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The Inversion of Exceptionality: Foucault, Agamben, and “Reproductive Rights”

The condition of the living being about to be annihilated by death resembles the state in which we find ourselves in the maternal womb, or in the state of vegetation.

—Xavier Bichat, *Recherches physiologiques sur la vie et la mort*

Just as in the fetus organic life begins before that of animal life, so in getting old and dying it survives its animal death.

—Giorgio Agamben, discussing Bichat in *Remnants of Auschwitz*

Since it has not to date arisen as a question, is it possible to open a debate with Giorgio Agamben concerning the role of women’s bodies in the politicization of life? What different inflections of life and of politicized life would result from an intermittent insertion “born of women’s bodies”?

Michel Foucault suggests that new sites of intensification and problematization occurring toward the end of the eighteenth century included reproduction and the birth rate in addition to the mortality rate.¹ When he described this specific modality for seizing hold of life, Foucault’s work opened itself up to a possibility that was little

developed in his own work: an interrogation of the intersection between an eventual notion of “reproductive rights” and the constitution of reproductivity as a biopolitical substance, inflecting state-based and other attempts to suppress abortion and the concurrent resistance to those attempts.

Foucault discusses abortion rights on at least two occasions. On one, it arises as part of his discussion of the relationship between power and resistance. That which makes power “strong,” such as the investment in the body, is prone to become a focus for counterclaims. It is in such terms that Foucault analyzes instances of state or medical panic at demands for free abortion. Respecting the “complex phenomena” of power, Foucault describes power’s investment in the body as stimulating desire with respect to one’s own body.

But once power produces this effect, there inevitably emerge the responding [*dans la ligne même de ses conquêtes, émerge inévitablement*] claims and affirmations [*la revendication*], those of one’s own body against power, of health against the economic system, of pleasure against the moral norms of sexuality, marriage, decency. Suddenly, what had made power strong [*ce par quoi le pouvoir était fort*] becomes the means by which it is attacked. Power, after investing itself in the body [*Le pouvoir s’est avancé dans le corps*], finds itself exposed to a counter-attack in that same body. Do you recall the panic of the institutions of the social body, the doctors and the politicians, at the idea of non-legalized cohabitation [*l’union libre*] or abortion?²

That revolt and liberation are incited by, rather than external to, the investments of power needn’t make, for example, the abortion activist more wary, and yet it also needn’t preclude an awareness of the tactics by which one may consolidate what one means to oppose. The issue arises again in this interview:

[Bernard-Henri Lévi]: This idea that . . . to be happy we must have sexual liberation is held basically by sexologists, doctors, and those who police sex [*policiers du sexe*]. . . .

Foucault: Yes, and that is why they present to us a formidable trap. What they are saying, roughly, is this: “You have a sexuality; this sexuality is both frustrated and mute; hypocritical prohibitions are repressing it. So, come to us, tell us, show us all that, confide in us your unhappy secrets. . . .”

This type of discourse is, indeed, a formidable tool of control and power. As always, it uses what people say, feel, and hope for. It exploits their temptation to believe that to be happy, it is enough to cross the threshold of discourse and to remove a few prohibitions. But in fact it ends up repressing [*rabattre*] and dispersing [*quadriller*] movements of revolt and liberation . . .

BHL: Hence the misunderstanding of certain commentators: “According to Foucault, the repression or the liberation of sex amounts to the same thing.” Or again: “Le Mouvement pour la liberté de l’avortement et de la contraception [a radical pro-choice group] and Laissez-les vivre [a pro-life group] are reducible to basically the same discourse [*c’est au fond le même discours*]. . . .”³

Agamben’s response to Foucault is well known for its reluctance to designate as only a modern phenomenon the seizing-hold of life by the political. While he does not engage in a project intended to flatten the differences between the ways that life has been politicized, one of the doubtless unintended by-products of his response to Foucault has been a nonengagement with the place of women in the biopoliticization of life. The question that was more centered within Foucault’s line of vision given his focus on, for example, nineteenth-century natalist politics, was that of the hystericization and preoccupation with women’s bodies. Once women’s reproductivity in matters of population control and of reproduction incitement becomes the political focus, in addition to an interest in the “quality” of neonatal life and the status of life more generally, no particular theoretical conflict is likely to arise from extending one’s analysis to the study of legislative intervention into state regulation of matters of contraception and abortion. Though it is possible to speculate about why Foucault contributed only minor remarks on the topic, given his support for contemporary abortion rights and his small collaboration with the Groupe de l’information sur la santé on this point in 1973 when abortion was still illegal in France,⁴ a Foucauldian analysis of formations surrounding abortion control and abortion rights is perfectly consistent with a Foucauldian biopolitics. It is not clear, however, that Agamben’s approach lends itself easily to a similar reflection.

To be sure, Agamben’s silence on the possible question could be one of a theorist’s many “nonaccidents.” Some reasons would be theoretical. The examples of bare life he considers are usually formations that one can

imagine having been identified as human life and then stripped of that status or subjected to a threshold status: the overcoma, the immigrant, the refugee, the internee, the enemy combatant, the *Muselmann*. A consideration of fetal life does not fit the series, as it usually is not situated at the threshold of depoliticization or dehumanization of previously politicized or humanized life. The fetus represents the zone of contested and intensified political stakes around the threshold between what some would consider “prelife” and what is to be identified as nascent human life, meaningful human life, and/or rights-bearing life.

Thus the ambiguous politicized life least separable from some women’s bodies happens to be a formation least appropriate for Agamben’s analysis. An emergent fetus usually is not considered to have had a political, legal, or linguistic status subsequently suspended. Rather, its original ambiguity is in contention when it comes to the anxieties of biopolitics. This may be one reason fetal life, despite being one of the major nodes of biopolitics, makes only the faintest of appearances in Agamben’s work, remaining an ambiguous threshold of life in which he has been least interested.

Yet there may also be strategic reasons for Agamben’s lack of interest in the biopolitics of women’s reproductivity.⁵ Once the interconnections between biopower and women’s reproductivity are considered, how can one avoid an engagement with the history of abortion regulation? The intense interrelation between biopolitics and abortion legislation overlaps with Foucault’s “threshold of modernity.”⁶ Once that interconnection is considered, one is confronted with the complex definitions of fetal life that, in fact, Agamben touches on in his discussion of Xavier Bichat in *Remnants of Auschwitz*. What happens when dying life is likened to fetal life, to the threshold between animal life and organic life, perhaps to bare life? Though his attention is directed more toward the threshold between human “being” and bare or barely “human,” and thus in some respects more toward the threshold relevant to thanatopolitics rather than prenatal politics, Agamben makes occasional references to the excess of the human to the human being according to both forms of threshold, seen more than once in the formulation “beyond or before”: “The human being is thus always beyond or before the human, the central threshold through which pass currents of the human and the inhuman, subjectification and desubjectification, the living being’s becoming speaking and the logos’ becoming living.”⁷ Yet this question of the before and the question of the prenatal, more specifically, might have the potential to trouble Agamben’s concerns.

Consider the form of Andrew Norris's question in his introduction to a collection of essays on Agamben's *Homo Sacer*: "What, for instance, are we to do when we are dealing with agents or things that have not already been recognized as the bearers of rights?"⁸ Once the question is posed in terms of that which "has not already been recognized" rather than that which is "no longer" recognized as the bearer of rights, what is at stake alters. Imagine that same question asked in a different context, at demonstrations taking place outside abortion clinics in the United States and elsewhere. Agamben's work might appear one step closer to an interested reading by the antiabortion activist whose extremism has extended to the passion for comparisons with Auschwitz.

This is a ghostly proximity not likely to take concrete shape in Agamben's work, partly because when he does consider those thresholds between "life and death, animate and inanimate, human and inhuman, nature and culture, law and bodies,"⁹ his tendency is also to stress a consideration of a "new living dead man, a new sacred man"¹⁰ and not the production of the threshold "prelife" or "prior to human life." However, it turns up intermittently in his references whenever he runs the post- and the prior together.

With the exception of Karen Quinlan, women's bodies are impressively absent from Agamben's writing, as are reproductive bodies. Yet it is true that the incorporation would not be a simple one, to such an extent that one of the conditions of his project could be located in the dissociation of "life" from "women's reproductivity." For the intriguing potential it has to operate as a lens to rethink the terms *life*, *bare life*, *threshold*, and *biopolitics*, it should be explored: Agamben's texts reappear as enveloping an alternative problematics that both unsettles and reorients these terms.

States of Exception

The biopolitical intensification and production of the ambiguous zone of the "prior to life" has a spectral and inverted relationship to Agamben's analyses. Not in order to create confusion with Agamben's, Carl Schmitt's, and Walter Benjamin's reflections on the state of exception, consider, for example, the inverted relationship between Agamben's state of exception and the states of exception associated with the history of abortion law in Europe, Britain, and Australia since the second half of the nineteenth century. Through its own and particular configuration, abortion has relentlessly and internationally—and in an uncannily duplicating formation of

policy and law—been its own state of exception. Exceptionality has provided the form through which these countries have accomplished the legal and political regulation of abortion.

This form of exceptionality is not the state of exception Agamben discusses in the context of Schmitt and Benjamin—it is not that a nation's laws are set aside through such pretexts as a state of emergency. Instead, a particular practice—in this case, regular and legal abortion—has often taken shape through the granting of a general exception to an ongoing law, which, in fact (except for the exception), continues to render it illegal. This would not be an instance of defining sovereignty by the capacity to suspend the legal regime. But if such a capacity defines sovereignty (as with Schmitt's analysis of the state of exception), we could ask what kind of sovereignty, if any, is ensured or produced through the intertwining of reproductive practice with the laws organizing and criminalizing it, and allowing for broad exceptions from that criminality, sometimes lasting decades in a legal system. Thus the exception becomes regularized and regulative. It is not an entire regime that is the exception to its own illegality, but the laws addressing one phenomenon, abortion. The state of exception is not the state, not the nation or a country's suspended legal system; rather, it is abortion "itself" that has frequently existed in a state of suspension or exception to its own illegality.

An analytic of exceptionality would be required to understand the peculiar form of biopolitics covering women's reproductivity, the interest in termination, and the conflicting and agitated interests in naming what is termed "life," "rights-bearing life," or life requiring responses identified as "protection," which have taken extreme and, on occasion, murderous forms. The specificity of the form of exceptionality applied to this phenomenon is striking, as is the specificity of the states of exception discussed by Agamben. Do these overlap in any way? At first glance, it seems the answer must be no. When Agamben stresses the pretexts and conditions associated with states of emergency and the temporary suspension of a legal regime, our attention is directed to the sovereign's capacity to effect itself by setting aside almost an entire constitution (as in the passing of the Enabling Act in Germany in 1933, legally authorizing—with two conditions, dictatorial powers and the capacity to effect laws without parliamentary involvement—government measures that could "deviate from the constitution")¹¹ or its legislative regime (as in Raymond Poincaré's declaring France to be under a state of siege from 1914 to 1918, transferring legisla-

tive power to the executive).¹² But in Agamben's discussion, states of exception have also included suspension of particular national and international laws, as in the U.S. military order of November 13, 2001, which effectively suspended the applicability of the Geneva Conventions and existing American laws covering detained prisoners by denying to suspected so-called enemy combatants detained in the United States and Guantánamo Bay the status of foreign prisoners of war or the status of American prisoners. As Agamben writes, the possibility of indefinite detention—also discussed by Judith Butler as a suspension of the applicability of those international and national laws that otherwise would have pertained to the detainees¹³—was accomplished through the constitution of a new category:

What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POWs as defined by the Geneva Convention, they do not even have the status of persons charged with a crime according to American laws. Neither prisoners nor persons accused, but simply "detainees," they are the object of a pure *de facto* rule.¹⁴

The USA Patriot Act (October 26, 2001) also operates through exceptionality.¹⁵ It grants a blanket exception to liberties otherwise covered under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments, which may be suspended in the "exceptional" circumstances of suspicion of terrorist activity. The constitutionality of the amendments has survived the enactment of the Patriot Act, and thus the act has granted an exception to amendments with which it would otherwise conflict. The wording of the Patriot Act was given maximum flexibility by inclusion of the capacious category "other purposes": it states that it is meant to "deter and punish American terrorists in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." Exempting investigators from demonstrating probable cause and including the wording "other purposes," the scope of the act to suspend the terms of constitutional amendments is potentially broader than the ongoing "legality" of the latter.¹⁶ The ambit of the enveloping exceptions could exceed the "ongoing" law, whose legality they don't ostensibly jeopardize.

Thus, the mode of exceptionality characteristic of some formulations of abortion law is not entirely unlike some forms of suspension discussed by Agamben. Particular laws are set aside within a legal regime and neverthe-

less persist within it, suspended to varying degrees. Each of these may be considered new exercises, forms, and constructions of sovereignty. Accordingly it is possible to ask what kind of sovereignty is effected through regularized but constantly volatile states of exception pertaining to legal regimes targeting women's reproductivity. Like the November 13, 2001, military order, these states of exception institute the fragility and centrality of bodies—reproductive no less than incarcerated. Whether the exception seems to protect while concurrently stressing the vulnerability of women's reproductive autonomy, or whether it seems to defend a state while weakening civil liberties, bodies are being intensified, weakened, and invested with their possible exposure to violence.

The Exceptionality of Abortion

From the 1820s through the rest of the nineteenth century in America, abortion past the fourth month of pregnancy was increasingly banned by individual states. Though this was reinforced in 1873 by the passage of the Comstock Law “for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles for Immoral Use,” which was applied to bans on obscene literature, information about birth control, and the practice of abortion, abortion remained a matter of state rather than federal law, having become illegal in all fifty states by the 1960s until the precedent established by *Roe v. Wade* in 1973. This case reconfigured abortion as included within the right to privacy protected under the Fourteenth Amendment of the U.S. Constitution:

State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy.¹⁷

As is clear in the ruling, these legal configurations have always been entangled with the language of exception. Throughout the nineteenth and twentieth centuries, the increasingly entrenched state-based criminalization of abortion usually allowed for exceptions under grounds such as rape or concern for the woman's life, health, or well-being. The bans, therefore, included exceptions that could, according to the contingencies of indi-

vidual states, doctors, judges, contexts, and cases, allow for extreme variation in the actual liberality of access to abortion. And though *Roe v. Wade* is widely considered to have decriminalized abortion, Mary Poovey has noted how it simultaneously reconfirms the state's readiness to intervene, given its wording: "a woman's right to terminate her pregnancy is not absolute, and may to some extent be limited by the state's legitimate interests in safeguarding women's health, in maintaining proper medical standards, and in protecting potential human life."¹⁸ Even the passage from the *Roe v. Wade* ruling, spelling out the new inclusion of abortion under the right to privacy, continues, "though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a 'compelling' point at various stages of the woman's approach to term."¹⁹

In many countries also considered to have long decriminalized abortion, including France, Canada, Britain, and Australia, abortion's legal treatment has followed a different and yet consistently echoing pattern of establishing conditions for dispensation, exemption, or exception from an already established and continuing illegality without actual repeal of earlier laws rendering abortion illegal. For example, abortion in Germany was outlawed in 1871, an illegality that persisted under the Weimar Constitution, continued through the Third Reich (though it was intermittently forced on non-Aryan women), and is still technically illegal. While the current German law does not allow abortions, it suspends their legal prosecution under certain stated conditions: if the abortion takes place during the first twelve weeks of pregnancy and in conjunction with appropriate—pro-life-inflected—counseling; during the first twenty-two weeks of pregnancy on grounds deemed eugenic or criminological; or thereafter only for reasons considered medical. A large number of countries that have decriminalized abortion in the twentieth century have done so according to variations on this model.²⁰

The form of exceptionality in question is one that has been analyzed by Michèle Le Doeuff in relation to France. Le Doeuff argues that the so-called Veil law, which was thought by many to have accomplished the decriminalization of abortion in 1975, acted as a reconfirmation of abortion's criminalization. It amounted to an exception reconfirming that abortion is illegal except under certain circumstances, however broad the scope of the latter may be. To enlarge on her example, in some contexts, as in Germany, where the exception effectively (though on diverse grounds) can apply throughout the entire term of the pregnancy, it is at least hypothetically possible that

every abortion could be allowed, while every abortion remains nonetheless an exception to its own illegality. No matter how broad the set of exceptions, and even if the exception has become the norm and covers the entire field, the exception—this is the interpretation proposed by Le Doeuff—does reconfirm the illegality.

Under the French legal regime Le Doeuff considers, abortion was made illegal under the 1810 French Penal Code and was redeclared punishable in 1920 by the *cour d'assises*. According to a 1920 law, article 317 of the Penal Code, abortion was an offense, as was the dissemination of information about abortion and contraceptive products. Le Doeuff described subsequent modifications to the law as follows:

The Neuwirth law, which permits the prescription of contraceptives and their sale in chemists, and the Veil law, which permits abortion in certain circumstances, are simply dispensations [*dérogations*] in relation to the law of 1920. . . .

We should also recall here the correct formulation of an old legal adage: “The exception proves the rule *for non-excepted cases*.” From this point of view, the dispensations provided by the Neuwirth and Veil laws correspond to a *reproclamation* of the 1920 law. . . . The legalization of an exception amounts to letting go of one element in order to uphold the fundamental point.²¹

Indeed, the phenomenon that preoccupies Le Doeuff could be thought of as the inverted form of an *Ausnahmezustand*: a particular kind of law, within a legal regime, that takes the relation to itself of setting itself aside, sometimes in certain specified conditions, and sometimes through the subsequent blanket or close to blanket exception to itself. This form of legality and exceptionality has been a primary form of incitement of, investment in, stimulation of, production of, and regulation of women’s bodies as reproductive biopolitical targets. Whether or not women have had relatively easy access to abortion, the law deems this access either tenuous or an exception, however broad, and regulates the reinscribed possibility that women might not have that access and that they are enmeshed in a web of agitated interests. Arguably, forms of sovereignty relating to women can be located in these formations.

Agamben has argued that the state of exception is identified both as a ubiquitous technique of government but also as a “constitutive paradigm of the juridical order.”²² It could similarly be said of women’s reproductivity

that one identifies a parallel subregime that prefers the creations of permanent states of exception, and that the repeated creation of abortion as a state of permanent exceptionality has been one of the essential workings of twentieth- and early-twenty-first-century biopolitics concerning women's reproductivity. Agamben's inflection draws attention not just to the technique but also to the peculiarity of a constitutive paradigm. Perhaps there is room for those interested in the intersection of biopolitics and women's reproductivity from the nineteenth century to think further about the significance of the forms, juridical and otherwise, through which women's reproductivity is produced as a concurrent target and result of that form. Agamben notes: "There are not *first* life as a natural biological given and anomie as the state of nature, and *then* their implication in law through the state of exception. On the contrary, the very possibility of distinguishing life and law, anomie and *nomos*, coincides with their articulation in the biopolitical machine."²³ There are parallels between Agamben's statement and the phenomena of all targets of reproductive biopolitics and their productions: languages, preoccupations and effects of freedom, life, fetal life, personhood, potential personhood, right to life, rights over one's body, autonomy, and privacy.

One could also ask around what kinds of bodies one sees this preference for continuing a law in relation to which a modality of sovereignty is pursued in the granting of dispensation from its own harshest version, such that the exemption both suspends and reconfirms the harshest rule. Examples might be located in the practices of pardon, long-term death row incarceration, and sentence commutation, all constituting fields of exception to a death penalty regime whose legality is not weakened, and in exceptions regularly granted to national immigration restrictions. This is the case with exceptional but not infrequent regularizations of illegal or "undocumented" immigrants in France, the United States, and Australia, occurring under the guise of exceptions to highly restrictive immigration laws that, if anything, can be maintained in their harshest versions under these circumstances.

This would be the inverted version of the state of emergency regarding civil liberties. Obviously, the exceptions can constitute a means of reconfirming, in an intensified version, the regime of regulation. To return to abortion, in contexts enamored of this particular structure of exceptionality, there is almost never an illegal abortion, while it's just as true that there is almost never a legal abortion.

Homo Sacer

What consequences would arise from an interrogation of the politicization of women's reproductivity from the perspective of Agamben's work? Might some light be shed on the treacherous nature of the rhetoric—not within Agamben's work but in antiabortion contexts—concerned with “potential life”? This is the parallel that leads one to not include abortion in the context of Agamben's discussion of threshold life, in addition to the point that this is not a life whose humanity has been stripped or lost. If it has any temporality at all, it would be the temporality of the prior, not the post.

In an uncanny ghosting, it is not uncommon for extreme antiabortion activists to make connections between abortion and extermination, invoking the specter of the Holocaust. Antiabortionists have been highly attuned to ruses for the politicization of the threshold of life, greatly attached to an appropriation of a category through the rhetorical or conceptual construction of fetal life as what one is tempted to think of as the pseudo-*homo sacer*. If the fetus is deemed akin to the subject in the camp, the antiabortionist figures the woman's body as a kind of camp. Such a camp is not unlike the detention camp of the illegal immigrant about whom the law adjudicates whether his or her life is to be considered a rights-bearing life. If so, it has often been noted that the rights—in cases in which they are conceptualized as such—are considered to make a kind of competing claim on the woman, as if they make competing rights claims on each other. Thus the woman seems to be slyly attributed the status of sinister sovereign, at the mercy of whom the fetus exists in its threshold state. It is also noteworthy that the woman's possible sovereignty may be considered a zone of disputed authority with an alternative sovereign power, the state. Recall the wording of *Roe v. Wade* that approximates the rhetoric of competing sovereign interests: “Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a ‘compelling’ point at various stages of the woman's approach to term.”²⁴

The woman legally forbidden to have an abortion is sometimes figured as a potentially murderous competing sovereign whose self-interest would thwart the intervening motivations of the state concerned with the threshold life in question. The alternative intention with which she is attributed is a pseudoviolent decision that this fetal life is not to be lived. Neither *zōē*, bare life, nor *homo sacer*, the fetus is rhetorically and varyingly depicted

as all of these, in an imitation of these patterns as they take place around *zoē*, *bios*, and the production of bare human life as vulnerable excess to which political life can be reduced. Agamben's analyses illuminate the way in which fetal life can come to be considered, particularly in antiabortion contexts and erroneously as a form of politicized bare life exposed to sovereign violence.

In the production of fetal life as a pseudo-*homo sacer*, we can usefully ask what has happened to the woman's body. Agamben's reflections have not encompassed an engagement with women's reproductive bodies. Yet one embarkation point for a potential exploration is to be found in his mention of "the woman" as one of the social-juridical entities superceding "the Marxist scission between man and citizen," and as such grouped with the series he proposes, which includes the voter, the worker, and the transvestite: "The Marxian scission between man and citizen is thus superseded by the division between naked life (ultimate and opaque bearer of sovereignty) and the multifarious forms of life abstractly recodified as social-juridical entities (the voter, the worker, the journalist, the student, but also the HIV-positive, the transvestite, the porno star, the elderly, the parent, the woman) that all rest on naked life."²⁵

It is surely fair to name the woman's reproductive body that which Agamben would prefer not to mention in his considerations of life. So we can and should ask, who is the *woman* who as a social-juridical entity rests on its division from naked life? My suggestion is that it is a woman whose status as potentially reducible to naked life is associated with her reducibility to reproductive life. This is the paradox of figuring the woman as a threatening and competing sovereign power over the fetus that is falsely figured as *homo sacer*: to do so is simultaneously to reduce the woman to a barer, reproductive life exposed to the state's hegemonic intervention as it overrides the woman erroneously figured as a "competing sovereign" exposing life. As she is figured as that which exposes another life, she is herself gripped, exposed, and reduced to barer life.

Notes

- 1 Michel Foucault, "Society Must Be Defended": *Lectures at the Collège de France, 1975–76*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003), 243–44.
- 2 Foucault cautions, "The impression that power weakens and vacillates here is in fact mistaken; power can retreat here, re-organize its forces, invest itself elsewhere . . . and

- so the battle continues.” Michel Foucault, “Body/Power,” in *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. Colin Gordon (New York: Pantheon, 1980), 56. Translation modified.
- 3 Michel Foucault, “Power and Sex,” in *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984*, ed. Lawrence D. Kritzman, trans. Alan Sheridan (New York: Routledge, 1988), 114. Translation modified.
 - 4 One can consult Michel Foucault’s 1973 piece, written in collaboration with Alain Landau and Jean-Yves Petit for the *Nouvel Observateur*, “Convoqués à la PJ,” in Foucault, *Dits et écrits, 1954–1988*, vol. 1, 1954–1975, ed. Daniel Defert and François Ewald (Paris: Gallimard, 2001), 1313–15. Foucault was in solidarity with a group (whose membership included medical practitioners) supporting abortion, the Groupe de l’information sur la santé.
 - 5 The question can be added to Ewa Płonowska Ziarek’s work on the reduction of women’s bodies to bare life. In addition to regretting the omission in Agamben’s work of considerations of slavery and of the rape of women, suggesting more generally that Agamben omits a consideration of both race and gender implications in his concept of bare life, Ziarek has proposed an analysis of the early-twentieth-century British radical suffragette movement and particularly its hunger strike strategies, whose stakes can be understood as a reappropriation by feminists of the woman’s body reduced to bare life. See Ewa Płonowska Ziarek, “Bare Life on Strike: Notes on the Biopolitics of Race and Gender,” *SAQ* 107:1 (2008): 89–105.
 - 6 Foucault states: “What might be called a society’s ‘threshold of biological modernity’ is situated at the point where the species has become the stakes of its own political strategies. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being [*sa vie d’être vivant*] in question.” Michel Foucault, *The History of Sexuality*, vol. 1, *An Introduction*, trans. Robert Hurley (New York: Random House, 1978), 143. Translation modified. “Ce qu’on pourrait appeler le ‘seuil de modernité biologique’ d’une société se situe au moment où l’espèce entre comme enjeu dans ses propres stratégies politiques. L’homme, pendant des millénaires, est resté ce qu’il était pour Aristote: un animal vivant et de plus capable d’une existence politique; l’homme moderne est un animal dans la politique duquel sa vie d’être vivant est en question.” Michel Foucault, *La volonté de savoir* (Paris: Gallimard, 1976), 188.
 - 7 Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans. Daniel Heller-Roazen (New York: Zone Books, 1999), 135.
 - 8 Andrew Norris is discussing the neomort: “Here the reassertion of rights is simply not an option. We must decide whether a neomort—a body whose only signs of life are that it is ‘warm, pulsating and urinating’—is in fact a human being at all, an agent or a thing.” Norris, “Introduction: Giorgio Agamben and the Politics of the Living Dead,” in *Politics, Metaphysics, and Death: Essays on Giorgio Agamben’s “Homo Sacer”*, ed. Norris (Durham, NC: Duke University Press, 2005), 1–30, 14.
 - 9 Thomas Carl Wall, “Au Hasard,” in *Politics, Metaphysics, and Death*, 31.
 - 10 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998), 131.
 - 11 Article 2 of the Enabling Act (*Ermächtigungsgesetz*) states: “Laws enacted by the gov-

- ernment of the Reich may deviate from the constitution as long as they do not affect the institutions of the Reichstag and the Reichsrat. The rights of the President remain.” Gesetz zur Behebung der Not von Volk und Reich (Law to Remedy the Distress of the People and the Nation), Reichstag, March 23, 1933, www.bpb.de/publikationen/04962540304433072098131403597315,9,0,Beginn_der_nationalsozialistischen_Herrschaft.html#art9 (accessed June 26, 2007).
- 12 Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 12.
 - 13 See Judith Butler, “Indefinite Detention,” in *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), 51. Butler writes: “In the name of a security alert and national emergency, the law is effectively suspended in both its national and international forms. And with the suspension of law comes a new exercise of state sovereignty, one that not only takes place outside the law, but through an elaboration of administrative bureaucracies in which officials now not only decide who will be tried, and who will be detained, but also have ultimate say over whether someone may be detained indefinitely or not.”
 - 14 Agamben, *State of Exception*, 3.
 - 15 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), 107th Congress, H.R. 3162, public law 107-56, October 24, 2001. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@L&summ2=m&> (accessed June 26, 2007).
 - 16 However, Agamben notes that the Patriot Act did, prior to the November 13, 2001, military order, specify that within seven days detained aliens “had to be either released or charged with the violation of immigration laws or some other criminal offense.” Agamben, *State of Exception*, 3. Also, there have been challenges to the act’s application. For example, the targeting of homeless people in Summit, New Jersey, under the Patriot Act clause mentioning “attacks and other violence against mass transportation systems” was challenged, and there has been room for contestation of the act’s extended application by individual plaintiffs and the American Civil Liberties Union.
 - 17 *Roe et al. v. Wade, District Attorney of Dallas County*, 410 U.S. 113 (1972), October 11, 1972. See www.conlaw.org/cites2.htm (accessed June 27, 2007).
 - 18 Mary Poovey, “The Abortion Question and the Death of Man,” in *Feminists Theorize the Political*, ed. Judith Butler and Joan Scott (New York: Routledge, 1992), 244.
 - 19 See www.conlaw.org/cites2.htm.
 - 20 In Britain, abortion was a crime from 1803 onward, still illegal under the 1861 Offences against the Person Act. Through the twentieth century, increasingly broad exceptions were granted by the following: the Infant Life (Preservation) Act of 1929, which allowed term-limited abortions to protect the woman’s life only; the Bourne Ruling of 1938, which extended the exception to include psychological grounds; and the Abortion Act of 1967, which consolidated the legality if there was a threat to the physical or mental health of the mother or existing children and if certified by two doctors. The Australian law was first governed by the British 1861 act. Despite its widespread availability (under an assortment of exceptions, including economic, social, and medical grounds, and usually with time limits), abortion has not been fully legalized in any state except the Australian Capital Territory, which passed the Abolition of Offence of Abortion Act in 2002. See 1861

Offences against the Person Act, OAP, 24 & 25 Vict., c. 94; Infant Life (Preservation) Act of 1929, 1929, 19 & 20 Geo., c. 34 5; *Rex v. Bourne* [1939] 1 K.B. 687, 3 All E.R. 615 (1938); Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87 27, October 1967; and Crimes (Abolition of Offence of Abortion) Act 2002 (Act 2002 no. 24), September 9, 2002, www.legislation.act.gov.au/a/2002-24/20020909-2735/pdf/2002-24.pdf (accessed June 26, 2007).

- 21 Michèle Le Doeuff, *Hipparchia's Choice: An Essay Concerning Women, Philosophy, Etc.*, trans. Trista Selous (Oxford: Blackwell, 1991), 247. Translation modified. Le Doeuff stresses that women's control of their own fertility is not enshrined as a fundamental right. Though there have been changes to French abortion law since the publication of *Hipparchia's Choice*, the conditional nature of its legality has persisted.
- 22 Agamben, *State of Exception*, 7.
- 23 *Ibid.*, 87.
- 24 See www.conlaw.org/cites2.htm.
- 25 Giorgio Agamben, *Means without End: Notes on Politics*, trans. Vincenzo Binetti and Cesare Casarino (Minneapolis: University of Minnesota Press, 2000), 6–7.

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