

# Death and Other Penalties

PHILOSOPHY IN A TIME OF MASS INCARCERATION

*Edited by*

GEOFFREY ADELSBERG, LISA GUENTHER,  
AND SCOTT ZEMAN

FORDHAM UNIVERSITY PRESS

*New York 2015*

Copyright © 2015 Fordham University Press

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means—electronic, mechanical, photocopy, recording, or any other—except for brief quotations in printed reviews, without the prior permission of the publisher.

Fordham University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Fordham University Press also publishes its books in a variety of electronic formats. Some content that appears in print may not be available in electronic books.

Visit us online at [www.fordhampress.com](http://www.fordhampress.com).

Library of Congress Cataloging-in-Publication Data

Death and other penalties : philosophy in a time of mass incarceration / edited by Geoffrey Adelsberg, Lisa Guenther, and Scott Zeman. — First edition.

pages cm

Includes bibliographical references and index.

ISBN 978-0-8232-6529-9 (cloth : alk. paper) —

ISBN 978-0-8232-6530-5 (pbk. : alk. paper)

1. Capital punishment—United States.

2. Imprisonment—United States. 3. Punishment—United States. 4. Criminal justice, Administration of—United States. I. Adelsberg, Geoffrey, editor.

HV8699.U5D337 2015

365'.973—dc23

2014040671

Printed in the United States of America

17 16 15 5 4 3 2 1

First edition

# Death Penalty “Abolition” in Neoliberal Times: The SAFE California Act and the Nexus of Savings and Security

*Andrew Dilts*

Accomplishing [death penalty] abolition is pretty good but also easy; now the essential thing to do is get rid of prisons.

—MICHEL FOUCAULT, 1981<sup>1</sup>

If one were forced for the sake of clarity to define [fascism] in a word simple enough for all to understand, that word would be “reform.” We can make our definition more precise by adding the word “economic.” “Economic reform” comes very close to a working definition of fascist motive forces.

—GEORGE JACKSON, 1971<sup>2</sup>

## *Introduction*

On November 6, 2012, the state of California was poised to become the eighteenth state in the United States to abolish the death penalty, replacing it with a sentence of life imprisonment without the possibility of parole (commonly referred to as LWOP). The Savings, Accountability, and Full Enforcement for California Act (The SAFE California Act) appeared on the statewide ballot as Proposition 34 and would have overturned a previous 1978 ballot initiative that restored the death penalty in California following the U.S. Supreme Court’s 1976 ruling in *Gregg v. Georgia*.<sup>3</sup> When the votes were counted, Prop. 34 lost by a margin of four percentage points, leaving the California existing death penalty statute in place.<sup>4</sup>

The prospect for passage looked promising leading up to the vote.<sup>5</sup> Not only has there been an emerging national trend in support of death penalty abolition but there has also been increasing support for ending the death penalty in California during the previous decade.<sup>6</sup> Prop. 34 had the backing of supporters of the previous 1978 initiative, insisting that it had been a “terrible mistake” to reinstitute state executions following *Gregg*.<sup>7</sup>

But perhaps the best reason to think that California would move into the “abolitionist” column was because the state faces one of the worst fiscal crises in the nation.

Prop. 34’s supporters seized on this fact, centering their argument on the high cost of the death penalty and California’s fiscal austerity. Even the title of the bill behind Prop. 34 succinctly stated the central argument proffered by supporters of the ballot initiative: a tight linking of “savings” and “full enforcement” of the law. The text of the bill itself and the \$2 million statewide advertising campaign launched by supporters insisted that death penalty abolition was both necessary and justifiable because the state’s citizens would be more secure through savings realized by closing death row.<sup>8</sup> “Killers and rapists,” the bill declared, “walk our streets and threaten our safety, while we spend hundreds of millions of taxpayer dollars on a select few who are already behind bars forever on death row.”<sup>9</sup>

Compared to other “western” nations, the end of capital punishment in the United States appears long overdue. As Michel Foucault noted in a 1977 interview discussing French capital punishment, the death penalty appears increasingly “absurd” in the world of the prison and its modern reinvention as a form of punitive correction and reformation. It is only “possible,” Foucault stated, to “condemn someone to death” under a “justice that functions only according to a code. . . . But if justice is concerned with correcting an individual, of gripping the depth of his soul in order to transform him, then everything is different.”<sup>10</sup> The persistence of the death penalty in the United States, thus, can be read as an archaic manifestation of an older technique of power, invested in a likewise archaic notion of sovereignty and a rejection of the rehabilitative ideal and its technique of indeterminate sentencing and criminological knowledge. “Today,” Foucault continues, “two systems are superimposed on one another.”<sup>11</sup> To abolish the death penalty in favor of incarceration (as the proponents of Prop. 34 sought) would be to finally render the penal system consistent with its own rationality and dominant form: the prison.

Had Prop. 34 succeeded, however, it would arguably have not been out of concern about the absurdity or contradictory nature of capital punishment in the modern period but rather because of the ascendancy of neoliberal governmentality, a political system that, as Bernard Harcourt has recently argued, attempts to “displace political conflict, contestation, and struggle . . . by extending an idea of orderliness from the economic realm to other spheres of human existence and practice.”<sup>12</sup>

In this chapter, I take up the case of Prop. 34 to question the meaning of death penalty abolition at the nexus of neoliberalism and penalty,

reading the failure of the referendum's passage as part of the way in which sovereign modes of power function within and possibly against neoliberalism. I am less interested in the specific reasons for the failure of Prop. 34 than in understanding how "abolition" of the death penalty appears most possible when its form is not an abolition at all but rather the substitution of one kind of death for another: of "death-in-prison" rather than execution.<sup>13</sup> Part of the puzzle of current death penalty abolition, of course, is that LWOP sentences appear "absurd" in much the same way as the death penalty.

As critics of Foucault have rightly noted, however, his account of the death penalty (as well as his genealogy of the prison) largely ignores the particularity of the U.S. carceral regime and its pernicious cultural and racial dimensions.<sup>14</sup> There is truth in these critiques, yet they should not lead us to reject Foucault's relevance to understanding death penalty abolition in our current moment. Foucault's account of the analytics of power, his engagement with "American" neoliberalism, and his own statements on the death penalty and its abolition are both relevant and helpful for conducting new genealogical investigations of the death penalty and its abolition, especially given the decidedly neoliberal turn in U.S. penalty over the last forty years.<sup>15</sup> While it is indeed possible to read Foucault's accounts of the death penalty in *Discipline and Punish* and the first volume of the *History of Sexuality* as necessarily connected to sovereign or juridical exercises of power, Foucault's own analysis complicates such a reading. By looking at the case of the death penalty and its abolition through the specific instance of the SAFE California Act, we can better understand Foucault's own insistence that power may be exercised through multiple discourses in mutually supporting and interlocking ways, and, more importantly, we can better identify the dangerous form that mainstream death penalty abolition has taken in the current moment.

The first section of this chapter details Prop. 34, reading the text of the SAFE California Act as an instance of a "neoliberal bargain," trading in the death penalty for LWOP in order to secure greater security through savings. The following section focuses on the key condition of possibility of this bargain—the commensurability of "death" for "life"—and shows how this condition functions through a productive contradiction or *aporia* between these two terms, ultimately displacing the lives of those being "exchanged." The next section shows how the language of neoliberalism informs both criminological and popular conceptions of permanently incarcerated persons as nevertheless monstrous and incorrigible offenders who are also fully responsible subjects, allowing for neoliberalism to coex-

ist with “earlier” modes of power. Finally, the last section returns to the question of what we mean by abolition itself, its potential limits, and the necessary task of constant self-reflection and transformation we face as a result.

### *The Neoliberal Bargain of Security through Savings*

The “abolition” of California’s death penalty statute proposed in the SAFE California Act had four key legislative components. First, it would have eliminated the punishment of “death” as a sentencing option and would have replaced any “death” sentence in the state’s criminal code with the sentence of “imprisonment in the state prison for life without the possibility of parole.” Second, any prisoner found guilty of first-degree murder and sentenced to imprisonment (of any duration) would be required to “work within a high-security prison as many hours of faithful labor in each day and every day during his or her term of imprisonment” with wages subject to deduction for victim restoration funds. Third, it would have established a \$100 million fund for law enforcement, specifically for the investigation of homicide and sex offense cases. Lastly, it would have automatically converted all standing death penalty sentences to a sentence of LWOP, effectively prohibiting all pending executions in the state while also suspending all litigation by current death row inmates.

As with most ballot measures, the text of the provision included preliminary statements of “findings and declarations” and “purpose and intent,” spelling out the justifications for the proposed legal changes. These sections lay out the rhetorical argument for the legislative changes, tightly linking together the discourses of public safety and fiscal austerity. More than half of these statements make claims about both the direct fiscal costs of the death penalty and the indirect costs imposed by trade-offs being made in terms of law enforcement. Directly, the provision claims that in “replacing the death penalty with life in prison without the possibility of parole, California taxpayers would save well over \$100 million every year,” and “\$1 billion in five years without releasing a single prisoner.” The majority of these savings would be realized by the wholesale elimination of the appeals process available to death row inmates and additionally through savings in prison housing (e.g., the proponents note that former death row inmates would no longer receive “private” cells).<sup>16</sup>

In addition to these direct costs, there are indirect opportunity “costs” of the death penalty in the form of unsolved rapes and murders. “Murders and rapists,” the first finding declares, “need to be stopped, brought to jus-

tice, and punished. . . . Our limited law enforcement resources should be used to solve more crimes, to get more criminals off our streets, and to protect our families.” The second finding echoes this claim: “Police, sheriffs, and district attorneys now lack the funding they need to quickly process evidence in rape and murder cases . . . Law enforcement should have the resources needed for full enforcement of the law. By solving more rape and murder cases and bringing more criminals to justice, we keep our families and communities safer.” Throughout the relatively short text of the bill, its authors insist that these “killers and rapists” go free *because* the death penalty saps resources away from investigating those crimes. By saving money through repealing the “costly” and “ineffective” death penalty, the state will “free up law enforcement resources to keep our families safe.”

If there is a moral argument in the bill, it is made in classically utilitarian terms of cost-benefit analysis: the positive good of public safety (under conditions of limited resources and fiscal austerity) *requires* the abolition of the death penalty. Absent such limited fiscal conditions, the bill offers only two other reasons to end the death penalty: (1) to reduce the “risk” of executing an innocent person and (2) to offer relief to families that must endure “the more than 25-year-long process of review in death penalty cases.” Yet even these claims are framed in actuarial language of risk and economic concerns about inefficiency, respectively. Moreover, these remaining two justifications are arguably in tension, given that one way to reduce the “risk” of a wrongful execution is through an extensive review and appeals process in capital cases.

The rhetoric of the public campaign in support of Prop. 34 was broader but still echoed this central argument. Television, print, and web advertising relied heavily on personal narratives to convey the message of increased public safety through fiscal savings. Television and radio ads in particular featured the family members of unsolved murder victims and law enforcement officials (including former wardens, district attorneys, judges, and police officers, all attesting to the fiscal costs of the death penalty litigation at the expense of other investigations). The campaign’s widest-reaching advertisements highlighted the case of Franky Carrillo, who was wrongly convicted of murder at age sixteen and served twenty years before finally being exonerated and released.<sup>17</sup> In one advertisement, Carrillo looks into the camera and states: “Even today people make mistakes. In my case, it was false eyewitness testimony. A ‘yes’ on Prop. 34 means we will never execute an innocent person. Life without parole is justice that works for everyone. We can’t afford to take chances; the costs are just too high.”<sup>18</sup> In

just a few sentences, the Carrillo ad deftly frames questions of fallible judgment, corrupt police practices, and justice as questions of costs and risk.

While the advertisement may not have proved effective at the ballot box, the *Los Angeles Times* directly pointed to the Carrillo ad in their endorsement of the ballot measure, writing, “[T]here is no knowing whether all 725 [death row inmates] . . . are guilty. That’s why the appeals process is so long, burdensome and expensive, and it’s why voters should end the risk that California will execute an innocent person.”<sup>19</sup> Other papers followed more closely to the script of safety through savings, such as the *San Jose Mercury News*’ endorsement of Prop. 34, in which the editorial board wrote, “*Never mind moral arguments*; the death penalty simply doesn’t work. Since it was reinstated in 1978, California has spent \$4 billion on just thirteen executions. We are no safer.”<sup>20</sup> This language very nearly echoed the words of one web ad released by the supporters, in which a former warden of San Quentin prison (where death row is housed) is heard speaking over a series of visuals of police lights, city streets, chain-link fencing, and a long, slow pan across a pile of \$100 bills. Jeanne Woodford states,

Working in criminal justice and understanding what really works, knowing that what makes us safer is solving crimes, . . . knowing that we have so many unsolved homicides and rapes in the State of California, and that local communities are having to take police off the streets, and rape kits still sit on shelves and aren’t tested because some communities don’t have the money to do that, knowing that when you use your criminal justice dollars in a much more strategic way, that’s what makes us safer, that’s really why I’m here and passionate about replacing the death penalty, because we can use our dollars and cents in a much more strategic way that improves criminal justice.<sup>21</sup>

Through the consistent linking of savings with security, the campaign for Prop. 34 masterfully brought together a host of public policy concerns (unsolved rapes and murders, wrongful executions, fiscal austerity, etc.) into a single narrative, picking up on what has become the dominant neoliberal analysis of crime and punishment, which has effectively shifted the elite discourse (if not actual policy) toward “smart on crime” frameworks that rely on statistical analysis and economic reasoning about policy.<sup>22</sup>

The “neoliberal bargain” of Prop. 34 promises both “security” and “savings” in the face of fiscal austerity, itself a broader manifestation of the meeting of the “penal” and “fiscal” crises in California.<sup>23</sup> This instance of the “bargain” works through a series of trade-offs. The California voter is



asked to give up punishing criminals with the death penalty in exchange for the punishment of life imprisonment without the possibility of parole. The “costs” of the repeal will more than pay for themselves in financial terms, and the voters themselves will be “paid” with both material and symbolic benefits: increased spending on law enforcement, catching more “killers and rapists,” forcing previously “idle” inmates to work, to share cells, punitively degrading their conditions and forcing them to be fully “responsible” laborers, and, finally, the promise that “no innocent person” will be killed by the state. There are moral claims present, but they become subsumed under the logic of exchange, transforming the “abolition” of capital punishment into a straightforward series of exchanges. The puzzle, however, is how exactly this vision of “abolition” became possible. Or rather, how could this series of exchanges be rightly called “abolitionist” at all when the replacement penalty, LWOP, *promises and assures* that inmates will die in jail?

*“‘For life’ or ‘for death,’ the two expressions are the same”*

The heart of the “neoliberal bargain” is really a trading of “life” for “death,” such that a life sentence without parole can be both substitutable for a death sentence and also qualitatively *not* a death sentence. This trade, in turn, depends on the fabrication and reification of a specific conception of the sentenced criminal as fundamentally incorrigible, monstrous, and yet also deeply responsible for their actions. More narrowly, the *legal* condition of possibility for such a trade has been well established in the widespread adoption of LWOP sentences throughout the United States, beginning in the early 1970s and dramatically expanding since the 1990s.<sup>24</sup> As such, the otherwise thorny question of proposing a replacement for the death penalty is relatively simple.<sup>25</sup> The greater difficulty appears to be the question of popular support, as, even despite a general decline, the death penalty continues to have overall high levels of popular support in the United States and in California.<sup>26</sup>

For anti–death penalty activists in California, building high popular support for “abolition” is a political necessity because the existing death penalty statute was passed through a ballot initiative, and as such, that statute can only be altered in the same manner.<sup>27</sup> This has been a difficult task given that support for capital punishment in the state has remained strong since the 1970s, with a steady two-thirds majority of voters supporting it. In November 2011, however, for the first time, a plurality of voters polled stated a preference for LWOP over the death penalty.<sup>28</sup> This opening in

public opinion goes partway to explaining the strategy employed by the proponents of Prop. 34, in that they would need to capitalize not only on this shift in public opinion but also build a relatively broad coalition to do so. That is, death penalty abolition appears to become more possible if it is reframed rhetorically and substantively as death penalty *replacement*.

Of course, the same poll that identified this political opening also demonstrated that many voters did not prefer LWOP to “death,” refusing their substitutability. This position echoes the nearly cliché principle enshrined in U.S. jurisprudence and political activism that death is “different” and “unique” as a form of punishment. This principle is so powerful and so taken for granted that it grounded both the Court’s 1972 moratorium on the death penalty and its reinstatement four years later. For pro- and anti-death penalty activists, it likewise grounds both abolitionist and retentionist positions: because “death” is a final and absolute punishment, abolitionists can claim it is outside the domain of civil society and “barbaric.” And likewise, because it is final, absolute, and represents the high-water mark of punishment, it serves as an *ultimate* punishment, and thus, as retentionists claim, it demonstrates the sanctity of human life in a way no other punishment can.

At the same time, however, what distinguishes life sentences without parole or executive clemency is that they, as Jessica Henry succinctly notes, “can only be fulfilled by the death of the offender.”<sup>29</sup> As such, “life” sentences should rightly be called “death-in-prison” (DIP) sentences.<sup>30</sup> As Henry argues, LWOP in particular, and all “death-in-prison” sentences more generally, easily meet the Court’s description in *Furman* of capital punishment as the “ultimate” punishment, distinct in its *kind* rather than its *severity*: it is an irrevocable punishment, rejecting the possibility of rehabilitation, and is an “absolute renunciation of all that is embodied in our concept of humanity.”<sup>31</sup> Or, as put by the proponents of Prop. 34, LWOP provides a “justice that works for everyone.” It can do so, only insofar as it is an “ultimate” punishment, taking the possibility of rehabilitation as a justification off the table, marking the offender as a permanent prisoner, fundamentally irredeemable.<sup>32</sup> But perhaps most bluntly, LWOP is still *effectively* a kind of death sentence. As put by Jeanne Woodford, the former death row warden at San Quentin quoted earlier, “We are spending millions and billions of dollars on a handful of inmates, when we could give them a sentence of life without the possibility of parole, *which would ensure that they would die in prison.*”<sup>33</sup>

At the same time, for LWOP to count as “abolition,” it must also be sufficiently a different *kind* of punishment than death. Tellingly, perhaps,

the case made for the SAFE California Act almost entirely avoided the question of its reality as a “death-in-prison” sentence and instead relies on an unarticulated yet seemingly “obvious” distinction between life and death, and between a “natural” death and an “execution.” This is in part because the majority of both popular and legal debate over capital punishment has focused specifically on the execution itself, and its manner, to almost fetishistic levels.<sup>34</sup> Legal debates in particular have focused almost entirely on getting execution “right” in constitutional terms. While both the method and meaning of “execution” have dramatically shifted over the course of U.S. history, there remains a presumption that an execution is qualitatively distinct from a “natural” death, even when that death occurs in prison, or when death can be linked to the pernicious racial history of capital punishment, to its persistent racially disproportionate application, or to the striking historical similarities between state executions and extrajudicial lynchings in the United States.<sup>35</sup> Yet because the public attention to the death penalty, its jurisprudence, and its activist attention have focused primarily on the moment, method, and meaning of *execution*, the adoption of LWOP and other DIP sentences effectively deflects attention away from the moment of death, even though death is necessarily a part of the sentence.<sup>36</sup> Being able to avoid a specific moment or technique of “execution,” such sentences become capable of appeasing the moral concerns of many abolitionists and, at the very least, offer incremental satisfaction, even for those who are deeply troubled by LWOP sentences as well.<sup>37</sup>

A side effect of this *aporia* between “life” and “death” has been that the same qualities that allow for the exchange of death in prison for death by execution also have allowed for their similarities to be selectively ignored. Because “death is different,” the Court requires strict review of offender qualifications, strict procedural guidelines, extended appeals processes, and additional standards of heightened scrutiny. The same procedural and substantive protections are simply not applied to DIP sentences at this time. This dramatic reduction of appellate rights was not at all lost on the supporters of Prop. 34 but rather was central to their “cost-savings” argument: the high cost of the death penalty stems primarily from the cost of litigating the appeals of inmates. Nor has this act been lost on death row inmates themselves. As explained by California death row inmate Correll Thomas:

The authors of [Prop. 34] know that . . . the courthouse doors will be slammed forever. They are attempting to force us condemned men and women to accept another death penalty without any habeas corpus

review of our sentences. And the few condemned men and women who currently have representation today, unless they have the funds to retain counsel for representation, would automatically be sentenced to life without the possibility of parole and lose their representation.<sup>38</sup>

Yet underlying these difficulties is a deeper connection between the death penalty and all prison sentences: the seemingly overdetermined notion that death is different. This is not to say that death is not, in fact, a final or ultimate punishment but to resist the distinction from the other side and account for how the prison system itself functions through the specter of death. In 1972, at the same time that the Supreme Court of the United States was considering its temporary moratorium on the death penalty, France was embroiled in debate over its own death penalty, prompted in part by the high-profile executions of two inmates at Clairvaux Prison in France. Writing in *Le Nouvelle Observateur*, Foucault responded to these executions with a scathing indictment not simply of the executions but of the entire French prison system. “The whole penal system,” he wrote, “is essentially pointed toward and governed by death. A verdict of conviction does not lead, as people think, to a sentence of prison *or* death; if it prescribes prison, this is always with a possible added bonus: death.”<sup>39</sup> Foucault’s involvement at the time with the *Group d’information sur les prisons* (GIP) had led him, along with other intellectuals and activists, to question not only the practice of punishment in France but moreover the logics by which punishment through prisons operated. In a precursor to his genealogy of the prison in *Discipline and Punish*, Foucault argued in the pages of the French press that the question of the death penalty and its particular application necessarily implied that the prison be questioned as well.

“‘For life,’ or ‘for death,’” Foucault writes, “the two expressions mean the same thing. When a person is sure that he will never get out, what is there left to do? What else but to risk death to save one’s life, to risk one’s very life at the possible cost of death.”<sup>40</sup> For Foucault, separating the question of the death penalty from the question of the prison—given the work that the GIP had been doing during the previous two years and a rash of inmate suicides that had occurred throughout 1972—was to ignore the material conditions of confinement that refused so neat a separation, a “choice,” as it were, between “life” and “death.” The public interest in the death penalty sparked by the Clairvaux case in France came at the expense of attending to the brutality and the constant presence of death within the prison walls. “Prison is not the alternative to death,” Foucault writes, “it carries death along with it. The same red thread runs through the whole

length of that penal institution which is supposed to apply the law but which, in reality, suspends it.”<sup>41</sup>

Other scholars have built on Foucault’s analysis here, and in turning to the U.S. context they note the central role the death penalty plays in the broader schemes of disciplinary power and governmentality.<sup>42</sup> The current practice of the death penalty in the United States, Timothy Kaufman-Osborn argues, “is a logical extension of certain strategies of disciplinary control that are part and parcel of the political economy of the late liberal state.”<sup>43</sup> For Kauffman-Osborn and others, any account of the death penalty or its abolition in the United States must grapple with its intimate connection to the broader carceral regime.<sup>44</sup> What they point to, along with critiques of the actual material conditions of imprisonment, is the fact that the trade-off between LWOP and the death penalty functions because of a displacement of analysis from the broader carceral system and the modalities of power that structure that system.

Under the current conditions of incarceration in the United States—violent, overcrowded, lacking oversight—a sentence of “life” and one of “death” are both distinct from each other and yet also commensurable. The conceptual and material *aporias* between “life” and “death” are perhaps contradictory but nevertheless productive of an abolitionist strategy that can embrace LWOP as a replacement for the death penalty. The punishment of death establishes the limits of the carceral system, at the same time functions through and with it, and nevertheless displaces our attention away from the specific conditions of that system. Put differently, if what we mean by the “abolition” of the death penalty is its replacement with LWOP, then we find ourselves confronting the challenge issued by Foucault’s statement that “for life” and “for death” express the same thing under the carceral form. And such a confrontation should necessarily call our attention to the specific and material practices of the carceral system and the rationalities that both underpin and are produced by those practices. Specifically, we must attend to the way in which incarcerated persons have been rendered entirely responsible for their actions and at the same time treated as radically irresponsible (and irrepressible) “killers and rapists” who will necessarily offend again.

After all, what is the common denominator or the common factor that can let us establish an exchange value (to borrow Marx’s language in the analysis of the commodity form) between life and death? Quite simply: the body of the condemned. What is the body of the condemned, the “lifer,” the prisoner being exchanged for? What underlying conceptions of criminality and subjectivity allow for this exchange to be “successful”? Who is

this permanently incarcerable subject who takes the place of the executable subject and is still distinct from the more generally (and temporarily) incarcerable subject?

Given the terms of this neoliberal bargain, the permanently incarcerable subject is a strange mix of things. First, they must be a person worthy of punishment, deserving retribution for a specific crime. But they must also be deserving of “ultimate” and “irrevocable” punishment, by virtue not only of the severity of their crime but also because they are ultimately irredeemable (otherwise, parole should be an option). Additionally, they appear to be such dangerous creatures that they are not worth the risk; they are not simply irredeemable but incorrigible.<sup>45</sup> Yet, as stipulated in the SAFE California Act, they must also be forced to labor like other prisoners to repay financial debts to their victims and not allowed to remain “idle” in private cells. They must be treated just like other prisoners, stripped of the privileges currently afforded to them on death row. Such a figure is obviously a self-contradictory one, and my analysis of the SAFE California Act could simply end here, noting the inherent contradictions between retributivist and utilitarian frameworks at the core of the bill. But this would be to miss the figure that has emerged from this neoliberal criminology: a kind of fully responsible monster that is radically dangerous, deserving of the worst, and yet always also alike enough to other prisoners to be treated equally. And it wrongly assumes that this contradictory mess of fully responsible monsters undermines rather than sustains our contemporary criminal punishment system.

### *Neoliberal Criminology and homo œconomicus*

On Foucault’s account, the emergence of the prison as a definitive form of penal practice and the incumbent development of disciplinary techniques of power reaching far outside the prison carried with them the specter of death at every turn. The “ultimate” punishment was never completely buried, forgotten, or entirely displaced. Once the public torture of the condemned criminal gave way to the simplicity, economy, and egalitarianism of the guillotine, the penitentiary technique quickly completed the “humane” transformation of punishment throughout the nineteenth century (at least in France). The prison had a “‘self-evident’ character” as a form of punishment, Foucault notes, “based first of all on the simple form of ‘deprivation of liberty.’ How could prison not be the penalty *par excellence* in a society in which liberty is a good that belongs to all in the same way and to which each individual is attached . . . by a ‘universal and constant’

feeling?”<sup>46</sup> A single punitive form (detention) could be imposed in nearly infinite degrees of severity as a quantification of time, making it both a universal and particular form of punishment. Moreover, at the heart of Foucault’s analysis is the claim that the twin principles of this apparatus— isolation and work— provided not simply a powerful form of social control but a subject of disciplinary power “transformed” into a docile body.<sup>47</sup>

According to this logic, the punishment of death *should* have faded away entirely, and not simply out of sight. If the prison gives birth to a mode of knowledge (the human science of crime, i.e., criminology) and an account of the criminal subject (the prison’s “twin,” i.e., the delinquent), then the finality of death by execution seems to work directly against these ends. Moreover, from the point of view of the eighteenth- and nineteenth-century reformers and proponents of the prison, a punishment of death appeared as an archaic if not barbaric form of punishment, a seeming throwback to a conception of the nation that is invested not in a people but in the sovereign body of the king.

That the “absurd” persistence of the death penalty is nevertheless a reality, however, makes it useful to track not simply the overlaps between regimes of power but also the ways in which power changes its justification and shifts its exercise over time and place, complicating simplistic readings of Foucault’s analysis of power. In the first volume of the *History of Sexuality*, Foucault famously argues for an analytics of power that moves beyond the limits of its sovereign conception linked to juridical power and enshrined in the language of law, prohibition, and, more generally, its “juridico-discursive” representation.<sup>48</sup> In its place, Foucault insists, we must make sure our accounts of power reflect a “strategical model” that emphasizes the “multiple and mobile field of force relations.”<sup>49</sup> Foucault turns to the “example” of the death penalty to illustrate how force relations have changed in the West: “Together with war it [the death penalty] was for a long time the other form of the right of the sword; it constituted the reply of the sovereign to those who attacked his will, his law, or his person.”<sup>50</sup> But while sovereignty had traditionally been defined in Hobbesian terms as that body (collective or singular) that possesses an exclusive right over life and death—to “take life or let live”—the “very profound transformation” of force relations in the West means that “the right of the sovereign is now manifested as simply the reverse of the right of the social body to ensure, maintain, or develop its life.”<sup>51</sup>

The effect of this transformation is observable, Foucault argues, in the corresponding change in the logic behind the death penalty: “As soon as power gave itself the function of administering life, its reason for being

and the logic of its exercise . . . 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?"<sup>52</sup> While the death penalty of the classical age operated through a public execution and the spectacle of the scaffold, under the disciplinary system the death penalty signaled a failure to reform a delinquent. As an exercise of biopower, the death penalty appears as an open contradiction of the "new" *raison d'état*: a taking of life rather than a making live. The necessary transformation would be to both shun the death penalty and, at the same time, to give it a new justification: "For such a power, execution was at the same time a limit, a scandal, and a contradiction. Hence capital punishment could not be maintained except by invoking less the enormity of the crime itself than the monstrosity of the criminal, his incorrigibility, and the safeguard of society. One had the right to kill those who represented a kind of biological danger to others."<sup>53</sup> This transformation, which does not ban the death penalty but reconfigures it as a technique for the promotion of (some) life at the necessary expense of some others, provides the conceptual footing for the bloodiest, most deadly, and most horrific executions of the twentieth century. In his 1976 lectures at the Collège de France, *Society Must be Defended*, Foucault succinctly notes that this cut between who may live and who must die is drawn expressly through the appearance of modern racism.<sup>54</sup> For Foucault, modern racism itself is "a way of introducing a break into the domain of life that is under power's control: the break between what must live and what must die."<sup>55</sup> Such an exercise of biopower by the modern state, he insists, is twofold: first it draws distinctions within the human species that appear to be biological in character, and, second, it establishes a form of death for those marked as biologically dangerous, abnormal, and unhealthy that will *directly* promote the life of the biological population to be preserved in a more purified and healthier form. "The fact that the other dies," Foucault states, "does not mean simply that I live in the sense that his death guarantees my safety; the death of the other, the death of the bad race, of the inferior race (or the degenerate, or the abnormal), is something that will make life in general healthier: healthier and purer."<sup>56</sup>

This conceptual footing—both rejecting and also justifying the death penalty for the good of the greater population—continues to drive current abolitionist legislation and mainstream death penalty activism, even as legislative language and campaigns appear to be racially "neutral" and "colorblind." The death penalty must be rejected, as expressed in the SAFE California Act, because under the conditions of austerity and the require-



ments of due process, executing criminals fails to protect the population. And at the same time, a different form of death—the living death in prison assured by LWOP—can ensure that existing threats will be contained because they will nevertheless die in prison, cheaper primarily because these prisoners are refused the same legal protections afforded to death row inmates. That is, what LWOP *as abolition* represents is not the end of the death penalty but a recent (and politically seductive) form, expressed as an economic replacement that stands not outside or against the power of the state to take life but entirely within it and subsumed by it. In this case, part and parcel with the death in prison, comes the prohibition on suicide implicit (and strictly enforced) as part of the LWOP sentence. Inseparable from the harsh treatment of extended confinement itself in LWOP, *life itself* has become a part of punishment, and those lives are discursively identified as pathologically abnormal, deviant, and incorrigible.<sup>57</sup> In part, what makes understanding Prop. 34 difficult is how it simultaneously invokes juridico-legal/sovereign techniques of power, disciplinary assumptions of the subject and an attachment to the prison, and, above all, the powerfully economic logic of biopower.

To understand this strange hybrid requires two additional theoretical contributions from Foucault's lectures that followed the introduction of the terms of biopower and his account of modern racism. First, we must finally dispense with the notion that these different modalities of power described by Foucault (juridico-legal/sovereign, disciplinary, mechanisms of security/biopower) are exclusive. To analyze a practice or discourse from the point of view of a Foucauldian analytics of power is not to identify the "correct" modality of power and move on. Rather, as Foucault makes clear in his 1978 lectures, *Security, Territory, Population*, each of these modalities can appear simultaneously throughout history, mutually supporting one another. What gives them a "kind of historical schema," and which might mislead our analyses, is that each modality can rightly be said to become dominant in different epochs (ancient, modern, contemporary).<sup>58</sup> Foucault states, "There is not the legal age, the disciplinary age, and then the age of security. Mechanisms of security do not replace disciplinary mechanisms, which would have replaced juridico-legal mechanisms. In reality you have a series of complex edifices in which . . . the techniques themselves change and are perfected . . . in which what above all changes is the dominant characteristic . . . the system of correlation between juridico-legal mechanisms, disciplinary mechanisms, and mechanisms of security. In other words, there is a history of the actual techniques themselves."<sup>59</sup>

Foucault gives special attention to the “mechanisms of security” of neoliberal governmentality not simply because they have become dominant in the contemporary period but also because the history of punitive practices leads us in this direction, as the latter half of the twentieth century saw a revolution in criminological practice and the emergence of mass incarceration in the United States. As Foucault puts it, “For some time now, for a good dozen years at least [i.e., since the mid-1960s], it has been clear that the essential question in the development of the problematic of the penal domain, in the way in which it is reflected as well as in the way it is practiced, is one of security. Basically, the fundamental question is economics and the economic relation between the cost of repression and the cost of delinquency.”<sup>60</sup> What characterizes the late twentieth century, especially in penal practices, is a heightened attention to costs, risks, and a way of knowing the subject that seeks to radically evacuate the subject of the pathologies of previous eras, in particular, the “disciplinary” era in which the rehabilitative ideal was dominant.

The second important contribution from Foucault’s lectures is found in his genealogy of liberalism in the 1979 course *Birth of Biopolitics* and its account of the distinctly “American” form of neoliberalism that attempts to redescribe criminal subjectivity on strong assumptions of rationality and responsiveness, what can be called neoliberal subjectivity.<sup>61</sup> This understanding of the subject is in turn predicated on the theory of human capital and its redescription of all of one’s actions and activities as investments in the self, what Foucault identifies as the critical redescription and ascendancy of *homo oeconomicus*.<sup>62</sup> Foucault’s interest in the “American” neoliberal theorists’ account of economic rationality and subjectivity stems from the ascendancy of biopolitical governance, in which techniques of power operate primarily at the level of the “population” and function primarily through “mechanisms of security.”<sup>63</sup> The new figure of *homo oeconomicus* that emerges out of human capital theory developed by the “Chicago-school” economic theorists—in particular, Gary Becker and Theodore Schultz—insisted that all actions, all activities, are coincident with one’s person.<sup>64</sup> From the point of view of this economic analysis, an individual is reduced to one’s market choices, and these choices are figured as investments in the self, in the manner of capital investments. The fundamental axiom of neoliberal human capital theory is that all consumption choices are also investment choices, that is, that one *is* what one *does* insofar as all actions are subsumable to the logic of consumption.<sup>65</sup>

An effect of this account of rationality, pioneered by Becker and Schultz along with other behavioral economists such as George Stigler and Isaac

Ehrlich, is the production of a neoliberal criminology that insists that there is no biographical or anthropological distinction between criminals and other persons. This view rejects traditional notions of criminal anthropology or of inherent criminality, and it actively resists the racist, classist, ableist, and sexist assumptions that permeated previous traditional criminological assumptions. As Becker puts it in his influential 1968 article "Crime and Punishment: An Economic Approach": "The approach taken here follows the economists' usual analysis of choice and assumes that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities. Some persons become 'criminals,' therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ."<sup>66</sup> In contrast to the contradictions and pathologies of nineteenth- and early-twentieth-century criminology, this is arguably a progressive position, seeking to be rid of the very model of "delinquency" Foucault diagnosed in *Discipline and Punish*.

But at its core, this neoliberal criminology is in effect not a criminology at all but rather the rejection of criminology itself in favor of economics. From the perspective of neoliberal human capital theory, Foucault glosses, "the criminal is not distinguished in any way by or interrogated on the basis of moral or anthropological traits. The criminal is nothing other than absolutely anyone whomsoever."<sup>67</sup> Under these terms, criminal law sets the "price" for crime by modulating the quantity (and quality) of punishment issued to produce a socially efficient level of crime. Gone is the assumption that the purpose of the law is to eradicate all crime (which would be inefficient), and gone, Foucault notes, are the figures of *homo legalis*, *homo penalis*, and *homo criminalis*. In their place is the singular figure of *homo aeconomicus*.<sup>68</sup>

Foucault points to Ehrlich's analysis of the death penalty to underscore this point of the analysis: that this approach results in the "anthropological erasure of the criminal."<sup>69</sup> All that an economic analysis of crime requires is "responsiveness" to sanction, an ability to react to the "price" imposed by punishment.<sup>70</sup> Foucault glosses Ehrlich, stating, "The abhorrent, cruel, or pathological nature of the crime is of absolutely no importance."<sup>71</sup> Ehrlich's specific claim is importantly not this strong; he writes, "The abhorrent, cruel, and occasionally pathological nature of murder notwithstanding . . ."<sup>72</sup> Nevertheless, Foucault is generally correct that Ehrlich's analysis of the death penalty seeks to remove notions of deep criminal differences (in keeping with Becker's assumptions about rational behavior), but Foucault's gloss misses the more interesting fact that Ehrlich does this *while*

*nevertheless assuming* that pathological and other “nonrational” motivations might influence the decision to murder. A more careful reading of Ehrlich’s analysis demonstrates that the economic reading *includes* nonrational action under the rubric of rationality through the idea of responsiveness. Even monsters, we must conclude following Ehrlich, are *responsive* to stimuli and therefore can have their behavior altered by increasing the “price” of murder with criminal punishment. Foucault does note that what matters from the point of view of neoliberal criminology is not that pathological or anthropological monsters might cease to actually exist but that even such monsters can be held responsible for their decisions *as if* they were rational actors. As Ehrlich himself puts it (and which Foucault quotes), “There is no reason a priori to expect that persons who hate or love others are less responsive to changes in costs and gains associated with activities they may wish to pursue than persons indifferent toward the well-being of others.”<sup>73</sup>

This is to say that the primary outcome of neoliberal criminology is not the complete or successful elimination of practices that discriminate between *kinds* of criminals but only one that purports to do so. This is even clear in Becker’s germinal 1968 article. The crimes of rape and murder are almost always mentioned in tandem and appear throughout Becker’s analysis as limit cases of the economic approach. While he argues that most punishments should be replaced with a system of monetary fines, he nevertheless notes that

another argument made against fines is that certain crimes, like murder or rape, are so heinous that no amount of money could compensate for the harm inflicted. This argument has obvious merit and is a special case of the more general principle that fines cannot be relied on exclusively whenever the harm exceeds the resources of offenders. For then victims could not be fully compensated by offenders, and fines would have to be supplemented with prison terms or other punishments in order to discourage offenses optimally. This explains why imprisonments, probation, and parole are major punishments for the more serious felonies; considerable harm is inflicted, and felonious offenders lack sufficient resources to compensate. Since fines are preferable, it also suggests the need for a flexible system of installment fines to enable offenders to pay fines more readily and thus avoid other punishments.<sup>74</sup>

When confronted with the hardest set of cases, Becker tempers his otherwise radical economic approach (and the replacement of most criminal law with tort law) with the continued presence of the prison, bodily

punishment (of confinement), and the spectre of death carried along with them. The central move Becker makes is to insist on the strict separation between acts and identities. There are, strictly speaking, no “criminals” for Becker but only actions that are criminal, defined “fundamentally not by the nature of the action but by the inability of a person to compensate for the ‘harm’ that he caused. Thus an action would be ‘criminal’ precisely because it results in uncompensated ‘harm’ to others.”<sup>75</sup> Thus, the quality that distinguishes rape and murder from other crimes, for Becker, is that the harms they cause are quantitatively greater than any individual could afford to repay. They are only “special cases” of where society must still rely on nonfinancial compensation (i.e., bodily punishment) for indigent individuals who commit crimes for which they cannot afford to pay. In this sense, Becker’s own argument reverts back to disciplinary forms of punishment such as “imprisonment, probation, and parole.”

Within the neoliberal approach to punishment generally, and with capital punishment specifically, disciplinary and juridical techniques and rationalities of power *remain and reemerge*. While neoliberal human capital theory enables and supports penological and criminological practices that might otherwise resist anthropological assumptions of criminality, they do so only by shifting attention to other points of contact and levels of analysis and by displacing questions such as “why might some persons be *systematically* less able to compensate for harms they have caused?” As Wendy Brown puts it more generally about neoliberalism as a political rationality, “[Neoliberalism] erases the discrepancy between economic and moral behavior by configuring morality entirely as a matter of rational deliberation about costs, benefits, and consequences. But in so doing, it carries responsibility for the self to new heights: the rationally calculating individual bears full responsibility for the consequences of his or her action no matter how severe the constraints on this action.”<sup>76</sup>

In the penal domain, however, this full responsibility in fact goes further, rendering “criminals” fully responsible for their actions but without actually displacing the categories of monstrous criminality. We are left, especially in cases like “murder or rape,” with individuals who are held fully responsible for their monstrosity, for a harm that cannot be repaid, and therefore subject to permanent punishment. Neoliberal criminology in practice has not brought about an end of the rehabilitative idea nor juridical forms of retributive punishment. Rather, what characterizes neoliberalism is, on the one hand, a reintroduction of these principles under what Pat O’Malley has called the “sign of risk” and, on the other hand, an

intensification of these techniques under those terms.<sup>77</sup> Moreover, the neoliberal shift in attention to crime rates (focusing on the population rather than the individual) and a renewed attention to “bad acts” rather than “bad actors” both actively hide (and possibly disavow) continued assumptions of classical liberal subjectivity. While these shifts may seem less caught up in the pathologies of disciplinary criminology (at least compared to nineteenth-century figures like the delinquent), they nevertheless belie the way in which the interpretation of one’s actions relies upon existing modes of interpretation that often refuse to identify some actors’ actions as ever being “bad” ones. The categorization of one’s acts as good or bad continues to depend on the existing norms and frames that guide our perception.

One is often marked as deviant and delinquent by virtue of racial and sexual identification rather than through a judgment of one’s actions independently (as if such a thing were possible). This is demonstrably the case in the United States, where the creation of criminal law, the very definitions of “harm,” and the boundaries of normality and deviance have been fully inflected by white supremacy, patriarchy, heteronormativity, and ablist (to give an obviously incomplete list).<sup>78</sup> Insofar as biopower, Foucault argues, operates through state racism, its neoliberal operation produces a cover story or alibi for contemporary white supremacy by reducing all “bad acts” to “poor investments.” That is, this outcome is not simply a failure to be sufficiently “colorblind” or properly “liberal” but rather reflects how forms of difference *have always* been integral to the establishment of “universal” categories that refuse to acknowledge difference. As Marx famously warned in “On the Jewish Question,” the abolition of social and political distinctions does not, in fact, end those distinctions but presupposes and requires them to operate in their own fashion, outside the reach of political redress.<sup>79</sup>

Through neoliberalism’s ability to deeply responsibilize all behavior and identify new forms of dangerousness (even if they are actuarial in their mode) while still clinging to older forms and figures (even as they continue to be racialized), in a refusal to attend to the multiplicity of theoretical and empirical discourses that shape reality, and above all in its claims to “optimize” difference, neoliberalism (in practice if not in theory) supports incarceration rather than works as a force to suppress it.<sup>80</sup> Neoliberalism in practice relies on harsh punitive sanction to govern poverty (and poor people) and to paternalistically police a racialized underclass.<sup>81</sup> Yet it has managed to do so under the rhetorical masks of equality, universality, and objectivity. As such, it remains subject to a basic critique: neoliberalism

posits a universalism that presupposes the various forms of political difference (race, sex, gender, etc.) that it then displaces to the economic margins as evidence of failed “investments” in human capital.

We are left with a form of criminal responsibility that is more pernicious than nineteenth- or early-twentieth-century notions of a criminal anthropology. This form of neoliberal subjectivity produces deeply responsible monsters and at the same time offers a plausible liberal deniability of such an anthropology. It pervades both left and right adoptions of neoliberal concerns over fiscal responsibility and the “crisis” of mass incarceration. And we should not, therefore, be surprised that a pervading fear of “killers and rapists left on the streets” runs throughout the abolitionist discourse of the SAFE California Act. Written into the earliest applications of human capital theory to the question of crime and punishment are its remainders, leftovers, uncompensatable harms, and *political* questions that return even in the face of the radical displacement of politics attendant to neoliberalism. But it is important to recognize the power of the neoliberal discourse: these are exceptions that do not challenge the rule, but which prove it.

### *Reform, Resistance, and the Limits of Abolition*

The failure of the SAFE California Act to pass as Prop. 34 was bemoaned by death penalty abolitionists and explained by pointing to a deep attachment to the death penalty, a general skepticism in the fiscal claims made by supporters of the measure, and (for more radical critics) a concern for the sake of death row inmates themselves who stood to lose access to the courts. Despite this setback, the abolitionist strategy of replacing the death penalty with LWOP continues in other states. In May 2013 Maryland repealed its death penalty statute. Under the Maryland repeal, death row inmates are to be resentenced, with an LWOP sentence available for capital murder cases.<sup>82</sup> As in California, proponents of the bill noted substantial cost savings to the state that would come from eliminating the appeals process reserved for death row inmates. Even in the face of defeat at the ballot box, the “road to abolition” continues to be paved in part by the neoliberal bargain: in these times of massive fiscal constraints, both supporters and opponents of state execution can be mollified by the promise of increased security through savings and the replacement of “death” with “life.” The editorial endorsement of the Maryland repeal made by the *Baltimore Sun* echoed the Prop. 34 campaign in California: “Replacing the death penalty with a maximum sentence of life without the possibility of parole serves to protect society and render severe punishment on those who commit the

worst crimes. It is cost-effective, and it provides finality for the families of murder victims in a way that the death penalty does not.”<sup>83</sup> Or as the Democratic Governor of Maryland Martin O’Malley put it more bluntly shortly before signing the repeal into law, capital punishment is “expensive and does not work.”<sup>84</sup>

Under current conditions, it appears that abolition of this sort is the only kind that is even possible (and in the case of Prop. 34, even this form of “abolition” continues to be out of reach in California). From one perspective, this can be regarded as the increasingly contracting space of political disagreement not subsumed to market rationality and a narrowing of possible sites of resistance outside of neoliberalism. This contraction should not be surprising to readers of Foucault, and his account of power refuses to think of power as a spatial topology or object to be held but instead as a set of force relations, situated practices, and ways of knowing that shift and move over time and across space. As such, we should not think that there is some ideal or pure form of “abolition” either, outside of a specific context or history. But we should remain cautious of the reach of “reform,” especially when it so clearly operates on the terms of “replacement” rather than a rethinking of the conditions of possibility of the practice in question. Reform is clearly not impossible, but an abolition of the death penalty that replaces it with LWOP and expands the reach of the carceral system is not an abolition worthy of the name.

The contemporary practice of execution *and its abolition* identify a location at which multiple modalities of power intersect and interact. In this way, both the failure of Prop. 34 and the success of Maryland’s repeal reflect the persistence of juridical power: a state that kills in a multitude of ways, each exposing the racial psychodramas of the “American” experience and its penal history. Additionally, the persistence of the death penalty in law (if not in practice, as actual executions continue to be under a de facto moratorium in California) might be read as a kind of popular resistance itself. The difficulty of neoliberalism is that the identifiable spaces of “resistance” appear smaller and more impossible to carve out. Insofar as the contemporary “abolitionists” have taken on a distinctively neoliberal and actuarial form, they also remain powerfully attached to disciplinary techniques and a retrenchment of confinement, forced labor, and death, even if it is now under the “sign of risk” and appears as a resistance to the state’s power to kill. Perhaps neoliberalism’s distinctive feature is its ability not simply to displace other strategies but to intensify them and to harmonize even contradictory and heterogeneous strategies. Even more than its reliance on an economic language that depoliticizes contempo-



rary death penalty “abolition” campaigns, we should be concerned by the ease with which that language *includes* rather than sets aside demands for permanent exclusion, forced labor, more police, more punishment, and more prisons. Neoliberalism, in this sense, is “neo” primarily in its reach: everything—all discourses, all practices, all persons—are professed to be subject to market rationalities. And as such, abolition itself, as a practice of resistance, can become “completely correlated to the systems of power that were designed to stifle it.”<sup>85</sup>

Shortly before France ended capital punishment in 1981, Foucault noted “the way in which the death penalty is done away with is at least as important as the doing-away. The roots are deep. And many things will depend on how they are cleared out.”<sup>86</sup> What France was in danger of doing in 1981, Foucault insisted, is precisely what neoliberal abolitionist strategies are in danger of doing today: failing to question the relation of the death penalty to broader systems of incarceration and the logics that support it. Once the death penalty is gone, Foucault asked:

Will there be a radical departure from a penal practice that asserts that it is for the purpose of correction but maintains that certain individuals cannot be corrected, ever, because of their nature, their character, or a bio-psychological defect, or because they are, in sum, intrinsically dangerous? . . . [T]here is a danger that will perhaps not be evoked—that of a society that will not be constantly concerned about its code and its laws, its penal institutions and its punitive practices. By maintaining, in one form or another, the category of individuals to be definitively eliminated (through death or imprisonment), one easily gives oneself the illusion of solving the most difficult problems: correct if one can; if not, no need to worry, no need to ask oneself whether it might be necessary to reconsider all the ways of punishing: the trap door through which the ‘incurable’ will disappear is ready.<sup>87</sup>

In the case of California, this danger was expressly written into Prop. 34 in multiple ways. And as death penalty abolition appears to be solidly on the track of reconfiguring and intensifying the carceral system but without questioning penal policy more generally, the danger continues to loom in future cases. If we are to go further, pushing against simplistic distinctions between life and death and the reigning “death is different” jurisprudence, it becomes clear that abolishing the death penalty requires that we question not only LWOP sentences but the prison itself, the entire carceral network, and also the basic grounds and practices of punishment. It may already be much too late, considering that the fastest growing populations

of incarcerated persons in the United States have not even been convicted of crimes but are persons languishing in immigration detention centers. When pressed to identify what a “model” prison would look like, Foucault noted that such a thing did not exist. The question of the prison would have to give way to the question of marginalization in all its forms: “The problem is not a model prison or the abolition of prisons. Currently, in our system, marginalization is effected by prisons. This marginalization will not automatically disappear by abolishing the prison. Society would quite simply institute another means. The problem is the following: to offer a critique of the system that explains the process by which contemporary society pushes a portion of the population to the margins. Voilà.”<sup>88</sup>

This challenge of continued analysis must be applied to the idea of abolition itself. In the “American” tradition, the practice of “abolition” must never be separated from its historical roots in the abolition of chattel slavery, lynching, and legal segregation. As Angela Davis notes, the idea of prison abolition necessarily takes these projects as models, recalling that each of these institutions were, within recent history, understood to be defensible if not permanent features of American society.<sup>89</sup> The work of groups like Critical Resistance, the Sylvia Rivera Law Project, and Against Equality draws on the increasingly large body of abolitionist theory and practice in fields such as critical race theory and queer theory and points to possibilities for such permanent self-reflection.<sup>90</sup> Yet the costs are visible as well. It is well worth remembering that the abolition of slavery in the Thirteenth Amendment contains a provision allowing for its continuance as “punishment for a crime,” allowing for the widespread growth of the convict-lease system following the Civil War; that the extension of voting rights in the Fourteenth Amendment likewise contained provisions allowing states to bar convicted criminals from the ballot box; that the death penalty in practice is so racially skewed as to resemble a legal version of lynching; and that schools are statistically more racially segregated today than at the time of *Brown v. Board of Education*. There can, on such an account, be no “end” to the analysis of penal practice, but rather it would become what Foucault called “a locus of constant reflection, research, and experience, of transformation.”<sup>91</sup>

27. Haas, “Tennessee’s Death Penalty Is Back on Track.”
28. Mike Mentrek, “Failed Execution of Romell Broom Prompts Efforts to Block 2nd Attempt,” *The Plain Dealer*, September 17, 2009, [http://blog.cleveland.com/metro/2009/09/failed\\_execution\\_of\\_romell\\_bro.html](http://blog.cleveland.com/metro/2009/09/failed_execution_of_romell_bro.html).
29. Rommel Broom was scheduled to be executed in Ohio on September 15, 2009. After the executioners tried for over two hours to find a viable vein to administer the lethal injection, the governor issued a week reprieve, during which Broom’s legal team filed another appeal.
30. Jacques Derrida discusses the tension between the concepts of *death* and *penalty* in the death penalty, a tension that is perhaps more apparent in French than in English: “What is it, this thing, the death penalty (*la peine de mort*)? Is it a penalty, a punishment (*une peine*)? . . . And what if the death penalty (*la peine de mort*) were an untenable artifact, a pseudo-concept, such that the two terms, penalty (*peine*) and death, punishment (*peine*) and capital, did not let themselves be joined, like an out of joint syntagm, and such that it would be necessary to choose between the penalty and death without one being able ever to justify their logical grammar, except by unjustifiable violence, so much so that it would be necessary to choose between the penalty and death, there where the one and the other never go together?” (quoted in Dutoit, “Jacques Derrida on Pain of Death” presented at Vanderbilt University, September 2011, from Derrida, second lecture of year two, thirteenth lecture overall, 2–3). Dutoit comments, “Derrida brings out that to put ‘penalty’ (punishment, pain) and ‘death’ together is a monstrous hybrid. Either one chooses ‘penalty,’ in which case one lets go of death: the convict does not get put to death; or one chooses death, which is not a punishment, a pain or a penalty, since all of those presuppose life, continued life. The ‘death penalty’ is impossible, an impossible concept, the existence of which and the legal theory of which, are both based on an ‘unjustifiable violence,’ a forcing together of law and nature as if this were possible.” Thomas Dutoit, “Kant’s Retreat,” *The Southern Journal of Philosophy*, 50, no. 1 (2012): 107–135. For a discussion of Derrida on capital punishment, see Oliver, *Technologies of Life and Death*.
31. Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996), 474–475.
32. Sarat, “Killing Me Softly,” 68.
33. Derrida, *The Death Penalty. Volume I*, 116; emphasis added.

DEATH PENALTY ABOLITION IN NEOLIBERAL TIMES: THE SAFE CALIFORNIA  
ACT AND THE NEXUS OF SAVINGS AND SECURITY

*Andrew Dilts*

1. Quoted in Robert Nye, “Two Capital Punishment Debates in France: 1908 and 1981,” *Historical Reflections / Réflexions Historiques* 29, no. 2 (2003): 223.

2. George Jackson, *Blood in My Eye*, reprint edition (Baltimore: Black Classic Press, 1990), 118.
3. *Gregg v. Georgia*, 428 153 (1976).
4. The final results were 48 percent in favor and 52 percent against. See <http://www.sos.ca.gov/elections/sov/2012-general/06-sov-summary.pdf>.
5. Tessa Stuart, “Proposition 34: Campaign to Repeal the Death Penalty Is Gaining Traction According to Poll,” in *The Informer* (Los Angeles: LA Weekly, 2012).
6. While support for the death penalty in California has been roughly constant since 1978, since 2000 there was a strong shift toward LWOP as the preferable sentence for capital murder cases. Mark DiCamillo and Mervin Field, “Support for Death Penalty Still Very Strong. But Increasing Preference for Life in Prison without Parole for Those Convicted of Capital Crimes,” in *The Field Poll* (San Francisco: Field Research Corporation 2011).
7. See Maura Dolan, “Former Death Penalty Supporters Now Working against It,” *Los Angeles Times*, September 23, 2012. In addition, the Safer California campaign highlighted the story of Don Heller—who drafted the 1978 ballot measure reinstating the death penalty—prominently on their website; see <http://www.safecalifornia.org/stories/new-voices/heller>.
8. Maura Dolan, “Campaign to Abolish California’s Death Penalty Begins Airing Ads,” *Los Angeles Times*, October 22, 2012.
9. As with all ballot initiatives in California, the full text of the provision, independent legislative and fiscal analyses, and arguments both for and against the measure are published by the California Secretary of State and sent to all Californian households with registered voters. This publication is also available online at <http://voterguide.sos.ca.gov/propositions/34/>.
10. Michel Foucault, “The Anxiety of Judging,” in *Foucault Live*, ed. Sylvère Lotringer (New York: Semiotext[e], 1996), 246.
11. *Ibid.*
12. Bernard E. Harcourt, “Dismantling/Neoliberalism,” *Carceral Notebooks* 6 (2010): 22.
13. See Jessica S. Henry, “Death-in-Prison Sentences: Overutilized and Underscrutinized,” in *Life without Parole: America’s New Death Penalty?*, ed. Charles J. Ogletree Jr. and Austin Sarat (New York: New York University Press, 2012).
14. In particular, see Angela Davis, “Race and Criminalization: Black Americans and the Punishment Industry,” in *The House That Race Built: Black Americas, U.S. Terrain*, ed. Wahneema Lubiano (New York: Pantheon, 1997); Angela Davis, “From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System,” in *The Angela Y. Davis Reader*, ed. Joy James (Malden, MA: Blackwell Publishing, 1998); David Garland,

*Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, MA: Belknap Press, 2010).

15. Loïc Wacquant, "The Penalisation of Poverty and the Rise of Neo-Liberalism," *European Journal on Criminal Policy and Research* 9, no. 4 (2001); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, NC: Duke University Press, 2009); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Cambridge, MA: South End Press, 2011); Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2011); Loïc Wacquant, "Three Steps to a Historical Anthropology of Actually Existing Neoliberalism," *Social Anthropology* 20, no. 1 (2012).

16. The claim that eliminating single-occupancy cells for the 725 inmates on death row in the summer of 2012 could reduce costs is somewhat ironic given that State of California is also under federal oversight to reduce unconstitutional levels of overcrowding throughout the state, as a result of the 2011 ruling in *Brown v. Plata* (2011).

17. Carrillo (currently a student at Loyola Marymount University) had not received a death sentence, a fact that opponents of Prop. 34 repeatedly emphasized in their criticisms. Carrillo did receive what is effectively a "death-in-prison" sentence of thirty years to life, plus a second life sentence.

18. *Franky Carrillo is voting YES on Prop 34*, YouTube Video, 0:30, posted by "SafeCalifornia," October 2, 2012, <https://www.youtube.com/watch?v=SDIQJoioDw>.

19. "Proposition 34's Common-Sense Appeal," *Los Angeles Times*, October 24, 2012. Prop. 34 was additionally endorsed throughout the state by the *Sacramento Bee*, *La Opinión*, the *San Bernardino Sun*, and the *San Francisco Chronicle*, as well as national newspapers such as *The New York Times*.

20. "Mercury News Editorial: California Should End Barbaric, Costly Death Penalty," *San Jose Mercury News*, July 30, 2012; emphasis added.

21. *Yes on 34*, YouTube Video, 2:39, posted by "SafeCalifornia," October 23, 2012, <http://youtu.be/kTXTZ3x2JjY>.

22. On the developing left/right political consensus on reforming criminal justice in line with "financial" and "investment" strategies, see Keady McBride, "California Penalty: The End/Price of the Neoliberal Exception," *Carceral Notebooks* 6 (2010); Christopher Berk, "Investment Talk: Comments on the Use of the Language of Investment in Prison Reform Advocacy," *Carceral Notebooks* 6 (2010).

23. See Jonathan Simon, "Janus Faced Leviathan: California's Prisons and the Universities as Two Faces of State Power," *Carceral Notebooks* 6 (2010).

24. Ashley Nellis and Ryan S. King, “No Exit: The Expanding Use of Life Sentences in America” (Washington, DC: Sentencing Project, 2009); Ashley Nellis, “Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States,” *Federal Sentencing Reporter* 23 (2010). On the increasing dependence by some abolitionist groups on LWOP as a replacement, see also Rachel E. Barkow, “Life without Parole and the Hope for Real Sentencing Reform,” in *Life without Parole: America’s New Death Penalty?*, ed. Charles J. Ogletree Jr. and Austin Sarat (New York: New York University Press, 2012); Marie Gottschalk, “No Way Out? Life Sentences and the Politics of Penal Reform,” in *Life without Parole: America’s New Death Penalty?*, ed. Charles J. Ogletree Jr. and Austin Sarat (New York: New York University Press, 2012). Every state that currently has the death penalty also has a LWOP option as an available sentence for capital crimes. Additionally, many states allow LWOP for noncapital crimes, and in some cases LWOP sentences are mandatory for specific noncapital offenses. The only categorical restrictions on LWOP apply to juveniles. *Graham v. Florida* (560 U.S. \_\_\_\_ 2010) restricted LWOP sentences for juveniles to capital crimes only, and *Miller v. Alabama* (567 U.S. \_\_\_\_ 2012) bars states from having mandatory LWOP sentences. The court, however, stopped short of categorically barring LWOP sentences for juveniles in *Miller*. The consideration of LWOP as a replacement for execution rests in no small part on the widespread availability of the sentence, which spread throughout the United States in the years following the 1972 moratorium imposed by Furman.

25. See Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th ed. (Oxford: Oxford University Press, 2008), 388–389.

26. This, at least in part, helps to explain why death penalty abolitionists in the United States have relied heavily on judicial and executive avenues, while simultaneously working to alter public opinion. Additionally, it is important to distinguish between legislative “abolition,” on the one hand, and judicial and executive “abolition,” on the other. There have been no executions in California since 2006, when a judicial moratorium was imposed for all executions using the standard “three-drug protocol” by the courts. In contrast, Illinois’s 2011 abolition of the death penalty came after an eleven-year moratorium issued by a controversial executive order by Governor George Ryan, who was later convicted of corruption.

27. Contrary to the European abolitionist trend, in which most states ended capital punishment despite popular support, death penalty abolitionists in California have to end capital punishment with a winning strategy at the ballot box, in a popular vote. See Andrew Hammel, “Civilized Rebels: Death-Penalty Abolition in Europe as Cause, Mark of Distinction, and

Political Strategy,” in *Is the Death Penalty Dying?*, ed. Austin Sarat and Jürgen Martschukat (Cambridge: Cambridge University Press, 2011).

28. DiCamillo and Field, “Support for Death Penalty Still Very Strong. But Increasing Preference for Life in Prison without Parole for Those Convicted of Capital Crimes.”

29. Henry, “Death-in-Prison Sentences: Overutilized and Underscrutinized,” 68.

30. *Ibid.*, 69. Given the incredibly low annual rate at which parole is granted, Henry argues, DIP sentences include a larger swath of inmates than just those sentenced to LWOP. In California, the difference between an indeterminate life sentence (i.e., one available for parole) and a LWOP sentence is itself questionable, given a historic 2–5 percent parole rate for lifers.

31. Quoted in Henry, “Death-in-Prison Sentences: Overutilized and Underscrutinized,” 72.

32. See Sharon Dolovich, “Creating the Permanent Prisoner,” in *Life without Parole: America’s New Death Penalty?*, ed. Charles J. Ogletree Jr. and Austin Sarat (New York: New York University Press, 2012).

33. Emphasis added. This fact would likely be obvious to a death row warden, given that of the ninety-seven death row inmates to die in California since 1978, only fourteen have actually been executed. Fifty-seven are reported to have died of natural causes, twenty have committed suicide, and six have died from “other causes.” Darrell Calhoun and Michael Martinez, “California Death Row Inmate Found Dead Hanging in His Cell” (2012/05/30 2012); available from <http://www.cnn.com/2012/05/29/justice/california-death-row-suicide/index.html>.

34. See, in particular, Simon Grivet’s comparative history of death penalty abolition in Simon Grivet, “Executions and the Debate over Abolition in France and the United States,” in *Is the Death Penalty Dying?*, ed. Austin Sarat and Jürgen Martschukat (Cambridge: Cambridge University Press, 2011).

35. *Ibid.* Also see Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition*, chap. 8.

36. See Thomas Dumm, “The Dead, the Human Animal, and the Executable Subject,” in *Who Deserves to Die?: Constructing the Executable Subject*, ed. Austin Sarat and Karl Shoemaker (Amherst: University of Massachusetts Press, 2011).

37. Jonathan Simon, “Governing Through Crime: 2012: Hope and Change Election Too,” *Governing Through Crime*, November 5, 2012, <http://governingthroughcrime.blogspot.com/2012/11/2012-hope-and-change-election-too.html>; Jonathan Simon, “Governing Through Crime: You Should Know: Why Death Row Inmates Oppose LWOP,” *Governing Through*

*Crime*, September 25, 2012, <http://governingthroughcrime.blogspot.com/2012/09/you-should-know-why-death-row-inmates.html>.

38. Kevin Cooper, Donald Ray Young, and Correll Thomas, “Death Row Debate: Yes or No on the Safe California Act?,” *San Francisco Bay View*, June 5, 2012.

39. Michel Foucault, “Pompidou’s Two Deaths,” in *Power*, ed. James Faubion, *The Essential Works of Michel Foucault, 1954–1984* (New York: The New Press, 2000), 419.

40. *Ibid.*

41. *Ibid.*

42. In particular, see Malcolm M. Feeley and Jonathan Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications,” *Criminology* 30, no. 4 (1992); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).

43. Timothy Kaufman-Osborn, “A Critique of Contemporary Death Penalty Abolitionism,” *Punishment & Society* 8, no. 3 (2006): 374.

44. See especially Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Angela Davis, “Racialized Punishment and Prison Abolition,” in *A Companion to African-American Philosophy*, ed. Tommy Lott and John Pittman (Oxford: Blackwell Publishing, 2003); Angela Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (New York: Seven Stories Press, 2005).

45. See Dylan Rodríguez, *Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis: University of Minnesota Press, 2004).

46. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 232.

47. In the United States, this fabrication of criminal others was deeply connected to and articulated upon discourses and institutions of racial and sexual oppression. See Joy James, *States of Confinement: Policing, Detention, and Prisons* (New York: Palgrave Macmillan, 2002); Ladelle McWhorter, *Racism and Sexual Oppression in Anglo-America: A Genealogy* (Bloomington: Indiana University Press, 2009); Davis, “Race and Criminalization”; Davis, “Frederick Douglass and the Convict Lease System”; Davis, *Are Prisons Obsolete?*; Davis, “Racialized Punishment and Prison Abolition”; Davis, *Abolition Democracy*.

As each of these authors has shown, it is wrong to simply read Foucault’s analysis of the birth of the prison into the “American” context without both noting its limits and producing a distinct genealogical investigation in this time and place. Nineteenth- and early-twentieth-century criminol-



ogy was intimately tied to the production of racially, sexually, and mentally “underdeveloped” others, policing the boundaries of whiteness, gender, and heterosexuality themselves. The predictable and tragic production of deeply criminal “others” was a direct outcome of the contradictory discourses of atomistic liberalism and disciplinary society, expressed through existing social and politics cleavages of difference. The delinquent, the monstrous criminal, and the dangerous individual each came to the fore as ways to productively manage inherent tensions between criminal liability attached to one’s bad actions and a disciplinary regime focused on one’s “bad” soul. That these figures were able to also police cleavages of difference such as whiteness, masculinity, heterosexuality, ability, and independence allowed for “American” citizenship to be shot through with criminological discourses. On this point, see especially Ladelle McWhorter, “Sex, Race, and Biopower: A Foucauldian Genealogy,” *Hypatia* 19, no. 3 (2004); McWhorter, *Racism and Sexual Oppression in Anglo-America*; Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, MA: Harvard University Press, 2010); Andrew Dilts, “Incurable Blackness: Criminal Disenfranchisement, Mental Disability, and the White Citizen,” *Disability Studies Quarterly* 32, no. 3 (2012).

48. See Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (London: Routledge, 2009).

49. Michel Foucault, *The History of Sexuality Vol. 1: An Introduction*, Vintage Books ed. (New York: Vintage Books, 1990), 102.

50. *Ibid.*, 136.

51. *Ibid.*

52. *Ibid.*, 138.

53. *Ibid.*, 137–138.

54. Michel Foucault, *Society Must Be Defended: Lectures at the Collège De France, 1975–1976*, trans. David Macey (New York: Picador, 2003), 254–256. For an especially clear reading of Foucault’s account of “racism” and its relation to biopower, see McWhorter, *Racism and Sexual Oppression in Anglo-America*.

55. Foucault, *Society Must Be Defended*, 254.

56. *Ibid.*, 255.

57. Cf. Dumm’s analysis of force feeding prisoners on hunger strikes: “In this strange state of affairs, the bio-political power to allow and sustain life comes to be the bio-political power to force one to live. Mercy in the form of sustaining life therefore becomes a punishment” (166). Thomas Dumm, “From Time to Torture: The Hellish Future of the Criminal Sentence,” in *States of Violence: War, Capital Punishment, and Letting Die*, ed. Austin Sarat and Jennifer Culbert (Cambridge: Cambridge University Press, 2009).

58. Michel Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977–1978*, trans. Graham Burchell (New York: Palgrave Macmillan, 2007), 6–9.

59. *Ibid.*, 8.

60. *Ibid.*, 9.

61. Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège De France, 1978–79*, trans. Graham Burchell (New York: Palgrave Macmillan, 2008).

62. See Andrew Dilts, “Michel Foucault Meets Gary Becker: Criminality Beyond Discipline and Punish,” *Carceral Notebooks* 4 (2008); Jason Read, “A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity,” *Foucault Studies*, no. 6 (2009); Trent Hamann, “Neoliberalism, Governmentality, and Ethics,” *Foucault Studies* (2009); Andrew Dilts, “From ‘Entrepreneur of the Self’ to ‘Care of the Self’: Neo-Liberal Governmentality and Foucault’s Ethics,” *Foucault Studies*, no. 12 (2011).

63. Foucault, *Birth of Biopolitics*, 317.

64. See the lectures of March 14, 21, and 28 in particular. The key texts by Becker are Gary S. Becker, “Investment in Human Capital: A Theoretical Analysis,” *The Journal of Political Economy* 70, no. 5, Part 2: Investment in Human Beings (1962); Gary S. Becker, “Irrational Behavior and Economic Theory,” *The Journal of Political Economy* 70, no. 1 (1962); Gary S. Becker, “Rational Action and Economic Theory: A Reply to I. Kirzner,” *The Journal of Political Economy* 71, no. 1 (1963); Gary S. Becker, “A Theory of the Allocation of Time,” *The Economic Journal* 75, no. 299 (1965). For Schultz, see Theodore W. Schultz, “Investment in Man: An Economist’s View,” *The Social Service Review* 33 (1959); Theodore W. Schultz, “Investment in Human Capital,” *The American Economic Review* 51 (1961); Theodore W. Schultz, “Human Capital: Policy Issues and Research Opportunities,” *Human Resources* (1972). I take up the question of Foucault’s relationship to these thinkers at greater length in Dilts, “From ‘Entrepreneur of the Self’ to ‘Care of the Self’: Neo-Liberal Governmentality and Foucault’s Ethics.”

65. See Becker, “A Theory of the Allocation of Time,” 503, 516.

66. G. S. Becker, “Crime and Punishment: An Economic Approach,” *The Journal of Political Economy* 76, no. 2 (1968): 176.

67. Foucault, *Birth of Biopolitics*, 253.

68. *Ibid.*, 249–250.

69. *Ibid.*, 258.

70. *Ibid.*, 259.

71. *Ibid.*, 258.

72. Isaac Ehrlich, “The Deterrent Effect of Capital Punishment: A Question of Life and Death,” *The American Economic Review* 65, no. 3 (1975): 399.

73. Ibid.
74. Becker, "Crime and Punishment: An Economic Approach," 196.
75. Ibid., 198.
76. Wendy Brown, "Neo-Liberalism and the End of Liberal Democracy," *Theory & Event* 7, no. 1 (2003).
77. Pat O'Malley, "Neo-Liberalism and Risk in Criminology," in *The Critical Criminology Companion*, ed. T. Anthony and C. Cunneen (Sydney: Hawkins Press, 2008). Robert Castel, "From Dangerousness to Risk," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, et al. (Chicago: University of Chicago Press, 1991); Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press, 2007).
78. See, for instance, Carol Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988); Charles W. Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997); Muhammad, *Condemnation of Blackness*; Robin D. G. Kelley, *Race Rebels: Culture, Politics, and the Black Working Class* (New York: Free Press, 1994); Cathy J. Cohen, "Deviance as Resistance: A New Research Agenda for the Study of Black Politics," *Du Bois Review: Social Science Research on Race* 1, no. 1 (2004).
79. Karl Marx, "On the Jewish Question," in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: Norton, 1978), 33.
80. See Wacquant, "Three Steps to a Historical Anthropology of Actually Existing Neoliberalism," 74–76; Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order*.
81. Joe Soss, Richard C. Fording, and Sanford Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (Chicago: University of Chicago Press, 2011); Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity*.
82. Commentators have referred to the Maryland bill expressly as the "left's austerity strategy." See Kailani Koenig-Muenster, "The Left's Austerity Strategy for the Death Penalty" (03/03/2013 2013); available from <http://tv.msnbc.com/2013/03/03/the-lefts-austerity-strategy-for-the-death-penalty/>.
83. "End Md.'s Death Penalty," *The Baltimore Sun*, January 15, 2013.
84. John Wagner, "O'malley Calls for End of Executions, Confirming Plans for Repeal Bill," *Washington Post*, 2013/01/15/ 2013.
85. Michel Foucault, "Considerations on Marxism, Phenomenology and Power," *Foucault Studies* 14 (2012): 109. As Foucault put it in this interview from April of 1978—given two days before he lectured at the *Collège de France* on the rise of the economic reason as the "new governmentality" that has given *raison d'état* "new content"—part of what one saw (with respect to

the interplay between “problems” of childhood sexuality and the pervasive concern about specific practices) was that resistance easily became deployment of the power itself being resisted.

86. Foucault, “Against Replacement Penalties,” 459.

87. *Ibid.*, 460–461.

88. Michel Foucault, “Le Grand Enferment,” in *Dits Et Ecrits, Tome 2: 1976–1988* (Paris: Gallimard, 2001), trans. Perry Zurn.

89. Davis, *Are Prisons Obsolete?*, 22–24.

90. For instance, see Elias Walker Vitulli, “Queering the Carceral: Intersecting Queer/Trans Studies and Critical Prison Studies,” *GLQ: A Journal of Lesbian and Gay Studies* 19, no. 1 (2012); CR-10 Publications Collective, ed., *Abolition Now! 10 Years of Strategy and Struggle against the Prison Industrial Complex* (Oakland, CA: AK Press, 2008); Ryan Conrad, ed., *Prisons Will Not Protect You* (Lewiston, ME: Against Equality Publishing Collective, 2012); Eric A. Stanley and Nat Smith, eds., *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland, CA: AK Press, 2011); Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law*; Beth E. Richie, *Arrested Justice: Black Women, Violence, and America’s Prison Nation* (New York: New York University Press, 2012).

91. Foucault, “Against Replacement Penalties,” 461.

#### ON THE INVIOIABILITY OF HUMAN LIFE

*Julia Kristeva*

1. Victor Hugo, *Écrits sur la peine de mort* (Actes Sud, 1992), 71.

2. Robert Badinter, *Débats À l’Assemblée Nationale Sur L’abolition de La Peine de Mort En France: Intervention de M. Badinter, Garde Des Sceaux, Ministre de La Justice* (Paris: Journal officiel de la république française, 1981), <http://www.peinedemort.org/document.php?choix=4738>.

3. Maimonides, *The Commandments*, trans. Charles B. Chavel (Brooklyn, NY: Soncino Pr Ltd., 1984), 269–271.

4. Charles de Secondat baron de Montesquieu, *Montesquieu: The Spirit of the Laws*, ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 82.

5. Cesare marchese di Beccaria, *Beccaria: “On Crimes and Punishments” and Other Writings*, ed. Richard Bellamy, trans. Richard Davies (Cambridge: Cambridge University Press, 1995), 66.

6. Jean Jaurès qtd. in Badinter, *Débats À l’Assemblée Nationale Sur L’abolition de La Peine de Mort En France*.

7. Albert Camus, “Reflections on the Guillotine,” in *Resistance, Rebellion, and Death*, trans. Justin O’Brien (New York: Vintage International, 1995), 132.