Coloniality and the Racial Ontopolitics of Law:
Foucault's Juridical Power Reconsidered

By

Sabeen Ahmed

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Türk arkadaşlarım için,

for showing me the limits of my world,
and for revealing to me my limitless determination
to challenge them at every turn.

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ABBREVIATIONS OF MICHEL FOUCAULT'S WORKS

LECTURE SERIES & MONOGRAPHS

AB	*Abnormal: Lectures at the Collège de France, 1974–1975.* Translated by Graham Burchell. New York: Picador, 2003.
AK	*The Archaeology of Knowledge: And the Discourse on Language*. Translated by A. M. Sheridan Smith. New York: Pantheon Books, 1972 [1969].
BP	*The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979.* Translated by Graham Burchell. New York: Picador, 2008.
DP	*Discipline & Punish: The Birth of the Prison*. Translated by Alan Sheridan. New York: Random House, Inc., 1977.
GL	*On the Government of the Living: Lectures at the Collège de France, 1979–1980.* Translated by Graham Burchell. New York: Picador, 2016.
GSO	*The Government of Self and Others: Lectures at the Collège de France, 1982 –1983.* Translated by Graham Burchell. New York: Picador, 2010.
HS1	*The History of Sexuality: An Introduction.* Volume 1. Translated by Robert Hurley. New York: Random House, 1978.
OT	*The Order of Things: An Archaeology of the Human Sciences*. New York: Vintage Books, 1994 [1970].
PPC	*Politics, Philosophy, Culture: Interviews and Other Writings 1977–1984.* Edited by Lawrence D. Kritzman. Routledge: New York, 1988.
SMDB	*Society Must Be Defended: Lectures at the Collège de France, 1975–1976.* Translated by David Macey. New York: Picador, 2003.
ST	*Subjectivity and Truth: Lectures at the Collège de France 1980–1981.* Translated by Graham Burchell. New York: Picador, 2017.
STP	*Security, Territory, Population: Lectures at the Collège de France, 1977–1978.* Translated by Graham Burchell. New York: Picador, 2007.
WK	*Lectures on the Will to know: Lectures at the Collège de France, 1970–1971, and Oedipal Knowledge*. Translated by Graham Burchell. New York: Picador, 2014.

ESSAYS AND INTERVIEWS

"ECS" "The Ethics of the Concern for Self as a Practice of Freedom." In *Essential Works of Foucault, 1954–1984: Ethics, Subjectivity and Truth*. Translated by Robert Hurley and Others. Edited by Paul Rabinow, 281–302. New York: The New Press, 1994.

"CT" "The Concern For Truth." In *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984.* Translated by Alan Sheridan and Others. Edited by Lawrence D. Kritzman, 255–70. New York: Routledge, 1990

"Gov" "Governmentality." In *Essential Works of Foucault, 1954–1984: Power.* Translated by Robert Hurley and Others. Edited by James D. Faubion, 201–22. New York: The New Press, 2001.

"IS" "Iran: The Spirit of a World Without Spirit." In *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984.* Translated by Alan Sheridan and Others. Edited by Lawrence D. Kritzman, 211–26. New York: Routledge, 1990

"NGH" "Nietzsche, Genealogy, History."

"OD" "The Order of Discourse." Translated by Ian McLeod. In *Untying the Text: A Post-Structuralist Reader*. Edited by Robert Young, 51–78. Boston: Routledge & Kegan Paul Ltd., 1981.

"OP" "On Power." In *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984.* Translated by Alan Sheridan and Others. Edited by Lawrence D. Kritzman, 96–109. New York: Routledge, 1990

"TJF" "Truth and Juridical Forms." In *Essential Works of Foucault, 1954–1984: Power.* Translated by Robert Hurley and Others. Edited by James D. Faubion, 1–89. New York: The New Press, 2001.

"TL" "Two Lectures." In *Power/Knowledge: Selected Interviews & Other Writings 1972–1977*. Translated by Colin Gordon, Leo Marshall, John Mepham, and Kate Soper. Edited by Colin Gordon, 78–108. New York: Vintage Books, 1980.

"TP" "Truth and Power." In *Power/Knowledge: Selected Interviews & Other Writings 1972–1977*. Translated by Colin Gordon, Leo Marshall, John Mepham, and

Kate Soper. Edited by Colin Gordon, 109–33. New York: Vintage Books, 1980.

"PR" "Politics and Reason." In *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984.* Translated by Alan Sheridan and Others. Edited by Lawrence D. Kritzman, 57–85. New York: Routledge, 1990.

"PS" "Power and Strategies." In *Power/Knowledge: Selected Interviews & Other Writings 1972–1977*. Translated by Colin Gordon, Leo Marshall, John Mepham, and Kate Soper. Edited by Colin Gordon, 134–45. New York: Vintage Books, 1980.

"PTI" "The Political Technology of Individuals." In *Essential Works of Foucault, 1954–1984: Power.* Translated by Robert Hurley and Others. Edited by James D. Faubion, 403–17. New York: The New Press, 2001

"QM" "Questions of Method." In *Essential Works of Foucault, 1954–1984: Power*. Translated by Robert Hurley and Others. Edited by James D. Faubion, 225–38. New York: The New Press, 2001.

"RS" "The Risks of Security." In *Essential Works of Foucault, 1954–1984: Power*. Translated by Robert Hurley and Others. Edited by James D. Faubion, 365–81. New York: The New Press, 2001

"SKP" "Space, Knowledge, and Power." In *Essential Works of Foucault, 1954–1984: Power.* Translated by Robert Hurley and Others. Edited by James D. Faubion, 349–64. New York: The New Press, 2001

"SS" "Social Security." In *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984.* Translated by Alan Sheridan and Others. Edited by Lawrence D. Kritzman, 159–77. New York: Routledge, 1990

"TL" "Two Lectures." In ." In *Power/Knowledge: Selected Interviews & Other Writings 1972–1977*. Translated by Colin Gordon, Leo Marshall, John Mepham, and Kate Soper. Edited by Colin Gordon, 78–108. New York: Vintage Books, 1980.

"WE" "What is Enlightenment?" Translated by Catherine Porter. In *The Foucault Reader*. Edited by Paul Rabinow, 32-50. New York: Pantheon Books, 1984.

Introduction

RETHINKING LAW AS ONTOPOWER

In many ways, I have been working on this dissertation since my first semester of graduate school, during which I began thinking through the figure of the *refugee* from a Foucauldian perspective. I had just returned from a year of living in Antalya, Turkey, where I was a *hazırlık* English instructor at Akdeniz Üniversitesi, one of the largest public universities in the country. *Hazırlık* was an intensive English "prep year" that most students were required to take before "formally" starting their university education, but the job requirements were minimal, especially in comparison to some of the other "Fulbrighters'" teaching obligations, in cities much more arduous than my resort destination on the Mediterranean. I had been in the country once before—the summer of 2013 on a language scholarship, the duration of which collided with the revolutionary Gezi Park protests—and planned to continue my Turkish language education in Antalya. I was still planning to write a philosophy dissertation on Ottoman political philosophy, in an effort to make sense of the political philosophy of the modern Islamic world from a non-Orientalist and non-Wahhabist perspective. I spent much of my year meeting people; booksellers, shopkeepers, cooks, artists, musicians, photographers, writers, graduate students. Many of them were refugees, though preferred the term "expatriate." It was fall of 2014, the year that Turkey surpassed my country of birth, Pakistan, as the largest refugee-hosting country in the world.[1] My understanding of the crisis was limited to what I saw and heard from friends, which was not too much; many of those from Syria had left the country well before, had already been living in Turkey for several years, and refused to read the news. Mostly I heard variations of the following: "No news in English, at least. I'll read French or German news if I need to, but why bother when all of them make Arabs and refugees look like vermin?"

Attitudes toward refugees in Turkey, at least on the part of the everyday citizen, seemed to be apathy or annoyance more than anything else. Those refugees who were

[1] Pakistan had been the largest refugee-hosting country for 32 consecutive years before 2014, with the vast majority of refugees from Afghanistan. In 2020, Turkey remains the largest refugee-hosting country in the world, with the vast majority from Syria.

educated or had come from well-to-do families existed in a comfortable yet distant relationship of solidarity with left wing intellectuals and students. To them—my friends—the crisis was a reaping of what the West had sown: neo-imperial and neocolonial modes of international "cooperation" masking over decades of military, diplomatic, and economic intervention in the Middle East, and centuries of colonial domination before then. The refugee problem was neither an existential nor human rights crisis, but a political and a racial one.

When I returned to the United States to begin the PhD program, I shifted my focus, wanting to interrogate how the figure of the "refugee" was portrayed in political-philosophical scholarship. I needed to find a way to make sense of the existential terror that the so-called European migrant crisis had inspired, the horror of this "radical Other" who needed to be kept out at all costs, portrayed by Western governments first as potential terrorists and later as strains on their countries' economies.

A Brief Gloss on Refugee Scholarship

I encountered Michel Foucault in fall of 2015, in a seminar titled "Biopower and Biopolitics" taught by Lisa Guenther, and although I could not articulate why at the time, I felt deeply that Foucault's revolutionary writings on race and power could help to make sense of a crumbling Western hegemonic geopolitical order from, crucially, the perspective of the "oppressed." It was no surprise to me that the same subdiscipline to most harshly vilify Foucault's silence on colonialism and empire could find in Foucault's philosophy the analytical tools to help speak to the actual *dynamics* of power in historical and political contexts eroded by decades of exploitation and ideological manipulation. I thought—and continue to think—that there was something Foucault could offer that was lacking in other philosophical scholarship on the refugee.

Once I dove into scholarly literature on the "refugee", I noticed three, often overlapping, trends of analysis:

1. *Theoretico-political analyses of political exclusion utilizing the conceptual framework of the "state of exception" popularized by Giorgio Agamben.* This framework serves as a means either of problematizing refugee camps, detention centers, or the Palestinian Occupied territories, or, as do Achille Mbembe and Dag Tuastad, using these contexts

to critique Agamben's formulation itself.[2] Drawing on the deeply racialized implications of such terms as "terrorist" or "threat" in the post-9/11 world, anticolonial and critical race theorists have contributed to the resituating of precarity within the matrix of neocolonial, globalist capitalism and Western sociocultural imperialism to showcase the legacies of colonial violence in the lived experiences of brown subjects still today. As they advance toward Western borders, these subjects become transformed into embodiments of the threat against which the (Western) State must protect itself at all costs, who heralds the emergency that allows the State to impose exceptional measures on *all* subjects and to entrench criteria of 'belonging' that in turn reify criteria for exclusion. The refugee thus demands that we challenge our understanding of political membership, citizenship, and borders, for her precarity is one that we *all* share in an age where the 'state of exception' is becoming everywhere the 'rule.'

2. *Ethico-political analyses of the encounter with the refugee taking up Jacques Derrida's Kantian-Levinasian reconceptualization of "unconditional hospitality."* These writings often suggest that the stateless person is the radical Other whose singularity demands full ethical recognition and treatment.[3] It is in the *proximal encounter*—the face-to-face confrontation with the stranger, the foreigner, the guest—that her Otherness appears to me prior to any qualification or identification, preceding any opportunity for reflection, and whose recognition demands an unconditional ethical response. The opening up of the self to the radical exteriority of the stranger marks the very *welcoming of the Other* that constitutes Levinas's ethics as hospitality. Levinas's insistence on a metaphysics of alterity is meant to provide a theory of Otherness that, although it emerges in the face-to-face encounter between embodied subjects, exists prior *to* and 'outside' the encounter and thereby "transcends the present in which it

[2] See for example Achille Mbembe, "Necropolitics," trans. Libby Meintjes, *Public Culture* 15, no. 1 (2003): 11–40; Dag Tuastad, "'State of exception' or 'state in exile'? The fallacy of appropriating Agamben on Palestinian refugee camps," *Third World Quarterly* 38, no. 9 (2017): 2159–70.
[3] See Jacques Derrida, "Hostipitality," in *Acts of Religion*, ed. Gil Anijdar (New York: Routledge, 2002), 358–420; and Richard Kearney and Kascha Semonovitch, eds., *Phenomenologies of the Stranger: Between Hostility and Hospitality* (New York: Fordham University Press, 2011).

commands me."[4] However, Derrida adds, the modern nation-state system by necessity transforms absolute hospitality into something constrained and conditional: the ethical is negated by the political, and therefrom emerges the antinomy. The absolute *Law* of hospitality must give way to the conditional *laws* of hospitality. It is an internal inevitability engendered by the very concept of the state: by recognizing political borders between geopolitical territories, the boundaries of the nation—the threshold of the home—are explicitly demarcated.

3. *Juridico-philosophical approaches to the refugee modeled on Hannah Arendt's deeply influential postwar formulation of the "stateless person."* Given the dichotomy of 'citizen' rights and 'human' rights, such approaches assert, the only true human right must be the right to be a member of a political community—what Arendt famously called "the right to have rights"—for only therein can one's 'human' rights be protected and upheld. The first contemporary theorist to have taken up this notion in earnest is Seyla Benhabib, whose writings, since her 2004 publication *The Rights of Others,* are deeply indebted to Arendt's conceptualization of statelessness, rights, and politicality, and which have inspired a renewed interest in 'legal right' as an object of philosophical analysis. As Benhabib writes, "the asylum seeker, the refugees and the stateless have become prisms through which to explore the hypocrisies of contemporary liberal democracies and of the postwar state system, which, on the one hand, affirms the universality of human rights, including the right to asylum and, on the other hand, gives nations the sovereign privilege to control their borders and engage in practices in defiance of their obligations under international law."[5] The transcendent universality of 'human rights,' according to Benhabib and scholars like Ayten Gündogdu, thus proves to be conditioned by a political logic which elevates concrete political membership above one's status as a human being.[6]

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[4] Emmanuel Levinas, *Otherwise Than Being: Or Beyond Essence,* trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 2006), 12.

[5] Seyla Benhabib, *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton: Princeton University Press, 2018), 5–6.

[6] See Ayten Gündogdu, *Rightless in an Age of Rights: Hannah Arendt and the Contemporary Struggle of Migrants* (Oxford: Oxford University Press, 2015).

It seemed to me that, on a theoretical level, the refugee had assumed the status of political martyr, the figure of bare life *par excellence* to whom our ethical responsibility should be oriented unconditionally, and who brings to light the inherent contradictions and aporias of the nation-state era. The refugee, in other words, has become a mythologized and abstracted symbol of precarity, liminality, exclusion, taking the place of what was previously called the "subaltern," the "colonized," *homo sacer*, and other such neologisms of social and political theory. These critiques are essential and illuminating, particularly for problematizing the assumption that, in the modern 'age of rights,' all persons have equal status before the law and equal right to be welcomed on the basis of their vulnerability. After all, time and time again we find groups of persons who have been excluded from this guarantee based on race, ethnicity, gender, and so forth by means of territorial borders, immigration policies, and narratives of state security.

I, of course, do not deny that this is the case. However, these critiques often rest on exposing conceptual oppositions embedded in the logic of juridical rights (or the "juridical human"), utilizing an abstract claimant of rights and ethical singularity as the subject for whom such critiques are launched. In other words, law is seen as a space of contestation and overcoming, as something that has thus far failed to actualize its promise of universality—a failure that the refugee illuminates more than any other contemporary figure—but whose promise of universality itself, despite its disingenuous applications thus far, engenders emancipatory potential. The refugee is therefore abstracted from her historical and geopolitical context, theorized instead as a figure of *exclusion*—whether from the realm of the ethical *or* the political—who stands in either as a challenge to the nation-state system, or as the paradigmatic and transcendental manifestation of the truly global citizen. Benhabib's approach, for example, is still situated in the realm of liberal rights discourse, calling for a "new conceptualization of the relationship between international law and emancipatory politics"—rather than interrogating international law *itself*—to uncover "a new way of understanding how to negotiate the facticity and the validity of the law (Habermas [sic]), including international humanitarian law, such as to create new vistas for the political."[7] The singularity of the "refugee" is located in the aporia between universal human rights and national citizenship, such that solutions to problems of statelessness require a radical rethinking

[7] Benhabib, *Exile, Statelessness, and Migration*, 103.

of the citizen-human, rather than on the material conditions that made such a subject as the "refugee" emerge on the global stage in the first place. And what has always been clear in crises of statelessness is that the mass of stateless persons is inevitably a *racialized* Other.

In our contemporary moment, we might ask the following: Why do almost all of today's refugees originate from the Global South?[8] Why is today's refugee decried as unassimilable in and threatening to 'Western society' in such stark contrast to the European refugee of the postwar age? Why have Afghan refugees, who from the 1980s until 2013 were by far the largest demographic of refugees in the world, been almost entirely absent in philosophical or theoretical scholarship on refugees? Why is there such an overwhelming disparity in the purported number of total refugees (over 20 million[9]) and those who are granted asylum in any given year (fewer than 100,000 in 2018[10])? And finally, for whom have the last several years been a "crisis"—over 6 million Syrian refugees who have had to flee a devastating civil war precipitated in part by Western intervention in the Middle East, or Europe?

FROM REFUGEE TO LAW

The racial reality of "refugeehood" has begun to gain traction in certain strands of postcolonial theory by scholars who recognize that the content of political policies and public opinion towards stateless persons (whether immigrants, migrants, or refugees) are profoundly contingent on one's ethnic background, perceived religious affiliation, age, and gender. In his reconceptualization of the Enlightenment "mind-body problem" as a problem of "racial non-being," for example, John Harfouch includes the "asylee" and the "refugee" among those subjects who, on racial grounds, have been rendered "disposable

[8] Additionally, as of 2017, 84% of the world refugee population under the UNHCR's mandate are hosted by developing countries. See Charlotte Edmond, "84% of refugees live in developing countries," *World Economic Forum*, June 20, 2017, https://www.weforum.org/agenda/2017/06/eighty-four-percent-of-refugees-live-in-developing-countries/.

[9] Including Palestinian refugees under the UNRWA's mandate (5.5 million), the number increases to about 26 million. The total number of forcibly displaced persons worldwide—that is, including *internally* displaced people—is over 70 million. See UNHCR, "Global Trends," 4.

[10] That same year, there were 3.5 pending asylum cases. See UNHCR, "Global Trends," 3.

to modernity as a whole."[11] In the spirit of these scholars, who are dedicated to making lasting and material interventions in concrete, *contemporary* problems, we must look not only at similar contexts from our history, but also be carefully attuned to the *differences* that rupture those similarities.

I first began thinking through these issues while writing my first major contribution to what is increasingly called "critical refugee studies"[12]: a chapter included in a collected volume titled *Refugees Now*, that began to put some of the above scholarship in conversation with postcolonial concerns regarding the discourses of law and rights. Therein I questioned the utility of utilizing the 1789 Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l'homme et du citoyen de 1789*) as a benchmark by which to theorize Agamben's *homo sacer*—the paradigmatic embodiment of which Agamben in 2008 suggested was the "stateless person" of today.[13] It was while writing this chapter that I was struck by the question of law and, more precisely, the forcefulness of law to so authoritatively define the limits of "subjecthood," whether in terms of citizenship or refugeehood, in legal as well as *ethical* and *political* terms. Rather than a failure of *application*, I wondered whether modern liberal law, particularly on the international state, articulated legal subjectivities in certain ways as to veil its role as a *racializing ontopower*. Quoting Falguni Sheth, whose work has inspired much of this dissertation, law, in the moment of its inscription, "has already constituted who it will protect and who it will abandon, and in the process, continually reshapes the current onto-juridical regime, the current cultural worldview, and—consequently, a new racial

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[11] John Harfouch, *Another Mind-Body Problem: A History of Racial Non-Being* (New York: SUNY Press, 2018), xxiv.

[12] An emerging field of study, "critical refugee studies" was first theorized as a discrete but interdisciplinary field by a Residential Research Group led by Lan Duong and Yen Le Espiritu at the University of California Humanities Research Institute from 2015–16. The focus of the Group was to "think through a new paradigm for the study of refugees" that could serve as "a site of social and political critiques," particularly "the unique braiding of militarism and imperialism underlying forced migrations on a global scale" (Lan Duong and Yen Le Espiritu, "Toward Critical Refugee Studies: Being and Becoming in Exceptional States of War, Violence, and Militarism," *UCHRI*, 2015, https://uchri.org/awards/toward-critical-refugee-studies-being-and-becoming-in-exceptional-states-of-war-violence-and-militarism/).

[13] See Sabeen Ahmed, "Critiquing Agamben's Refugee: The Ontological Decolonization of Homo Sacer," in *Refugees Now: Rethinking Borders, Hospitality, and Citizenship*, eds. Kelly Oliver, Lisa Madura, and Sabeen Ahmed (London: Rowman and Littlefield, 2019), 153–69.

order whereby some population is casted out of the law's protection."[14] I began to suspect that it wasn't an interrogation of the *refugee* that would help make sense of our present (and growing) crisis of statelessness; it was an understanding of the *productive force*—whether discursive, ontological, economic, ideological, or theological—*of law itself*.

I decided that Michel Foucault's work, whose emphasis on excavating the "historical ontology" of the present I had always found fecund for analyzing modern political crises[15], would serve as the conceptual framework of analysis for such a reading of law. In the years since that seminar on "Biopower," however, it was clear that, where Foucault was most *promising*, he was also *least helpful*—particularly for understanding a contemporary, *global* conflict: in his characterization of "biological racism" as the most basic and fundamental "mechanism" of the modern state.[16] It is an extraordinarily expansive framework by which to understand power, eschewing reductionism in favor of interrogating the *operation* of power in a way I thought could illuminate the underlying power struggles coursing beneath the construction of the "refugee" on the international stage. In all of his painstaking analyses of the various *dispositifs* and practices of power that have most contributed to our constitution as modern subjects, however, it is the notion of "racism" that is least developed. How is one to make sense of Foucault's unambiguous and radical claim that "the modern State can scarcely function without becoming involved with racism at some point"?[17] To borrow from Alex Feldman, who captures the problematic so beautifully, "how (and in what sense) was racism *inscribed* in the fundamental mechanism of the state, and 'where' was racism (what was it like and how did it function) before this moment of inscription (such that it could lend itself to being inscribed in the state)?"[18] The answer to me seemed somehow fundamentally tied to the lacuna that so many scholars have identified in Foucault's genealogy of modern power: *law*.

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[14] Falguni Sheth, *Toward a Political Philosophy of Race* (New York: SUNY, 2009), 55.
[15] "WE," 46.
[16] For Foucault, the term "state" should be understood as a multiplicitous assemblage of institutions, techniques of normalization and regulation, all working within a heterogenous interplay of power and knowledge.
[17] SMBD, 254.
[18] Alex Feldman, "The Genesis of Foucault's Genealogy of Racism: Accumulating Men and Managing Illegalisms," *Foucault Studies* no. 25 (2018): 279.

I had always been struck by Foucault's silence on the role of *law* in biopolitical modernity, particularly given law's potency on the *international stage*; indeed, what is the "International" if not one enormous juridical framework intended to impose a sense of *order* on an artificially-constructed collection of sovereign states? And yet, the "expulsion thesis" that has dominated orthodox interpretations of Foucault's engagement with law seems deeply misguided. For one, Foucault often speaks about "juridico-legal codes" and new forms of legislation under disciplinary power and biopower. Second, Foucault's conceptualization of the "juridico-discursive" model of power is consistently presented as a particular expression of the *sovereign power* to "make die." Third, although he never wrote on or addressed their thought explicitly in his work, Foucault's intellectual contemporaries included such figures as Frantz Fanon and Edward Said, and the beginning of Foucault's transition to thinking through a genealogy of power came on the heels of the 1968 protests. There was no way Foucault could not have been thinking about *law*; the rule of law, international law, the emancipatory potential of law, and so forth. Indeed, Foucault explicitly addresses the imperatives of *human rights* in a statement delivered at the UN in Geneva shortly before his death.

It was thus clear to me that Foucault never intended to define "law" itself as a fundamentally "negative" power or power of repression. The sort of law that Foucault has in mind here is an *artifact* of a particular historical moment: the era of the European monarchies. In this sense, Foucault is speaking about "laws" more as "rules" enacted by legislation and enforced by a centralized authority (the sovereign). So important is this conceptual distinction that Mark Kelly, author of a recent article devoted to Foucault's theory of the "norm," asserts that "what Foucault ultimately designates as the 'law,' … I prefer to designate as the 'rule.'"[19] Speaking to Foucault's conceptualization of the law as sanction or prohibition, François Ewald, former collaborator of Foucault's and de facto executor of Foucault's intellectual estate, states that Foucault's "equation of law and death does not derive from the essential character of law," but rather a particular expression of sovereign power.[20] Thus, Foucault's rejection of "juridico-sovereign power" does not preclude the existence of a modality of power we might call *juridical power*.

[19] Mark G. E. Kelly, "What's in a Norm? Foucault's Conceptualization and Genealogy of the Norm," *Foucault Studies* no. 27 (2019), 2.
[20] François Ewald, "Norms, Discipline, and the Law," trans. Marjorie Beale, *Representations* no. 39 (1990): 138.

It was clear to me that whatever "Foucauldian" notion of "juridical power" might exist, it would not be in *opposition to* or a *rejection of* his broader understanding of power. This dissertation aims to supply such a notion of "juridical power" by reimagining juridical power as a *rationality* of government, in much the same way as "sovereign power" or "disciplinary power" are different rationalities of government which can (and often do) overlap with the operation of other forms of power. For example, we might say that sovereign power constitutes certain subjectivities such as the "monarch" or the "president," governs institutions like parliament or the presidency, or finds expression by utilizing certain forms of law or by waging war. Disciplinary power similarly constitutes subjectivities (the criminal, the abnormal, the mad), institutions (the prison, the hospital, the asylum), and is expressed through certain technologies (surveillance, media, propaganda). Like sovereign power and disciplinary power, *juridical power* should be understood as a strategy or modality of power that constitutes subjectivities (the citizen, the alien, the refugee), judicial institutions (courts, tribunals, legislative bodies), and modes of expression (constitutions, laws, fatwas). Juridical power is an expansive concept precisely because it *transforms* across spatiotemporal contexts and epistemes, alongside and in response to changing expressions of sovereign power, disciplinary power, and biopower.

TOWARD A JURIDICAL ONTOPOLITICS

In the context of biopolitical modernity, racism—which is what allows the sovereign right to kill to be reintroduced in a state whose imperative it is to foster life—is utilized to demarcate the population along lines of purity and impurity. Racism is the *enforcement* of a type of *normativity* upon a sub-population determined to be "impure." Insofar as the state is beholden to a *public* for its own internal stability, however, it seems that the racialization of any one population must to some degree be *approved* and its project *taken up* by the wider, non-racialized public. Beneath the level of the state, then, how does the state rally its own population against a manufactured, racialized enemy within? How does the public come to accept and enact the racialization of a sub-population that the state has identified as a threat? That is, *how do racialized subjects become normalized as raced Others?* This question to me was perfectly in keeping with Foucault's broader interest in "State racism," since in many ways the very notion of biopolitical modernity is meant to

answer the fundamental question of Nazi totalitarianism: how could an entire group of citizens turn against their own to such a radical and devastating effect?

In an extraordinary passage in *Security, Territory, Population*, a series of lecture delivered at the Collège de France from 1977 to 1978, Foucault offers a characterization of a term that he calls the "public." The public is a notion that makes scant appearance in his other works, but, in many ways, was the answer to the above question. The public is the population as *subject* and, under modern logics of power, it must participate in its own subjectivation. Emerging in the eighteenth century—the start of what Foucault calls 'governmentality'—the public

> is the population seen under the aspect of its opinions, ways of doing things, forms of behavior, customs, fears, prejudices, and requirements; it is what one gets a hold on through education, campaigns, and convictions. The population is therefore everything that extends from biological rootedness through the species up to the surface that gives one a hold provided by the public. From the species to the public; we have here a whole field of new realities in the sense that they are the pertinent elements for mechanisms of power, the pertinent space within which and regarding which one must act.[21]

Foucault's characterization of the "public," is expansive, but for the sake of brevity we might say that the "public" is the population *as it sees itself*. This is the dimension of the population upon which normalizing power must be exercised, such that the population comes to normalize *itself*.

On the level of the population, only juridical power seems to be able to account for this sort of normalization. Disciplinary power, the main technology of normalization in Foucault's genealogy, intervenes at the level of the *individual*, concerned first and foremost with her *conduct*. *Biopower*, the power which takes as its target the *population*, intervenes at the level of *life itself*; not, however, at the level of the biological alone, but what Foucault sometimes calls the "sociobiological." The life to be "fostered" under biopower is thus "at once a biological *and* a civic or political life."[22] It does not control the

[21] STP, 75.
[22] Feldman, "Genesis of Foucault's Genealogy of Racism," 282, emphasis added.

conduct of the population—and, as such, does not influence the beliefs or actions of the population—but rather takes the entire population as a *political problem* to be addressed, managed, and regulated. The political practice by which this is accomplished is, as we know, *biological racism*. Racism serves "as a way of fragmenting the field of the biological that power controls," a way of "separating out the groups that exist within a population" and "allow power to treat the population as a mixture of races," to "treat the species, to subdivide the species it controls, into the species known, precisely, as races."[23] But this racism must also be *normativizing*; it must reify the notion of an *optimal* race, for only could such a normative inflection inspire the dominant population to *willingly participate* in the destruction of the raced Other.

For this reason, it is not *biopower* but *juridical power* that racializes. Juridical power, as I will show over the course of this dissertation, is an *ontopower*; it *ontologizes* subjects by imposing upon reality itself a system of *order* in which subjects are constituted *in relation to one another.* Much of this occurs directly through legislation, of course, whether in the form of sanctioning laws or constitutions, conventions, treaties, and so forth. But juridical power also has a privileged access to the *truth*, understood not as a representation of a metaphysical reality outside of the material, but as a *regime* which governs the very production of knowledge domains and objects which in turn govern the production of *norms*. Truth is thus always bound up with *power*, for power, shaping the formation of knowledge, is what produces reality itself. This is why Foucault, in an interview with François Ewald, asserts that "nothing is more dangerous than a political system that claims to lay down the truth."[24] Juridical power, I will show, determines what regime of truth will be the one to govern the knowledge of the social and political world—the only "reality" that exists—and in this sense it *ontologizes reality itself*.

What should be clear is that "ontology" in this context is *political* rather than *metaphysical*. Metaphysically speaking, ontology understood as 'first philosophy,' concerned with being qua being, portends to discover the essence of some *external* reality, revealing what it is that comprises 'being-ness' *before* 'being' is placed in any sort of qualified (social or political) context. This fundamentally metaphysical interpretation has been challenged by such thinkers as Marx, Nietzsche, and Heidegger, who in various

[23] SMBD, 255.
[24] "CT," 267.

ways aimed, whether explicitly or implicitly, to do away with such ahistorical renderings of personhood and replace the 'givenness' of man with a critical interrogation of how man comes to *be* within a constellation of historical, material, and social practices and institutions. This critique of metaphysics has underpinned many of the critical sub-disciplines of philosophy by thinkers who have found the apolitical and transhistorical Cartesian iteration of the rational and autonomous subject incapable to account for the material realities of subjugation, oppression, and violence that took place in Europe in the 20th century. Foucault, similarly suspicious of metaphysical analyses of subjectivity and reality, believed that critical philosophers needed to orient their work toward a "*historical investigation* into the events that have led us to *constitute* ourselves and to *recognize* ourselves as subjects of what we are doing, thinking, saying."[25] Genealogical inquiry therefore aims to excavate the "historical ontology of ourselves"[26], whose investigations "always bear upon a material, an epoch, a body of determined practices and discourses."[27] In this anti-metaphysical conception of ontology, philosophical critique

> is not transcendental, and its goal is not that of making a metaphysics possible: *it is genealogical in its design and archaeological in its method*. Archaeological—and not transcendental—in the sense that it will not seek to identify the universal structures of all knowledge or of all possible moral action, but will seek to treat the *instances of discourse* that articulate what we think, say, and do as so many historical events. And this critique will be genealogical in the sense that it will not deduce from the form of what we are what it is impossible for us to do and to know; but it will separate out, *from the contingency that has made us what we are*, the possibility of *no longer being, doing, or thinking what we are, do, or think*. It is not seeking to make possible a metahysics that has finally become a science; it is seeking to give new impetus, as far and wide as possible, to the undefined work of freedom.[28]

In the words of Foucault scholar Johanna Oksala, Foucault's critique of ontology reveals that "reality as we know it is the result of social practices and struggles over truth and

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[25] "WE," 46, emphasis added.
[26] Ibid.
[27] Ibid, 49.
[28] Ibid, 46, emphasis added.

objectivity."[29] Foucault invites us to rethink ontology itself as *political*, that is, as "a *politicized* conception of reality"[30], which in turn allows us to forge spaces for competing (and perhaps subjugated, in the Foucauldian sense) ontological frameworks to challenge heretofore established visions of reality.

It is the constitutive relationship between truth and reality that renders juridical power an *ontopower*: law *institutionalizes a particular social and political order*, imposing upon "reality" a particular logic of organization and social arrangement that must be reinforced by apparatuses of power as well as domains of knowledge and discursive practices by which subjects are constituted and are able to constitute themselves. "Ontopower" is itself a neologism of two concepts: *ontology*, the branch of philosophy dealing with "being" (under which are included the notions of 'becoming' and 'reality'); and *power*, which I understand in the Foucauldian sense of a relation of force which circulates throughout the social body and which reifies the limits of possibility for different types of social actors. The reality constituted by ontopower is neither arbitrary nor random, but a response to a range of conditions and dynamics that are outside of the state's control. And this reality is fundamentally *normative*, as it demands that subjects and populations work in the service of *actualizing* the social and political order demanded by the state.

Given her emphasis on the legal as well as her deep engagement with Foucault's work on governmentality, my understanding of "ontopower" resonates with the one proposed by Falguni Sheth. For Sheth, ontopolitics "foregrounds the role of sovereign authority in ascribing *racial divisions* […] at the level of the ontological, or onto-ethical."[31] For Sheth, the framework of biopower alone cannot capture the "the impetus and the path of racism" that has come to ground post-9/11 sociopolitical life, paradigmatically the instantiation of the "Muslim" and "Arab" as a new "evil race" (54–55), given its location not in biological categories but in social, cultural, and religious categories. Accordingly, Sheth argues, Foucault's theory of biopower undermines the still-relevant role of *sovereign power* (in the form of a central sovereign authority) as an architect of new

[29] Johanna Oksala, "Foucault's Politicization of Ontology," *Continental Philosophy Review* 43.4 (2010): 445.
[30] Ibid, 447, emphasis added.
[31] Falguni Sheth, "The War on Terror and Ontopolitics: Concerns with Foucault's Account of Race, Power Sovereignty," *Foucault Studies* no. 12 (2011): 53.

racial divisions which must be thought of in concert with regulatory power. Ontopolitics, Sheth writes,

> depends on the creation of categories—categories that appear to have an objective foundation—to create "ontological" divisions among populations, i.e. to distinguish different subsets of the population morally, politically, socially, and of course legally. These categories are "ontological" in the sense that they denote some subjects as possessing some objective moral or political essence—always an essence that is in dialectical opposition to another.[32]

In the context of biopolitical modernity, the population of ontopolitically racialized subjects are framed not solely as biologically impure, but as moral, political, legal, or cultural *threats to the racial integrity* of the state itself. By rethinking ontopower as the *modus operandi* of the juridical, and juridical power as actualizing the *political desire* of the state in the form of its social and political arrangement of forces and subjectivities, we can reposition law and its myriad forms of expression as fecund sites of problematization and critical scrutiny, including in the production of "stateless" persons and refugees.

OVERVIEW OF DISSERTATION

By rethinking juridical power as an *ontopower* and modern law as a form of *racial ontopolitics*, my aims are threefold: (1) to offer a novel contribution to Foucault scholarship that has, to my estimation, insufficiently explored the role of juridical power in biopolitical modernity; (2) to unearth the seeds of a productive theory of power that Foucault himself had begun to explore but never took up again; and (3) to establish a method by which to approach contemporary crises of *statelessness*—and, more precisely, the material limitations of the *refugee* regime—in a heretofore underdeveloped manner. Thus, while this dissertation is fundamentally about *law* rather than the *refugee*, my hope is to provide a framework by which to rethink and problematize the mechanics of modern international law that makes possible the emergence of the figure of the "refugee" on the global stage at all.

[32] Ibid, 73.

The first chapter lays out the theoretical scaffolding for a new reading of Foucauldian juridical power as an *ontopower*; that is, as a productive power which constitutes subjects by codifying the *racial standard of optimality* around which sovereign power, disciplinary power, and biopower are oriented in the modern State. I begin with an overview of Foucault's famous, tripartite genealogy of power as a means of better locating the role (or non-role) of the "juridical" therein. By showing how the combined rationalities of sovereign power, juridical power, and biopower work in the service of a particular manifestation of *governmentality*, it becomes clear that modern power, no matter its modality, operates by means of assemblages of institutions, administrative techniques, and knowledge structures through which they act upon and constitute individuals as *subjects*. The norm, as I will show, serves as the bedrock of this subjectivation, through both disciplinary normalization and biopolitical regularization, and is the notion according to which I suggest we rethink the place of *juridical power* in modernity.

While this understanding of law as ontopolitical contrasts sharply with Foucault's "juridico-discursive" model of sovereign power, it echoes to a significant degree a theorization of law that Foucault puts forth in the context of *classical antiquity*: the codification of the *nomos*, that is, the "order of the world," by means of a paradigm of judicial decision-making called *krinein*. Chapter two argues that this conceptualization of law exemplifies the link between the *nomos* and "truth," and it is in Ancient Greek judicial decision-making where Foucault believes this link is first forged. The order of the world upon which legal judgments are made has reified a dynamic relationship between justice and truth that renders "truth" at once an *irrefutable* as well as a *normative* category. What the *nomos* does, then, is impose a *normative reality*: the domains of knowledge that participate in the regime of truth are always already normatively-oriented, for their target is the production of particular subjectivities that together compose and perpetuate the state's desired social and political order. Insofar as the *nomos* is manifested in juridical institutions, apparatuses, and discourses, it is the case that *law*, *juridical power itself*, is an *ontopolitical* and *normativizing power*. What we find thereafter is that "truth is what makes it possible to *exclude*; to separate what is dangerously mixed; to distribute *the inside and*

outside properly; to trace the boundaries between what is pure and what is impure."[33] As such, juridical power in classical antiquity is an *ontopower*, the power to *impose order in the name of truth*, and we can feel its repercussions still today.

In chapter three, I suggest one can find in modern governmentality a parallel to the Ancient Greek *nomos* in the form of the *norm*. Because the *nomos* elevates certain domains of knowledge over others, the *nomos* makes certain *norms* authoritative rather than other. Juridical power, now understood as that which institutionalizes the *nomos*, is the power that determines which norms are imbued with the prescriptive force of the government of self and others. The implementation and administration of "order" is what the biopolitical state takes as both its starting point and its end—not in the image of some divine kingdom to come, but with the aim instead of maintaining the population at an optimal level of health and, as such, *racial purity*. The implication is that the *nomos* of modernity, the order around which social and political reality is constituted, is itself a *racial nomos*. What prevents Foucault from theorizing the lasting force of juridical power, I suggest, is this disregard of the *colonial context*. By drawing on a range of texts by historians as well as postcolonial critiques of Foucault's outline of "race war discourse," chapter three concludes that the racial standard of optimality around which biopower, disciplinary power, and sovereign power are today oriented has its origins, in part, in the European colonizing projects of the sixteenth, seventeenth, and eighteenth centuries. While Foucault periodizes the emergence of "biological racism"—distinct from scientific racism in that it is concerned with the biological processes of the population in *political* terms—to the end of the nineteenth century, and argues that it was only by weaponizing biological racism that *biopower* came to be the reigning logic of modern government, the colonial context demonstrates that concerns with "biological purity" permeated European modes of governance well before being applied *internally* in the form of European "State racism." Put differently, the juridical subjectivation of populations on the basis of racial optimality has its roots in European colonizing projects themselves. For example, as certain critical race scholars and postcolonial theorists attuned to the inextricable link between racial identity and sexual normality, notions of racial ideality and degeneracy which constituted the juridical sphere not only predated the emergence

[33] WK, 187, emphasis added.

of scientific discourses about sexuality, but likely themselves "*provided the background and the testing ground for the later nineteenth century scientific/medical and legal discourses of sexual normativity and perversion*."[34] It seems, then, that the very notion of "racial purity" cannot be understood outside of a rehabilitated understanding of juridical power as a *productive* power, as a power that imposes a *racial order* upon social and political reality that is *codified* in juridical practices, legal discourses, and, especially, the subjectivation of individuals and populations along racial lines. It was only on the basis of these preestablished, normative racial identities and hierarchies that the otherization of sub-populations have been able to take place with such success: the earlier entrenchment of these racial normativities is precisely what allowed *biological racism* to be inscribed as the basic mechanism of power in the modern state, principally by elevating the *white, Anglo-European* as the standard of *racial* optimality.

The final chapter revisits Foucault's extraordinarily rich interpretation of the history of "race war discourse" and draws out the link between race discourse and *truth*. In so doing, it illustrates how the changing shape of race war discourse from the seventeenth to the nineteenth centuries, the subjects to whom race was ascribed and the objectives of these ascriptions, worked to displace *old juridical regimes* and instantiate new forms of political organization and social arrangements; that is, *new social and political realities*. By attending to the colonial context as theorists such as Ann Laura Stoler and Ladelle McWhorter do, we instead find myriad examples of non-penal forms of juridical power used to constitute *raced populations* and naturalize *normative* social arrangements, not only complicating Foucault's decentering of law in modernity but also challenging his suggestion that the race war discourse served most influentially at the *margins of law*, at the "extremities" where power's "exercise became *less and less juridical*."[35] By relocating the extant history of colonialism in the development of modern law, we can better see the how, as Nasser Hussain and others have suggested, colonialism is "the foundation on which the project of modernity is initiated"[36] in a manner not yet fully explored.

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[34] Nadine Ehlers, "Onerous Passions: colonial anti-miscegenation rhetoric and the history of sexuality," *Patterns of Prejudice* 45.4 (2011): 323.
[35] SMBD, 28, emphasis added.
[36] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), 28.

Beyond their undeniable perseverance in modern expressions of "biopolitical racism," these colonial modes of racialization haunt the international legal regime in a way Foucault himself overlooked, despite his proximity to the debates around global notions of subjecthood and rights. What we find is that such legal categories such as "citizen," "alien," "terrorist," and "refugee" are by no means neutral, but constructed upon histories of struggles for domination and subjugation, control and disciplinarization, aiding in the establishment of a particular *desire for order* whose normative force becomes reified in the elevation of certain *norms of behavior* and *racial subjectivities* over others. It is thus not enough to simply advocate to "expand" the application of these legal subjectivities to those whom they are presently denied, but problematize, interrogate, and deconstruct the very terms of their ascriptions as legal subjectivities, think these ascriptions as working always in hegemonic Western interests, for it is precisely Western regimes of truth that continue to try and govern our fundamentally *global* modes of life.

Chapter One

THEORIZING JURIDICAL POWER WITHOUT SOVEREIGNTY

Breaking from sovereign-centric notions of power that largely dominated political theory in the twentieth century, Michel Foucault understood 'power' neither as a synonym for domination nor a commodity to be possessed, but as a *relation of force* which can, "and must, be studied only by looking at the interplay between the terms of that relationship."[37] The terms of these relations of force are expressed through different *rationalities* of government—together comprising what Foucault calls *governmentality*—which transform and adapt in response to a range of historical contingencies, geopolitical political events, shifting dynamics of power, innovations of media and technology, and emergent epistemes and discursive domains. This notion of power as *rationality* is crucial for understanding how different logics of government mutually reinforce one another at the same time that they may come into conflict with one another. As defined by Colin Gordon, former research assistant to Michel Foucault at the Collège de France, rationality is "a way or system of thinking about the nature of the *practice of government* (who can govern, what governing is; what or who is governed), capable of making some form of that activity *thinkable and practicable* both to its practitioners and to those upon whom it was practiced."[38]

Insofar as it makes legible and legitimate certain forms of activity, a fundamental dimension of governmentality is *knowledge*: "Governmentality studies," according to Randy Lippert, "assume specific knowledges are necessary for particular governmental domains to emerge and function and that associated practices are dependent upon knowing their objects."[39] For Foucault, knowledge aids power in creating, reproducing, and modifying its fields of exercise, while power—whether sovereign, disciplinary, or biopolitical—in turn makes use of and shapes the production of knowledge for the ends

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[37] SMBD, 134.

[38] Colin Gordon, "Governmental Rationality: An Introduction," in *The Foucault Effect*, 3, emphasis added.

[39] Randy Lippert, "Governing Refugees: The Relevance of Governmentality to Understanding the International Refugee Regime," *Alternatives: Global, Local, Political* 24.3 (1999), 297.

that are demanded by a particular manifestations of government. Importantly, the ends of government are neither transhistorical nor fixed; the operations of disciplinary power, sovereign power, and biopower will take certain forms under 'liberal government' that they might not under 'neoliberal' government. Only by studying the *operation* of these different modes of power can we make sense of how government attains its ends—and in so doing uncover the various mechanisms of subjectivity that are required for their fulfillment. As I see it, the notion of power-knowledge is the conceptual ground upon which Foucault's entire genealogical project rests, unifying "the deployment of force and the establishment of truth" toward the *subjectivation* of individuals and with it the *ontologization* of the entire political order itself.[40]

The aim of this chapter is to make clear the Foucauldian topography, so to speak, on which the theoretical analyses in this dissertation will be grounded and the specific arguments are to be situated. It offers an overview of Foucault's genealogy of modern power, with particular emphasis on the dynamic role of *power-knowledge* (*le savoir-pouvoir*) in the transition from the juridico-discursive model of sovereign power (exemplified by *penal law*) to disciplinary power (as a power of *normalization*).[41] The significance of power-knowledge, particularly in a modern *episteme* built on the authority of the human sciences, explains why and how for Foucault it is the *norm* rather than *laws* that lend potency to modern governmentality, by both influencing and shaping the behavior of subjects from without as well as presenting to subjects an optimal standard or model by which they modify their own conduct from within. The norm, more simply, makes possible the government of others and the self. By centralizing the norm as the touchstone of modern governmentality, I conclude by examining the way in which "biological racism" has directed the normalization and *normativization* of subjects, demonstrating how it is a *racial "norm"* that allows for the reintegration of the sovereign power to "make die" into the biopolitical imperative to "foster life." The racial norm (which as we will later see may be better understood as *the standard of racial optimality*) is what makes the

[40] DP, 184.

[41] Throughout this dissertation, I use "juridico-discursive" and "juridico-sovereignty" interchangeably. In all instances I am referring to a particular mode of *sovereign power*. Unless qualified otherwise, my use of the term "law" is synonymous with "juridical power," which I suggest is *distinct* from sovereign power.

sovereign power to kill fully compatible with the biopolitical drive to protect the population.

While Foucault himself is relatively silent on *how* this racialization is supposed to take place, I suggest that Foucault's genealogy of modern power leaves room for a modality of power called "juridical power" that persists *within* biopolitical modernity. It is on the basis of *truth*—both the production of truth through discursive practices and those objects that are produced *by* these discursive practices—that, as I show in the following chapters, this latent theory of "juridical power" is to be found. And indeed, once juridical power's productive rationality is brought to bear upon colonial logics of government, we find that juridical power is precisely what facilitates and institutionalizes the *racialization* of the norm in modernity. In other words, it is the ontopolitics of truth embedded in law that makes possible the integration of *racism* as a means of repurposing and redeploying the state's old, sovereign power to "make die."

FOUCAULT'S GENEALOGY OF POWER: SANCTION, NORMALIZATION, RACIALIZATION

As mentioned, power for Foucault is a *relation of force* that can only be understood by examining the terms or strategies of that relation, the actors upon and through whom force is exercised, and the manufacturing of subjects as 'power-effects.'[42] Rather than an object or commodity, power in this sense denotes a *rationality* or *strategy* that administers the relations between subjects, the workings of institutions and apparatuses, the aims of social, economic, and political practices, and the rules of discursive formations. As he defines it in several of his Collège de France lectures, power is the "conduct of conduct," something that "is always present" in human relationships "in which one person tries *to control the conduct of the other*."[43] Importantly, "conduct" here need not refer solely to observable behavior, but the very range of actions available to subjects, "including their acts of believing and discoursing."[44] It is in the relations between subjects where this

[42] SMBD, 134.
[43] "ECS," 292, emphasis added.
[44] Robert Nola, "Knowledge, Discourse, Power and Genealogy in Foucault," *Critical Review of International Social and Political Philosophy* 1.2 (1998): 109.

power over conduct can be seen, and these "power relations" as Foucault calls them "are mobile, they can be modified, they are not fixed once and for all."[45] As such, power can never be absolutely centralized in the hands of one individual or class as a commodity or right, as it has been in the Hobbesian and later social contract traditions, but rather exists *everywhere* that there are relations between individuals, circulating through and across institutions and social bodies. As a result, Foucault's understanding of power is presented, not as a theory of political structures or ideology, but as a dynamic and fluid concept which can only be critically understood and normatively assessed by examining the interplay of its relational elements in concrete, historical contexts.

Foucault undertakes his inquiry of power by means of *genealogy*, a method sensitive to the historicality and contingency of different arrangements of force and the ways in which these arrangements are implemented, legitimized, and sustained in localized sites and spaces. Rather than approaches that take as their object of analysis the "nation-state," genealogical inquiry locates the ethos of modern power in the notion of *governmentality*. For Foucault, the modern state cannot be thought of in terms of a unified sovereign actor that wields some unilateral commodity called "power," but rather as an entity that is "superstructural in relation to a whole series of *power networks*" and which "consists in the codification of a whole number of *power relations* which render its functioning possible."[46] Governmentality—a neologism of "government" and "rationality"—is in this sense concerned with deploying and maintaining particular *balances of force* that are reified in and circulate through a "heterogeneous ensemble" of institutions, technologies, discursive practices, and subjects themselves. The task of genealogy is to "determine what are, in their mechanisms, effects, their relations, the various power-apparatuses that operate at various levels of society."[47] What genealogical inquiry reveals is that the architectonics of governmentality are rooted in the combined rationalities of sovereign power (the power to "make die"), disciplinary power (the normalization of individuals), and biopower (the regulation and securitization of

[45] "ECS," 292.
[46] "TP," 122, emphasis added. My use of the term "state" throughout this dissertation, unless stated otherwise, is predicated on Foucault's holistic understanding of the state.
[47] SMBD, 13.

optimality at the level of human life itself), the latter of which best characterizes the political imperative of the modern state.[48]

Foucault's genealogy of biopower—the modality of power that defines modern governmentality—is flanked on one end by the pre-mercantilist feudal societies of the Middle Ages and on the other by the Nazi genocide of the twentieth century, and is in this sense restricted to the *European* context (a point we will return to and problematize more fully in chapters three and four). Central to the transformation of power during this time are transformations of *knowledge* (*savoir*) out which different "subjects" are constituted, principally the result of the emergence of the human sciences in the eighteenth century.[49] Once "man" has become an epistemological object, rather than a pre-given, universal and timeless agent who is the foundation of thought and action, the subject is made visible as an individual who has been *constituted by* a complex interplay of techniques of power and domains of knowledge, a nexus of force that Foucault terms "power-knowledge" (*le pouvoir-savoir*). So central is this understanding of a "constituted subject" that, in a short but illuminating essay titled "The Subject and Power," Foucault discloses that "the goal of [his] work … has not been to analyze the phenomena of power, nor to elaborate the foundations of such an analysis …, [but] instead, has been to create a history of the different modes by which, in [Western] culture, *human beings are made subjects*."[50] The subject is not *a priori* to the operation of power, nor is she a pre-formed universal as she is taken to be in phenomenology or existentialism, but is herself an *effect* of the mutually-constitutive operation of power-knowledge (*pouvoir-savoir*). Part and

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[48] For this reason, some scholars of Foucault take 'biopower' to be synonymous with 'governmentality' (see for example Mona Lilja and Stellan Vinthagen, "Sovereign power, disciplinary power and biopower: resisting what power with what resistance?" *Journal of Political Power* 7. 1 [2014]: 107–26; and Mitchell Dean, *Governmentality: Power and Rule in Modern Society* [London: SAGE Publications Ltd., 2010]). Although it goes beyond the scope of this project, it should be noted that Foucault also offers a separate but overlapping genealogy of "government" which has its roots in *Christian pastoral power*, and which is followed by the development of military techniques and, finally, the police. See fn. 20 below.

[49] Crucially, "emergence" for Foucault always designates that which is "produced in a particular state of forces" ("NGH," 376). Emergence is not spontaneous, in other words, but something that is *facilitated*.

[50] "SP," 326, emphasis added. A crucial dimension of the subjectivation of the human being is understood by "the way the human being *turns* him- or herself *into* a subject" (ibid, 327). The subject is thus both an effect of power-knowledge as well as an autonomous agent who plays an active role in her own subjectivation.

parcel with Foucault's analysis of power is thus the analysis of *formations of knowledge* (*connaissance*) or *discursive practices* by which human beings come to be made intelligible *as subjects*, acted upon by other subjects and institutions, and according to which they themselves act.

This analytic shift from the unilateral sovereign-subject relationship to the constitution of individuals as subjects allows for Foucault the conceptual transition from the "juridico-discursive" model of *sovereign power* to a dynamic, normalizing and individualizing conception of *disciplinary power*: a strategy of power that targets the behavior of individuals. While the juridico-discursive model of sovereignty—which for Foucault illuminated the limits of modern political theory—could only reduce the subject to an abstraction, disciplinary power for Foucault preserved the fundamental *constitutiveness* of subjectivity by recognizing how institutions, modes of discourse, and social practices *controlled the conduct* of individuals in accordance with accepted *norms of behavior*. Foucault's meditations on disciplinary power, conduct and deviancy, and knowledges of the subject occupied much of his early writings, but he rightly came to see that no inquiry into the modern state could focus solely on the individual subject. Such an analysis could only capture a "microphysics" of power "too much oriented to processes of disciplining and the examination of local practices and singular institutions like the prison or the hospital."[51] Foucault's appointment at the Collège de France in many ways heralds the notion of the *population*—and with it, a mode of power called *biopower*—as a central object of power-knowledge.

The crux of biopolitical subjectivation is not the disciplinarization of the of individuals according to pre-determined metrics of normality, but the management of the population at an optimal level of *sociobiological life*—life that is "at once a *biological* and a *civic or political* life"[52]—by inverting the sovereign right to kill into a (*bio*-)*political imperative* to *make live*. The classical sovereign power to kill is not wholly absent; however, it is only after *racism* becomes a "basic mechanism" of power that the biopolitical state can invoke its old sovereign power to *make die*, by demarcating the body politic into *optimal* and *suboptimal* populations; that is, as *sub-races* in opposition to the optimal or

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[51] Thomas Lemke, "Foucault's Hypothesis: From the Critique of the Juridico-Discursive Cocnept of Power to an Analytics of Government," *Parrhesia* no. 9 (2010): 33.
[52] Feldman, "Genesis of Foucault's Genealogy of Racism," 282, emphasis added.

"pure," human race. By framing certain populations as "threatening" to the health of the state's "ideal" population, the biopolitical state can use its sovereign right to kill *in the service of* biopower itself. Importantly, as we will see shortly, Foucault tells us neither how the 'production' of raced populations is carried out nor how social and political reality are transformed to reflect their racialization; we know merely that disciplinary and security apparatuses act together to enforce, manage, and regulate the behavior of its subjects and secure the integrity of its population according to already-established metrics or norms of conduct. For this reason, Foucault identifies the "power of the Norm" as the principal technology of subjectivation in modern governmentality.[53] In order to better grasp the complexity and significance of the norm, however, we must more carefully examine how and why the individual and the population, rather than the "abstract subject of rights," have become the focus of government.

FROM SOVEREIGNTY TO DISCIPLINE

Delivered between 1975 and 1976 at the Collège de France, *Society Must Be Defended* offers Foucault's most comprehensive and oft-cited outline of biopower. In these lectures, Foucault argues that the fundamental metamorphosis in the modern (that is, post-seventeenth century) political development of the West is that power no longer operates according to the classical model of sovereignty in which juridical institutions exercise direct control over subjects by threat of sanctions and punishments, but according to disciplinary and regulatory technologies by which subjects, often unwittingly, come to normalize their *own* behavior. Prior to the transition to modern forms of disciplinary power and biopower, politics was—and for Foucault continued to be—understood almost exclusively in terms of a "juridico-discursive" model of sovereign power, that is, "in terms of *rights* and from the perspective of *repression*" in the form of prohibitory and constraining laws.[54] The sole political relationship is the one that exists between the

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[53] DP, 184. It should be noted that Foucault himself capitalizes "Norm," presumably because he is speaking to the Norm as an abstract concept rather than gesturing toward any one norm in particular.
[54] Lemke, "Foucault's Hypothesis," 32.

sovereign subject of rights and the *absolute* sovereign, who wielded authority over subjects by means of her unique right to *make die*. As Thomas Lemke summarizes the shortcomings of such a "macro" interpretation of power, "power is either reduced to certain modes of exercise like constraint, force or violence, or it is exclusively analyzed as stabilization, continuation or legitimation of social relations … without paying attention to how these relations generate and change material forms of existence, social identities, and bodily experiences."[55] Foucault wants to move away from such reductive and two-dimensional formulations of power, for they cannot reveal anything about the myriad, aleatory ways in which power operates on and through individuals, who are not abstract subjects of rights but in fact constituted to think of and conduct themselves in certain ways.

The eighteenth century marks for Foucault the lynchpin of modern governmentality, heralded by the rapid industrialization and demographic expansion of Western society and a new *episteme* of knowledge production, specifically the emergence of "man" as an epistemological object. This new understanding of man, made intelligible in particular via the discursive domains of psychiatry and the biological sciences, necessitated new technologies of power to subjugate bodies and manage individuals at an optimal level of productivity. The heart of this transformation is what Foucault calls *normalization*, a concept which is analyzed to varying degrees in his lecture series as well as his later monographs. Simply put, normalization refers to the practices by which individuals "can be seen, on the one hand, and modified on the other"[56], principally via *surveillance* and constructed *norms of behavior* according to which individuals are expected to comply and in accordance with which "deviants" can be identified. It is the work of disciplinary power to individualize as well as normalize, and this normalization is carried out by means of various social institutions such as the police, the hospital, the asylum, the school, and even the family.

Against the repressive logic of penal law and the right to "make die" that exemplifies juridico-discursive sovereignty, the logic of normalization operates according to the surveillance model of the *Panopticon*, a carceral architecture of invisible

[55] Ibid, 33.
[56] STP, 56.

yet constant hierarchical observation and judgment over the activities of prisoners. In its original conceptualization by Jeremy Bentham, the organizational structure of the Panopticon "induced in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."[57] Positioned in an observation tower around which is built a circular row of cells, the security guard has the power to observe the behavior of any inmate at a given time. Though the guard can never actually see *all* inmates at once, the prisoners, who never know *when* they are being watched, are nevertheless constantly exposed to the *possibility of being observed*. This threat of observation compels the prisoners to regulate their behavior *as if* they are being watched at all times.

Although no such architectural Panoptican exists in the modern state, disciplinary power functions according to the Panoptic logic of surveillance, exemplifying both the need to control subjects at the level of their activity as well as the entry of *economy* into calculations of power: "Discipline increases the forces of the body (in economic terms of utility) and diminishes those same forces (in political terms of obedience)."[58] The aim of disciplinary power is to maintain subjects at the level of material productivity required by capitalism, without allowing them to stray too far from the various modes of subjectivity (as prisoners but also as students, as workers, as patients, and so forth) to which they are shackled. Accordingly, the "power-effect" of panoptic discipline is the subject who himself

> assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection. By this very fact, the external power [viz. sovereign power] may throw off its physical weight; it tends to the non-corporal; and, the more it approaches this limit, the more constant, profound, and permanent are its effects.[59]

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[57] DP, 201.
[58] Ibid, 138.
[59] Ibid, 202–203.

Normalization, as the above passage indicates, is concerned first and foremost with the *behavior* of political subjects and results in their *self-disciplinarization*, a manifestation of the Panopticon's "mind-over-matter type of power" at work in the production of docile subjects.[60] This mode of self-mastery is a remnant of the Christian ritual of *confession* and its attendant emphasis on the *flesh*[61]—that is, the *body* of the individual—but which, in ostensibly secular modernity, is rooted in the early modern *episteme* of the human sciences, including natural history, the biological sciences, and psychiatry.

In concert with the "empirical turn" in eighteenth century scientific study, disciplinary power emerges as a positive power manifested in "a productive network that runs through the whole social body," decentralizing the old model that saw the concentration of power in the hands of a single sovereign.[62] During this period, punitive measures predicated on violations of law are gradually replaced by disciplinary techniques predicated on "the behavioral potentialities" of subjects, the function of which was "no longer punishing individuals' infractions but *correcting* their potentialities"[63]—focused, in other words, no longer on the actions *taken* by individuals but the actions individuals *might* take. As such, disciplinary power's mode of expression is not prohibition codified in laws, but techniques of normalization that are exercised through different social apparatuses and mechanisms of surveillance, thus marking the beginning of "the age of social control."[64] Because disciplinary power intervenes at the level of

[60] "TJF," 58.
[61] It is a remnant, in other words, of Christian *pastoral power*, a "beneficent power" that aims toward the "salvation [subsistence] of the flock" (STP, 126). Though rich in itself, a sustained analysis of "pastoral power" goes beyond the parameters of the present study. What bears mentioning, however, is that for Foucault, pastoral power differs from classical sovereign power insofar as it is "exercised on a *multiplicity* rather than on a *territory*" (ibid, 129, emphasis added)—that is, on individuals themselves rather than the territory of governance—and "implies a knowledge of the *conscience* and an ability to direct it" ("SP," 376, emphasis added). In the modern state, pastoral power gives rise to disciplinary power, taking shape in the "family, medicine, psychiatry, education, and employers" (ibid, 335), rendering it particularly potent for developing relations of *conduct* between and internal to subjects. For an excellent overview of Foucault's notion of pastoral power, I direct the reader to Ben Golder, "Foucault and the Genealogy of Pastoral Power," *Radical Philosophy Review* 10.2 (2007): 157–76.
[62] "TP," 120.
[63] "TJF," 57, emphasis added.
[64] Ibid. In *Society Must Be Defended*, Foucault identifies four operations of disciplinary power: "selection, normalization, hierarchicalization, and centralization" (SMBD, 181).

individual bodies, modifying and constraining their habits and actions, Foucault often identifies disciplinary power as both a normalizing and an *individualizing* power; that is, as a power operating "through corrective training in order to produce a *normalized individual*."[65] Nevertheless, this attention to disciplinary power, which Foucault refers to as a political analysis of the microphysics of power, alone cannot make sense of the relationship between subjects and the institution of the state. In other words, Foucault as yet lacks a *macrophysics* of power that can make sense of the subjectivation and normalization not of individuals, but the *collectivity* of individuals of interest to government.

Foucault's solution to this lacuna is to apply the same style of analysis "that had been used to study techniques and practices addressed to individual human subjects" to "techniques and practices for governing *populations* of subjects at the level of a political sovereignty over an entire *society*."[66] If disciplinary power is for Foucault an individualizing and normalizing power at the level of the behavior of the subject, then *biopower* denotes the "administration, control, and direction of the *accumulation of men*."[67] For Foucault, the management of the population at an "optimal" level of life has become the fundamental task of the modern state, expressed through an inversion of the old sovereign right to "take life" into the new biopolitical imperative to "*make live*." "Populations" here refers not "to collection[s] of individual juridical subjects within a determinate territory"—not, for example, to the abstract, legal conceptualization of the body politic in social contract theory—but rather to entities which have "a life and a specific density of [their] own, to which the techniques of security must adapt themselves and upon which they must begin to operate."[68] The "population" first emerges as a political problem under mercantilism, under which it is conceived as a *productive force* and the primary guarantor of the *wealth* of the State: the population "can only be the basis of the state's wealth and power … [if] it is framed by a regulatory apparatus (*appareil*) that prevents emigration, calls for immigrants, and promotes the birth rate."[69] Such an

[65] Daniel McLoughlin, "Giorgio Agamben on Security, Government and the Crisis of Law," *Griffith Law Review* 21.3 (2012): 686.
[66] Gordon, "Governmental Rationality," 4, emphasis added.
[67] "TP," 125.
[68] Golder, "Foucault and the Genealogy of Pastoral Power," 164.
[69] STP, 69.

understanding of population changes under *physiocratic* conceptions of production, wealth, and capital. The population is no longer seen as either a generalized productive force or abstract subjects beholden to an absolute sovereign, but rather as a material collection of individuals which is "dependent on series of variables," among which is its subjectivation *of itself.*[70] As Foucault states:

> The population is not, then, a collection of juridical subjects in an individual or collective relationship with a sovereign will. It is a set of elements in which we can note constants and regularities even in accidents, in which we can identify the universal of desire regularly producing the benefit of all, and with regard to which we can identify a number of modifiable variables on which it depends.[71]

Once "population" emerges as a modal concept, in other words, the question of the *desire* of the population—of that by which the population will say "yes," for example to its participation in a free market system—becomes a central question of governance.[72] The desire of the population must conform to the "universal of desire"—the "greater good," whatever it may be—of the state as a whole. It is for this reason that Foucault ultimately identifies the population as "the final end of government."[73] It may thus be more accurate to say that, for Foucault, the modern state is a site of *biopolitical governmentality* that operates along two poles: the disciplinary normalization of *individuals*, and the biopolitical management of groups of individuals in the form of the *population*.

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[70] Ibid, 71, emphasis added.
[71] Ibid, 74.
[72] Although it is here discussed in the context of economic transformations, Foucault identifies the same impulse to conform under Christian pastoral power. When "government" is understood in this sense, it is not the desire of the individual within the population, but the desire of the population as a collective unit that allows for government to "direct the souls" of those subjects who *desire to have their souls directed*. As he states in the *Government of the Living*: "The one directed always wants to be directed, and the direction will last, function, and unfold only insofar as the one directed still wants to be directed" (GL: 230). When thought in the context of capitalism, however, one could argue the same: the free market system can last only as long as the population willingly participates in it.
[73] STP, 105.

Decapitating the Juridico-Discursive Sovereign

Prior to the emergence of the "art of government" in the sixteenth and seventeenth centuries, during which disciplinary power and later biopower began to permeate government, sovereign power operated according to a "juridico-discursive model" in which a central sovereign entity exercised absolute authority over subjects within a territory. According to Foucault, absolutist forms of power, whether monarchical or contractual, uphold a "classic[al] juridical theory" in which power is conceptualized as "a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate, either wholly or partially, through a legal act or through some act that establishes a right, such as takes place through cession or contract."[74] Under the traditional model of sovereignty, the source and legitimacy of power are found in the *law*: all subjects under the sovereign are seen as *abstract subjects of rights* to whom certain protections and freedoms are owed *by nature*. At the same time, the sovereign exercises his absolute authority over his subjects by wielding the power or the "right" to *make die*—legitimized first on divine and, later, hereditary grounds—to withhold protection from those who it deems a danger to its existence. Under this classical conception of power, sovereignty and law are inseparable.

Foucault of course did not believe that such an "abstract subject of rights" *existed*. His critique of "juridico-discursive" sovereignty was oriented to modern political theories that continued to take the sovereign-subject relationship as the fundamental analytic of politics and which reduced "power" to the status of a commodity that was expressed exclusively by means of law. In an interview first published in *L'Arc* in 1977, several years into his tenure at the Collège de France, Foucault famously states:

> Sovereign, law, and prohibition formed a system of representation of power which was extended during the subsequent era by the theories of right: political theory has never ceased to be obsessed with the person of the sovereign. Such theories still continue today to busy themselves with the problem of sovereignty. What we need, however, is a political philosophy that isn't erected around the problem of

[74] "TL," 88.

> sovereignty or, therefore, around the problems of law and prohibition. *We need to cut off the king's head*. In political theory that has still to be done.[75]

The problem, as Foucault saw it, was that these conceptualizations of power—whether structured around a monarch whose authority was divinely ordained (although the monarch is Foucault's most frequent figure of reference in his critiques of juridico-discursive sovereignty) or around a Hobbesian or Rousseauean representative sovereign[76]—made the very notions of sovereignty and subjectivity purely functional, reducing the history of Western politics to the rote reproduction of this binary arrangement of an absolute lawgiver and those repressed under his rule. For this reason, Foucault urges us to theorize "a political philosophy that isn't erected around the problem of sovereignty or, therefore, around the problems of law and prohibition."[77]

What is important is that the "problems of law and prohibition" to which Foucault is here referring is a particular *juridical practice* utilized by *sovereign power*. For Foucault, the term "juridico-discursive" represents the discourse through and by which sovereignty *articulates* its power to make die; that is, through a law that prohibits, that constrains, that says "no," and in its most extreme iteration, that sanctions one's execution. In the *History of Sexuality*, Foucault states the "juridical system of the law … cannot help but be armed, and its arm, *par excellence*, is death; to those who transgress it, it replies, at least as a last resort, with absolute menace."[78] Given its aim, however, this is not a form of power we can call *juridical power*—for "law" does much more than merely sanction—but rather a particular, historically-situated *juridical practice* whose aim was, during this time, to reinforce the centrality and singularity of sovereignty. One way of distinguishing between juridical *power* and juridical *practice* is to imagine written law—the juridico-discursive expression of legal rules—as a *technique* or *technology*[79] which may "come to serve different functions depending on the specific *rationalities*"—that is, *modalities of power*—"they articulate with."[80] This is precisely why Foucault recognizes

[75] "TP," 122, emphasis added.
[76] See "ECS,"294.
[77] "TP," 121.
[78] HS1, 144.
[79] Foucault here plays on the Ancient Greek *techne*.
[80] Lippert, "Governing Refugees, "296, emphasis added.

that "law" does not disappear with the transition to disciplinary modes of government; the problem is rather the rote application of such a narrowly defined arrangement of force to *all* expressions of power in the modern state. Any political philosophy that takes law as its object of investigation is, for Foucault, a political philosophy that continues to rely on the now-archaic figure of the absolute sovereign as the sole architect of power. By doing so, it blinds itself to those polyvalent and malleable dynamics of power *relations*—relations which one subject exerts influence over the conduct, behavior, or comportment of another—as well as techniques of governance.

For this reason, Foucault believes that the sixteenth century saw the transition from "sovereign control" to the "art of government." *Government* here refers not to a site of power but rather a set of administrative techniques, policies of securitization, and methods of control. Government is always the government *of men and things*—institutions, modes of subjectivation, or domains of knowledge—and is always concerned with the *relations between* men and things. The modern state must therefore be understood in terms of *governmentality*—the "rationality of government," which Foucault uses interchangeably with the "art of government"—and *power* in terms of strategies and modalities. "[I]nstead of being laws," Foucault tells us, the "instruments" of government "now come to be a range of multiform *tactics*."[81] Given Foucault's rejection of metaphysical givens and historical essences, there is no fixed set of instruments; *biopolitical* governmentality, which for Foucault exemplifies modernity, is simply a particular *mode* of governmentality in which the concern of government is first and foremost man and the population at the level of *life itself*, and the instruments of government oriented toward its regulation and securitization, whether in terms of biological health, mortality rates, demographic expansion and contraction, and so forth.[82] Government is thus better understood in relation to its aims, for it "has a *purpose*, it *arranges things* [for an end]"[83]:

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[81] "Gov," 211.

[82] Foucault does not reject the possibility of multiple "governmentalities" that operate at once, and which may harmonize *or* conflict with one another at certain moments. In the *Birth of Biopolitics*, for example, he speaks of "neo-liberal governmentality" whose expression itself varies across States. See BB, pp. 192–207.

[83] STP, 98, emphasis added.

> Whereas the end of sovereignty is internal to itself and gets its instruments from itself in the form of law, the end of government is internal to the things it directs (*diriger*); it is to be sought in the perfection, maximization or intensification of the *processes it directs*, and the instruments of government will become diverse *tactics* rather than laws. Consequently, law recedes; or rather, law is certainly not the major instrument in the perspective of what government should be.[84]

While monarchies were concerned with retaining security over the *territory* by any means necessary, government for Foucault is concerned with maintaining security over the *population*—the success of which the population itself must desire and its actualization to which the population must consent. As a result, Foucault tells us, "the ends of government cannot be effectively achieved by means of the law"[85] and heralded "the growing importance assumed by the action of the *norm*, at the expense of the juridical system of the law."[86] The new "wisdom" of governing thus lies in the "knowledge of things, of the objectives that can and must be attained, and the 'disposition (*disposition*)' one must employ in order to attain them."[87] Of course, Foucault did

> not mean to say that law fades into the background or that the institutions of justice tend to *disappear*, but rather that the law operates *more and more as a norm*, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part *regulatory* … We have entered a phase of *juridical regression* in comparison with the pre-seventeenth-century societies we are acquainted with.[88]

The "juridical regression" identified above is precisely what is denied in sovereign-centric political theories; the shift to a normalizing and regulatory mode of government takes as its focus not repression or prohibition, but is "centered on life."[89] Rather than discursive expressions of sovereign power, laws are tactics of government that "arrange

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[84] Ibid, 99, emphasis added.
[85] Ibid.
[86] HS1, 144, emphasis added.
[87] STP, 100.
[88] HS1, 144, emphasis added.
[89] Ibid.

things in such a way that, through a certain number of means, such-and-such ends may be achieved."[90] Despite this "incorporation" of law into governmental apparatuses, however, Foucault by no means suggests that the *penal system* has been done away with in the modern state. Once the era of the absolute sovereign came to an end, penal modes of power were no longer tied exclusively to sovereignty. In the eighteenth century, Foucault states, there takes place a "theoretical reworking of penal law" such that the crime, "or the penal infraction, [became] a breach of *civil law*", reframed as an assault on society as a whole rather than the sovereign alone.[91] The penal system as a whole comes to "represent what is useful for *society*" rather than the *sovereign*, thus "defin[ing] as reprehensible that which is *harmful* to society."[92] This transformation is accompanied by "a new definition of the criminal" that sees her as "the *social enemy*" and later, the *threat*.[93] Under disciplinary society, the individual who breaks the law is an *internal* enemy regarded as a threat to the larger social body.

Alongside this new model of the criminal as social threat, the eighteenth century saw the emergence of the prison as a mechanism, first of targeting criminals, and then of targeting any individual who *might become* a criminal. Power was concerned "not so much over what individuals *did* … as over what they *might do*, what they were *capable of doing*, what they were *liable to do*, what they were *imminently about to do*."[94] This transformation unsurprisingly coincides with the development of the human sciences, including the disciplines of psychiatry and medicine, such that the emphasis of penal power turns from the action (the infraction) to the *individual* (the potential threat):

> The control of individuals, this sort of punitive penal control of individuals at the level of their potentialities, could not be performed by the judiciary itself; it was to be done by a series of authorities other than the judiciary, such as the police and a whole network of institutions of surveillance and correction—the police for surveillance, the psychological, psychiatric, criminological, medical, and pedagogical institutions for correction. In this way, in the nineteenth century, there developed around the judicial institution—to enable it to assume the function of

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[90] "Gov," 211.
[91] "TJF," 53.
[92] Ibid, emphasis added.
[93] Ibid, 54. emphasis added.
[94] Ibid, 56–57, emphasis added.

> controlling individuals at the level of their *dangerousness*—a vast series of institutions that would enclose individuals in their bounds throughout their existence: pedagogic institutions such as the school, psychological or psychiatric institutions such as the hospital, the asylum, the police, and so on. This whole network of nonjudicial power was designed to fulfill one of the functions that the justice system assumed at this time: no longer punishing individuals' infractions, but correcting their potentialities.[95]

Although he does not state it explicitly in the above passage, it is the Panopticon which exemplifies the architecture of surveillance and correction necessary for social control, the "system that was to spread over the whole practice, and, to a certain degree, the whole theory of penal law."[96] This emphasis on *control* would come to redefine the entire ethos of the penal system.

The panoptic transformation of the penal system helped to facilitate to de-centralization of the juridico-sovereign model, as the direct intervention of individual conduct could only take place "from below," from apparatuses such as the police which were "born parallel to the judicial system" but "outside it."[97] The aim of this "control" is no longer simply the expulsion or confinement of criminals, however, but "to insert individuals into an apparatus of *normalization*," to sequester them by means of an institutional network of which the prison, the school, and the hospital are a part.[98] While the form of power exercised through these institutional networks is not formally juridical, it is at once economic, political, epistemological, and *judicial*: these networks "extract a knowledge about those individuals who are subjected to observation," imposing upon them a "judging authority" that ensures their conformity, docility, and participation in the construction of social and political reality itself.[99] Beyond suggesting that the modern function of law is regulatory and normalizing, however, Foucault gives us neither a sustained analysis of *how* such forms of law operate—are they written? are they drawn up by legislative bodies in lieu of an absolute sovereign?—nor an indication that there can exist any form of law that is not itself tied to either sovereign power or biopolitical

[95] Ibid, 57.
[96] Ibid, 71.
[97] Ibid, 67.
[98] Ibid, 78, emphasis added.
[99] Ibid, 84, emphasis added.

governmentality; that is, the possibility that there exists such a thing as "juridical power" as a *modality of power* (like, sovereign power, disciplinary power, or biopower) in its own right. In order to make sense of the contours of such a power, we must locate its relation to that which Foucault believes has surpassed the "law" in governmental priority: the norm.

LAW, NORM, ORDER

Foucault himself never gives us a *theory* of the norm per se, but refers to it consistently across his writings as the standard of normality against which subjects are measured and around which disciplinary power and biopower are oriented. Foucault draws his conceptualization of the norm from French philosopher Georges Canguilhem's work on "normality," particularly as it is explored in his medical-anthropological book *Le Normal et le pathologique* (1943). Building upon Canguilhem's study of the institutionalization of medical discourse—"established in the effort to organize a national medical profession and a hospital system capable of operating general norms of health"[100]—Foucault defines the "power of the Norm" as a *homogenizing rule* by which one can partition "all the shading of individual difference" by identifying those heterogeneous members of the optimal social body.[101] In *Security, Territory, Population*, Foucault theorizes the "norm" as the primary instrument of disciplinary power, stating that

> [d]isciplinary normalization consists first of all in positing a model, an *optimal model* that is constructed in terms of a certain result, and the operation of disciplinary *normalization* consists in trying to get people, movements, and actions to conform to this model, the *normal* being precisely that which can *conform to this norm*, and the *abnormal* that which is *incapable of conforming to the norm*. In other words, it is not the normal and the abnormal that is fundamental and primary in disciplinary normalization, *it is the norm*. That is, there is an originally *prescriptive character* of the norm and the determination and identification of the normal and the abnormal becomes possible in relation to this posited norm.[102]

[100] DP, 184.
[101] Ibid.
[102] STP, 57, emphasis added.

As Foucault declares here, the *norm*—rather than the norm*al* or *ab*norm*al*—is primary and fundamental under disciplinary power, because the norm is what makes possible the identification of deviations therefrom. In this sense, at the same time that it excludes, the norm is deeply *productive*. Foucault scholar Mark Kelly ambiguously yet succinctly defines the norm as "a model of perfection that operates as a guide to action in any particular sphere of human activity"[103]—giving rise to an understanding of the norm as *normative* and *corrective*, prescribing what subjects *ought to do* and engendering disciplinary *dispositifs* of norm*alization*.[104]

The norm is not exclusive to disciplinary power, however, any less than the individual is the sole target of government. Because the norm is the determinant of "normality," it is also the referent of *biopower*, allowing the state to "qualify, measure, appraise, and hierarchize."[105] In his summary course of the *Society Must Be Defended* lecture series, Foucault repositions the "norm" as the element which "circulate[s] between the disciplinary and the *regulatory*," applied both to "body and population alike"[106], making it "possible to control both the disciplinary order of the body and the aleatory events that occur in the biological multiplicity" as something "that can be applied to both a body one wishes to discipline and a population one wishes to regularize."[107] Described in terms of "technologies," Foucault states that disciplinary technology "is a technology in which the body is individualized as an organism endowed with capacities," while biopolitical technology is "a technology in which bodies are replaced by general biological processes."[108] Once biopower has emerged, the norm "aims to establish a sort of homeostasis, not by training individuals, but by achieving an overall equilibrium that protects the security of the whole from *internal dangers*."[109] Disciplinary power takes as its target the individual as "an organism endowed with capacities"[110],

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[103] Mark G. E. Kelly, "What's in a Norm? Foucault's Conceptualisation and Genealogy of the Norm," *Foucault Studies* no. 27 (2019): 2.
[104] Such as sexuality, criminality, and madness.
[105] HS1, 44.
[106] SMBD, 252, emphasis added.
[107] Ibid, 252–53.
[108] Ibid, 249.
[109] Ibid, 249, emphasis added.
[110] Ibid, 249.

while biopower's target is the "biological or biosciological processes characteristic of human masses."[111] By the end of the eighteenth century, the two become "superimposed" upon one another in a regime of biopolitical governmentality, and the norm can be thought of the matrix which *orients them both*, even if in distinct ways

It should be clear that norms, as those which govern the threshold of the normal, are products of *knowledge formations*; they are those which scientific, medical, and other disciplines determine to be "optimal" and which, through the interplay of disciplinary techniques of governance and regulatory techniques of biopower, are applied to the subject and the population as a means of identifying and sequestering deviations as well as compelling obedience. Norms, of course, are what make the identification of "deviants" possible and give rise to disciplinary techniques that can "measure, supervise, and correct" their 'deficiencies.'[112] For this reason, the "constitution of a knowledge (*savoir*) of government is absolutely inseparable from the constitution of a knowledge [*connaissance*] of all the processes revolving around population."[113] Disciplinary power,

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[111] Ibid, 250.

[112] See DP, 200–201. Insofar as disciplinary power operates on the individual body and its various processes, it is "a *human science* which constitutes [the] domain [of norms], and *clinical knowledge* their jurisprudence" ("TL", 106, emphasis added). It is for this reason that Foucault's explorations of power are conducted primarily through archaeological analyses of the discourses of medicine (including mental illness) and sexuality. This does not mean, however, that Foucault gives primacy to the sciences or statistics as manufacturers of norms *tout court*. Foucault recognizes that knowledge, imbricated in both discursive and non-discursive practices, can be reproduced in "fiction, reflection, narrative accounts, institutional regulations, and political decisions" (AK, 183). Of non-scientific domains, Foucault highlights ethics, art, and politics as possible arenas of archaeological investigation in which one uncovers "a 'certain way of speaking'" that is "invested not in scientific discourses, but in a system of prohibitions and values" in ethics (ibid, 193), "embodied in techniques and effects" in art (ibid, 194), or analyzed "in the direction of behavior, struggles, conflicts, decisions, and tactics" in politics (ibid, 194). All of these domains give rise to what Foucault calls *dispositifs*, "heterogenous ensembles" of discursive practices, institutions, and strategies of power that generate and enforce those norms by which subjects, through tactics of surveillance, pedagogical techniques, and disciplinarization, constitute themselves.

[113] STP, 106. By way of brief example, the "medicalization of madness"—that is, "the organization of medical knowledge [*savoir*] around individuals designated as mad"—is for Foucault a paradigm example of power-knowledge at work in the constitution of the "abnormal" ("ECS", 296). On Foucault's account, madness "was at a particular time integrated into an institutional field that constituted it as a mental illness occupying a specific place alongside other illnesses" (ibid, 297). This was an institutional field that adhered both to the

concerned with the individual at the level of the body, and biopower, concerned with the population at the level of its biosociological processes, "do not exist at the same level" and can therefore "be articulated *with each other*."[114] The knowledge-*savoir* of modern government directs the production of knowledge of both individuals and populations, in order for power to most effectively manage, regulate, and control those who are subject to it and to stratify subjects along lines of normality and deviation, inclusion and exclusion. The norm is thus what supplies the modern state with its productive logic: it informs the state of the optimal level at which the life of the population is to be regularized and maintained, and simultaneously makes visible those bodies or sub-populations that fall below the desired level of optimality; it makes visible the deviant or the *ab*normal, whose status can be measured only after and against those subjects who are deemed to be "normal" and, thus, against the norm itself.

At the onset of biopower, Foucault says, "methods of power and knowledge assumed responsibility for the *life processes* and undertook to control and modify them"[115]—paradigmatically through the deployment of sexuality[116]—such that it "was *life* more than the *law* that became the issue of political struggles."[117] Biopower ultimately makes the life-death nexus central to governmentality, marking the shift from the normalization of individuals to the regulation of bodies and, alongside it, the differentiation and massification of subjects in terms of preserving a certain societal *order*. As Foucault states,

> in the eighteenth century one sees the development of reflection upon architecture as a function of the aims and techniques of the government of societies. One begins to see a form of political literature that addresses what the order of a society should be, what a city should be, given the requirements of maintenance of order; given

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imperatives of economic, social, and political order as well as already-accepted discourses about mental illness.

[114] SMBD, 250, emphasis added.

[115] HS1, 142, emphasis added.

[116] Foucault here characterizes sex as "a means of access both to the life of the body and the life of the population" and "a standard for the disciplines and as a basis for regulations" (HS1, 146).

[117] HS1, 145, emphasis added.

> that one should avoid epidemics, avoid revolts, permit a decent and moral family life, and so on.[118]

The "requirements of maintenance and order," as Foucault writes in *Discipline and Punish*, manifest as "a type *of location of bodies in space*, of distribution of individuals in relation to one another, of *hierarchical organization*, of disposition of centers and channels of power, of definition of the instruments and modes of intervention of power, which can be implemented in hospitals, workshops, schools, prisons."[119] Biopolitical governance in turn sees the "old power of death that symbolized sovereign power now carefully supplanted by the administration of bodies and the calculated management of life."[120] Biopower is concern with the population at the level of its "biological processes," not in the sense of biological data, but in "the political character of life and death."[121] Biopolitics is the politicization of life itself, the normativization of different forms of life that must also reinscribe the threat, fact, and omnipresence of *death* into all of the state's political calculations. Life and death are no longer the "limit points" of sovereignty, but "included in the [political] order itself."[122]

Just as "law" has not disappeared fully, however, Foucault does not mean to suggest that disciplinary power and biopower have replaced sovereign power. For Foucault, sovereign power, disciplinary power, and biopower work together in a "triangular" model of force: "sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism."[123] What differentiates biopolitical governmentality from the juridico-sovereign monarchies of old is that its function is to *promote* life rather than *take* life. The conceptual puzzle that remains, then, is how sovereignty's power to take life is to be reintegrated into a model of governance tasked with fostering life—how, in other words, the modern state can "justify the exercise of the sovereign right to kill in an economy of

[118] "SKP," 349.
[119] DP, 205, emphasis added.
[120] HS1, 139–40.
[121] Feldman, "Genesis of Foucault's Genealogy of Racism," 281, emphasis added.
[122] Ibid.
[123] HS1, 107–108.

power concerned with the life and well-being of the population."[124] The answer is what Foucault rather controversially calls *racism.*

THE BIOLOGICAL RACISM OF BIOPOWER

"How can the power of death, the function of death, be exercised in a political system centered upon biopower? It is, I think, at this point that *racism* intervenes."[125] Elaborating on this famous claim in *Society Must Be Defended*, Foucault notes that the end of the nineteenth century sees the aim of government transition from the general securitization of optimality to "the imperative to protect the race."[126] Biological racism becomes a strategy to stratify the population into sub-categories based on their degree of threat to the overall "purity" of the human race. This stratification in turn allows for the reintegration of sovereign power to "make die" into the otherwise preservative impulse of biopolitics, rendering the death of the "other race, the subrace, the counterrace" necessary for the success of biopower as a whole.[127] As Foucault writes, "[t]he juxtaposition of—or the way biopower functions through—the old sovereign power of life and death implies the workings, the introduction and activation, of racism."[128] Society, thus, *must be defended*, and it must be defended *against the inferior race*.

Importantly, the racism of interest to biopower, biological racism, should not be confused with scientific racism. Breaking with the empirical fixity of scientific racism, biological racism operates as mobile and malleable notion working in concert with the establishment of the desired social order, subject to transformation in the face of unexpected or extraordinary events or the emergence of new domains of knowledge or threat. Foucault's notion of "racism" is thus not tied exclusively to an ethnic or morphological understanding of "race," but rather to the category of the "human race" in terms of biological *purity*—a notion which, lacking a fixed meaning, is deeply

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[124] Verena Erlenbusch, "From Race War to Socialist Racism: Foucault's Second Transcription," *Foucault Studies* 22 (2017): 137.
[125] SMBD, 254, emphasis added.
[126] Ibid, 80.
[127] Ibid, 61–62.
[128] Ibid, 258.

contingent and thus *normative*. Biological racism exceeds the narrow scope of application of scientific racism, becoming, as Falguni Sheth has written, "a way of organizing and managing populations in order to attain certain societal goals, such as political coherence, social unity, and a well-functioning economy."[129] Understood in this way, biological racism both individualizes and hierarchizes as well as unifies and normativizes: race functions as a tool of inclusion-exclusion by ascribing a normative, racial identity to certain designated sub-populations against a purported threshold of "optimality."

As we will see in much greater detail in chapter four, Foucault's theory of "biological racism" is the outcome of a detailed genealogy of "race war discourse" spanning the sixteenth to the nineteenth centuries, originally rooted in the "civil and religious wars of the sixteenth century"[130] and culminating in the thanatopolitical Nazi campaign against Jews and other Eastern European "degenerate" populations as a means of purifying the Aryan race of internal threats.[131] Foucault's genealogy of race is thick with philosophical, historical, and discursive meaning, predicated not only upon the emergence of new modalities of power, but also the eighteenth-century emergence of the "human species" as a scientific category and object of knowledge. As such, "race" in the sense utilized by biopower could only develop once "man" ceased to be metaphysical or ontological 'given' and became an object of knowledge, emerging simultaneously with the development of the empirical and social sciences. Though racism had "already been in existence for a very long time"[132], however, it is only at the onset of biopower in the late-nineteenth century that racism becomes "up with the workings of a State that is obliged to use race, the elimination of races and the purification of the race, to exercise its sovereign power."[133] More fully, Foucault asserts that it was

[129] Falguni Sheth, *Toward A Political Philosophy of Race* (New York: SUNY Press, 2009), 22.
[130] SMBD, 49.
[131] Although this manifestation of biological racism deployed the sovereign imperative to "make die" to the extreme in the form of genocide, Foucault acknowledges that killing need not be "simply murder as such, but also every form of *indirect murder*: the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on" (SMBD, 256, emphasis added).
[132] SMBD, 254.
[133] Ibid, 258.

> the emergence of this biopower that inscribe[d] [racism] in the mechanisms of the State. It is at this moment that racism is inscribed as *the basic mechanism of power*, as it is exercised in modern States. As a result, the modern State can scarcely function without becoming involved with racism at some point, within certain limits and subject to certain conditions. … [Accordingly,] [t]he appearance within the biological continuum of the human race of races, the distinction among races, the hierarchy of races, the fact that certain races are described as good and that others, in contrast, are described as *inferior*: all this is a way of *fragmenting the field of the biological* that power controls. It is a way of separating out the groups that exist within a population.[134]

Racism is that which allows for the paradoxical reintegration of the sovereign imperative to "make die" into the biopolitical impetus to foster life—life that is "at once a biological and a civic or political life."[135] "In a normalizing society," Foucault states, "race or racism is the precondition that makes killing acceptable."[136] In contrast with identifying and eliminating threats to the *sovereign* that were read through the classical discourse of war, threats to the *population* relocate this discourse of war into the field of governmentality itself, rendering not a "military or warlike relationship of confrontation" between the state and its external, political adversaries, "but a biological-type relationship" that proliferates internally across the social body.[137] Ultimately, racism exposes the limits of biopower by illustrating how "certain bodies are not in the zone of protected life, are indeed expendable and subjected to strategic deployments of sovereign power that 'make die.'"[138] With the shift from concentrated sovereign power to decentralized biopower, "[t]he problem of sovereignty is not eliminated; on the contrary, it is made more acute than ever."[139]

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[134] Ibid, 254, emphasis added.
[135] Feldman, "Genesis of Foucault's Genealogy of Racism," 282, emphasis added.
[136] SMBD, 256.
[137] Ibid, 255.
[138] Nadine Ehlers, *Racial Imperatives: Discipline, Performativity, and Struggles Against Subjection* (Bloomington: Indiana University Press, 2012), 11.
[139] STP, 107.

CONCLUSION: WHENCE RACIAL PURITY?

To return for a moment to Foucault's genealogy of power, we might say that the norm is to disciplinary power what prohibitory law was to the juridico-discursive model of sovereign power. Once the individual as a living organism becomes the primary concern of the State, norms have to be established as standards according to which individuals could be measured and categorized, the abnormal separated from the normal. Norms are operative any time there is a normative stratification of bodies along lines of deviation, whether on grounds of madness, degeneracy, criminality, or sexual deviance.[140] In this sense, the norm has a crucial, productive function that renders it distinct from law understood in strictly negative terms: the norm is what allows for the constitution of *differentiated subjectivities*. The problem, however, is that it is unclear what constitutes the "norm" at the level of the *population*. Foucault's discussion of norms is almost exclusively embedded in the context of disciplinary normalization, where the purpose of norms is not simply to hegemonize, but individualize subjects as a means of identifying deviants. This is precisely why Foucault speaks of a fundamentally *individualizing* dimension to normalization. When Foucault discusses of the normalization of the *population*, however, it is unclear on what basis this normalization takes place. Rather than techniques of normalization, Foucault speaks of mechanisms of security in relation to the regulation of the population, of protecting it from those forces that might compromise its sociobiological health.[141] It is unclear what a *shared norm* that mediates between and intersects disciplinary power and biopower would look like.

This ambiguity between the normalization of the individual and the normalization of the population is exacerbated by an extremely peculiar claim in *Security, Territory, Population*: "Due to the primacy of the norm in relation to the normal, to the fact that disciplinary normalization goes from the norm to the final division between the normal

[140] Foucault writes for example that the development of the modern prison allowed for the emergence of a "new criminal 'race' … into the field of vision of public opinion," positioned against the non-criminal, non-deviant population, and who was subsequently rendered in need of containment and management ("QM," 233).
[141] Foucault uses the epidemic of smallpox as a paradigmatic example of the securitization of the population at the level of its health.

and the abnormal, I would rather say that what is involved in disciplinary techniques is a *normation* (*normation*) *rather than a normalization*."[142] According to Mark Kelly, Foucault's distinguishing remark was most likely a "tentative and apparently abortive" decision to differentiate between disciplinary and biopolitical normalization.[143] Several pages later, however, Foucault states that,

> [i]n the disciplines one *started from* a norm, and it was in relation to the training carried out with reference to the norm that the normal could be distinguished from the abnormal. Here [in biopolitical regulation], instead, we have a plotting of the normal and the abnormal, of *different curves of normality*, and the operation of normalization [of the population] consists in establishing an *interplay* between these different distributions of normality and [in] acting to bring the most unfavorable in line with the most favorable … The *norm* is an *interplay of different normalities*.[144]

This is decidedly unclear. If the disciplinary norm produces curves of normality out of which the biopolitical norm is subsequently derived, in what sense is the biopolitical norm different from the disciplinary norm? Recall that Foucault states that the norm "can be applied to both a body one wishes to discipline and a population one wishes to regularize."[145] Since there are a multitude of disciplinary norms (not simply norms regarding sexuality, but also norms regarding criminality, madness, and physical health), is there also a multitude of biopolitical norms? Or is the biopolitical norm the "average," however measured, of this multitude of norms?

In what is arguably his most comprehensive conceptualization of biopower, found in the final lecture of *Society Must Be Defended*, Foucault sharply contrasts disciplinary power from biopower, stating that the purpose of biopower "is not to modify any given phenomenon as such, or to modify a given individual insofar as he is an individual, but, essentially, to intervene at the level in which *these general phenomena are determined*, to

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[142] STP, 57.
[143] Kelly, "What's in a Norm?," 11.
[144] STP, 63.
[145] SMBD, 252–53, emphasis added.

intervene at the level of their *generality*."[146] Disciplinary power and biopower are "two series: the body-organism-discipline-institutions series, and the population-biological processes-regulatory mechanisms-State."[147] The regulatory mechanisms of biopower are straightforward enough: Foucault lists renting and saving related to housing, health-insurance, pensions, rules regarding hygiene, and other mechanisms of population control as examples thereof.[148] But what precisely constitutes the *norm* of the "regulatory"—what it is that is being *regulated*, in other words—remains vague.

And indeed, what of *race*? Given Foucault's construction, biological racism can only ever be understood at the level of the *population*, but is the "purity of the race" meant to serve as the "norm" of biopower? If so, it seems that it must *also* be the norm of disciplinary power, but Foucault is quick to clarify that it is "the emergence of *biopower* that inscribes [racism] in the mechanisms of the State"[149]—implying, in other words, that race only became a fundamental concern of the state in the late-nineteenth century—insofar as the biopolitical state "is, and must be, the protector of the integrity, the superiority, and the purity of the race."[150] Biological racism, its demand for racial purity, is what allows the state to justify its deployment of the sovereign right to kill. Racism introduces the "break," not into the domain of the body (that is, the conduct of the individual), but "into the domain of *life* that is under power's control" (that is, the population at the "level of its biological processes"[151]). Given Foucault's already ambiguous conceptualization of the intersection of disciplinary power and biopower, this notion of "racism"—its content, its functioning, its implementation—remains deeply unclear. Foucault rarely offers definitions of his concepts, at most offering clarificatory explanations for his deployment of certain terms in particular contexts, but his silence regarding how "racism" functions as a technique of government is especially vexing given his unambiguous assertion the modern state is a *fundamentally racist state*. Alex Feldman has put the problematic beautifully and succinctly: "how (and in what sense) was racism *inscribed* in the fundamental mechanism of the state, and 'where' was racism

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[146] Ibid, 246.
[147] Ibid, 250,
[148] See SMBD, 251.
[149] SMBD, 254, emphasis added.
[150] Ibid, 105, emphasis added.
[151] Ibid.

(what was it like and how did it function) before this moment of inscription (such that it could lend itself to being inscribed in the state)?"[152]

The remainder of this dissertation is an attempt to make sense of this functioning of racism. As it will argue, what Foucault and others sometimes call the "biopolitical norm"—and which I will refer to as the "optimal standard"—is ultimately *racial purity itself*, with the sub-optimal, sub-population constituting a *sub-race* that threatens the integrity of the population. In other words, the norm of biopolitical governmentality is a *racial norm*: the very concept of "racial purity" is what renders the human race commensurable with the various (sub-)races within it and allows the state to "exercise the old sovereign right to kill."[153] If sub-optimality is ascribed to that race or those races to which we *don't* belong, then the optimal standard is precisely the race to which we *do* belong—and as "more and more of our number die, the race to which we belong will become all the purer."[154]

If we apply this conceptualization of "racial purity" to Foucault's differentiation of disciplinary and biopolitical normalization, it becomes the case that *racial purity* represents the statistical average of all curves of normality that are derived from disciplinary norms. Because they engender the curves of normality out of which the standard of racial purity is measured, however, disciplinary norms must come first and are consequently always already *racial norms*. And yet, there is no way that disciplinary norms can be racial norms, for the practice of disciplinary normalization *precedes* the integration of "racism" into the biopolitical calculations of the state. Thus, it must either be the case that: a) the norm of racial purity has ontic priority over individualizing norms, serving as the metric around which disciplinary norms have been constructed from the star; or b) the standard of racial purity is not the "norm" of the population, but something else entirely.

As I will demonstrate in the following chapters, both (a) and (b) are, in fact, true, and it is *juridical power* that makes it so. The existence of a modality of power concerned with law—what I will call "juridical power" throughout this dissertation—is what is both

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152 Feldman, "Genesis of Foucault's Genealogy of Racism," 279.
153 Ibid, 256.
154 Ibid, 257.

missing in Foucault's genealogy of biopolitical modernity and what helps us to resolve the quandary of biopolitical racism. More precisely, juridical power both imposes upon the state a racial regime of truth and renders the biopolitical standard of optimality a racial optimality. Juridical power is an *ontopower* that constitutes not just subjectivities, but also social, political, and economic *reality itself*. Juridical power cannot be subsumed under sovereign power, disciplinary power, or biopower, but works conterminously with all three—just as each of the three does with the others—as a *rationality*, rather than a "tactic," *of government*. And the juridical power that completes this picture is one that Foucault himself began to explore, not in the context of governmentality, but in the context of *Classical Antiquity*.

Chapter Two

LAW AND THE WILL TO *NOMOS*

In chapter one, I briefly suggested that Foucault's notion of the "juridico-discursive" model of sovereign power should be understood as an historically-situated conceptualization of sovereignty's relationship to punitive legislation, rather than as a framework for understanding the power or operation of "law" itself. On this reading, the juridico-discursive model should be understood as a particular manifestation of the sovereign power to make die, articulated in the form of prohibitory laws. Under the absolute sovereignty of the European monarchs, laws were the principal tools by which the sovereign made her authority felt, most forcefully by sanctioning the death of those subjects who might pose a threat to her rule. If we think law *beyond* prohibition and punitive sanctions, however, something appears "both behind and before the law," and this "something" is what Foucauldian legal theorist Mikhaïl Xifaras calls "'the social,' understood as an *autonomous ontological order*."[155] For Xifaras, who interprets Foucauldian "law" strictly in punitive terms, no notion of an "autonomous ontological order" can be found in Foucault's writings on the "juridical" (whether in terms of juridical systems or "juridico-discursive" sovereignty). In this chapter, I suggest that such an autonomous ontological order, which precedes legislation and upon which legislation and legal institutions are predicated, is in fact a product of law on Foucault's account itself; not law in its discursive mode, but law as a *modality* of *power* in its own right.

This chapter develops a notion Foucauldian *juridical power* which takes as its aim the establishment of the "autonomous ontological order" that constitutes social, economic, and political reality. More precisely, I suggest that law is an *ontopower that institutionalizes the social order*, and that this is made possible because juridical power is the *will to truth* of the state made manifest. The will to truth, an echo of Friedrich Nietzsche's will to power, denotes for Foucault *the desire of power to control discourse*, with "discourse" understood as the production of knowledge, the ways in which objects of

[155] Mikhaïl Xifaras, "*Illegalisms* and the Law of Civil Society: From Foucault to Marx," in *Law and Philosophical Theory: Critical Intersections*, ed. Thanos Zartaloudis (London: Rowman & Littlefield, 2018), 13. I am deeply grateful to Eric Ritter for bringing this text to my attention.

knowledge can be interpreted and reinforced, the authority of certain knowledges over others, the authority of certain speakers over others, and so forth. This desire to control discourse extends well beyond the discursive dimension, however. As Foucault writes in the *Archaeology of Knowledge*, discourses can "constitut[e] a new object, giv[e] rise to a new strategy, giv[e] place to new enunciations or new concepts" and thereby modify power's entire field of exercise.[156] Additionally, as Foucault states in his eminent lecture "The Order of Discourse,"

> when we ask the question of what this will to truth has been and constantly is, across our discourses, this will to truth which has crossed so many centuries of our history; what is, in its very general form, the type of division which governs our will to know (*notre volonté de savoir*), then what we see taking shape is perhaps something like a *system of exclusion*, a *historical, modifiable,* and *institutionally constraining system*.[157]

The will to truth—that which "governs our will to know"—is thus the will to instantiate a certain *system of exclusion* that is reinforced by the power-knowledge nexus: the production of discourses that validate this system, techniques of security that enforce this system, and processes of normalization by which subjects come to accept this system. In this sense, we could say that the will to truth is the desire to *construct reality itself*, while juridical power actualizes this will by determining and imposing upon a political society a particular *regime of truth*. Juridical discourse, which for Foucault *is the discourse of truth*, thus engenders an inviolable social and political ontology which is established, reproduced, and transformed in accordance with the state's will to truth. And as I will demonstrate in this chapter, the regime of truth which is willed by power is expressed by what Foucault calls the *nomos*.

While chapter one brought together works from across Foucault's expansive oeuvre, the textual focus of this chapter will be the first lecture that Foucault delivered at the Collège de France, which set the tone for all of his work to follow, *The Will to Know*. At its core, the *Will to Know* is a meditation on the relationship between power and

[156] AK, 83.
[157] "OD," 54, emphasis added.

knowledge which is illustrated through a genealogy of *law*—and more precisely, law's relationship to *truth*—in classical antiquity. As Michael Behrent observes in his review of this extraordinarily dense text, "Western philosophy and Western law are, Foucault suggests, intimately linked, in part because both contributed to the dissemination of a particular understanding of truth"[158]: the idea that truth is an objective, neutral, or observable fact rather than an effect of power mired in contingency and materiality.

***POUVOIR-SAVOIR* AND THE ONTOPOLITICS OF TRUTH**

As I stressed throughout my overview of Foucault's genealogy of power in chapter one, sovereign power, disciplinary power, and biopower share an underlying concern with the 'subject' as a concrete and historically situated object of knowledge. What should by now be clear is that, for Foucault, there is no such thing as an *a priori* subject; although there may exist human beings or individuals, one becomes a "subject" only by and through certain knowledge formations, normalizing institutions, and administrative mechanisms; that is, by processes of *subjectivation*. For this reason, Foucault's genealogy of biopolitical governmentality works to uncover those extant apparatuses by which subjects have come to be constituted and constitute themselves in Western modernity. What renders modern power particularly insidious is that it "is both an *individualizing* and a *totalizing* form of power"[159]; that is, power and the knowledges that accompany and reinforce its exercise subjectivize both *individuals* as well as *populations* in manners that are often veiled or concealed behind purported truths about the proper "care of the self." Because "knowledge is always a certain strategic relation in which man is placed"[160], it is only by reinterpreting the subject as *an effect of power-knowledge* that we can begin to interrogate "the problem of the present time, and of what we are" and work toward a new and liberated ethics of the self.[161]

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[158] Michael C. Behrent, "The Genealogy of Genealogy: Foucault's 1970-1971 Course on *The Will to Know*," *Foucault Studies* no. 13 (2012): 171.
[159] "SP," 332.
[160] "TJF," 14.
[161] "SP," 336.

The naturalization of man from abstract subject upon whom power is inflicted to concrete, "constituted" individual reaches its zenith with the emergence of the human sciences in the eighteenth century, marking "when, for the first time, men are no longer called 'mankind (*le genre humaine*)' and begin to be called 'the human species (*l'espèce humaine*)'"[162]—in other words, man as a *biological* entity. Accordingly, "the theme of man, and the 'human sciences' that analyze him as a living being, working individual, and speaking subject, should be understood on the basis of the emergence of population as the correlate of power and the *object of knowledge*."[163] The nexus of government is thus *power-knowledge* (*le pouvoir-savoir*), the analysis of which can illuminate "the problem of the relationship between *subject* and *truth*."[164] So central is the inquiry into power-knowledge that Foucault suggests that his entire body of thought has sought to

> pose the problem of knowledge and power, … [as] an instrument that makes it possible to analyze the problem of the relationship between subject and truth … how the subject constituted itself, in one specific form or another, as a mad or a healthy subject, as a delinquent or nondelinquent subject, through certain practices that were also games of truth, practices of power, and so on. I had to reject a priori theories of the subject in order to analyze the relationships that may exist between the constitution of the subject or different forms of the subject and games of truth, practices of power, and so on … [The subject] is a form, and this form is not primarily or always identical to itself.[165]

As expressed in the above, the "subject" is never a consequence of knowledge or discourse alone, but of discursive practices that become connected to "whole series of social and economic processes at a given time [and] also with institutions and practices of power"[166]; that is, of discursive practices that are taken up as "true." Knowledges, the discursive practices that comprise them, the objects which result from them, and the subjectivities they impose upon individuals who are obligated to conform to them, are thus always a *political problem* to be interrogated.

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[162] STP, 75.
[163] Ibid, 79, emphasis added.
[164] "ECS," 289.
[165] Ibid, 290.
[166] Ibid, 296.

What should be clear is that Foucault's understanding of "knowledge" is always an historically situated and socio-politically mediated knowledge—a "*fundamentally interested knowledge*"—that exists "at the furthest remove from the postulates of classical metaphysics."[167] The distinction between *savoir* and *connaissance* is significant here, as Foucault distinguishes between the two throughout his corpus while both are translated in English as "knowledge." Knowledge-*savoir* denotes the underlying rules of a system of thought, "knowledge in general," or the "conditions of possibility" for any object of knowledge coming into being. Knowledge-*connaissance* designates a specific corpus or discipline of knowledge, or the "conditions of reality" by which a *particular* object of knowledge comes into being.[168] Taken together, "*savoir* refers to the broad discursive conditions underlying the formation of knowledge within the disciplines, the latter known as *connaissance*."[169] Whenever Foucault is speaking of knowledge in relation to power, he is speaking of knowledge-*savoir*, that is, the overarching yet unstated rules governing knowledge formations and discursive practices, while knowledge (*connaissance*) formations themselves can only be analyzed in particular historical contexts. Knowledge thus plays a political role for Foucault, setting the rules and conditions that orient the production of subjects themselves:

> If we truly wish to know knowledge, to know what it is, to apprehend it at its roots, in its manufacture, we must look not to philosophers but to *politicians*—we need to understand what the relations of struggle and power are. One can understand what knowledge consists of only by examining these relations of struggle and power, the manner in which things and men hate one another, fight one another, and try to dominate one another, to exercise power relations over one another.[170]

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[167] WK, 227–28.

[168] In both cases, "conditions" are historical rather than metaphysical or transcendent. As Foucault writes,"*[s]avoir* refers to the conditions that are necessary in a particular period for this or that type of object to be given to *connaissance* and for this or that enunciation to be formulated" (AK, 16 fn.3).

[169] Tony McHugh, *Faces Inside and Outside the Clinic: A Foucauldian Perspective on Cosmetic Facial Modification* (Farnham: Ashgate Publishing, 2013), 43.

[170] "TJF," 12.

Knowledge-*savoir*, thus, is shaped by struggles for power, and knowledge-*savoir* in turn configures power's field(s) of exercise.

The phenomenon of power-knowledge is central to understanding Foucault's rather radical notion of "truth," which for Foucault is more an authoritative status than an evaluation of the validity of propositions. Against the conception of "truth" that has dominated Western thought for the past 2,000 years, Foucault sees truth as a *regime* that does not reflect a transcendent metaphysical reality, but itself *generates* reality as a social and political fact. Truth and power-knowledge are extraordinarily overlapping concepts, but we can say that regimes of truth are that which condition power-knowledge to "uphold particular relationships of domination."[171] As Foucault states,

> truth isn't outside power or lacking in power … Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its 'general politics' of truth—that is, the types of discourses it accepts and makes function as true; the mechanisms and instances that enable one to distinguish true and false statements; the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.[172]

The emergence of "regimes of truth" can only ever be analyzed as *events*—that is, as historically-situated emergences that are mired in contingency and struggles for power—that fundamentally rupture the ways of understanding and constituting "reality" that came before. Truths are not "found," for they do not "exist" outside of discursive practices or knowledge formations. The "truth" of "man" as rational and autonomous, for example, does not represent some metaphysical *essence* of man, but rather the elevation of a certain conceptual configuration that is itself an historically emergent means of *directing* the production of knowledge, including the discourses of philosophy, of psychology, of sociality, and of biology. For Foucault, however, *all* ideas, experiences, and objects of knowledge must be analyzed as "events"—as discrete moments in time

[171] Stephen P. Reyna and Nina Glick Schiller, "The Pursuit of Knowledge and Regimes of Truth," *Global Studies in Culture and Power* 4.3-4 (2010): 333.
[172] "TP," 131.

always already located in historical contexts rife with social, political, and economic demands, and that exist in relation to other events and series of events. Foucault's conceptualization of power-knowledge is precisely an invitation to rethink objects of knowledge as events mired in contingency and historicality that is prima facie absent in metaphysical postulates and first principles. Domains of knowledge—"which are constitutive of *connaissance*" as "rule-governed relation[s] between subject and object of knowledge"[173]—are the products of "relations of struggle and power, the manner in which things and men hate one another, fight one another, and try to dominate one another."[174] In turn, what constitutes a true utterance—that is, a statement about some thing that is regarded as fact—is the product of these "historical forces" which can in turn "be threatened by historical forces"[175], open to contestation and revision when necessary. By rethinking truth-utterances as "events," Foucault is inviting us to rethink discourse as itself bound to the movement of *power*, that must adhere to certain *rules* if its utterances are to be taken up as "true" at all: "one is 'in the true,'" Foucault states, "only by obeying the rules of a discursive 'policing' which one has to reactivate in each of one's discourses."[176]

For Foucault, our modern, Western regime of truth is at its core "a condition of the formation and development of capitalism" and thus predicated upon the productive capacities of subjects.[177] The emergence of the human sciences—and in particular medicine and psychiatry—allowed for a new insight into the individual at the level of her *body* and thus, her capacities, behaviors, and desires. The individual herself, in other words, became a "subject of knowledge." Empirical data gathered about the "subject" in different domains of knowledge in turn made possible determinations about what behaviors, ways of thinking, and desires would best suit the interests of the state, and which would be *deviations* from the determined "normal." In this sense, knowledge about the subject allowed for the production of *norms*, or determinations legitimized as

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[173] Graham Burchell, "Translator's Note," in *Lectures on the Will to know: Lectures at the Collège de France, 1970–1971, and Oedipal Knowledge*, trans. Graham Burchell (New York: Picador, 2014), xv.
[174] "TJF," 12.
[175] Ladelle McWhorter, "The Event of Truth: Foucault's Response to Structuralism," *Philosophy Today* 38.2 (1994): 63.
[176] "OD," 61.
[177] "TP," 132.

objective, accurate, and true standards of normality, of what was norm-*al* as well as *ab*-norm-al. The production of norms thus transformed and manufactured technologies of social control, pedagogical strategies, and surveillance in order to ensure the subjectivation of individuals: the institution of the "family" now became tasked with monitoring their children, for example at the level of their sexuality and sexual behaviors; the institutions of medicine and psychiatry with determining correct treatments for physical or psychic abnormalities; the school for training citizens in proper civic behavior; and so forth. Much of Foucault's thought is dedicated to inquiring into the techniques of normalization that have generated modern forms of subjectivity—in particular the homosexual and the mad—and for this reason Foucault characterizes his work as an inquiry into the "*historical ontology of ourselves*."[178] Of course, Foucault is not speaking of "ontology" in the sense of historical essences or transcendental notions, but as an *orientation,* an "*attitude*, an *ethos*, a *philosophical life*" that engages in a "critique of what we are."[179] Rather than ontological givens, subjectivities are *imposed upon us*; we are not available to ourselves in any metaphysical sense because we always are born into a regime of truth—what Foucault calls the *historical a priori*—that is laden with histories of struggles for power and domination. Truth is therefore *ontopolitical*, constituting not just who we are but how we are to interpret, shape, and move through social and political reality itself.

The notion of "ontopower" (with "ontopolitics," we might say, as its mode of expression) is a neologism of *ontology*, the philosophical inquiry into "being," and *power*, which as we know for Foucault designates a relation of force. Taken together, ontopower denotes a *productive* mode of power which contours or shapes the field upon which beings emerge. According to Falguni Sheth, whose work has been deeply influential for my own approach to Foucault's work, ontopolitics

> depends on the creation of categories—categories that appear to have an objective foundation—to create "ontological" divisions among populations, i.e. to distinguish different subsets of the population morally, politically, socially, and of course legally. These categories are "ontological" in the sense that they denote some subjects as possessing some objective moral or political essence—always an

[178] "WE," 45.
[179] Ibid, 50, emphasis added.

> essence that is in dialectical opposition to another […] These essences are ascribed based on the level of threat that some subjects/populations are perceived as posing to sovereign power.[180]

Sheth's understanding of ontopower here is resonant with Foucault scholar Johnanna Oksala's interpretation of Foucault's entire genealogical-archaeological project as "an ontological inquiry into *the way in which reality is instituted* that reveals this institution [reality] *as a political process*."[181] We should see now why power-knowledge plays such a crucial role in Foucault's genealogy of modern power: power and knowledge together constitute those subjects and forms of subjectivity that allow for the realization and maintenance of certain regimes of truth and with it. And because regimes of truth are ontopolitical, they constitute not only subjects, but the social, political, and economic arrangement itself—the field of *reality* upon which men and things emerge, and the *norms* that help to keep them in *order*. For this reason, says Foucault, "truth is no doubt a form of power" that must be interrogated.[182] As I argued in the previous chapter, Foucault's rejection of metaphysically or ontologically transcendent truths is precisely why he critiques juridico-sovereign political theories fixated upon an understanding of the subject as an abstract or universal subject of rights. As this chapter aims to illustrate, the paradigm of the "abstract subject of rights" is itself made possible on the basis of a particular understanding of "truth" that has dominated Western thought for over 2,000 years—and understanding of "truth," Foucault tells us in the *Will to Know*, that was reified by Ancient Greek *judicial practices*.

PARADIGMS OF TRUTH IN JUDICIAL DECISION-MAKING

Foucault begins his yearlong seminar by outlining the development of Ancient Greek law from the seventh to the fifth centuries BCE, with the transition from sophistic to apophantic (propositional) truth paralleling the transition from the Homeric "ordeal" to

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[180] Falguni Sheth, *Toward a Political Philosophy of Race* (New York: SUNY Press, 2009), 73.
[181] Johanna Oksala, "Foucault's Politicization of Ontology," *Continental Philosophy Review* 43.4 (2010): 447, emphasis added.
[182] "OP," 107.

the Hesiodic *krinein.* Nowhere else does Foucault draw the link between law and truth so strongly, nor does he elsewhere so explicitly problematize the development of the Western conception of truth as representation. It is an illuminating text and one that, I suggest, posits a provocative understanding of "juridical power" which, even if not explicitly addressed in Foucault's writings on biopolitical modernity, can inform a yet-undertheorized interpretation of the mechanics of modern power-knowledge and subjectivation. More precisely—and more crucial for our purposes—the *Will to Know* offers a critical perspective on the notion of *nomos* which, in turn, brings into sharper relief the role and significance of "truth" in a Foucauldian theorization of law.

The early lectures in the *Will to Know* offer a close study of Aristotelian logic and sophism. Drawing heavily from Friedrich Nietzsche's extant writings on the "will to power," Foucault is concerned with unmasking the purported objectivity and neutrality of apophantic philosophy that covers over the power dynamics with which statements of "fact" are fundamentally imbued. Knowledge on this reading is an "invention" which emerges out of a battle galvanized by "instincts, impulses, desires, [and] fear," which is "always servile, dependent, interested (not in itself, but in what is liable to interest the instinct or instincts which dominate it)," and whose "truth" is only ever a manufactured "and always renewed falsification" that determines the conditions of its own validity.[183] Truth understood in this way—as a *sophistic* truth—dispenses with classical metaphysical postulates of universality and logical demonstration by revealing how truth is "produced as an *event* of the *will*."[184] Only does sophistic truth—laden as it is with intention, materiality, and recognition of its own relationship to a speaking subject who manipulates of the elements of discourse to win or "obtain this or that result"[185]—"embrace the view that *truth is an effect of power*," that truth is constituted by and mutually constitutive of power, rather than a fact of correspondence that exists outside of or prior to power.[186] Apophantic philosophy, on the other hand, neutralizes the fundamental relationship between the statement and the speaking subject, allowing the proposition to hang in the metaphysical ether as uncontestable fact, performing objectivity and immutability. More simply, *apophantic truth dispels with the materiality of truth*. The sophist,

[183] WK, 227.
[184] Ibid, emphasis added.
[185] Ibid, 58.
[186] Behrent, "The Genealogy of Genealogy," 169, emphasis added.

conversely, is he who recognizes—and uses to his advantage—the materiality of "truth" and conceives the utterance of this or that truth as an enunciation situated in place and time. Rather than a metaphysics of reality, to which apophantic philosophy purports to correspond, sophistic truth is an *ontologizing force* that works to "establish a relation of domination" and, thus, is always the result of a struggle between wills.[187]

About a third of the way through the lecture series, Foucault shifts from an appraisal of truth to an analysis of *law*. In his outline of Greek practices of judicial decision-making, Foucault identifies "Homeric" law and "Hesiodic" law as the two predominant systems of law operating in classical antiquity. What the transition from Homeric to Hesiodic law shows us is the transformation of the role of "truth" itself, from the divine will of the gods revealed through the struggle, the "ordeal," to the judgment of a neutral arbiter made in accordance with the *nomos*, the "order of the world." Though never stated explicitly, Foucault's characterization of Homeric law maps on to the sophistic approach to knowledge and truth, while Hesiodic law demonstrates the elevation of juridical truths to the status of fact. In this latter case, "both propositional truth and the law (at least in the form that became dominant in the West) refuse to own up to the role that *power* plays in their *production*" and deny their participation in the power-knowledge nexus.[188]

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[187] WK, 64.

[188] Behrent, "The Genealogy of Genealogy," 158, emphasis added. The figure of Oedipus, who appears in several of Foucault's lectures and interviews as "the manifestation of truth in the form of subjectivity" (GL: 75), serves as the symbol of both this legal transformation as well as the broader power-knowledge nexus that undergirds law in antiquity. In the context of the *Will to Know*, the drama of Oedipus serves as a conduit for conceptualizing the relationship between truth and power, in the form of Oedipus's a) lack of knowledge that he had killed his own father despite his attempts to outrun the oracle's prophecy, and b) need to identify any "impurities" that could compromise the health and harmony of the city. Brandon Konoval has recently suggested that the figure of Oedipus "haunts" Foucault's thought—as he did for many French thinkers concerned with questions of power—given the sheer range of perennial themes present in the play. As Konoval writes, Foucault's use of Oedipus in the *History of Sexuality* paved the conceptual path toward a rethinking of practices of sexuality as *governmental* practices, providing "key coordinates orienting Foucault's genealogical and critical projects of the mid-1970s" (Brandon Konoval, "From Sexuality to Governmentality: The Oedipus Complex of Michel Foucault," *Modern Intellectual History* 16.1 [2019]: 222). For more on the Foucault's use of myth and mimesis, I direct the reader to Konoval's essay.

Under Homeric law, the determination of justice proceeds through a struggle to the death between two complainants in the form of an "ordeal." Each party swears an oath that delegates the outcome of the struggle, not to a judge or magistrate, but to the "savage and unlimited sovereignty of the gods."[189] The oath is a "test of truth"—not a metaphysical or absolute truth, as "the gods are not bound by the truth"[190], but rather their *passion* or *will*. The truth is what the litigants, who have pledged the oath and offered themselves to the "obscurity of the future," must accept unconditionally.[191] As such, the truth is temporally-indexed, expressed in "linguistic events"—the arbitrary determinations made by the gods—"that set the terms of their own validity," a validity that could not extend beyond the ordeal for which they were uttered.[192] The notion of the "event" does considerable conceptual work beyond the *Will to Know*, exemplifying Foucault's broader rejection of linear narratives or "structural" accounts of power grounded in ahistorical, metaphysical essences. As mentioned in the previous section, Foucault's entire genealogical method can be said to be predicated on identifying those "events" and "accidents" (which Foucault elsewhere calls "ruptures" and "discontinuities") that have engendered new domains of knowledge and practices of power and, with them, subjectivities. Heralding a singular moment situated in time, "event" suggests that productions of knowledge are always a transformation or introduction of some (thing, concept, notion) that is an *appropriation* or a *domination* over what came before. The event is "not a decision, a treaty, a reign, or a battle, but the reversal as a relationship of forces, the usurpation of power, the appropriation of a vocabulary turned against those who had once used it, a domination that grows feeble, poisons itself, grows slack, the entry of a masked 'other.'"[193] The event is that which supplies "truth" its *materiality*.

The violence of post-Aristotelian Western metaphysics is its denial of truth's material event-ful-ness in favor of reifying and thematizing objects or concepts as categories that transcend difference, historical transformation, and social embeddedness. As Ladelle McWhorter puts it, "thinking events means thinking within the

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[189] Behrent, "The Genealogy of Genealogy," 165.
[190] WK, 76.
[191] Ibid, 85.
[192] Behrent, "The Genealogy of Genealogy," 164.
[193] "NGH," 381.

destabilization and de-centering of identity, constancy, non-contradiction. It means thinking history historically, thinking difference differentially."[194] For Foucault, this applies just as urgently—if not more so—to the notion of truth itself. By conceptualizing "truth" as a metaphysically stable status, one rejects or disregards the "configuration of forces" undergirding the production of truth utterances.[195] The virtue of sophistic discourse is its commitment to truth-utterances *as* events, recognizing them as historically emergent responses to historically situated conflicts. Sophistic truth, in other words, recognizes the *perspectival* reality of truth. The sophistic paradigm of truth-as-event is radically transformed in Hesiod's *Works and Days*, however, by the appearance of a "new type of judgment" that denies the temporality of truth utterances and institutes a paradigm of truth that is to be decisive in the history of Western metaphysics.[196] This form of judgment, which Foucault tells us "gradually occupies the whole space of Greek judicial practice"[197], is the legal concept of *krinein*. Rather than the determinations of the gods, the *judge* now serves as the sovereign to whom litigants defer, who *decides* the "truth" of the trial by establishing which of the two litigants is in the right and formulating the sentence that is to be enacted. What is crucial about the sentence is that it is no longer meant to punish—as was the case with the ordeal—but rather to "*regulate* the interplay of recompenses and dismissals" in accordance with "the allocation and circulation of things"[198]—that is, with *the order of things*.

Krinein paves the way for a new understanding of justice as a *judgment* that proclaims the truth precisely by taking as its aim the restoration of a "just" order. The judicial decision in *krinein* is therefore seen not as an event, but as the *rehabilitation* of an arrangement of relations that transcends its own historical embeddedness and simultaneously denies the singularity of the litigants on whose behalf the decision is itself made. If truth under Homeric judgment was mediated by Zeus, in Hesiodic judgment it is mediated by *Dike*, goddess of justice and the moral order of the city, for *dikaion*, the "principle of measurement," is that upon which *krinein* is founded.[199] The sentence which

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[194] McWhorter, "The Event of Truth," 164.
[195] Ibid.
[196] WK, 87.
[197] Ibid, 90.
[198] Ibid, 94, emphasis added.
[199] Ibid, 92.

is prescribed by the judge must be made in accordance with *dikaion*, and this *dikaion*—that is, *justice*—is "linked," as Foucault states, "to an order of the world" or *nomos* which renders justice a *political* rather than either a *personal* or a *divine* matter.[200] In her recently published *On the Genealogy of Critique*, Diana Stypinska observes that the practice of *krinein* "did not rely on the notion of the rights of the subject" but instead

> implied an ethical differentiation informed by the understanding of the order of the world (*nomos*) and made in accordance with what was perceived as *dikaion*, that is, just. This conceptual triangulation of *krinein* ([judgment]) *dikaion* (justice) and *nomos* (order of the world) had a crucial consequence, namely, it led to the positioning of the problem of [judgment] not only within the sphere of ethics, but also of politics [such that] the concern with justice was, by extension, the concern with the politics of the city.[201]

As a form of judgment, *dikaion* is based on measurement and an investigation into empirical facts, resembling "Aristotelian propositions about states of affairs" which generates a new conception of law as "the determination of truth—in the sense not of some kind of transcendent revelation, but of a meticulous investigation by a human subject."[202] In "saying what is just (*dikaion*)," the judge or lawmaker is he who *reifies* "the order of things" by virtue of conforming to the *nomos*, both "through his songs and knowledge as well as through his prescriptions and sovereignty."[203] *Krinein*, tied as it is to *dikaion* (justice) and *nomos* (the order of the world) is ultimately a manifestation of the power-knowledge nexus itself. The "assertion of truth" that constitutes the judicial decision, Foucault writes, "connects the discourse of justice with political discourse in

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[200] Ibid, 95.

[201] Diana Stypinska, *On the Genealogy of Critique: Or How We Have Become Decadently Indignant* (London and New York: Routledge, 2020), 25. Where I have used the term "judgment," Stypinska uses the translation "critique." Because Stypinska's project is dedicated to a historical genealogy of the phenomenon of "critique," Hesiod's *krinein*, in her terms, "resonate[s] with many latter [sic] accounts of critique found in the Ancient Greek texts" (ibid, 24). However, given Graham Burchell's decision to translate Foucault's use of *krinein* as "judgment," alongside my and Foucault's interest in thinking "judgment" in relation to "truth," I have replaced Stypinska's terminology.

[202] Behrent, "The Genealogy of Genealogy," 173.

[203] WK, 95.

which sovereignty is exercised, with the discourse of knowledge (*savoir*) in which the order of the world is set forth."[204] Because *dikaion* "guides the judge's sentence in *krinein*," the judge is bound not to the determinations of the gods, but to a just *arrangement* of things, to a *just nomos*.[205] Juridical discourse, in the form of the judicial decision, is now equivalent to "true discourse," and that which is "true" is in turn that which is "just."

What ultimately follows the transition from Homeric to Hesiodic judgment is that *order* rather than divine *will* becomes the standard of measurement for justice; it is the order of the world—the order of things—that the judge's sentence is meant to uphold and which determines the "truth" of the sentence. No longer a contingent and historical event, truth becomes unchanging and discoverable—what Foucault calls "observable fact." And for Foucault, the "dynasty of *krinein*", the paradigm of apophantic truth, is the metaphysical dynasty in which we are still entrapped.[206]

THE *NOMOS* GROUNDING *KRINEIN*

To better understand the relationship between truth and justice in the context of *krinein*, it is helpful to understand why precisely *krinein* emerged as a paradigm for legal judgment in the first place. According to Foucault, "the use of *krinein* is linked to the development of a society in which there are increasingly extensive economic relationships which extend beyond the family framework"[207]; that is, when *oikonomic* strategies become necessary for regulating and managing the relations between subjects, when the *city-state* as a form of political life (and on which the modern state is modeled) begins to take shape.[208] Once forms of economic relations began extending beyond localized structures, a manner of settling legal disputes needed to be established that could overcome the limitations of the previous paradigm of legal judgment—called *dikazein*—in which the judge's sentences tended to favor the more socioeconomically

[204] Ibid, 96.
[205] Ibid, 103.
[206] Ibid, 96.
[207] Ibid, 102.
[208] We should note here the parallel between the emergence of the classical episteme and the modern episteme.

well-positioned litigant.[209] *Krinein*, as Stypinska writes, "opened up the possibility of a ruling based on the interpretation of the judge"—an interpretation that was based on the larger societal order—"rather than the claimants' socio-economic status" and allowed the judiciary to "re-operationalize its measures so that they were suitable for dealing with a variety of newly emergent disputes."[210] The geographic and demographic expansion of social and political life necessitated some manner of organization that could both settle legal disputes according to certain, predetermined standards as well as govern social relations outside of the legal realm. As a result, the entrenchment of *krinein* as the dominant framework for judicial decision-making "was compelled by the problem of just *governance*" and the need to "*establish[] order* within the city-state."[211] *Nomos* is accordingly not simply the order of the world, but the "*law of men*" itself: it prescribes a *social* arrangement "which will truly be [man's] insuperable law only if it is in conformity with the order of the world."[212] Paradoxically, judicial decisions under *krinein* both constitute the order of the world and are simultaneously constituted by it; by confirming what *nomos* is, *krinein* itself engenders it.

Foucault's use of the concept of "*nomos*" is rather distinct from the understanding of *nomos* that dominated fourth and fifth century, pre-Socratic, sophistic thought. For the sophists, *nomos* referred to "law" or "custom" and was positioned in opposition to *physis*, which would be translated as "nature."[213] The *nomos-physis* debate was central not only to pre-Socratic metaphysics, but also to morality and politics; while *physis* was used to denote natural necessity, free of human interpretation, *nomos* presupposed a human

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[209] Foucault identifies "*dikazein*" as a short-lived paradigm of justice, which replaced the Homeric ordeal prior to the entrenchment of *krinein*. Though no longer bound to the will of the gods, the judge's decision in *dikazein* nevertheless grounded its "truth" on the wealth litigants.
[210] Stypinska, *On the Genealogy of Critique*, 24.
[211] Ibid, 25, emphasis added.
[212] WK, 120, emphasis added.
[213] According to classicist W. K. C. Guthrie, the two standard denotations of *nomos* in the realm of ethics and politics were more specifically: "(i) usage or custom based on traditional or conventional beliefs as to what is right or true, [and] (ii) laws formally drawn up and passed, which codify 'right usage' and elevate it into an obligatory norm backed by the authority of the state." W. K. C. Guthrie, *The Sophists* (Cambridge, UK: Cambridge University Press, 1971), 56–57. The codification of *nomos*, typically in the form of *writing*, came at a much later time than *nomos* understood as custom or habit, developing alongside the emergence of the *democratic city-states* of Ancient Greece.

mind from which *nomoi*, or human laws, emanated. The question of philosophical interest and scholarly debate was whether political laws and moral values were derived from *physis*—that is, were divine or god-given—or derived from *nomos* as "something imposed by man upon his fellows"[214]; whether justice was *by nature* or *artificial*, whether morality was *a priori* or the product of human convention, whether *nomoi* that defied *physis* demanded obedience or should be rejected. By qualifying *nomos* as a manifestation of *dikaion*—that is, justice itself—Foucault is complicating this dichotomy by asking us to rethink the very ontology of the "just order": is the order just by nature? Or is the order—and with it, *justice itself*—a product of human design, a convention, an *imposition*?

Foucault doesn't take up the *nomos-physis* debate explicitly, but we see a strong parallel in the sophistic-apophantic antithesis that undergirds his reading of Hesiodic law. Recall that, for Foucault, Homeric law, the form of justice predicated on the "ordeal," is the Ancient Greek paradigm of justice that exemplifies the spirit of sophistic discourse: the outcome of the ordeal, the judge's sentence derived from of the gods' will, *determined the truth*. Sophistic truth could therefore be thought of as truth "by convention." With the transition to *krinein* under Hesiodic law, however, the judge's sentence is delivered not as a *determination* of truth, but as an *adherence to* or *reestablishment of the* nomos. The judge does not purport to *establish* truth, for "truth" is no longer conceived of as an "event." Truth is now *already established* in the form of the *just nomos*—and in this sense, paradoxically, is *physis*—and the judge's role is to *re-establish or restore it following its disruption*. The *nomos* that the judge invokes in his sentence is therefore one that *masquerades as physis*, and the violence of *nomos* lies precisely in this deception: at the same time that it claims to uphold the *nomos*, the judge's sentence is presented as a *denial* or *repudiation* of *nomoi*—of the *arbitrariness* of the gods' will in matters of justice—in an attempt to impose order and predictability upon the conduct of those subject to it. The *nomos* of *krinein* is *presented as* a natural order, a *social arrangement whose truth-status is beyond question*.

In actuality, of course, *nomos* is not rooted in an *a priori* order, but constitutes the order of the world itself by assuming a prescriptive authority over it. "As it takes shape in the practice of justice," Foucault writes, *dikaion* or justice "extends far beyond it: it

[214] Ibid, 59.

becomes the rule of daily life; it becomes organization of the world. It prescribes what is to be done every day and traces the course of things."[215] Insofar as *nomos* prescribes the order that is just, it cannot be attributed to one individual or source, for *nomos* is not "a discourse which [can] be delivered by anyone in particular"[216]; rather, "*it must speak from nowhere*, or from a medium point, or from a common place" such as the oracle, the lawgiver, or the Assembly.[217] It must deny, in other words, its status as created and present itself as the necessary and eternal. It "will arise as the juridico-political structure of the city" itself.[218]

Yet, if the "truth" of judicial decision-making is determined by its correspondence to *nomos*, juridical discourse can refer only to its own internal (manufactured or constructed) rationality: "Judicial discourse is not organized (finally or from the start) by reference to a statement of the truth which is prior or external to it. For judicial discourse, the relation to truth is established according to rules which are specific to it."[219] This circular notion of "truth" as both self-constitutive and self-referential is what Foucault believes has haunted our way of thinking into the present such that the "notion of *nomos* becomes central and ambiguous" in contemporary political life:

> On the basis of this juridical form of *krinein*, a singular type of true discourse appears which is linked to the *dikaion*, to the *nomos*, to the order of the world and the organization of the city. It is still very far from what is true discourse for us, but, through multiple transformations, ours derives from it … The judicial utterance which wins out is no longer that in which the imprecation has greatest weight, it is what conforms to the *nomos*.[220]

What results is that the discourse of justice—of *law*—has become the discourse of *truth itself*. As Foucault states, "the function of this discourse of the law is to *bring to light* and *reestablish the order of things* … the order of a different order. A *permanent order* accessible

[215] WK, 110.
[216] Ibid, 162.
[217] Ibid, emphasis added.
[218] Ibid, 156.
[219] Ibid, 84.
[220] Ibid, 96.

to everyone through the way of the *logos*."[221] It is a truth that makes itself known and felt in the very arrangement of social, political, and economic life. Unlike the juridico-sovereign law of sanction and prohibition that Foucault attributes to the sovereign power of the Middle Ages, this form of juridical power is not negative, but explicitly positive and productive.

JURIDICAL ONTOPOWER AND THE INSTITUTIONALIZATION OF *NOMOS*

As we have now seen, the paradigm of *krinein* heralded a transformation of the role of "truth" in legal decision-making in antiquity and shaped the organization of the city-state more broadly, granting law a degree of permanency theretofore nonexistent. Prior to the entrenchment of *krinein*, law was an utterance that, due to its temporal singularity, need not have been recorded for future reference. This unwritten law, or *thesmos,* had "no existence or at any rate, actuality, outside of this singular emergence."[222] Once truth required permanency, it became *codified* in the form of the written law: "Inscribed in stone, present in the midst of everyone without anyone having to formulate it, *nomos* is no longer uttered by anyone in particular, it speaks by itself, in its own name."[223] *Nomos* is thus *institutionalized*—Foucault elsewhere defines *nomos* as "institutional rule"[224]—and, with it, transforms the paradigm of truth in law from "event" to "observable fact," fact that is "always there, inscribed in stone, activated in *logos*, conveyed by the zeal of habits, and legible in nature."[225] From this moment onward, "we see the great philosophical questions of the West taking shape."[226] Truth is no longer effect, and knowledge formations and discourses, whether in the form of law, philosophy, or science, will be

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[221] Ibid, 165, emphasis added.
[222] Ibid, 150.
[223] Ibid, 153.
[224] Ibid, 164.
[225] Ibid, 153. In the *Will to Know*, Foucault positions *nomos* against *thesmos*, which he characterizes in part as "unwritten" law (see WK, 150), but is careful also to note that *nomos* "can no more be identified with the written law than *thesmos* can be reduced to oral tradition" (ibid, 151). What sets *thesmos* apart from *nomos* is that *thesmos* was "imposed" and preserved in *memory* rather than as "several forms of quite distinct institutions" (ibid).
[226] Ibid, 154.

viewed *independently* of power, external to the influence of power, rather than as the result of a struggle for power.

Perhaps the most significant consequence of this linking of justice and truth, the city-state organized around *nomos*, is that "truth is what makes it possible to *exclude*; to separate what is dangerously mixed; to distribute the inside and outside properly; to trace the boundaries between what is pure and what is impure."[227] With the entrenchment of *krinein* as the paradigm of justice in the democratic city-state comes a reintegration of the *theological*, not in terms of the gods as sovereign, but in terms of the *purity* with which truth is imbued. Just as the form of "truth" has metamorphosed from "event" to "observable fact," the archaic notion of "purity" has transformed from the act of "ablution" and the "regaining of innocence" into the possession of *criminality* (in opposition to innocence) or *ignorance* (in opposition to knowledge). Foucault attributes this transition to "a whole series of changes in the religious life of the seventh and sixth centuries"[228] that ushered in a new relationship of the self to her own conduct, in which her successes and misfortunes could be attributed to her diligence to the observation of "arbitrary rites which ha[d] to be remembered more than objects which ha[d] to be offered" in sacrifice.[229] The arbitrariness of the rites is central, as it applies the demands of the rites to *everyone* rather than differentiating on the basis of wealth or social status, *democratizing* as it were the responsibility of each individual to the *polis's* larger prosperity. As such, Foucault concludes, "the same constitution of a new political power which enabled the establishment of … a *nomos*, made possible the establishment of a new type of religious practice"[230]: the normativization of *conduct*. And what this new religious ethos brings with it is the notion of *impurity* or, more simply, *deviancy*.

The city-state of antiquity is thus one whose just order is legitimized in (and in turn legitimizes) its religious principles. Once this religious dimension is activated, the legal system itself—its rules and sanctions—takes on a *normative character*, predicated on

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[227] Ibid, 187, emphasis added.
[228] Ibid, 170. Though he does detail these changes in his lectures, Foucault gestures towards Louis Molinier's "Le Pur et l'Impur dans la pensée des Greces d'Homère á Aristote" (1952).
[229] Ibid, 171.
[230] Ibid, 173.

each citizen's acceptance of and obedience to the natural as well as religious order. In turn,

> *exclusion* appears as the final and decisive element by which a social space completes its formation and closure on itself … It is also by exclusion that *individuality* completes its formation and closure on itself as a support of a juridical and religious quality which defines the pure and impure. [Thus] [i]t is not because the social space was formed and closed on itself that the criminal was excluded from it; but the possible exclusion of individuals is one of the elements of the formation of the social space.[231]

The impure is he who breaks from the order—from the "*nomos*, the 'social space' that defines the city"[232]—either out of unacceptable ignorance or intentional disobedience of the rites demanded of him: "Under the reign of *nomos*, the offence consists in ignoring a law that is there, visible to, and known by everyone, made public in the city and decipherable in the order of nature. The impure is someone who has had his eyes closed to the *nomos*. He is impure because he is *anomos*."[233] The impure is he who "endangers the city," threatens its order and with it, "threatens its ruin." As a result, the impure sanctions "the intervention of *political* power," akin to a proto-sovereign power (to make die and let live) in the modern sense.[234] As Foucault writes, "wherever *nomos* reigns, that is to say, throughout the space that constitutes the city, the criminal is dangerous. His pollution compromises the order of things and of men. That is why he must be excluded."[235] The impure, the criminal, the ignorant, the *anomos*—all these subjectivities refer to the individual who deviates, whose very existence within the city disrupts its order and therefore demands exclusion, whether in the form of exile or death. In the language of Foucault's genealogy of *modern* power, we might say that the *anomos* is the *abnormal*—and with it, the *nomos* is the "normal" itself.

What, then, is implied by Foucault's extensive and extremely archaic outline of apophantic and sophistic truth, the transition from an oath-based to a norm-based

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[231] Ibid, 180, emphasis added.
[232] Ibid, 187.
[233] Ibid, 188.
[234] Ibid, 181.
[235] Ibid, 187.

grounding of justice, and the integration of matters of religious ethics into the legal sphere? Precisely that the *nomos*, the *order of the world* upon which legal judgments are made, has solidified a very particular link between justice and truth that renders "truth" at once an *irrefutable* as well as a *normative* category. And as Foucault concludes his year-long lecture, "[t]his type of assertion of truth was to be decisive in the history of Western knowledge."[236] Juridical discourse, the discourse of truth, attains its self-evident quality precisely by putting forth a *nomos* according to which all subjects in a political society are expected to conduct themselves in the name of justice.

Foucault's detailed outline of *krinein* (and *nomos*) makes no other appearance in his body of work (to my knowledge) and, given its deeply historic periodization, seems to be rather absent in scholarship that focuses on Foucault's genealogy of modern power. Yet, the conceptual contours of *krinein* are relevant for any thinking of power-knowledge, not solely because Western knowledge is modeled on apophantic (rather than sophistic) truth, as Foucault suggests, but also because it has entrenched a particular and deeply productive link between "justice" and *nomos* understood as "order." The link becomes especially visible in Foucault's "Course Summary" to the *Will to Know* lecture series, wherein he classifies one of the fundamental characteristics of the transformation of justice in ancient Greek law, "the search for a *nomos*," as the search for "a just law of distribution ensuring the order of the city by *installing a reigning order in the city that is the order of the world*."[237] As that which installs the truth of the "order of the world," we might say that the *nomos* is *ontopolitical*: the truth of *nomos* does not generate propositions about factual states-of-affairs, but rather *makes reality itself* by *imposing itself upon it*.

Let us recall that, for Mikhaïl Xifaras, law is what produces the "autonomous ontological order" of "the social."[238] On Xifaras's reading of Foucault, limited to his writings on punishment and criminality, "the law is productive, but the law remains only *negatively* so … only by way of repression and sanction."[239] In order to correct this narrow conceptualization of law's productivity, Xifaras believes we must turn to the work of *other*

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[236] Ibid, 228.
[237] Ibid, emphasis added.
[238] Xifaras, "*Illegalisms* and the Law of Civil Society," 13.
[239] Ibid, 15, emphasis added.

thinkers.[240] What the *Will to Know* reveals, however, is that Foucault uncovers a much more robust notion of law as, not simply constitutive of social relations, but that which *constitutes reality itself*. This is why, as Sheth writes, "at the moment of its founding, the law has already constituted who it will protect and who it will abandon, and in the process, has reshaped the current *onto-juridical regime*, and cultural *worldview*."[241] By identifying those who deviate from the order as *a-nomos* or "impure," law demarcates the limits of purity while sedimenting a *nomos* that is at its core exclusionary. Truth is thus a regime which delegates certain domains of knowledge, certain productions of "truth" as *authoritative* while others are *disqualified* or *subjugated*. As Foucault states in an interview fittingly titled "Truth and Power," power is *accepted*—uncontested or unnoticeable in its circulation—precisely because "it produces discourse[s]"[242] which are maintained, adapted, and changed in relation to "regime[s] of truth."[243] The "general politics of truth" that establishes this regime engenders "the types of discourse which it accepts and makes function as true, the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true."[244] The "politics of truth" in this sense demonstrates the necessity of attending to "the political, economic, institutional regime of the production of truth" if we hope to make visible the operation of power in any given context. And this is precisely because truth is *binding*, it *obligates* individuals to "move about in one way or another" and in this sense *subjectivizes* them in the name of an inviolable, just order.[245] This is why Foucault ultimately defines the "will to know" (*vouloir-savoir*) as the will to "determine the *effect of truth*."[246] The will to know, in other words, is the will to *make true* and, in so doing, to *impose order*. Likewise, the will to *truth* demands the *enactment of this order*, to make this order *real*. And judicial decisions in the age of *krinein*, which find their legitimacy in their purported adherence to the just *nomos*, the just order, in actuality

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[240] Xifaras draws on Karl Marx's early writings in order to do so.
[241] Sheth, *Towards a Political Philosophy of Race*, 75, emphasis added.
[242] "TP," 119.
[243] Ibid, 131.
[244] Ibid.
[245] "ECS," 295.
[246] WK, 227, emphasis added

constitute the nomos *itself*. Juridical power in classical antiquity is an *ontopower*, the power to *impose order in the name of truth*, and we can feel its repercussions still today.

WILL TO TRUTH AS DESIRE FOR ORDER

It is widely recognized that Foucault's theorization of the will to know (*savoir*)—and his conceptualization of "power" more generally—is deeply indebted to Friedrich Nietzsche's writings on the "will to power." Regarding power, for example, both Nietzsche and Foucault refrain from theorizing power as inherently or fundamentally normatively bad, evil, or corrupt. Foucault's relational understanding of power is an observation about sociality itself: there exists some degree of power in any relationship between subjects, precisely because subjects are themselves constituted by power. For Nietzsche, "power" is simply the drive of all living things toward self-preservation, the success of which demands a continual fight for survival. For human beings, this drive can only be actualized by operating upon some "conception of reality of what is uniform and predictable" according to which we can develop "schemes of behavior" that are reliable and realizable.[247] Where we have gone *wrong*, Nietzsche believes, is in developing a pathological need (whether religious, philosophical, empirical, or scientific) to impose a sense of *order* and *being* upon a world that is fundamentally one of *entropy* and *becoming*. Our will to power has become a will for *domination*, the desire to grasp reality "*in order to master it, in order to take it into service*."[248] It is neither first principles nor rationality, but our need for order that interprets—and thereby constructs—the world. In this sense, knowledge for Nietzsche, too, is an "instrument of power" that aids in the domination and subjugation of others by defining the parameters of political stability and social hierarchies under the guise of objectivity and irrefutability; that is, under the guise of *truth*. The principle or domain of knowledge, Nietzsche writes, "is no *criterion* of truth,"

[247] Friedrich Nietzsche, "The Will to Power as Knowledge," in *The Will to Power: Selections from the Notebooks of the 1880s*, trans. R. Kevin Hill and Michael A. Scarpitti, ed. R. Kevin Hill (New York: Penguin Books, 2017), 287.
[248] Ibid, emphasis in original.

however, "but rather *an imperative as to what shall be deemed* true."[249] It is for this reason that Foucault declares that knowledge-*savoir*, which posits the rules that govern the production of *connaissance*, is "produced as an *event of the will* [*vouloir*]."[250] Knowledge is not *of* the truth but works *in the service of* truth, "a matter of *making* things determinate, of making things *true* and *lasting*."[251] Similarly for Foucault, "[w]illing the truth is willing it to *appear*, to *express itself*, to *be there*."[252] Thus, for both Nietzsche and Foucault, the *will to power* is at the same time the *will to know*, which is governed by the *will to truth.* And if subjects are effects of power, as Foucault asserts throughout his texts, then they are at the same time effects of knowledge and, thus, (the regime of) truth itself.

Although the lectures on biopower and security have largely dominated contemporary Foucault scholarship, the will to truth is arguably the lynchpin around which Foucault's entire genealogy of power is carried out. On December 2, 1970, Foucault gave his inaugural lecture at the Collège de France, prior to the start of his series on the *Will to Know*. It was an essay that would set the stage for the 13 years of lectures that followed, and which Edward Said has since called Foucault's "most important work."[253] Titled the "Order of Discourse" (*L'Ordre du Discours*), this dense lecture introduces many of the concepts that Foucault would spend the rest of his life developing through the methodological synthesis of archaeology and genealogy. The theme of the lecture is the notion of *discourse*, the target of archaeological analysis that Foucault had been developing in his "early" works, *The Order of Things* and *The Archaeology of Knowledge*. As we saw at the start of this chapter, Foucault defines "discourse" in "The Order of Discourse" as "a system of exclusion, a historical, modifiable, and institutionally

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[249] Ibid, 300, emphasis in original.
[250] WK, 227, emphasis added.
[251] Nietzsche, "The Will to Power as Knowledge," 320, emphasis added. Like Foucault, Nietzsche also acknowledges the existence of "subordinated knowledges," or knowledges whose objects have "failed" to be taken up as "true." As Nietzsche writes: "There is no struggle for existence between ideas and perceptions, only a struggle for supremacy – the vanquished idea is *not* annihilated, but rather *driven to the background* or *subordinated*" (ibid, 346, emphasis in original).
[252] WK, 214, emphasis added.
[253] Robert Young, ed., "The Order of Discourse," in *Untying the Text: A Post-Structuralist Reader* (Boston: Routledge & Kegan Paul Ltd., 1981), 48.

constraining system," not emerging in a vacuum but "historically constituted."[254] This conceptualization echoes the understanding of "discourse" developed in the *Archaeology of Knowledge,* in which discourses do "more than use [...] signs to designate things" but are themselves "practices that systematically *form* the objects of which they speak."[255] Underlying both conceptualizations is the *productive* nature of discourse: discourses allow certain enunciations, thematic continuities, and polemical interchanges to be heard or taken up as intelligible, coherent, relevant, and valuable, as well as determine which speaking subjects, domains of knowledge (*connaissance*), and objects of knowledge are taken up as authoritative. The practice of discourse is always *of* an object insofar as it makes said object "manifest, nameable, and describable"[256], and discourses simultaneously determine who counts as an "authority of emergence" of these objects.[257]

Though it bears striking similarities with his theorization of knowledge-*connissance*, "discourse" and "knowledge" are not, strictly speaking, interchangeable. Neither, however, are they fully separable. Knowledge, as Foucault writes, is

> that of which one can speak in a discursive practice, and which is specified by that fact: the domain constituted by the different objects that will or will not acquire a scientific status...; knowledge is also the space in which the subject may take up a position and speak of the objects with which he deals in his discourse...; knowledge is also the field of coordination and subordination of statements in which concepts appear and are defined, applied and transformed...; lastly, knowledge is defined by the possibilities of use and appropriation offered by discourse... [Such that] there is no knowledge without a particular discursive practice; and any discursive practice may be defined by the knowledge that it forms.[258]

What Foucault indicates here is that discourses refer to the material, verbal traces of "things said," finding their expression paradigmatically in *writing*. Discourse, we might say, is the *manifestation* of knowledge, actualizing the *conditions of possibility* of the

[254] "OD," 54.
[255] AK, 49, emphasis added.
[256] Ibid, 41.
[257] Ibid, 44.
[258] Ibid, 183.

articulation of knowledge as well as *who* can articulate knowledge.[259] Knowledge-*savoir* gives rise to discourses, but discourses are ways of speaking *about* objects of knowledge—whether logical, philosophical, religious, scientific, or aesthetic. Discourses are for this reason crucial to power's exercise, for they direct the functions that must be "carr[ied] out *in a field of non-discursive practices*."[260] Discourses are the 'laws' of institutions, the "object[s] of desire"[261], and the "*power which is to be seized*"[262], for discourses constitute certain modes of subjectivity. It is not enough to simply problematize discourses at the level of language alone, but to think of them as entrenched in "relations of force, strategic developments, and tactics"[263]; that is, as entrenched in the power-knowledge nexus.

In the seminars that follow the *Will to Know*—those which have been, in recent years, most frequently taken up in scholarship on power, sovereignty, violence, and precarity—Foucault positions *discourse itself* as his object of analysis, examined and problematized by recognizing that discourses are violent, discontinuous practices co-constituted by conditions external to the linguistic signs and structures inherent in them. Discourse analysis, in other words, is not the search for a unity of truth or historic and autonomous continuity of ideas, but itself an analysis of the *epistemologies of power* out of which discourses emerge. Discourses, whether of law or the social sciences, are therefore *events*; they transform over time, not as a *unification* of discursive objects that came before, but as new and unstable forms of *violence* and *exclusion* that are imposed upon things, "reveal[ing] [their] link with desire and with power"[264], those things "for which and by which there is struggle."[265] And if discourse is always working in the service of a will to truth, then power's desire is not merely discourse, but determining what "truth" itself *is*. Indeed, so significant is the notion of the "will to truth" that Foucault in "The Order of Discourse" identifies "call[ing] into question our will to truth"—alongside "restor[ing] to discourse its character as an *event*," which the apophantic paradigm of truth has veiled

[259] The idea of discourse being the "manifestation" of knowledge is a mirror of both juridical power being the "manifestation" of the will to know, as well as *nomos* being the "manifestation" of truth.
[260] AK, 68, emphasis in original.
[261] "OD," 52.
[262] Ibid, 53.
[263] "TP," 116.
[264] Ibid, 52.
[265] Ibid, 53.

from us—one of the principal "themes which govern the work" he goes on to explore over the subsequent twelve years.[266] The "will to truth" determines "the history of the range of objects to be known, of the functions and positions of the knowing subject, of the material, technical, and instrumental investments of knowledge."[267] The will to truth establishes and constrains the limits of domains of knowledge and discursive practices, not determining merely *what* counts as true, but *how* truth is itself reproduced, institutionally saturated, and socially disseminated.[268] The will to truth ultimately explains why

> in every society the production of discourse is at once controlled, selected, organized, and redistributed by a certain number of procedures whose role is to ward off its powers and dangers, to gain mastery over its chance events, to evade its ponderous, formidable materiality … as if discourse … is in fact one of the places where […] politics exercise[s] in a privileged way some of [its] most formidable powers.[269]

To control discourse is thus to control knowledge and, with it, truth itself. As such, *the will to truth is precisely that for which domains of knowledge and discursive practices emerge*. The will to truth denotes a *desire for order*, the desire to instantiate a particular *nomos*, to establish a particular *regime of truth*. And yet, Foucault observes, "we speak of the will to truth no doubt least of all."[270] The will to truth is hidden to and from us, concealed behind logical axioms, immutable laws, metaphysical postulates, and scientific objectivity.

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[266] Ibid, 67.
[267] Ibid, 55.
[268] It bears mentioning that Foucault does not believe that "will to truth" is an ideological distortion that stands in opposition to any metaphysically or ontologically 'real' truth; indeed, these are precisely the grounds on which he takes issue with Marxist ideology critique. For Foucault, the problem to be solved "does not consist in drawing the line between that which, in a discourse, falls under the category of scientificity or truth, and that which comes under some other category; rather, it consists in seeing historically how effects of truth are produced within discourse that, in themselves, are neither true nor false" ("TP," 119). The will to truth, then, is not the will to uncover deep metaphysical truths about the nature of reality, but the will to establish discourses that *produce* certain concepts, notions, or objects of knowledge that are taken up *as true* and come to shape the practices of institutions and social life more generally.
[269] "OD," 52.
[270] Ibid, 56.

Given the analysis presented in this section, it should come as no surprise that Foucault identifies Ancient Greece as the paradigmatic context in which the "will to truth" is both "the discourse that answers to the demands of desire" and "the discourse which exercises power."[271] Although both apophantic discourse and sophistic discourse take truth as their "object of desire," however, only the sophist admits the materiality of discourse, that truth, as "a product or an effect of knowledge," is, too, an "event of the will."[272] Apophantic discourse, taking as its object "reality" itself, must instead dispel with this event-ful-ness and materiality; it must *neutralize* materiality in order to make "truth" operate as a continuous relation "to the object"[273] and, thereby, an inviolable relation of *domination*.

CONCLUSION: FROM *NOMOS* TO NORM

As we saw in the first section of this chapter, apophantic truth became the model of truth in Western society by means of *judicial discourse*: "the assertion of truth was present in judicial discourse from the start."[274] For Foucault, judicial discourse has always been "institutionalized *as having to be* true utterances"—as *asserting* true utterances, that is—but never has judicial discourse been organized "by reference to a statement of truth which is *prior* or *external* to it."[275] The "word of truth" is instead "linked to the obscurity of the *future*," as a means of imposing order on or controlling this obscurity.[276] As such, the "assertion of truth connects the discourse of justice with political discourse in which sovereignty is exercised, with the discourse of knowledge (*savoir*) in which the order of the world is set forth."[277] Juridical discourse—the discourse of law—is that which, by setting forth the order of the world, institutionalizes the truth itself.

[271] Ibid.
[272] WK, 216.
[273] Ibid, 49.
[274] Ibid, 83.
[275] Ibid, 84, emphasis added.
[276] Ibid, 85, emphasis added.
[277] Ibid, 96.

The consequence of such an understanding of the will to truth is that the *nomos* of *krinein*, the truth of the "order of the world," is itself an "event of the will," the result of a *desire* for order rather than the existence of any a priori order itself. It is a desire that in turn must constrain *other discourses*, modifying and transforming "true" discourse over time, and yet it is a desire that is presented as apophantic necessity. Thus, Michael Behrent concludes, "Foucault leaves little doubt that it is not power-knowledge itself, which at its origins is intimately linked to truth-as-ordeal, but its surreptitious *occlusion* by the philosophical and legal practices that are invested in *truth-as-established-fact*, which lie at the root of many modern institutions."[278] And of these institutions, those working in the service of juridical power—of the power to *impose order*—remain the most authoritative at the same time that their contingency is most concealed, disguised, disavowed.

If the discourse of law *is* the discourse of truth, then the *power* of law is itself the power to *make true*. It is a power whose legitimacy lies in its unique claim to the *nomos*, the just order of the world, which, when imposed upon social and political life, delineates the limits of the pure precisely by identifying the *a-nomos*, the *impure*. It is a *nomos* that is at its core exclusionary and driven by a desire to regulate these exclusions, a *will to power* that is no longer recognized as such. Under the apophantic model of truth that has governed Western philosophy since the era of *krinein*, "'[t]rue discourse, freed from desire and power by the necessity of its form, cannot recognize the will to truth that pervades it."[279] Yet, Foucault asks us, "what is at stake in the will to truth, in the will to utter this 'true' discourse, if *not* desire and power?"[280]

In "Truth and Juridical Forms," an interview published several years after the *Will to Know* lectures were delivered, Foucault states that juridical practices have "[given] rise to models of truth which still circulate in our society, are still imposed upon it."[281] It is law's self-instituted jurisdiction over apophantic truth, to truth as *fact* rather than *event*, that the "relations of struggle and power" coursing underneath juridical discourses are particularly dangerous. In the words of Falguni Sheth, they "conceal" and "naturalize"

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[278] Behrent, "The Genealogy of Genealogy," 178, emphasis added.
[279] "OD," 56.
[280] Ibid, emphasis added.
[281] "TJF," 12.

the hierarchization of subjects behind a veil of ontological certainty and "seemingly objective moral and political judgments."[282] However, once we interrogate the juridical—"which is usually considered as timeless, inevitable, substantial, and unquestionable"[283]—we find that the subjectivities produced through law's myriad articulations are historically-situated, contingent, and embedded in a complex matrix of social, cultural, economic, and political meanings that aggregate to produce a certain *order* and, in so doing, fulfill a certain *desire*. Thus, if social and political reality, the *nomos*, is made manifest through power-knowledge, then *juridical power*, with its unique claim to apophantic truth, governs power-knowledge itself. It determines what forms of knowledge are required to bring about a certain order as well as the institutions and social practices that entrench and reproduce these knowledges within the regime of truth.

We have now seen that Foucault's analysis of Ancient Greek law exposes an alternative understanding of juridical power as the power to make true, to impose order. Juridical power actualizes a *political reality* that is presented as uncontestable and fundamental truth according to which all those under its jurisdiction must heed. What we take to be "reality" is thus always historically contingent, constituted through discursive practices that elevate certain social arrangements, subjectivities, and relations of force as sacrosanct reflections of a just *nomos*, of a true order. Operating by means of judicial decisions and juridical practices that assume the form of apophantic discourse, *juridical power* is an *ontopower* that *codifies the* nomos, that *institutionalizes the order of political reality itself*. And insofar as the *nomos* with which *krinein* is to correspond is the *nomos* in accordance with *dikaion*, the social arrangement reified by juridical power is a fundamentally *normative* social arrangement: the *just* social arrangement. *Nomos*, by prescribing what is just, determines the conduct of subjects, the truth by which the world is to be ordered, and the regime of truth upon which all judicial decisions are premised. *Nomos* is, we might say, the *will to truth made manifest*. The question to be addressed in the following chapter is what such a juridical power might look like in biopolitical *modernity*. If under Greek *krinein* the role of law was to (re-)establish the just order, what role does

[282] Sheth, *Toward a Political Philosophy of Race*, 23.
[283] Patrice Maniglier," The Order of Things," in *A Companion to Foucault*, eds. Christoper Falson, Timothy O'Leary, and Jana Sawicki (Oxford: Blackwell Publishing Ltd., 2013), 104.

law play in an age of de-centralized authority, in which power operates and is reproduced through aleatory mechanisms and institutions?

To be sure, *nomos* is not a term that Foucault utilizes in his genealogy of modern power. However, if we keep in mind the close connection between *nomos* and *truth*, I argue that a parallel dialectic between *nomos* and the *norm* becomes unambiguously clear: because the *nomos* elevates certain domains of knowledge over others, the *nomos* makes certain norms authoritative rather than other. *Juridical power,* understood as that which institutionalizes the *nomos*, is the power that determines which norms are imbued with the prescriptive force of the government of self and others. The implementation and administration of "order" is what the biopolitical state takes as both its starting point and its end—not in the image of some divine kingdom to come, but with the aim instead of maintaining the population at an optimal level of health. I therefore suggest that a conceptualization of juridical power as the actualization of "will to truth," though left unsaid, permeates Foucault's understanding of modern governmentality. Indeed, only such an account can explain how precisely the standard of "optimality" out of which norms are derived is itself determined on the basis of racial *purity*.

Chapter Three

THE RACIAL *NOMOS* OF BIOPOLITICAL MODERNITY

My analysis of Foucauldian juridical power has thus far drawn almost entirely on Foucault's work in order to rethink the role of power-knowledge and, especially, *truth*, in the production of subjectivity. The previous chapter demonstrated that the power of law, what I have been calling *juridical power*, is an ontopower that institutionalizes the nomos and, as such, prescribes the order of the world itself. It does so by imposing an inherently violent and exclusionary order in the name of a regime of truth which is presented as apophantic. In reality this regime of truth is built neither on metaphysical essentials nor transhistorical givens, but is that which the state *wills to make real*—that is, the *ontological order of social and political reality*—in the form of the *nomos*. The *nomos* is thus the will to truth made manifest, demonstrating the fundamental, ontopolitical nature of "truth" that, for Foucault, has been covered over in Western thought from the emergence of *krinein* to the present.

By saying that "juridical power *institutionalizes* the *nomos*" I mean merely that juridical power is a strategy or rationality of power that *constitutes reality* and the *subjects* within it, principally by means of juridical apparatuses, judicial decisions and legislations, and discursive practices of law-making which can take shape in constitutions, contracts, fatwas, legal theories, executive orders, legislative bodies, courtroom procedures, statutory interpretation, legal systems themselves.[284] Other domains of knowledge and modes of power can work to reinforce the aims of juridical power, including by *normalizing individuals* in accordance with the subjectivities imposed upon them, *regulating* a spatial and demographic order as a means of managing the population, and *eliminating* those individuals or populations that challenge or pose a threat to the integrity of the order itself. As we know, however, the circulation and reproduction of power through these various institutions and subjectivities is not normatively neutral. Norms by their very nature mark the threshold between the normal and the *ab*-normal—the undesired, the deviant, the criminal, the mad—and in this sense are metrics of exclusion at the same time that they are corrective standards. Additionally, the domains of knowledge (*connaissance*) that determine the threshold of normality are

[284] This list is not intended to be exhaustive.

themselves governed by overarching rules or "conditions of possibility" for their articulation, by means of participating in the *regime of truth* that governs reality.

My aim in this chapter is to demonstrate that the *nomos* is precisely that from which disciplinary norms of modernity are derived. That which enables us to see the *nomos*, however, is not discrete norms, but the *standard of optimality* against which the population is measured. The conceptual distinction between *nomos* and norm is what allows us to differentiate between the *disciplinary norm* and what I will call the *optimal standard* of biopower.[285] I demonstrate how the *nomos* has come to be embodied in the biopolitical standard of optimality by tracing the transformation of the *will to truth* from the Christian pastorate to seventeenth century "government." I thus begin with an overview of Foucault's analysis of the transition from the Christian pastorate to modern government, before turning to the question of "order" that emerges in response to the formation of the population. Following this overview, I suggest that norms of modern governmentality should be understood as metrics of normality that operate in order to bring about the *nomos:* the ideal (or desired) order of social and political reality. On this reading, rather than being equivalent to the *nomos*, norms in fact *derived from it*. By prescribing the regime of truth, the *nomos* determines what forms of knowledge and discursive practices—and the norms that are produced therefrom—will fortify the social and political reality demanded by the state. Because Foucault's genealogy reveals that biological racism is the "basic mechanism of power" in modern governmentality, I conclude that the *nomos* of the biopolitical modernity is a *racial nomos*. I end the chapter by revisiting Foucault's paradigmatic biopolitical state, Nazi Germany, in order to better understand *how* the racialization of populations was able to take place. Though Foucault himself is silent on this question, I show that it was precisely by means of the *law* that the sub-optimal population was raced and, subsequently, *institutionalized* as an enemy of the state that could justifiably be exterminated for the sake of the whole.

[285] This is not to say that the "optimal standard" is not itself a "norm," but its target is the *population* rather than the individual.

FROM DIVINE RATIONALITY TO GOVERNMENTAL REASON

As I have stated at various points, Foucault himself never uses the term "norm" to describe the operation of *krinein* in his writings on ancient Greek law. Likewise, Foucault never uses the term *nomos* in his genealogy of normalizing, biopolitical governmentality. Given Foucault's prioritization of historicality and his disavowal of conceptual thematization, this careful and discriminating deployment of terminology is very much in keeping with Foucault's methodological commitments. Indeed, Foucault clearly seems to associate the norm "with specifically modern forms of power" because, "with the rise of modernity, sovereign power found itself unable to effectively control all aspects of increasingly complex societies" by means of (punitive) laws alone.[286] Insofar as the "norm" serves as the principal technology of modern government, however, norms themselves are tied to the emergence of certain forms of *knowledge*: the rise of the human sciences and expertise on the "correct conduct" of individuals as living beings. What is striking is that the historical emergence of the norm—a product of the industrialization of society that heralded the art of government—parallels the historical emergence of the *nomos* of *krinein*, which was accompanied by the demographic expansion of the city-state and the increasing complexity of social and economic relations in the *polis*. In both cases, the "transformation of Western reason"[287]—or, stated differently, the transformation of the Western *will to truth*—marks an *event*, a rupture from what came before, in the form of an expanded civil society, a new *target of power*.

To speak of a "*nomos*" of biopolitical modernity is therefore not to invoke the *nomos* of antiquity, precisely because modern power's target—that is, the object of interest to the state apparatus—is distinct from power's target in antiquity. It is today man understood as an organic, independent, autonomous being in relation with others. The *nomos* of *krinein*, as Foucault suggests in the *Will to Know*, took as its aim the reification of a just order built upon the religious virtues of knowledge (of the *nomos*) and purity (of behavior). The *nomos* of Christianity, though never characterized by Foucault in these terms, organized the world in a manner distinct from the pagan religiosity of pre-Christian society, transforming virtue and good conduct into a constant yet deeply

[286] Dianna Taylor, "Normativity and Normalization," *Foucault Studies* no. 7 (2009): 49.
[287] STP, 286.

individualized striving for deliverance and avoidance of the "desires of the flesh." The target of power under the Christian pastorate was, in other words, the *Christian* subject. Indeed, so powerful was the normalizing force of this *nomos* that Foucault theorizes disciplinary power's emphasis on individual conduct as a relic of Christian practices of confession. As he states in the "Subject and Power," "the modern Western state has integrated into a new political shape an old power technique that originated in Christian institutions"—that is, *pastoral power*.[288] What is key is that the reification of Christian *nomos* was made possible as a political project in part through a certain system of *law*—"human, natural, and divine"[289]—which upheld a vision of reality in conformity with nature as decreed by God and which saw the virtuous "conduct of life" as itself divinely sanctioned.

Although a sustained analysis of Christianity's transformation of Western legal principles goes well beyond the scope of this project, it is worth noting that the emergence of *natural law*—with its origins in Plato's linking of virtuous action with man's use of *reason*—ushered the equivalence of the "natural" *as itself* the "rational": "The rules of reason," now "being in accordance with nature and with truth, govern all the of the relations with men."[290] Similarly, as Foucault observes in the context of Christian pastoral power, "earning one's salvation and submission to the law are, of course, conditional upon acceptance, belief, and profession of a particular truth" such that "the pastor guides to salvation, prescribes the law, and teaches the truth."[291] Salvation, reason, and obedience are for Foucault the three fundamental elements that link truth, in the form of law, with the direction of *conduct*. It was only once truth was *taught* to each soul in the flock that the individual's conscience could be directed and her relationship with God established, both of which demanded her continued obedience to this truth for salvation.

Following the decline of Christianity's influence in matters of politics, alongside the increasing complexity of mercantilist social and economic relations in the sixteenth and seventeenth centuries, Foucault identifies *raison d'État* as the logic by which the

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[288] "SP," 332.
[289] "PTI," 406.
[290] William A. Banner, "Origen and the Tradition of Natural Law Concepts," *Dumbarten Oaks Papers* 8 (1954): 63–64.
[291] STP, 167.

Westphalian nation-state reframes Western politics in terms of balances of force.[292] The transformation generated by the Treaty of Westphalia, according to which states "no longer have to band together in accordance with their religious adherence"[293], heralds a metamorphosis of the notions of salvation, obedience, and reason. According to Foucault, "the treaty of Westphalia established the division of the Church arising from the Reformation as an accepted, institutionalized, and recognized fact, as well as that states, in their politics, choices, and alliances no longer have to band together in accordance with their religious adherence."[294] The new political rationality of *raison d'État* "does not have to abide by the laws … in the sense of yielding to positive, moral, natural, and divine laws because they are stronger," but only insofar as "it *posits them as an element of its own game*."[295] The Westphalian state need not mold itself in the image of any "final Empire," and will thus "exclude the game of these natural laws," laws whose legitimacy (that is, truth) was taught and understood by all, but "produce something that in a way will only be the establishment of a direct relationship of the state *with itself*."[296] Truth, which was once found in nature and thus legible to all, has transformed into *raison d'État*, the *will of the state,* an internal rationality known only to itself and which upholds *necessity* (of security, of self-preservation, of its own expansion) over and above the "law" as formerly understood. Or, more simply, we might say that the salvation of the state itself, at whatever cost, is the "law" of *raison d'État*.

Prior to Westphalian sovereignty, the wisdom of the sovereign lay in "knowing the positive laws of the country, the natural laws imposed on all men, and, of course, the laws and commandments of God himself."[297] Under the new art of government, *raison d'État*, required that the sovereign know "those elements" of the state "that enable the

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[292] According to Foucault, the social and political order of the Empire, "whether of the Caesars or of the Church," was "something that haunted the medieval perspective" in a providential sense, making the individual salvation of his subjects the imperative of the sovereign for the sake of the "final Empire" as "the fusion of all particularities and kingdoms in a single form of sovereignty" (STP, 260). In the post-Westphalian global order, that comes into being in the wake of the *coup d'État*, this notion of the "single sovereign" is replaced by "perpetual peace" as the "stability acquired in and through a balanced plurality" of states (ibid).
[293] STP, 291.
[294] Ibid.
[295] Ibid, 262, emphasis added.
[296] Ibid, emphasis added.
[297] Ibid, 273.

state to be preserved in its strength," chief among which was the control of the *population* by means of an "administrative apparatus" that was at the same time "an apparatus of knowledge."[298] Unlike the teaching of truth that was required for the salvation of the *individual* under pastoral power, the truth of *raison d'État*, which is required for the salvation of the state, cannot be made accessible to all, for the state would then "be in danger of losing some of its effects and not having its expected consequences if everyone were to know what was going on."[299] The order of government needs to be kept obscure, for it obeys no recognizable principle but that of its own fashioning. Rather than an *informed and obedient* public, the art of government demands a *docile and compliant* public, a public it can ensure will not revolt, and whose opinions and habits it can control and modify as needed. It demands a public, in other words, that is "obliged to produce the truth by the power that demands truth and needs it in order to function."[300] The "constitution of subjectivity" will no longer "be acquired through the relationship to a *recognized* truth," as it was under the pastorate, but will "be acquired instead through the production of an *internal, secret, and hidden truth*."[301] The logic of "governmental reason" is thus *internal to the state itself*: "law presupposes itself; it necessarily precedes itself."[302] Under the art of government, there is nothing metaphysically essential about the law, for the law proposes *as* true whatever it *needs* to be true, but in the eyes of political subjects, the law nevertheless retains its mythical link to the eternal, the transcendent, and the divine.

Importantly, while juridical practices of governmental reason do not operate in as direct and commanding a manner as they did under the Christian pastorate, juridical power's control over truth, in the form of the *order* it prescribes, now has the power to direct the production of norms of conduct the state can use to control the public. And the principal interest of the state, for which it requires the control and obedience of individuals, is its own *self-preservation*:

[298] Ibid, 274.
[299] Ibid, 275.
[300] SMBD, 24.
[301] STP, 184, emphasis added.
[302] François Ewald, "The Law of Law," in *Autopoietic Law – A New Approach to Law and Society*, ed. Gunther Teubner (Berlin: De Gruyter, 1987), 36.

> The state functions as an objective in this political reason in the sense that it is that which must result from the active interventions of this reason or rationality … What the intervention of *raison d'État* must arrive at is the state's integrity, its completion, consolidation, and its re-establishment if it has been compromised, or if a revolution has overturned it or momentarily suspended its strength and specific effects … Governmental reason thus posits the state as the principle for *reading reality* and as its objective and imperative. The state is what *commands* governmental reason, that is to say, it is that which means *one can govern rationally according to necessity*.[303]

By invoking necessity, all decisions made by the state, all transformations of social, political, or economic institutions, all subjectivities imposed upon individuals are *prima facie* rational and, thus, *true*. The truth, however, is itself a calculation of force aimed at preserving a certain geopolitical and spatial order (preserving, in other words, the ideal "balance of force"), and what domains and objects of knowledge are taken up as "true" are whatever the state deems necessary to maintain this order.

As we know from chapter one, Foucault more or less abandons any sustained analysis of law as an apparatus of governmentality once governmental reason or the "art of government" has made its appearance in the genealogy of power. The *institution* of law does not disappear, of course, since the emergence of the modern state is "a scheme of intelligibility for a whole set of *already established institutions*, a whole set of *given realities*," built upon a foundation already sedimented with history and meaning.[304] For this reason, François Ewald, commenting on Foucault's suggestion that the "action of the norm" has grown in significance "at the expense of the juridical system of the law"[305], states that

> the formation of a normalizing society in no way diminished the power of law or caused judicial institutions to disappear. In fact, normalization tends to become accompanied by an astonishing *proliferation* of legislation … The norm, then, is opposed not to law itself but to what Foucault would call 'the juridical': the institution of law as the expression of sovereign power. If, as Foucault puts it, 'the

[303] STP, 287, emphasis added.
[304] Ibid, 286, emphasis added.
[305] HS1: 144.

> law cannot help but be armed,' and if its weapon *par excellence* is death, this equation of law and death does not derive from the essential character of the law.[306]

Ewald is here articulating the view I set forth in chapter one, that the prohibitory laws of the juridico-discursive model are tied to a particular manifestation of the sovereign power to make die. Law's ability to sanction death says nothing about the essential character of juridical power, for juridical power itself cannot be reduced to sanctioning legislation; juridical power, rather, speaks to a particular power over truth, and which it then enforces by institutionalizing this truth by means of various juridical discourses, legal apparatuses, judicial decisions, and when needed, cooperation *or* noncompliance with other modalities of power. At its core, what the juridico-discursive model of sovereignty demonstrates is the tendency of modalities and rationalities of power to *coalesce*.

If we consider juridical power as the power to institutionalize the *nomos* through a privileged and inviolable access to truth, then the *power* of law has neither disappeared nor has it been decentered as a fundamental dimension of governmental reason. What has changed is simply that it is now *norms* rather than *sanctioning laws* that directly intervene in the behavior of political subjects. And as Ewald himself notes, the "law can also function by *formulating norms*."[307] These norms are taken up and reified in already-existing institutions and social realities because of their conformity with the regime of truth that the state requires for its own self-preservation. However, unlike (juridico-discursive) law's use of violence or constraint, "the norm is related to power [through] an *implicit logic* that allows power to reflect upon its own strategies and clearly define its objects."[308] In the same way that the sovereign power to kill has fortified itself for the new age of biopolitical governmentality by redirecting its focus from *external enemies* to *internal threats*, the power of law to institutionalize the *nomos* is just as acute as ever before.

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[306] François Ewald, "Norms, Discipline, and the Law," 138.
[307] Ibid, emphasis added.
[308] Ibid, 139, emphasis added.

Importantly, when norms become reified not solely by institutional practices or apparatuses but by *subjects* themselves—that is, when subjects begin to govern their *own conduct* in accordance with norms—the population as a whole stops "think[ing] critically about these phenomena," stops "giv[ing] them much thought at all," and the resulting "naturalization effectively promotes acceptance and conformity with prevailing norms on both an individual and societal level."[309] Normalized subjects are thus not seen as subjects *constituted by* the power-knowledge nexus, but as ontologically essentialized in certain *normative* ways. When norms become naturalized, those upon whom norms are imposed fail to recognize the normativity of the behavioral standards by which they are appraised and to which they feel compelled to orient themselves, "to see the framework for what it is—a particular and limited product of prevailing modes of thought and existence."[310] The danger, in other words, is that the norm masks its participation in the "regime of truth" instituted by the *nomos*, presenting itself instead "as a *given* and therefore *outside of power*—benign and closed to critical analysis."[311] As a result, *normativity itself*, establishing what is proper versus improper, is *naturalized* "to the point where [certain behaviors] are perceived not as a particular set of prevailing norms, but instead simply as 'normal,' inevitable."[312]

For Dianna Taylor, Foucault's work on sexuality is illustrative of this link between norms and truth: "insofar as sex is seen as fundamental to who one is, generating and obtaining knowledge about sexuality is synonymous with having access to truth. The interconnection of sex and truth, in turn, encourages the acceptance and internalization of sexual norms and thus *masks their normalizing character*."[313] What Foucault calls the "deployment" of sexuality marks, for Taylor, the "establishment of sexual norms within society."[314] These sexual norms emerge out of certain *discourses*—whether medical, biological, or psychiatric—that purport to reveal "truths" about sexual subjectivity that

[309] Taylor, "Normativity and Normalization," 53.
[310] Ibid, 58.
[311] Ibid, 46, emphasis added, emphasis added.
[312] Ibid, 47.
[313] Ibid, 57, emphasis added.
[314] Ibid.

become reproduced by *subjects themselves* in their own conduct and the way they govern the conduct of others.

It is precisely for this productive force of truth identified by Taylor that Foucault famously rejects the "repressive hypothesis" of sexuality in his groundbreaking *History of Sexuality*. The failure of the "repressive hypothesis"—that bourgeois Victorianism saw the repression of any discussion of sex and policed enunciations surrounding sex—was that, historically speaking, discourses of sex *proliferated* from the seventeenth century onward: despite its status as taboo, people were speaking of sex and sexuality more than ever before. With the expansion of these discourses, sexuality itself became "an especially dense transfer point for relations of power"[315] and an analyzable historical construct, "a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, [became] linked to one another, in accordance with a few major strategies of knowledge and power."[316] Of course, discourses of sexuality were not uniform across the seventeenth to the nineteenth centuries, but transformed in their discursive formations and aims, *adapting*, as it were, to concomitant shifts in power's growing interest in man as a living organism. Part and parcel with these discursive shifts was a transformation of norms of sexuality such that sex was taken up by individuals as a problem of *self-conduct*, one that demanded surveillance and regulation from childhood onward, and as such was a social—and thus, political—problem. The techniques by which sexual norms came to penetrate social life were not the legal sanctioning of indecent behavior, but rather through the pedagogical strategies of parents and teachers and "an entire medico-sexual regime" which "took hold of the family milieu."[317] It was, in other words, the growth of *discourses about sex* that allowed for new forms of power—namely, normalization and regulation—to attach to individuals at the level of their sexual *subjectivities*. What Foucault's *History of Sexuality* demonstrates above all is that the question of the subject is the heart of the question of power-knowledge: if it is by interrogating the material effects of disciplinary technologies and discursive regimes that

[315] HS1, 103.
[316] Ibid, 105–106.
[317] Ibid, 42.

the field of norms is made visible, the object of interrogation turns out to be *the constitution of the subject* "as the result of a *process*."[318]

The consequence of such a reading, according to French philosopher Guillaume le Blanc, is that the "greatest concern of the disciplinary function" is the creation of the subject, "insofar as *subjection* can be considered as the *truth* of the discipline."[319] Le Blanc is speaking here to Foucault's productive reconceptualization of "truth" as "bond, as obligation, and also as politics" rather than as "content of knowledge or as formal structure of knowledge," rendering the very problem of politics at once the problem of the subject *and* the problem of truth.[320] Indeed, as Mark Kelly presciently observes, "Foucault ultimately sees the problematization of the relationship of truth to subjectivity as the animus for all his work."[321] If truth is what gives rise and legitimizing force to *norms*—that is, if norms gain persuasive force by veiling themselves behind claims to truth—then the problem of politics demands an understanding not only of normalizing practices, but the "relations of struggle and power, the manner in which things and men hate one another, fight one another, and try to dominate one another, to exercise power relations over one another" that results in the codification of certain norms over others.[322] Without such an interrogation, subjectivizing norms come to be seen as *natural*, and with them certain subjectivities themselves become "naturalized" as essential *truths* about individuals—both from the perspective of others as well as from the perspective of the individual herself—and according which they are put into *normative relation* with others.[323]

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[318] Guillaume le Blanc, "Becoming a Subject in Relation to Norms," in *Foucault and the Making of Subjects*, eds. Laura Cremonesi, Orazio Irrera, Daniele Lorenzini and Martina Tazzioli (London: Roman and Littlefield, 2016), 129.
[319] Ibid, 130.
[320] ST, 12.
[321] Mark G. E. Kelly, *The Political Philosophy of Michel Foucault* (New York: Routledge, 2009), 80.
[322] "TJF," 12.
[323] For example, if homosexuality is medicalized as a *pathology*—as an ab-normal manifestation of sexual subjectivity—then homosexual *individuals* are in turn constituted as *deviants* and may, in certain circumstances, come to see *themselves* as deviant.

Taking together the analyses thus far presented, we can say that both *nomos* and the norm enforce directives upon subjects, but in importantly distinct ways. The *nomos*, by claiming a correspondence with "truth" as objective fact, creates the "reality" that becomes entrenched by the production of various standards of normality. While *nomos* operates in accordance with terms of validity that it itself produces, however, the production of norms, by means of various disciplinary domains, is beholden to conditions of validity that are *outside of it*. The *nomos* prescribes the "regime of truth" out of which certain domains of knowledge (*connaissance*)—and with them, certain standards of *normality*—are elevated over others. The *nomos* governs the *order*, while norms govern the conduct of individuals to constitute them as *subjects within this order*, with the ultimate aim of upholding those relations of domination that the *nomos* demands. It is on this basis that the norm "lays claim to power" and operates as "an element on the basis of which a certain *experience* of power is founded and legitimized."[324]

At the level of the individual, as we know, norms are *corrective*, compelling individuals to monitor their own behavior to comply with what has been predetermined as "proper." According to Nadine Ehlers,

> the norm represents those acceptable roles, behaviors or traits that become naturalized and thus seen as 'normal'; the norm functions 'as the universal prescription for all' disciplinary subjects. The norm is produced when certain behaviors and identities are set up as ideal, while others are not, and norms become normalizing in so far [sic] as they impose standards and correct behavior.[325]

So much is clear enough. What, however, do we make of the elusive "population" and the standard against which *it* is measured? Dianna Taylor's analysis of the norm provides one conceptual solution:

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[324] AB, 50.

[325] Nadine Ehlers, "Onerous passions: colonial anti-miscegenation rhetoric and the history of sexuality," *Patterns of Prejudice* 45.4 (2011), 322. Ehlers is here quoting from Michel Foucault's *Psychiatric Power*.

> With discipline, the norm establishes the normal: individuals are brought and bring themselves into conformity with some pre-existing standard. With biopower, the norm is established from several "normals," as represented specifically by "curves of normality"; … different normal curves are produced by studying a population, form those normal curves the norm gets established as an optimal or ideal normal which is then brought back to bear on the population in order to regulate that population – that is, to dictate how the population ought to behave. Since populations are not fully engaged in relations of power until this prescriptive function is implemented, the foundation and legitimation of biopower still hinges on the norm in important ways.[326]

As we see in the above, Taylor attributes the *norm* to disciplinary power and the "*optimal normal"* to biopower. The norm constitutes individuals while the "optimal normal"—which I interpret as equivalent to the "optimal standard"—regulates the population. Where I depart from Taylor is in her assertion that the "optimal normal" is *established from* disciplinary norms, and suggest instead that the "optimal normal" is what upholds the *just order*, the *nomos dikaios*, of the state itself. In other words, the optimal standard, as a representation of the *nomos*, governs the production of norms. What is considered to be "normal" in various domains (whether of sexuality or madness, for example) is therefore whatever best *upholds* the optimal standard—or perhaps more accurately, the optimal *order*. Recall how, once penal *law* is replaced by disciplinary norms that work to "correct" individual conduct, the penal *order itself* remains in place, operating in the background of disciplinary power and allowing for power's shift in interest from individual *action* to individual *potential*: "Order is what remains when everything that is prohibited has in fact been *prevented*."[327]

Beyond the penal order, Foucault gestures towards the primacy of the *nomos* in his analysis of apparatus of security, in which

> what is involved is precisely not taking *either* the point of view of what is prevented or the point of view of what is obligatory, but *standing back sufficiently* so that one can grasp the point at which things are taking place, whether or not

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[326] Taylor, "Normativity and Normalization," 50–51.

[327] STP, 46, emphasis added. The difference for Foucault, which we will trouble later on in this chapter, is that "a system of legality always focuses with greatest precision" on what is to be *prohibited*, while "in the system of disciplinary regulation, what is determined is what one *must do*" (ibid).

> they are desirable. This means trying to grasp them *at the level of their nature* … at the level of their *effective reality*. The mechanism of security works *on the basis of this reality*, by trying to *use it as a support and make it function*, make its components function *in relation to each other*.[328]

Governmentality demands neither prohibition (as did "juridico-discursive" sovereignty) nor conformity (as does disciplinary normalization), but their "regulation within the element of *reality*."[329] As a result, discipline "works in a sphere that is, as it were, *complementary* to reality."[330] On my account of juridical power, we could say that the "effective reality" that the art of government works to regulate *is the reality prescribed by the* nomos *itself*, the reality that is actualized when the regime of truth governs the production of knowledge, while the operation of discipline is *complementary to* and *reinforces* the *nomos*. Consequently, the "optimal normal" that Taylor describes above is not extrapolated from *already-existing* "curves of normality" within which disciplinary norms operate, but generated by the *nomos* for which these curves of normality are themselves produced. What we ultimately find is that the *modus operandi* of the *nomos* is the reification of a *normative reality*: the domains of knowledge that participate in the regime of truth are always already normatively-oriented, for their target is the production of particular subjectivities that together compose and perpetuate the state's desired social and political order. Insofar as the *nomos* is manifested in juridical institutions, apparatuses, and discourses, it is the case that *law*, *juridical power itself*, is a *normative power*.

Ewald as we know gestures toward the nascent role of law in disciplinary society when he suggests that "normalization tends to be accompanied by an astonishing proliferation of legislation," not in terms of "the institution of law as the expression of sovereign's power"[331]—that is, a *juridico-discursive* model of sovereignty—but as a power capable of "producing *social* law, a law constituted with reference to the particular society it claims to *regulate*."[332] Indeed, it is for this reason that Ewald suggests, though leaves

[328] Ibid, 46–47, emphasis added.
[329] Ibid, 47 emphasis added.
[330] Ibid, emphasis added.
[331] Ewald, "What's in a Norm?," 138.
[332] Ibid, 155, emphasis added.

rather unexplored, the possibility that law can "function by *formulating* norms."[333] Ewald's provocative suggestion is an echo of Foucault's own acknowledgement that

> the relationship of the law to the norm does in fact indicate that there is something that we could call a normativity *intrinsic* to any legal imperative, but this normativity intrinsic to the law, *perhaps founding the law* … cannot be confused with what we are trying to pinpoint here under the name of procedures, processes, and techniques of norm*alization*. I would even say instead that, if it is true that the law refers to a norm, and that the role and function of the law therefore—the very *operation of the law*—is to *codify a norm*, to *carry out a codification in relation to the*

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[333] Ibid, 138, emphasis added. Just as I do, Ewald sees Foucault's norm as an avenue by which to reconsider the "relationship between knowledge and power and its influence on the status and function of legal thought in modern societies" (ibid, 139). However, what Ewald offers is not a theory of law's relation to the norm on *Foucault's* terms, but the role of law in the context of the *welfare state*, a political arrangement that Ewald saw as an exemplary manifestation of modern governmentality and which he explored at length in a 600-page dissertation that was supervised by Foucault himself. For more on Ewald and Foucault's remarkable relationship, see Michael C. Behrent, "Accidents Happen: François Ewald, the 'Antirevolutionary' Foucault, and the intellectual Politics of the French Welfare State," *The Journal of Modern History* 82 (2010): 585–624. For Ewald, the influence of the norm under the disciplinary power of normalization is "primarily localized" and *actuarial* in nature: *insurance* is what links the "micro-instrumental" function of the disciplinary norm to the "bio-political" function of the regulatory norm. It is the management of *risk* as a constituent feature of biopolitical modernity that gives rise to insurance as that which "produces risks by making them visible and comprehensible" to the individual who sees modern life as an endless horizon of potential threat (Ewald, "What's in a Norm?," 142). Insurance thus marks the development of "a new *rule of justice*" that operates on the level of the *social*, because society, in biopolitical modernity, has "come to understand itself and its problems in terms of the principles of the technology of risk" (ibid, 147, emphasis in original). On this reading, law is no longer the product of a sovereign will, but of the collective social body; it is a product of the social body's recognition of the risks it is exposed to and the economico-biopolitical need to manage those risks for its own self-preservation. The social law that emerges from the elevation of insurance as the primary rule of justice is one that puts forth legal *regulations* rather than formal constitutions or codes. Though it goes beyond the scope of the present analysis, it bears mentioning that Ewald's infamous support for liberal reforms of the French welfare state in the early 2000s was seen by some "as evidence for [the] long-held suspicion" that the "late" Foucault was himself an advocate of liberalism. In an interview published with the *LA Review of Books*, Ewald clarified that Foucault's interest in liberalism was not ideological as much as it was "a way to criticize traditional political philosophy" and getting "a clearer sense of what governmentality actually meant" (Johannes Boehme, "'What Do You Want Me to Regret?': An Interview with François Ewald," *LA Review of Books*, November 3, 2017, https://lareviewofbooks.org/article/what-do-you-want-me-to-regret-an-interview-with-francois-ewald/).

> *norm*, the problem I am trying to mark out is how techniques of normalization develop from and below a system of law.[334]

It bears emphasizing that Foucault is here not putting forth his *own* conceptualization of law's relationship to the norm, but commenting on a formulation put forth by Hans Kelsen—founder of the Vienna School who, according to Foucault, "wanted to show that there was and could not fail to be a fundamental relationship between the law and the norm"[335]—whose work was of interest to legal theorists and political philosophers at the time at which Foucault delivered his lecture. Foucault thus re-emphasizes the goal of his genealogical analysis as identifying "how techniques of normalization develop *from and below a system of law*, in its margins and maybe even against it."[336] And indeed, it does seem that law holds some degree of primacy over sovereign power, disciplinary power, and biopower, such that juridical power can direct, govern, or even *censor* the production of discourses, norms, and subjectivities. Mark Kelly observes in Foucault's *History of Madness* that "from the Middle Ages onward, the law began to cognize madness quite *independently* of medicine," integrating madness into the discourse of *criminality*.[337] Alongside this discursive shift, law transforms the mad subject *herself* into a *potential threat* to the social body, not normalizing the *behavior* of the subject, but *normativizing the subject as a deviant*. The discrepancy between the two explains in part why madness

> came no longer to imply *exemption* from the judicial system, but rather *became a consideration within the criminal trial*, resulting perhaps in a different sentence. This implies that normalization appeared in medicine at a time when its apparent competitor, the law, was ascendant in relation to madness. Thus Foucault suggest that the modern medical 'science' of madness, founded in the period in which medicine itself had adopted normalization as its modus operandi, *'grew out' of the legal conceptualization of insanity rather than out of the previous medical one*.[338]

To be sure, it would be misleading to say that *all* juridical interventions or transformations of the production and dissemination of knowledge—whether scientific

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[334] STP, 56, emphases added
[335] Ibid, 56.
[336] Ibid, emphasis added.
[337] Kelly, "What's in a Norm?," 19, emphasis added.
[338] Ibid, emphasis added.

or not—are malevolent in their aims or intentions. There is nothing inherently nefarious about power *as such*, and this is precisely why power must be interrogated, as Kelly does above, in context. What *is* crucial here is that, insofar as the law has a relationship to the norm, it cannot be the sort of *normalizing* relationship that the norm has to disciplinary power. Imploring readers of Kelsen to not confuse the law with the normalizing imperative of disciplinary power, Foucault reminds us to keep juridical power and disciplinary power as two separate modalities of force. If we try to pinpoint a link between juridical power and the norm, then, we too must be careful not to conflate the underlying, *normativizing* logic of juridical power with the *normalizing* logic of disciplinary power.

TRACING THE ROOTS OF OUR RACIAL *NOMOS*

Let us recall that Foucault famously identifies "racial purity" as the standard of optimality that enables the reintegration of the sovereign right to make die in the name of sociobiological *optimization*. This sovereign right need not take the form of *execution*, however; Foucault acknowledges explicitly that "death" encompasses "*indirect murder*" as well as direct murder: "the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on."[339] What I have intended to show over the course of this chapter is that *juridical power* is that which, by institutionalizing the *nomos* (or the state's will to truth), governs the production of norms by virtue of supplying the optimal standard of governmentality. If the optimal standard of *biopolitical* governmentality is a *racial* standard of optimality as Foucault suggests, then the *nomos* of modernity is a *racial nomos*.

At first glance, this assertion seems clearly at odds with Foucault's genealogy of biopolitical governmentality for two reasons: 1) neither of Foucault's analyses of the *dispositifs* of madness or sexuality invoke any notion of "racial purity"; and 2) Foucault periodizes the emergence of norms in the eighteenth and nineteenth centuries, while the biopolitical usurpation of racism does not take place until the twentieth century. If there is no such thing as a racial *nomos*, we must retroactively project biopower's preoccupation with the racial purity of the population onto disciplinary power's preoccupation with the

[339] SMBD, 256, emphasis added.

"correct conduct" of the individual. If there *is* a racial *nomos*, we must accept one of two solutions: either 1) the *dispostifis* of madness and sexuality have *always* been racial; or 2) the emergence of biopower is not as recent of an event in Western politics as Foucault indicates.

As it were, both of these latter possibilities have been explored and, in fact, *defended* in philosophical scholarship. On the one hand, feminist scholars and race theorists have long-remarked on the failure of Foucault's *dispositif* of sexuality in particular to account for intersectional experiences of sexual subjectivation. According to Nadine Ehlers, for example, ideal "norms" of sexuality were always predicated on *whiteness* such that non-white individuals were *prima facie* incapable of embodying sexual normalcy, and these norms began circulating *well before* Foucault periodizes the emergence of biological racism. Rather than *scientific discourses*, however, these norms of sexuality were predicated on *racial hegemony*. Speaking of the administration of the early American colonies,

> the mores or notions of standard and acceptable forms of behavior and identity were circulating *prior to* and *outside of* scientific discursivity and institutionalization in the seventeenth and eighteenth centuries, and such workings were *beginning* to form the ideas of the norm and sexual normativity. In the early colonies, racial conduct and, in turn, racial identity were disciplined in particular ways and were beginning to become standardized (and to function as the prescription for all white subjects), but this was happening mainly in relation to the concepts of the 'ideal', the 'good', the 'proper' and the 'natural.' Black sexual difference was not yet conceived of as developmental failure (that would come later), but was instead constructed primarily through religio-moral and legal discourses, and understood as a consequence of the African's (and then slave's) supposedly defective religion and savagery … [and] black sexuality was predominantly formed through and subject to juridico-discursive power, that is, the *prohibitory modalities of power* that marked the deployment of alliance.[340]

There are several points worth highlighting in this passage. First, because notions of "biological purity" were not yet in circulation, standards of sexual normalcy in the American colonies were chosen initially by reference to *racial identity*, and racial identity was itself normativized and naturalized on the basis of ideality, goodness, propriety, and

[340] Ehlers, "Onerous Passions," 323.

naturalness. We do not yet have scientific discourses "justifying" or "proving" the inferiority of the non-white races, but non-white inferiority was nonetheless reified in religious, ethical, and legal discourses.

Second, black sexual conduct was controlled not by disciplinary norms that defined the thresholds of sexual normality, but by *laws* that prohibited particular *expressions* of sexuality (predominantly those of *black* subjects) as well as *sexual relations* (between black subjects and white subjects). Sanctioning laws were not the only juridical means by which these normative racial identities were codified, however. Because the black male slave was legally designated as a unit of property "with no legal autonomy in the private or public sphere," he was "viewed as sexually uncontrolled" and excluded "from assuming the privileges associated with patriarchal masculinity in general"[341]—excluded, that is, from participating in social and political life. What this demonstrates is that "law" did not operate exclusively in terms of prohibition, but in some contexts actively *produced* forms of subjectivity—such as *property*—around which normative ascriptions were able to coalesce. Ehlers additionally notes that white women who engaged in unlawful forms of sexual conduct (such as entering into interracial unions) could be "discursively reconfigured as *'not-white'*, that is, as '*unnatural'* and as *slave*" and her children "defined" as black.[342] Ehlers here shows how the "prohibitory modalities" of juridical power themselves fashioned forms of subjectivity *within and against these very negations*, such that the prohibition of certain forms of conduct were often used to constitute *racial* subjectivities and, thus, were *subjectivizing* at the same time that they were sanctioning. Anti-miscegenation laws in particular could erase certain forms of subjectivity while simultaneously entrenching positive or acceptable norms of relationality. Prohibitory laws in these cases did not arouse the sovereign right to kill, but rather cleared the grounds for legally-sanctioned, *racial* subjectivation—including upon those subjects who had *yet to be born*—as a means of safeguarding an unstated, racially hegemonic social and political order.

Third, the subjectivation of racial identity in the early Americas did not take place through scientific discourses, but through *religious, ethical, and legal discourses*; in other words, through the system of law that characterized the Christian pastorate and the pre-

[341] Ibid, 327.
[342] Ibid, 332.

Westphalian sovereign state.[343] Though the stratification of racial identities could not be validated scientifically, their proliferation in "pre-modern" regimes of truth nevertheless imbued racial identity with a sense of ontological immutability and sociopolitical normativity. Even an ascription as straightforward as criminality, tied as it is to the breaching of a "law that says no," simultaneously establishes and operates against a background norm of civic decorum that determines how the *well-behaved* subject—one who respects the bodily autonomy and personal property of others—must comport herself. This is precisely how "criminality" ceases to be attached solely to actions and begins to designate a subjectivity of its own, a subjectivity positioned *against* the proper, the normal, and the appropriate. How else are we to explain Foucault's offhand remark that the integration of Panoptic logic in matters of government instigated the emergence of a "new *criminal 'race'* … into the field of vision of public opinion"?[344]

Criminality aside, what is important here is that the proliferation and entrenchment of racial normativity through discourses of sexuality and sexual deviancy is not a product of "race" being *read back onto* sexual subjectivity retroactively, but instead demonstrates that "race" *helped to constitute* discourses of sexuality and sexual deviancy *themselves*. For both blacks *and* whites in early America, for example, "[n]orms of manhood and womanhood (and their circulation within ideas about sexuality) could only be imagined along *racial lines*; sexual and gendered difference had to be imagined as racially inflected in order to justify slavery: a condition that was seen, precisely, to *demonstrate* (retroactively) this difference."[345] For scholars like Ehlers and Aliyyah Abdur-Rahman, notions of racial ideality and degeneracy which constituted the juridical sphere not only predated the emergence of scientific discourses about sexuality, but likely themselves "*provided the background and the testing ground for the later nineteenth century scientific/medical and legal discourses of sexual normativity and perversion*."[346] In other words,

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[343] As Foucault writes in *Security, Territory, Population*, sovereign wisdom lay in "knowing the positive laws of the country, the natural laws imposed on all men, and, of course, the laws and commandments of God himself" (STP, 273).
[344] "QM," 233, emphasis added.
[345] Ehlers, "Onerous Passions," 236.
[346] Ibid, 323. See also Aliyyah Abdur-Rahman, "'The Strangest Freaks of Despotism': Queer Sexuality in Antebellum African American Slave Narratives," *African American Review* 40.2 (2006): 223–37.

judicial decisions concerning sexuality may have *directed the production of scientific discourses* (and with them, *norms*) regarding sexuality.

To be sure, the possibility that norms of sexuality were generated *outside* of and *prior to* scientific domains of knowledge is one that Foucault himself would have accepted. As his history of sexuality suggests, the discourses surrounding sexuality that would help shape Victorian attitudes toward sexual subjectivity began developing as early as the sixteenth century, transforming and adapting to changes in discursive practices in the interim, and taking their most lasting shape after the emergence of the human sciences. Additionally, we know that Foucault does not limit the production of norms to the social sciences, that he himself proposes that the discursive domains of art, ethics, and politics might give rise to norms of correct conduct.[347] In this sense, Foucault might very well have accepted that norms regarding sexuality were in circulation in discursive spaces outside of the scientific. Foucault was less likely, however, to have acknowledged that *racial normativity* may have contributed to the *formation of* these discursive practices and, hence, *norms themselves*. This is not merely an oversight on Foucault's part, but points to a fundamental lacuna in his genealogy of modern power as a whole: his silence regarding law's *productive power* in the period before and during the West's political turn toward governmentality, which undoubtedly shaped, to some degree, the production of scientific discourses that would substantiate and thereby "justify" racial hierarchies that facilitated and legitimized European colonial and imperial projects.[348]

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[347] See for example AK, pp. 193–194.

[348] We might here think of eighteenth century Linnaean taxonomy, introduced by Swedish botanist Carl Linnaeus in his *Systema Naturae*, which helped to reify the existence of the "four races of men," while the beginning of the nineteenth century saw the development of "cranioscopy"—a precursor to "phrenology" which was later debunked as a legitimate scientific domain—that equivocated mental functions with certain cranial attributes in order to "validate" European intellectual superiority on scientific grounds. See A/P/A, "Timeline of Scientific Racism," *Haunted Files*, n.d., https://apa.nyu.edu/hauntedfiles/about/timeline/. Regarding the *philosophical* origins of the theory of the "four races," I direct readers to John Harfouch's excellent *Another Mind-Body Problem*, in which he suggests that Kant's racial anthropology was intended to resolve another "question" regarding the mind-body union that sought to deny non-European races the very capacity for "being" itself. See John Harfouch, *Another Mind-Body Problem: A History of Racial Non-Being* (New York: SUNY Press, 2018).

As already discussed, I and several other theorists have cast doubt upon whether Foucault's characterization of the "juridico-discursive" model of sovereign power was meant to characterize the "essentiality" of law, or instead merely represent one particular *manifestation* of law *in the service of* the sovereign right to kill. What remains constant in either instance is that Foucault's discussion of "juridico-discursive" model is tied fundamentally to the monarchical form of sovereign power and the "abstract subject of rights" that this configuration of power is said to have taken for granted. What Ehlers and others have demonstrated, however, is that prohibitory forms of law in certain contexts—*during the same time period as these sovereign monarchies were in place*—were not used merely to execute or constrain, but also to subjectivize individuals in order to withhold from them rights that other subjects were granted or deny them membership in the "population" of rights-holding subjects altogether (by, for example, constituting them as property). Foucault's failure to acknowledge this profoundly *productive* and *subjectivizing* dimension of the juridico-discursive model is perhaps why he failed to recognize that the notion of "biological racism" was itself being enacted well before the human sciences were tasked with "validating" racism on sociobiological grounds. "Racial purity" in the pre-modern state did not take shape in scientific discourses, but rather in the discourses and institutions of *law itself*.

Because Foucault never engages with alternative conceptualizations or manifestations of "juridical power," however, he at most concedes that, while techniques of normalization "develop from and below a system of law," they do so in law's margins "and maybe even *against* it."[349] The term "against" here indicates that modes of power—*including juridical power*—may not always reinforce one another seamlessly. Because of the contingency of events, there is always the possibility that a new discourse or even regime of truth will emerge to challenge prevailing discursive practices and truth games. For Foucault, it is precisely within these ever-present interstices that we forge spaces of contestation and resistance.

[349] STP, 52.

Just as we may problematize the emergence of normalizing norms, scholars have wondered whether Foucault's periodization of *biopower*—understood as power over the *life* of the population—is an accurate reflection of Western political history. Most famously, Giorgio Agamben's *Homo Sacer* argues that biopower has been *inseparable* from sovereign power, that the inclusion of "biological life" in matters of politics and power "constitutes the original—if unconcealed—nucleus of sovereign power" and that "*the production of a biopolitical body is the original activity of sovereign power*."[350] Agamben's challenge to Foucault is not without its critics, and no less from those who accuse Agamben of misreading Foucault altogether.[351] I myself am less interested in pinpointing the temporal emergence of biopower than I am in the emergence of *biological racism* as biopower's standard of optimality. If it *is* the case that the racial standard of optimality has governed the production of disciplinary norms in the modern state, then it must also be the case that the standard of "racial purity" that biopower takes as its metric of operation—and thus the re-emergence of the sovereign right to *make die*—emerged *well before* the early twentieth century, and perhaps ever since the Treaty of Westphalia first transformed Western governmentality altogether. And indeed, because Foucault acknowledges the possibility that the sovereign right to "make die" can materialize in forms other than "killing," it is clear that the Westphalian state has imposed forms of *social and political death*—if not "simply murder *as such*"[352]—upon members of populations deemed 'racially impure' *for literally centuries.*

Even if we are to look only at the Nazi context, however, we find that Foucault is deafeningly silent on one of the most crucial dimensions of Nazi rule: the ratification of laws (principally the Nuremberg Laws) which were "made to *define* which Germans were Jewish and to *exclude* them," thereby *institutionalizing* the racialization of German Jews

[350] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 6, emphasis in original.
[351] See in particular Frost, "Agamben's Sovereign Legalization of Foucault"; C. Heike Schotten, "Against Totalitarianism: Agamben, Foucault, and the Politics of Critique," *Foucault Studies* no. 20 (2015): 155–79.
[352] SMBD, 256, emphasis added.

by *denying* them Reich citizenship—and, with it, *humanity itself*.[353] Of course, these laws could not be instantaneously and unilaterally applied—there were those who were not "full" Jews whose citizenship status remained ambiguous, as well as non-Jewish Germans who were married to Jews—nor was it universally celebrated. As Nathan Stoltzfus notes, the Third Reich often had to compromise on the implementation of particular laws if and when they believed they would face public resistance, thus staggering its de-nationalization of Jews, "privileging one group, and completing the persecution of the first group before beginning with the other."[354] By doing so, the Reich was able to slowly naturalize the racialization of Jews in the eyes of Germans, facilitating the normative degradation of the Jewish people such that, by the time Jews were being relocated to camps, the Reich had amassed the support of the German people in its campaign to "purify" the state. Once enacted in the form of what Richard Heideman calls "state-sanctioned hate,"

> [t]hese laws emboldened an entire nation to turn against their fellow citizens, neighbors, colleagues, and friends, many of whom had fought alongside them in the First World War, and subjected the Jewish people to social, economic, and political isolation, ultimately culminating in the attempted mass extermination and genocide of an entire people and other minorities. *The laws of the Nazi government made the Holocaust possible.* They permeated all aspects of daily life in German society, stoked national Anti-Semitism, and enabled, influenced, and emboldened the police and German judiciary to act with complete disregard for the inalienable rights of people to be safe and free.[355]

What we learn from the Nazi context is that the productive force of law *reaffirms* the fragility of discursive practices themselves, exposes them as *events* rather than stages in an historical teleology, even when working within the boundaries of a broader (racial) regime of truth. It shows, too, that juridical practices can (and often did) come into conflict

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[353] Nathan Stoltzfus, "Societal Influences on the Promulgation and Enforcement of the Nuremberg Laws," *Soundings: An Interdisciplinary Journal* 94.3/4 (2011): 378. In other words, it was the institutionalization, not of the sub-*racialization* of a population, but a *dehumanization* of that population altogether.

[354] Ibid, 384.

[355] Richard D. Heideman, "Legalizing Hate: The Significance of the Nuremberg Laws and the Post-War Nuremberg Trials," *Loyola of Los Angeles International and Comparative Law Review* 39.5 (2017): 6.

with other discursive practices, that negotiations have to be made in order for the state to *actualize* its will to truth. Yet it is only through the juridical institutionalization of racial subjectivities that the modern state, with its purported commitment to the "rule of law," can command the state-sanctioned death of entire populations.

It seems, then, that the very notion of "racial purity" cannot be understood outside of a rehabilitated understanding of juridical power as a productive power, as a power that imposes a racial order (*nomos*) upon social and political reality that is codified in juridical practices, legal discourses, and, especially today, the juridical subjectivation of subjects along racial lines. In certain instances, as we have seen, it was around these *normativized racial subjectivities* that *norms* of normality and ab-normality were subsequently constructed. In others, new juridical tactics (such as de-nationalization or the stripping of citizenship) resulted in the transformation and/or production of norms—whether biological, psychiatric, medical, or ontological—that then *racialized* previously "accepted" populations as *impure* and *eliminable*. And in others still, the extension of racial optimality to members of formerly racialized populations—even if only partially, for example through suffrage or for purposes of the national census and resource allocation—have worked over time to entrench *other* racial antagonisms and/or (re-)consolidate the overall political and social capital of the racially optimal population.[356]

Whether in terms of the state's regulation of scientific research, censorship in public higher education, the status of corporations as "legal persons," the proliferation of contracts, or of the withholding of territorial sovereignty from indigenous groups, new forms of subjectivity and relations of power have long been utilized to cohere the changing needs of the state. Legal categories such as "citizen," "alien," "terrorist," and

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[356] This was especially true in the United States following an era of mass immigration of Europeans, among whom were "highly undesirable but nonetheless 'white' persons," between the 1840s and the 1924 passage of the Johnson-Reed Act that restricted European immigration to the United States and entirely excluded Asian immigration (Matthew Frey Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* [Cambridge, MA: Harvard University Press, 1998], 7). For much of this period, according to Matthew Jacobson, "race was the prevailing idiom for discussing citizenship and the relative merits of a given people" (ibid, 9)—that is, on *political and moral* terms rather than *biological* terms. After the 1920s, "partly in response to a new racial alchemy generated by African-American migrations to the North and West" due to Jim Crow terror, "whiteness was reconsolidated: the late nineteenth century's probationary white groups were now remade and granted the scientific stamp of authenticity as the unitary Caucasian race" (ibid, 8).

"refugee" are by no means neutral, but constructed upon histories of struggles for domination and subjugation, control and disciplinarization, aiding the establishment of a particular *desire for order* whose normative force becomes reified in the elevation of certain norms of behavior over others. Indeed, we see this productive articulation of juridical power in the proliferation of "extra-judicial" decisions that have led many scholars to declare that the *contemporary* state is a "state of exception" that has become the "rule." An oft-cited example is the United States' authorization of the 2001 Patriot Act which enormously expanded the capabilities of law enforcement to infringe upon individual privacy. Drafted in response to the 9/11 terrorist attacks, the Patriot Act was one of several "exceptional" measures taken in the wake of the 9/11 terrorist attacks as a means of re-securing American "freedom" and global hegemony[357], ushering in scientific and technological innovations (such as surveillance technologies and the armed drone) as well as political rationalities (use of the "us versus them" trope, the invocation of the clash of civilizations discourse, and so forth) that resulted in new forms of subjectivity (the "terrorist") and relations of power (the formation of the US Immigration and Customs Enforcement). Rather than framing these changes as "exceptional," however, the operation of juridical power in these contexts is profoundly in keeping with the juridical power of the state to constitute social and political *reality itself*, modifying and establishing "truths" concerning deviancy and impurity, national values and priorities, and, in the case of the United States, perhaps what it means to be "American" altogether. Foucault was certainly correct to call upon political theorists to "cut off the king's head," for such a narrow understanding of law blinds us to the myriad forms in which juridical power is manifested under modern governmentality.

CONCLUSION: THE COLONIALITY OF MODERN GOVERNMENTALITY

My argument that law has served a fundamentally racializing function for much of Western political history is by no means novel. Outside of Foucault scholarship, critical race theorists and political philosophers have challenged liberalism's myth of

[357] My use of the term "exception" here is a nod to Giorgio Agamben's revival of the "state of exception" as a conceptual framework for such legislative actions. Post-9/11 scholarship that utilizes the "exception" framework often upholds the Patriot Act as a paradigmatic indication that the "state of exception has become the rule."

"universality," particularly in juridical discourses on human rights for denying the racial inflections embedded in the very notion of the "universal." For example, Cornelia Klingler problematizes the discourse of universalism on two accounts: on the one hand, "[a]ll those who are subject to having their identify fixed in essentialist and universalist terms appear to be limited in their decision-making power, activities, and opportunities for development," and "[o]n the other hand, all those who cannot or will not comply with such fixed definitions are excluded from the concept" altogether.[358] Étienne Balibar has for decades written on the role of race and racism in a global politics underwritten by Anglo-European desires and interests but which claims to be predicated on "the principle of the indivisible unity of the human species."[359] The "universality" of modern liberalism is for Balibar a "*civic bourgeois* universality" which by necessity manufactures an exclusionary category that can only be excavated through a "dialectical investigation of the *antinomies of the universal*."[360] And most recently, Serene Khader has taken to task the West's newfound (post-9/11) concern for women's rights in the global South by exposing it as an example of liberalism's justification for ongoing imperialist domination—a domination that is made possible "because of the frequency with which universalism and normativity are assumed to be aligned with support for Western values and interests."[361]

At the level of discourse, the notion of "universality" in international law, which is by design "customary," exposes the *artificiality* of the international order itself. For political theorist Turan Kayaoglu, to whom we will return in the following chapter,

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[358] Cornelia Klingler, "Essentialism, Universalism, and Feminist Politics," *Constellations* 5.3 (1998), 334.

[359] Étienne Balibar, "Racism Revisited: Sources, Relevance, and Aporias of a Modern Concept," *PMLA* 123.5 (2018), 1634.

[360] Étienne Balibar, "Civic Universalism and its Internal Exclusions: The Issue of Anthropological Difference," *boundary 2* 39.1 (2012), 209, emphasis added.

[361] Serene J. Khader, *Decolonizing Universalism: A Transnational Feminist Ethic* (Cambridge: Oxford University Press, 2019), 2. For Khader, we need to move not toward moral or cultural relativism—which is typically positioned in opposition to the universalist framework—but toward a normative, *nonideal universalism* if we hope to think beyond universalist principles of "ethnocentrism, justice monism, and idealizing and moralizing ways of seeing that associate Western culture with morality" (ibid, 22). What makes Khader's anti-imperialist universalism a "nonideal" universalism is its recognition that moral and political concepts respond to *existing injustices* rather than abstract conditions of justice and equality, urging us to train our "evaluative focus" on "the nonnormative assumptions held by those likely to adopt it and the effects normative concepts will produce if adopted under existing social conditions"; that is, a universalism that is "responsive to imperialism" (ibid, 36).

international law's emphasis on treaties and conventions—of which the Universal Declaration of Human Rights would be an example—"was instrumental in the international jurists' need to justify the existence of international law when legal naturalism and its transcendental basis for law, like natural reason, became untenable with the rise of legal positivism."[362] On this reading, international law's invocation of "universality" reveals itself less as a commitment, promise, or guarantee then as a *discursive strategy* utilized by jurists to legitimize international law's own normative and "objective" force. In this sense, we see how an *international* juridical power began to fashion the terms of its own internal logic and ontological validity.

This being said, it is striking that Foucault identifies the Treaty of Westphalia as a decisive event in Western political history—rightly so, for it marked the end of the feudal logics of the Middle Ages and the beginning of modern government—without once attending to the Treaty's impact on the *geopolitical order* or the development of an extraordinarily Eurocentric vision of international relations which continues to dominate IR studies. Following Westphalia, the hegemonic aims of the Holy Roman Empire became the hegemonic aims of the *Western European race*, a transition that undoubtedly influenced the development of and *investment in* a race war discourse predicated upon the idea of *one true race*. According to scholars who attended the 52nd German Historians' Convention (*Deutscher Historikertag*), for example, the Peace of Westphalia was decisive in assigning the European states "a place in the hierarchy of the international system" after which, buttressed by mutual cooperation, "the politics of *colonization* became possible."[363]

Weaving between the global and the governmental, the object of attention in the following chapter is the racial logic of *colonial governmentality* or, borrowing anthropologist David Scott's conceptualization, "the *political rationalities* of colonial power."[364] Though my utilization of colonial governmentality as a heuristic of analysis is quite different from Scott's, it is worth quoting in full how we might think of such a notion:

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[362] Turan Kavaoglu, 199.

[363] "The Peace of Westphalia Also Had its Dark Side," *EurekAlert!: Public Release*, September 19, 2018, https://www.eurekalert.org/pub_releases/2018-09/coe-po091918.php.

[364] David Scott, "Colonial Governmentality," in *Anthropologies of Modernity: Foucault, Governmentality, and Life Politic* (Malden, MA: Blackwell Publishing, 2005), 25.

> By this obviously Foucauldian formulation I mean those historically constituted complex of knowledge/power … [by] which colonial power is organized as an activity designed to produce effects of rule. More specifically, what I mean to illustrate are … the *targets* of colonial power (the point or points of power's application; the object or objects it aims at; and the means and instrumentalities it deploys in search of these targets, points, and objects) and the *field* of its operation (the zone that it actively constructs for its functionality).[365]

Scott's focus of analysis, he goes on to clarify, is not "decentering" Europe from the genealogy of governmentality, but interrogating European governmentality in relation to its colonial site of application: its construction of the *colonial subject*.[366] In Scott's words, "what is important to understand … is that with the formation of the political rationality of the *modern* colonial state, not only did the rules of the political game but *the political game itself* changed—not only did the relation of forces between colonizer and colonized change, but so did *the terrain* of the political struggle itself."[367] The transformation of the terrain is seen in the "emergence at a moment in colonialism's history … *a form of power not merely coincident with colonialism*."[368] In this sense, the power of interest to Scott is not the construction of the colonial subject as such, but the power to break down the "conditions" of "old forms of life" and "constructing in their place new conditions so as to enable—indeed, so as to *oblige*—*new forms of life to come into being*."[369] This is not a power singular to the colonial context, which would position something called "colonialism" in diametric opposition to "Europe," but one that "clarifies the distinctiveness of—and the transformation entailed in—the making of *modern* power in [Europe's] colonial career."[370]

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[365] Ibid, 25.

[366] "Colonial" is here a more apt term than "colonized," for the latter implies a unilateral relation of domination in which the ontic status of the subject under colonial governance is rendered static and hegemonized. "Colonial" subjectivity is meant instead to capture the dynamic constitution of those individuals subject to *particular* relations of force, such that there may be different manifestations of colonial subjectivity in different colonial contexts—between for example men and women, young and old, Muslim and Christian, etc.—encompassing the dialectical nature of subjectivity. Because multiple arts of government may be superimposed and negotiated within a state, there may be present capitalist, biopolitical, and other rationalities of government operating within colonial governmentality.

[367] Scott, "Colonial Governmentality," 29, emphasis in original.

[368] Ibid, 25, emphasis in original.

[369] Ibid, emphasis in original.

[370] Ibid, 27, emphasis in original.

It is, in other words, an attempt to reimagine Foucault's genealogy of modern power that takes into consideration the deeply constitutive phenomenon of *colonialism* therein.

For Scott, then, the political rationality at work in colonial governmentality is a *mode of power in its own right*, one which produces colonial subjects through "the destruction and reconstruction of colonial space."[371] More strongly, it is the "*systematic redefinition and transformation of the terrain on which the life of the colonized was lived*"[372] in order "to produce not so much extractive-effects on colonial *bodies* as governing-effects on colonial *conduct*."[373] It is, in other words, the power to constitute the space of governmentality itself. In this sense, Scott's interest in colonial governmentality is on the subjectivation of the colonized individual insofar as this *subjectivation* involved certain techniques and *dispostifs* of power—"the new knowledges it would now depend upon, the new technologies it would seek to deploy, the new domains it would now need to construct as the field of its operations"[374]—that were deployed to *transform space* and subsequently *allow for* the constitution of (colonial) subjects. Scott mentions time and again that the "new game of politics" which enfolded the colonial subject depended upon "the construction of a legally instituted space where legally defined subjects could exercise rights"[375], stated elsewhere as "a new social and legal space for the desiring subject."[376] What is "colonial power" in this sense if not a *legal* power, the "colonial space" if not a *legal* space, "colonial reality" if not a *legally-constituted reality*? At its core, Scott writes, the aim of colonial power was the "concerted attempt to *alter the political and social worlds* of the colonized."[377] And indeed, "one site for inducing these [colonial power-]effects on colonial conduct was the *courtroom itself* and particularly the *jury system*"[378]—the system, in other words, tasked with *re-establishing order*.

What I have aimed to show thus far is that juridical power *is itself* the power to ontologize the space of governmentality by *institutionalizing* the *nomos* that is to orient the production of social norms and discourses. Where I depart from Scott, then, is that I

[371] Ibid, 35.
[372] Ibid, 36, emphasis in original.
[373] Ibid, 35, emphasis added.
[374] Ibid, 38.
[375] Ibid, 39.
[376] Ibid, 41.
[377] Ibid, 44, emphasis added.
[378] Ibid, 42.

attribute the constitution of colonial space and colonial subjectivity to *juridical power*, rather than to a "distinctive political rationality" that emerged alongside and in the service of colonialism. To position juridical power as ontically prior to "colonialism" is by no means to say that the expression and actualization of juridical power is fixed across time and space; given the historicality of power's operation, juridical power can only be critically interrogated by examining its sites of application—the *specific* subjectivities constituted in *specific* spaces for *specific* ends. Indeed, dynamics between the "colonizers" and the "colonized" belie the once-held assumptions that there existed a hegemonic European domination over the indigenous populations, a hegemonic system of law, or an absence of autonomy, agency, or resistance among colonial subjects. What the colonial context illuminates is that the notion of "racial purity" is a malleable yet forceful juridical construction that, in the post-Westphalian age, has often been utilized by European powers to organize *global* space.

In the following chapter, I argue that Foucault's disregard of the colonial context in his genealogy of power—particularly given its coevality with the development of modern Western governmentality—led him to overlook the racializing dimension of juridical power that was in play well before the "co-option" of "race war discourse" on the part of the European governmental state. By drawing on postcolonial critiques of Foucauldian thought as well as analyses of racializing tactics utilized by colonial officials, I will show how it was *precisely through law* that colonial powers racialized colonial populations. This juridical racialization not only helped to entrench racial hierarchies in colonial spaces, however, but generated the development of a pre-scientific notion of *racial purity* that would, in its most extreme manifestation, *de-humanize* sub-optimal populations as *external to the human race itself*. It was only on the basis of these preestablished, normative racial identities and hierarchies that the otherization of sub-populations have been able to take place with such success: the earlier entrenchment of these racial normativities is precisely what allowed biological racism to be inscribed as the basic mechanism of power in the modern state, principally by elevating the *white, Christian, Anglo-European* as the standard of *racial* optimality in modernity.

Chapter Four
Colonial Ontopolitics and European Purity

As race theorists and scholars of postcolonialism have long-argued, the racializing dimension of biopolitical governance that Foucault locates at the end of the nineteenth century had been taking shape much *earlier* than Foucault's historical genealogy would have us believe.[379] It is, of course, in the *colonies* that these early biopolitical tactics of government were being worked out, well before their so-called "internal application" to European bodies. The utilization of racial purity as a standard of governmental management and organization was, at the very least, coterminous with the seventeenth century emergence of *government*, and thus embedded in the formation of the Westphalian state itself. Thus, rather than serving as a "*byproduct* of Europe's internal and permanent state of war with itself," as Ann Laura Stoler paraphrases Foucault's analysis of colonialism in *Society Must Be Defended*, the colonies were fundamental sites of racializing ontopolitics that were not incidental but "*formative* of those [intra-European] conflicts."[380]

This chapter brings together the underlying threads of the previous three chapters, to weave together an image of the racial ontopolitics of coloniality through *juridical power*. In so doing, we find that the *nomos* of Western modernity—the organizing principle around which normativized subjectivities are produced and the population is organized—is a fundamentally *racial nomos*. Though many scholars have already written of the role of law in the production of racial subjectivities, what has *not* yet been explored is the imbrication of *race* and *truth* in modern (that is, post-Westphalian) juridical power that renders juridical discourse itself a *racializing discourse*. The colonial context shows us that the stratification of populations along lines of ontological purity have worked to *naturalize* these normative, ontological determinations within the law itself—visible in

[379] See for example Feldman, "The Genesis of Foucault's Genealogy"; Stoler, *Race and the Education of Desire*; Ladelle McWhorter, "Ehlers, "Onerous Passions"; Martha Kaplan, "Panopticon in Poona: An Essay on Foucault and Colonialism," *Cultural Anthropology* 10.1 (1995): 85–98; Robert Young, "Foucault on Race and Colonialism," *New Formation* 25 (1997): 57–65; and Claire Cosquer, "Altering absence: From race to empire in readings of Foucault," *Foucault Studies* no. 26 (2019): 1–20.
[380] Ann Laura Stoler, *Race and the Education of Desire: Foucault's* History of Sexuality *and the Colonial Order of Things* (Durham and London: Duke University Press, 1995), 28.

such modern legal subjectivities as the "citizen," the "alien," and the "refugee." Rather than challenge Foucault's genealogy, my aim is to complicate the Eurocentrism of Foucault's theorization of modernity and thereby expose the inherent *coloniality* of the historical ontology of ourselves. It is only through recognizing this dimension of modern political subjectivity that we can hope to *truly* forge spaces of political, social, and ethical contestation, resistance, and emancipation.

What bears emphasizing at the outset, however, is that nowhere in *Society Must Be Defended* does Foucault purport to offer us a theory of *race* as such. He is rather highlighting those moments of rupture in which discourses that utilized the language of "race" were *repurposed*, *strategically transformed*, and *deployed* for various governmental aims. "Racism" in this sense is not tied to ethnic, morphological, or scientific features, but exists anywhere there is a systemic, social and political bifurcation of the population. Alex Feldman writes for example that Foucault's outline of race war discourse made "a major contribution in emphasizing the link between race discourse and the discourse of enemyship"[381]—a theoretical link that grounds Giorgio Agamben's Schmittian-Foucauldian conceptualization of the "state of exception." And indeed, Foucault himself continued to develop his thinking about the intersection of race and population beyond *Society Must Be Defended*. Foucault as we know had planned for the *History of Sexuality* to be a multivolume series, and of the five "future titles" listed on the back cover of the first edition of volume one, the final volume—never written or published—was to be called *Populations et races*.[382] The lecture series, in which his most developed writings on race and racism are found, were never intended to provide genealogies of *race* or *racism*, but rather locate the emergence of a particular sort of racism—*biological* racism—within the broader "historical ontology of ourselves."

As this chapter will illustrate, the colonial context was a site in which law was frequently deployed in a *prescriptive* and *productive* sense, not only subjectivizing bodies along lines of normality but instantiating a hierarchy of racial purity that would allow for "biological" racism to be discriminately applied to populations internal to Europe. It was through juridical articulations of *racial impurity and degeneracy* in particular that the

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[381] Alex Feldman, "The Genesis of Foucault's Genealogy of Racism: Accumulating Men and Managing Illegalisms," *Foucault Studies* no. 25 (2018), 278.
[382] See Feldman, "Genesis of Foucault's Genealogy of Racism," 274.

constitution of the bourgeois, European subject came to orient the disciplinary and biopolitical imperatives that Foucault otherwise locates in the nineteenth and twentieth centuries. By attending to the colonial context as theorists such as Nadine Ehlers, Ann Laura Stoler, and Ladelle McWhorter do, we instead find myriad examples of non-penal forms of juridical power used to constitute raced populations and to naturalize *racially normativized* social arrangements, not only complicating Foucault's "juridico-discursive" model of sovereignty but also challenging his suggestion that "race war discourse" was most effective at the *margins of law*, at the "extremities" where power's "exercise became *less and less juridical*."[383] Alongside the absolutist arrangements of sovereignty that Foucault emphasizes, in other words, alternative and polyvalent structures of juridical power were being enacted and appraised in various colonial contexts, demonstrating the deeply *productive* dimension of juridical power: the reification of *white, Anglo-European, Christian subjectivity* as the optimal measure of "racial purity." It was this historically specific form of racial subjectivity that would go on to orient the targets of disciplinary power, biopower, and, sovereign power in modern governmentality. As such, we find that the racial *nomos* that defines modern juridical power—that which upholds white, Anglo-European, Christian subjectivity as the standard of racial purity—is inseparable from the development of modern governmentality itself.

THE BEGINNINGS OF BIOLOGICAL RACISM

As mentioned in brief, Foucault famously reconceptualizes "racism" as a mechanism of inclusion-exclusion that works in the service of identifying and delimiting the "one true race" against those sub-races who threaten the purity and integrity of the "optimal" body politic. For Foucault, the emergence of "biological racism," the zenith of which saw the genocide of German and Eastern European Jews and other "degenerate" populations at the hands of the Nazi State, is part of a broader genealogy of "race war discourse" which has its roots in the "civil and religious wars of the sixteenth century."[384] During this period, the discourse of "perpetual war" allowed those who were subjugated within and by oppressive monarchical regimes to instantiate a *counter-historical discourse* against

[383] SMBD, 28, emphasis added.
[384] Ibid, 49, emphasis added.

those in power, challenging the juridico-philosophical legitimation of absolute sovereignty and elevating the voices of those on "the side that [was] in darkness" in the histories of sovereign glory.[385] Those who spoke this discourse did not speak from the position "of a universal, totalizing, or neutral subject," but from the position of an *adversary*, of a participant in a struggle that coursed underneath the surface of what the sovereign would called "peace," who asserted her right to be free from repression.[386] By rejecting the "philosophico-juridical discourse" of power occupied by "the position of the universal subject"[387], this was a *revolutionary discourse* that "neither appeal[ed] to universal rights and justice nor [sought] to substitute a sovereign of its own"[388] but which rejected in full those representations of power that championed narratives predicated on the military victories of the sovereign. It was a "historico-political discourse" which transformed war from a conflict between the state and an external enemy into "a permanent social relationship," repositioning war as "the ineradicable *basis of all relations and institutions of power*."[389] And as Foucault reveals, this war "that [was] going on beneath order and peace, the war that undermine[d] … society and divide[d] it in a binary mode [was], basically, a *race war*."[390]

In its early stages, race war discourse stratified the social body "around two races"—characterized by ethnic difference, cultural difference, or difference in language[391]—and this notion of the "clash between two races" came to serve as the analytic framework of all social struggles, whether on biological grounds or on the basis of class.[392] Amidst the political restructuring of Europe and Anglo-America in the

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[385] Ibid, 70.
[386] Ibid, 52.
[387] Ibid, 268.
[388] Ladelle McWhorter, "Decapitating Power," *Foucault Studies* no. 12 (2011), 81.
[389] SMBD, 49, emphasis added.
[390] Ibid, 59–60, emphasis added.
[391] Foucault himself states that "two races exist whenever one writes the history of two groups which do not, at least to begin with, have the same language or, in many cases, the same religion" (SMBD, 77)
[392] These are what Foucault identifies as the "two transcriptions" of race war discourse (SMBD, 60). Interestingly, Foucault states that the biological transcription is what is "articulated with European policies of colonization" (ibid). Because my focus is on the biological dimension, I do not address the question of class warfare here. For an excellent analysis on the development of *class war discourse*, however, I direct the reader to Verena Erlenbusch, "From Race War to Socialist Racism: Foucault's Second Transcription," *Foucault Studies* no. 22 (2017): 134–52.

seventeenth century, however, race war discourse became co-opted by the bourgeois ruling classes as a means of consolidating power in the vacuum once occupied by the absolute sovereign. Race war discourse thus began to function "very differently," such that "the other race [was] basically [no longer] the race that came from elsewhere or that was, for a time, triumphant and dominant, but that it [was] a race that is *permanently, ceaselessly infiltrating the social body*, or which [was], rather, constantly *being re-created in and by the social fabric*." [393] It was, in other words, "the splitting of *a single race"*—the *human* race—"into a *superrace* and a *subrace*."[394] As a result,

> the discourse of race struggle […] will be recentered and *will become the discourse of power itself*. It will become the discourse of a centered, centralized, and centralizing power. It will become the discourse of a battle that has to be waged not between races, but by a race that is portrayed as the *one true race*, the race that holds power and is entitled to define the norm, and against those who deviate from that norm … which make[s] the discourse of race struggle function as a principle of *exclusion* and *segregation*, and ultimately, as a way of *normalizing society*.[395]

After its emergence as a counter-historical discourse at the onset of government in the sixteenth century, then, race war discourse by the mid-seventeenth century "was transformed from a tool of the underclass to a tool of the bourgeoisie" until "it was finally absorbed by the nation-state and translated into biological categories."[396] What precisely it means to be the "discourse of power itself" is unclear, but we do know that, by the mid-nineteenth century, this discourse of race war has "adopt[ed] a *biologico-medical perspective*" that was made possible by the emergence of the human sciences and which ushered, according to Foucault, "the appearance of what will become actual racism," replacing the historical dimension with "the postevolutionist theme *of the struggle for existence*."[397] Of course, much of this transformation was predicated on the shifting

[393] SMBD, 61, emphasis added.
[394] Ibid, emphasis added.
[395] Ibid, emphasis added.
[396] Ladelle McWhorter, *Racism and Sexual Oppression in Anglo-America: A Genealogy* (Bloomington: Indiana University Press, 2009), 58–59.
[397] SMBD, 80, emphasis added. Foucault's use of the phrase "actual racism"—let alone the "appearance" of it—is extraordinarily vague, but it seems to gesture toward what he will later call *biological racism*, the stratification of populations on the basis of biological difference.

understanding of "race" from a determination of lineage and cultural heritage to an essentializing feature of human biology. As we well know, the State's concern with the sociobiological dimension of its subjects is precisely what made it possible to frame the *population* "as a political problem, … as a biological problem and as power's problem."[398] Impure elements—such as the "criminal" and the "deviant"—now become recast as *threats*, as "heterogenous elements which are not essential" to the population and on the basis of which the state declares itself "the protector of the integrity, the superiority, and the *purity* of the race."[399]

These normative inflections in part explain why, as Foucault states in *Society Must Be Defended*, "once the mechanism of the *biocriminal* was called upon to make it possible to *execute* or *banish* criminality, criminality was conceptualized in *racist terms*."[400] Foucault does not speak of the "biocriminal" elsewhere, but in a roundtable interview conducted in 1977—one year after he delivered the *Society Must Be Defended* lectures—Foucault asserts that the birth of the modern prison at the start of the nineteenth century engendered the notion of "a whole new criminal 'race'" that was perceived as "incorrigible" and whose status as a "race" was what distinguished the criminal from the *homo penalis* of the "classical regime of penal theory."[401] As Pasquale Pasquino writes in an article reflecting on Foucault's theorization of the prison,

> *homo penalis* is nothing more or less than the citizen, the man of the contract. *Homo penalis* exists as a potentiality in each of us, but is actualized only through such violations of the law as any person may commit simply as the outcome of an erroneous action … Very schematically, we can say that *homo penalis* is joined here by a new subject, *homo criminalis*, which constitutes a veritable new *species*, a *separate race of people* whose acts are not results of a false calculation … but

[398] Ibid, 245.
[399] Ibid, 81, emphasis added.
[400] Ibid, 258. What Foucault means by "biocriminal" is unclear, as he does not expand on the term, but its proximity to the concept of biopower suggests that the biocriminal is the individual who is found to *threaten* the population at the level of *health*—a concept that might today be used to scapegoat an entire race for the emergence of an epidemic or technology of biological warfare. We might think of the pathological linking of the Coronavirus to China in U.S. political discourse, which has contributed to a sharp rise in discrimination and hate crimes against Asian-Americans, or calls for closing the border to Hispanic refugees and immigrants on grounds of preventing the proliferation of drug cartels.
[401] "QM": 233.

manifestations of an *evil nature* … [and] the new ['positive' school of] legal theory will regard the criminal as an *excrement of the social body*.[402]

The rise of the criminal as an *ontologically distinct race* is attributed by Pasquino to the rise of "positivist" legal theory, in contrast with the "classical regime of penal theory" which took crimin*ality* as a status to which all citizens in a society were vulnerable, should they commit an infraction. Once racialized, criminality became tied to the *subject herself*—perhaps as the "biocriminal" Foucault had earlier invoked—and separated from the rest of the population as "naturally a savage, and socially an abnormal."[403] Incidentally, it was the decline of natural law and the emergence of positive law—law divorced from the natural (rational) order—that allowed for the reinscription of "criminality" as a *naturalized subset* of the human speices, as a *race of its own kind*. Pasquale is making explicit, though not in so many words, what Foucault gestures at throughout his overview of race war discourse: that the changing shape of race war discourse from the seventeenth to the nineteenth centuries, the subjects to whom raciality was ascribed, and the objectives of these ascriptions, worked to displace *old juridical orders* and instantiated new forms of political organization and social arrangements; that is, *new social and political realities*.

Given its intervention at the level of the species, biological racism becomes fundamental to biopolitical governmentality understood as the "control over relations between the human race, or human beings insofar as they are a species, insofar as they are living beings, and their environment, the milieu in which they live."[404] Because biopower "has no control over death"[405], however, biological racism also allows the state to reframe "the death of the other, the death of the bad race, of the inferior race (or the degenerate, or the abnormal) [as] something that will make life in general healthier: healthier and purer."[406] Biological racism accordingly "justifies the death-function in the economy of biopower by appealing to the principle that *the death of others makes one biologically stronger* insofar as one is a member of a race or population, insofar as one is an

[402] Pasquale Pasquino, "Criminology: The Birth of a Special Knowledge," in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: The University of Chicago Press, 1991), 238.
[403] Ibid.
[404] SMBD, 245.
[405] Ibid, 248.
[406] Ibid, 255.

element in a unitary living plurality."[407] By the end of the nineteenth century, race war discourse works entirely in the service of what Foucault calls "State racism"—an "internal racism of *permanent purification*" that has become one of the "basic dimensions of social normalization."[408] This instrumentalization of racism in turn allows the state to reintegrate the old sovereign right to "kill" in the service of the "biological protection" of the *human race itself*.[409] Biological racism, with its authority over *purity* and *impurity*, has imbued the very notion of 'race' with a normative valence: to be racially impure is to be *outside of the human race*, and the extermination of the racially impure will make the human race, itself, purer.

In the final lectures of *Society Must Be Defended*, Foucault identifies Nazi Germany as the space in which biopower, disciplinary power, and sovereign power converge absolutely, precisely through the deployment of biological racism. Nazism, as Foucault states, "was in fact the *paroxysmal development* of the new power mechanisms [of racism] that had been established since the eighteenth century," because it was the first state in which disciplinary power and biopower were as "tightly [and] insistently regulated" so as to facilitate the genocide of a people within its own borders.[410] Part of this was made possible as a result of the state's invocation of such terms as "cockroaches," "criminals," "degenerates," and "deviants," that *naturalized* and thus *essentialized* Jews, homosexuals, and other "impure" sub-populations as fundamentally and unalterably Other and which simultaneously justified genocide as a biological *need* to protect humanity. The discourse of race—which for Foucault still dominates Western political modernity—has thus becomes "bound up with the workings of a State that is obliged to use race, the

[407] Ibid, 258, emphasis added.
[408] Ibid, 62, emphasis added.
[409] Ibid, 82. Foucault here identifies Nazi racism as the paradigm of the biological transcription, and Soviet-style "racism" in which the "class enemy becomes a sort of biological threat," as the class-oriented transcription (ibid, 83).
[410] Ibid, 259. Crucially, this was not a genocide *unilaterally* inflicted by the Nazi regime upon European Jews; the success of Nazi totalitarianism meant that the "murderous power" of sovereignty was "unleashed throughout the *entire social body*" and the power to kill "was granted not only to the State but to a *whole series of individuals"* before, "[u]ltimtely, *everyone* in the Nazi State had the power of life and death over his or her neighbors" (ibid, emphasis added; with regard to the latter claim, Foucault refers specifically to the practice of *informing*). The most extraordinary and devastating dimension of Nazism, not solely to Foucault but to so many of the thinkers of the early twentieth century, was its ability to make *every German* an "obedient Nazi," to *willingly participate* in the destruction of the incorrigible Other.

elimination of races and the purification of the race, to exercise its sovereign power. The juxtaposition of—or the way biopower functions through—the old sovereign power of life and death implies the workings, the introduction and activation, of racism."[411] The political consequence of this biological racism is the need to "'defend society against all the biological threats posed by the other race, the subrace, the counterrace."[412] Society, in other words, *must be defended*, and it must be defended *against the inferior race*.

COMPETING JURIDICAL DISCOURSES OF RACE WAR

Before addressing the imperial absence in his genealogy, it is worth emphasizing that Foucault characterizes these European political transformations in terms of competing discourses of *truth*: from the juridico-philosophical "universal truth" of peace, to the historico-political "perspectival truth" of struggle between races, to what we might call the biologico-medical truth of racial purity. As he states in his course summary, the first rupture in this history of race war discourse—marked by the emergence of the historico-political discourse of the oppressed rather than the 'sovereign'—was a discourse that "*lay[] claim to truth and right*" as a means of "establishing a truth that functions as a *weapon*."[413] This revolutionary iteration of race war discourse aimed at "defining and discovering, beneath the [abstract] forms of justice that have been instituted" by lineages of sovereign monarchs "the *order that has been imposed*, the forgotten past of real struggles, actual victories, and defeats"[414], rejecting "the continuity of law" that worked "to establish a juridical"—and thus immutable—"link between" sovereign monarchs.[415] It was a discourse "from below" that ultimately searched, "beneath the stability of the law or the truth" imposed by the sovereign, for "the indefiniteness of history."[416] In this sense, it was certainly a discourse that operated at the margins of a "juridico-philosophical" law that masked over its violence through appeals to the abstract, universal subject. It "[understood] power by looking at its extremities … [understood] power in its most

[411] Ibid, 258.
[412] Ibid, 61–62.
[413] Ibid, 268–69, emphasis added.
[414] Ibid, 56, emphasis added
[415] Ibid, 66.
[416] Ibid, 56.

regional forms and institutions, and especially at the points where this power transgress[ed] the rules of right that organize[d] and delineate[d] it, overstep[ped] those rules and [was] invested in institutions, [was] embodied in techniques and acquire[d] the material means to intervene … where its exercise became *less and less juridical*."[417] However, insofar as this revolutionary discourse attempted to put forth a new regime of *truth*, it attempted to "*lay[] down the law*"[418]—not the law of the universal subject, of the juridical order that was then in place, but a *new* law, characterized by new "rules of right, mechanisms of power, [and] truth-effects."[419] Though it circulated outside of the *established* discourse of law, revolutionary race war discourse was a *juridical discourse* through and through: by professing an alternate regime of truth based in permanent social struggle, it took as its target the reorganization of social and political reality itself.

Importantly, it was also a discourse that attempted to return to truth its quality as an *event*: as contingent, perspectival, partisan, and contestable, rather than as "the universal truth of the philosopher."[420] (And as Foucault established in *The Will to Know*, the universal truth of the philosopher—and, thus, the juridico-philosophical discourse of the sovereign—is an *apophantic truth*.) Juridico-philosophical discourse—or what might more accurately termed the *juridical discourse of the sovereign*—is consistently described by Foucault as a discourse that denies the historicality of history and establishes instead a "great uninterrupted jurisprudence of power"[421], while historico-political discourse—what we might call the *juridical discourse of race war*—is a discourse that wants to reestablish the link between history and the historic*al*. This appeal to history rather than metaphysical abstraction functions in this sense as "a living law or a resuscitated law; [making] it possible to judge the present, and to make it submit to a stronger law" as and when needed.[422] In terms of its emergence in the sixteenth century, this discourse was revolutionary precisely because it "introduced a rift into the discourse of truth and law *that had been spoken for thousands of years*"[423]—the "Roman-style" discourse of history, the discourse of truth in *Classical Antiquity*, the truth which *krinein* had established as

[417] Ibid, 27–28, emphasis added.
[418] Ibid, 25, emphasis added.
[419] Ibid.
[420] Ibid, 52.
[421] Ibid, 77.
[422] Ibid, 67.
[423] Ibid, 54, emphasis added.

metaphysically essential and which "pacifies society, justifies power, and *founds the order*."[424]

If juridical discourse was at first the discourse of a sovereign who purported to deny history is historicality by speaking of power in the language of rights and justice, it becomes, at the start of the age of *government*, the historical discourse of *race war*—not of a sovereign race, but of a permanent "confrontation between races" and the "race struggle that goes on within nations and within laws … *beneath and through laws*."[425] For a moment it is as if the discourse of race war is the discourse that will expose the *violence of apophantic truth* itself, will demonstrate that juridical truth is neither historically essential nor metaphysically inviolable, but itself a *mode of power* that aims to set the terms of social and political reality. It is perhaps for this reason that Foucault "was indeed praising the discourse of race war."[426] The revolutionary potential of this "sophistic" juridical discourse was arrested, however, by its bourgeois appropriation such that, by the end of the nineteenth century, the discourse of *racism*—of medico-biological truths of racial purity—has become, as we have seen, "the discourse of power itself."[427] But what mode of power is this discourse if not a *juridical power*, a power that can determine, define, institutionalize the "race that holds power" as "the one *true* race," the race that is thereby "entitled to *define the norm*"?[428] Under biopolitical governmentality, juridical discourse *has become racist discourse*—and this was made possible by the emergence of a new form of truth predicated neither upon philosophical universals *or* historical contingency, but on *science and reason*.

Foucault, of course, does not characterize either iteration of "race war discourse" as *juridical discourse* as I have here, but rather as a strategy of *sovereign power*: "thanks to the shift from law to norm, from races in the plural to race in the singular, from the emancipatory project to a concern with purity, sovereignty was able to invest or take over the discourse of race struggle and reutilize it for its own strategy."[429] As we know, the attribution of race war discourse to sovereign power allows Foucault to explain how the

[424] Ibid, 73, emphasis added.
[425] Ibid, 69, emphasis added.
[426] Ibid, 65.
[427] Ibid, 61.
[428] Ibid, 61 emphasis added.
[429] Ibid, 81.

biopolitical state, predicated upon the fostering of life, could "exercise the sovereign right to kill against some so that others may live."[430] The old imperative to protect the territory of the sovereign has turned into "the imperative to protect the *race*"[431]—not simply the purer race, but the *human race* in its entirety. The changing "truths" of race—from social, political, or religious identity to *normative ontology*—reflect not simply ruptures in the discourse of race and race war, but reflect the changing *needs of the State itself*. And as I have aimed to show over the course of this dissertation, it is *juridical power* that works to satisfy the needs of the state, precisely by imposing upon its subjects and population ontopolitical regimes of truth.

Whither Colonialism?

To reiterate in brief, Foucault's genealogy of biopolitical governmentality is predicated upon the development of a "biological racism" that is itself grounded in centuries of European race war discourses that identified an 'enemy group' and an 'in-group,' "them and us, oppressor and oppressed," the "binary parts" of which were "theorized as races."[432] Prior to the eighteenth century emergence of the human sciences, "race" in the sixteenth and seventeenth centuries "did not refer to morphologically distinct groups but rather to *cultures*"[433], categorizing different groupings of people—often along class lines—in order to make sense of those "political struggles in England and France" that aimed "to challenge sovereign power."[434] Although the timespan of his genealogy encompasses the entire history of European empire—from the colonization of the Americas to the European chartered companies to the "Scramble for Africa"—Foucault almost never discusses race war discourse in the context of these European projects. Any mention of "colonial" race war discourse is utilized as a heuristic for the internal bifurcation of peoples *within Europe's borders* for political or territorial gain (such as between the "races" of the Franks, the Gauls, and the Celts). By way of example, Foucault draws on a sixteenth

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[430] Erlenbusch, "From Race War to Socialist Racism," 139.
[431] SMBD, 80, emphasis added.
[432] Chloë Taylor, "Race and Racism in Foucault's Collège de France Lectures," *Philosophy Compass* 6.11 (2011), 750.
[433] Ibid, emphasis added.
[434] Erlenbusch, "From Race War to Socialist Racism," 138.

century text, *Apologia pro regibus*, to illustrate how the techniques of "legitimate" American colonization in the sixteenth century were used to *justify* the Norman invasion of England as an expression of "the right colonization."[435] This for Foucault constitutes

> if not the first, at least an early example of the sort of *boomerang effec*t colonial practice can have *on the juridico-political structures of the West*. It should never be forgotten that while colonization, *with its techniques and its political and juridical weapons*, obviously transported European models to other continents, it also had a considerable boomerang effect on the mechanisms of power in the West, and on the apparatuses, institutions, and techniques of power. A whole series of colonial models was brought back to the West, and the result was that the West could practice something *resembling colonization*, or an *internal colonialism*, on itself. This is how the theme of race conflict functioned in the discourse of the *king*.

In an extraordinarily distinct deployment from revolutionary race war discourse, early colonization—seen as (divine) right—was employed *by the monarch* to justify his expansion into other *European* territories. In other words, the "juridical weapons" that were "transported" to the colonial territories were of the same discursive stock as the philosophico-juridical discourse of sovereignty: as a law that was immutable by nature. Only *after* this episode does Foucault suggest that the "race war" coursing underneath juridical institutions became the counter-discourse of the oppressed.

When read as an historical chronology, colonialism does not appear in Foucault's genealogy again until the *end of the nineteenth century*, where it is used to differentiate "race war discourse" from "racism" or "racist discourse" *as well as* "medio-biological" race discourse. In a clarificatory remark at the start of his second lecture on the history of race war discourse, Foucault states the following:

> I think we should reserve the expression 'racism' or 'racist discourse' for something that was basically *no more than a particular and localized episode* in the great discourse of race war or race struggle. Racist discourse was really no more than an episode, a phase, the reversal, or at least the reworking, at the *end of the nineteenth century*, of the discourse of race war. It was a reworking of that old discourse, which at that point was already hundreds of years old, in *sociobiological*

[435] SMBD, 103.

> *terms*, and it was reworked for purposes of *social conservatism* and, at least in a certain number of cases, *colonial domination*.[436]

There is no connection made between this manifestation of "nineteenth century" racism and the colonizing racism of the sixteenth century, but in both cases we can imagine them as prototypes for the way in which "race discourse" or "racism" would soon after be *internally* proliferated. Indeed, the notion of "racism" deployed in "colonial domination" seems to Foucault to have been sublated by the biologico-medicalization of "race" that transformed race war discourse into the "struggle for existence"—a struggle that subsequently engendered the State racism that allowed for the reintegration of the sovereign right to kill, allowed the state to "introduce a break between what must live and what must die" and "fragment[] the field of the biological that power controls."[437] On Foucault's account, in other words, only the *biologico-medicalization* of race is conterminous with the emergence of biopower. It is only this new, *biological racism* that will allow "power to treat the population as a mixture of races" and "subdivide the species" into "subspecies known, precisely, as races."[438] It is not a military relationship or political relationship—Foucault says nothing here about an *economic* relationship, it bears mentioning—but a *sociobiological* relationship, a relationship that can use its power to kill only if it results "in the elimination of the biological threat to and the *improvement* of the species or race."[439] Indeed, the singularity of *Nazi* State racism was its integration of biological racism into "the very *prophetic* discourse from which the theme of race struggle emerged."[440] It was able "to function within an ideologico-mythical landscape" grounded upon the "legend of warring races,"[441] combining the scientific truth of biological racism with the eschatological truth of prophecy, as if marrying the inviolability of science with a distinctly Christian, moral providentialism. Nazi State racism, in other words, made the truth of racial purity inviolable at the same time that it was *normative*.[442]

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[436] Ibid, 65, emphasis added.
[437] Ibid, 254–55.
[438] Ibid, 255.
[439] Ibid, 256, emphasis added. It bears repeating that Foucault's use of the term "kill" does not mean "simply murder as such, but also every form of *indirect* murder" (ibid, emphasis added).
[440] Ibid, 82.
[441] Ibid, 82.
[442] This is importantly different, Foucault thinks, from the anti-Semitism that proliferated during the Middle Ages—presumably conterminous with colonizing racism of early American

Finally, in a third moment of the genealogy, Foucault notes that

> racism broke out at a number of privileged moments, and […] they were precisely the moments when the right to take life was imperative. Racism *first develops with colonization*, or in other words, *with colonizing genocide*. If you are functioning in the biopower mode, how can you justify the need to kill people, to kill populations, and to kill *civilizations*? By using the themes of *evolutionism*, by appealing to a *racism*.[443]

Is the "racism" to which Foucault is here referring, this racism couched in the language of *evolutionism* rather than socio-biologism, the same as the racism which erupted in "particular, localized episodes" mentioned earlier? If so, was the racism of colonialism evolutionary rather than sociobiological? Or is it the case that biological racism is tied fundamentally to an evolutionist narrative of progress? As I noted at the outset of this chapter, my aim is not to unearth all of the historical and conceptual inconsistences of Foucault's (surviving) thoughts on colonialism, colonizing racism, or colonial racism, however we choose to understand these notions. It is rather to suggest that Foucault's genealogy of modern power, and in particular the transformations of discourses regarding *race* for strategic political gains, reveals an unstated yet extraordinarily potent understanding of modern *juridical power*: the utilization of race discourse as a "*juridical weapon*" to *normativize* and *naturalize* certain populations as fundamentally impure, which in turn institutionalized a racial *nomos* as a means of ordering, organizing, and regulating social and political reality.

What the colonial context illustrates is that the normative ontopolitics of "racism" did not emerge with *biopolitical* governmentality as Foucault suggests, but through a *juridical power* that utilized "race" as a marker of *ontological purity*. In this sense, the transformation of racism's discursive deployment between Westphalian government and

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colonialism—that had "a religious and racial attitude" and which was "devoted solely to the political analysis of the internal war, or the social war" (SMBD, 88–89). With *biological racism*, "Jews came to be seen as—and were described as—a race that was present *within all races*," a *biological threat* rather than a social or political one (ibid, 89, emphasis added). Biological anti-Semitism, we might say, became superimposed upon the "old mechanisms" of anti-Semitism. Foucault uses this distinction less to remark on anti-Semitism itself, however, than on the emergence of a new rationality of the *State*: its ability to turn a "primitive" anti-Semitism of social conflict into a biologically-grounded justification for state-sanctioned *death*.

[443] SMBD, 257, emphasis added.

biopolitical modernity reflects the changing rationality of juridical power: the adaptation of the racial *nomos* to emergent domains of knowledge, military and economic campaigns, and changing social demographics. As such, Foucault is right to claim that "racism is inscribed as the basic mechanism of power," but this is not due to the emergence of biological racism in the late-nineteenth century; rather, it is because the institutionalization of a racial *nomos* is and has been the aim of modern governmentality since its emergence.

By way of example, anthropologist Ann Laura Stoler, who examines the construction of raced subjects primarily in the Dutch East Indies, has made the now widely-accepted argument that we cannot fully understand the formation of eighteenth and nineteenth century notions of European sexuality without also attending to notions of "race" that were simultaneously and co-productively taking shape in the context of *empire*. Her seminal *Race and the Education of Desire* is a crucial intervention in the Foucauldian discourse of sexuality, which for Foucault was an exemplary (if not the first widespread) object and site of biopolitical control. Race and sexuality, according to Stoler, were notions that not only established hierarchized boundaries between the colonial settlers and the "natives" of the colonial territories—thereby outlining the oppositional contours around which the bourgeois self was constructed—but also *among Europeans themselves*, giving rise to a discourse of "purity," moral righteousness, and civility that later made possible and supplied the biopolitical imperative of identifying "degenerate," internal threats to the (European) body politic. Writing with particular attention to the unique racial hybridity that existed in the colonies, Stoler suggests that the discourse of sexual "degeneracy" central to Foucault's *History of Sexuality*

> not only targeted colonized populations …, but also the indigent, supposedly *décivilisé*, racially-hybrid members within the European community. Degeneracy characterized those who were seen to veer off bourgeois course in their choice of language, domestic arrangement, and cultural affiliation. Notions of degeneracy registered dissension among Europeans and basic uncertainties about who would be granted that privileged status.[444]

[444] Stoler, *Race and the Education of Desire*, 32.

What Stoler is trying to show us over the course of this text is that discourses of inclusion at work in the biopolitical identification of threats are at their core *ethno-nationalist* discourses whose very logics of purity and optimality were both constituted by and "productive of racial distinctions, of clarified notions of 'whiteness' and what it meant to be *truly* European.'"[445] Notions of "degeneracy" such as those implied here were thus not used simply to distinguish between Europeans and non-Europeans, but a means of controlling the acceptable limits of bourgeois sexuality by hierarchizing Europeans *against one another*. Accordingly, "the discursive and practical field in which nineteenth-century bourgeois sexuality emerged was situated on an *imperial landscape* where the cultural accoutrements of bourgeois distinction were partially shaped through contrasts forged *in the politics and language of race*."[446]

Stoler repositions the question of children's sexuality—a focal point for Foucault in the *History of Sexuality*—in conversation with discourses of sexual licentiousness, deviancy, and unruliness that were so frequently used to describe the "natives" in colonial territories. Drawing on a range of empirical sources, including eighteenth and nineteenth century childcare and housekeeping manuals, Stoler infers that,

> if to be a respectable bourgeois adult meant that one acquired a set of behaviors that prescribed restraint and civility, they also *proscribed* something else: namely, that these were attributes in which racial and class 'lower-orders' did not share … For becoming adult and bourgeois meant distinguishing oneself from that which was uncivilized, lower-class, and non-European.[447]

Just as the discourse of the masturbating child gave rise to logics of surveillance and discipline at the level of the individual (body), the ethicosocial consequence of comparing "racialized Others" with children "provided a moral justification for imperial policies of tutelage, discipline and specific paternalistic and maternalistic strategies of custodial control."[448] Against Foucault's dismissal of both ethnic racism *and* class considerations

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[445] Ibid, 8, emphasis added.
[446] Ibid, 5.
[447] Ibid, 151. Stoler's observation invites us to put the attributes of the "child" and the "savage native" in contraposition with the Enlightenment notions of reason, autonomy, and civility that were used as justification of a distinctly *Western* teleology of historical progress.
[448] Ibid, 150.

(the latter of which were mired in binary readings of Marx), Stoler illustrates how taxonomies of sexuality, race, *and* class that came to define Western capitalist liberalism were first rehearsed and codified in the colonial territories.

Important for my purposes—and which I think Stoler is carefully adept at illustrating—is not that Foucault's reading of "race" as a technology of population stratification is itself problematic or reductive. On the contrary, this Foucauldian reading of "race" is deeply resonant across a range of institutional practices, as it allows for intersectional and polyvalent analyses of subjugation that cut across class, gender, *and* ethnic lines—as well as lines that have yet to be drawn. Stoler's 'colonial' rereading of the *History of Sexuality* as such does not reject the genealogy that Foucault presents, but illustrates the *incompleteness* of that genealogy without an attendant consideration of the global and colonial dimensions that were integral to the constitution of the European, bourgeois self.[449] While Stoler herself does not position her inquiry from a juridical standpoint, she—like many critical race theorists, critical legal theorists, and feminist theorists have long-argued—does demonstrate how *law* in the colonies operated as much more than a penal instrument and was deployed as a means of domination, subjugation, and hierarchization along racial lines. Even in the context of European sexuality, which on Stoler's reading is intimately bound up with libidinal taxonomies of race and class, "desire follows from, and is generated out of, *the law*, out of the power-laden discourses of sexuality *where it is animated and addressed*."[450] In what follows I briefly look at several examples of this racial ontopower at work in various contexts of colonial and settler-colonial domination as a means of illustrating the widespread utilization of juridical power as a mechanism of normative hierarchization, normalizing judgment, and racial exclusion.

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[449] Foucault does mention in brief—almost as if in passing—that race war discourse could be used to "promote the *global strategy* of social conservatisms" (SMBD, 62, emphasis added); in other words, to conserve *particular social arrangements on the global stage*. Indeed, one could argue that it was precisely the global application of race war discourse that justified the colonization of non-European "races."

[450] Stoler, *Race and the Education of Desire*, 165, emphasis added.

The Raciality of Colonial Law

The gritty details of legal procedures, legislative practices, and juridical institutions in the colonies were extraordinarily complex, unique and heterogenous across colonial territories, and frequently susceptible to transformation, as historians of empire and law have outlined at length. In the early years of colonialism, competing and pluralist legal orders existed both within colonies and between colonial empires, with indigenous and native ethnic groups often maintaining local norms and forms of control and over their own territories under the broader jurisdiction of colonial administrators. Tensions between secular and religious authorities were common, as were relations between native subjects and "mediators" working in concert with *as well as against* the colonial authorities' efforts to stabilize and maintain control over colonized populations. Nevertheless, the late seventeenth century onward saw the blossoming of infrastructural and ideological cohesion across European colonial government, a foreshadowing of the twentieth century's international juridical order. In the words of historian Lauren Benton, who examines the transition from pluralist legal colonial systems to European state-dominated and hegemonic legal systems,

> routines for subordinating the law of ethnic and religious communities to state law replaced more fluid forms of legal pluralism and began also to be widely replicated … Jurisdictional politics became symbolically important and politically charged. Attention focused in particular on debates about the legal status of indigenous peoples and, especially, the definition of roles for cultural and legal intermediaries. Legal actors played upon these tensions in crafting legal strategies that often involved appeals to state law, *even before the colonial state had articulated claims to sovereignty*. Paradoxically, such processes often meant sharpening artificial divisions between "modern" and "traditional" realms, and between state and nonstate legal authorities. And as political contests shaped a structure of state-centered legal pluralism and reproduced it (in some places as a fiction of governance rather than a political reality), *this shift helped to form, in turn, the interstate order.*[451]

[451] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400–1900* (Cambridge, UK: Cambridge University Press, 2004), 6, emphasis added.

As Benton illustrates in this passage, the development of legal frameworks in the colonies were not simply spaces in which legal orders were imposed on native territories from without, but part of wider practices of negotiation and contestation, "not an exclusive cultural property but the product of an ordered and contested multiculturalism."[452] Importantly, colonizing powers were by no means totalizing sources of domination. As Benton notes, "colonized subjects perceived the possibility of using [jurisdictional] tensions to their advantage"[453] and often exploited or forged sites of resistance against colonial administrative and judicial efforts: "Conquered peoples showed themselves to be quite adept and sophisticated at interpreting the significance of claims to jurisdiction and strategically taking positions to undermine those claims."[454] Additionally, native populations at times argued in favor of the *expansion* of colonial jurisdictional claims "so that rights recognized under state authority could be extended more widely."[455] This does not diminish the strength of juridical power by any means, but reinforces the malleability and modifiability of power to adapt to contingent and changing events. What is important for us is a rough analysis of the strategies of dominance at play in these spaces—and in particular those regarding the constitution of *racial* subjectivities that were intended to take the place of local, ethnic, or indigenous identities—as these logics of dominance foreshadow the later interstate juridical order of the twentieth century. As such, my focus is less on these instances of resistance as much as it is on those juridical efforts, on the part of the colonizing powers to impose racial subjectivities in order to mark not simply cultural or ethnic but also *sociobiological* difference between Europeans and non-Europeans.

While Foucault himself foregoes any ontopolitical reading of law in his juridico-discursive model of sovereign power, the colonial context provides a starkly different theater of juridical discourses, practices, and institutions that not only served the ontopolitical role of constituting subjects, but also introduced racial *normativities* according to and upon which disciplinary and biopolitical imperatives of normalization, hierarchization, and regularization could then be imagined, practiced, and reified. As Tayyab Mahmud has observed in the context of colonial India, "imperatives of colonial

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[452] Ibid, 7.
[453] Ibid, 13.
[454] Ibid, 14.
[455] Ibid, 15.

rule combined with a grammar of racial difference to constitute racialized stereotypes of natives to facilitate *legally sanctioned regimes of discipline and control*."[456] Mahmud identifies three "interrelated processes" operative in colonial India that illustrate this racial knowledge-power at work:

> (1) that Europe's colonies furnished a privileged terrain where disciplinary orders and techniques informed by the modern grammar of racial difference were forged; (2) that colonial constructions of race were always unstable, malleable, and contingent; and (3) that plasticity of colonial racial stereotypes issued from the changing exigencies of colonial rule *with the only constant being the imperative to maintain colonialism* as a rule of difference and domination.[457]

Crucial here is the third process: it is not simply that notions of racial difference were constantly negotiated and contested, but that these negotiations were always oriented toward the *maintenance of racial domination*. The colonial context, in other words, was a space in which the contours of optimality and racial purity were experimented and enacted, well before "biological racism" emerged as the reigning logic of *intra-European* relations of force.

Manifest in the racial logic of colonialism is the location of "race" in the power-knowledge nexus, as racial ascriptions were assigned to make legible certain subject bodies—*non-European bodies*—as inferior, sub-human, and degenerate. For Mahmud, race made "the expanding world intelligible and manageable" to Europeans by orienting, not only the human sciences, but the "modern disciplines of *geography*, *anthropology*, *history*, and *literature*."[458] In the discursive production of raced bodies, the "colonizer was the subject of this knowledge production; the native only the object who furnished the body on which colonial power was to be inscribed."[459] Recalling that Foucault's analysis in the *Order of Things* spans across centuries of European colonialism—much like his history of race war discourse in *Society Must Be Defended*—one could go so far as to suggest that the development of "man" as an empirical object was a *racial project from the start*: it was not

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[456] Tayyab Mahmud, "Colonialism and Modern Constructions of Race: A Preliminary Inquiry," *University of Miami Law Review* 53 (1999): 1219.
[457] Ibid, 1224.
[458] Ibid, 1226, emphasis added.
[459] Ibid, 1227.

a normatively neutral "order of things," but a *racial* order of things that was at play in terms of both knowledge production and relations of force.

The denouement of the racial *nomos* in the colonial context, in turn, was the entrenchment of a *racial* standard of optimality and with it, racializing norms of conduct. As Nadine Ehlers notes,

> the norm [for Foucault] represents those acceptable roles, behaviors, or traits that become naturalized and thus seen as 'normal'; the norm functions 'as the universal prescription for all' disciplinary subjects. The norm is produced when certain behaviors and identities are set up as ideal while others are not, and norms become normalizing in so far [sic] as they impose standard and correct behavior.[460]

What makes the social order a *racial* order is that law in this early period "became key to the diligent labor of *regulating whiteness*" rather than utilizing the juridico-discursive model of a "neutral" subject of law.[461] To be "raced" was to have ascribed to oneself a certain *normative status* by which one became constituted as a subject *against the "white" norm*, rendering the racialized subject a power-effect of juridical ontopolitics. And if it is the case that juridical power works to institutionalize a desired social order, then law, in the moment of its inscription in treaties, conventions, constitutions, articles, court decisions, and laws themselves, *codifies* those practices and behaviors that, through normalizing techniques, are naturalized among the social body in terms of criminality and innocence, abnormality and normality, deviancy and desirability—all racially coded and fundamentally exclusionary.[462]

JURIDICAL RACIALIZATION BEFORE BIOPOLITICS

To reiterate the thesis of this chapter, I suggest that "race war discourse" has always operated on the level of the juridical in order to differentiate between social groups,

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[460] Nadine Ehlers, "Onerous passions: colonial anti-miscegenation rhetoric and the history of sexuality," *Patterns of Prejudice* 45.4 (2011), 322.
[461] Ibid, 339, emphasis added.
[462] Foucault himself identifies social scientific discourses and statistical methods of hierarchization as the discursive spaces in which the norm becomes codified in the 18th and 19th centuries; I am not discounting the force of such discourses, nor suggesting that the discursive theater of law operates in any way *independently* of them.

constituting certain subjectivities as socially, economically, politically, and ontologically superior to others. These subjectivities are then actualized through the heterogenous interplay of knowledge formations, norms, and expressions of power applied to individuals and populations. The discourse of race war, Foucault himself notes, is not only a discourse in which truth has become *perspectival*, but the discourse that itself "*established a basic link between relations of force and relations of truth*."[463] In this sense, race war discourse is itself a *juridical discourse*, one which imposes upon social and political reality a regime of truth according to which knowledge formations and subjectivities are constituted.

As we briefly saw at the end of chapter three, colonial America was a particularly fertile training ground for juridical racialization, as law was the primary tool used to codify the 'second-hand status' of African and indigenous subjects, reifying them as 'lesser than' their white counterparts and instantiating a normative socioeconomic and political hierarchy that has had lasting material consequences—including the ever-widening and deeply racially-determined wealth gap that hovers in the background of American notions of criminality, responsibility, moral dignity, and material desert—and which has been continually "reinstituted through modern conceptions of race and identity embraced in law."[464] Ladelle McWhorter—who has problematized Foucault's presentation of 'race' by constructing an 'Anglo-American,' counter-genealogy of racism—notes that race war discourse was intimately bound up with 'traditional' racist thinking in Britain and the United States of the eighteenth century. Although twentieth century biopower deploys race in a particular manner that is predicated on (a claim to) biological purity, race itself "could not have been an invention of biopower"[465], McWhorter claims:

> Thomas Jefferson and many of his revolutionary counterparts were awash in the discourse of race war, which supported their revolutionary democratic strivings [against the British]. But that same discourse also supported their very anti-democratic racist attitudes and actions. To Jefferson, at least in his political thinking, African-Americans were not individual people with varying

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[463] SMBD, 52, emphasis added.
[464] Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106.8 (1993), 1714–15.
[465] McWhorter, *Racism and Sexual Oppression in Anglo-America*, 13.

> backgrounds and values but one single nation, a unified racial body that would inevitably act as a body—a threatening body—if given the chance.[466]

Insofar as race war discourse was utilized by the American revolutionaries, McWhorter tells us, it served to both advance the rhetoric of emancipation from their British oppressors *as well as* frame the black population as a unified, threatening body along both morphological and sociobiological lines as a *threatening body.*

Cheryl Harris, whose deeply influential law review analyzes the establishment of 'whiteness' as 'property' in the United States, similarly illustrates how

> [t]he racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest. Although the systems of oppression of Blacks and Native Americans differed in form—the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land—undergirding both was a racialized conception of property implemented by force and ratified by law.[467]

By identifying the link between property law and racialization, Harris gestures toward *non-penal* forms of law that were used to instantiate historical forms of domination. The range of laws that delineated who was capable of owning property further reified the Enlightenment conceptualization of "*white* manhood […] as being marked by the right of property interest (in self, external objects and others)" while "the black male slave was an individual unit of *property*."[468] The impulse of the newly-freed Americans to control not only political membership but also opportunities for wealth accumulation demonstrate how the very *founding* of the American nation was predicated on the exclusion of subjects seen as biologically inferior (in the Foucauldian sense) to subjects of white, northern European heritage. A particularly notable example of the racializing foundation of this sociopolitical order is the "Three-Fifths Compromise," found in Article 1, Section II of the U.S. Constitution (establishing the composition of the House of Representatives) meant to maximize the influence and clout of Southern states in the U.S. legislature by artificially increasing the number of representatives therefrom:

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[466] McWhorter, "Decapitating Power," 92.
[467] Harris, "Whiteness as Property," 1715.
[468] Ehlers, "Onerous Passions," 327, emphasis added.

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to the Service for a Term of Years, and *excluding Indians not taxed, three fifths of all other Persons*.[469]

Despite their instrumentalization of the slave population, it was well known that white Southern representatives in the House never intended, in actuality, to represent the interests of the slaves.

Crucially, insofar as racial purity was the cornerstone of juridical *discourse* in the American colonies, racial norms were circulating among colonizers well before their formal codification in law. In a column in the December 28th, 1787 issue of the *Massachusetts Gazette*—one year prior to the ratification of the Constitution—James Winthrop, writing in favor of limited federal rights and greater state autonomy, 'observed' how the "eastern states have, by keeping separate from the foreign mixtures,

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[469] U.S. Const. art. I, § II. It should be noted that the compromise was intended not to reify the sub-person status of the black subject relative to the white subject, but rather for the fairness of representation in the federal legislature. In a column written by "Brutus" III that appeared in the 15 November 1787 *New York Journal*, the author contributes the following to the ongoing question of representation, likening the status of slaves to that of cattle:

> If they [non-free agents] have no share in government, why is the number of members in the assembly, to be increased on their account? Is it because in some of the states, a considerable part of the property of the inhabitants consists in a number of their fellow men, who are held in bondage, *in defiance of every idea of benevolence, justice, and religion, and contrary to all the principles of liberty*, which have been publicly avowed in the late glorious revolution? If this be a just ground for representation, *the horses in some of the states, and the oxen in others, ought to be represented*—for a great share of property in some of them, consists in these animals; *and they have as much control over their own actions, as these poor unhappy creatures, who are intended to be described in the above recited clause, by the words, 'all other persons.'* By this mode of appointment, the representatives of the different parts of the union, will be extremely unequal; in some of the southern states, the slaves are nearly equal in number to the free men; and for all these slaves, they will be entitled to a proportionate share in the legislature—this will give them an unreasonable weight in government, which can derive *no additional strength, protection, nor defence from the slaves, but the contrary*. *Why then should they be represented?* (Bailyn, *The Debate on the Constitution*, 318–19, emphasis added).

acquired their present greatness in the course of a century and a half, and have preserved their religion and morals."[470] Further on in his column, Winthrop describes the "present state" of the country as containing "six millions of white inhabitants," the annual increase of which was "about two hundred and fifty thousand souls, exclusive of emigrants from Europe"[471], putting in words the belief of many that the United States should proceed in its formation as a country predominantly of Europeans—that is, of white subjects.

Linkages between race and land ownership were similarly at play in the European colonies, though for different aims. Often, the strategic linking of land ownership to racially-differentiated populations enabled colonial authorities to maintain power by using native subjects as proxies. Tayyab Mahmud notes in the context of the British Raj that

> through in-migration from other parts of Punjab of selected families and clans that had remained loyal to the British during the Great Revolt of 1857, a new landed aristocracy having political allegiance to the British was created. These new landowners and their peasants were designated 'agricultural castes,' on whom the British relied for political support, revenue returns, military recruitment, and raising of cattle and horses for the military.[472]

As the above indicates, the language of *blood* or *racial purity* was frequently deployed as a means of pitting ethnic Indians against one another and in the service of securing colonial sovereign control; that is, with the aim of protecting *British authority* above all. The same notion of purity served as the basis of a "martial race theory" that codified racial hierarchies among ethnic Indians "in a series of official Recruiting Handbooks for the Indian Army."[473] Here, the

> Aryan element of martial race theory was closely associated with notions of racial purity. If fighting ability was hereditary, then racial mixing would produce only *degeneracy and weakness*. Colonial recruiting strategies, therefore, favored those groups who followed restrictive marriage practices and those who thus promised to be *racially pure*. The martial race theory and the attendant recruitment policies

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[470] Bernard Bailyn, ed., *The Debate on the Constitution: Part One* (New York: Literary Classics of the United States, Inc., 1993), 628.
[471] Ibid, 629–30.
[472] Mahmud, "Colonialism and Modern Constructions of Race," 1234.
[473] Ibid, 1232.

did not so much recognize groups with propensity to martial skills as they *created such groups*.[474]

Often, the polyvalent deployments of racial categories were incommensurate or contradictory, with "the same group being designated both a 'martial race' and a 'criminal tribe.'"[475] The plasticity and malleability of racial categories under the law were predicated on the material aims of such deployments—that is, the *needs of the state*—all of which have reified ontopolitical hierarchies as well as local and global economic relations of domination that persist in the South Asian subcontinent today.

In the context of the French and Dutch colonies, as Ann Stoler has observed, anti-miscegenation laws were, alongside childcare manuals and guidebooks, frequent sites of racialization. These legal articulations were often couched in terms of the "purity" of European blood in contrast with the blood of natives. Additionally, children of mixed blood were said to be more likely to perpetrate crimes from "revert[ing] to the native affiliations" of the indigenous blood that "flowed in their veins."[476] Based on historical documents of the era, Stoler writes that "the notion of degeneracy appears repeatedly in the 1898 Indies legal code on mixed marriages to justify why European women who choose native men as their husbands should not be entitled to Dutch citizenship."[477] Degeneracy, identified almost exclusively along racial (blood) lines, was thus "not a 'European' disorder or specifically colonial one, but a 'mobile' discourse *of empire* that designated eligibility for citizenship, class membership, and gendered assignments to race."[478] Taking together these and other disparate discursive events, Stoler qualifies her overarching aim as an examination of "the discursive conditions for the emergence of state racism and its specific technologies."[479] These discursive conditions, she goes on to say, took the form of the "discursive production of *unsuitable participants in the body politic*" and these "internal exclusions" became sedimented in law.[480]

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[474] Ibid, emphasis added.
[475] Ibid, 1238.
[476] Stoler, *Race and the Education of Desire*, 50.
[477] Ibid, 32.
[478] Ibid.
[479] Ibid, 62.
[480] Ibid.

By deconstructing the very language of the laws ratified under colonial rule, Stoler brings to light those qualifications, criteria, and descriptions that worked to *ontologize* subjects in differentiated and socially-hierarchized manners in the pursuit of the "cultivation of whiteness" in various European colonial settings.[481] In so doing, Stoler demonstrates how the colonial usurpation of race war discourse as early as the 17th century was very much oriented toward "technologies of rule" that Foucault otherwise periodizes in the late nineteenth and early twentieth centuries. Stoler writes that, despite their divergent and sometimes competing iterations across social science and humanities disciplines, "there is good evidence that discourses of race did not have to await mid-nineteenth-century science for their verification"[482], and have instead merely altered their logics of expression across spatiotemporal contexts as needed:

> Distinctions of color joined with those of religion and culture to distinguish the rulers from the ruled, invoked in varied measures in the governing strategies of colonial states. In the nineteenth century, on the other hand, race becomes the organizing grammar of an imperial order in which modernity, the civilizing mission and the "measure of man" were framed. And with it, "culture" was harnessed to do more specific political work; not only to mark difference, but to rationalize the hierarchies of privilege and profit, to consolidate the labor regimes of expanding capitalism, to provide the psychological scaffolding for the exploitative structures of colonial rule.[483]

Contrary to this reading, writes Stoler, Foucault's Eurocentric framing renders colonialism a "byproduct of Europe's internal and permanent state of war with itself" rather than as "*formative of those conflicts*."[484] Whether Stoler's historical analysis is accurate or satisfying is beside the point; more interesting for our purposes is her broader observation (which others have taken up since) that Foucault didn't discount the *reality* of colonialism, but instead—misguidedly, though very much in line with the philosophical works of more colonially-minded intellectuals such as Albert Memmi and Jean-Paul Sartre—found it peripheral to his "theoretical engagement" with race discourse

[481] Ibid.
[482] Ibid, 27.
[483] Ibid.
[484] Ibid, 28, emphasis added.

and racism[485], to the detriment of utilizing Foucauldian genealogy for a robust interrogation the *global* modern.

CONCLUSION: WESTPHALIAN SOVEREIGNTY AND THE COLONIALITY OF THE INTERNATIONAL

At the beginning of his course summary of the *Society Must Be Defended* lectures, Foucault writes that "in order to make a concrete analysis of power relations, we must abandon the juridical model of sovereignty" and in its stead "study power not on the basis of the primitive terms of the relationship"—of a relationship defined fundamentally by *law*, that is—"but on the basis of the relationship itself that determines the elements on which it bears: rather than asking ideal subjects what part of themselves or their powers they have surrendered in ordered to *let themselves become subjects*, we have to look at how relations of subjugation can *manufacture subjects*."[486] What "law" does Foucault speak of here, if not the mythical law of the social contract, of the absolute sovereign who offers "protection" in exchange for freedoms, of a distinctly *Western*, *philosophical*, and *apophantic* theorization of "law"? By examining the colonial context through an alternative understanding of juridical power unbound by the constraints of a philosophy of absolute sovereignty, it becomes clear is that juridical relations between subjects were anything but unilaterally imposed; they were negotiated, mediated, often ambiguous, and transformed as needed in order to ensure that the broader dynamics of domination—of European interests above indigenous interests—were secured. Juridical power in the colonies constituted relations that "intersect[ed], refer[red] to one another, converge[d], or, on the contrary, c[a]me into conflict and str[o]ve to negate one another."[487] Not only does this reading complicate Foucault's theorization of the juridical model of sovereignty, but demonstrates the coeval infliction of juridical power, at the start of government, upon subjects who were anything but abstract holders of rights.

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[485] See Stoler, *Race and the Education of Desire*, 23. Notably, Stoler includes Frantz Fanon among these colonially-minded intellectuals of the era who failed to consider colonial racism as a dimension of "the racial underpinnings of French society itself" (ibid).
[486] SMBD, 265, emphasis added.
[487] Ibid, 266.

In this chapter I have aimed to rethink Foucault's history of "race war discourse" in the context of colonialism to demonstrate that it was precisely by means of "the juridical" that racialized subjectivities were—and continue to be—produced, that the proliferation of "race war discourse" within Europe was paralleled by the production of racial difference through juridical discourses of *colonial* race. It was a discourse that instantiated a normative truth of racial optimality toward which various other discursive and non-discursive institutions, *dispositifs*, and social norms were oriented, reworked, and transformed—not only in the colonial territories, but eventually in Europe itself. The colonial context was thus a space in which the contours of optimality and racial purity were experimented and enacted, laying the conditions of possibility by which "biological racism" could emerge in the discourses of the human sciences and become a strategic technique of *intra-European* subjectivities and relations of force in the late-nineteenth and twentieth centuries.

By rethinking juridical power as a subjectivizing power at the same time that it is a "negative" power, we find that the biological racism characteristic of biopolitical modernity has its origins, in part, in the juridical racialization of both colonized and "mixed-race" European subjects as ontopolitically "impure" in relation to the "pure" (white) European populations. Foucault's concern with deployments of power-knowledge in the subjectivation of both individuals and as well as populations thus seems nowhere more relevant than in the context of colonialism, both for colonialism's role in the actualization of the white, Anglo-European *nomos* of racial optimality as well as for problematizing contemporary geopolitical problems that have their roots in colonial projects of social stratification, hierarchization, and normalization. More broadly, however, the colonial context shows us how *law*, at the moment of its instantiation, has already marked out not only who will be included and who will be excluded from the optimal social order of the State but, by defining the contours of subjectivity across multiplicitous levels of social life, it prescribes *how* and *where* subjects are to be included and excluded. "In the colonial construction of race within the framework of the modern grammar of racial difference," Mahmud writes,

> one discerns "the general epistemic violence of imperialism, the construction of a self-immolating colonial subject for the glorification of the social mission of the colonizer." This violence was then deployed in specific sites of colonial governance

> and *thereby lent itself to the violence of law*, both "the *founding violence*, the one that *instantiates and positions law* … and the violence that *conserves*, the one that *maintains*, *confirms*, *insures the permanence and enforceability of law*."[488]

It is an "invented truth" that law articulates, manifesting in the form of juridical subjects who are *always already racialized* and whose racial normativities become reproduced and entrenched through domains of knowledge and different modalities of power, whether sovereign (through the reintroduction of the power to kill), disciplinary (in the form of normalizing techniques) or biopolitical (in the protection of the population). And as Falguni Sheth has suggested in her challenge to the *modern* model of Western liberal universalism, "the law has already constituted who it will protect and who it will abandon, and in the process, *continually reshapes the current onto-juridical regime*, the *current cultural worldview*, and—consequently, a *new racial order* whereby some population is casted out of the law's protection."[489]

Since at least the seventeenth century, juridical power has utilized the discourse of race in its ontopolitical organization of social, political, and economic space. For this reason, Foucault's explicit nod to the Treaty of Westphalia as a formative event in the history of Western politics makes his disregard of the colonial context as a formative site of early biological racism particularly perplexing. Rather than the mere co-option of race war discourse, the transformation of "race war discourse" from a *revolutionary* to a *biopolitical* discourse could *naturalize* racial difference by simultaneously forging new forms of racial *solidarity* at the level of the *optimal* population. Indeed, for political theorist Turan Kayaoglu, the hegemony of the Westphalian narrative in international relations—made possible precisely by the continued historical, cultural, and political disregard of the non-European world—has helped to "perpetuate a Eurocentric bias in international relations theory" itself.[490] The discursive history of international relations as a domain of knowledge has prioritized European perspectives, interests, and norms that, even if

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[488] Mahmud, "Colonialism and Modern Constructions of Race," 1230–31, emphasis added. Mahmud is here quoting Gayatri Chakravorty Spivak, "Three Women's Texts and a Critique of Imperialism," *Critical Inquiry* 12.1 (1985): 243, 251.
[489] Falguni Sheth, *Toward a Political Philosophy of Race* (New York: SUNY, 2009), 55, emphasis added.
[490] Turan Kayaoglu, "Westphalian Eurocentrism in International Relations Theory," *International Studies Review* 12.2 (2010): 193.

shifting over time, have consistently marginalized non-Western and non-European subjectivities, made them peripheral to the West as the primary driver of international geopolitics. The "exceptionalism" of the Westphalian narrative has in turn allowed

> scholars to reinvent a framework of *normative hierarchy* depending on where Western and non-Western societies placed in the narrative. Western states *produce* norms, principles, and institutions of international society and non-Western states *lack* these until they are *socialized* into the norms, principles, and institutions of international society. In this perspective, international society is a normative hierarchy assumed to reflect the *natural division of labor* in international relations.[491]

Paraphrasing Kayaoglu, the discourse of international relations has put forth a *normative* vision of the geopolitical order, in which the non-West is constituted as inferior *by nature*. However, given that the "nation-state" is by design a *political and legal artifice*, the nation-state order institutionalized through international law must itself be regarded as a racializing project of subjectivation, intended to help preserve a Western social, economic, and political hegemony or *nomos* on grounds of is immanent superiority, civility, or location the timeline of historical progress. It should thus be unsurprising that "the Westphalian narrative was first developed by German historians and usurped by international jurists in the nineteenth century," first in response to the Napoleonic invasion and then as a means of naturalizing "*non-European societies*" as societies of "political disorder and religious intolerance"[492]—as backwards or pre-modern societies that could be justifiably colonized and exploited, frozen in time.

Though the Westphalian narrative did not emerge in international relations discourse until the nineteenth century, concerns surrounding the structure, hierarchy,

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[491] Ibid, 194, emphasis added.

[492] Turan Kayaoglu, "Westphalian Eurocentrism in International Relations Theory," *International Studies Review* 12.2 (2010): 195, emphasis added. As Kayaoglu suggests, this has led to an interpretive bias in IR studies: "Westphalia-confirming non-Western practices are attributed to conditions external to non-Western states, such as their socialization by European states; Westphalia-disconfirming non-Western practices are attributed to non-Western states' *inherent inferiority* and an example of the *challenge thy* [sic] *pose the Westphalian order*" (ibid, 196, emphasis added). Because "Western societies continuously evolve *faster* than the non-Western states are socialized by adopting the existing norms, principles, and institutions," the "progress of the Western normative order will continue to sustain a normative hierarchy in which the non-Western tortoise will never catch the European hare" (ibid).

and institutions of the global order began to permeate *raison d'État* by the mid-eighteenth century. After the publication of Vattel's *Law of Nations*, "one of the most important bridges from natural to positive law," state sovereignty rather than divinely-sanctioned or hereditary monarchical sovereignty became elevated as the foremost principle for any international arrangement and "sovereign states became the sole *representatives* of their *populations*."[493] This periodization not only maps onto Foucault's genealogy of government and characterization of the "population" as the target of biopolitical governance, but also helps to clarify why the *state* would usurp "race war discourse" for purposes of self-preservation against both internal and external (sub-racial) threats. The formal development of international law in the nineteenth century led to "further cooperation in Europe and to further differentiation between Europe and the rest of the international system" until, by the end of the nineteenth century,

> most international jurists took the existence of a *normative hierarchy* as the *natural division* in the international system. Combined with other nineteenth-century hierarchical discriminations, like *scientific racism*, 'scientific' international law allowed jurists to argue that the unique combination of rationality and culture that existed in Europe enabled the European political order to evolve toward more efficient outcomes, fueled by the Peace of Westphalia and bolstered by subsequent treaties and conventions. In contrast, the narrative encapsulated that the other societies were in *disorder* in terms of their political and legal system.[494]

One of consequences of this normative construction of civility (and its unstated complement, barbarism) was that "the construction of European exceptionalism and *Orientalism* were codependent."[495]

Even outside of the European context, Michael Omi and Howard Winant suggest in *Racial Formation in the United States* that, after the end of Reconstruction in 1877, "the U.S. colorline started to be inscribed *around Europe*, rather than *through* it, chiefly because of the sheer demographic weight of the new immigrants, and also because other racial conflicts"—particularly the influx of Black refugees to the American North in the wake

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[493] Ibid, 198, emphasis added. In IR studies, this form of state sovereignty is also called "Westphalian sovereignty."
[494] Ibid, 202, emphasis added.
[495] Ibid, emphasis added.

of the Jim Crow laws[496]—"drew attention away."[497] Additionally, the early period of the twentieth century saw the proliferation of discourses about *ethnicity* rather than *race* dominating debates about civic relations, most likely because "[e]thnic groups were *implicitly white* (or becoming white)."[498] The consolidation of white American subjecthood around the category of "ethnicity" rather than "race" not only gestures toward the deeply porous contours of *intra-white* racial hierarchization, but also made possible the continued hegemony of Anglo-Europeanness without exposing its racial scaffolding. Indeed, only afterward could "social scientists move from a focus on the U.S. 'racial frontier' … toward more comprehensive attention to the idea of racial 'otherness' within the American nation."[499] To be sure, this is not to say that biological, social scientific, or other disciplinary discourses of race have not been used to supplement or provide supposedly "empirical" legitimacy for the legal racialization of subjects. Foucault himself repeats throughout his works that discursive events—such as conceptual transformations undergirding the deployment of "race" over time—are multiplicitous and "dispersed between institutions, laws, political victories," and other discursive and non-discursive sites.[500] However, by rethinking modern juridical power as the *ontically primary* site of racialization through its imposition of a racial *nomos*, we can better make sense of how it is that "racism" has become inscribed as the basic mechanism of power, not only in the modern state, but on the international stage more broadly.

What a further study must examine, then, is how colonial modes of racialization have haunted and continue to haunt the international legal regime—of *international juridical power*—in a way that Foucault, despite his proximity to the debates around global notions of subjecthood and rights, overlooked. In so doing, we might find that the racial ontopolitics of juridical power work to maintain not only hierarchized social orders, but various *geopolitical* arrangements of power that are essential to understanding international "crises" such as those of statelessness or mass migration. Such a project

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[496] And the Jim Crow laws are yet another historical example of a *juridical practice* that worked to implement an explicitly racial hierarchy that permeated every facet of social, political, and economic life, with normative consequences that can be felt still today.
[497] Michael Omi and Howard Winant, *Racial Formation in the United States* (New York: Routledge, 2015), 25.
[498] Ibid, 29.
[499] Ibid.
[500] WK, 194.

could not be more essential than in our present moment, defined in large part by a fascistic, ethnonationalist backlash to the demythologization of classical narratives of Western progress, of an Enlightenment that brought with it a deeply racial historical teleology, of promises of providence and prosperity shattered by an unfettered capitalism that has never before precipitated such staggering asymmetries of wealth. This dissertation is an attempt to move in this direction, to inspire new avenues for thinking not only law and subjectivity, but how we might instantiate a more sustainable and equitable social and political *reality* itself.

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