980a, 138)

But, we should ask, is the construction of capital punishment as a relic, one that gives expression to a premodern conception of sovereignty, entirely adequate? Granted, the opposition between old and new may offer a partial account of why all European states have now effectively abolished capital punishment; and, granted, it may indicate in part why it is now necessary in the United States to demonize those sentenced to die. But, as my discussion of the juridico-medical complex suggests, and as *Heckler* illustrates, in a sense execution by lethal injection is a peculiarly modern phenomenon, one that turns on a conflation of the late liberal state's claim to specify the conditions under which its members shall live and die. Foucault's metaphor of the triangle, it is true, represents an improvement over this formulation insofar as it suggests the simultaneous but uneasy coincidence of past and present, and hence of diverse imperatives of state action. But, even so, Foucault never seeks to determine how the classical conception of sovereignty has itself been reconfigured in response to the advance of governmentalization and globalization, each of which has significantly diminished the late liberal state's capacity to fulfill some of the fundamental imperatives conventionally ascribed to and demanded of the putative monopolist of the means of legitimate violence. Whether execution by lethal injection can counter the erosion of political authority that attends these twin developments is the question to be taken up in the final section of this chapter.

The Paradoxes of Lethal Injection

In my chapter on the place of pain in capital punishment, I suggested that the medicalization of capital punishment and, more specifically, our endorsement of a medicalized construction of embodied suffering immunize the state from challenges it might have to confront were we to adopt an expressly political reading of pain. Here, my aim is to suggest that, although the medicalization of capital punishment remedies certain problems, it simultaneously generates others. Recall that in my analysis of gender and capital punishment, I asked whether some kinds of executed bodies are better suited than others at accomplishing what Elaine Scarry (1985) calls "analogical verification," that is, the process whereby the palpable materiality of the human body is called upon to

confirm the reality of the intangible; and recall that I concluded that women's bodies, in virtue of the way they are conventionally coded, especially when white and heterosexual, are problematically implicated in the project of reconstituting the authority of the liberal state. I now want to suggest that specific methods of execution are more or less well suited for this same purpose, and that lethal injection, regardless of the distinguishing features of the condemned body, is not. This dilemma, I conclude, indicates what may well be an insurmountable conflict between the technological reforms that effectively eliminate the corporeal character of punishment in the name of humanitarianism and the state's need for punishments that can affirm the cause of sovereignty only by visibly harming and hurting the human body.

The classical doctrine of sovereignty represented a hyperbolic articulation of the bid of absolutist monarchs to secure their territorial integrity, and hence their ability to protect against external conquest and internal disorder, by expropriating and then securing hegemonic control over the means of legitimate violence. Within liberal regimes, the imperatives of sovereignty, as we have seen, were subsequently joined by and to those of anatomic- and biopolitics. How these imperatives came to inform and reconfigure one another can be schematically illustrated by offering a few broad generalizations about reforms in the domain of criminal law during the late nineteenth and early twentieth centuries on both sides of the Atlantic. It is then that the claims of retribution and deterrence, predicated on the assumption that punishment is exclusively a legal matter imposed in the name of the sovereign state upon formally equal rational subjects who have elected to violate the terms of the social contract, were partly supplanted by the claims of rehabilitation. Those claims, by way of contrast, were predicated on the assumption that the goal of intervention is reform of the character of individual subjects, via deployment of various forms of nonlegal expertise, by various formally private bearers of professional knowledge, and within a host of disciplinary institutional sites, including the prison, but also the clinic, the reformatory, the halfway house, and so forth. With proliferation of such sites and extension of their logic into the body politic, the reform of offenders came to be linked to more generalized forms of intervention aimed not just at criminals but at entire subpopulations, oriented toward the goals of prevention and normalization, and initiated either by the state

or by quasi-private agencies, such as churches, charities, self-help groups, and reform organizations. Considered collectively, in time, these developments bore fruit in what David Garland calls the “penal-welfare complex” (1985, 5),¹⁶ which, by its very name, suggests a conflation of the sides of Foucault’s triangle as well as an elaboration of the role of the state in the direction indicated by the concept of governmentality. An essential aspect of that elaboration, the converse of the spread of anatomic- and biopolitical technologies throughout the body politic, is the insinuation of medical and psychological knowledge within the domain of criminal punishment; and that in turn helps to fashion the context within which adoption of lethal injection as a method of execution eventually becomes viable and the challenge of Skillern and Chaney becomes conceivable.

Emergence of the penal-welfare complex, while certainly signifying the generation and diffusion of a new modality of power, does not spell the end of the state’s classical functions. No matter how much transformed by the imperatives of anatomic- and biopolitics, the traditional claims of sovereignty, best revealed in the promise to provide security against enemies without and criminals within, remain central to the late liberal state’s identity. Yet, as I intimated in chapter 6, that state now finds it ever more difficult to make good on its affirmation of sovereign authority, and that for at least two reasons. First, as one would expect given its governmentalization, the state has grown ever more decentered (which is not to say decentralized). Its capacity for autonomous action is effectively compromised by the relations it now sustains with various formally nonpolitical sources of authority and expertise (the medical profession, for example), and its efforts to activate the governmental powers of these “private” agencies through means other than that of legal command. Caught within this thicket, the liberal state is not a Hobbesian sovereign dressed in the kinder and gentler garb woven by Locke, but rather a source of managerial control that operates, in large part, by creating incentive structures (e.g., tax breaks and subsidies) that aim to induce rather than compel desired forms of conduct.

Second, the state’s capacity to act like a proper sovereign is compromised by its situation within a network of global interconnection that mocks its claim to control events even within its own borders. Late modernity, to quote William Connolly again,

is a time when the worldwide web of systemic interdependencies has become more tightly drawn, while no political entity or alliance can attain the level of efficiency needed to master this system and its effects. . . . Nonstate terrorism, the internationalization of capital, the greenhouse effect, acid rain, drug traffic, illegal aliens, the global character of strategic planning, extensive resource dependencies across state boundaries, and the accelerated pace of disease transmission across continents can serve as some of the signs of this contraction of space and time in the late-modern world. Together they signify a widening gap between the power of the most powerful states and the power they would require to be self-governing and self-determining. (1991, 24)

This gap is troublesome, Connolly explains, not merely because it hobbles the late liberal state in its relations with foreign powers, but also, and perhaps more so, because it undermines the state's self-representation as an agency that is capable of efficaciously translating the will of the democratic electorate into coherent public policy. As such, the authority of the late liberal state is unsettled at precisely the moment when erosion of its sovereign capacity renders it least able to afford a legitimacy crisis. What, therefore, is to be done?

There are many possible responses to this dilemma. In principle, the official representatives of such a state could simply confess to its diminished ability to secure sovereignty's traditional functions, but the political consequences of doing so would likely be disastrous. It is far more probable that a state facing this predicament will vacillate between, on the one hand, policy initiatives aimed at acknowledging its reality (e.g., by parceling out some measure of its responsibility for internal security to neighborhood block watch committees); and, on the other hand, emphatic reaffirmations of the myth of sovereignty (see Garland 1996). One means of attempting the latter is to adopt a punitive law-and-order stance that reasserts the state's capacity to govern by force of command and, as an extension of that strategy, to engage in the time-honored display of sovereign might that is imposition and execution of the death sentence.¹⁷ On this reading, to recall an argument I advanced in chapter 3, executions are to be construed not as manifestations of an already-realized sovereign authority, understood in familiar Weberian terms. Instead, capital punishment is to be construed as a

means by which the late liberal state seeks to manufacture that authority or, better still, as one among many means by which that state seeks to (mis)represent itself as the uncaused cause of the conditions constitutive of its own existence. Punishment of any sort, suggests David Garland, "is a dramatic, performative representation of the way things officially are and ought to be, whatever else the deviant would make of them. And by means of its example, its repetition, and its practical enactments, punishment helps construct a social regime in which these forms of authority, personhood, and community are in fact the established ones" (1990, 265). The question to be asked, then, is whether execution by lethal injection, considered as a performative enactment, can effectively participate in constituting a state that can present itself credibly as a sovereign agent capable of preserving the peace within and defending against aggression without. If it cannot, then capital punishment may be in danger of slipping into obsolescence not so much because it is anachronistic, not so much because it contradicts the biopolitical imperatives of the late liberal state, but because in time it may become useless to the very state that now imposes and inflicts it.

To establish a context for this contention, let me quickly recapitulate an argument advanced by Mona Lynch in "The Disposal of Inmate #85271: Notes on a Routine Execution" (2000). Lynch begins by asking how we might think about capital punishment were we to adopt the theoretical perspective that has come to be known as the "new penology" (see Feeley and Simon 1992; Simon and Feeley 1995). This perspective, which implicitly suggests that neither Foucault's triangle, nor Garland's penal-welfare complex, is entirely adequate as an articulation of the distinguishing features of the late liberal state, affirms that neither preventative nor rehabilitative models suffice to explain many of the more significant recent reforms in criminal intervention. The overriding goal of these reforms, according to this model, is neither the elimination of crime, nor reform of the criminal, but rather efficient and cost-effective management of those classified as dangerous, or potentially so, based on aggregate statistical predictions regarding the likelihood of illegal behavior on the part of diverse subpopulations. On this account, writes Lynch, "[T]hose subject to penal intervention are mere punishable units to be classified and distributed in penal categories based upon a set of actuarial criteria, and their internal states, including motivations, drives, capacity for redemption, goodness or evilness, are

irrelevant to the process" (2000, 7). Incarceration is one means of effecting this distribution, capital punishment is another, and both are well understood on the metaphor of "waste management." The death penalty, therefore, and *pace* Justice Brennan, is not "different." Rather, it is merely the consummate disposal strategy; and, like all other manifestations of the new penology, its ends are to be accomplished through routinization of the execution process and elimination of all affective elements that might otherwise interfere with this rationalized task.

Central to that endeavor, Lynch argues, is adoption of lethal injection, which, to recall the quotation with which this chapter began, renders execution a virtual nonevent. Specifically, as she testifies on the basis of her own experience as witness, during an execution by this means, there is no clear indication as to when the act of killing begins, the body evinces no signs that it is being killed, and its status as dead can be known not by any discernible change in the character of embodiment, but only via an act of official declaration. This "event" is rendered still more mundane, Lynch notes, by its incorporation within a detailed set of normalized operating procedures (e.g., by shifting the time of executions from midnight to customary business hours). Adherence to this bureaucratized protocol, complementing the anesthetizing effects produced by this sterile technology, maximizes the efficiency of the execution team; reduces the public uproar, the irrelevant noise, that is so often occasioned by the use of other methods; and, so, by reducing the political controversy over capital punishment, expedites the pace of executions, thereby making it easier to meet targeted system goals, including reduction of the backlog now clogging death row.

In her closing remarks, Lynch suggests that "the reshaping of the death penalty into a sanitized and routinized disposal process . . . may actually hasten its obsolescence" (2000, 25). To defend this nonobvious conclusion, she contends that those who are persuaded that lethal injection renders state killing more or less unproblematic fail to appreciate "the affective underside of punishing," which is most often expressed in the "populist desire for the execution to mean something more than a simple elimination process, even if that desire is rooted in feelings of blood lust and vengeance" (25–26). As evidence of this desire, she cites execution night parties thrown by college students in Huntsville, Texas, repeated affirmations of the Florida electorate in favor of the

electric chair's retention, and widespread circulation via the Internet of images of a bloodied Allen Lee Davis following his botched electrocution. Equally well, she might have cited the mother of a murder victim, who, after learning about the particulars of execution by lethal injection, asked: "Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they've done to our children" (quoted in Sarat 1991a, 53). Or, finally, she might have cited Justice Antonin Scalia, who, in *Callins v. Collins* (114 S. Ct. 1128 [1994]), contended that the "quiet death" caused by lethal injection is "enviable" and even "desirable" (1142) when compared to that suffered by most homicide victims. What all of these examples indicate is that execution by lethal injection exposes a tension between our desire to realize the claims of retribution by killing those who kill and a method that, because it appears to do no harm other than killing, cannot satisfy the intuitive sense of equivalence that informs this conception of justice. While this tension might appear to augur a return to more graphically violent methods of execution, Lynch thinks that outcome unlikely since such a move would contradict our discourse of humanitarianism and our rationalized commitment to technological mastery over death. Instead, and precisely because the transformation of executions into so many nonevents strips them of the ability to communicate or confirm any meanings other than those associated with waste disposal, she speculates that capital punishment may in time come to appear literally pointless: "If and when the death penalty loses its potency as a shorthand answer to serious social woes (and it will some day), its superfluousness as penal policy and practice will likely be revealed" (2000, 27). Should that day come, proponents of the death penalty, and, more particularly, those who have promoted lethal injection because they believe it greases the state's machinery of death, will have finally outwitted themselves.

The problem with lethal injection, however, is deeper than this analysis in terms of the frustrated claims of vengeance suggests. The more profound import of Lynch's speculation can be teased out by asking whether execution by lethal injection can successfully participate in constituting the sort of state that can credibly present itself as an institutional complex whose sovereign pretensions have not in fact been seriously eroded by the twin forces of governmentalization and globalization. To see why it may not be able to do so, recall one last time the

torture and execution of Damiens, as described in the opening pages of Foucault's *Discipline and Punish* (1979). The visible dismemberment of Damiens's body is the means by which the impaired authority of the sovereign, whose body mimetically represents that of the body politic, is reconstituted. Maximization of the pain suffered by Damiens is a spectacular manifestation of the absolute gulf separating subject from sovereign and, at the same time, a theatrical ritual through which the will of that sovereign is retethered to the divine order of things and so to the ultimate authority of God. Essential to this enterprise's success—its substantiation of the claims of sovereign authority—is palpable demonstration of the utter vulnerability of the human body and, more specifically, its reducibility to the status of a thing consumed by pain that is as limitless as is the claim to sovereignty itself.

Now, by way of comparison, consider the lethal injection of Charlie Brooks, the first person in the United States to be dispatched by this means. Shortly before the execution of Brooks, the medical director of the Texas Department of Corrections justified his participation by arguing that just as a physician routinely cuts living flesh out of persons for therapeutic purposes, so too was he professionally authorized to help society cure itself of crime by assisting in the killing of Brooks (Schwarzschild 1982, 15). For my purposes, what is important about this statement is its reliance on an organic metaphor that is more germane to the world of Damiens than to ours. That this claim sounds both foreign and ethically callous to our ears testifies to the demise of the cosmological and political presuppositions that informed the representation of Damiens not as an individual *per se*, but as an integral member (albeit one that is disposable) of a body politic that is itself understood on the model of a living organism. That understanding cuts against our depoliticized conception of medicine by representing the executioner as one who heals the body politic by amputating its diseased limbs; and that in turn is very much at odds with a secularized and individualistic culture committed to a conception of justice that may justify capital punishment through reference to the claims of deterrence or retribution, but is unlikely to represent satisfaction of either of those claims as a means of restoring a wounded nation to wholeness by rectifying the cosmic disorder engendered by criminality.

But if the body of Charlie Brooks is not that of Damiens, whose is it? What does the executed body become when located in the context

defined by death's rationalization and on the field defined by the state's governmentalization? In his catalog of different representations of the punishable body, Alan Hyde argues that lethal injection originally emerged in response to worries about the sentimental body, that democratic entity which, precisely because it is fundamentally kin to all other bodies, is defined by its capacity to experience pain and, by displaying its anguish, to excite sympathy. But, he goes on, today the executioner's needle is administered "neither to an eighteenth-century body symbolically representing the social order [Damiens], nor a nineteenth-century sentimental body, but rather to our distinctive late-twentieth-century artifact, the absent body" (1997, 196). Hyde's point can be clarified by recalling Foucault's claim that, when the law of the liberal state touches the body, "it is in order to deprive the individual of a liberty that is regarded both as a right and as a property. . . . Physical pain, the pain of the body itself, is no longer the constituent element of the penalty" (1979, 11). The lethally injected body is the body that, so far as is possible given the irreducible materiality of the human frame, corresponds to the imperatives of liberal law and, more particularly, the imperative that punishment take shape as the deprivation of an abstract right and, in this case, the right to life. Because the body, on this construction, cannot itself be the target of punishment, because it is only a means to the achievement of an end that is not itself embodied, the palpable reality of the body must be elided; and that, of course, is exactly what execution by lethal injection accomplishes by causing a death that appears to involve no killing.

But can the nonevent that is a lethal injection, performed upon an absent body, in accordance with the medicalized imperatives of biopolitics, accomplish the work that the late liberal state requires of it? As the example of Damiens indicates, an execution that retains traces of torture is a viable means of achieving what Scarry (1985) calls "analogical verification," that is, the process through which "pain is relied on to project power, mortality to project immortality, vulnerability to project impregnability" (126). As in human sacrifice, practical demonstration of the state's right to determine who shall live and who shall die seeks to appropriate the brute facticity of the executed body in order to affirm its claim to ultimate authority. But can that end be accomplished via a form of punishment that inflicts no pain, that eliminates dying from death, that expunges the very traces of material embodiment that

would appear to be required if the abstract is to be made concretely real? Precisely because it remains unmarked, precisely because it bears no signs of the violence done to it, the lethally injected corpse resists its incorporation within tales of political signification regarding sovereign authority far more effectively than does the body produced by hanging or electrocution.

In one sense, of course, the perfection of this nonevent is precisely what the state requires, for it entails a method of killing that is categorically distinct from that employed in most conventional homicides. But, in another sense, by rendering execution a nonevent, the state renders it, to use Lynch's term, *pointless*, and a pointless event is one from which it can derive little or no political advantage. Or, perhaps more cautiously, when executions are thus conducted, the state may prove able to communicate, construct, and validate only those meanings that are suggested by the paradigm of waste disposal. It is not clear, however, that these meanings are the sort required by the late liberal state in order to rejuvenate the claims of a classical conception of sovereignty, and hence to authorize its own unique claim "to decide life and death" (Foucault 1980a, 135).

Inviting the construction of killing as a humanitarian event, the biopolitical reconfiguration of this ultimate expression of sovereign authority undercuts a central political imperative of capital punishment; and, in that sense, it is the very perfection of execution by lethal injection that renders it a failure. The paradox deepens when we realize that the medicalization of capital punishment is itself an expression of the state's governmentalization, which I have identified as one of the primary causes of the very erosion of sovereign authority that, in principle, is to be remedied by imposition and infliction of the death sentence. And there is one final self-defeating twist to this irony. If the argument advanced here is correct, then it is only when lethal injections are botched,¹⁸ and only because such mishaps make palpably real the embodiment of the person being executed, that the late liberal state can secure whatever validation capital punishment is capable of providing. But, of course, whatever that state gains in terms of affirmation of its claim to sovereign authority via a botched injection is simultaneously lost as a result of its failure to live up to the biopolitical imperatives that secure expression in our impossible quest for a "humane execution."