

Book Review

Regulating Death: Capital Punishment and the Late Liberal State

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When the State Kills: Capital Punishment and the American Condition. By Austin Sarat.* Princeton, N.J.: Princeton University Press, 2001. Pp. 324. \$29.95.

For foes of the death penalty, these are the worst but also the best of times. In 1976, when the U.S. Supreme Court decided *Gregg v. Georgia*,¹ which effectively lifted the moratorium imposed four years earlier by *Furman v. Georgia*,² there were 420 persons on death row. Today, that number is approaching an even 4000. The rate of executions has risen with equal rapidity, climbing from one in 1977 to twenty-five a decade later and, in 1999, to just shy of one hundred.³ Despite a recent slight dip,⁴ there is little reason to think that we will see a dramatic drop in the number either of those sentenced to die or of those actually executed in the coming years. For close to two decades now, Congress and the Supreme Court, betraying mounting impatience with the due process requirements adopted in

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1. 428 U.S. 153 (1976).

2. 408 U.S. 238 (1972).

3. For these and related statistics, see generally Bureau of Justice Statistics, U.S. Dep't of Justice, Capital Punishment Statistics, at <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited Nov. 19, 2001).

4. See Fox Butterfield, *Federal Study Finds Decline in Executions*, N.Y. TIMES, Dec. 11, 2000, at A20.

response to *Furman's* concerns about fairness, have made it ever more difficult for death row inmates to obtain federal habeas review of their convictions and sentences.⁵ In addition, in close to half of the thirty-eight states that now authorize capital punishment, post-conviction defender programs and capital resource centers have been defunded, thus making it ever more difficult for inmates on death row to secure adequate legal representation.⁶ Finally, the nearly universal adoption of lethal injection as a method of execution has sanitized the act of killing, thereby rendering it far more palatable than when we dispatched persons using gas, a rope, a bullet, or a lethal jolt of electricity.

For these reasons and many others, the gears of the machinery of death are now unusually well-greased. Yet it is simultaneously true that the question of capital punishment is disputed today in a way that it has not been since the 1970s. In 1997, the American Bar Association's House of Delegates adopted a resolution calling on states to halt executions until equal protection of the law was guaranteed to all.⁷ In 1998, the execution of Karla Faye Tucker prompted a national debate, especially among members of the Christian right, about the morality of capital punishment.⁸ The following year, the Nebraska legislature approved a two-year moratorium on executions, although this was later vetoed by the Governor.⁹ In early 2000, after thirteen men on death row were exonerated by new evidence, Governor Ryan of Illinois suspended all executions pending a review of capital trials in that state.¹⁰ Later that same year, although thwarted by another gubernatorial veto, the New Hampshire legislature voted to abolish the death penalty.¹¹ Still more recently, Columbia University issued a study indicating that of 4578 death sentence appeals conducted between 1973 and 1995, over two-thirds were successful in state or federal courts, whether because of incompetent defense counsel, mendacious police officers, or

5. See, e.g., Erwin Chemerinsky, *Access to Justice: The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37 (1999); Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Counsel*, 38 AM. CRIM. L. REV. 147 (2001); Jordan Steiker, *Did the Oklahoma City Bombers Succeed?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 185 (2001).

6. See Harvey Berkman, *Costs Mount for Indigent Defense*, NAT'L L.J., Aug. 7, 1995, at A18.

7. ABA, Report with Recommendations No. 107, from ABA 1997 Midyear Meeting, <http://www.abanet.org/irt/rec107.html> (last visited Nov. 12, 2001) [hereinafter Recommendation No. 107].

8. See, e.g., Teresa Malcolm, *Tucker's Death Affected Robertson's Views*, NAT'L CATH. REP., Apr. 23, 1999, at 4; Sam Howe Verhovek, *As Woman's Execution Nears, Texas Squirms*, N.Y. TIMES, Jan. 1, 1998, at A1.

9. See Dirk Johnson, *Legislature of Nebraska Votes Pause in Executions*, N.Y. TIMES, May 21, 1999, at A14; *Veto of Execution Bill Is Not Challenged*, N.Y. TIMES, May 30, 1999, at A16.

10. See Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

11. See John Kifner, *A State Votes To End Its Death Penalty*, N.Y. TIMES, May 19, 2000, at A16.

prosecutors whose zeal outstripped their fidelity to the law.¹² Shortly thereafter, the U.S. Department of Justice released another study indicating significant racial and geographical disparities in the federal death penalty system.¹³ The cumulative effect of these and other developments was registered in a Washington Post-ABC poll conducted in April of 2001. Leaving aside what has come to be known as the "McVeigh exception,"¹⁴ this survey indicated that overall support for capital punishment has fallen from 80% to 63% since 1994, and that nearly half of all Americans would now abandon executions altogether if given a reliable option of life imprisonment without parole.¹⁵

On the basis of such evidence, it is tempting to predict, as Robert Jay Lifton and Greg Mitchell recently did, that "[b]efore long, the death penalty apparatus in our country will collapse under its own moral, psychological, and eventually political weight."¹⁶ That prognostication, though, may be wishful thinking. If support for capital punishment has waned in recent years, this is not so much because new abolitionist arguments have been articulated and widely accepted, but because publicity has recently been lavished upon individualized stories of capital defendants represented by sleeping, intoxicated, or disbarred attorneys, of persons on death row proven innocent by undergraduate journalism students at Northwestern University, and of exonerations of the condemned on the basis of DNA testing.¹⁷ Woven together, these stories have loosened the grip of

12. See Brooke A. Masters, *Most Death Sentences Reversed, Study Finds*, WASH. POST, June 12, 2000, at A10. The study, authored by James S. Liebman, Jeffrey Fagan, and Valerie West, and titled *A Broken System: Error Rates in Capital Cases, 1973-1995*, can be found at <http://justice.policy.net/jpreport/index.html>.

13. David A. Vise, *Disparities Found in U.S. Death Penalty Prosecutions*, WASH. POST, Sept. 13, 2000, at A17. For the study itself, see U.S. DEP'T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000)* (2000), <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>. Attorney General John Ashcroft later denied that this study demonstrated the existence of any intentional bias in the administration of capital punishment. See David Stout, *Attorney General Says Report Shows No Racial and Ethnic Bias in Federal Death Sentences*, N.Y. TIMES, June 7, 2001, at A29.

14. The "McVeigh exception" refers to the tendency of death penalty opponents nevertheless to support the execution of Timothy McVeigh. A published study indicated that 81% of the American public supported his execution, including 22% who said they opposed capital punishment in general. Richard Morin & Claudi Deane, *Support for Death Penalty Eases; McVeigh's Execution Approved, While Principle Splits Public*, WASH. POST, May 3, 2001, at A9 (citing a CNN-USA Today-Gallup poll conducted shortly before the date on which McVeigh was originally scheduled to die).

15. *Id.* For a careful analysis of public opinion on the death penalty over the past half-century, see Samuel Gross & Phoebe Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in *CAPITAL PUNISHMENT AND THE AMERICAN FUTURE* (Stephen Garvey ed., forthcoming 2001) (manuscript on file with author). Their assessment of eroding support for the death penalty suggests that it has declined by approximately 6% to 8% since the mid-1990s, from the 70-75% range to the 63-68% range.

16. ROBERT JAY LIFTON & GREG MITCHELL, *WHO OWNS DEATH?* 231 (2000).

17. See, e.g., Julian Borger, *Trial and Error*, GUARDIAN (London), Feb. 15, 2000, Features Pages, at 2 (discussing the efforts of Northwestern University students to prove the innocence of certain persons on death row in Illinois); Susan Milligan, *Support Grows for DNA Testing in*

conventional pro-death penalty narratives, which told of disingenuous lawyers manipulating legal technicalities in order to postpone indefinitely the execution of coddled criminals. In their stead, we often now hear a new, more skeptical narrative in which innocent persons are not infrequently hustled toward the death chamber by officials who, like all other government bureaucrats, are prone to corruption and slipshod work.

While the impact of these stories in shaping public opinion should not be minimized, it may be that these tales are better suited to generate support for a moratorium on the death penalty than for its wholesale abolition. "There is no inconsistency," write Samuel Gross and Phoebe Ellsworth, "in the fact that sixty-four percent of the population favors a moratorium (at least when DNA is mentioned), and about the same number favors the death penalty."¹⁸ Though attractive as a way of breaking the rhetorical impasse that materializes when persons, absent a third alternative, feel compelled to choose between unvarnished support for and opposition to capital punishment, a moratorium is ultimately a strategy of deferral. As such, it may simply elicit additional efforts to do what the courts have been trying (unsuccessfully) to do since 1972, namely, to rationalize the administration of capital punishment in a way that rectifies its most troubling and glaring defects. And, if this is so, then it is not inconceivable that, in the long run, the moratorium movement may play into the hands of those who now exploit the gains secured by the Federal Death Penalty Act of 1994,¹⁹ which made some sixty additional categories of crime, such as major narcotics trafficking, subject to the federal death penalty, and, far more important, by the Antiterrorism and Effective Death Penalty Act of 1996, which reduced the power of federal courts to review the fairness of state capital prosecutions.²⁰ In addition, support for a moratorium may vanish as quickly as it has arisen, especially should the American economy experience a significant downturn or should crime rates take a marked upturn, in which case a reinvigorated commitment to capital punishment

Death-Row Cases, BOSTON GLOBE, June 28, 2001, at A1 (describing persons released from death row following DNA testing of evidence); Henry Weinstein, *Ruling on Sleeping Lawyer*, L.A. TIMES, Aug. 14, 2001, at A10 (noting that a Texas man was granted a new trial because his attorney had slept through a significant portion of the initial proceeding).

18. Gross & Ellsworth, *supra* note 15, at 53.

19. 18 U.S.C. §§ 3591-3598 (1994).

20. Among other things, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.), established a one-year deadline within which state prisoners must file their federal habeas petitions, narrowed the circumstances under which a federal or state prisoner may appeal a federal district court's denial of his or her petition for habeas relief, barred federal habeas relief to state prisoners whose claims have been decided by the state courts unless the result was contrary to U.S. Supreme Court precedent or was based upon an unreasonable finding of fact, amended habeas procedure for federal prisoners to include the limitations that it makes applicable to state prisoners, and barred repetitious habeas petitions.

might prove politically useful in deflecting attention from more systemic ills.

Such skepticism aside, the fact remains that we now stand at a remarkably volatile moment in the history of capital punishment in America. Whereas just five or six years ago, the death penalty appeared so firmly entrenched that it required no explicit defense against its marginalized opponents, today it appears vulnerable and thus in need of justification. Given this context, it is all the more surprising that the case against capital punishment appears oddly stalled, so much so that Gross and Ellsworth can contend, with considerable plausibility, that “the last new argument against the death penalty may have been made by Cesare di Beccaria, in 1764.”²¹ The conventional arguments against capital punishment fall effortlessly off the tongue: The death penalty has no demonstrable deterrent effect; it is morally impermissible to risk the execution of an innocent; capital punishment is unfair because it discriminates against the poor as well as against persons of color; it is less expensive to incarcerate persons for life than to execute them; and so forth. Although I do not mean to reject these arguments, especially since they are all true, I do want to suggest that none responds effectively to the passion for vengeance that explains the stubborn fidelity of so many Americans to the death penalty even after its systemic failings have been repeatedly exposed;²² and that, therefore, opponents of capital punishment should welcome any effort to expand the terms of their discourse.

That is precisely what Austin Sarat offers in his *When the State Kills*.²³ Sarat exhorts us to move beyond the conventions of “moral argument and policy debate”²⁴ and shows us how we might begin to do so by asking what role capital punishment has played, and continues to play, in fashioning the collective identity of our nation. Should we situate the death penalty within this more comprehensive context, he argues, we will come to see that “[s]tate killing damages us all, calling into question the extent of the difference between the killing done in our name and the killing that all of us would like to stop and, in the process, weakening, not strengthening, democratic political institutions.”²⁵ That conclusion, in turn, invites a shift to what Sarat, in his final chapter, calls a “new abolitionism.”²⁶ What is novel about such abolitionism is its refusal to accept the burden of

21. Gross & Ellsworth, *supra* note 15, at 21-22.

22. *Id.* at 36 (reviewing poll data indicating that an appeal to retributive justice, usually encapsulated in the notion of “a life for a life” or “an eye for an eye,” is the justification most often cited by proponents of capital punishment, with deterrence and incapacitation trailing far behind).

23. AUSTIN SARAT, *WHEN THE STATE KILLS* (2001).

24. *Id.* at 14.

25. *Id.* at 15.

26. *Id.* at 250.

responding to those who invoke an unvarnished retributivist justification of capital punishment and seek to put their opponents in the position of pleading on behalf of the despicable. Once one is thrust into that rhetorical box, in order "to be against the death penalty one has . . . to defend the life of Timothy McVeigh."²⁷ Instead, Sarat seeks to change the subject: "As we think about capital punishment, the faces we should be looking at are our own. The question to be asked about state killing is not what it does for us, but what it does *to us*."²⁸ Once we regard the death penalty as a sort of mirror held before our nation's face, we begin to see that

[s]tate killing contributes to some of the most dangerous features of contemporary America. Among them are the substitution of a politics of revenge and resentment for sustained attention to the social problems responsible for so much violence today; the use of crime to pit various social groups against one another . . . ; the perpetuation of racial fear and antagonism; the erosion of basic legal protections and legal values in favor of short-term political expediency²⁹

To develop these claims, Sarat offers seven essays, each of which has been published elsewhere in an earlier incarnation. Four of these essays, in one way or another, are centrally concerned with capital trials. What makes these chapters especially powerful is Sarat's commitment to grounding his theoretical inquiry in the often grubby world of the local courtroom, whether that be by attending the trial of William Brooks, a young African-American man charged with the rape and murder of a white woman in a small town in Georgia, or by interviewing jurors who, again in Georgia, elected to condemn John Henry Connors to death for having murdered a convenience-store cashier after Connors had stolen ten one-dollar bills and some food stamps from the register. In these four essays, Sarat explains his opposition to the introduction of victim impact statements in the sentencing phase of capital trials; shows how jurors in capital cases are persuaded to jettison reservations that might otherwise incline them to recommend a life sentence rather than execution; and, in what is perhaps the volume's most moving essay, praises the small band of death penalty lawyers specializing in appellate and post-conviction procedures who seek to fashion stories that, though often destined to fail, nonetheless create a durable record, a memorial of sorts, that testifies to the law's enduring ideals even while it condemns the law's failure to make good on those same aspirations.

27. *Id.* at 249.

28. *Id.* at 250.

29. *Id.* at 30.

Two additional and equally intriguing chapters deal with what Sarat calls “the cultural representations and resonances of capital punishment.”³⁰ The first of these, taking up an issue especially salient in light of the McVeigh case, asks whether executions should be broadcast on national television and, if so, what bearing this might have on the character of the present debate over capital punishment. The second, tacitly acknowledging that executions are unlikely to become televised spectacles any time soon, asks how the practice of state killing is typically rendered in popular films, including *Dead Man Walking*, *Last Dance*, and *The Green Mile*, each of which Sarat finds profoundly conservative in its fixation on the question of individual responsibility and its consequent failure to attend to the forms of structural violence that render deeply problematic the understanding of free will presupposed by our vocabulary of responsibility. The remaining essay, which I consider with some care in a later section, examines various court challenges to specific methods of execution in order to ask, first, how we might understand the popularity of lethal injection and its promise of a painless death; and, second, whether this method’s alleged humanity may prove problematic for the state precisely because the death it causes appears too easy. Like all of its companions, this essay is enriched by Sarat’s sustained drive to transcend the parochialism of more familiar modes of inquiry into the death penalty by bringing the best of contemporary interdisciplinary legal scholarship to bear on this vexing issue. The net result is a volume that is strikingly successful in fulfilling its author’s pledge to disclose “new narrative possibilities in the conversation about state killing.”³¹

The essays that comprise *When the State Kills* are unified by their preoccupation with capital punishment, but also by a broader concern with the law’s legitimacy and, more specifically, with legitimation of the forms of coercion in which the state necessarily traffics. On Sarat’s account, this end is principally accomplished through multiple strategies aimed at unambiguously differentiating the state’s violence from the violence that it punishes. In Part I of this Review, I elaborate this theme and show how it plays out in several of this volume’s essays. In Part II, I ask what conception of the liberal state is tacitly presupposed by Sarat in his articulation of these legitimating strategies (as well as in the book’s title), and, because I am not convinced that this conception is entirely adequate, borrowing from Michel Foucault’s later work, I advance what I take to be a more nuanced understanding. In order to show what is at stake in the difference between these two conceptions, I describe, in Part III, the reading of lethal injection, the currently favored method of carrying out the death

30. *Id.* at 29.

31. *Id.* at 250.

penalty, that each generates. Finally, in Part IV, returning to the contemporary controversy over capital punishment, I briefly ask how the new abolitionism recommended by Sarat might be reconfigured in light of the argument of the two previous Parts.

I. THE (IL)LEGITIMACY OF STATE KILLING

Capital punishment, Sarat argues, undermines the distinction between extralegal and legal violence, which in turn jeopardizes the law's claim to legitimacy.

Legitimacy is . . . one way of charting the boundaries of state violence. It is also the minimal answer to skeptical questions about the ways that state violence differs from the turmoil and disorder the state is allegedly brought into being to conquer. But the need to legitimate this violence is nagging and continuing, never fully resolved in any single gesture.³²

No single gesture will suffice because challenges to the integrity of this distinction are incessant, emanating from outside as well as inside the halls of justice. When an anonymous member of the crowd gathered outside the Noble County courthouse in order to catch a glimpse of McVeigh shouted, "His children should be shot,"³³ voice was thereby given to the sort of spiteful malevolence the law must disavow in order to sustain the demarcation between its measured retribution and the mob's intemperate vengeance. When the presiding judge affirmed that the purpose of this trial was not to "seek revenge against Timothy McVeigh" and that "the penalty phase hearing . . . cannot be turned into some type of lynching,"³⁴ his words erected a barrier as firm as that manufactured by the courthouse's external walls. This boundary between legal and extralegal violence, which McVeigh himself transgressed by representing the Oklahoma City bombing as an act of justified retaliation against a federal government guilty of murdering eighty persons trapped within the Branch Davidian compound at Waco, is undermined in a far more insidious way when the source of that erosion wears a judicial robe. That, Sarat tells us, is how we should think about the Supreme Court's 1992 order in the case of Robert Alton Harris forbidding the issuance of additional stays of execution by any other court, an edict that was punctuated by Chief Justice Rehnquist's blunt dictate: "Let's get on with it."³⁵ When the impatient quest for finality in capital

32. *Id.* at 22.

33. *Id.* at 5.

34. *Id.* at 8.

35. *Id.* at 20.

cases trumps the due process protections that render the law's violence something other than bloodlust, when it becomes difficult to spell out just what distinguishes the voice of William Rehnquist from that of the unnamed caller quoted above, Sarat concludes, capital punishment must be abolished in order to save the law.

Sarat's worry about the law's integrity also informs his criticism of the admission of victim impact statements within capital trials. Criminal law, he argues, is an essential ingredient of a larger order of justice that seeks "to substitute structured public processes for unpredictable private action and, in so doing, to justify punishment as a response to injuries to public order rather than to particular individuals."³⁶ In recent decades, that order has come under fire due to the mobilization of a powerful victims' rights movement, one that questions the capacity of the liberal state to respond adequately to the grief and rage of those who want greater satisfaction than the law appears able to provide. The call to do justice to that suffering becomes still louder in capital trials where unbearable anguish is met and, according to the partisans of this movement, exacerbated by a system of "super due process"³⁷ intended to safeguard defendants from these same unbounded furies. On Sarat's reading, this fragile accomplishment was gravely compromised when, as a result of the Supreme Court's decision in *Payne v. Tennessee*,³⁸ prosecutors were permitted to incorporate accounts of the torment endured by the relatives of murder victims into the penalty phase of capital trials. By allowing private passions to shape the character of public justice, this ruling reintroduced the very sort of vengeful impulses from which the law, if it is to sustain the impersonality that is an indispensable component of its legitimacy, must distance itself.

Sarat's concern with the relationship between extralegal and lawful violence is equally central to his analysis of the trial of William Brooks. There, Sarat explores the discursive means through which the already-completed violence of crime—in this instance, the rape and murder of a white woman by a black man—is distinguished from the violence of a punishment yet to be inflicted. This analytical task is complicated by pain's stubborn resistance to linguistic articulation and intersubjective confirmation. We can guess but never say for certain what sort of suffering Jeannine Galloway experienced when, as she begged her assailant to release her, she was shot at point blank range in the back of her neck. So too, we can imagine but never say for certain what sort of suffering William Brooks may experience as a result of his incarceration on death row as well as his eventual execution. In light of pain's elusiveness, the task of the

36. *Id.* at 34.

37. Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 (1980).

38. 501 U.S. 808 (1990).

prosecution is twofold. First, it must deploy the rhetorical devices that will induce members of the jury to imagine as vividly as possible Galloway's presumed pain. That is accomplished in part by fixing the jury's attention on pain's metaphorical signs, i.e., the weapon that caused it and the wound that expressed it, and in part by demonizing the black perpetrator and purifying the white victim in order to heighten the horror of this crime's violence. Second, the prosecution must seek to differentiate the violence inflicted by Brooks from that of the punishment it hopes the jury will impose. That is accomplished in part by opposing the brutal and indiscriminate violence of criminality, which respects no distinction between the deserving and the undeserving, to the regulated violence of the state, which is meted out only to those whose culpability has been unequivocally determined in accordance with the law's exacting procedures; and in part by referring to the act of execution as an abstraction, as "the death penalty," thereby occluding the instrumentality (the weapon) through which that penalty is to be inflicted as well as the harm (the wound) that will testify to the pain it may cause. In response, during the penalty phase, the defense must appeal to the virtue of mercy, which is one of the marks by which the law's violence is distinguished from its extralegal counterpart. Yet, at the same time, the defense must subvert this distinction by rendering visible to the jury the graphic violence of capital punishment, in this case, by conjuring up an image of the "elimination of life by 2200 volts of electricity."³⁹ Thus, destabilization of the boundary that is central to the law's legitimacy is jeopardized by the rhetorical imperatives of the contest that is a capital trial; and, for that reason, too, Sarat concludes, the death penalty extracts a price too high for the law to bear.

As these capsule summaries intimate, the dominant motif of *When the State Kills* harbors a tension, one that Sarat neither articulates nor addresses. As he has persuasively argued elsewhere, violence is an immanent ingredient of the law of the liberal state in at least three ways: "1) it provides the occasion and method for founding legal orders; 2) it gives law (as the regulator of force and coercion) a reason for being; and 3) it provides a means through which law acts."⁴⁰ If, as the second prong of this quotation especially suggests, the liberal state's violence is justified and, indeed, constituted at least in part by that which it opposes, then we must conclude that violence is "that point of departure from which complete departure is impossible."⁴¹ Affirming this impossibility, much of Sarat's work is aimed at demonstrating the permeability of the distinction, for example, between

39. SARAT, *supra* note 23, at 119 (quoting Stephen Bright).

40. Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1112 (1995).

41. Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *LAW'S VIOLENCE* 211, 212 (Austin Sarat & Thomas Kearns eds., 1992).

revenge and retribution and, by extension, the law's inevitable failure categorically to differentiate its violence from its extralegal counterpart. "The demand to hear the voice of the victim in capital trials" is a manifestation of this failure and, as such, "is but a symptom of the fragility and instability of the myths and stories that have been used to legitimate the killing state."⁴² When these fables are punctured, as they are so effectively by Sarat, we learn that the capital sentencing decision, "[t]hough represented in state law as a strictly regulated and formally guided exercise of reasoned moral judgement," is in fact "a negotiated social transaction fraught with tactics of persuasion, advocacy, rhetorical claims, and intimidation."⁴³ As this example indicates, many of Sarat's most insightful arguments are aimed at deflating the pretensions of liberal law by revealing the sordid realities that compromise the law's claim to stand above the fray as a beacon of impartial rationality; and so, he concludes, "The killing state, in spite of the formal protections of the law, may end up being a lawless state."⁴⁴

Yet, at the same time, Sarat is equally if not more emphatic in insisting that the law make good on the self-representation that he himself has led us to suspect cannot be realized. That aspiration explains why the hero of Sarat's new abolitionism is Justice Harry Blackmun, who, shortly before his retirement from the Supreme Court, declared, "From this day forward, I no longer shall tinker with the machinery of death."⁴⁵ Concluding that the death penalty cannot be administered in a way that simultaneously reconciles the claims of individualized sentencing and consistency across diverse cases, the twin imperatives of the Supreme Court's post-*Furman* jurisprudence, Blackmun became an abolitionist only when compelled to acknowledge "the damage that capital punishment does to central legal values and to the legitimacy of the law itself."⁴⁶ Very much like that of Blackmun, Sarat's opposition to the death penalty is one that "finds its home in an embrace, not a critique, of those values"⁴⁷ and, more specifically, the value of a legal order whose legitimacy is predicated, at least in part, on the unequivocal demarcation of its violence from that which it punishes.

How are we to make sense of this embrace on the part of one who has so effectively demonstrated the impossibility of definitively securing the distinction that is indispensable to the law's legitimacy? Why, in other words, does not Sarat simply abandon the promise of liberal law on the ground that it is so much ideological claptrap? Here, I think, is a clue:

42. SARAT, *supra* note 23, at 57.

43. *Id.* at 156.

44. *Id.* at 157.

45. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

46. SARAT, *supra* note 23, at 253.

47. *Id.*

The killing state threatens to expose the facade of law's dispassionate reason, of its necessity and restraint, as just that—a facade—and to destabilize law by forcing choices between its aspirations and the need to maintain social order through force. Violence threatens to swallow up law and leave nothing but a social world of forces arrayed in aggressive opposition. Where violence is present can there be anything other than violence? This question puts enormous pressure on legal rituals such as the capital trial to demonstrate and affirm the difference between state killing and the violence that the law condemns.⁴⁸

In this passage, if I read it correctly, Sarat reveals the Hobbesian nightmare that informs his commitment to reaffirm and shore up the conception of law that he is otherwise so adept at rendering problematic. If the law's claim to rationality and impersonality is revealed as a mere façade, then at least in principle little stands between us and the war of all against all. This fear, which is aggravated by Sarat's conviction that we as a nation are "increasingly unable to agree upon a shared set of public values,"⁴⁹ explains why he wishes to rule out of court victim impact statements. Their admission introduces into the law the sort of private claims that muddy the distinction between personal vengeance and public justice, and so unsettle the vision of law that must be safeguarded if we are to forestall a downward spiral into anomic anarchy. "Neither popular nor populist," Sarat argues, the law of the liberal state "is different and superior because through public processes it ascertains guilt and fixes punishment and, in so doing, prevents an escalating cycle of injury-response-injury."⁵⁰ More generally, this fear also explains why Sarat is so passionately opposed to the death penalty. Far more graphically than any other form of state violence, the practice of capital punishment threatens to undo an illusion we cannot do without.

II. WHEN WHAT STATE KILLS?

Sarat's defense of law's cause presupposes a conception of the state that he does not elaborate. Although Sarat invokes the phrase "state killing" in every essay of this volume, he never gives his understanding of that killing's institutionalized agent the sort of systematic theoretical articulation one might think required by his overall argument. Consequently, the reader must infer the nature of his conception of the state from context and connotation. One central clue is Sarat's contention, repeated in slightly differing form throughout the text, that capital

48. *Id.* at 124.

49. *Id.* at 58.

50. *Id.* at 57.

punishment statutes afford expression to “the ultimate power of sovereignty, namely the power over life itself,”⁵¹ and, correlatively, that executions are manifestations of “the state’s violent majesty.”⁵² Although this latter phrase vaguely recollects the absolutist monarchies of early modern Europe, it seems obvious that this is not what Sarat has in mind. Rather, I would suggest, these phrases point toward an essentially Weberian representation of the modern state, i.e., one that regards the nation as a well-bounded territorial unit ruled by a government that has successfully secured a monopoly over the means of legitimate violence, which is itself given formal articulation through the state’s claim to sovereignty. In addition, it seems apparent that this state is of the specifically liberal variety, an inference that is reinforced by the epigraph, taken from John Locke’s *Second Treatise of Government*, that Sarat appends to his introductory essay: “Political power . . . I take to be the right of making laws with the penalty of death.”⁵³ On this Lockean understanding, the state is a uniquely public entity in the sense that, although governing in the name of the people, it is abstracted from the private realm over which it rules. That rule, including the state’s acts of violence, is rendered legitimate, at least in part, through its exercise in accordance with the formal imperatives of law. “[T]he Community,” Locke explains,

comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties; and by Men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that Society, concerning any matter of right; and punishes those Offences, which any Member hath committed against the Society, with such Penalties as the Law has established.⁵⁴

It is precisely because execution, more than any other punishment, endangers this representation of the state as a neutral umpire abstracted from the popular passions and prejudices of civil society that Sarat, unlike Locke, concludes that it must cease.

51. *Id.* at 154.

52. *Id.* at 128; *see also id.* at 24 (“State killing, I contend, both expresses sovereign prerogative and, as in the McVeigh case, satisfies public desires for vengeance by responding to the pain of the victims of crime.”); *id.* at 62 (claiming that the botched electrocution of Pedro Medina in 1997 was deemed newsworthy “because it reminded us of the ferocity of the sovereign state’s power over life itself”); *id.* at 69-70 (suggesting that, in challenging the constitutionality of specific methods of execution, “[l]aw stands ready to police the excesses of sovereignty, but it still grants sovereignty its due”); *id.* at 129 (observing that in capital trials, “[o]n the one hand, the juror speaks in the powerful, retributive tones of a sovereign assaulted; on the other hand, the juror speaks in the muted, restrained tones appropriate to popular sovereignty”).

53. *Id.* at 3.

54. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

On occasion, Sarat employs a phrase that hints that this Weberian conception of the state may no longer be altogether adequate, as when he asks about the status of capital punishment within “neoliberal regimes”⁵⁵ or its “role in the modern economy of power.”⁵⁶ But these are isolated phrases whose greater import is left largely unexplored. To see why they perhaps warrant more systematic reflection, consider once more Sarat’s critique of the victims’ rights movement:

Indeed if revenge succeeds in making itself a force in legal justice, it does so by tearing down these boundaries and rearranging these categories. It blurs the line between public and private justice, between the justice of the state acting against those who defy its order and the justice of the victim calling for vengeance against those who are responsible for private pain and suffering.⁵⁷

Responding to this erosion, Sarat commends a reconstruction of these boundaries, a reclarification of these lines, and thus a return to a state whose law, although necessarily implicated in violence, is demarcated as sharply as possible from the forms of extra-state violence it condemns. Yet, elsewhere, Sarat insists that the oppositions necessary to sustain the categorical distinction between revenge and retribution, including those of “public versus private, impersonal versus personal, general versus specific,” are “all being called into question by the conditions of modern life.”⁵⁸ If that is indeed so, then perhaps the conception of the liberal state presupposed by Sarat, one that generates a reading of capital punishment as the ultimate expression of that state’s unique claim to sovereignty, is handicapped by its origins within a historical context quite unlike our own. More importantly, as I suggest in my Conclusion, resuscitation of the conditions of that state’s legitimacy may perhaps be neither feasible nor even desirable.

In the remainder of this Part, accordingly, my purpose is to specify the terms of what I, elaborating Sarat’s undeveloped terminological clue, designate the “neoliberal state” (which I mean to oppose to his Weberian/Lockean construction). To do so, I turn to an author who is often cited by Sarat, but whose categories of analysis are not as fully exploited as they might be. In the final chapter of the introductory volume to *The History of Sexuality*, Michel Foucault argues that prior to the seventeenth century the defining privilege of sovereignty within European absolutist

55. SARAT, *supra* note 23, at 25.

56. *Id.* at 14.

57. *Id.* at 37.

58. *Id.* at 43.

monarchical regimes was the right to “decide life and death.”⁵⁹ 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, this claim was gradually delimited through struggles aimed at designating the conditions under which it could legitimately be exercised. In time, the state’s privilege came to encompass only those situations 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 “dissymmetrical” 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.⁶⁰

Within absolutist regimes, on this understanding, the biological existence of human beings was regarded as an “inaccessible substrate”⁶¹ 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, i.e., the economy, and as management of the economy emerged as a target of deliberate state 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

59. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 135 (Robert Hurley trans., Vintage Books 1990) (1976).

60. 1 *id.* at 136.

61. 1 *id.* at 142.

destroying them.”⁶² 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 administrative 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.⁶³

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, in *The History of Sexuality*, he calls “an *anatomo-politics of the human body*.”⁶⁴ 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.”⁶⁵ 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

62. 1 *id.* at 136.

63. Michel Foucault, *Governmentality*, in THE FOUCAULT EFFECT 87, 99 (Graham Burchell et al. eds., Pasquale Pasquino trans., 1991).

64. 1 FOUCAULT, *supra* note 59, at 139. Anatomo-politics appears to be roughly congruent with what Foucault, in *Discipline and Punish*, called “disciplinary power.” MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 170 (Alan Sheridan trans., Pantheon Books 1977) (1975).

65. 1 FOUCAULT, *supra* note 59, at 139.

science of criminology. The second, 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.”⁶⁶ 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. Their aim in doing so was principally, although not exclusively, to maximize the nation’s well-being, whether 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, seeking to loosen the grip of the conception of sovereignty that tacitly informs much of Sarat’s argument, rehabilitates and then reworks an archaic sense of the term “government”:⁶⁷

This word must be allowed the very broad meaning which it had in the sixteenth century. “Government” did not refer only to political

66. *Id.*

67. In suggesting that Foucault’s category of “governmentality” builds on the categories introduced in the closing chapter of *The History of Sexuality*, I realize that 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 governmentality concepts are neologisms (“bio-power,” “pastoral power,” “governmentality”); others are historical terms (“police,” “raison d’etat”) 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 “anatomo-political” and the “bio-political” the same as the contrast between “discipline” and “government”?

David Garland, “Governmentality” and the Problem of Crime, 1 THEORETICAL CRIMINOLOGY 173, 193-94 (1997) (citations omitted). While sorting out these terminological complexities is no doubt important, it is not essential to my effort to establish an alternative reading of the neoliberal state as a preface to contrasting my reading of the politics of lethal injection with that offered by Sarat.

structures or to the management of states; rather it designated the way in which the conduct of individuals or of groups might be directed: the government of children, of souls, of communities, of families, of the sick. It did not only cover the legitimately constituted forms of political or economic subjection, but also modes of action, more or less considered and calculated, which were destined 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.⁶⁸

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, and 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 bio-political 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 Foucault's observations do suggest, first, that what Sarat calls the "state" should be situated on the more comprehensive field of political relations indicated by the term "governmentality."⁶⁹ Second, the aim of inquiry, as Nikolas Rose urges, 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."⁷⁰ Finally,

68. Michel Foucault, *The Subject and Power*, in HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM & HERMENEUTICS 208, 221 (Leslie Sawyer trans., 1982).

69. Sarat comes closest to appreciating the import of Foucault's concept of governmentality when he writes: "Modern power fosters and regulates life through a multiplicity of local institutions and everyday practices, rather than by threatening death in spectacular but sporadic displays." SARAT, *supra* note 23, at 206. But, again, this represents a rare departure from his more familiar representation of the state in what I have here called Weberian and Lockean terms.

70. NIKOLAS ROSE, POWERS OF FREEDOM 18 (1999). Nikolas Rose makes a similar observation elsewhere with Peter Miller:

Central to the possibility of modern forms of government . . . are the associations formed between entities constituted as "political" and the projects, plans and practices

in contrast to Sarat, who does not as a rule inquire into the generative conditions of the Weberian state's sovereign pretensions, we should ask how that state, although constituted by its situation on this larger field, 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, between public and private, and between 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, in particular, into 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.⁷¹ 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 anatomic and bio-political modalities of power within neoliberal regimes. For example, the operation of certain technologies of anatomic-political power, such as the multiple but generally hidden 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

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.

Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOC. 173, 175 (1992).

71. See, e.g., 1 FOUCAULT, *supra* note 59, at 89 (“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.”); see also Foucault, *supra* note 63, at 95 (“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.”).

dismissals on the basis of these results can and cannot be challenged. Here, rather than disappearing, law helps to constitute the workings of anatomic-political power. By the same token, certain technologies of bio-political 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, define what does and does not count as "medical" treatment, mandate coverage for the uninsured, etc. 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."⁷²

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 that of "regulation."⁷³ This perspective acknowledges that the workings of anatomic- and bio-political 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; but nor 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.⁷⁴ Neither of these caricatures adequately grasps the way in which law, especially as it is informed by various sorts of nonlegal knowledge and expertise (e.g., medical, psychiatric, and 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, penitentiaries, etc.), and as those parts become more deeply invested in the regulation of formally nonpolitical domains (e.g., banking transactions, medicine, domestic

72. 1 FOUCAULT, *supra* note 59, at 144.

73. See generally ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW* (1994).

74. Foucault offers this representation of law:

[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.

Michel Foucault, *Two Lectures*, in *POWER/KNOWLEDGE* 78, 105 (Colin Gordon ed., Colin Gordon et al. trans., 1980).

relations, product safety, restaurant sanitation, welfare entitlement), law is itself governmentalized.⁷⁵

Before proceeding to the implications of Foucault's argument for Sarat's reading of capital punishment, let me simply note that how we conceptualize those implications 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 anatomo- and bio-politics, 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, anatomo-politics, and bio-politics now coexist in a triangulated relationship on the field of governmentality.⁷⁶ Were we to elaborate the terms of this geometrical metaphor, he continues:

[M]aybe 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.⁷⁷

Whatever its value in helping us get a conceptual handle on the competing imperatives and hence the internally fractured character of the neoliberal state, the metaphor of triangulation is not unproblematic (as I suspect Foucault would be the first to concede). For example, by assigning

75. See Nikolas Rose & Mariana Valverde, *Governed by Law?*, 7 SOC. & LEGAL STUD. 541, 546 (1998).

76. For example, Foucault argues that “[w]e 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.” 1 FOUCAULT, *supra* note 59, at 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 bio-politics. 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.

77. 1 *id.* at 103-04.

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; appreciation of that mutual imbrication, I argue in Section III.D, is crucial to an adequate understanding of the politics of lethal injection. Moreover, and as I suspect Sarat would be quick to note, the understanding of sovereignty put forward by Foucault must be reconfigured within an American context where it, advanced in the name of the people, bears few if any traces of the European absolutist regimes that inform Foucault’s conception. Be that as it may, as I also hope to show, the heterogeneous conception of the neoliberal state recommended by Foucault alerts us to complications (as well as opportunities) that are likely to remain unacknowledged when the death penalty is configured, as it often is by Sarat, as the ultimate affirmation of the Weberian state’s claim to sovereign authority.

III. NEEDLING THE SOVEREIGN

To speak of capital punishment in the United States today is to speak of lethal injection. Although several states afford the condemned a choice of method, thirty-six of the thirty-eight states that now authorize capital punishment, as well as the U.S. military and the federal government, designate lethal injection as their default means of dealing death.⁷⁸ How are we to make sense of this nearly universal abandonment of other methods, and what dilemmas does the adoption of lethal injection pose for the contemporary liberal state? Moreover, and in light of the argument of the preceding Part, what might it mean to contend that execution by lethal injection is not so much a new means of making good on the state’s traditional claim to “the ultimate power of sovereignty, namely the power over life itself,”⁷⁹ but rather an instance of regulated death on the more comprehensive field of political relations specified by the term “governmentality”?

In Section A of this Part, I begin to tackle these questions with an account of Sarat’s reading of lethal injection. Then, in Section B, in order to show how an appropriation of Foucault’s concept of governmentality calls attention to phenomena whose import for our understanding of lethal injection remains unappreciated by Sarat, I consider, first, the rationalization of death in modern Western cultures and, second, the contemporary controversy over physician-assisted suicide. The former establishes a vital element of the context within which lethal injection

78. For information on statutorily prescribed methods of execution throughout the United States, see Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/methods.html> (last visited Nov. 19, 2001).

79. SARAT, *supra* note 23, at 154.

comes to be construed as not merely a possible but, indeed, our preferred method of execution; the latter, especially when juxtaposed to execution by lethal injection, indicates the unstable terrain that now defines the politics of death in neoliberal regimes. To show how that instability has taken shape in the specifically legal domain, in Section C, I consider a single Supreme Court case, *Heckler v. Chaney*,⁸⁰ which, I argue, cannot be understood adequately absent appeal to something akin to Foucault's triangulated conception of the neoliberal state. Finally, in Section D, I show how the governmentalization of the neoliberal state creates a crisis for its pretensions to sovereignty, especially when compounded by the effects of globalization, and I explain why I am persuaded that execution by lethal injection is ill-equipped to serve as a means of remedying that crisis.

A. *Legitimation by Injection*

The third chapter of *When the State Kills*, titled "Killing Me Softly: Capital Punishment and the Technologies for Taking Life," furnishes an additional iteration of Sarat's overarching theme, the never-quite-secure opposition between state violence and its extralegal kin. A crucial premise of this chapter is Sarat's contention that "[i]n a society that has replaced public punishment and torture with the penitentiary, state killing appears anachronistic."⁸¹ To paper over its status as embarrassing relic, ever more refined technologies of execution have been adopted over the past century. These innovations, culminating in lethal injection, do not in any way compromise the state's title to its ultimate sovereign prerogative, but they do indicate that enforcement of this title is subject to certain constraints, such as when the Supreme Court in 1890 prohibited execution methods that "involve torture or a lingering death."⁸² Yet, Sarat argues, the very success of the quest to secure a method of execution, which, unlike those caused by less genteel means, leaves the body unmarked and appears to cause no pain, may also render it unable to satisfy one of the central political imperatives of capital punishment. If, as one survivor of the Oklahoma City bombing maintained, "death by injection is 'too good' for McVeigh"; if, as Arlene Blanchard contended, justice will only be done when he is compelled to "experience just a little of the pain and torture that he has put us through";⁸³ and if, as Justice Antonin Scalia once noted, "a quiet death by lethal injection" appears "pretty desirable"⁸⁴ when compared to the

80. 470 U.S. 821 (1985).

81. SARAT, *supra* note 23, at 206.

82. *In re Kemmler*, 136 U.S. 436, 447 (1890).

83. SARAT, *supra* note 23, at 64.

84. *Callins v. Collins*, 510 U.S. 1141, 1142-43 (1994) (Scalia, J., concurring in denial of certiorari).

torments endured by many homicide victims, then our most perfect method of killing may prove unable to appease the desire for vengeance that animates much of the enthusiasm for the death penalty. What Blanchard and Scalia both understand is that execution by lethal injection involves, on the one hand, a tension between our desire to realize the claims of retribution by killing those who kill, and, on the other, a method that, because it seems to do no harm other than killing, cannot satisfy the intuitive sense of equivalence that informs this conception of justice.

At first blush, Sarat continues, it might appear that the authority of the liberal state, as our designated agent of collective retribution, may be undermined by its refusal to engage in “archaic displays of sovereignty like those demanded by the survivors . . . of the Oklahoma City bombing.”⁸⁵ That conclusion, while not altogether wrong, is at the very least partial. When the state kills, this deed “generates an anxious questioning about the ways state violence differs from the violence to which it is, at least in theory, opposed.”⁸⁶ Whatever legitimation deficit is precipitated by lethal injection’s inability to do justice to the passion of revenge is largely offset by its capacity to assuage just this sort of questioning. The state, Sarat reminds us once again, “must find ways of distinguishing [its] killing from the acts to which it is a supposedly just response and to kill in ways that do not allow the condemned to become an object of pity or to appropriate the status of the victim.”⁸⁷ Capital punishment’s medicalization helps to nail down this distinction precisely because it appears so unlike an act of bloodthirsty retaliation:

The survival of state killing as an exercise of sovereign power depends on its ability to respond to the return of revenge, while being subject, even if against its will, to an unending search for technologies that in their capacity to kill with a pretense of humanity allow those who kill both to end life and, at the same time, to believe themselves to be the guardians of a moral order that, in part, bases its claims to superiority in its condemnation of killing.⁸⁸

Sarat concludes, although not unproblematically, that, in the final analysis, death by lethal injection sustains the law’s claim to dispassionate rationality and hence the authority of the state that administers it.

There is much to commend in Sarat’s reading of lethal injection, and by no means do I mean to reject it outright. Indeed, I would argue that, at least in one respect, Sarat’s reading is more insightful than is that offered by

85. SARAT, *supra* note 23, at 84.

86. *Id.* at 83.

87. *Id.* at 64.

88. *Id.* at 84.

Foucault in *Discipline and Punish*. There, Foucault argues that lethal injection, precisely because it seems to cause a death absent a killing, effectively shores up liberalism's conviction that legally mandated punishments aim not to inflict corporeal pain per se, but rather to employ the body as an intermediary through which the capacity of the juridical subject to bear rights is suspended or, in the case of capital punishment, eliminated altogether. Whereas Foucault, on the basis of this reading, concludes that the medicalization of capital punishment successfully contributes to the realization of a "utopia of judicial reticence,"⁸⁹ Sarat, to his credit, insists that this utopia is a precarious accomplishment, for it is forever troubled by unruly passions demanding precisely the sort of display that lethal injection is intended to quell. That said, the fact remains that Sarat's reading of lethal injection is state-centric in the sense that it construes the statutes that authorize this penalty as commands issued and enforced by an institutionalized monopolist over the means of legitimate violence, and that it regards executions as the ultimate and, as such, the most extraordinary expression of sovereign authority. Yet these are precisely the premises that are called into question by Foucault's later work, which recommends that we situate this state and its claim to sovereign authority within the more comprehensive context suggested by the category of governmentality.⁹⁰

B. *Rationalizing Death*

A complete genealogy of the needle's displacement of hanging, the gas chamber, electrocution, and the firing squad is beyond the scope of this Review. A crucial element of that account, however, one that is neglected by Sarat precisely because his account focuses so single-mindedly on the state and its legitimation dilemmas, is the rationalization of death in modern Western political orders. In his history of attitudes toward death in the West, Philippe Ariès suggests that in premodern orders dying was regarded first and foremost as a matter of fate.⁹¹ As such, death 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

89. FOUCAULT, *supra* note 64, at 11.

90. Such an approach is occasionally intimated by Sarat, as when he insists that the practice of capital punishment "is caught up in, and sustained by, a series of contradictions in our social and political attitudes," SARAT, *supra* note 23, at 15, and when he suggests that these contradictions are generated in large part by the erosion of the categorical distinctions (e.g., between public and private, criminal and victim) that were once constitutive of liberal political orders, *id.* at 43. But, again, these insights are never pursued in a way that occasions a fundamental rethinking of what I have labeled Sarat's Weberian presuppositions.

91. PHILIPPE ARIÈS, WESTERN ATTITUDES TOWARD DEATH 13, 28 (Patricia M. Ranuin trans., 1974).

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, i.e., 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, mortality had become for many not a given, but something akin to a scandal. Mocking the Enlightenment fantasy of humanity's capacity to subject the world and its events to rational mastery, death stands now 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 a matter first and foremost 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, we more typically ask about its determinate cause or causes. Furthermore, because we believe that all causes can, at least in principle, be determined through scientific inquiry, and because we believe that all causes, once known, are, at least in principle, subject to technical intervention, we ever more come to believe that 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 might or should 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 by all available means. As such, suggests Zygmunt Bauman, offering a metaphor that is much to my liking:

[D]eath 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 in technology.⁹²

92. ZYGMUNT BAUMAN, MORTALITY, IMMORTALITY AND OTHER LIFE STRATEGIES 140-41 (1992).

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, the body 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."⁹³

When the meaning of life is defined in terms of defeating death, i.e., 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.⁹⁴

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).⁹⁵

So construed, the rationalization of death—mapping it onto an epistemological space that is inhabited 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

93. *Id.* at 36.

94. *Id.* at 130.

95. *Id.*

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 that profession's discursive practices.

Premodern death was a public event, not simply in the sense that it was an everyday occurrence, a product of violence, accident, or the cumulative burdens of embodiment, but also in the sense that it was interpretable in terms of shared structures of ritualized, typically religious, meaning. Medicalized death within neoliberal regimes, by way of contrast, is in certain respects a fundamentally private affair. That this is so, it should be acknowledged, 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 extra-state 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, 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 thus 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 unease in the face of death.

On the basis of considerations of this sort, Bauman concludes: "Death is now the thoroughly private ending of that thoroughly private affair called life."⁹⁶ 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.'"⁹⁷ But this representation, as

96. *Id.*

97. 1 FOUCAULT, *supra* note 59, at 138.

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, forms of specialized knowledge, and codes of conduct have been joined to state authorities, public policies, government-funded programs, administrative regulations, and formal statutes in the constitution of what Foucault aptly designated the “juridico-medical complex.”⁹⁸ That complex includes the finely reticulated relationship between law and medicine in, to cite but a few examples, certifying the fact of death, dictating the form and content of living wills, regulating the operation of morgues, dictating the allocation of scarce organs for transplant purposes, analyzing DNA evidence during homicide trials, governing the conduct of fetal tissue research, determining when life support may or may not be withdrawn, and disposing of embryos after sperm or egg donors have died.

The juridico-medical complex is part and parcel of what Sarat begins to get at, but never specifies adequately, via his occasional references to neoliberal regimes and distinctively modern economies of power. The elements of this complex are many, but none respects the categorical distinctions between state and society, public and private, that Sarat thinks crucial to maintaining the distinction between extralegal revenge and the just retribution meted out by law. To illustrate this border confusion, consider one of the more controversial contemporary manifestations of death’s progressive rationalization, namely, physician-assisted suicide. Like execution by lethal injection, physician-assisted suicide is located within what Michael Davis calls “the shadow country of medicine.”⁹⁹ 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

98. MICHEL FOUCAULT, *The Social Extension of the Norm*, in FOUCAULT LIVE 197 (Sylvère Lotringer ed., Lysa Hochroch & John Johnston trans., 1996).

99. Michael Davis, *The State’s Dr. Death: What’s Unethical About Physicians Helping at Executions?*, 21 SOC. THEORY & PRAC. 31, 44 (1995). The relationship between these two issues grows more direct when we ask if someone condemned to die should be permitted to “commit suicide” by waiving the right to all post-conviction 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 MELVIN I. UROFSKY, *LETTING GO: DEATH, DYING AND THE LAW* (1993); and Kathleen Johnson, Note, *The Death Row Right To Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981).

border threat, has condemned physician-assisted suicide on the ground that it “is fundamentally incompatible with the physician’s role as healer”; or that the AMA’s House of Delegates has adopted a resolution opposing all bills aimed at legalizing this practice.¹⁰⁰ 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 ground that its own 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 physicians to do what, until 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 neoconservative reprivatization.¹⁰¹ Either way, the politicization of this issue indicates the increasing untenability of an unvarnished Weberian understanding of the liberal state, i.e., 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.

The tenability of this understanding of the liberal state is similarly called into question when we consider execution by lethal injection, yet another manifestation of death’s rationalization, in light of the category of governmentality and so in relation to the juridico-medical complex. Here, too, our attention is directed to the constellation of state and extra-state techniques, knowledges, regulations, authorities, and forms of conduct that comprise this practice, a constellation that, for my purposes, can be gathered together under the heading of “medicalization.” But what exactly does it mean to say that execution by lethal injection is a medicalized

100. Am. Med. Ass’n, Ethical Opinion No. E-2.211, Physician-Assisted Suicide (1996), http://www.ama-assn.org/apps/pf_online/pf_online; Am. Med. Ass’n, House of Delegates Policy No. H-270.965, Physician-Assisted Suicide (1998), http://www.ama-assn.org/apps/pf_online/pf_online.

101. On these two different readings of this controversy, see Thomas F. Tierney, *Death, Medicine and the Right To Die: An Engagement with Heidegger, Bauman and Baudrillard*, 3 BODY & SOC’Y 51 (1997).

procedure? This question is thornier than one might at first suspect. 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 ground 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."¹⁰² 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.¹⁰³ 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, in particular by exhorting them to refrain from "participation" (although it does permit them to "certify" death, provided that its declaration is announced by

102. REPORT OF THE N.Y. STATE COMM'N ON CAPITAL PUNISHMENT 75 (Albany, Troy Press Co. 1888). In a comparative vein, it is worth noting that, in 1953, England's second Royal Commission on Capital Punishment also explored lethal injection as an alternative to hanging, but ultimately elected not to recommend this innovation, primarily in response to objections registered by the British Medical Association. REPORT OF THE ROYAL COMM'N ON CAPITAL PUNISHMENT 1949-1953 para. 749 (1953). 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." *Id.* para. 748.

103. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4209(f) (1995) ("The administration of the required lethal substance . . . 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 Correction] . . . without prescription . . .").

another).¹⁰⁴ To the extent that this exhortation produces its desired results, which is not always the case, perhaps we should conclude, following Michael Davis, that execution by lethal injection is no more of a medical procedure than execution by firing squad is a military procedure.¹⁰⁵

What these competing reflections indicate is that, as is the case with physician-assisted suicide, and as one would anticipate 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 event, a painless matter of putting the condemned "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.¹⁰⁶ On the other hand, for reasons suggested above, the medical profession has an obvious interest in resisting

104. An American Medical Association report on capital punishment 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.

Am. Med. Ass'n, House of Delegates Policy No. H-140.957, *Physician Participation in Capital Punishment* (1997), http://www.ama-assn.org/apps/pf_online/pf_online. 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.

Id. 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 vary 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 AM. COLL. OF PHYSICIANS ET AL., *BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES* 49-72 (1994).

105. Davis, *supra* note 99, at 46.

106. See, for example, *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992), in which a person condemned to die in Arkansas by lethal injection argued that, if the state was not required by statute to have the procedure performed by a physician, it could not guarantee that lethal injection would not violate the Eighth Amendment's prohibition of cruel punishment.

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.”¹⁰⁷ 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 bio-political and punitive functions. How that destabilization opens up novel ways of rendering problematic capital punishment by lethal injection—ways that are unlikely to be appreciated 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.

C. *Safe and Effective Executions*

In Part II, I appropriated Foucault’s concept of governmentality in order to demonstrate the permeability of the state/nonstate distinction in neoliberal regimes and, by extension, the inadequacy of an unvarnished Weberian construction of the state. In Section III.B, I suggested that the erosion of this border is manifest in the emergence of a juridico-medical complex. In addition, I argued that the current controversy over physician-assisted suicide, as well as that concerning the appropriate role, if any, of medical personnel in the administration of executions by lethal injection, are both indicators of this complex’s emergence and its instability. In the present Section, my concern is with the second of these two controversies and, more particularly, with the way in which the neoliberal state’s adoption of bio-political responsibilities, in addition to those traditionally associated with the claims of sovereignty, invites legal challenges to the practice of capital punishment that would have been inconceivable had the liberal state remained explicable in the Weberian terms generally endorsed by Sarat.

Demonstrating the infinite ingenuity of the American legal profession, attorneys acting on behalf of Larry Chaney and Doyle Skillern, death row inmates in Oklahoma and Texas, submitted in the final weeks of 1980 a petition to the Food and Drug Administration. In the petition, Chaney and

107. See, e.g., Herb Haines, *Primum Non Nocere: Chemical Execution and the Limits of Medical Social Control*, 36 SOC. PROBS. 442 (1989); Dennis S. Hsieh, *Physicians Should Give Injections*, 261 JAMA 132, 132 (1989).

Skilern argued 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,"¹⁰⁸ especially when administered by untrained penitentiary personnel, the FDA was legally bound to prohibit their employment for this purpose.¹⁰⁹ More specifically, they stated that employment of barbiturates and paralytics for the purpose of inflicting a death sentence violated the "new drug" as well as the "misbranding" provisions of the Food, Drug, and Cosmetics Act (FDCA) of 1982.¹¹⁰ To make the first of these two claims, they argued that these drugs qualified as new because lethal injection was not a use for which the drugs had been deemed "safe and effective." In support of this reading of the term "new," Chaney and Skilern also 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 drugs employed by veterinarians to put infirm and diseased animals to death. To make the second of the 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. 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 were "not approved for use as a means of execution, [were] not considered safe and effective as a means of execution and should not be used as a means of execution."¹¹¹ In closing, Chaney and Skilern, arguing from the FDA's mandate to take appropriate action whenever the use of a drug endangers public health, petitioned the FDA to "[a]dopt a policy and procedure for the seizure and condemnation from prisons or state departments of corrections 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 injections."¹¹²

These claims were denied review by the FDA on the ground that its jurisdiction did not extend to regulation of the drugs in question when employed in conjunction with the performance of a lethal injection, and the FDA cited its discretionary authority in justifying its refusal to initiate any

108. *Inmates Ask Ban on Drugs as Method of Execution*, N.Y. TIMES, Jan. 8, 1981, at A13 (quoting the petitioners' brief filed with the Department of Health and Human Services).

109. For a careful account of the legal controversy that emerged out of this petition, see Michele Stolls, *Heckler v. Chaney: Judicial and Administrative Regulation of Capital Punishment by Lethal Injection*, 11 AM. J.L. & MED. 251 (1985).

110. 21 U.S.C. §§ 331(b), 331(k), 352, 355(a) (1994).

111. *Inmates Ask Ban on Drugs as Method of Execution*, *supra* note 108.

112. *Chaney v. Heckler*, 718 F.2d 1174, 1178 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985).

investigative or regulatory activity with respect to the claims advanced by Chaney and Skillern. In defending this reaffirmation of the boundary demarcating the state's punitive from its bio-political imperatives, and apparently without deliberate irony, the FDA claimed that employment of the drugs required for an execution by lethal injection fell within a recognized exception to the FDCA's coverage, known as the "practice of medicine" exemption. That exemption was 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 fell into this same category. Moreover, the FDA contended, the use of drugs for the purpose of lethal injection did not pose a danger to public health, first, because the number of persons affected was limited to those convicted of capital crimes and sentenced to death, and second, because no duly authorized statutory enactment that furthered a legitimate state purpose could, 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 the District Court for the District of Columbia.¹¹³ One year later, that court granted summary judgment in favor of the FDA on the ground that its decision not to undertake investigatory or enforcement proceedings was not subject to judicial review. That ruling was vacated in October 1983 by a divided panel of the D.C. Circuit 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 2-1 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."¹¹⁴ If the unapproved use of approved drugs in these other two contexts threatened public health, as the FDA had maintained in the past, it was irrational to conclude that the use of drugs to kill persons did not do the same. Additionally, Wright argued, the FDA's refusal to act might implicate the constitutional rights of the condemned and, more specifically, their right to a noncruel execution. While it was no doubt true that the FDA was "refusing to exercise

113. For a subsequent variation on the arguments advanced in *Chaney*, see *Delaware v. Deputy*, 644 A.2d 411 (Del. Super. Ct. 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, not surprisingly, proved no more successful than did *Chaney*.

114. *Chaney*, 718 F.2d at 1189 (emphasis omitted).

enforcement discretion because it [did] not wish to become embroiled in an issue so morally and constitutionally troubling as the death penalty,"¹¹⁵ such inaction was impermissible if it deprived the condemned of the FDA's expert judgment regarding the safety and effectiveness of the drugs employed in lethal injection. This was all the more true if the agency's refusal had 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, Judge Antonin Scalia argued that the FDA's discretionary authority was sufficiently broad to warrant its refusal to initiate investigatory 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 represented use into a law not only permitting but mandating federal supervision of the manner of state executions."¹¹⁶ Leaving aside these considerations of federalism, Scalia went on, the majority's solicitude for those sentenced to die by this method was 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.¹¹⁷

Two years later, in 1985, after eight executions by lethal injection had already been conducted, Scalia's opinion prevailed when the U.S. Supreme Court unanimously reversed the ruling of the court of appeals.¹¹⁸ Writing for the Court, Justice Rehnquist elected not to address the question of whether the drugs used in lethal injection were 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 meaningful standards for defining the limits of that discretion.

115. *Id.* at 1192.

116. *Id.* (Scalia, J., dissenting).

117. *Id.* at 1197.

118. *Heckler v. Chaney*, 470 U.S. 821 (1985).

Heckler v. Chaney has had considerable impact on subsequent cases dealing with judicial review of administrative agencies, but very little on capital punishment jurisprudence. I have reviewed it here, however, because it illustrates my contention that the dilemma of capital punishment within the neoliberal state, especially when such punishment is 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 and, more specifically, the emergence on that field of a juridico-medical complex. While the ironies of Rehnquist's opinion were no doubt lost on Skillern, who was executed by lethal injection one month after *Heckler* was argued before the Supreme Court but two months preceding its decision, its author clearly sensed that the terms of the case induced 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."¹¹⁹ The counterintuitive result to which Rehnquist alludes appears to censure a specific way of executing human beings because, in doing so, it may harm them. That, in turn, is the premise of the contention that the administrative agency authorized to protect persons from dangerous drugs should also be required to certify their capacity to kill reliably.¹²⁰

What Chaney and Skillern sought to do was not so much to contest the ultimate manifestation of sovereign 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- and bio-politics has altogether displaced that of sovereignty), he might well contend that the collision that results is a function of the opposition between the old

119. *Id.* at 827.

120. The authors who come closest to appreciating the oddly revelatory character of *Heckler* are Franklin Zimring and Gordon Hawkins, who close their discussion of this case by writing:

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.

FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 119 (1986). The present Section of this Review, along with its immediate predecessor, may be read as an effort to articulate the historical and institutional conditions of the reality Zimring and Hawkins find "monstrous." *Id.*

and the 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.¹²¹

But, we should ask, is this construction of capital punishment as a relic, one that gives expression to a premodern conception of sovereignty, entirely adequate? Sarat presupposes much the same understanding when, after quoting the preceding passage from Foucault with approval, he suggests that “execution, even execution by lethal injection, seems rudely out of place, a throwback to earlier, more savage times.”¹²² 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, that opposition may also explain, 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 confusion of the imperatives of sovereignty and those of bio-politics, a conflation of the neoliberal 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 what Foucault does not do adequately (and nor does Sarat) is to ask how the classical conception of sovereignty has itself been reconfigured in response to the advance of governmentalization,

121. 1 FOUCAULT, *supra* note 59, at 138. Foucault also argues:

Law cannot help but be armed, and its arm, *par excellence*, is death; to those who transgress it, it replies, at least as a last resort, with that absolute menace. The law always refers to the sword. But a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms. It is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility.

1 *id.* at 144.

122. SARAT, *supra* note 23, at 206.

which has subverted at least partly the traditional liberal distinction between state and society, as well as the advance of globalization, which has diminished at least partly the neoliberal 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 next Section.

D. *Death as a Nonevent*

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. As I noted earlier, the imperatives of sovereignty, within liberal capitalist regimes, were subsequently joined by and to those of anatomo- and bio-politics. 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.¹²³ It was 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 institutional sites, including the prison, but also the clinic, the reformatory, the halfway house, and so forth. With the proliferation of such sites and the 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

123. For an account of these reforms in the United States, see DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE* (1980). For an exploration of these transformations in England, see STANLEY COHEN, *VISIONS OF SOCIAL CONTROL* (1985).

David Garland calls the “penal-welfare complex,”¹²⁴ 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 bio-political technologies throughout the body politic, is the insinuation of medical and psychological knowledge into the domain of criminal punishment. That, in turn, helps to fashion the context within which adoption of lethal injection as a method of execution eventually becomes possible 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 bio-politics, the traditional claims of sovereignty, best revealed in the promise to provide security against enemies without and within, remain central to the neoliberal state’s identity. Yet, that state now finds it ever more difficult to make good on the imperatives of sovereignty, for at least two reasons. First, as one would expect given its governmentalization, the state has grown ever more de-centered (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 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 complex network of global interdependencies that mocks its claim to control events even within its own borders. Late modernity, to quote William Connolly,

is a time when the worldwide web of systemic interdependencies has become more tightly drawn, while no political entity or alliance

124. DAVID GARLAND, *PUNISHMENT AND WELFARE* 5 (1985). Garland, it should be noted, 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 penality, i.e., from public displays of sovereign authority aimed at inflicting maximal pain to “private” incarceration aimed at rehabilitation of the “soul,” 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.

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.

This condition renders increasingly anachronistic and dangerous, I think, classic-modern conceptions of the state as a sovereign or self-subsistent entity that enters into "foreign relations" or—within the frame of the democratic ideal—as a self-sufficient, democratically accountable political entity with the efficacy to control the collective destiny.¹²⁵

As such, the authority of the neoliberal 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 a claim to sovereignty that is now ever more mythical.¹²⁶ One means of accomplishing the latter, of course, 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.

Sarat, I suspect, would have no particular quarrel with this analysis of the neoliberal state's woes as well as this reading of its preferred ways of responding to them. There is, however, a subtle but significant difference between our positions. Whereas Sarat usually (though not always) reads capital punishment as a manifestation of an already realized (although often troubled) sovereign authority, I am proposing that it be read instead as a

125. WILLIAM CONNOLLY, *IDENTITY/DIFFERENCE* 23-24 (1991).

126. On this point, see David Garland, *The Limits of the Sovereign State*, 36 *BRIT. J. CRIMINOLOGY* 445 (1996).

means by which the neoliberal state, in its sovereign capacity, is manufactured.¹²⁷ This representation of the neoliberal state as an *effect* avoids the sort of reification that is encouraged by Weber's formal definition. On this genealogical account, the state is not some privileged first cause that stands apart from the order it is said to rule. Rather, it is a relational consequent whose appearance of free-standing reality is produced and sustained by the reiterated and combined working of the various practices that serve to demarcate "it" from the complex of practices that come to be deemed "external" to it. Timothy Mitchell provides a useful example of such a state-generating practice:

One characteristic of the modern state . . . is the frontier. By establishing a territorial boundary and exercising absolute control over movement across it, state practices define and help constitute a national entity. Setting up and policing a frontier involves a variety of fairly modern social practices—continuous barbed-wire fencing, passports, immigration laws, inspections, currency control and so on. These mundane arrangements, most of them unknown two hundred or even one hundred years ago, help manufacture an almost transcendental entity, the nation state. This entity comes to seem something much more than the sum of the everyday activities that constitute it, appearing as a structure containing and giving order and meaning to people's lives. . . . What we call the state, and think of as an intrinsic object existing apart from society, is the sum of these structural effects.¹²⁸

The reality of the state, on this account, is an appearance generated by the establishment of a uniform legal system, the securing of territorial borders, the creation of a common coinage, and, equally if not more importantly, acts of killing with impunity. 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

127. Sarat comes closest to endorsing this understanding of the relationship between capital punishment and the neoliberal state when he writes: "At a time when citizens are skeptical that government activism is appropriate or effective, the death penalty provides one arena in which the state can redeem itself by taking action with clear and popular results." SARAT, *supra* note 23, at 18. In effect, my criticism of Sarat is predicated on the assumption that there is no such thing as the state independent of the work accomplished by this and other state-constituting practices.

128. Timothy Mitchell, *The Limits of the State: Beyond Statist Approaches and Their Critics*, 85 AM. POL. SCI. REV. 77, 94 (1991).

which these forms of authority, personhood, and community are in fact the established ones.¹²⁹

Considered as so many performative enactments, executions actively participate in constituting the state that is then (mis)taken to be the uncaused cause, the original author, of these same deeds; and, in doing that, executions help to fashion a state that can plausibly affirm its capacity to fulfill the traditional prerogatives of sovereignty.

The advantages of this formulation are several. First, it discourages us from doing what Sarat too often does, i.e., taking as an unproblematic given the antecedent reality of the liberal state. Second, it helps us to recognize, *pace* Sarat, that this state may actually benefit from the permeability of the distinction between its violence and its extralegal counterpart precisely because such instability requires it to engage in perpetual remanufacturing of the conditions of its own legitimacy. Third, it encourages us not to presuppose but to ask of any given political practice whether it does or does not succeed in contributing to the constitution of a state that can sustain its Weberian self-representation as an autonomous locus of sovereign authority. More specifically, can execution by lethal injection effectively participate in manufacturing a state that is able to present itself credibly as sovereign monopolist over the means of violence and, hence, as an agent capable of preserving the peace within and defending against aggression without? If it cannot, as I suggest, then capital punishment may be in danger of slipping into obsolescence not because it is anachronistic, as Sarat would have it, and not because it contradicts the bio-political imperatives of the welfare state, as Foucault would have it, but rather because it may in time 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 her *The Disposal of Inmate #85271: Notes on a Routine Execution*.¹³⁰ Lynch begins by asking how we might think about capital punishment were we to adopt the theoretical perspective, most often associated with the work of Jonathan Simon and Malcolm Feeley, that has come to be known as the “new penology.”¹³¹ This perspective, which implicitly contends that neither Foucault’s triangle nor Garland’s penal-welfare complex is entirely adequate as an articulation of the distinguishing features of the neoliberal state, suggests that neither preventative nor rehabilitative models suffice to explain many of the more

129. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 265 (1990).

130. Mona Lynch, *The Disposal of Inmate #85271: Notes on a Routine Execution*, in 20 STUDIES IN LAW, POLITICS, AND SOCIETY 3 (Austin Sarat & Patricia Ewick eds., 2000).

131. See Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); Jonathan Simon & Malcolm M. Feeley, *True Crime: The New Penology and Public Discourse on Crime*, in PUNISHMENT AND SOCIAL CONTROL 147 (Thomas G. Blomberg & Stanley Cohen eds., 1995).

significant recent reforms in penal intervention. The overriding goal of these reforms, according to this model, is neither the elimination of crime nor the 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 this process.”¹³² 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, is not, *pace* Justice Potter Stewart, “a punishment different from all other sanctions in kind rather than degree.”¹³³ 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 any affective elements that might interfere with this rationalized task.

Central to that endeavor, Lynch argues, is adoption of lethal injection as a method of execution. “[T]he point,” said C.J. Drake, spokesperson for the Florida Department of Corrections, shortly after that state completed its first two executions by lethal injection, “is to make what you see as uneventful as possible.”¹³⁴ Echoing Drake’s observation, on the basis of her own experience as witness to a lethal injection in Arizona, Lynch testifies that 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 death is rendered still more mundane, ever more a nonevent, Lynch notes, by its incorporation within a detailed set of normalized operating procedures (which includes, incidentally, a shift in the time of executions from midnight to conventional 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

132. Lynch, *supra* note 130, at 7.

133. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976).

134. *Lethal Injection Executions More Secretive than by Chair*, SARASOTA HERALD-TRIB., Mar. 3, 2000, at ZB.

it easier to meet targeted system goals, including reduction of the backlog of persons 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.”¹³⁵ To defend this nonobvious conclusion, without saying so in so many words, she questions Sarat’s contention that the legitimacy deficit caused by the “humanitarianism” of lethal injection, i.e., its failure to satisfy the claims of retribution, is more than compensated by the law’s deployment of a technology of killing that is uniquely its own, i.e., one that is clearly distinguishable from the methods typically employed by common murderers. That conclusion, Lynch implies, underestimates “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.”¹³⁶ 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 Allan Lee Davis following his botched electrocution. While these incidents might appear to augur a return to more violent methods of execution, Lynch thinks that unlikely since such a move would contradict our discourse of humanitarianism and our 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.”¹³⁷ Should that day come, proponents of the death penalty and, more particularly, those who have promoted the cause of lethal injection because they believe this method lubricates the state’s machinery of death, will have finally outwitted themselves.

The broader import of Lynch’s speculation can be teased out by asking whether execution by lethal injection can successfully participate in reconstituting the sort of state that can credibly present itself in Weberian terms, i.e., 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

135. Lynch, *supra* note 130, at 25.

136. *Id.* at 25-26.

137. *Id.* at 27.

so, first recall the torture and execution of the attempted regicide, Damiens, as described in the oft-cited opening pages of Foucault's *Discipline and Punish*.¹³⁸ The visible dismemberment of Damiens's body is the means by which the impaired authority of the absolutist 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, i.e., 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, consider the lethal injection of Charlie Brooks, the first person in the United States to be dispatched by such 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.¹³⁹ 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 a vital 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 within 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

138. See FOUCAULT, *supra* note 64, at 3-5.

139. Henry Schwarzschild, *Homicide by Injection*, N.Y. TIMES, Dec. 23, 1982, at A15.

punishable body, Alan Hyde argues that lethal injection originally emerged in response to worries about the sentimental body. This democratic entity, 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 [Damien], nor a nineteenth-century sentimental body, but rather to our distinctive late-twentieth-century artifact, the absent body."¹⁴⁰ 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 property Physical pain, the pain of the body itself, is no longer the constituent element of the penalty."¹⁴¹ The lethally injected body is the body that, as far as possible given the irreducible materiality of the human frame, corresponds to the imperatives of liberal law and, more particularly, the requirement 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 tangible reality of the body must be elided. And that, of course, is exactly what execution by lethal injection accomplishes by causing a death that seems to involve no killing.

But, once more, can the nonevent that is a lethal injection, applied to the absent body and figured in the managerial terms of the new penology, do the work required by the neoliberal state in order to sustain the credibility of its sovereign pretensions? In her discussion of the political import of religious sacrifice, Elaine Scarry claims that, when a collectivity finds that its belief in the supernatural is thrown into doubt, its members can reconsolidate their faith through rituals that confirm the reality of the unseen through the production of intense pain in what can be seen, whether that be their own bodies or those of their enemies. If we extrapolate this contention to the arena of capital punishment, we might conclude that an execution that retains traces of torture is a viable means of achieving what Scarry calls "analogical verification," i.e., the process through which corporeal suffering is converted into political conviction, "pain is relied on to project power, mortality to project immortality, vulnerability to project impregnability."¹⁴² But, if the task of analogical verification is to appropriate the materiality of the body in order to substantiate the reality of a claim to authority that is now seriously compromised, can that end be accomplished via a form of punishment that inflicts no pain, that eliminates

140. ALAN HYDE, *BODIES OF LAW* 196 (1997).

141. FOUCAULT, *supra* note 64, at 11.

142. ELAINE SCARRY, *THE BODY IN PAIN* 126 (1985).

dying from death, that expunges the very traces of material embodiment that would appear to be required if the abstract is to be made concrete? Precisely because it remains unmarked, precisely because it bears no signs of the violence done to it, the lethally-injected corpse resists incorporation within tales of political signification regarding sovereign authority far more effectively than does the body produced by hanging, lethal gas, the firing squad, or electrocution.

In one sense, and as Sarat recognizes when he argues that the law's legitimacy demands its adoption of a means of killing that is categorically distinct from those employed in most conventional homicides, the perfection of this nonevent is precisely what the neoliberal state requires. But, in another sense, by rendering execution an event that never quite happens, the state also renders it, to recall Lynch's term, "pointless," and a pointless event is one from which the state can derive little political advantage. Or, perhaps more carefully, 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 neoliberal 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." Inviting the construction of killing as a humanitarian event, the bio-political reconfiguration of this ultimate expression of sovereign authority undercuts a central political imperative of capital punishment; and in this sense it is the very perfection of execution by lethal injection that renders it a consummate failure. The paradox deepens when we realize that the medicalization of capital punishment is itself an expression of the state's governmentalization, which I earlier 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,¹⁴³ and only because such mishaps make palpably real the embodiment of the person being executed, that the neoliberal 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 bio-political imperatives that secure expression in our quest for a "humane execution." As such, the neoliberal state is caught between a rock and a hard place: While its preferred method

143. For an account of various ways executions by lethal injection can go wrong, see Deborah Denno, *Execution and the Forgotten Eighth Amendment*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 547 (James Acker et al. eds., 1998).

of execution fails to hurt the body in a way that concretely materializes its sovereign pretensions, methods that do just that are unacceptable precisely because the violence they inflict all too graphically harms this same body.

IV. TOWARD A STILL NEWER ABOLITIONISM

In these closing remarks, I return to Sarat's call for a "new abolitionism" in order to raise certain questions about its adequacy, questions that are informed in large part by the alternative understanding of the liberal state advanced in this Review's preceding two Parts. Recall that Sarat's abolitionism takes shape as a call to shift the terms of the contemporary debate about the death penalty. In a culture too much in love with vengeance, Sarat argues, any "frontal assault on the simple and appealing retributivist rationale for capital punishment"¹⁴⁴ is sure to be read as an expression of sentimental sympathy for Timothy McVeigh and his ilk and, for that reason, to fail. Recall also that the hero of Sarat's new abolitionism, one that abandons the doomed frontal strategy, is Harry Blackmun, who, in 1994, after close to two decades of "tinkering with the machinery of death," declared: "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."¹⁴⁵ Saying so, Blackmun made clear that his reluctant abolitionism manifests "a kind of legal and political conservatism," for it is predicated on a defense of "mainstream legal values of due process and equal protection."¹⁴⁶ For this reason, should they follow Blackmun's example, today's foes of the death penalty will speak from "a position of political respectability"¹⁴⁷ when they affirm that our system of capital punishment, by virtue of its capricious and discriminatory determination of who lives and who dies, violates norms of fairness to which we are all presumably committed:

One can, abolitionists now are able to concede, believe in the retributive or deterrence-based rationalizations for the death penalty and yet still be against the death penalty; one can be as tough on crime as the next person yet still reject state killing. All that is required to generate opposition to execution is a commitment to

144. SARAT, *supra* note 23, at 249.

145. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

146. SARAT, *supra* note 23, at 252.

147. *Id.* at 253.

democracy, the rule of law, and a mature engagement in responding to society's most severe social problems.¹⁴⁸

Indeed, on Sarat's account, adoption of this sort of abolitionism may open up unexpected political alliances, as evidenced by the fact that calls for a moratorium on the death penalty have recently been issued by prominent conservatives, including Pat Robertson and George Will,¹⁴⁹ and by the fact that, in 2000, the contemporary king of capital punishment, George W. Bush, granted his first stay of execution in order to allow DNA testing of evidence linking a man on death row in Texas to the rape of a woman he was convicted of murdering.¹⁵⁰

There is much to commend in Sarat's effort to reconfigure the terms of our contemporary debate over capital punishment, and evidence from recent public opinion polls suggests that concerns articulated in the language of fairness are often effective in nudging death penalty proponents to reconsider their position.¹⁵¹ That said, to repeat a point I made in my Introduction, this brand of abolitionism suffers from an obvious problem: The conclusion that Blackmun finds "virtually self-evident" and Sarat embraces, i.e., that our post-*Furman* experiment with the death penalty is necessarily doomed to failure, and that therefore nothing can save it from its deficiencies, is not nearly so clear to others. Indeed, immediately following his exposition of Blackmun's declaration of self-absolution, as another example of the new abolitionism, Sarat cites the American Bar Association's 1997 resolution calling for a moratorium on the death penalty. Unlike the position adopted by Blackmun, that resolution does not contain a categorical rejection of capital punishment; instead, as Sarat himself points out, it "appears to hold out hope for a process of reform in which the death penalty can be brought within constitutionally acceptable norms."¹⁵² In order to conform to those norms, the ABA contends, competent counsel in capital cases must be provided to all, adequate post-conviction habeas protections must be restored in order to ensure that innocent persons are not executed, and effective mechanisms must be devised in order to guarantee that discrimination plays no role in

148. *Id.* at 253-54.

149. See Brooke A. Masters, *Pat Robertson Urges Moratorium on U.S. Executions*, WASH. POST, Apr. 8, 2000, at A1; George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23.

150. Frank Bruni & Richard A. Oppel, Jr., *Bush Delays an Execution for the First Time in Five Years*, N.Y. TIMES, June 2, 2000, at A18.

151. Morin & Deane, *supra* note 14.

152. SARAT, *supra* note 23, at 254. Recommendation No. 107, *supra* note 7, "calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures . . . intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed."

determining who is or is not convicted of capital crimes and sentenced to death. In Sarat's judgment, however, in the present political climate, there is little reason to think that these deficiencies will or can be remedied. That prognosis forms the basis for his conclusion that the system of capital punishment is now so badly broken that it cannot be fixed.¹⁵³

The danger of Sarat's stance here, one that is common to all positions that are not predicated on absolutist ethical or religious rejections of state killing, is that it leaves open the door for a resumption of capital punishment if and when the ABA's concerns are, or more cynically, appear to be, addressed. While I agree with Sarat that there is little reason to think that substantive fairness is likely to become a hallmark of death penalty jurisprudence any time soon, there is every reason to believe that the proponents of capital punishment are quite clever enough to propose reforms, which, if adopted, will enhance the death penalty's semblance of formal rationality and thereby alleviate the concerns of those who are troubled by the issues highlighted by the ABA. Indeed, as I write, the capital punishment capital of America, Texas, is moving in exactly this direction, as its legislature passed bills during the 2001 session aimed at improving the quality of legal defense for the poor and providing DNA testing for many criminal defendants and prisoners.¹⁵⁴ While such reforms are to be welcomed insofar as they achieve their limited ends, as with others adopted in the post-*Furman* era, they may also serve to legitimate the killing state by rationalizing the procedures that generate sentences of death. Supporters of the death penalty, in short, may prove willing to abide by a somewhat diminished number of killings as a condition of safeguarding the authority of the state to exact this supreme sacrifice.

This last point suggests that the dilemma of Sarat's new abolitionism may have a more profound dimension. As I have noted throughout this Review, and as Sarat reminds us on the final page of *When the State Kills*, his "rejection of the death penalty takes the form of an effort to prevent the erosion of the boundaries between state violence and its extralegal counterpart."¹⁵⁵ What erodes this distinction is everything that worries the ABA, i.e., infection of the legal process by racial prejudice, the conviction of persons because of incompetent counsel, the employment of lethal technologies that, especially when they go awry, appear to murder rather than to execute, and so forth. To his credit, and unlike the ABA, Sarat refuses to propose incremental reforms aimed at resecuring the borders undermined by the practice of capital punishment, arguing instead for its wholesale abolition. But he does so, it seems clear, in the name of the very

153. See SARAT, *supra* note 23, at 254-57.

154. Jim Yardley, *Texas Set To Shift in Wake of Furor on Death Penalty*, N.Y. TIMES, June 1, 2001, at A1.

155. SARAT, *supra* note 23, at 260.

sort of state that, as I suggested in Part II, his critique of capital punishment presupposes. That is to say, his abolitionism turns on an appreciation of the threat posed by the death penalty to the sort of Weberian state whose claim to legitimacy is predicated on its strict adherence to the formal procedures that secure the abstraction of its laws from society and so make good on its promise of fairness. That, the reader will recall, is precisely the point of Sarat's critique of the victims' rights movement, which fails to respect the strict demarcation between public justice and private vengeance that is essential to the liberal state's authority.

It is not clear, however, given the argument I have advanced, that recovery of such a state is either possible or desirable. In all likelihood, it is not possible if, indeed, the governmentalization of the state has advanced as far as Foucault would have us believe and if the forces of globalization are now as powerful as Connolly would have us think. Even if possible, though, recovery of such a state may be undesirable precisely because, historically, a key ingredient of that state's self-understanding has been the very conception of sovereignty that invites affirmation of political power's ultimate authority over life and death. Is it possible, in other words, that efforts to refortify the borders definitive of the classical liberal state—e.g., between government and civil society, public and private, official and unofficial—may have the ironic effect of reconsolidating, if only in mythical terms, the sort of state that assumes the form, to quote Sarat, “of power pretending to its own infallibility,”¹⁵⁶ including the claim to infallibility that is implicit in every act of state killing? Worse still, to the extent that this self-representation is progressively undermined by the forces of governmentalization and globalization, is this not also the sort of state that will find it ever more necessary to engage in symbolic acts aimed at manufacturing this same self-representation, whether they take the form of capital punishment, or of pseudo-wars like that conducted in the Persian Gulf by George Bush, the elder, in 1991?

In part, Sarat's new abolitionism speaks the language of constitutional discourse, as when he urges us to abandon arguments predicated on an appeal to the Eighth Amendment and to shift instead to the Fourteenth. On other occasions, albeit in more muted tones, his abolitionism speaks the language of cultural democracy, as when he appeals to a temperament that is “marked by a spirit of openness, of reversibility, of revision quite at odds with the confidence and commitment necessary to dispose of human life in a cold and deliberate way.”¹⁵⁷ Cultivation of that temperament may require more than an appeal to the Fourteenth Amendment's Equal Protection Clause, and it may well be at odds with the Weberian conception of the

156. *Id.* at 16.

157. *Id.*

liberal state that is presupposed by that Clause. Indeed, it may require a thoroughgoing critique of that state as well as a rejection of the conception of sovereignty that remains, at least for now, essential to its self-identity. What sort of abolitionism might we imagine, for example, if we were to take as our aim maximal destabilization of the very borders Sarat seeks to reestablish? Is it possible that dissolution of the Weberian state on the field suggested by the term “governmentality,” combined with exploitation of the tensions and contradictions that suffuse that field (for example, those that are implicit in the debate over physician-assisted suicide), is a more promising way to contest the state’s standing as monopolist over the means of legitimate violence and hence capital punishment’s status as the ultimate expression of that monopoly? No doubt, such an abolitionism is fraught with its own peculiar perils. Be that as it may, it is well worth asking whether adoption of more humble and tentative modes of doing politics, modes that are inconsistent with the liberal state and its sovereign pretensions, no matter how mythical, may be a condition of our collective renunciation of the punishment that is death.
