

Biopolitics and the Female Reproductive Body as the New Subject of Law

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To say that the histories and conceptual frameworks of Michel Foucault have, since the late 1980s, heavily influenced feminist theory is an understatement. On the other hand, one might add that the influence of Foucault on feminist jurisprudence and feminist legal theory has been much less pronounced, in spite of the obvious value of Foucault's work for critical legal theory more generally.¹ One probable reason for this is the uncanny resemblance of Foucault's 'sexless subject' to the abstract sexless subject of law which feminist legal theory has been tirelessly critiquing since its inception (giving rise to feminist works with titles such as: "unspeakable subjects",² "the hidden gender of law",³ "sexing the subject of law",⁴ and so on).

And yet, when a 'new Foucault' – the Italian political philosopher Giorgio Agamben – hit the critical legal scene in the late nineties, one might argue that a new kind of feminist legal theory was quickly born; one that was receptive and subtly attentive to the work of both Foucault and Agamben. And this in spite of the fact that Agamben's legal subjects are, like Foucault's, utterly sexless. What might explain this phenomenon? Here, we suggest that Agamben's work on law and citizenship, in focusing exclusively on Foucault's concept of *biopolitics*, and therefore on questions of the regulation of populations rather than of individual bodies, represents a point of departure that is particularly 'user friendly' for feminist legal theory. We would also argue that feminist legal scholars need not be disturbed by Agamben's apparent sex blindness – as earlier scholars were by the sex blindness of Foucault.

While it is not possible, due to limits of space, to do justice to the full impact Agamben's work has had on Foucauldian scholarship, it seems important to mention here a particular dimension of his theoretical manner of working, which in some sense constitutes a thread running through all his works on political and legal theory, namely the idea of a "zone of indistinction": the collapse of 'inside' and 'outside' into one another; the impossibility of speaking of social exclusion without at the same time speaking of an inclusion; one is included in order to be excluded. The zone of indistinction is an immediate effect of a regime of justice and rights in which all legal categories are derived from a politics

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¹ See for example Vanessa E. Munro, "Legal Feminism and Foucault – a Critique of the Expulsion of Law", in *Journal of Law and Society*, 28, 4 (December 2001): 546 – 67.

² Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, Hart Publishing: Oxford 1998.

³ Regina Graycar and Jenny Morgan, *The Hidden Gender of Law*. Sydney: Federation Press, 2nd ed. 2002.

⁴ Ngaire Naffine and Rosemary J. Owens (eds), *Sexing the Subject of Law*. LBC Information Services: Sydney 1997.

founded in biology. Such a regime, which Foucault named the biopolitical state, is primarily concerned with the questions of whether a being is alive or dead; whether it lives or dies; how long it can, or should live; in what manner it will die; how healthy it is in its state of life, and so on.

The reduction of all living beings to biological organisms under biopolitical regimes (which, for Foucault and Agamben, refers to all the populations of modern states – with the late eighteenth century as the key moment of historical transformation) accompanies the collapse of “traditional political distinctions . . . such as those between Right and Left, liberalism and totalitarianism, private and public”.⁵ That is the meaning of the zone of indistinction: the impossibility of distinguishing the supposedly legally protected citizen from politically vulnerable “bare life”. Bare life is the term Agamben uses to denote life that may be killed or preserved arbitrarily, developed from Agamben’s revisionist work on Hannah Arendt’s discussion of the political category of the refugee in *The Origins of Totalitarianism*.⁶

It is not difficult to imagine ways in which Agamben’s framework, which does not recognize the legal categories of public and private, might speak to feminist legal perspectives, which dismantled these artificial distinctions of liberal political theory years ago.⁷ But it is not the collapsed binaries *per se* which have attracted feminist scholars to his work, but rather his particular collapse of the political category of the citizen into the biological category of “bare life”. This category has invited feminist theorists to ponder the gender implications of a political theory of law that sees politics as the reduction of all citizens to their ‘bare’ biological functions (what Foucault referred to as “the bestialization of man”⁸). In a recent edited collection of essays entitled *The Agamben Effect*,⁹ Penelope Deutscher asks the critical 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’?”¹⁰ As one might expect, Deutscher’s engagement with Agamben is in part intended as a corrective to a male theory that is blatantly indifferent to gender difference, and indeed other bodily markers of difference. She writes: “women’s bodies are impressively absent from Agamben’s writing, as are reproductive bodies”.¹¹ Elsewhere, she points out that when Agamben speaks of “life”, he means that which has been first identified as human “and then stripped of that status or

⁵ Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*, Daniel Heller-Roazen, trans, Stanford University Press: Stanford, California 1998, 122.

⁶ See Hannah Arendt, “The Decline of the Nation State and the Rights of Man”, in *The Origins of Totalitarianism*, Harvest Books: New York 1976, 267-304.

⁷ See Frances E. Olsen’s “The Myth of State Intervention in the Family” and other essays included in the seminal collection, *Feminist Legal Theory*, Frances E. Olsen, ed, Dartmouth: Aldershot 1995.

⁸ Michel Foucault, *Dits et écrits*, cited in Agamben, *Homo Sacer*, 3.

⁹ Special edition of the *South Atlantic Quarterly*, 107 (1) 2008, Alison Ross, ed.

¹⁰ Penelope Deutscher, “The Inversion of Exceptionality: Foucault, Agamben, and ‘Reproductive Rights’”, in *The Agamben Effect*, above, 55-70; here 55.

¹¹ Deutscher, “The Inversion of Exceptionality”, 59.

subjected to a threshold state: the overcomatose person,¹² the immigrant, the refugee, the internee, the enemy combatant, the *Muselmann*.¹³ This makes it hard to insert into the theory forms of life that have never been accorded the status of the human in the first instance: the fetus, for example, and indeed the reproductive life of woman herself as womb-owning bearer of the fetus. Life, in an Agambenesque world, according to Deutscher, is life dissociated entirely from women's reproductivity. Yet, it is perhaps this very dissociation of woman from the theory that strikes Deutscher as the key to its potential for feminist theory; an "intriguing potential", she writes, "to operate as a lens to rethink the terms *life, bare life, threshold, and biopolitics*".¹⁴

If we were to intervene in order to reformulate Deutscher's hypothesis regarding the "potential" in Agamben's work for feminist theory, it would be as follows: woman is absent from the theory insofar as the body of 'woman' (by which we mean 'reproductive woman') is already assumed as a key political referent. The theory, as it stands, sex blind as it is, is committed to an analysis of bodies in relation to the legal thresholds between "life and death, animate and inanimate, human and inhuman, nature and culture".¹⁵ It therefore begs for an analysis of human bodies in relation to reproduction, and as mechanisms for reproduction. 'Human life', in such an analysis, and with it 'human rights' and the ethical foundations of citizenship in any given biopolitical state, must inevitably turn to a set of political and legislative questions around reproduction, reproductive rights (especially abortion), sexuality, and the family. In short, biopolitical theory cannot avoid making the female body central to its analysis of human life as an undefined essence both protected and unprotected by law.

Against this (our) argument, Deutscher might justifiably reply, as indeed she makes clear in her essay, that Agamben's analysis, while enabling a legal analysis that occupies a "ghostly proximity" to feminist analysis, nevertheless contains a 'non accidental' sex blindness, which fails in its feminism, just as sex blind legal and political theory has *always* failed in its feminism.¹⁶ Consider, then, the groundbreaking legal history by Ruth Miller, entitled *The Limits of Bodily Integrity*.¹⁷ Miller proceeds from a theoretical insight informed directly by Foucault and Agamben:

Contemporary jurisprudence has not been a simple by-product of, but has been aimed precisely at constructing, [a] biologically/sexually passive, politically active sovereign subject ... Defined first

¹² An overcomatose person is one whose vital functions have effectively ceased but for the intervention of life-support technologies - "[t]he survival of the overcomatose person automatically ended as soon as the life-support system was interrupted". Agamben, *Homo Sacer*, 160-161. The status of the overcomatose person is politicized by Agamben when he asks: "What was the zone of life beyond coma? Who or what is the overcomatose person?" (161).

¹³ Deutscher, "The Inversion of Exceptionality", 58.

¹⁴ Deutscher, "The Inversion of Exceptionality", 58-59.

¹⁵ Agamben, cited in Deutscher, "The Inversion of Exceptionality", 59.

¹⁶ Deutscher, "The Inversion of Exceptionality", 59.

¹⁷ Ruth Miller, *The Limits of Bodily Integrity. Abortion, Adultery, and Rape Legislation in Comparative Perspective*, Ashgate: Aldershot 2007.

and foremost as a biological (sexual and reproductive) criminal in need of regulation, this citizen can operate only in (and as) biopolitical space.¹⁸

The bracketed “(and as)” is crucial here. What we are to understand from Miller’s analysis is that contemporary jurisprudence in modern times has been dedicated to the legal construction of a subject that not only occupies political space as a biological, reproductive animal, but which *is* biopolitical space – which for Miller means the womb. The womb, and by logical extension, the womb-owner is, in Miller’s analysis, the paradigmatic citizen (or what she calls “the neutral citizen”) of the modern biopolitical state. She writes, and we quote this highly important passage at length by way of conclusion,

For the most part a legal fantasy, [the] neutral citizen is rational and politically inviolate, operates faultlessly in the public sphere, and exercises right or performs duties under the aegis of a classical-juridical social contract. As a matter of course this citizen is also male. ...

[T]hese interpretations of the political neutral ... hold only if we assume that classical juridical theory has indeed served as a model for sovereign relations over the past 200 years – if we assume that modern nation states have in fact been operating according to a liberal social contract. If, however, we assume that the predominant model of sovereignty has been biopolitical, that the fundamental sovereign right has been the right to make live and let die – if we place sexual and reproductive legislation at the center of citizenship formation, and understand political activity as biological passivity – then we need to rethink this analysis ... Rather than understanding men as the norm and women as artificial facsimiles of men, it makes far more sense in a biopolitical framework to understand women as the norm and men as their copies. It is the womb that has become the predominant biopolitical space, it is women’s bodily borders that have been displaced onto national ones, [and] it is thus the citizen with the womb who has become the political neutral – and rather than grudgingly granting women the artificial phalluses assumed by liberal theory, one can in fact advance an argument that men instead have been granted the artificial wombs assumed by its biopolitical counterpart.¹⁹

Earlier, we suggested that although Agamben’s theory seems to neglect questions of sexual difference, sex blindness here might be immaterial from a feminist perspective, insofar as Agamben’s biopolitical conceptual framework, which works with a particular biological conception of legal citizenship, inevitably and logically proceeds to the reproductive body of woman as a key political referent (by virtue of the dichotomies it interrogates and collapses, such as life/death, animate/inanimate, human/inhuman, nature/culture, etc). In Miller, this point is made using a biopolitical framework derived from Foucault and Agamben to argue that the modern biopolitical state automatically places biological reproduction at the center of what it means to be a political citizen. Her thesis uses Agamben’s theoretical framework to illustrate the paradigmatic status of the female citizen (as womb owner), rather than correcting his framework for its lack of attention to bodily markers of sexual difference. In fact, Miller even goes as far as to critique feminist political theory for a kind of sex blindness; one which assumes that the neutral citizen is male, thereby confusing liberal political fantasy with biopolitical reality.

¹⁸ Miller, *The Limits of Bodily Integrity*, 128.

¹⁹ Miller, *The Limits of Bodily Integrity*, 149.

Is it possible that an ‘Agamben effect’ in critical legal theory is facilitating a new understanding of citizenship, according to which it is the *female reproductive body* which represents the universal (paradigmatic) subject of law? As such, feminist legal theory might usefully serve as a tool for analysing the “relentless *inclusion*” of women in the biopolitical state.²⁰ This also would suggest that feminist legal theory is becoming paradigmatic of all critical legal theory in just the same the way as the female reproductive subject has become the paradigmatic legal subject within the biopolitical state.

²⁰ Cf. Miller, *The Limits of Bodily Integrity*, 13.
