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Foucault's Keystone: *Confessions of the Flesh*

How the Fourth and Final Volume of *The History of Sexuality* Completes Foucault's Critique of Modern Western Societies

BERNARD E. HARCOURT
Columbia University, USA

ABSTRACT. The fourth and final volume of *The History of Sexuality* offers the keystone to Michel Foucault's critique of Western neoliberal societies. *Confessions of the Flesh* provides the heretofore missing link that ties Foucault's late writings on subjectivity to his earlier critique of power. Foucault identifies in Augustine's treatment of marital sexual relations the moment of birth of the modern legal actor and of the legalization of social relations. With the appearance of the modern legal subject, Foucault's critique of modern Western societies is complete: it is now possible to see how the later emergence of an all-knowing *homo œconomicus* strips the State of knowledge and thus deals a fatal blow to its legitimacy. The appearance of both the modern legal actor and *homo œconomicus* makes it possible to fold the entire four-volume *History of Sexuality* back into Foucault's earlier critique of punitive and biopolitical power. And it now challenges us to interrogate how we, contemporary subjects, are shaped in such a way as to implicate ourselves—both willingly and unwittingly—in the social order within which we find ourselves and that, through the interaction of knowledge-power-subjectivity, we reproduce.

Keywords: Augustine, consent, legalization, modern legal subject, *homo œconomicus*, critique of neoliberalism.

In the final pages of the now-final volume of *The History of Sexuality*, Volume 4: *Les Aveux de la chair* (*Confessions of the Flesh*), Foucault's intellectual project achieves its long-awaited completion. In those final pages, dedicated to Augustine's writings on marital sexual relations, Foucault reveals the heretofore missing link that now binds his four-volume history of sexuality to his critique of Western forms of governing. Foucault discovers in Augustine the birth of the modern legal actor and legalization of social relations. Foucault identifies the moment when, in Western Christian societies, the mechanisms of social ordering gave rise to what Foucault calls "the subject of law" (« *le sujet de droit* »): the modern

rights-bearing and responsible individual inscribed in a legal framework of accountability, responsibility, and autonomy.

Like the final piece of a jigsaw puzzle, the appearance of the modern legal actor completes Foucault's overarching critical project. With *Confessions of the Flesh*, the genetic make-up of the modern legal subject is decoded. It is now possible to fold the four-volume series of *The History of Sexuality* back into Foucault's critique of power and neoliberal governance, from whence it originated.

With that missing piece now firmly in place in a book that was intended to be published—and it is of the utmost importance to distinguish his published monographs, all ten of them now, from his other productions, whether lectures, conferences, essays, or interviews—it is finally possible to fully articulate Foucault's critique of contemporary neoliberal forms of governing in the full three-dimensionality that Foucault had promised—the three-dimensionality of *savoir-pouvoir-sujet*, of knowledge, power, and subjectivity (or, as others had proposed earlier, of epistemology, politics, and ethics).

Foucault's critique of Western societies, specifically the neoliberal forms of governance at the turn of the 1980s, can now be articulated and summarized as follows:

The modern legal subject—*le sujet de droit*—begins to appear with Augustine's writings on consent, will, responsibility, accountability, and autonomy in the context of marital sexual relations in works such as *De bono conjugali* and *De nuptiis et concupiscentia*. The legal actor who emerges in Augustine's writings flourishes in the modern political theories of sovereignty of the sixteenth and seventeenth centuries (which are often discussed under the rubric of "reason of state" or *raison d'État*). The modern legal subject ends up placing certain limits on sovereign power and gives rise to the ideas of checks and balances, of divided power, of limits on governing, and ultimately, to the paradigm of mid-twentieth-century liberal democracy.

As against that model of liberal democratic governance, there emerges a competing figure of *homo œconomicus*, with origins in Locke and the writings of the Physiocrats and liberal economists of the eighteenth century, but then in more concentrated form in the theories of neoliberal economists after World War II. As the experience, practices, and subjectivity of *homo œconomicus* begin to supplant that of the modern legal actor, the economic subject gradually delegitimizes and deposes the state in a far more sweeping way. It strips the state of all possible knowledge, rendering government entirely impotent: only the neoliberal subject can know his own interests; the government and the collectivity, by contrast, have no access and no way to know anyone's best interests. As a result, the state and collectivity are stripped of knowledge; they are ignorant and helpless. Whereas the modern legal subject only placed limits on the state, *homo œconomicus* now divests the state and collectivity of all knowledge and legitimacy, thereby doing away with the need for government entirely.

But—and this is the locus of Foucault's critique—the premise that *homo œconomicus* knows his self-interest best, and that the government and collectivity are ignorant on this score, is itself simply an assumption and a bald assertion. It is an unfounded belief, a mere assertion of truth. Yet it is baked into the theory of neoclassical economics, from François

Quesnay and Adam Smith to Friedrich Hayek and Gary Becker. As a result, the entire framework of neoliberalism rests on an illusion, a sleight of hand: all of the theories, practices, institutions, and structures of neoliberal governance are themselves baked into the initial imagination of an all-knowing *homo œconomicus*.

Confessions of the Flesh provides the missing piece to Foucault's critique by locating, in Augustine's writings on consent and responsibility in marital sexual relations, the key transformation from the subject of lust of early Christian thought to the modern legal subject who limits state sovereignty. As Foucault writes, "Consent – and this is the reason for the central role it plays in Augustine and will play later – makes it possible to designate the subject of concupiscence as a subject of law."¹ The appearance of the modern legal subject in Augustine's theoretical framework is what makes possible the ensuing transformation of the subject of law into the *homo œconomicus* of neoclassical economic and neoliberal thought – the form of subjectivity that then radically strips the government and collectivity of all knowledge and legitimacy.

As Foucault emphasized in 1979 in his lectures on *The Birth of Biopolitics*, in order to understand the contemporary moment, the neoliberal economic subject had to be distinguished from the modern legal actor. The distinction was key: "*homo œconomicus et sujet de droit n'étaient donc pas superposables*,"² Foucault emphasized. "In the eighteenth century," Foucault lectured, "the figure of *homo œconomicus* and the figure of what we would call *homo juridicus* or *homo legalis* are absolutely heterogeneous and cannot be superimposed on each other."³ But in order to understand and analyze *homo œconomicus*, Foucault had to trace the transformation of subjectivity – what he called "the history of desiring man," what we might rename "the history of the desiring subject" – from ancient Greece, through the Greco-Roman philosophers and practices of the first centuries, to the patristic period and Augustine, in order to discover the birth and genetic make-up of the modern legal subject. *Confessions of the Flesh*, in this sense, lays the final stone, the keystone, to the full edifice of Foucault's critique of neoliberalism.

When Foucault originally began his examination of biopolitical forms of power in the first volume of *The History of Sexuality* in 1976, he was openly dissatisfied with the explanatory force of disciplinary power, which he had set forth a year earlier in his magnum opus *Discipline and Punish*. Neither the model of political sovereignty, which Foucault neatly encapsulated in the formulation "to take life or let live," nor the paradigm of surveillance, discipline, and the punitive society, seemed fully adequate to the task of critiquing the emerging softer forms of social governance and management associated with the budding neoliberalism of the 1970s – reflected in the election in France of President Valéry Giscard d'Estaing in 1974. Foucault sketched in Volume 1 of *The History of Sexuality*, *The Will to Know*, the contours of a new model of power: the biopolitical form of power. Foucault famously reversed that earlier formulation to read "to make live or let die" and focused now on the management of populations, rather than the discipline of individuals.

¹ Michel Foucault, *History of Sexuality vol. 4, Confessions of the Flesh* (2021), 280.

² Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France 1978-1979* (2004), 295.

³ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (2008), 276.

At that time in 1976, Foucault outlined how his analysis would proceed, listing on the back cover the five volumes that would appear next: *La chair et le corps*; *La croisade des enfants*; *La femme, la mère et l'hystérique*; *Les pervers*; and *Population et races*.⁴ Those five books were intended to trace how the experience of what was called “sexuality” since the nineteenth century came into being and how it shaped the modern subject.⁵

The aim, all along, was to explore the regulation of sexual relations—one of the richest domains of moralization in human history⁶—in order to understand better and critique “modern Western societies,” in Foucault’s words.⁷ In other words, the goal all along was to seize better the form of power relations that Foucault would christen biopolitical power. But this, Foucault realized, first required a better understanding of liberalism and neoliberalism. Foucault explained this clearly to his audience at the Collège de France on January 10, 1979, in his lectures on *The Birth of Biopolitics*. As he indicated, he had intended to focus those lectures on the core question of biopolitics but needed first to better understand the modern legal subject and the emergence of neoliberalism:

I thought I could do a course on biopolitics this year, but it seems to me that the analysis of biopolitics can only get under way when we have understood the general regime of this governmental reason I have talked about [...] Consequently, it seems to me that it is only when we understand what is at stake in this regime of liberalism opposed to *raison d’État* ... only when we know what this governmental regime called liberalism was, will we be able to grasp what biopolitics is.⁸

A couple of months later, Foucault gave the title *On the Government of the Living* for the following year’s Collège de France lectures, reflecting his intention to continue the work on biopolitics as a form of governing.⁹ However, just as his lectures on *The Birth of Biopolitics* did not return directly to biopolitics but focused instead on neoliberal discourse in France, the history of Ordoliberalism in Germany, and American neoliberal thought, Foucault’s lectures *On the Government of the Living* did not centrally engage biopolitics but instead went further back in history to an earlier archive—namely Sophocles, the Stoics,

⁴ Draft manuscript versions of the first two are now in the Fonds Foucault at the Bibliothèque nationale de France. See “Foreword” of Frédéric Gros, *Confessions of the Flesh*, vii.

⁵ The concept of “experience” is central to Foucault’s project and, as Henri-Paul Fruchaud has highlighted, traces back to Foucault’s work on Binswanger. As Fruchaud reminds us, Foucault wrote, in a draft “Preface” originally destined for the English translation of *The Use of Pleasures*, that his thoughts on experience related back to his work on Binswanger. This important reference will be discussed in the critical apparatus of the forthcoming publication of Foucault’s manuscript on Binswanger, which was written shortly after his Introduction to Binswanger’s *Rêve et existence*, published in 1954. See forthcoming volume in *Cours et travaux avant le Collège de France, Binswanger et l’analyse existentielle*, edited by Elisabetta Basso, due out in May 2021.

⁶ Michel Foucault, *The History of Sexuality*. vol. 2: *The Use of Pleasure* (1990), 10.

⁷ Michel Foucault, *Histoire de la sexualité 2. L’usage des plaisirs* (1984), 10; Foucault, *The Use of Pleasure*, 3-4 (“My aim was [...] to analyze the theoretical and practical context with which it [that quite recent and banal notion of ‘sexuality’] has been associated. In short, it was a matter of seeing how an ‘experience’ came to be constituted in modern Western societies...”).

⁸ Foucault, *The Birth of Biopolitics*, 21-22.

⁹ Michel Foucault, *On the Government of the Living: Lectures at the Collège de France, 1979-1980* (2014), Course Context, 327.

and the early Christian pastoral—in order to reexamine the genealogy of our contemporary neoliberal forms of rationality.

Surprisingly, Foucault had eschewed the ancients as a source of governmental reasoning two years earlier. On February 8, 1978, in his lectures *Security, Territory, Population*, after discussing *Œdipus Rex*, Foucault observed that: “I do not think that the idea that one could govern men, or that one did govern men, was a Greek idea. If I have the time and courage I will come back to this problem, either at the end of these lectures or in the next series of lectures...”¹⁰ But by 1980, Foucault had decidedly changed his mind. And precisely where Foucault left off in 1978 is where he picks up in the 1980 lectures *On the Government of the Living*. On his return to these texts in 1980—specifically to *Œdipus Rex* and the early Greco-Roman philosophers—Foucault locates the origins of a genealogy of the modern subject. The 1980 lectures represent both a corrective, in which he casts doubt on his earlier statement about Greek antiquity, and a return to the search for our modern governmentality.

As he drafted *La chair et le corps*—the intended second volume to *The History of Sexuality* on Christian conceptions of sexual relations after the Lateran Council, the volume that would have been closest to *Confessions of the Flesh*¹¹—Foucault refined his theory of subject creation and reached further back in history. He did so publicly in the first four lectures of *On the Government of the Living* at the Collège de France, reinterpreting *Œdipus Rex* through the lens of truth-telling and the manifestation of self, and he provided, in effect, a curative to his earlier claim about the lack of any art of governing in ancient Greece. This launched his investigation into the pre-Christian East and moved the genealogy of the modern subject back, opening new vistas and reorienting the project from the couple knowledge-power to the trinity knowledge-power-subject. The reorientation led Foucault to study the avowal, the examination of conscience, the direction of others, forms of truth-telling—in sum, the work on subjectivity and subject creation that would first come together in his lectures at Louvain in 1981, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*, and later produced the second, third, and now fourth and final published volumes of *The History of Sexuality*.¹²

Confessions of the Flesh thus provides the missing jigsaw piece in the now fully-published book series: the emergence of the modern legal subject. This completes Foucault's overall argument and does so, as I mentioned earlier, in the full three-dimensionality of knowledge-power-subjectivity to which Foucault aspired. Foucault did not, however, have the time, given his illness, to reframe Volume 4 after he had published Volumes 2

¹⁰ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (2007), 123. It is at this point in 1978 that Foucault turns to the pre-Christian East, spiritual direction, and the pastoral.

¹¹ See “Foreword” of Frédéric Gros, *Confessions of the Flesh*, viii-ix.

¹² Interestingly, the step-wise sequence of his return to ancient Greece is reflected as well in the drafting of the three final volumes of *The History of Sexuality*: Foucault began with Volume 4 on the patristic thinkers, writing it sometime between 1980 and 1982, and put it aside after having sent the manuscript to Gallimard in the Fall of 1982; he then proceeded to draft Volumes 2 and 3 (which were intended to be one volume on the ancients) and published them in April and May 1984, shortly before his untimely death in June of that year.

and 3. Precisely for this reason, the publication of *Confessions of the Flesh* in its present unfinished condition presents the reader with the opportunity to complete the task that Foucault had left incomplete: namely, to reintegrate the work on subjectivity back into the overarching framework of knowledge-power-subject. That was the task that was cut short by Foucault's untimely death; however, the fourth volume of *The History of Sexuality* offers a blueprint of how to complete that final task: it reveals how to fold back the study of subject creation and subjectification into the knowledge-power-subject framework.

I strongly suspect that Foucault would have performed this integrative work in the process of editing the manuscript of *Les Aveux de la chair* for final publication.¹³ I believe this integrative work would have formed the crux of a conclusion to the volume, which is clearly missing, at least on my reading.¹⁴ Foucault did not have the opportunity, because of his untimely death. What we are reading is the manuscript draft that reflects his thinking in about 1980-82, at the time that he returned to the Ancients.¹⁵ But with the appearance of the modern legal subject at the tail end of Volume 4, I trust Foucault would have done the work of folding his history of the desiring subject into his critique of power in modern Western societies. The publication of the volume in 2018, thirty-four years later, reveals the path forward—and in that alone, it is a remarkable contribution to contemporary critical thought.

Many readers of Foucault have complained that the turn to subjectivity, to care of the self, and to truth-telling at the end of Foucault's intellectual journey undermines the political force of his philosophy and has pushed contemporary critical thought into a complacent apolitical direction. Ella Myers argues, for instance, in her book, *Worldly Ethics: Democratic Politics and Care for the World* (Duke 2013),¹⁶ that Foucault's turn in the early 1980s away from the study of power and toward the practices of the self is ultimately

¹³ I should emphasize this is a speculative claim. I make it on the basis of Foucault's full theoretical and intellectual trajectory, and not on any written indications or reports from his contemporaneous friends and associates, or from Daniel Defert's chronology. The existence and placement of the material published as Appendix 2 at pages 291-314 of *Confessions of the Flesh* provides some corroborating evidence for this speculation, although my argument does not rest in any way on those materials but on the broader arc of Foucault's work. Those materials in Appendix 2 include developments that Foucault expressly made in his lectures on governmentality in his Tanner lectures and in *Security, Territory, Population*—precisely the moment of integration that I am proposing; and those materials from Appendix 2 were located in a folder physically located at the end of the first part of the manuscript of *Les Aveux de la chair*. See "Foreword" of Frédéric Gros, *Confessions of the flesh*, xii-xiii; Stuart Elden, "Review: Foucault's *Confessions of the Flesh*," *Theory, Culture & Society* March 20 (2018) (discussing Appendix 2 and how it "shows ever more clearly how the projects on governmentality and sexuality were mutually constitutive"). So there is corroborating evidence; but again, my argument here rests on the broader theoretical and structural aspects of Foucault's critical intellectual journey.

¹⁴ See also Sverre Raffnsøe, "Foucault's *Confessions of the Flesh*. The fourth volume of *The History of Sexuality*," *Foucault Studies*, No. 25 (October 2018), 415 (noting that "the volume ends rather abruptly"). Although the Introduction to Volume 2 may have served as an introduction to Volume 4, as it did to Volume 3, I nevertheless feel that *Les Aveux de la chair* starts abruptly and that there may have been an opportunity, in a preface or introduction, for Foucault to perform some of the integrative work I am suggesting.

¹⁵ See "Foreword" of Frédéric Gros, *Confessions of the flesh*, xi; Sverre Raffnsøe, "Review: Foucault's *Confessions of the Flesh*," *Foucault Studies*, No. 25 (October 2018), 395-396 (describing and dating this to 1976).

¹⁶ Ella Myers, *Worldly Ethics: Democratic Politics and Care for the World* (2013).

depoliticizing and undemocratic. Some scholars go even further and argue that Foucault himself actually favored neoliberalism.

Confessions of the Flesh should dispel those complaints and misreading, and open the way to integrate Foucault's projects on knowledge-power and subjectivity. As Foucault underscored in the section titled "Modifications" in the introduction to *The Use of Pleasures* (Volume 2) when he resumed publication of *The History of Sexuality* in 1984—one of the single-most important passages in Foucault's writings post *Discipline and Punish*—the turn to subjectivity in Volumes 2, 3, and now 4, had to be understood as a complement to the critique of power. Foucault's critical project, as he emphasized in "Modifications," was three-dimensional and involved, in his own words, first "the formation of sciences (*savoirs*)," second "the systems of power," and third "the forms within which individuals are able, are obliged, to recognize themselves as subjects."¹⁷ Foucault observed that his previous research on the archaeology of knowledge and the genealogy of power served well to study the first two dimensions,¹⁸ but that he fell behind in elaborating the third dimension, namely subjectivity.¹⁹ And whereas the study of knowledge had required a first shift in the critical method toward archeology, and the study of power had required a second shift in the critical method toward genealogy, to get at the third dimension of his project Foucault needed to make another shift in his approach to study the history of the desiring subject.²⁰ The reason being that we intuitively tend to take desire as static, constant, essential, atemporal, almost universal—as if subjects have always had the same sexual desire—whereas, as Foucault argued, desire must be studied genealogically, a task that he described as both historical and critical, "*un travail historique et critique*."²¹ The critical

¹⁷ *The Use of Pleasure*, 4 ("To speak of 'sexuality' as a historically singular experience also presupposed the availability of tools capable of analyzing the peculiar characteristics and interrelations of the three axes that constitute it: (1) the formation of sciences (*savoirs*) that refer to it, (2) the systems of power that regulate its practice, (3) the forms within which individuals are able, are obliged, to recognize themselves as subjects of this sexuality.")

¹⁸ *The Use of Pleasure*, 5 ("Now, as to the first two points, the work I had undertaken previously—having to do first with medicine and psychiatry, and then with punitive power and disciplinary practices—provided me with the tools I needed. The analysis of discursive practices made it possible to trace the formation of disciplines (*savoirs*) while escaping the dilemma of science versus ideology. And the analysis of power relations and their technologies made it possible to view them as open strategies, while escaping the alternative of a power conceived of as domination or exposed as a simulacrum.")

¹⁹ *The Use of Pleasure*, 5-6 ("But when I came to study the modes according to which individuals are given to recognize themselves as sexual subjects, the problems were much greater. [...] Thus, in order to understand how the modern individual could experience himself as a subject of a "sexuality," it was essential first to determine how, for centuries, Western man had been brought to recognize himself as a subject of desire.")

²⁰ *The Use of Pleasure*, 6 ("It appeared that I now had to undertake a third shift, in order to analyze what is termed "the subject." It seemed appropriate to look for the forms and modalities of the relation to self by which the individual constitutes and recognizes himself qua subject. After first studying the games of truth (*jeux de vérité*) in their interplay with one another, as exemplified by certain empirical sciences in the seventeenth and eighteenth centuries, and then studying their interaction with power relations, as exemplified by punitive practices—I felt obliged to study the games of truth in the relationship of self with self and the forming of oneself as a subject, taking as my domain of reference and field of investigation what might be called "the history of desiring man.")

²¹ Foucault, *L'usage des plaisirs*, 12.

dimension is key: It is the critical historical study of the subject of desire that would call for “*toute l'étude autour de la lente formation, pendant l'antiquité, d'une herméneutique de soi.*”²²

It would be an impoverished reading of *Confessions of the Flesh*—or, for that matter, of the other two volumes from 1984, or his Collège de France lectures after 1980—to view Foucault’s work on subjectivity as *displacing* his earlier problematization of knowledge-power. It does not “scrap” nor “defer his analysis of modern society” but rather completes it.²³ It does not represent a break from the earlier critical intervention but rather a fulfillment of it. It adds a necessary dimension.

Foucault expressly stated, in his last lectures in 1984, *The Courage of Truth*, that it would be an impoverished reading of his theory of knowledge-power to set aside the subject: “to depict this kind of research as an attempt to reduce knowledge (*savoir*) to power, to make it the mask of power in structures, where there is no place for a subject, is purely and simply a caricature.”²⁴ Foucault did not need to state the inverse at that moment, but it is fully implicit in what he said: It would be an impoverished reading of Foucault’s work on subjectivity not to integrate it back into the critique of knowledge and power. In this sense, it is essential to read Volumes 2, 3, and now 4 *back into* Volume 1. It is crucial now to integrate all three dimensions of Foucault’s thought — knowledge-power-subject — in order to understand his full critique of modern forms of governance.²⁵

With the birth of the modern legal subject in *Confessions of the Flesh*, it is now possible to do precisely that. It is possible to integrate the full *History of Sexuality* back into his critique of modern Western societies. As I have suggested, I believe that is what Foucault would have done in a revised introduction and conclusion to the fourth and final volume of this series—but was cut off by his illness. That is our greatest task and challenge today: to explore how we have been shaped as subjects in such a way as to implicate ourselves—both willingly and unwittingly—in the social order within which we find ourselves and that, through the interaction of knowledge-power-subjectivity, we reproduce and

²² *Ibid.*, 13.

²³ Joseph Tanke, “The Final ‘Final Foucault?’” *Los Angeles Review of Books*, August 1 (2018). Tanke’s essay on Foucault’s *Confessions of the Flesh* is brilliant and insightful, but in this one respect, I disagree—especially where he writes that “As a result, the emergence of this ethical axis compelled Foucault to scrap, or at least to defer, his analysis of modern society in terms of ‘bio-power’—his designation for the configuration of power and knowledge responsible for managing human life by treating individuals as members of a population, subjecting them to probabilistic calculations regarding health, sanitation, life-expectancy, birthrate, and race—in order to undertake a genealogy of ‘desiring man.’”

²⁴ Michel Foucault, *The Courage of Truth: The Government of Self and Others II: Lectures at the Collège de France, 1938-1984* (2011), 10.

²⁵ As Stuart Elden emphasizes, “the projects on governmentality and sexuality were mutually constitutive.” Stuart Elden, “Review: Foucault’s *Confessions of the Flesh*,” *Theory, Culture & Society* 20 (2018). Daniele Lorenzini contributes importantly to the task of repoliticizing Foucault’s final lectures and volumes of *The History of Sexuality* by interpreting them as constituting “a political history of the will” and as contributing to Foucault’s genealogy of neoliberalism. See Daniele Lorenzini, “The Emergence of Desire: Notes Toward a Political History of the Will,” *Critical Inquiry* 45 (2019); Daniele Lorenzini, “La politique du paradis. Foucault, *Les Aveux de la chair* et la généalogie du néolibéralisme,” in *Après Les Aveux de la chair. Généalogie du sujet chez Michel Foucault*, ed. Boehringer Sandra & Laufer Laurie (2020), 249-261.

reestablish.²⁶ With *Confessions of the Flesh*, it is finally possible to see Foucault's full critical project and, now, to give it life.

I. A NOVEL LEGAL THEORY

Let us begin here by framing Foucault's critical project, as evidenced in the newly published Volume 4, and tracing the continuities and differences. What will become apparent is that *Confessions of the Flesh* articulates a novel legal theory.

A. Continuities

The fourth and final volume of *The History of Sexuality* prolongs Foucault's meticulous, painstaking archival project to analyze and expose the manner in which social, cultural, religious, and ethical practices have shaped humans during different historical periods. The volume completes, chronologically, the second and third volumes, pushing the analysis from Greek antiquity and the early Common Era philosophers to the early Christian thinkers of the first to fifth centuries. Foucault's archive, in this fourth volume, is the discourse of those early Church scholars and ascetics, or what are called the early Christian fathers, from early Greek thinkers such as Clement of Alexandria (c. 150-215), Origen (c. 184-253), and John Chrysostom (c. 349-407), to the early Latin fathers such as Tertullian (c. 155-222), Ambrose (c. 337-397), and John Cassian (c. 360-435), through the great Church father, Saint Augustine (354-430).

We are all familiar, by now, with the broad stroke of his analysis: whereas the ancient Greeks (circa the fifth and fourth centuries BCE) understood sexual relations primarily through the framework of *aphrodisia*, a philosophical understanding that focused on the idea of an ethical self-mastery intended to prevent the subject from getting consumed by the pleasures of sexual relations (Volume 2, *L'usage des plaisirs, The Use of Pleasures*)²⁷; whereas the Greek and Roman philosophers of the early Common Era (circa the first two centuries CE), especially the Stoics, conceptualized sexual relations primarily through the *techniques of the self*, such as the examination of conscience, the memorization of rules of austerity, and practices of penitence (Volume 3, *Le Souci de soi, The Care of the Self*)²⁸; and by contrast to us moderns, who invented psychoanalytic, medical, and legal frameworks to regulate our *sexuality* (Volume 1, *La Volonté de savoir, The Will to Know*)²⁹; the early

²⁶ This is the challenge posed today when digital subjects expose and implicate themselves daily in the construction of our new expository society in the digital age, or get enmeshed in the counter-insurgency warfare paradigm of governing post 9/11. Daniele Lorenzini explores this as well in his chapter, "La politique du paradis. Foucault, *Les Aveux de la chair* et la généalogie du néolibéralisme" (2020).

²⁷ Foucault, *L'usage des plaisirs; The Use of Pleasure*. See also Lorenzini, "The Emergence of Desire," 453; Stuart Elden, "Review: Foucault's *Confessions of the Flesh*," *Theory, Culture & Society* March 20 (2018) (describing the transition from *aphrodisia* to flesh to sexuality); Lynne Huffer, *Foucault's Strange Eros* (2020).

²⁸ Michel Foucault, *Histoire de la sexualité 3. Le Souci de soi* (1984); Michel Foucault, *The History of Sexuality*, vol. 3: *The Care of the Self* (1988).

²⁹ Michel Foucault, *Histoire de la sexualité 1. La Volonté de savoir* (1976); Michel Foucault, *The History of Sexuality*, vol. 1: *An Introduction* (1990).

Christian thinkers deployed the framework of *lust*, *flesh*, and *sin* as a way to curb and regulate sexual relations. Stuart Elden, Daniele Lorenzini, Nancy Luxon, Sverre Raffnsøe, Joseph Tanke and others have laid this out elegantly in important reviews of the fourth volume.³⁰

But—and this is one of the surprising discoveries in *Confessions of the Flesh*—the patristic tradition was far closer to the Greeks than had previously been imagined. The relation of the fathers to the ancients is far more continuous than it is to the moderns. Pace Nietzsche, Foucault dispels the idea that Christianity radically transformed the relation to sex or invented the suspicion of pleasure.³¹ In most respects, he proposes, it drew on the earlier writings and merely reframed the precepts of Stoic or pagan ethics. So, referring to the ancient Greek framework of *aphrodisia*, Foucault notes on the very first page of what might have been the first chapter: “One finds this same regime, essentially unmodified, in the doctrine of the second-century Fathers...These principles would have migrated, as it were, into Christian thought and practice, from pagan milieus...”.³² Or, referring to the first text analyzed, *Paedagogus* of Clement of Alexandria, written at the end of the second century CE, Foucault underscores “a great continuity with the texts of pagan philosophy and morality of the same epoch, or the period immediately preceding.”³³ Throughout Volume 4, Foucault stresses first the continuity, before then refining the analysis to uncover the subtle transformations.

B. Difference

In the course of presenting the continuities and subtle shifts, there is one transformation that eclipses all others. It is the emergence of the subject of rights and responsibilities in Augustine’s writings. It is the juridical turn in Augustine that would prefigure modernity. As Foucault explains:

³⁰ Elden, “Review: Foucault’s *Confessions of the Flesh*,” *Theory, Culture & Society* March 20 (2018); Alexandre Gefen, *Critical Inquiry* 22 August (2018); Lorenzini, “The Emergence of Desire”; Nancy Luxon, “Review: *Les Aveux de la chair*,” *Contemporary Political Theory* 19:S3 (2020), S192-S196; Sverre Raffnsøe, “Review: Foucault’s *Confessions of the Flesh*,” *Foucault Studies* No. 25 (2018), 393-421; Joseph Tanke, “The Final ‘Final Foucault’?” *Los Angeles Review of Books*, August 1 (2018).

³¹ As Lorenzini notes, the foil here is Nietzsche. Foucault’s history of the subject of desire, he writes, “questions Friedrich Nietzsche’s claim that ‘it was Christianity with its fundamental *ressentiment* against life that first made sexuality into something unclean.” Daniele Lorenzini, “The Emergence of Desire: Notes Toward a Political History of the Will,” *Critical Inquiry* 45, 452 (quoting Friedrich Nietzsche, *Twilight of the Idols, or How to Philosophize with a Hammer*, in “*The Anti-Christ*,” “*Ecce Homo*,” “*Twilight of the Idols*,” and *Other Writings* (2005), 228. See also Raffnsøe, “Review: Foucault’s *Confessions of the Flesh*,” *Foucault Studies* No. 25 (2018), 400. Although Nietzsche is more absent in Volume 4 than he is in earlier work, it is nevertheless interesting to think of the place of Nietzsche in this genealogy of the desiring subject and of the modern subject of law. As François Ewald reminded me, the definition of the subject of law through the concept of responsibility is present in Nietzsche, in the second essay to the *Genealogy of Morals*, which rests as well on the historians of Roman law, especially on their work regarding the birth of the subject capable of contracting; so Nietzsche casts a shadow over this final volume as well.

³² Foucault, *Confessions of the Flesh*, 3.

³³ *Ibid.*, 33.

The effects and consequences of the Augustinian theory of concupiscence have obviously been considerable. I would just like to underscore an aspect of it that concerns the government of souls and the sexual conduct of spouses in particular. This government involved their "juridification" or rather the insertion of elements that would have given a juridical type of formalization to practices, rules, prescriptions, and recommendations that had previously been reflected primarily in the forms of spiritual asceticism and the techniques of purification of the soul.³⁴

In this respect, *Confessions of the Flesh* sets forth a unique theory of law: legal norms are not imposed on humans by lawmakers or on high. No, by contrast to theories of law that imagine the imposition of legal norms, Foucault proposes that humans have to be *shaped* into rights-bearing subjects first, and that this work is performed in the ethical and moral sphere of the regulation of social relations. This process of anterior subject creation, Foucault traces primarily to Augustine: it is in Augustine's introduction of the notion of *consensus*, of consent, into the framework of lust in the context of marriage and marital sex, Foucault argues, that subjects begin to be thought as capable of being responsabilized and responsabilizable subjects—as subjects who can be assigned responsibility and culpability for their sexual acts through a process of self-examination of one's relation to God. In effect, the notion of consent that emerges in Augustine is *the condition of possibility* of thinking of ourselves as subjects of rights within a juridical framework not only within but also beyond the domain of sexual relations.

It is here that *Confessions of the Flesh* differs from the other set of lectures that treat the same archive, the 1981 Louvain lectures, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*. But the difference is telling. The distinction helps us close in on the unique contribution of Volume 4.

To be sure, the series that now constitutes *The History of Sexuality* practically parallels, in its breadth and scope, Foucault's lectures at Louvain, *Wrong-Doing, Truth-Telling*. The role of avowal in Volume 4 echoes the centrality of avowal at Louvain. The breadth of history, now, with the final three volumes, comes close to that of the Louvain lectures. Both texts are centrally about law. *Wrong-Doing, Truth-Telling* focused on the relation between veridiction (telling truth, the diction of *veritas*) and jurisdiction (declaring justice, the diction of *juris*). *Confessions of the Flesh* is centrally about law as well, as evidenced by the very last and weighty sentence: "*In this analytic [the analytic of the subject of concupiscence], sex, truth, and law are bundled together, by ties that our culture has tended to draw closer rather than loosen.*"³⁵

But the differences between the two are worth noting because they reveal different theories of law and the unique contribution of Volume 4. *Wrong-Doing, Truth-Telling* studied the avowal in order to see how the subject implicates himself in his own subjugation. In those lectures, the focus is on the relation between avowal and social order. It is on how the subject implicates himself when he tells truth in processes that produce social order: How, for instance, Antiochus implicates himself in the construction of the social

³⁴ Ibid., 276-277.

³⁵ Ibid., 285.

hierarchy of ancient Greece through his quasi-avowal to Menelaus. In *Confessions of the Flesh*, of course, the analysis also focuses on how the discourse of flesh and lust produces a truth about oneself. In this sense, *The History of Sexuality* is also about sexual avowal and truth. That was, recall, the original intended title of the series: *Sexe et vérité*. But in *Confessions of the Flesh*, another key dimension is the relation to law and juridification; not just in the sense of *Wrong-Doing*, the relation between veridiction and jurisdiction, but in the sense of the emergence of a modern legal subject. So what *Confessions of the Flesh* offers, in addition to *Wrong-Doing*, *Truth-Telling*, is the genealogy of the rights-bearing individual that is the foil to neoliberal thought. It thus offers the groundwork for Foucault's critique of neoliberalism.

C. The Subject of Law

Foucault's point is not that legal proscriptions emerge only in early Christian thought. Nor that a juridical framework first arises there. Of course not. That would be preposterous. There was the Book of Deuteronomy in the Old Testament. There were proscriptions on adultery and sodomy throughout the Jewish Torah. "Let him who is without sin cast the first stone": surely, under Hebraic law, there was already a conception of rights and duties, and of law, in the context of sexual relations. Foucault himself references throughout *Confessions of the Flesh*, in his words, a "classic" codification³⁶ that includes "the same prohibitions (adultery, debauchery, defilement of children, relations between men), and the same obligations (having procreation in mind when one marries and when one has sexual relations), with the same references to nature and its lessons."³⁷ Similarly, there are mentions of "law" far earlier in time in the historical analysis in *Confessions of the Flesh*. Listen to the discussion of Clement of Alexandria (an early father of the end of the second century CE) in his treatise, *Paedagogus*. Foucault writes there that, as *logos*, "As the Word, it [the pedagogue] teaches God's law; and the commandments it formulates are the universal and living reason."³⁸ There was law before and there is law in the early Christian fathers. There are also elements of will, of *volonté*. Read here too the continuation of the discussion of Clement: "in these right actions which are in keeping with the Logos, we must recognize a will united with God and with Christ."³⁹

So Foucault's argument, naturally, is not that Augustine's discourse on lust, consent, and marriage created for the first time legal duties in the context of sexual relations. Moreover his claim also is not that legal prohibitions are what shaped us as subjects. Foucault had already been clear about this in *L'usage des plaisirs*: "c'est donner là comme solution la question elle-même . . ."⁴⁰ No, the continuous cycles of legal prohibitions do not explain how we were shaped. They are rather the product of it.

³⁶ Ibid., 33.

³⁷ Ibid.

³⁸ Ibid., 6.

³⁹ Ibid., 7.

⁴⁰ Foucault, *L'usage des plaisirs*, 16.

Rather, Foucault's argument is that Augustine's writings solidified and justified, and legitimated, the conception of humans as rights-and-responsibility-bearing subjects in the field of sexual relations and, through its expansion, across human experience. In other words, it is only through the continual expansion of the justifiability and legitimacy of thinking of humans as legal subjects—here, through the further juridification of the field of marital sexual practices—that the modern liberal subject of rights and responsibilities, and of possessive individualism, would emerge. The modern political theory of individualism—from the Lockean notion of individual rights, through MacPherson's theory of possessive individualism, to Gary Becker's conception of human capital—depends on and derives from this expansion of the legitimate field of the juridical. Augustine is just one phase in this genealogy and evolution, but a pivotal one because of the emerging centrality of consent in sexual relations.

D. The Main Thread of Volume 4

The overarching project of *Confessions of the Flesh* is to show that, although early Christian thought had significant continuities with Stoic practices, and although there were some differences regarding, for instance, the severity of the regulations,⁴¹ those differences pale in comparison to the more important point that Christian thought shaped differently our relation to ourselves. The penitential discipline of the second half of the second century CE and the monastic ascetic practices of the end of the third century CE create a whole new relation toward the self and between wrong-doing and truth. There is a striking parallel to *Wrong-Doing, Truth-Telling*, which Foucault emphasizes in the opening pages of the fourth volume:

The practice of penance and the exercises of the ascetic life organize relations between “wrong-doing” and “truth-telling”; they bundle together relations to oneself, to evil and to truth, in a way that it is doubtless much more innovative and much more determinant than this or that degree of severity added or subtracted from the code.⁴²

Foucault argues that the patristic tradition formed the subject around the notion of “flesh” as a mode of experience, as a mode of knowing oneself, as a way of achieving truth. It is a new mode of subjectivation: in a telling passage struck by Foucault, he writes, “The flesh is a mode of subjectification.”⁴³ In this sense, baptism represents, for Foucault, the creation of what he calls “a certain relation between a nullification of evil and manifestation of truth”⁴⁴ and which he describes meticulously in the second part of Chapter 1, developing

⁴¹ Foucault, *Confessions of the Flesh*, 34-36.

⁴² *Ibid.*, 35; Foucault develops these themes of “dire vrai” throughout the first chapter, referring, for instance, to the avowal in medieval penitence as a form of truth-telling, by contrast to the early Christian penitence itself entirely constituting a truth-telling. Foucault, *Confessions of the Flesh*, 77-78.

⁴³ *Confessions of the Flesh*, 36 n.*.

⁴⁴ *Ibid.*, 36

“the laborious baptism”⁴⁵ and relying on the texts of Tertullian, especially *De paenitentia*.⁴⁶ It involves rituals of interrogatories, exorcisms (placing of the hands, blowing on the face), and confession or *exomologesis* that constitute a new mode of subject creation.⁴⁷

In early patristic thought, Foucault maintains, subjectivation takes place in novel ways. So, for instance, Foucault compares the Stoic examination of conscience, as reflected in Seneca’s essay *On Anger*,⁴⁸ with the examinations of self in the writings of Clement, Hilary of Poitiers, or Ambrose, in order to demonstrate a shift. For Seneca, it is a question of reviewing one’s daily actions in order to remind oneself or program oneself to follow the proper rules of conduct and not to make the same mistakes again. By contrast, for Clement or Hilary, there is a different relation to the self that is mediated through God: “Here self-knowledge is not in any way a spiritual examination, or a plunge into the depths of oneself; it involves an ascent toward God, at the urging of a soul that is able to rise toward him.”⁴⁹ And if we turn to the writings of John Cassian on early spiritual direction, we see another set of metaphors and pathways.⁵⁰ Here, the Christian fathers speak of examining oneself as the miller or the money-changer might distinguish the good from the bad. The examination and direction are intended to weed good from bad thoughts and to test the purity of one’s thoughts; to determine whether the thoughts one is having are honest and faithful, or the product of deceit.⁵¹ The contrast between the approaches is sharp—and it is precisely the subtle transformations in the ways in which we speak truth about ourselves, reveal our truths, manifest ourselves, and in the process shape our subjectivity, that Foucault unearths in their most minute details.

But *the main thread of the book* concerns, within that broader arc, the emergence of the modern subject of law. At every step of the analysis in *Confessions of the Flesh*, Foucault

⁴⁵ *Ibid.*, 37-57.

⁴⁶ See Foucault, *Confessions of the Flesh*, 41 et seq.

⁴⁷ *Confessions of the Flesh*, 49-53.

⁴⁸ See *Confessions of the Flesh*, 82-84. Foucault had developed this analysis of the examination of conscience in Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice*, ed. Fabienne Brion and Bernard E. Harcourt (2014), 97-103; as well as *The Government of the Living*, 241 (“When the light is lowered and my [partner], familiar with my habit, has become silent, I examine with myself my whole day [...] and I take the measure again of my words and deeds, I measure them anew. [...] I leave nothing out. [...]’ Thus, in that discussion, Seneca says, ‘you spoke too aggressively, you reproached someone with too little reserve and you did not correct him. On the contrary, instead of correcting him, you offended him. See to it that in the future what you say is not only true, but that the person whom you speak can bear the truth you tell him.’”

⁴⁹ *Confessions of the Flesh*, 85; see also Foucault, *The Government of the Living*, 253 (“One knows oneself so that one can have access to knowledge of God, that is to say so that one can recognize what is divine in oneself, so that one can recognize the part or element in the soul that is of divine form, principle, origin, or at any rate in contact with God.”)

⁵⁰ *Confessions of the Flesh*, 102-105.

⁵¹ *Ibid.*, 103-104; see also Foucault, *The Government of the Living*, 301 (“What in fact does the money-changer do?” Foucault asks. “Cassian says the money-changer is someone who checks the metal of the coin, who checks its nature, its purity, and also the image stamped on it, someone who questions the coin’s origin. [...] [First possibility: an idea comes to mind with all the brilliance of philosophical language], one thinks it pure gold—and God knows how philosophers can gild their ideas—but they are only the ideas of philosophers and not truly Christian. So they must be rejected. False metal.”)

carefully lays the groundwork for the argument that Augustine alone juridified sexual relations. At every stage, Foucault makes sure to lay a foundation for his thesis—which reflects the centrality of that intervention. At every step of the way before he gets to Augustine, Foucault underscores that, even if there were earlier elements that resembled the juridical, they were not central, and that the subject of law only emerges with Augustine.

1. *The Juridical Is Only a Minor Dimension of the Penitential*

So, to begin with, Foucault analyses the rise of penitence in the second century CE (fully detailed in section III of Chapter 1) and emphasizes that, although there is a juridical dimension to the new penitential practices, that juridical dimension is *not* central. Foucault notes that there are certainly medical and juridical dimensions to penitence. Medical, in the sense that the model is often that of injuries and remedies, of the sick and the healer, with the priest taking the role of the doctor.⁵² Juridical, in the sense that the model is also often of the wrongdoer and the jury, taking place in the tribunal of truth, with the priest as judge.⁵³ But despite this, and the fact that both the medical and the juridical models will increase in importance later with the penitential avowal (*exagoreusis*), Foucault maintains that they only have an “accessory role.”⁵⁴ What is really determinative is the model of martyrdom, because it is more connected to the conduct of truth, Foucault states.⁵⁵ Foucault goes out of his way to stress that, in penitential practices, the juridical element that is there is of no importance, and that there is no creation of a subject of law.

2. *Juridical Not a Part of the Monastic*

Foucault then provides a lengthy discussion of monastic obedience, reading John Cassian who described intimately the rules of monastic life.⁵⁶ But here too, it is not a juridical model but rather one of absolute submission. The permanent examination and confession of the self as well—what is called *exagoreusis*—is not modeled on the juridical for Foucault.⁵⁷ In fact, Foucault specifically emphasizes that it is not modeled on a juridical confession.⁵⁸ “Exagoreusis is not like an admission in court. It does not take place within an apparatus of jurisdiction; it is not a way for someone who has violated a law to recognize his responsibility in order to lessen the punishment.”⁵⁹

⁵² *Confessions of the Flesh*, 75.

⁵³ *Ibid.*, 76.

⁵⁴ *Ibid.*, 76.

⁵⁵ *Ibid.*, 76-77.

⁵⁶ *Ibid.*, 90 et seq.

⁵⁷ *Ibid.*, 100 et seq.

⁵⁸ *Ibid.*, 109-110.

⁵⁹ *Ibid.*, 109.

3. *Not a Part of the Regulation of Virginit*

The unique practice of virginity in Christianity — which both continued, but differed from, the pagan practices of continence — has a productive dimension, namely it contributes to the unique way of being that characterizes the Christian ethos: a special relationship “of the individual to himself, his thought, his soul, and his body.”⁶⁰ By contrast to ancient Greek notions of continence and abstinence that are merely repressive, the idea of chastity is a positive force that gives rise to the concepts of the soul and body, and relations to self.⁶¹

But the techniques of self-care associated with virginity do not amount to a law, Foucault stresses. It is not regulated as law; other features are more important. “It is not a law,” Foucault affirms.⁶² It does not form a proscription. Foucault writes:

It is a mode of relation between God and man; it marks that moment in the history of the world and in the movement of salvation where God and his creature no longer communicate through the Law and obedience to Law. [...] It is an exercise of the soul upon itself, which carries it as far as the immortalization of the body. It is a relation of the soul to itself in which the unending life of the body is at stake.⁶³

Elsewhere, Foucault simply writes of virginity: “A choice, and not a law.”⁶⁴ Once again, we are not yet at the juridification of sexual relations.

Foucault develops the productivity of virginity at pages 154-155 of *Confessions of the Flesh*, where it becomes clear that, as a form of relation to the body — one that involves infinite labor (and the concept of labor and of the laboriousness of these practices is key)⁶⁵ — these practices ground the importance of sex in Western life. “The central place of sex in Western subjectivity is clearly marked by the formation of this mystique of virginity.”⁶⁶ Foucault elaborates, at pages 188-89, on the productivity of virginity, on the surveillance that it produces and the mode of subjectivation: it is the opening of a new domain, he argues, not repression. But here to, he emphasizes, it is *not* juridical.

4. *Marriage: Consent at the Source of the Subject of Law*

Foucault begins his analysis of what he calls “the arts of matrimonial life” at the end of the fourth century CE proposing a similar theoretical structure of similarities and differences — with the major difference here being that sexual relations between husband and wife are no longer viewed as primarily important for purposes of procreation.⁶⁷ With Christianity, it is as if a whole new panel of a triptych opens up: marital sexual relations

⁶⁰ Ibid., 116.

⁶¹ Ibid., 167.

⁶² Ibid., 134.

⁶³ Ibid., 134.

⁶⁴ Ibid., 143.

⁶⁵ Ibid., 154, 37.

⁶⁶ Ibid., 155.

⁶⁷ Ibid., 197.

are not valued simply to have children but to calm lust and avoid the sins of fornication.⁶⁸ In effect, marriage is not just for procreation but for the enjoyment of consensual sex that is not blameworthy.⁶⁹

But even here, in this pre-Augustinian moment, Foucault makes sure to emphasize that the juridical element associated with marriage at that time—in creating obligations and in being itself “a law”⁷⁰—is not primordial and that what still takes precedence is the relationship to oneself.⁷¹ The paradigm remains the relation of self to self. As he explains

Even in the dual form of marriage, the basic problem is what to do with one's own concupiscence; hence it is the relation of oneself to oneself. And the internal law of marital sex was first organized as a way of managing through the other this fundamental self-to-self relation.⁷²

It is only with Augustine that there emerges, first, the notion of pacts or contracts,⁷³ and then a jurisprudence of sexual relations that, Foucault claims, will take considerable importance in the second half of the Middle Ages and into the eighteenth century.⁷⁴ Through notions of consent, free will, and lack of culpability, Augustine transforms the earlier lines of demarcation and effectively constructs a juridical model.⁷⁵ Foucault explains:

In centering his analysis of concupiscence not on the problem of the pure and the impure, of the soul and the body, of matter and spirit, of passion and self-control, but on that of the voluntary and the involuntary, or more exactly on the very structure of the will, it is clear that he was inscribing it in a system of juridical references. He undertook the task [...]: positing the sinner as a subject of law; or, as we would say in other vocabulary, positing the subject of desire and the subject of law as existing simultaneously and in a single form. The two most important notions, no doubt, for this juridification were those of consent (consensus) and usage (usus).⁷⁶

This is precisely the passage that gives rise to a juridico-physical relationship between the subject of lust and the subject of law—and the emergence of this figure of the rights-and-responsibilities-bearing individual who will play such an important role in the religious and political theories for so many centuries, through and beyond the Reformation.⁷⁷ The central idea here is of an intertwining of the juridical and the physical, of the institutional

⁶⁸Ibid., 209.

⁶⁹ Ibid., 209-210; see also Nancy Luxon, “Review: *Les Aveux de la chair*,” *Contemporary Political Theory* 19:S3 (2020), S194 (noting that *Les Aveux de la chair* “opens up (for a readerly audience if not those of early Christianity) the space of a spiritual subject not yet soldered to a juridical one – a claim radical in its time, but now more familiar from the intervening years of speculation.”)

⁷⁰ *Confessions of the Flesh*, 213.

⁷¹ Ibid., 220.

⁷² Ibid.

⁷³ Ibid. 244.

⁷⁴ Ibid., 253.

⁷⁵ Ibid., 259.

⁷⁶ Ibid., 277.

⁷⁷ Ibid., 276-277 (Foucault extends this period to the Reformation), 280 (discussion of the “juridico-physical”).

and of the corporeal. As Foucault provocatively writes: “one made use of a right in making use of a body.”⁷⁸

II. FOUCAULT’S CRITIQUE OF NEOLIBERALISM

Confessions of the Flesh thus provides the missing genealogical link to the rights-and-responsibility-bearing modern legal subject who represents the foil to the neoliberal economic subject. And Foucault’s critique of neoliberalism hinges on that distinction.

As Foucault made clear in his lectures in 1979 on *The Birth of Biopolitics*, the central actor of neoclassical economic thought and of neoliberal practice, *homo oeconomicus*, can only be understood properly in contradistinction to the modern subject of law.⁷⁹ Foucault traces the emergence of the economic subject back to the writings of English empiricist philosophy from Locke onwards: the appearance of what he calls “a subject of interest,” and which he defines as “a subject as the source of interest, the starting point of an interest, or the site of a mechanism of interests.”⁸⁰ He distinguishes this emerging subject of interest from the modern legal subject of, say, Blackstone, and shows how it develops eventually into the subject of *laissez-faire* in the eighteenth and nineteenth centuries, into the subject of rational choice in the twentieth century, and into the neoliberal subject at the end of the twentieth century. This economic subject is directly contrasted with the subject of lust and the subject of law who emerges in the final pages of *Confessions of the Flesh*. The foil animates Foucault’s argument. As he writes in 1979:

[...] the theory of the subject in English empiricism probably represents one of the most important mutations, one of the most important theoretical transformations in Western thought since the Middle Ages.

What English empiricism introduces—let’s say, roughly, with Locke—and doubtless for the first time in Western philosophy, is a subject who is *not so much defined by his freedom, or by the opposition of soul and body, or by the presence of a source or core of concupiscence marked to a greater or lesser degree by the Fall or sin*, but who appears in the form of a subject of individual choices which are both irreducible and non-transferrable.⁸¹

It is on the basis of that distinction that Foucault identifies the logic of neoliberal thought: What is so powerful about classical liberalism and reinforced in neoliberalism is that, by contrast to the subject of rights who can limit the power of the state, the idea of the economic subject strips the state of all knowledge. It completely disarms the state. In this sense, the theory of *homo oeconomicus* outdoes the theory of the subject of law and, in the process, strips the state and all collective authority of any and all legitimacy because they have no knowledge and no possibility of knowledge.

⁷⁸ Ibid., 280.

⁷⁹ Foucault, *Naissance de la biopolitique*, 295 (lecture of April 4, 1979).

⁸⁰ *The Birth of Biopolitics*, 273.

⁸¹ Ibid., 271-272 (emphasis added).

Foucault's central critique of neoliberalism can be located in his lecture of March 28, 1979—I refer to it elsewhere as his “third critique” because there are two others in *The Birth of Biopolitics*.⁸² This third critique argues that the very ideal of a deregulated government is baked into the cake of neoliberalism because of the underlying theory of the subject in the rational actor model. In other words, the political outcomes are inserted from the get-go and inscribed in the notion of the rational, self-interested subject that founds the very approach. The original theory of the self-interested and self-knowing subject, assumed by these thinkers, automatically disqualifies the knowledge of the political sovereign or the collectivity.

In other words, neoliberalism assumes from the outset a subject who alone is the knowing subject, and, as a result, there is no question that the political body must ultimately be disqualified. Foucault explains this in the following passage:

Economic rationality is not only surrounded by, but founded on the unknowability of the totality of the process. *Homo œconomicus* is the one island of rationality possible within an economic process whose uncontrollable nature does not challenge, but instead founds the rationality of the atomistic behavior of *homo œconomicus*. Thus the economic world is naturally opaque and naturally non-totalizable. [...] Liberalism acquired its modern shape precisely with the formulation of this essential incompatibility between the non-totalizable multiplicity of economic subjects of interest and the totalizing unity of the juridical sovereign.

[...] *Homo œconomicus* ... tells the sovereign: You must not. But why must he not? You must not because you cannot. And you cannot in the sense that “you are powerless.” And why are you powerless, why can't you? You cannot because you do not know, and you do not know because you cannot know.

[...] The basic function or role of the theory of the invisible hand is to disqualify the political sovereign.⁸³

⁸² This central critique can be located on pages 282-283 of the English edition and pages 285-286 of the original French edition of *The Birth of Biopolitics*. I discuss the other two critiques in my essay on Foucault's *Birth of Biopolitics* at Foucault 13/13 here: <http://blogs.law.columbia.edu/foucault1313/2016/03/30/foucault-813-some-questions-for-nancy-fraser-richard-brooks-and-kendall-thomas/>.

⁸³ *Birth of Biopolitics*, 282-283; *Naissance de la biopolitique*, 285-286. This (third) critique can also be discerned in two other places. First on page 271 of the English, page 275 of the French edition, when Foucault begins the discussion, rhetorically:

Is *homo œconomicus* [...] not already a certain type of subject who precisely enabled an art of government to be determined according to the principle of economy, both in the sense of political economy and in the sense of the restriction, self-limitation, and frugality of government?

Second, on page 292 on April 4, 1979, in the last lecture, where Foucault is discussing the fact that “*Homo œconomicus* strips the sovereign of power inasmuch as he reveals an essential, fundamental, and major incapacity of the sovereign, that is to say, an inability to master the totality of the economic field. The sovereign cannot fail to be blind vis-a-vis the economic domain or field as a whole.” (*Birth of Biopolitics*, 292; *Naissance de la biopolitique*, 296).

In effect, the epistemological *assumptions* regarding the economic subject are entirely responsible for the theoretical *outcomes*: neoliberal economic theory rests on an illusion, an unfounded belief.

I would argue that this critique of neoliberalism was confirmed during a seminar with Gary Becker and François Ewald at the University of Chicago in 2013, when Becker read and responded to Foucault's discussion of his work. During the course of that seminar, when Becker was pushed on the empirical foundation for certain of his assertions, Becker spontaneously exclaimed that "I believe there's a lot of risk of government overregulating society with too many laws, and *that's why I've always been a small government person.*"⁸⁴ Becker returned to this statement a few moments later, and elaborated:

It comes from a belief that the government usually makes things worse, rather than making them better, for the bulk of the population. It's an analysis—it may be a wrong analysis, but that's the analysis. [...] When I say I'm a small government person, I am making the judgment that whatever the imperfection when the private sector operates, the effects are worse when I see the government operating. Now, other people may say that the evidence for that is not so clear, that in other sectors it is different. I recognize that. But that is what it would be based on.⁸⁵

That exchange with Becker instantiates Foucault's critique. It lays bare the epistemological assumption underlying neoliberal thought—a bare, unfounded assumption—that itself produces the political outcomes favoring a purportedly limited government. (I say "purportedly" because the neoliberal conception of a small government is joined at the hip by a massive domestic and international police state that serves to maintain the appearance of free markets.⁸⁶) In any event, the subjectivity assumed by neoliberal theory animates the political outcomes.

In thus completing the genealogy of the subject of concupiscence and the subject of law, *Confessions of the Flesh* provides the final building block necessary for the critique of Becker and American neoliberalism. Volume 4 demonstrates, in detail, how Augustine's conception of consent in the context of marital sexual relations forms the final and formerly missing link in the chain: the modern legal subject.

CONCLUSION

In the public seminar at Columbia University *Critique 13/13*, we took on the challenge of returning to classical texts of critical theory to diagnose our contemporary crisis and

⁸⁴ See Gary S. Becker, François Ewald, and Bernard E. Harcourt, "Becker and Foucault on Crime and Punishment," *Carceral Notebooks*, vol. 9: *Neoliberalism (cont'd)* (2013), 32 (emphasis added); see also generally Gary S. Becker, François Ewald, and Bernard E. Harcourt, "Becker on Ewald on Foucault on Becker': American Neoliberalism and Michel Foucault's 1979 *Birth of Biopolitics* Lectures," *Carceral Notebooks*, vol. 7: *Neoliberalism and Risk* (2011).

⁸⁵ Becker, Ewald, and Harcourt, "Becker and Foucault on Crime and Punishment," *Carceral Notebooks*, vol. 9: *Neoliberalism (cont'd)*, 37-38.

⁸⁶ See Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (2011).

reorient our political struggles.⁸⁷ I would argue that the challenge with regard to *Confessions of the Flesh*—as well as *The Use of Pleasures* and *The Care of Self*—is to fold the history of the desiring subject back into the overarching critical project, to integrate the work on subjectivity into the earlier theory of knowledge-power, in order to produce a more robust three-dimensional critique of the present. And then, perhaps even more importantly, to confront the full history of the present against our contemporary modes of critical praxis and resistance.

More concretely, the challenge is to better understand how we, contemporary subjects, have been shaped, understand ourselves, experience and reproduce relations of power in this period of crisis marked by hegemonic neoliberal practice, new digital technologies, post-9/11 counterrevolution, global climate change, and pandemic; and how this interacts with and against our ongoing forms of resistance and revolt. In bridging the philosophical work on subject creation and the earlier critique of power, and placing Foucault's critical project squarely under the tri-partite structure of knowledge-power-subjectivity, *Confessions of the Flesh* offers one of the most promising models for a way forward.

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⁸⁷ See *Critique 13/13*, Columbia Center for Contemporary Critical Thought, Columbia University, <http://blogs.law.columbia.edu/critique1313/>.

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Author info

Bernard E. Harcourt

beh2139@columbia.edu

Columbia Center for Contemporary Critical Thought

Columbia University

USA

Bernard E. Harcourt is the Isidor and Seville Sulzbacher Professor of Law and Professor of Political Science at Columbia University and a chaired professor at the École des Hautes

Études en Sciences Sociales. He is the author most recently of [*Critique & Praxis: A Critical Philosophy of Illusions, Value, and Action*](#) (2020).