

Notes

Chapter 2

1. For analyses of this argument, see Shugrue 1995; Bell 1996; Flynn 1997; Crocker 1998; and Feldman 1999.

2. For examples of such rejections, see *People v. Frye*, 18 Cal. 4th 894 (1998), 1030–31; *People v. Massie*, 19 Cal. 4th 550 (1998), 574; *Ex Parte Bush*, 695 So. 2d 138 (1997), 140; *State v. Schackart*, 190 Ariz. 238 (1997), 259; *Bell v. State*, 938 So.W. 2d 35 (1996), 53; *State v. Smith*, 280 Mont. 158 (1996), 183–84; *White v. Johnson*, 79 F. 3d 432 (1996), 439–40; and *Stafford v. Ward*, 59 F. 3d. 1025 (1995), 1028. It is worth noting that many petitioners raising “Lackey claims” have failed not because courts have addressed the merits of this claim, but because they have encountered a sort of catch-22 procedural hurdle: On the one hand, if a prisoner waits until he or she has been on death row long enough to raise this claim credibly, it may be barred on the grounds that, in order to qualify for relief through habeas corpus, it had to be raised at the earliest possible opportunity. On the other hand, should this issue be raised at the earliest possible opportunity on direct appeal, it is unlikely that the prisoner will have been confined for a period of time long enough to render this contention credible.

3. For an equally alarmist criticism of long delays between sentencing and execution in capital punishment cases, see Justice Rehnquist’s dissenting opinion in *Coleman v. Balkcom*, 451 U.S. 949 (1981): “When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system. . . . When our systems of administering criminal justice cannot provide security to our people in the streets or in their homes, we are rapidly approaching the state of savagery” (959, 962), a state that, on Rehnquist’s account, cannot help but encourage various forms of vigilante justice.

4. The relevant statute of Washington State (RCW 10.95.185), from which my primary example in this chapter is drawn, authorizes a superior court judge to seek permission to witness an execution for which he or she signed the death warrant. However, that judge is not required to do so, and the superintendent of the facility in which the execution takes place is not required to approve that request, should it be submitted.

5. Dubber's tentative explanation for the gradual dissociation of judges from the actual infliction of punishment complements the argument I offer in chapter 3 on the relationship between hanging and the centralization of state power in England. He writes: "These attempts by high public officials to distance themselves from public executions had nothing to do with the much-discussed appearance of moral sensibilities in the eighteenth century that rendered unbearable an act previously thought perfectly justified. Instead, we may speculate, it constituted an effort by those of the highest official status to distance themselves from public acts of punishment once it was no longer necessary openly and constantly to assert their monopoly over the infliction of violence. Once the central authority had completed and secured the centralization of legitimate violence, its representatives may have come to believe that the symbolic advantages of participating in public acts of violence were outweighed by its disadvantages. The execution, after all, was a public act carried out by a person, who through his association with that very act became infamous, that is, relegated to the lowest social status available" (1996, 550). Now that executioners in the United States have by and large assumed the status of anonymous technicians, I would suggest that the infamy once associated with them has migrated to various technologies of execution and, specifically, to all those that appear less scientifically refined than does lethal injection.

6. On this point, see Cover 1986: "Because in capital punishment the action or *deed* is extreme and irrevocable, there is pressure placed on the *word*—the interpretation that establishes the legal justification for the act. At the same time, the fact that capital punishment constitutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence makes the imposition of the sentence an especially powerful test of the faith and commitment of the interpreters. Not even the facade of civility, where it exists, can obscure the violence of a death sentence" (1622–23).

7. The passage from which this phrase is taken is worth quoting in its entirety: "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." Incidentally, as I read his dissenting opinion in *Callins v. Collins* (114 S. Ct. 1128 [1994]), it is when Justice Blackmun becomes persuaded that the system of capital punishment cannot be administered in a way that clearly preserves the distinction between law's violence and the violence it punishes that he concludes that the system itself must now be abandoned. In his concurring opinion in the same case, Justice Scalia seeks to distinguish the law's violence from its extralegal counterpart by insisting that the former is less brutal than the latter. Leaving aside the question of whether or not this claim is true, it seems clear that this is quite insufficient to insure the law's legitimacy.

8. The authority of judges to issue stays complicates in interesting ways the effort of judges to distance themselves from the actual violence of an execution. On the one hand, as Robert Cover (1986) notes, it is the possibility of a stay that transforms killing into an act of constitutional violence by linking the deeds of the executioner to the rationality of the judge. On the other hand, the denial or the lifting of a stay of execution implicates a judge in the act of killing in a way that is arguably inadvisable from the perspective of law's legitimacy. For a specific example of this difficulty, consider the Supreme Court's 1992 order prohibiting all federal courts from issuing additional stays in the case of Robert Alton Harris (*New York Times*, April 22, 1992, A1). That order evoked widespread outrage on the grounds that the Court's desire get on with the killing of Harris took precedence over its commitment to the rule of law. For a helpful analysis of this case, see Caminker and Chemerinsky 1992.

9. Austin Sarat (1995) explores how the knowledge that jurors will not have to inflict the sentence they impose, as well as the knowledge that their decision is subject to a lengthy appeals process, often helps to overcome whatever reluctance they might otherwise have about casting a vote for death.

10. For a helpful exploration of the way courtroom preoccupation with the imperatives of "super due process" occludes the bodily harm commanded by a death sentence, see Sarat 1993.

11. Anticipating Dubber's claims regarding the work performed by various "responsibility-shifting mechanisms," Cover concludes his essay by claiming that, when the law commands the infliction of harm, "responsibility for the violence must be shared; law must operate as a system of cues and signals to many actors who would otherwise be unwilling, incapable or irresponsible in their violent acts. The social organization of violence manifests itself in the secondary rules and principles which generally ensure that no single mind and no single will can generate the violent outcomes that follow from interpretative commitments" (1986, 1628).

12. In fairness to Cover, I should note that, in this essay, there is a tension between, on the one hand, the passages I have quoted thus far and, on the other hand, those where he suggests not that judges "set in motion" the sequence of events that culminates in the infliction of state violence, but that they themselves "deal pain and death" (1986, 1609). The present chapter in effect asks whether there is some sense in which this latter and less obvious claim can be sustained.

13. At the discretion of the court and with the consent of the defendant and the prosecuting attorney, a jury may be waived and the trial court judge shall then respond to this same question.

14. I will be glossing over a host of important complications in my brief overview of Austin's basic argument. For a brilliant examination of some of these complications, see Felman 1983. For a still more wonderful account of these difficulties, see Austin's own *How to Do Things with Words* (1962). What makes this work so delightful is its endless willingness, in each succeeding

chapter, to deconstruct the distinctions elaborated in its predecessor. Thus, for example, by the end of this series of lectures, the initial distinction Austin draws between descriptive and performative utterances has more or less dissolved, as he has come to realize that the intelligibility of performative utterances turns on factual implications that may be true or false, and that descriptive utterances have a quasi-performative dimension insofar as the use of all language, qua action in the world, serves to refashion it in this way as opposed to that.

15. For Austin's initial elaboration of these distinctions, as well as the example I modify here, see *How to Do Things with Words* (1962, 94-107).

16. See Bourdieu 1991: "By trying to understand the power of linguistic manifestations linguistically, . . . one forgets that authority comes to language from outside. . . . Language at most *represents* this authority, manifests and symbolizes it" (109).

17. In *Excitable Speech*, Judith Butler argues that Bourdieu's account of the institutional conditions of a performative's illocutionary force is effectively conservative: "By claiming that performative utterances are only effective when they are spoken by those who are (already) in a position of social power to exercise words as deeds, Bourdieu inadvertently forecloses the possibility of an agency that emerges from the margins of power. His main concern, however, is that the formal account of performative force be replaced by a social one; in the process, he opposes the putative playfulness of deconstruction with an account of social power that remains structurally committed to the status quo" (1997, 156). This criticism, although apt, is not of concern to me since my object of inquiry is a category of performative utterance issued by those who are unambiguously positioned as figures of authority.

18. For another argument against separating the illocutionary force of legal sentences from the conditions of their enforcement, see Derrida 1990. In this essay, Derrida recapitulates a central tenet of legal realism: "Applicability, 'enforceability,' is not an exterior or secondary possibility that may or may not be added as a supplement to law. It is the force essentially implied in the very concept of *justice as law*" (925).

19. "To what extent," Butler writes in *Excitable Speech*, "does discourse gain the authority to bring about what it names through citing the linguistic conventions of authority, conventions that are themselves citations? Does a subject appear as the author of its discursive effects to the extent that the citational practice by which he/she is conditioned and mobilized remains unmarked? Indeed, could it be that the production of the subject as originator of his/her effects is precisely a consequence of this dissimulated citationality?" (1997, 51).

20. The ninth lecture of Austin's *How to Do Things with Words* (1962) is entirely devoted to an elaboration and defense of the distinction between the consequences of illocutionary as opposed to perlocutionary acts. My aim here is to deny neither the intelligibility nor the utility of this distinction, but to show that it is more permeable than Austin appears to suggest. In that sense, I am

subverting this opposition in the same way that he undoes his own distinction between performative and nonperformative utterances.

21. The question of physician participation in executions is actually more complex than I make it out to be here, in part because the AMA distinguishes between “pronouncing” death, which it finds unethical, and “certifying” death, which it finds acceptable. According to the AMA’s Council on Ethical and Judicial Affairs, “pronouncing” involves “monitoring the condition of the condemned during the execution and determining at which point the individual has actually died,” whereas “certifying” is a matter of “confirming that the individual is dead after another person has pronounced or determined that the individual is dead.” For a complete statement of these guidelines, see Council on Ethical and Judicial Affairs 1993.

22. Articulating the puzzle that is echoed by my concerns in this chapter, Cover writes: “We have done something strange in our system. We have rigidly separated the act of interpretation—of understanding what ought to be done—from the carrying out of this ‘ought to be done’ through violence. At the same time we have, at least in the criminal law, rigidly linked the carrying out of judicial orders to the act of judicial interpretation by relatively inflexible hierarchies of judicial utterances and firm obligations on the part of penal officials to heed them. Judges are both separated from, and inextricably linked to, the acts they authorize” (1986, 1627).

23. See also *In re Medley* (134 U.S. 160 [1890]), in which the Supreme Court considered the constitutionality of a Colorado law that mandated pre-execution solitary confinement and allowed prison wardens to conceal execution dates from the condemned. Although the Court ultimately found the Colorado law unconstitutional on ex post facto grounds, its opinion included the following claim: “[W]hen a prisoner sentenced to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.” That uncertainty “must be accompanied by an immense mental anxiety amounting to a great increase of the offender’s punishment” (172). For a summary of the primary research dealing with the psychological consequences of extended confinement on death row, see Shugrue 1995.

24. Although I do not use her specialized vocabulary, the remaining paragraphs of this section derive from the argument Scarry (1985) advances in chapter 5 of this work. For my elaboration of that argument, see Kaufman-Osborn 1997, 37–56.

25. The possibility of drawing an analogy between a person condemned to death as a result of a judicial sentence and a person condemned to death as a result of a terminal disease has not escaped the courts. See in particular *Potts v. State* (376 S.E. 2d 851 [1989]), in which the Georgia Supreme Court, citing the situation of someone who suffers for many years from a terminal illness, concluded that a thirteen-year stay on death row, followed by a retrial and resentencing to death row, is not cruel and unusual punishment.

26. In this essay, Johnson reports that a large number of the men he interviewed on death row in Alabama in 1978 used the phrase "living death" to characterize their experience. That image, he writes, "highlights and integrates the dominant concerns evoked by death row confinement. The image entails the death row prisoners' massive deprivation of personal autonomy and command over resources critical to psychological survival as well as their enforced isolation from the living, with the resulting emotional emptiness and death" (1979, 181). Building on this study, in his *Death Work* (1990), Johnson explores in considerable detail the processes by which those prepared for capital punishment are effectively dehumanized. On his account, the "executions that culminate this confinement are the work of *instruments of authority* acting within stipulated *routines* on condemned prisoners rendered as *objects* to be stored and ultimately dispatched in the execution chamber" (136-37). For a remarkably effective fictional exploration of the way in which the imposition of a death sentence imposes a sort of living death by rendering the things of this world "immaterial" and so confining the condemned to a condition of suffocating embodiment, see Sartre 1969 as well as the interpretation of this story offered by Scarry (1985, 31-32).

27. The following account of conditions and procedures on death row and in the death chamber at the Washington State Penitentiary in Walla Walla are derived from the field instructions (WSP410.500) issued by the Department of Corrections on November 4, 1992. My understanding of these conditions and procedures was amplified considerably by a tour of the Intensive Management Unit and the death chamber on January 8, 1999. I wish to thank my former student, Dave Mastin, for securing permission for me to inspect these facilities as well as the penitentiary's superintendent, John Lambert, for his candid remarks during our tour.

28. Emile Benveniste, in chapter 22 of his *Problems in General Linguistics* (1971), categorically denies the possibility of an infelicitous performative on the grounds that any utterance that fails to accomplish what it says is, by definition, not a true performative. For a criticism of Benveniste's argument, albeit one that fails to recognize how his claims unwittingly reinforce the sovereign pretensions of the modern state, see Felman 1983.

Chapter 3

1. In this abbreviated account of Foucault's claims regarding the relationship between sovereign and disciplinary power, I ignore several tensions internal to his writings on this matter. (For helpful discussions of these ambiguities, see Minson 1980 and Baxter 1996.) This omission is justified because my aim in this context is not so much to get Foucault right, as to indicate the readings that inform Ignatieff's criticism of Weber as well as Poulantzas's criticism of Foucault. In this note, however, I do want to cite a tension, which, were it to be acknowledged, would complicate the criticisms of both. As I have already indi-

cated, Foucault often strictly opposes “juridico-discursive” power, that is, the form of power that defines the absolutist regimes of early modernity, and “disciplinary power,” that is, the form of power that he sometimes argues defines modernity (see, e.g., 1980c, 106). When writing in this vein, Foucault typically suggests that this opposition is categorical in the sense that the conceptual apparatus used to make sense of juridico-discursive power cannot be employed to make sense of disciplinary power; and it is historical in the sense the latter displaces the former in time. Yet, at other times, Foucault insists that “sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society” (1980c, 108). This latter tendency, which will become important to me in chapter 7, is most fully fleshed out in Foucault’s later work on “governmentality” and, more particularly, in his claim that modern power can be represented profitably in terms of a “triangle” of “sovereignty-discipline-government” (1991a, 102). Were either Poulantzas or Ignatieff to take this later work into account, it might well require that they temper their sharp opposition between Foucault and Weber (which, in a sense, is precisely my aim in this essay).

2. Although this mandates no qualification of my main argument, I should note that Ignatieff is not uncritical of Foucault. Specifically, he argues, first, that Foucault conceptualizes all social relations as relations of domination and, as such, fails to appreciate those that are “conducted by the norms of co-operation, reciprocity and the ‘gift relationship’” (1983, 203); and, second, that even Foucault’s analysis of the prison in *Discipline and Punish* (1979) remains too much indebted to a “state-centred conception of social order” (1983, 204). Whereas the first charge, if true, would require a fairly fundamental revamping of Foucault’s basic categories of analysis, the second simply exhorts him to remain true to his own deconstructive account of the state.

3. Citing Weber’s *The Theory of Social and Economic Organization* (1947), Ignatieff writes: “Because studies of such [nonstate] grievance procedures exist only for the early modern period, it would be easy to conclude that the state expropriated such functions in its courts and prisons in the course of consolidating its monopoly over the means of legitimate violence.” But, he counters, “the monopoly of the state of the means of violence is long overdue for challenge” (1983, 205).

4. For a helpful discussion of the principal theoretical differences between Poulantzas and Foucault, especially on the question of state power, see Jessop 1986.

5. It is worth noting that, at least on occasion, Foucault effectively endorses Weber’s (and, by extension, Poulantzas’s) argument about the early modern state’s expropriation of hitherto decentered structures of power as well as its self-representation as an arbiter whose neutrality is assured by power’s appearance in the form of law: “The great institutions of power that developed in the Middle Ages—the monarchy, the state with its apparatus—rose up on the basis of a multiplicity of prior powers, and to a certain extent in opposition to them:

dense, entangled, conflicting powers, powers tied to the direct or indirect dominion over the land, to the possession of arms, to serfdom, to bonds of suzerainty and vassalage. If these institutions were able to implant themselves, if, by profiting from a whole series of tactical alliances, they were able to gain acceptance, this was because they presented themselves as agencies of regulation, arbitration, and demarcation, as a way of introducing order in the midst of these powers, of establishing a principle that would temper them and distribute them according to boundaries and a fixed hierarchy. . . . The slogan of this regime, *pax et justitia*, in keeping with the function it laid claim to, established peace as a prohibition of feudal or private wars, and justice as a way of suspending the private settling of lawsuits" (Foucault 1980a, 86–87).

6. See also Weber 1958b: "[T]he history of rationalism shows a development which by no means follows parallel lines in the various departments of life. . . . In fact, one may—this simple proposition, which is often forgotten, should be placed at the beginning of every study which essays to deal with rationalism—rationalize life from fundamentally different basic points of view and in different directions. Rationalism is a historical concept which covers a whole world of different things" (77–78). For a helpful elaboration of Weber's concept of rationalization, see Brubaker 1984.

7. See also Garland 1990: "For Foucault, the combined outcome of the growth of discipline, the influence of human science, and the extended power of the administrative networks has been to restructure penal practice in a new way. His own description of this new form of penalty centers upon its intrinsic forms of power and knowledge and its relationship to the offender's body, but, as we have seen, one can also understand this in broader, Weberian terms, as the tendency towards rationalization in the penal realm" (189).

8. This generalization should be qualified since, on occasion, Weber is quite attentive to the way in which forms of rationality are inscribed within and constitutive of specific practices. See, for example, his insightful discussion of "discipline" in modern military organizations as well as in capitalist factories (1978, 2:1148–57). This discussion can easily be read as an anticipation of Foucault's general concerns in *Discipline and Punish* (1979).

9. Scholarship concerning the conduct of hanging prior to the sixteenth century is quite thin. I have relied primarily on the accounts offered by Abbott 1991, 1994; Atholl 1954; Bland 1984; Laurence 1971; and Marks 1947.

10. The earliest mention of Tyburn in conjunction with an execution occurs in 1196 when William FitzOsbert, better known as "Longbeard," was hanged. The site of the gallows is now marked by a small circular plaque embedded in the bricks of a virtually inaccessible traffic circle where Edgware Road meets Oxford Street, adjacent to London's Marble Arch.

11. Hay's approximation is echoed by Langbein (1977), who estimates that, during Elizabeth's last years, executions numbered about eight hundred per year (40). For the citation of numbers much higher than those offered by Hay and Langbein, see Rusche and Kirchheimer 1939, 19; and Abbott 1994, 235.

Reliable figures on the number of executions are available for the years following 1701, not before. For helpful tables indicating English execution rates during the eighteenth and nineteenth centuries, see Gatrell 1994, 616-19.

12. For a careful discussion of Weber's analysis of the persistent irrationalities of specifically English law, see Sugarman 1985.

13. For what is perhaps the most careful account of the conduct of executions at Tyburn, including the numerous misadventures that occurred there, see Radzinowicz 1948, 165-205.

14. In the first decade of the nineteenth century, because the crowds at Newgate executions continued to prove unruly, the scaffold was moved to a significantly higher platform. This reconstruction, writes John Bender, "made for a sharply demarcated relation between beholder and criminal and heightened the pictorial effect by holding the public at a distance and forcing their gaze upward" (1987, 247). To compare the initial gallows erected outside Newgate with its taller counterpart, see the two plates that appear in Bender 1987, 248.

15. Mackay was not the first to be executed under the terms of the new statute. That honor was reserved for Thomas Wells, an eighteen-year-old railway porter, who did not respond well when the Dover stationmaster chastised him. He was hanged privately at Maidstone on August 13, 1868.

16. For accounts of that standardized scaffold pattern, see Abbott 1991, 141; and Atholl 1954, 104. It is worth noting that those who were required to use this table expressed skepticism about its utility and, in a sense, resisted the rationalization of their craft. Quoting the unnamed official who trained him, Albert Pierrepoint writes, "Get it right, we don't want any butchery. Now you've got your table, Home Office issue, table of drops, executioners, for the use of. Use it, but use your own judgment too. Remember it's only a guide, and you've got to vary it according to your experience. Pull the man's head off and it's no use saying 'But that's what it had in the table'" (n.d., 179).

Chapter 4

1. The four states are Washington, Montana, Delaware, and New Hampshire. New Hampshire authorizes hanging only if lethal injection cannot be administered. Delaware authorizes lethal injection for those whose capital offenses occurred after July 4, 1983; those whose offenses were committed before that date may select lethal injection or hanging. Similarly, Montana and Washington now define lethal injection as their primary method of execution, with hanging available at the option of the condemned.

2. For an excellent expression of this characterization of hanging, see Judge Reinhardt's dissenting opinion in *Campbell v. Wood* (18 F.3d 662 [9th Cir. 1994]): "[H]anging is a savage and barbaric method of terminating human life. We are convinced that judicial hanging is an ugly vestige of earlier, less civilized times when science had not yet developed medically-appropriate methods of bring-

ing human life to an end. . . . Hanging is associated with lynching, with frontier justice, and with our ugly, nasty, and best-forgotten history of bodies swinging from the trees or exhibited in public places" (701).

3. To illustrate this argument, consider the example of lightning. Our conventional understanding is implicit in the claim: "Look at the lightning flash." On this grammatical construction, lightning is taken to be the independent substance that generates the flash qua effect. To oppose this account, Nietzsche might write something like the following: "Look at the lightning-flash," where the hyphen signifies not the discrimination of cause from effect, but rather a concurrent configuration of events within which no one substantial thing can be unambiguously discriminated as substance or attribute, cause or effect. We imagine that we can engage in such discrimination only because we abstract from this myriad of events those that happen to concern us at present, and we then treat the sum of those effects as the substantial source of the property that is the flash. But, in the last analysis, there is no lightning behind the flash; "it" is that flash, that mobile configuration of effects, nothing more and nothing less. My thanks to Tom Davis for this example.

4. Most mainstream legal scholarship, I would argue, occludes the constitutive relationship between law and violence. For a seminal effort to render this relationship visible, see Cover 1986. For two essays written in the spirit of Cover, see Sarat and Kearns 1991, 1995.

5. This commitment was given its constitutional (as opposed to technical) articulation when, in his dissenting opinion in *Francis v. Resweber*, 329 U.S. 459 (1947), Justice Burton insisted that the "all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself" (474).

6. In this chapter, I appropriate Scarry's (1985) argument about pain's *resistance* to linguistic articulation. In the next chapter, however, I will show why, on political grounds, we should reject her more extreme claim to the effect that pain can *never* be afforded such articulation and, as such, is necessarily and radically solipsistic.

7. In this regard, it is worth noting that the garrote was rejected as a method of execution by the New York State Commission on Capital Punishment of 1888 on the grounds that it, although certain to lead to a quick death, does not do so via a single causal mechanism: "Physiologically considered, it involves two causes of death, one a mashing of the spinal column, the chief bone of the body; the other a strangulation analagous [*sic*] to that produced in hanging. No reasons are seen why two fatal elements should be employed. Surely an apparatus can be arranged such that one, single, simple cause of death can be put in operation quickly, certainly and humanely. To multiply the causes savors of barbarity" (50). To multiply the causes, in other words, mocks the rationalizing ideal implicit within the metaphysic of the hangman.

8. I wish to thank Alan Hyde for making this paper available to me.

Chapter 5

1. My representation of modernist pain as an unmitigated evil to be wholly eradicated requires some qualification. It is only in recent decades that the medical profession has come to think of pain's amelioration as something akin to a categorical imperative. When anesthesia was first introduced, by way of contrast, it was not uncommon for physicians to resist its use in surgery either on the ground that the pain that accompanies and follows an operation is a functionally necessary constituent of the physiological processes of recuperation, or on the ground that such pain is a form of divine punishment for human depravity. Traces of this theological construction remain apparent in the discourse of those who represent the pain endured by AIDS patients as a punishment for sinful sexual conduct. Moreover, the colloquial expression "No pain, no gain," suggests that in certain contexts—e.g., athletic competitions and bodybuilding—pain is not figured as a purely aversive reality; and much the same is true of those who argue on behalf of "natural" childbirth.

2. Granted, these photographs offer a different sort of testimony than do Shaw's words, if only because human eyes simultaneously grasp the coexistent parts of the whole that is offered by a visual representation, whereas language unfolds its synthetic meanings in time as each word gives way to the next. Whether intended or not, Shaw's prose attempts to mimic the visceral immediacy of these photographs through the breathlessness of his remarkable single-sentence description, an effect created by the use of semicolons wherever a period might introduce a more emphatic break. If only in part, Shaw's account thereby counters the majority's disaggregation of the extended performance that is the execution of Allen Lee Davis, its breaking of that complex event into so many discrete units of space and time, each of which can be rendered unproblematic in the eyes of the law.

3. For an ultimately unsuccessful attempt to assess the amount of pain caused by different methods of execution, see Hillman 1993. "It is difficult to know," Hillman writes, "how much pain the person being executed feels or for how long because many of the signs of pain are obscured by the procedure or by physical restraints." Hence, at best, "one can identify those steps which are likely to be painful" (745–55). This skeptical conclusion is not sufficient, however, to prevent Hillman from offering a chart in which he claims to identify the causes of pain occasioned by different methods of execution, the sort of sensation produced by each cause, and the intensity of each such sensation, although he does reluctantly confess that "the likely duration of the sensations is not known" (749).

4. For a helpful account of the distinguishing features of the English grammar of pain, see Fabrega and Tyman 1976b. For an indication of the different ways several Asian languages fashion the experience of pain, see Diller 1980. Whereas the English language of pain is defined, for the most part, by certain undifferentiated nouns that are qualified adjectivally (e.g., a *sharp pain* or a

burning pain), the Thai language is defined by a series of verbs that are less prone to such qualification because the discriminations afforded by adjectives in English are already contained within them. It is also worth noting that the Thai discourse of pain draws no clear distinction between what speakers of English label physiological as opposed to psychological or emotional distress.

5. For an example of work that affirms the cultural variability of pain but retains the problematic distinction between its prediscursive reality and its linguistic formulation, see Fabrega and Tyma 1976a: “To place the analysis in perspective, we have to remember that in rendering a description the individual has to first choose appropriate words which in his language label his experience. Following this, he must place these words in more or less well formed utterances which realize his grammatical rules. In the process, he renders pain as a linguistic object” (325).

Chapter 6

1. See, e.g., Last 1998: “Notably absent from the hoopla over Tucker, however, were America’s feminists, those activists who have so much to say on every other topic that touches upon women. And they were absent—or utterly incoherent, on those occasions when they did try to make a statement to the press—primarily because feminism hasn’t been able to decide what to think about gentler treatment accorded women by the justice system. It’s hard to say you’re out to help women if you want women treated as harshly as men; but it’s hard to say you’re for equal treatment if you don’t” (35).

2. Tucker’s gender identity was actually more complex than I have rendered it here. Shortly before her arrest, she boasted to a friend that she experienced an orgasm each time she drove a pickax into the bodies of her victims, thereby marking her as something closer to a man, albeit one who reveals far more than one should about the sexualization of violence in contemporary American culture. By the time of her death, however, she was married, fastidiously attentive to her appearance, and infinitely repentant, all clear indicators that she had gone a long way toward resecuring the status of a woman. Absent that transformation, her execution would have occasioned considerably less controversy, a fact borne out by the comparatively humdrum execution of the “Black Widow,” Judy Buenoano, two months later.

3. For a variety of reasons, it is not at all clear that we should welcome this more complete realization of the liberal ideal of equality under the law. To cite but one, consider the following: “Many prosecutors sounded like feminists in arguing that the Tucker execution signaled that women indeed had achieved equal rights in capital litigation, and were being held just as accountable for their actions as men are” (Verhovek 1998a, 1). Leaving aside whatever misgivings we should experience when state prosecutors and feminists are said to sing the same tune, when the law is legitimated on the grounds that it has at last made good on its promise of equality, the cultivation of that appearance may well occlude our appreciation of gender-based discrimination in domains that receive considerably less attention from CNN. Ironically, one of those domains

may be the courtroom itself. Since 1972, the Supreme Court has endorsed the view, to quote from Justice Brennan's concurring opinion in *Furman v. Georgia* (408 U.S. 238 [1972]), that "death is different" in the sense that, relative to others, it is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity" (287–89). In conjunction with this dissociation of capital punishment from more routinized modes of state violence, the Court has mandated a lengthy series of state and federal appellate reviews before any given death sentence is actually carried out. Yet, as Radin (1980) and others have noted, this appearance of punctilious formal rationality masks the virtually unconstrained discretionary latitude that is in fact granted to capital sentencers, especially given the Court's refusal to circumscribe the range of possible mitigating factors, and hence the ways gender actually impinges upon the juridical administration of death. By propping up liberalism's abstract myth of formal equality, in other words, the execution of a woman now and then may help to disguise the concrete workings of sexism within the liberal body politic.

4. See Weissberg 1983: "If we fancifully treat the judiciary as a single and calculating mind, we could say that it has conceived a fiendishly clever way of satisfying the competing demands on the death penalty: We will sentence vast numbers of murderers to death, but execute virtually none of them. Simply having many death sentences can satisfy many proponents of the death penalty who demand capital punishment, because in a vague way they want the law to make a statement of social authority and control. It will also satisfy jurors who want to make that statement in specific cases with the reassurance that the death sentence will never really be carried out. And we can at the same time avoid arousing great numbers of people who would vent their moral and political opposition to capital punishment only on the occasion of actual executions" (387).

5. Obviously, I do not mean to represent this as a complete catalog of the pressures that enter into determination of the actual number of death sentences carried out. Consider, for example, the plausible claim that the emancipation of women from traditional restraints provokes an anxiety-ridden backlash whose manifestations range from the antiabortion crusade to the Defense of Marriage Act. If the criminal justice system is, at least in part, a vehicle through which the collective desire for revenge sometimes expresses itself, then it is certainly possible that the state will be pressed to execute women who are, in effect, asked to stand as surrogates for those who have provoked such anxiety. On this point generally, see Connolly 1991 and, more particularly, his representation of the contemporary liberal state as "a ministry for collective salvation through a politics of generalized resentment" (207).

Chapter 7

1. With respect to neutralizing the opposition, consider the following quotation, taken from the *Oklahoma City Times*, February 3, 1977: "The most telling point in favor of the drug method is that it might restore the death penalty to actual use" (1). For a helpful review of various court challenges to lethal injec-

tion as a method of execution, all of which have proven unsuccessful, see Skelton 1997. Most courts, Skelton explains, have simply affirmed the constitutionality of lethal injection without extensive comment. Moreover, and without exception, those that have addressed the merits of the Eighth Amendment claims have found that lethal injection does not constitute cruel and unusual punishment. For the most careful judicial consideration of these claims of which I am aware, see *LaGrand v. Lewis*, 883 F.Supp. 469 (1995).

2. In suggesting that Foucault's category of "governmentality" builds on the categories introduced in the closing chapter of *The History of Sexuality* (1980a), I am glossing over a host of interpretive problems. To see the point, consider the questions raised by David Garland concerning the proliferation of categories in Foucault's later work: "Some of the concepts are neologisms ('bio-power,' 'pastoral power,' 'governmentality'); others are historical terms ('police,' 'raison d'état') and others are conventional terms of analysis to which Foucault imparts a slightly unconventional meaning (e.g., his use of the terms 'liberalism' and 'security'). This can lead to some confusion. It is not clear, for example, how 'pastoral power,' 'bio-power' and 'security' relate to one another; are they distinct kinds of practices, or different names for the same kind of thing? Nor is it clear how these relate to the notion of 'governmentality.' Is bio-power an earlier term for the 'governmental' form of power, or merely a specific instance of it? Is the contrast between the 'anatomy-political' and the 'bio-political' the same as the contrast between 'discipline' and 'government'?" (1997, 193–94). While sorting out these terminological complexities is no doubt important, it is not immediately relevant to my effort to establish a context for making sense of the politics of lethal injection.

3. See also Rose and Miller 1992: "Central to the possibility of modern forms of government are the associations formed between entities constituted as 'political' and the projects, plans, and practices of those authorities—economic, legal, spiritual, medical, technical—who endeavour to administer the lives of others in the light of conceptions of what is good, healthy, normal, virtuous, efficient or profitable. Knowledge is thus central to these activities of government and to the very formation of its objects, for government is a domain of cognition, calculation, experimentation and evaluation. And, we argue, government is intrinsically linked to the activities of expertise, whose role is not one of weaving an all-pervasive web of 'social control,' but of enacting assorted attempts at the calculated administration of diverse aspects of conduct through countless, often competing, local tactics of education, persuasion, inducement, management, incitement, motivation and encouragement" (175).

4. See, for example, Foucault 1980a: "And if it is true that the juridical system was useful for representing, albeit in a nonexhaustive way, a power that was centered primarily around deduction (*prélèvement*) and death, it is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go

beyond the state and its apparatus" (89). See also his claim in "Governmentality" (1991a): "Whereas the end of sovereignty is internal to itself and possesses its own intrinsic instruments in the shape of its laws, the finality of government resides in the things it manages and in the pursuit of the perfection and intensification of the processes which it directs, and the instruments of government, instead of being laws, now come to be a range of multiform tactics" (95).

5. See, for example, Foucault 1980c: "[T]he theory of sovereignty, and the organisation of a legal code centred upon it, have allowed a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the State, the exercise of his proper sovereign rights" (105).

6. I realize that in asking this question I am glossing over what some might consider an important problem. Specifically, I am assuming that the categories of analysis Foucault derives from his reflections about European states can be transposed to the United States. While it is true that I am not considering the cultural and political peculiarities that complicate this project, I remain persuaded that the categories of analysis provided by Foucault are of use in highlighting the conflicting imperatives confronted by liberal regimes on both sides of the Atlantic. That, of course, is not to deny that there is much work to be done in terms of identifying and exploring the features that distinguish each from the others.

7. See, for example, Foucault's claim in "Governmentality" (1991a): "We need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government; in reality one has a triangle, sovereignty-discipline-government" (102). The careful reader will notice that I have altered the structure of Foucault's triangle in the sense that I have labeled its sides *sovereignty*, *anatomo-politics*, and *biopolitics*. I have then situated Foucault's triangle, thus conceived, on the more comprehensive political field designated by the term *governmentality*. This, I think, is more consistent with the overall thrust of his argument, and, even if that is not the case, it is certainly more conducive to my purposes in this chapter.

8. The relationship between these two issues grows more direct when we ask whether someone condemned to die should be permitted to "commit suicide" by waiving the right to all postconviction appeals, thereby bringing on an execution that would otherwise be delayed by additional judicial review. To support an affirmative response to this question, some have argued that the situation of a person condemned to die is, in crucial respects, analogous to that of a person suffering from a terminal illness. For explorations of some of these questions, see Johnson 1981 and Urofsky 1993.

9. In a comparative vein, it is worth noting that England's Royal Commission on Capital Punishment (1953) also explored lethal injection as an alternative to hanging, but ultimately elected not to recommend this innovation, pri-

marily in response to objections registered by the British Medical Association. Intriguingly, and perhaps suggesting a significant difference between American and British culture, the commission also rejected lethal injection on the ground that it is easier for the condemned “to show courage and composure in his last moments if the final act required of him is a positive one, such as walking to the scaffold, than if it is mere passivity, like awaiting the prick of a needle” (par. 748).

10. See, for example, Title 11, Article 4209(f) of Delaware Code Revised (1995): “The administration of the required lethal substances . . . shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs [to the commissioner of the Department of Corrections] without prescription.”

11. Policy H-140.957 of the American Medical Association reads in part: “An individual’s opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a state execution. ‘Physician participation in execution’ is defined generally as actions which would fall into one or more of the following categories: (a) an action which would directly cause the death of the condemned; (b) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (c) an action which could automatically cause an execution to be carried out on a condemned prisoner.” The policy goes on to state that, when the method is lethal injection, “the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing or maintaining lethal injection devices; consulting with or supervising lethal injection personnel.” In spite of this policy, virtually every state that employs lethal injection as a method of execution requires that a physician be present, although that party’s specific responsibilities varies considerably from state to state. Some statutes require that a physician “determine” or “pronounce” death; some indicate that a physician must be among the witnesses to an execution; some simply instruct the warden or superintendent to “invite” or “cause” a physician to attend; and some stipulate that licensed health care officials can be compelled to participate in an execution. For a complete list of state statutory requirements concerning the role of physicians at executions, see the study issued by the American College of Physicians, Human Rights Watch, the National Coalition to Abolish the Death Penalty, and Physicians for Human Rights (1994), titled *Breach of Trust: Physician Participation in Execution*.

12. See, for example, *Hill v. Lockhart* (791 F.Supp. 1388 [1992]), in which a person condemned to die in Arkansas by means of lethal injection contended that, because the relevant statute does not require that this procedure be performed by the appropriate expert, that is, by a physician, the state cannot guar-

antee that execution by this means will not violate the Eighth Amendment's prohibition of "cruel" punishments.

13. For a careful account of the legal controversy that emerged out of this petition, see Stolls 1985.

14. For a later variation on the arguments advanced in *Chaney v. Heckler* (1983), see *Delaware v. Deputy* (644 A.2d 411 [1994]). In this case, an inmate challenged a state statute, first, on the ground that it authorized correctional officers to obtain controlled substances absent a prescription, as required by the Food and Drug Administration; and, second, on the ground that it did not provide guidelines concerning the selection and training of the persons to administer a lethal injection. This suit proved no more successful than did *Chaney*.

15. The authors who come closest to appreciating the oddly revelatory import of *Heckler v. Chaney* (1985) are Zimring and Hawkins (1986). After reviewing the twists and turns of this case, they write: "The author whose work comes to mind here is, of course, Lewis Carroll. The trial scene at the end of *Alice's Adventures in Wonderland* bears a number of similarities to the litigation and the controversy we have described. Some critics have seen the nonsensical nature of the trial of the Knave of Hearts as a metaphor for real and tragic features of human existence, and it has for this reason been compared with Kafka's *The Trial*. In the *Chaney* case, too, the surface absurdities arise from, and direct attention to, a monstrous underlying reality" (119).

16. Garland (1985) disagrees with Foucault, not in the sense that he rejects his argument regarding the most apt way to characterize the shift from early modern to modern forms of penalty, but rather in the sense that he is persuaded that, at least in the context of England, the transformations noted by Foucault did not take place until the late nineteenth and early twentieth centuries. I find Garland persuasive on this point, and I would make much the same argument in the context of the United States. For another exploration of these transformations, again in the context of England, see Cohen 1985.

17. In typically opaque prose, Max Weber makes much the same point when, in *Economy and Society*, he writes: "The modern position of political associations rests on the prestige bestowed on them by the belief, held by their members, in a specific consecration: the 'legitimacy' of that social action which is ordered and regulated by them. This prestige is particularly powerful where, and in so far as, social action comprises physical coercion, including the power to dispose over life and death. It is on this prestige that the consensus on the specific legitimacy of action is founded" (1978, 1:903–4).

18. For an account of the various ways executions by lethal injection can go wrong, see Denno 1998.