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## Chapter Three

### Unborn and Born-again Victims: Governing Life through the Unborn Victims of Violence Act of 2004

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#### Abstract

This chapter examines post 9/11 rhetoric surrounding “unborn children” and the legal and moral claims to personhood advanced on their behalf. Taking the US Unborn Victims of Violence Act of 2004 as a case study, the authors demonstrate how the Bush administration, post 9/11, sought to shift political and popular discourses on “life.” In effect, the events of 9/11 became the occasion to advance conservative policies and legislation under the aegis of securing or protecting the nation from terrorism. Drawing on Michel Foucault’s understanding of biopolitics, we claim that the repeated post-traumatic invocation of 9/11 has led to an unethical extension of governmental power over the limits and definitions of life. Similar “personhood initiatives” continue to be advanced across the United States. The authors challenge what are ostensibly moral biopolitical claims in this context, and conclude by proposing, in response, an ethic of critique.

Trauma today is more a feature of the moral landscape serving to identify legitimate victims than it is a diagnostic category which at most reinforces that legitimacy.

—Fassin and Rechtman, *The Empire of Trauma*

## Introduction

After the 1993 bombing at the World Trade Center, a memorial fountain, designed by Elyn Zimmerman, was erected in the Austin J. Tobin Plaza for the six people that died in the attack. Amongst the names listed on the fountain was Monica Rodriguez, an expectant mother. Her name was inscribed on the fountain along with the words, "and her unborn child." The larger inscription on the fountain read in both English and Spanish: "On February 26, 1993, a bomb set by terrorists exploded below this site. This horrible act of violence killed innocent people, injured thousands, and made victims of us all" (Conn 2007, 13). Although the fountain was destroyed during the 9/11 terrorist attacks, the National September 11 Memorial and Museum Board decided to include the names of the dead from the 1993 bombing on the 9/11 memorial, maintaining the precedent to include "unborn victims" with the names of known expectant mothers: "the forms sent to the next of kin of all 9/11 victims included the option of indicating that a loved one was pregnant at the time of her death. In total, there are 11 instances of families who requested that their loved ones' names be inscribed with the words 'and her unborn child' on the 9/11 Memorial" (Blais and Rasic 2011, 183). President and CEO of the 9/11 Memorial and Museum, Joe Daniels, states that the inclusion of "unborn victims" is "a special part of the memorial" as "[i]t reinforces that message about the whole project that the folks were just like us, that they were about to start these lives.... It reminds us that they were who we are" (qtd. in Ngo 2011, n.p.). Of course, the acknowledgement of "unborn children" on the new memorial may offer some amount of solace for the family members of victims, but this acknowledgement and the rhetoric surrounding the inclusion of the unborn in a post 9/11 political climate also raises some pressing questions. What does it mean, for instance, to reinforce a message that identifies "we" with "they," the victims of terrorism? How are we "made" into, or interpellated as, victims of trauma? What work is done when we acknowledge the unborn as victims, legitimizing the "life" of a foetus under violent circumstances? Further, if the unborn are identified as victims, what does it mean for "us all" when we are asked to assume the "life" of the foetus and collectively identify or empathize with "unborn victims of violence"?

This essay attempts to offer answers to these questions through a reading of the Unborn Victims of Violence Act of 2004, as we reflect upon the ways the Bush administration, post 9/11, sought to shift political and popular discourses on "life." In effect, the traumatic events of 9/11 became the occasion for the Bush administration to advance conservative policies and legislation under the aegis of securing or protecting the nation. Through the repeated invocation of 9/11, terrorism, and victimhood, trauma operates as a "floating signifier" (Fassin and Rechtman 2009, 276), effectively occupying a place beyond critical scrutiny, for the purposes of extending control over the life of the US population. Drawing on Michel Foucault's understanding of biopolitics, we analyze the Unborn Victims of Violence Act as one instance in which the repeated invocation of 9/11 has led to an extension of governmental power over the limits and definitions of life. We challenge the ostensibly ethical claims of biopolitics in this context, and conclude by proposing, in response, an ethic of critique.

## Unborn Victims: National Sanctity of Human Life Day

Representative Lindsey Graham (R-SC) first introduced the Unborn Victims of Violence Act as a bill under President Clinton in 1999. The language and spirit of the original bill remains in the final act as signed by President Bush in 2004: "to protect unborn children from assault and murder, and for other purposes." The 1999 bill would pass the House of Representatives, but would die in the Senate when Clinton promised a veto (Wilson 2006, 186). Lindsey Graham reintroduced the bill as the Unborn Victims of Violence Act of 2001, which would also pass the House of Representatives, but was placed on the calendar by the Senate on 8 June 2001. It was on 18 January 2002, shortly after the 9/11 terrorist attacks, that President Bush found the occasion to publicly advance his administration's agenda on "unborn victims" in a speech delivered on the National Sanctity of Human Life Day—the first such presidential proclamation since 1993 (Clinton had abandoned the practice during his time in office). President Reagan first designated 22 January 1984 as National Sanctity of Human Life Day, a date dedicated to the opposition of abortion and strategically timed to coincide with the anniversary of the Supreme Court's decision in the case of

*Roe v. Wade*. In his 2002 proclamation, Bush reiterated a “commitment to respect the life and dignity of every human being” (Bush 2002), but while Reagan would compare abortion with the American history of slavery (Reagan 1984), Bush linked abortion directly with the spectre of terrorism.

Consistent with the core principles about which Thomas Jefferson wrote, and to which the Founders subscribed, we should peacefully commit ourselves to seeking a society that values life—from its very beginnings to its natural end. Unborn children should be welcomed in life and protected in law. On September 11, we saw clearly that evil exists in this world, and that it does not value life. The terrible events of that fateful day have given us, as a Nation, a greater understanding about the value and wonder of life. Every innocent life taken that day was the most important person on earth to somebody; and every death extinguished a world. Now we are engaged in a fight against evil and tyranny to preserve and protect life. In so doing, we are standing again for those core principles upon which our Nation was founded. (Bush 2002)

This statement does the unambiguous work of aligning the pro-choice movement with “evil” and “tyranny,” dividing the nation into those that support and those that oppose what are cast as “core American principles.” Further, this proclamation not only suggests that the pro-choice movement works towards the same goals as those responsible for acts of terrorism, but also aligns victims of the 11 September 2001 terrorist attacks with “unborn victims” of abortion.

Roughly one year later, following the murder of Laci Peterson in December 2002, Representative Melissa Hart (R-PA) would introduce the Unborn Victims of Violence Act of 2003, which may also be cited, as the bill indicates, as Laci and Conner’s Law. The death of Laci Peterson and her unborn son, “Conner,” along with President Bush’s commitment to “the culture of life,” fuelled the passage of the bill, which went through the House of Representatives on 26 February 2004, later passing in the Senate on 25 March 2004. Days before the bill passed in the Senate, Senator Dianne Feinstein (D-CA) introduced an alternative measure, the Motherhood Protection Act, which refers to

“[a]ny person who engages in conduct that...causes the termination of a pregnancy or the interruption of the normal course of pregnancy” with exceptions for “conduct relating to an abortion for which the consent of the pregnant woman has been obtained,” for “conduct relating to medical treatment” (Motherhood Protection Act 2004). This alternative bill is careful not to refer to the protection of “unborn children” or even “the foetus,” but rather refers to the protection of “the pregnancy” in an attempt to avoid ascribing personhood to the foetus. Feinstein’s bill was rejected in the Senate by a vote of fifty to forty-nine (Wilson 2006, 187). Responding to the Senate’s decision in a press release, Feminist Majority President Eleanor Smeal argued:

The very fact that the majority in the Senate refused to vote for the exact same bill with one small change not granting separate personhood to the fetus shows that [t]his legislation had nothing to do with protecting pregnant women, and everything to do with restricting women’s rights....This is all part of the attempt by the right-wing to stop women’s advancements, and to have legislation in place for when they capture the majority on the Supreme Court. This bill, along with others passed in states and federally, are traps waiting to be used to make abortion and birth control illegal. (Feminist Majority Foundation 2004)

After a five-year campaign led by the National Right to Life Committee, President George W. Bush ultimately signed Laci and Conner’s Law on 1 April 2004.

Since then, there have been a number of legislative developments in the United States that work in tandem with the common goal of assigning personhood to the unborn. Recently, for example, Paul C. Broun (R-GA) introduced the Sanctity of Human Life Act as a bill on 7 January 2011 for the explicit purpose of changing and clarifying legal definitions of “fertilization,” “cloning,” and “human” “to provide that human life shall be deemed to begin with fertilization” (Sanctity 2011). A week later, on 20 January 2011, Duncan D. Hunter (R-CA) introduced the Life at Conception Act as a bill for the purpose of implementing “equal protection under the 14th article of amendment to the Constitution for the right to life of each born and preborn human

person" (Life at Conception Act 2011). Both of these bills have since been referred to a committee on the judiciary or to a subcommittee on the constitution. More recently, Mississippi voters rejected Proposition 26 on 8 November 2011, which sought to alter the definition of the term "person" in order "to include every human being from the moment of fertilization, cloning, or the functional equivalent thereof" (Riley 2011). Similar personhood initiatives in Utah and Virginia have also been put forward, but have since been dropped by state senates (Associated Press 2012; Tavernise 2012). These are a few of the many controversial bills, along with the Unborn Victims of Violence Act, that have been put forward to undermine *Roe v. Wade* and extend governmental control over the definitions of life and personhood.

### Born-again Victims: The Politics of Trauma

What is significant about President Bush's National Sanctity of Human Life Day proclamation is not simply the moral equation he makes between terrorists and the pro-choice camp, or the victims of the 9/11 attacks and "unborn victims" of abortion. The sleight of hand here is rather obvious, no more covert than the rhetoric of the "preborn human person" or the "unborn child," which, with a heavy hand, shifts the discourse away from the foetus (or the mother) and deploys the language of personhood to politico-ideological ends. These are the well-known tactics of "personhood initiatives," of those who seek to overturn the rights enshrined in *Roe v. Wade*, those who understand personhood as beginning at conception, and those who deem themselves to be "pro-life" (a term that forecloses upon debate by erecting a problematic binary between those who value "life" and those who value the opposite, however this is conceived). Significantly, "those who do not value life" has also been a familiar refrain in the War on Terror. Shortly after Bush signed the Unborn Victims of Violence Act into law, his senior counsellor, Karen Hughes, in a fashion very similar to the president's proclamation, stressed the American commitment to the value of life in opposition to terrorism.

After September 11th, the American people are valuing life more and realizing that we need policies to value the dignity and worth of every life. And President Bush has

worked to say, let's be reasonable, let's work to value life, let's try to reduce the number of abortions, let's increase adoptions...and really, the fundamental difference between us and the terror network we fight is that we value every life. (qtd. in CNN 2004)

President Bush's attorney general, Alberto Gonzales, also characterized Al-Qaeda as different from all other enemies because it does "not cherish life" (Hersh 2004, 5), effectively justifying the exceptional measures that must be taken in this "war." Indeed, as we argue in the next section, it is the ambiguation concerning the meaning of "life" itself that is seized upon as a form of biopower, in Foucault's sense of the term, and which gets deployed biopolitically—for whoever controls the definition of "life" will be positioned rhetorically as the most capable of defending it.

What is of greater interest in terms of Bush's proclamation, however, is the means by which this exercise of biopower is executed. The 9/11 terrorist attacks themselves operate metonymically as a kind of moral code that both obfuscates power's hold over "life" while, simultaneously, obviating the need for such a move, sidestepping any justification through the logic of trauma. Bush clearly draws the connection: "The terrible events of that fateful day have given us, as a Nation, a greater understanding about the value and wonder of life" (Bush 2002); though the causal relation is never substantiated, it is taken on faith. Through the invocation of 9/11, not only is a nation re-traumatized, a wound reopened, made to bleed in the name of the "unborn children," but what is more, these "unborn victims" are figured alongside the victims of terrorist attacks, and with them, an entire nation—interpellated as victims of 9/11, and who identify themselves moreover as potential victims of the future attacks that are promised to come (let us ignore for a moment how such generalized and globalized interpellation does violence to the irreducibly singular, *actual* victims of 9/11). The temporality of victimhood here rather seamlessly extends into the indefinite future of a perpetual, endless War on Terror; while conversely, the spectral victims of an indefinite future, reified through the inassimilable violence of 9/11, extends rather easily as well into the murky past of the "unborn victim." Both the War on Terror

and “unborn victims” or similar “personhood” legislation cedes to the logic of the pre-emptive strike.

Indeed, under the logic of trauma, the impetus for the public to identify and empathize as victims speaks to a shift that has occurred in our understanding of trauma—from a clinical category to a moral one. We might even consider the moral dimensions of trauma and victimhood as necessary counterparts to “shock doctrine” politics (Klein 2007), where natural or man-made disasters provide the occasion to implement neoliberal and biopolitical forms of governance. As Didier Fassin and Richard Rechtman argue in *The Empire of Trauma*, in recent decades “trauma” has shifted from what was once a dubious clinical diagnosis to “an irrefutable reality linked to a feeling of empathy, [which] has spread throughout the moral space of contemporary societies” (2009, 6). To fail to be traumatized, to refuse to identify as a victim—or moreover, to question one’s own complicity in these traumatizing and victimizing events—is constituted as a social and moral failure. Victimhood is now concomitant with trauma, and trauma with the facticity of events deemed by social forces to be traumatizing, a circular logic. Consequently, it is impermissible to deny the trauma, to deny one’s victimhood, much less to experience it. To do so is tantamount to denying the event itself took place. Meanwhile, the complexity of the event is flattened into a narrow set of effects and affects, re-historicized, and, one might say, manipulated and deployed for purposes of spurious relation to the event itself.

Trauma, then, might be understood as a moral code, the moral economy of contemporary societies, where affective compliance is at once a sign of one’s belonging and a measure of what is real, true, and good. You’re either with us or against us: the new face of empire. Problematically, of course, nothing is more passive than a victim whose moral agency has been evacuated, unless those victims succeed in mobilizing their victimhood as a tool in a demand for justice (Fassin and Rechtman 2009, 279). Here, however, if we follow Bush’s proclamation, collective victimhood is too easily displaced into an identification with “unborn victims,” and the victim’s agency too easily mobilized to resurrect, as it were, the “unborn.” The ostensible demand for justice contained in pro-life legislation is made to stand in for a complex set of social and historical conditions. The victim’s traumatic affects,

here imaginatively reoccupied as “agency,” offer the illusion of agency so long as those affects are compliant and do the state’s bidding, spoken, as it were, with the voice of the unborn, of the dead. There is no question here of the individual, no sense of individual responsibility for the social and historical conditions that may have led to the event. In turning to the “unborn,” 9/11’s victims—however this status is claimed—forsake justice for retribution and are “born-again” in the redemptive embrace of biopolitics. The politics of trauma, here thinly veiled as biopolitics, operates as a fundamentalism, simultaneously a tenet and a test of faith.

### Human Capital: Biopolitics and the Regulation of “Life”

What is the question of life—of *bios*—itself? The challenge is not simply to locate the concept of life within the “history of ideas,” but, as Foucault writes, “to discern beneath them how one or another object could take shape as a possible object of knowledge” (1998, 445). How is it, then, that life itself has become an object to be known, discussed, controlled, and maximized, preserved, or even ransomed and bartered? And more importantly, *whose* life is at stake in these questions? How, for instance, does war succeed in conflating the life of the nation with *my* life, such that the following logically contradictory slogan immediately makes some kind of perverse sense to us: “Go get slaughtered and we promise you a long and pleasant life” (Foucault 2000, 405)? The life that is slaughtered and, simultaneously, preserved cannot logically coincide; and yet, the one who is interpellated by this command/promise is meant to understand a deeper “truth” in life, notwithstanding the fact that he or she has but one life to give. These are undoubtedly different ways to speak of life, and it is not at all obvious that the singular life that is mine can or ought to be mapped onto a collective national life, a political life deemed to be universal, or more “true.”

We suggest in this chapter that, in Foucauldian terms, politics today is none other than biopolitics, the systematic production of life as population, as species-life, as life that is subject to control and regulation by ostensibly democratic political authorities. Foucault defines “biopolitics” in the following terms: “the endeavor, begun in the eighteenth century, to rationalize the prob-

lems presented to governmental practice by the phenomena characteristic of a group of living human beings constituted as a population: health, sanitation, birthrate, longevity, race" (2003a, 202). Here, Foucault claims that in modernity the "life" of the population increasingly comes to inform the ways that individuals are governed—as collectivities or populations whose very lives and vital well-being are increasingly subject to governmental control, surveillance, regulation, segregation, health and welfare policies, improvement programs, and pro-life initiatives—through forecasts, education, risk management, statistical measures, etc.

With biopolitics we see a shift away from the classical form of sovereign power conceived as the *patria potestas*—the power of the family father who enjoyed "the right to 'dispose' of the life of his children and his slaves" (Foucault 1978, 135)—and toward the authority of the state, a power vested in the state apparatus itself. While the slogan of classical sovereign power was the power "to take life or let live"—i.e., the sovereign's political right to revoke the life of a subject or to let him live—the formula of biopolitical power is "to make live and let die" (Foucault 2003b, 241). Thus the focus has shifted dramatically: power no longer concerns the sovereign's imperial hold on the individual body; rather, it is characterized as a decentralized and polymorphic power that regulates the masses, the population, man-as-species, the "race." The sovereign's prerogative to kill or let live gradually is replaced by the diffuse political power to *make* live—that is, through predictive rationality to bestow life, to foster it, to protect it by regulating human reproduction, fertility, productivity, public health and hygiene, accidents, medicine, and the like. In sum, biopolitics does not treat individual bodies; bodies are "massified," bodies are "regularized," and "bodies are replaced by general biological processes" (Foucault 2003b, 249).

The mechanisms introduced by biopolitics include forecasts, statistical estimates and overall measures... regulatory mechanisms must be established to establish an equilibrium, maintain an average, establish a sort of homeostasis, and compensate for variations within this general population and its aleatory field. In a word, security mechanisms had to be installed around the random element inherent in a population of living beings to as to

optimize a state of life...maximize and extract forces. (Foucault 2003b, 246)

As this description attests, the major thrust of biopolitics is underwritten by the instrumentalization and maximum economization of "life." The trauma of 9/11 and the aftermath of compliant affect provided the occasion for "disaster capitalism" (Klein 2007; also see Nadesan 2011) feeding a military-industrial complex, with wars waged on questionable pretexts—weapons of mass destruction (WMDs) in Iraq, the pursuit of shadowy "mastermind" terrorists in Afghanistan. Unsurprisingly, Foucault devotes the major part of *The Birth of Biopolitics* to lectures on neoliberalism and its logics, analyzing the ways in which individuals are seduced into seeing themselves as "human capital" within a system that calculates, quantifies and otherwise measures all manner of human relationships according to the terminology of the "free" market. In Foucault's words, neoliberalism "extends the economic model of supply and demand and of investment-costs-profit so as to make it a model of social relations and of existence itself, a form of relationship of the individual to himself, time, those around him, the group, and the family" (Foucault 2008, 242). However perverse, by these lights it makes perfect sense to characterize the 9/11 terrorist attacks as an attack on American "freedom": by striking the World Trade Center, a symbol of transnational free-market capitalism, not only do the terrorists succeed in crippling free market enterprise in a truly global context, they also undermine the terms in and by which the neoliberal subject is defined as "free."

In other words, while the classical liberalism of the eighteenth century located worth—or dignity—in the individual human person, under neoliberalism, liberalism or "freedom" is redefined in globalizing economic terms, and the market itself (rather than the individual person) is conceived as an end-in-itself according to principles of autonomy and agency, even inalienable rights, dignity, and sovereignty (witness the rise of corporate "personhood"). In this respect, the free market is thought to ensure the equality of all human beings, never mind that individual access to this market is limited by any number of other factors—social, gendered, economic, racial, etc. In the neoliberal world view, then, the value of the individual person becomes

measured quasi-biologically as “human capital,” as “human resources,” vital to the state’s national interests. The individual is reconceived as “entrepreneur of himself, being for himself his own capital, being for himself his own producer, being for himself the source of [his] earnings” (Foucault 2008, 226). To some extent, these neoliberal terms have become interiorized, second-nature to us when we seek to define our subjectivity and our agency; but there is nothing natural or necessary in this self-understanding—the state has arrogated to itself the power to bestow and to protect “life” and “personhood,” their limits and exceptions, for example, extending legal personhood to corporations, on the one hand, and withholding it from “enemy combatants,” on the other. The life and personhood of the unborn is particularly contested terrain, but is one place we can see biopolitical forces at work.

### Biopolitical Trauma as Moral “Code”

We have argued that post 9/11, emergent biopolitical forms of governance relied on the politics of trauma in order to seize hold of “life,” life’s meaning and its limits. Using Foucault’s slogan, “to make life and let die,” we can see political forces at work to judge the living from the dead—distinguishing those whose life should be defended from those who are “merely” allowed to die (e.g., as collateral damage), two salient examples of the latter being Hurricane Katrina and the case of Terri Schiavo (see Diedrich 2011). We are proposing the term “biopolitical trauma” to indicate the intensification, post 9/11, of a particular “moral code,” an ethic, a set of tacit rules to which the subject submits in her own subjectivation. In *The Use of Pleasure*, Foucault characterizes biopolitics specifically as a kind of *techné* animated by a “code of behaviour,” elsewhere called a “coercion-technology” (Foucault 1999), because it is through behavioural techniques that the population is defined (nationally, geopolitically, ethnically, etc.), controlled, and coerced as a mass of docile bodies. The technology is all the more profound when it operates covertly, beneath the surface, on a moral register, informing the very lives that we lead. Foucault writes: “we should not be surprised to find that in certain moralities the main emphasis is placed on the code, on its systematicity, its richness, its capacity

to adjust to every possible case and to embrace every area of behavior” (Foucault 1985, 29). In a biopolitical regime, the code appears infinitely malleable, indeed, infinitely applicable, because it embodies the will of a diffuse and presumably collective authority who sees to the depths of one’s being and interpellates the subject transversally, as a member of a population deemed to be “at risk.” The kind of subject that emerges in this relation is the product of what Foucault calls a “quasi-judicial” subjectivation. Analytically, however, it is impossible to draw a direct, causal line from an event to its effects; what *appears* as causally connected is oftentimes a ruse by which more subtle and diffuse forces take hold and operate.

We see the moral code getting played out—codified, as it were—in the Unborn Victims of Violence Act of 2004, an amendment to the United States penal code. In this section we return briefly to the act as an instance, a representative occasion, for the ways that biopolitical trauma takes hold and operates. The law’s short title, Laci and Conner’s Law, refers to Laci Peterson, a white woman whose brutal murder became a front-page story in large part because she was seven-and-a-half months pregnant at the time of her death. The case of her murder and the consequent death of the prenatal child she was carrying provided the occasion for a public debate on justice—what a just punishment should be—but also the occasion to shift the discourse on the meaning of life and on the definition of personhood more generally. Concern for “justice” here *appeared* as the direct cause of debate, allowing a subtle and diffuse discourse to promote a broader biopolitical agenda surrounding personhood. Significantly, as Rebecca Stringer (2005) notes, the legislation extends rights to the fetus while utterly failing to enshrine in law a woman’s right to be free from violence; and indeed, we might say that the latter is the price of the former. It is not insignificant that the Unborn Victims of Violence Act names the unborn child in this case. Naming is never a neutral act; it is a performative one, ensuring the one who is named some place in the social order—personified, gendered, part of a family, a culture. “Conner” is a good American name, the name of a baseball player, a family man, the name of someone, we imagine, who loves the flag and abhors terrorism. It is the name of someone who will be missed. Here, Conner is the name of the recognizably human, and so,

even if his life is not yet viable outside the womb, it is nevertheless significant that in naming him we can talk about him in his absence, and call him to life, imagining a certain kind of life for him, a life, we are told, that ought to be valued by us, collectively.

What, according to the wording of the law, is the status of the foetus, or, to deploy the language of the law itself, the status of “the unborn child,” of Conner? It asserts that he is an “unborn victim.” The law stipulates that whoever causes harm to a foetus “is guilty of a separate offense,” and shall be punished accordingly: “the same as the punishment provided...had that injury or death occurred to the unborn child’s mother” (Unborn Victims 2004, (a)(1)(2)(A)). The killer is now responsible for two deaths, not just one. But this wording strategically avoids assigning any individuated identity to the foetus, any singular juridical status; instead, in the wording of the law the foetus shares the mother’s juridical status, and here we are meant to call the mother’s legal personhood to mind, and through an act of metonymy to assign to the foetus all of the rights of her person, in effect doubling these rights (which is why some Republicans characterized this legislation as “feminist”). And yet, if the foetus is truly a rights-bearing person, it nevertheless cannot in any straightforward way assume any of the responsibilities or obligations of personhood or citizenship, and so its biological connection to its mother is essential—a relation that is forcibly juridicized.

To be clear, the law does not state that the foetus is a person in its own right, and the law does not conclude that the foetus is fully a human being in itself or as such. Indeed, in the eyes of the law, to be a human being requires something else, something more than metonymic personhood and potentiality. Interestingly, Laci and Conner’s Law affirms that a punishable offence has been committed even if the perpetrator *never intended* to cause harm to the foetus, or even if the perpetrator *did not* or, indeed, *could not have known* that the woman was pregnant; however, it is not until the perpetrator has both *knowledge* of the foetus she is carrying and the clear *intent* to cause harm to it that there is any mention of this foetus being a “human being” (Unborn Victims 2004, (C)). This marks the familiar distinction between manslaughter and murder, but it is especially noteworthy here because the term “human being” is used, and to be human, it suggests, requires both recognition and a certain

knowledge of the foetus, so that “recognition” and “knowledge” become the hallmark of human being. Here, it is precisely this status of the “human being” that the law produces when it judges how the perpetrator “recognized” and had “knowledge” of the foetus, even if he refuses to recognize or to know that foetus as a human being. Presumably, he cannot *intend* to cause harm to the foetus without also at once *recognizing* it as a human being and thus intending to cause harm to the human; and presumably, his intention itself bears upon the foetus’s humanity—the human at once signifying something more than metonymic or potential life, something like political life, a life that is able and obliged to be represented and recognized as human, a life that is able to be murdered. But conversely, it is also a life whose humanness relies on a certain form of representability and recognizability. Although provisions are inserted to allow for abortions (Unborn Victims 2004, (c)(1)), other medical procedures (Unborn Victims 2004, (c)(2)), and a woman’s own right to choose (Unborn Victims 2004, (c)(3)), the wording of the law suggests that the foetus is arguably no less human in these cases because both knowledge and intent to cause harm are present.

Thus, in the wording of the law we find a grey area, a strategic ambiguity, in the very definition of what constitutes human life, caught somewhere between our knowledgeable recognition or our intent, on the one hand, and the brute “fact” of the foetus’s humanity that our knowledge and intent are supposed to register, on the other. Given the absence of any clear ontological priority here, the site of the production of the foetus’s humanity is, we suggest, juridical—indeed, it is forcibly juridicized through the law’s rhetoric, designed to register what *appears* to be a biological fact, but whose biological “facticity” is only produced at great rhetorical expense. Consider how the law explicitly defines the foetus, not only resignifying the foetus as an “unborn child,” but then re-biologizing this “unborn child,” through quasi-medical language, to serve predetermined juridical ends: “the term ‘unborn child’ means a child in utero, and the term ‘child in utero’ or ‘child, who is in utero’ means a member of the species *homo sapiens*, at any stage of development, who is carried in the womb” (Unborn Victims 2004, (d)). The life of the foetus, then, “at any stage of development,” becomes none other than what we might call a kind of “species-life”—a life that is recognizable in



the widest possible sense, and in a sense that is presumably irrefutable because it is rooted in biology, but also a life that is now deployed juridically on behalf of the state, in brief, a biopolitical life—the domain of life over which politics has taken control, “power’s hold over life” (Foucault 2003b, 239).

### Disambiguating “Life”: Biopolitics and Ethical Life

For all its power, the analysis of biopolitical, pro-life language simply does not cut the Gordian knot of trauma, affect, and faith; it is not enough to plot the heavy-handed rhetoric of pro-life proponents. In some sense, the project of disambiguation so conceived has the opposite effect: it works to shore up these terms by conceding the ways they are deployed, allowing the terms of debate to be determined in advance, rather than exposing or, better, subverting the implicit power in their deployment. It is necessary but nevertheless insufficient to look at the ways that language is manipulated toward various political ends. In addition, we shall need an understanding of biopolitical forms of governance and how they are constitutive of the discourse, how they produce a traumatized subject only too willing to cede to biopolitics—for, as we argued above, it is on the level of affect that this rhetoric is effective. We must be cognizant that the affective terms—in the capacious sense of this word—by which we understand ourselves and our own human being, are terms that have poisoned the discourse in advance. By “affective terms” here we have in mind the ways that trauma has become a language, a moral code, by which the self relates to itself—“language” in the widest sense, as cultural idiom, the means of affective compliance and our sense of belonging, all of which are highly mediated, manipulated, and mobilized in the name of biopolitical “life,” but which, like “life” itself, are deployed precisely so as to strike the subject as *immediate*, natural, and beyond critique. In other words, as Fassin and Rechtman (2009) suggest, today there is something “self-evident” about trauma, and this is in concert, we contend, with the “self-evident” understanding of the self, of “life,” and being human. The rhetoric of the immediate or self-evident is highly effective here because any form of critical questioning gets cast as an illogical and perhaps even immoral proposition, just as critical discourse on 9/11 and the

War on Terror was frequently dismissed as un-American, unpatriotic, itself a form of terrorism—tantamount to denial or the ravings of conspiracy theorists.

To sketch a critical response to the constitutive demands of biopolitical life, and to propose a strategy to expose its inner workings, we turn briefly to Foucault’s late work on ethics from circa 1979 until his death in 1984. Importantly, this turn to ethics must be distinguished from the “codes of behaviour” and the biopolitical trauma of “moral codes,” which we have discussed above. Instead, in a properly ethical understanding, the subject is not simply produced through a moral code of behaviour, but rather understands him- or herself as subjectivated through a reflexive moment, through what Foucault calls “practices of the self.” Ethical reflexivity, as Foucault describes it, offers some hope for the subject to understand the effective and affective biopolitical terms that circulate as available ways of being a self, of being recognizably human. It is a critique of recognizability and knowledge as such, and the manner in which these are deployed, and underlie subjective constitution. As Foucault writes, “the system of codes and rules of behavior may be rather rudimentary. Their exact observance may be relatively unimportant, at least compared with what is required of the individual in the relationship he has with himself” (Foucault 1985, 30). In other words, it is much less important to focus on the code’s systematicity, its capacity to incorporate every behaviour, or even its backing by biopolitical authority. The “practices of the self” that form the subject’s self-reflexive relationship, Foucault explains, are based on “different actions, thoughts, and feelings as he endeavors to form himself as an ethical subject” (Foucault 1985, 30). He calls this an “ethics-oriented” morality, and clearly distinguishes it from the politico-juridical or “code-oriented” morality that characterizes a “code of behaviours.” We might summarize this as a *reflexive* mode of subjectivation, in the self’s critical relation to the self, where the self objectivizes the self in a manner that crystallizes its ethical subjectivity—in short, a critical practice, an ethic of critique.

By emphasizing the self–self relation as essential to ethical life, an ethical study will, according to Foucault, seek to understand “the forms within which individuals are able, are obliged, to recognize themselves [*peuvent et doivent se recon-*

*naître*] as subjects" (1985, 4). The goal, then, is to recognize the constitute role of the "affective terms," as we have called them—and to understand their power even as this power subjectivates us. Here, too, there is an ambiguation in ethical life, but it follows a different trajectory from the ambiguation that is produced and deployed for biopolitical ends; obedience to the biopolitical "code" might well appear to resolve ambiguation, but obedience as such is not ethical because it has not come from the subject. In contrast, an ethical approach places the ambiguation front and centre, and allows us to sustain our subjectivity in the face of ambiguation because this struggle marks the condition of ethical life.

Note the reflexivity of Foucault's statement above, "individuals are able, are obliged, to recognize themselves [*peuvent et doivent se reconnaître*]" : self-recognition is key, and the constitution of the self that is incumbent on recognition follows from an ability, an obligation to recognize oneself, even as "affective terms" are effectively concealed. Recognizability does not capitulate to "knowledge" as it does in Laci and Conner's Law, since it struggles precisely over the politics of the production of knowledge and truth—that is my obligation as an ethical subject. The conjunction [*et*] that joins and yet distinguishes my being able [*pouvoir*] from my being obliged [*devoir*] (in the translation, curiously replaced by a comma and the repetition of the verb *être*, "to be")—that conjunction is itself ambiguous: am I able and obliged, or does my ability causally oblige me, or, again, is my ability superseded by an obligation that would mark the limits of or, perhaps, animate my ability? My power, here, my being able [*pouvoir*], is characterized by a productive ambivalence; the power that is at once mine and that nevertheless subjectivates me is a power that is at once an ability and an obligation. Significantly, we cannot establish any logical priority: I ought to because I can, and I can because I ought to. The ethical subject does not immediately coincide with herself, and in this moment, in this ambivalence, lies a possibility for freedom and for being-other-wise. One is obliged, but the choice is ethical through and through because one is also free, able to refuse.

Indeed, these choices are a part of everyday life, the sign of the subject's livingness. Again, ethical thought is not mere calculation, nor is it the rote application of an established code. The

code is not ethical as such. In "The Subject and Power" (1983), Foucault suggests that we might better understand power relations in the quotidian if we begin with very modest, local resistances to power. These local struggles return us to ourselves and to the ways in which the self relates to itself, the manner in which it has been subjectivated. "The main objective of these struggles," Foucault writes, "is to attack not so much such-or-such institution of power, or group, or elite, or class but, rather, a technique, a form of power" (Foucault 1983, 331). It is the technique, the *techné* itself, a whole way of life that must be subject to ethical scrutiny. This "form of power" against which we struggle is a form "that applies itself to immediate everyday life[,] categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him that he must recognize and others have to recognize in him" (Foucault 1983, 331). In other words, Foucault exhorts us to struggle against the very power of subjectivation, against "affective terms," whether this individualized fixing of my identity comes through "control and dependence" or whether it ties me to my identity "by a conscience or self-knowledge" (Foucault 1983, 331), by my very own doing.

### Conclusion: An Ethic of Critique

The promise of Foucault's ethics in this sense is that we become free to choose ourselves, and to refuse the kind of relation we have to ourselves, free to forge new ones. It is a mode of ethical refusal, a refusal of the manner in which we are objectivized and, more tellingly, the manner in which we objectivize ourselves. Foucault writes: "Maybe the target nowadays is not to discover what we are but to refuse what we are" (1983, 336), which means, paradoxically perhaps, that we must be able to refuse what we are without quite discovering or knowing it yet, and also without knowing what it is—or who—we will become. In other words, the refusal is not predicated on cognitive knowledge or on intent (to deploy the language of Unborn Victims), neither on a looking forward nor a looking back. The "we" here is doubled promiscuously, displacing the site and substantiality of the subject, freeing it to new possibilities and a new life. This project is patently political: the "we" that refuses is not just a grammatical fiction but is that subjectivity that is both *able* and *obliged* to "liberate us both

from the state and from the type of individualization linked to the state" (Foucault 1983, 336). "We" are free to refuse not only the imposition of identity that comes from without, heteronymously, but refuse also the forms of self-imposition, those "affective terms" that have become the hallmark of who we are as modern, traumatized subjects. In a tentative tone, then, we might say that ethics offers an antidote to biopolitics, a refusal of a code-oriented morality, coercion-technologies, or what Foucault elsewhere calls "political rationality," "forms of rationality, which the human subject applie[s] to himself" (Foucault 1989, 355).

The refusal in question emerges not from biopolitical life but from "everyday life," from a self that has become "historically constituted as experience" (Foucault 1985, 6–7), a mode of "being," which, through historical problematizations, "offers itself to be, necessarily, thought" (Foucault 1985, 11). While Foucault employs a rhetoric of liberation here, it is always in relation to that self-reflexive moment of subject formation, always in conjunction with ethics as the relation of self–self. One must strive to "get free of oneself," he writes, to "stray afield" from oneself, to "free thought from what it silently thinks, and so enable it to think differently" (Foucault 1985, 8–9). Ethics has little to do with codes, and everything to do with critical thinking, with philosophy—"an exercise of oneself in the activity of thought" (Foucault 1985, 9). Otherwise said, "The work of the intellect is to show that what is, does not have to be what it is" (Foucault 1989, 359).

To get free of or stray afield from oneself implies an ethics of self-renunciation that differs substantially from the biopolitical self-renunciation that marks the modern, traumatized subject and interpellates her as a random and interchangeable member of a population. Recall the state's biopolitical command/promise: "Go get slaughtered and we promise you a long and pleasant life!" In other words, the biopolitical state paradoxically demands that you renounce your life so that you may live, for your freedom is not yours, and never was. But there is a conflation here between *your* life and the life of the population or state. Without returning us wholesale to a subject framed by the morality of knowledge and intent, ethical self-renunciation embraces the ambiguation of a life lived. It is a principle of living, a style of life, that does not capitulate to a code.

Our claim in this chapter is that the "*bios*" that amounts to a form of biopolitical "life" is not the same as ethical "life." And only through ethical life—the "*bios*" of a life lived—can our shared political life become something other than biopolitics. It is to insist that the concept of modern life as biopolitical trauma—as "power's hold over life"—is itself produced politically and historically, and therefore can become other than what it is. Such a task is exigent upon us, we argue, given the Unborn Victims of Violence Act of 2004 and other "personhood" initiatives, which index a shift in power's hold over life, particularly in the wake of 9/11. Here we witness the birth of a new form of fundamentalism (sutured to US Christian evangelism) in which we are "born-again" as victims through the affective compliance of trauma, ostensibly secular as event and response, but which operates with all the force of a floating or transcendental signifier, a divine command to wage war on the "evil" and "tyranny" "that does not value life." Affect and trauma feed on each other, in a circular logic—"they were who we are," an affective identification, a tenet and test of faith; the born-again and the unborn undergo a conversion and are consolidated as victims, and, blurring the boundaries between the living and the dead, the work of mourning becomes a displaced pursuit of biopolitical salvation.

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