

Before the Law:  
Humans and Other Animals in a Biopolitical Frame

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I.

To begin at the beginning: I choose the word “frame” for my title (rather than adjacent terms such as, say, “context”) for a few different reasons that interconnect some of the subterranean conceptual passageways of this long essay. First, I want to mark a lengthening genealogy of biopolitical thought that stretches back from current avatars such as Roberto Esposito, Judith Butler, and Giorgio Agamben, through the *locus classicus* of Michel Foucault’s later work (a *locus* that is becoming more and more *classicus* by the day, thanks to the ongoing translation and publication of his lectures at the Collège de France), to what we are now in a position to see as biopolitical thought *avant la lettre*, as it were, in the work of Hannah Arendt and Martin Heidegger. Directly pertinent for my title is the sense of Heidegger’s *Gestell* (or “enframing” or “framework,” as it is often translated) from his well-known later essay, “The Question Concerning Technology.”<sup>1</sup> There, Heidegger asserts that the essence of technology is not “anything technological” but rather how it discloses the world to us as mode of “bringing-forth” what is here for us, and how.<sup>2</sup> For Heidegger (and, as we shall see, for biopolitical thought generally), enframing is anything but a neutral concept; indeed, with the luxury of 20-20 hindsight, we can now see that it is deep background (as the journalists say) for what Foucault and others will call the *dispositifs* or apparatuses of biopolitics. *Gestell*, while neither natural nor human, frames the human’s relation both to itself and to nature, and in ways that are far from sanguine in Heidegger’s view.<sup>3</sup> “Where enframing reigns,” Heidegger writes, “there is *danger* in the highest sense.”<sup>4</sup> What we encounter here is a mode of revealing the world which sets it out before us in a mode of instrumentality and utility that Heidegger famously calls “standing-reserve” (*Bestand*). As Heidegger puts it in a famous passage,

As soon as what is unconcealed no longer concerns man even as object, but does so, rather, exclusively as standing-reserve, and man in the midst of objectlessness is nothing but the orderer of the standing reserve, then he comes to the brink of a precipitous fall; that is, he comes to the point where he himself will have to be taken as standing-reserve. Meanwhile man, precisely as the one so threatened, exalts himself to the posture of lord of the earth. In this way the impression comes to prevail that everything man encounters exists only insofar as it is his construct. This illusion gives rise to one final delusion: It seems as though man everywhere and always encounters only himself.<sup>5</sup>

But the self he encounters is, as Heidegger notes, fallen, inauthentic: “*In truth, however*” Heidegger continues, “*precisely nowhere does man today any longer encounter himself, i.e. his essence.*”<sup>6</sup>

The effect of this enframing is thus two-fold: not only is the human being cut off from a more authentic relation to the natural world, it is also cut off from an authentic relationship to itself. Sounding notes that, as we’ll see, both Michel Foucault and Peter Sloterdijk will amplify decades later, Heidegger asserts that humanity thus comes, in fact, to be seen as a kind of standing-reserve in and of itself—a fact reflected in the contemporary reframing of individuals as “human resources” and the like.<sup>7</sup> Over and against this work of *Gestell*, Heidegger sets what he calls the “saving power”<sup>8</sup> of a humanity (and a humanism) not wholly subordinated to calculation and utility, one that is able to engage artistically, poetically, and philosophically, in reflection and meditation, in questioning (hence Derrida’s emphasis in the subtitle of his book on Heidegger, *Of Spirit*, on Heidegger and “*the question*”).<sup>9</sup>

We find here, then, not just one of the high water marks of humanism’s familiar opposition of art and philosophy on the one hand to calculation and utility on the other, but also an even deeper and more decisive determination of the proper and improper relation of the human to technology, and hence to itself: “Technology is no mere means,” Heidegger reminds us, and while it may operate improperly as calculation and resource management, it may also take on a more edifying role in “the arts of the mind and the fine arts,” where it “belongs to bringing-forth, to *poiesis*.”<sup>10</sup> In fact, as Heidegger’s thought develops in both “The Question Concerning Technology” and the “Letter on Humanism,” this difference between a proper and improper relationship to technology enables, in turn, a decisive ontological distinction between those who are fully human and those who are less than human, those others who have been so fundamentally distanced from Being by an improper relationship to technology that their very humanity is in question.<sup>11</sup> As Heidegger writes in the “Letter,” “For this is humanism: meditating and caring, that man be human and not inhumane, ‘inhuman,’ that is, outside his essence.”<sup>12</sup>

Now we know, as I have pointed out elsewhere (following well-known discussions by Derrida and others), that the primary means by which this “saving” takes place is above all through the capacity for language, which is, properly understood, not semiotic but phenomenological, and gives access to things “as such,” as opposed to language understood as “communication,” “information,” and the like.<sup>13</sup> We thus find a fundamental distinction, as Timothy Campbell puts it, “between those, on one side who are mere subjects of communication; those who later will be enrolled among the ranks of *animalitas*; and others who, thanks to a proper writing, are seen as free, individual human beings, capable of ‘care.’”<sup>14</sup> Precisely here, in this distinction between the proper and improper relation not just to technology, but more fundamentally of the human to itself, we may locate the hinge in Heidegger’s work between the two main lines of contemporary biopolitical thought, one (associated with Foucault) focused on technology and *dispositifs*, and the other (associated with Agamben) focused on the subject’s proper relation to its own singularity and uniqueness—its “ipseity” (to use the term Derrida will later unpack in relation to the question of sovereignty). By these lights, ipseity and sovereignty are taken to be in stark opposition to the “animal,”<sup>15</sup> and to the animality of the human when the human becomes something anonymous, either

through massification (as in Foucault's studies of the mechanisms biopolitics such as population sciences and medicalization) or by being reduced to an equally anonymous condition of "bare life."<sup>16</sup> But what I want to emphasize here is Heidegger's opening up of a gap—a dangerous gap, as the history of biopolitics well shows, but also one jealously guarded by humanism—between humanity and animality as ontologically opposed zones. Indeed, the "humans *and other animals*" of my title is meant as a direct challenge to this distinction, so crucial to Heidegger's entire corpus—indeed, one of its central dogmas (to use Derrida's characterization<sup>17</sup>).

Heidegger's meditations on the frame and enframing will eventually be radicalized and pushed to their self-deconstructing conclusions in another famous discussion of the frame—namely, Derrida's analysis of the *parergon* (a term he borrows from Kant) as that "which simultaneously constitutes and destroys" what it frames, paradoxically supplementing that which is already complete.<sup>18</sup> It separates the inside from the outside, the intrinsic and the extrinsic, and yet also serves to bridge them, making them interdependent. Derrida's analysis of the *parergon* does to Heidegger's *Gestell* what his *pharmakon* will do to Heidegger's distinction between the proper and the improper—and in ways, as we will see, that connect directly to what Roberto Esposito and others have identified as the "immunitary" (and, with Derrida, "autoimmunitary") logic of the biopolitical.<sup>19</sup> To put it this way is to remind ourselves that the question of framing is not simply a logical or epistemological problem, but a social and material one, with consequences. Framing decides what we recognize and what we don't, what counts and what doesn't; and it also determines the consequences of falling outside the frame (in the case at hand in this book, outside the frame as "animal," as "*zoe*," as "bare life").

We are now in a better position to critically assess, however briefly, another towering figure in the prehistory of contemporary biopolitical thought, Hannah Arendt, to help clarify (against her own intentions, as it were) why talk about non-human animals *at all* in the context of biopolitics is not simply a category mistake. Arendt brilliantly argues in *The Origins of Totalitarianism* that the idea of "universal human rights" is dubious because it attempts to ground the standing of the subject of rights in the mere biological designation of the human being as *homo sapiens*, whereas rights themselves are always a product of membership in a political community. They are, as she puts it in *The Human Condition*, "artificial."<sup>20</sup> By contrast, a "human being in general—without a profession, without a citizenship, without an opinion"—belongs "to the human race in much the same way as animals belong to a specific animal species."<sup>21</sup> And more interesting still is Arendt's suggestion that groups founded to support universal human rights and the declarations they frame "showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals."<sup>22</sup>

Arendt is on to something here, but her humanist commitments prevent her from recognizing exactly what it is. Her resistance to what Jacques Derrida will later (and in agreement with Heidegger) reject as "biologistic continuism," and her recourse to what we might call a formal or conventional concept of rights is perfectly correct, as far as it goes, but it is immediately pressured and complicated by the historical fact that the very call of the Universal Declaration of Human Rights of 1948 arises on the basis

of the massive presence of stateless persons—persons derived of personhood in precisely her sense—during World War II and its wake. It arises, that is, with the increasingly undeniable presence of what biopolitical thought will canonically come to call “bare life.”<sup>23</sup> And so the dilemma she faces is that her formal concept of rights, derived as they are from reciprocal membership in a political community, leaves her no immediately apparent way to recognize the claims of these newly stateless persons whose problem “is not that they are deprived of life, liberty, and the pursuit of happiness,” but rather “that they no longer belong to any community whatsoever.”<sup>24</sup> But when Arendt confronts the conundrum raised by this historical event—namely, how can the claim of these people be framed, what constitutes “a right to have rights”?—she falls back on a classically humanist argument that derives from Aristotle: for the “right to have rights” consists in the ability to enter into relations of reciprocal obligation (or what she calls, a little more lyrically, “a framework where one is judged by one’s actions and opinions).”<sup>25</sup>

Here, then, we find the classic opposition, already familiar to us from Heidegger, of the authentically political as a realm of freedom, choice, “artifice” and so on versus the realm of necessity, utility, and mere “animal” or “natural” existence.<sup>26</sup> And, as in Aristotle, that opposition, like the right to have rights, is grounded in the human being’s capacity for speech and language (and a rather naturalistically conceived idea of language at that).<sup>27</sup> As she puts it in *The Human Condition* (virtually paraphrasing Aristotle’s famous passage from the *Politics*), “speech is what makes man a political being.”<sup>28</sup> What Arendt is right about—and we will return to these issues in much more detail later—is that the designation of those who have standing, who have rights, is a matter of sheer convention outside of any naturalistic ground or biological designation. What she is wrong about is that the problem raised for humanism by “bare life”—how do we recognize the “right to have rights” for stateless persons but not for “savages” or “beasts” (her terms)<sup>29</sup>—can be solved by the gatekeeper function of “speech.” Indeed, the most obvious symptom of this conundrum in Arendt’s position is that “speech” appears to be both “natural” and “artificial.”<sup>30</sup> On the one hand, speech provides the naturalistic basis, specific to humans, of the “right to have rights”; but on the other hand, speech alone is not enough to secure standing. It has to be “relevant” and recognized, as she puts it—has to hew, that is, to a set of artificial social conventions (indeed, that they *are* artificial and not “natural” is what makes them political).<sup>31</sup>

At this juncture, of course, we might question the relevance of speech for determining the rights-holding subject by means of Jeremy Bentham’s famous observation (and Derrida’s unpacking of it in *The Animal That Therefore I Am*) that that fundamental question here is not, “can they reason?,” or “can they talk?,” but “can they suffer?”<sup>32</sup> Here, the issue would be not the paradoxical nature of a speech that is both artificial and natural, redoubled in the difference between “rights” and “the right to have rights” (a right that is, paradoxically, not one), but rather the sheer irrelevance of speech itself to the question of standing (a question we will return to shortly). But what I want to underscore here instead is a logic implicit in Arendt’s writings, particularly in *The Origins of Totalitarianism*-- a logic that she doesn’t quite tease out but one that will be central to biopolitical thought in the decades that follow: the fact, as

Esposito puts it, that “the category of those who enjoy a certain right is defined only by contrast with those who, not falling within it, are excluded from it.”<sup>33</sup>

And here—to move to the main part of my title—we can begin to glimpse the many senses of what it means to be “before the law”: “before” in the sense of that which is ontologically and/or logically antecedent to the law, which exists prior to the moment when the law, in all its contingency and immanence, enacts its originary violence, installs its frame for who’s in and who’s out. This is the sense of “before” that is marked by Arendt’s speculations on the “right to have rights,” and it is against such a “before” that the immanence of the law and its exclusions is judged. And thus, “before” in another sense as well, in the sense of standing before the judgment of a law that is inscrutable not just because it establishes by fiat who falls inside and outside the frame, but also because it disavows its own contingency through violence: namely, the violence of sacrifice for which the distinction between human and animal has historically been bedrock, providing for the law the “foundation” for its exclusions that the law cannot provide for itself. As Derrida, Agamben, and others have reminded us, those who fall outside the frame, because they are marked by differences of race, or species, or gender, or religion, or nationality, are always threatened with “a non-criminal putting to death.” As Derrida puts it in the interview “Eating Well,” “Thou shalt not kill” turns out not to be a universalizable maxim, but one that only concerns those for whom it is a “proper” imperative, those who fall inside the frame.<sup>34</sup>

In this light, it is all the more instructive to recall, as Derrida points out in his essay “Before the Law,” that when Freud addresses the problem of the origin of law (what is its basis? on what moral foundations does it rest?) he resorts to what amounts to a sacrifice of the animal, and more broadly of animality, as the means by which both the human and the basis of the law are secured.<sup>35</sup> Here and elsewhere, Freud’s concept of “organic repression” marks the point at which the properly human breaks free of and rises above its animal origins, and it is on that basis that moral behavior is founded.<sup>36</sup> But this is not just a “schema of elevation,” as Derrida puts it; it is also a “schema of purification”—purification of the animal in “man.”<sup>37</sup> Since “man” has to *already* exist to find that which is repugnant in need of repression and thus rise above it, Freud’s search for the origin of law simultaneously marks its own impossibility. Instead, the law is “an absolutely emergent order, absolute and detached from any origin.”<sup>38</sup>

But if Derrida is right that this sacrificial structure is fundamental to the entire canonical discourse of “Western metaphysics or religions,” the work that it accomplishes is anything but academic, since it is also of “the order of the political, the State, right, or morality,” never far from the mundane violence of everyday life.<sup>39</sup> One of the most powerful insights of biopolitical thought is thus to raise this uncomfortable question: if the frame is about rules and laws, about what is proper, and not simply a matter of a line that is given by nature between those inside and those outside, then to live under biopolitics is to live in a situation in which we are all always already (potential) “animals” before the law—not just non-human animals according to zoological classification, but any group of living beings that is so framed. Here, the distinction “human/animal”—as the history of slavery, colonialism, and imperialism well shows—is a discursive resource, not a zoological designation; it is, as we will discuss in more detail, a

kind of *dispositif* or apparatus. It is all the more ironic, then, that the main line of biopolitical thought has had little or nothing to say about how this logic effects non-human beings—a cruel irony indeed, given how “animalization” has been one of its main resources. And it is to that problem that I want to devote my attention in the pages that follow.

## II.

In a sense, what follows may be seen as an attempt to explore the extent to which biopolitical thought can help us understand jarring juxtapositions of the sort that I now want to offer in two examples of how non-human animals are currently framed at opposite extremes in relation to moral standing and legal protection, how they stand before the law.

First example: On June 25 of 2008, the Environmental Committee of the Spanish Parliament approved resolutions to grant basic rights to Great Apes on a quite traditional model of human rights. To use the language of *The Great Ape Project* co-authored by philosophers Peter Singer and Paola Cavalieri, the three basic rights outlined for this new “community of equals” are 1) “The Right to Life,” which means that “members of the community may not be killed except in very strictly defined circumstances” such as self-defense; 2) “The Protection of Individual Liberty,” which forbids imprisonment “without due process” and only where it can be shown to be “for their own good, or necessary to protect to protect the public”; and 3) “The Prohibition of Torture,” which forbids “the deliberate infliction of severe pain on a member of the community.”<sup>40</sup>

Second example: According to statistics provided by the US Department of Agriculture, in the previous year, 2007, about nine billion animals were killed in the United States for food—the vast majority of them raised in Confined Animal Feeding Operations (CAFOs) or “factory farms”—double the number in 1980. This figure does not include the killing of fish, crustaceans, and other farmed animals, nor does it include equines.<sup>41</sup> The National Commission on Industrial Farm Animal Production—a project of the Pew Charitable Trust and the Johns Hopkins Bloomberg School of Public Health—concluded in its final report of 2006 that “at present, federal regulation of the treatment of farm animals is minimal,” with the two main pieces of legislation having been passed in 1873 and 1958. With one exception (regarding the slaughter of horses), the Commission notes that all other attempts to upgrade federal laws governing standards for farm animal slaughter, housing, and transport have failed—a paucity of regulation that that is in marked contrast to federal oversight of many (but not all) animals, including farm animals.<sup>42</sup>

I will return to the second example, factory farming, in some detail later in these pages, and like the first, it will eventually push us well beyond the purview of current legal doctrine. But it should be noted that even within that limited purview, the Commission’s assessment is, if anything, overly sanguine. The two primary laws regulating the treatment of non-human animals in the United States are The Animal Welfare Act and the Humane Methods of Livestock Slaughter Act. The latter was passed by Congress in 1958, amended in 1978 and 2002, and stipulates that cattle, horses, and other livestock killed for food must be slaughtered with minimal pain and suffering. Before the 1978 amendment, livestock routinely had their throats cut while fully conscious., but now they must, for example, be stunned (or otherwise made insensible) before killing. It is worth noting, however, that ninety-nine percent of the animals killed for food in the United States each year (namely, chickens) are excluded from protection by the HSA—a

fact that is doubtless driven by the additional expense that would be incurred by the poultry industry were they to be protected by the law.

The 2002 amendment followed a front-page story in *The Washington Post* in April 2001 called “They Die Piece By Piece” which documented widespread unchecked cruelty in the US slaughterhouse industry.<sup>43</sup> But even after the passage of the 2002 amendment, abuses continue on a massive scale because of one fundamental problem. The law is only as strong as its enforcement, and, as is well documented, the USDA has typically been anything but vigorous in its enforcement of the HSA, as USDA inspectors themselves acknowledge.<sup>44</sup> This fact is less surprising, perhaps, when we remember that the agency itself aids in the marketing and promotion of the very food industries it is charged with regulating.<sup>45</sup> (Indeed, the 2002 amendment in effect simply mandated enforcement of the laws already on the books.) And while it is true that the other main law cited by the Commission, the Animal Welfare Act (passed in 1966 and amended several times since), provides more extensive protection, mice, birds, and rats are specifically excluded from the Act, and—as with the plight of chickens under they HSA—they make up about 95 percent of all animals used in scientific research in the United States.<sup>46</sup> At the same time, the status of a “person” as defined in the AWA includes “any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.”<sup>47</sup>

The underlying problem is thus clear. Animals are things and not persons under United States law—things that may or may not have legal status depending upon whether or not they have a property relation to an entity designated a “person,” who thus has a legal interest in, and standing to argue on behalf of, the animal in question. One obvious solution to this rather counter-intuitive state of affairs—and it would be one with wide-ranging economic consequences—would be to eliminate the property status of at least some non-human animals by granting them some form of personhood, making them, in turn, potential bearers of rights.<sup>48</sup> But even within existing legal doctrine, we find considerable disagreement about the appropriateness of the “rights” framework for recognizing and protecting the standing of non-human animals. On one side, we have legal theorists such as Richard Posner, Cass Sunstein, and Richard Epstein, who believe that the adaptation of the rights model to animals is fundamentally wrong-headed. Epstein, for example, believes that we should continue to treat animals as property, not persons (even in some limited sense), and argues that we should work to minimize harm to animals as long as it does not compromise human gains. He grounds his position in what he regards as a well-justified speciesism. “The root of our discontent,” he writes, “is that in the end we have to separate ourselves from (the rest of) nature from which we evolved. Unhappily but insistently, the collective *we* is prepared to do just that. Such is our lot, and perhaps our desire, as human beings.”<sup>49</sup> And Posner holds that the most sound approach to the issue is a “humancentric” one that eschews “philosophical argument.”<sup>50</sup> “Legal rights,” he argues, “have been designed to serve the needs and interests of human beings, having the usual human capacities, and so make a poor fit with the needs and interests of animals.”<sup>51</sup>

Now I agree with Epstein about a point I have argued in some detail elsewhere: that animal rights philosophy, in spite of itself, continues to rely upon a speciesist (or better, perhaps, anthropocentric)

model of subjectivity in its criteria for determining which beings deserve rights.<sup>52</sup> And I think Posner is right that there is “a sad poverty of imagination” in thinking that issue of animal protection can only be addressed under the rubric of rights.<sup>53</sup> But I would also agree, and more fundamentally, with those at the other end of the animal rights argument—philosophers such as Singer, Cavalieri, and Tom Regan, and legal scholars such as Steven M. Wise and Gary Francione—that positions such as Posner’s and Epstein’s rely upon a thoroughgoing ethnocentrism thinly disguised (and sometimes not disguised at all) as a hard-nosed legal pragmatism giving “straight talk” to the airy philosophers (such as Singer) or those legal scholars overly influenced by them (such as Wise).<sup>54</sup> Posner, for example, wholly subordinates the question of rights to economic utility and political expediency, holding that that “legal rights are instruments for securing the liberties that are necessary if a democratic system of government is to provide a workable framework for social order and prosperity. The conventional rights bearers are with minor exceptions actual and potential voters and economic actors. Animals do not fit this description.”<sup>55</sup> And Epstein is even more bald in his deployment of what Regan has called the “might makes right” position: “Let it be shown,” he asserts, “that the only way to develop an AIDS vaccine that would save thousands of lives is through painful or lethal tests on chimpanzees. . . . An animal right to bodily integrity would stop that movement in its tracks. It will not happen, and it should not happen.”<sup>56</sup>

Such positions are question-begging in the extreme, I think, and are easily disposed of, as Singer disposes of Posner’s in an exchange in that began in the online magazine *Slate*. Singer’s criticism makes the same point as Tom Regan’s observation that a theory such as Posner’s “takes one’s moral breath away. . . as if, for example, there would be nothing wrong with apartheid in South Africa if few white South Africans were upset by it.”<sup>57</sup> As Singer rightly observes, Posner’s legal “pragmatism” is in fact “an undefended and indefensible form of selective moral conservatism.”<sup>58</sup> And as for the pragmatics of its “pragmatism,” the Posner/Epstein line fares no better. Posner, like Epstein, suggests that the property status of animals is actually a boon to their protection, “because people tend to protect what they own,” and like Epstein he suggests that what we mainly need is more vigorous enforcement of laws that prevent “gratuitous cruelty.”<sup>59</sup> In a similar vein, Epstein holds that such a position at least “blocks some truly egregious practices without any real human gain, gory lust to one side.”<sup>60</sup> But Epstein’s contention only gives the lie to Posner’s insistence that few of us are “so indifferent to animal suffering, that we are unwilling to incur at least modest costs to prevent cruelty to animals,”<sup>61</sup> for as Singer points out, anti-cruelty laws do not apply to the case where the largest amount of animal suffering by far takes place—namely, factory farming. Against what Posner calls, without a trace of irony, “the liberating potential of commodification,” Singer points out that “we don’t have to wonder how many animals suffer and die because they *are* someone’s property,” because we know that of the nine to ten *billion* animals raised for food in the United States each year, the vast majority—easily several billion—spend their entire short lives in the brutal conditions of the factory farm.<sup>62</sup> Indeed, such anti-cruelty laws do not even apply to the overwhelming majority of animals used in biomedical research, product testing, and the like, because (as I have already noted), the US Animal Welfare Act of 1966, as amended under the Senate leadership of

Jesse Helms in 2002, specifically excludes birds, mice, and rats—that is to say, about 95 percent of the animals used in such research.<sup>63</sup>

As even this brief sketch suggests, one might well conclude that we find an increasingly fraught disjunction between existing legal doctrine and our ability to do justice to non-human animals, even as our knowledge of what are taken to be their ethically relevant characteristics and capacities (to suffer, to communicate, to engage in complex forms of social behavior and bonding, and so on) increases dramatically year by year. And more specifically—to stay within the purview of rights discourse a moment more—we find increasing conceptual pressure on the difference between what legal philosophers call “will-based” and “interest-based” theories of rights. The former is rather baldly represented by Posner et al., and the latter grounds the positions of not just Singer and Regan but also of renowned legal philosopher Joel Feinberg, who argues in his influential essay “The Rights of Animals and Future Generations” that it is not enough to say simply that we have duties *regarding* animals (the familiar “indirect duty” view made famous by Kant<sup>64</sup>); rather, we have *direct* duties to (at least some) animals because what is fundamental here is not that they can understand or claim their rights but that—like human infants and mentally impaired people—they are beings who have “conative urges,” the “integrated satisfaction of which constitutes their welfare or good” that, as such, deserves protection.<sup>65</sup> Though it content to remain within both analytic philosophy and rights discourse, Feinberg’s position is related in important ways to attempts to think beyond existing legal frameworks and their philosophical underpinnings in the work of philosophers such as Cora Diamond, Judith Butler, and Jacques Derrida. While Derrida, for his part, is sympathetic with those who protest against the way animals are treated in factory farming, product testing, biomedical experimentation, and the like, he nevertheless believes that “it is preferable not to introduce this problematic concerning the relations between humans and animals into the *existing* juridical framework” by extending some form of human rights to animals.<sup>66</sup> This is so, he argues, because “to confer or to recognize rights for ‘animals’ is a surreptitious or implicit way of confirming a certain interpretation of the human subject”—an interpretation (and this is confirmed, it seems to me, in the positions of both Posner and Epstein) that “will have been the lever of the worse violence carried out against nonhuman living beings.”<sup>67</sup> So while Derrida is sympathetic with the motivations behind calls for animal rights to protect them from violence, he doesn’t support the rights framework per se.<sup>68</sup> And so, Derrida concludes, “For the moment, we ought to limit ourselves to working out the rules of law [*droit*] such as they exist. But it will eventually be necessary to reconsider the history of this law and to understand that although animals cannot be placed under concepts like citizen, consciousness linked with speech, subject, etc., they are not for all that without a ‘right.’ It’s the very concept of right that will have to be ‘rethought.’”<sup>69</sup>

A crucial point of emphasis in Derrida’s articulation of our ethical responsibility to animals is shared by Cora Diamond, and likewise she finds it actively evaded by the rights model. For Diamond as for Derrida, our shared vulnerability and finitude as embodied beings forms the foundation of our compassion and impulse toward justice for animals—a vulnerability that gets “deflected,” as she puts it,

by the rights model and the kinds of argument it deploys (pro or con), with its emphasis on agency, reciprocity, and the like. As Diamond puts it,

The awareness we each have of being a living body, being “alive to the world,” carries with it exposure to the bodily sense of vulnerability to death, sheer animal vulnerability, the vulnerability we share with them. This vulnerability is capable of panicking us. To be able to acknowledge it at all, let alone as shared, is wounding; but acknowledging it as shared with other animals, in the presence of what we do to them, is capable not only of panicking one but also of isolating one. . . . Is there any difficulty in seeing why we should not prefer to return to moral debate, in which the livingness and death of animals enter as facts that we treat as relevant in this or that way, not as presences that may unseat our reason? <sup>70</sup>

From this vantage, to try to think about our ethical obligations to animals by deploying the rights model misses the point, not just because the question is thicker and more vexing than the thin if-P-then-Q propositions of a certain style of analytic philosophy, but also because “when genuine issues of justice and injustice are framed in terms of rights, they are thereby distorted and trivialized.” This is so, Diamond argues, because the rights model, going back to its origins in Roman law, is concerned not with justice and compassion but with “a system of entitlement” and who gets what share within such a system. Instead, she argues, what is crucial to our sense of the injustice done to animals is our repulsion at the brute subjection of the body that they so often endure. For Diamond, the “horror of the conceptualizing of animals as putting nothing in the way of their use as mere stuff” depends upon “a comparable horror at human relentlessness and pitilessness in the exercise of power” toward other human beings (in the practice, say, of torturing political prisoners).<sup>71</sup>

To put the question this way is to modulate the discussion of animals, ethics, and law into a different register, one that does not take for granted, much less endorse, our current legal structures for confronting such issues: namely, the register of biopolitics. Here too, the question of the body and embodiment, and the political and juridical power over life itself, is fundamental. Take, for example, Judith Butler’s *Precarious Life: The Powers of Mourning and Violence*. In the immediate post-9/11 context in which Butler’s book was written and to which it responds, the Posner version of legal pragmatism that views the law as that which insures the well-being of “us” and ours over and against “them” takes on much more ominous overtones—particularly in light of the more and more routine suspension of law by executive fiat, the increasingly regularized declaration of a “state of exception” so well analyzed by Agamben and others, that establishes a “no-man’s land between public law and political fact, and between the juridical order and life.”<sup>72</sup> Against the conjugation of law, power, and community we find Posner’s legal pragmatism, Butler asserts that the fundamental question that needs to be reopened in the current political context is this: “Whose lives count as lives? And finally, What *makes for a grievable life?*” “Is there a way,” she asks, “in which the place of the body. . . opens up another kind of normative aspiration within the field of politics,” to “consider the demands that are imposed upon us by living in a world of beings who are, by definition, physically dependent on another, physically vulnerable to one

another?”<sup>73</sup> “From where,” she asks, “might a principle emerge by which we vow to protect others from the kinds of violence we have suffered, if not from an apprehension of a common human vulnerability?”<sup>74</sup>

Yet precisely here, Butler’s effort (whose impulses I admire and share, of course) runs aground on the question of non-human animals. After all, why should the dangers and vulnerabilities, the exposure to violence and harm, that accrue from the fact of embodiment be limited to a “common *human* vulnerability?” Why shouldn’t *non-human* lives count as “grievable lives,” particularly since many millions of people grieve very deeply for their lost animal companions? (I will leave aside for the moment the even more complicated point that at least some non-human animals—elephants and great apes, for example—apparently grieve over the loss of those close to them.)<sup>75</sup> Here and there, during the period in which she is working on *Precarious Life*, Butler hints at how her approach to the biopolitical might bear upon fundamentally rethinking the human/animal divide. In an interview from 2005, for example, she essentially restates in her own terms Derrida’s critique of the fundamentally anthropocentric norms of humanism that require the “abjection” of alterity, whether it be in the form of the “animal,” the “inhuman,” or the “inorganic.”<sup>76</sup> And in an interview from four years later, she suggests that the shared “precariousness” of humans, animals, and the environment “undoes the very conceit of anthropocentrism.”<sup>77</sup> Making a distinction that I will develop in much more detail later, Butler is right, I think, to claim in *Frames of War* that “Not everything included under the rubric of ‘precarious life’”—plants, for example—warrants protection from harm.<sup>78</sup> And she is also right to criticize “an ontology of individualism” which fails to recognize that the conditions that sustain life are not isolated and limited to “the discrete ontology of the person” but rather imply “the interdependency of persons.”<sup>79</sup> But it is not clear, however, why non-human animals would not fall under such a definition of “persons” understood as part of a “social ontology” of interdependency since, clearly, some non-human animals have their own social relations of interdependency, and still others live in relations of interdependency with human beings—not just in the case of companion animals but also (in the other direction, as it were) in the case of service animals.<sup>80</sup>

The reasons for this lacuna in Butler’s text are complex, I think, and I won’t be able to explore them here, but the problem is not, in any event, the perhaps expected one: that animals have an ontologically and existentially different relationship to their finitude than we do, along the lines of Heidegger’s existential of “being-toward-death” (which Derrida has convincingly critiqued, to my mind, in connection with the human/animal dichotomy).<sup>81</sup> In fact, Butler is at pains to separate herself from such an ontology in many of her key theoretical and methodological commitments.<sup>82</sup> Rather, the main problems seem to be 1) that Butler’s concept of ethics and of community remains tied to a “reciprocity” model based upon a “mutual striving for recognition,” and 2) that her notion of subjectivity—and this is a directly related point—remains too committed to the primacy of “agency” for ethical standing, whereas a crucial aspect of taking “embodiment” seriously, if we believe Diamond and Derrida, is that it subverts the overly-hasty association of agency with personhood.

As for the first, Butler insists “that each partner in the exchange recognize not only that the other needs and deserves recognition, but also that each, in a different way, is . . . striving for recognition.”<sup>83</sup>

But what about those members of the community who *aren't* striving for recognition but nevertheless clearly meet the definition of what Butler calls "grievable life?" On the second point, we might linger over Butler's contention that "when we are speaking about the 'subject' we are not always speaking about an individual: we are speaking about a model for agency and intelligibility."<sup>84</sup> And yet her primary examples of vulnerable subjects—newborn infants, for example—have to do (to use the language of analytic philosophy) not with moral agents (those whose *behavior* is subject to moral evaluation) but with moral *patients* (those whose *treatment* is), as in her contention that "primary vulnerability" is a "condition of being laid bare from the start and with which we cannot argue," a "primary scene. . .of abandonment or violence or starvation," of "bodies given over to nothing, or to brutality, or to no sustenance."<sup>85</sup>

Equating standing with moral agents and not moral patients is, of course, a hallmark of the reciprocity model whose most ossified form is Rawlsian contractualism (whose limitations have been convincingly critiqued, to my mind, by Singer, Regan, and Cavalieri, among others).<sup>86</sup> Indeed, as I have argued in some detail elsewhere, I would agree with Derrida, Zygmunt Bauman, and others that that the *truly* ethical act is one that is directed toward the moral patient from whom there is no expectation, and perhaps no hope, ever, of reciprocity. Such an act is freely given, outside any model of reciprocity and exchange whose most brazen form is the economic and political template for rights enunciated earlier by Posner.<sup>87</sup> One might think that Butler's invocation in the last section of her book of Levinas—whose model of ethics is not one of reciprocity but rather of being held "hostage" to the Other in an ethical debt that one can never meet—might mitigate against such a charge. But the problem with Butler's position, as with Levinas', is its underlying assumption about *who can be* party to an ethical relationship. In Levinas, as we know, such relations concern only those with a "Face," and the animal has no face because it has no awareness—no concept, if you like—of its own mortality. But if the embodied vulnerability that subtends all agency "emerges," as Butler puts it, "with life itself," if "we cannot recover the source of this vulnerability" that "precedes the formation of the 'I,'"—that is to say, if our finitude is radical precisely *because* it has no concept—then it is not clear why this does not entail at least some non-human as well as human beings.<sup>88</sup>

Butler is certainly right, as many philosophers have emphasized, that "dehumanization" is a fundamental mechanism for producing a "Western" idea of the "man" over and against populations considered "dubiously human."<sup>89</sup> But as I have argued in detail elsewhere, as long as the automatic exclusion of animals from standing remains intact *simply* because of their species, such a dehumanization by means of the discursive mechanism of "animalization" will be readily available for deployment against *whatever* body that happens to fall outside the ethnocentric "we." So when Butler calls for "a politics that seeks to recognize the sanctity of life, of all lives," I believe she needs to expand her call across species lines, to declare the human/animal distinction irrelevant, strictly speaking, to such a call. But to do so, she would need to move away from the centrality of reciprocity and agency to ethical and political standing that we find in *Precarious Life*.<sup>90</sup> This is not to offer any specific advice for the moment about "line drawing" with regard to membership in the community (a point I'll return to later); it is

simply to suggest that Butler's own theoretical coordinates ought to compel an understanding that the ham-fisted distinction of "human" versus "animal" is of no use in drawing it.

The fundamental conflict in Butler's position is underscored all the more by her focus in *Precarious Life* on the question of Jewish identity and anti-Semitism, simply because that has been Exhibit A in the biopolitical literature of the "animalization" of a population produced as "dubiously human" by and for a political program. I'll return to this traumatic site in some detail in the pages that follow, but to fully understand its many dimension we need to frame out more fully the background and contours of biopolitical thought as it has evolved from Foucault forward through the work of Agamben, Esposito, and others. As is well known, Foucault argues in *The History of Sexuality* that "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 in question."<sup>91</sup> Moreover, as Foucault famously defines biopolitics, it "is the power to make live. Sovereignty took life and let live. And now we have the emergence of a power that I would call the power of regularization, and it, in contrast, consists in making live and letting die."<sup>92</sup> Foucault develops this line of investigation later in his career. In the lectures collected in "*Society Must Be Defended*," for example, he argues that a "new mechanism of power" arose in the seventeenth and eighteenth centuries, one that had "very specific procedures" and "new instruments." This new type of power, he argues, is "absolutely incompatible with relations of sovereignty," and it is based on "a closely meshed grid of material coercions rather than the physical existence of a sovereign."<sup>93</sup>

Foucault thus allows us to see, as Esposito points out, that for biopolitics the fundamental mechanism concerns not sovereignty and law but rather "something that precedes it because it pertains to its `primary material."<sup>94</sup> (As is well known, Foucault's main examples are medicine and the rise of the various "health" professions under the broader regime of "governmentality" and its specifically modern techniques of managing, directing, and enhancing the lives of populations via hygiene, population sciences, food sciences and so on, the better to extend and consolidate political power.) Even more importantly for our purposes, Foucault argues that this shift from sovereignty to biopower involves a new concept of the subject, one who is endowed with fundamental interests that cannot be limited to or contained by the simple *legal* category of the person. But a trade-off is involved here. If the subject addressed by biopolitics comprises a new political resource, it also requires a new sort of political technology if it is to be fully controlled and exploited. The bio-subject, you might say, is far more multi-dimensional and robust than the "thin" subject of laws and rights; that is both its promise and its challenge as a new object of political power.

As Foucault characterizes it, the subject theorized during this period by English empiricist philosophy is something new, defined not so much by freedom or the struggle of soul versus body, but rather as a subject "of individual choices which are both irreducible and non-transferable."<sup>95</sup> Those choices and the ability to make them derive, he argues, not from reason but from the capacity to feel (and the desire to avoid) pain, which is "in itself a reason for the choice beyond which you cannot go." It is a

reason beyond reason, you might say, “a sort of irreducible that does not refer to any judgment, reasoning, or calculation.”<sup>96</sup> And this means, Foucault argues, that “the subject of right and the subject of interest are not governed by the same logic.”<sup>97</sup> (And it is here, as Diamond argues, following the work of Simone Weil, that we may locate the origins of a concept of justice that is not just different from but in fact fundamentally *opposed* to the concept of “rights.”)<sup>98</sup>

In opposition to what Foucault calls *homo juridicus* (or *homo legalis*)—the subject of law, rights, and sovereignty—we find in this new subject, *homo oeconomicus*, “an essentially and unconditionally irreducible element against any possible government,” a “zone that is definitively inaccessible to any government action,” “an atom of freedom.”<sup>99</sup> The subject of interest thus “overflows” the subject of right, “surrounds” him and, indeed the “permanent condition” of his possibility.<sup>100</sup> *Homo oeconomicus* thus founds a new domain of “irrational rationality” that is of a fundamentally different order from sovereignty and the juridical subject. *Homo oeconomicus* thus says to the sovereign “you cannot because you do not know, and you do not know because you cannot know.”<sup>101</sup> But such a creature, of course— and for that very reason—poses a threat to power, one that will in time give rise to the regime of governmentality and its exercise of biopower,<sup>102</sup> which will in turn involve new sciences and discourses: of ratios of birth and death, fertility and mortality rates, figures on longevity—in short, sciences of “populations” whose task it is to manage this aleatory element by “a power that is not individualizing but, if you like, massifying, that is directed not at man-as-body but man-as-species.”<sup>103</sup> Foucault thus discloses a key element of the modern political landscape—the “radical transformation of the idea of *humanitas*,” as Esposito puts it—that escapes the very political and legal concepts inherited from modernity. “*Humanitas* increasingly comes to adhere to its own biological material,”<sup>104</sup> Esposito writes, and what is involved here is not so much the “animalization” of human populations but rather the exposure of how that designation simultaneously masks and makes possible the more fundamental operations of modern politics by means of what Agamben calls “the anthropological machine, which each time decides upon and recomposes the conflict between man and animal”—a machine that depends upon (to use the terms that Agamben borrows from Aristotle) the distinction between *bios* (or political “form of life”) and *zoe* (or “bare life”).<sup>105</sup>

At this juncture, however, it is worth emphasizing an important difference between Agamben and Foucault—or rather a set of differences whose consequences I want to unfold over the next few pages. While it is no doubt true—both in Foucault’s own discourse and in point of fact—that sovereignty continues to be an important force in modern politics, Foucault’s point is that it becomes recontextualized, and finally subordinated, to a fundamental political shift. Where Foucault allows us to disarticulate sovereignty and modern biopolitics, Agamben (as Jacques Rancière elegantly puts it) “matches them by equating Foucault’s ‘control over life’ with Carl Schmitt’s state of exception.”<sup>106</sup> And the result is an overly formalized symmetry between the figure of the sovereign and *homo sacer*, both of whom stand at the extreme opposite limits of a juridico-political order in which they are simultaneously included and excluded, inscribed in the law either by being abandoned by it (in the case of *homo sacer*) or establishing it by extra-legal means (in the case of the sovereign). As Agamben puts it, “the sovereign and *homo*

*sacer* present symmetrical figures and have the same structure and are correlative: the sovereign is the one with respect to whom all men are potentially *homines sacri* and *homo sacer* is the one with respect to whom all men act as sovereigns.”<sup>107</sup>

Now this exaggerated formal symmetry might seem of little moment—might seem merely academic, you might say—were it not for the fact that it leads Agamben to engage in a fundamental form of dismissal and disavowal of the embodied existence that we share with non-human animals—the very existence underscored, as we have seen, by Diamond, Butler, and Derrida.<sup>108</sup> “Agamben remains so fascinated by the hyperbolic opposition between meaningful life and mere animality,” Jonathan Elmer argues, “between power and the absolute powerlessness of ‘bare life,’ that a trace of contempt edges into his description of those who have been reduced to the latter condition”—a fact which expresses itself in any number of odd ways in Agamben’s work.<sup>109</sup> For example, as Elmer notes, it leads him to condemn humanitarian aid groups by hewing to a logic that would allow the space between them and the Nazi death camps to become absolutely minimal. As Agamben puts it, humanitarian organizations “can only grasp human life in the figure of bare or sacred life, and therefore, despite themselves, maintain a secret solidarity with the very powers they ought to fight. . . . The ‘imploring eyes’ of the Rwandan child. . . may well be the most telling contemporary cipher for the bare life that humanitarian organizations, in perfect symmetry with state power, need.<sup>110</sup> The problem as Rancière notes, is that Agamben subsumes under the same umbrella refugee camps, holding areas for illegal immigrants, the prison at Guantanamo, and much else besides—all of which are in turn assimilated to the fundamental paradigm of the Nazi camps as “the ‘nomos’ of modernity.” And in this highly formalized space, “the executioner and victim. . . appear as two parts of the same ‘biopolitical’ body,” and the polarity of state of exception and bare life “appears as a sort of ontological destiny.”<sup>111</sup>

The only alternative to this logic in Agamben’s work appears to be what in *The Open* he calls the “suspension of the suspension” of the anthropological machine that ceaselessly reconjugates the relation between the *bios* and *zoe*, human and animal, a radical *Gelassenheit* (or “letting be of Being”, to use Heidegger’s term).<sup>112</sup> As Agamben writes,

In our culture man has always been the result of a simultaneous division and articulation of the animal and the human, in which one of the two terms of the operation was also what was at stake in it. To render inoperative the machine that governs our conception of man will therefore mean no longer to seek new—more effective or more authentic—articulations, but rather to show the central emptiness, the hiatus that—within man—separates man and animal, and to risk ourselves in this emptiness: the suspension of the suspension. Shabbat of both animal and man.<sup>113</sup>

What Agamben offers us here, as Dominick LaCapra characterizes it, is a sort of “postsecular negative theology *in extremis*,” an “empty utopianism” that should give us pause because of “the linkage among an extremely negative if not nihilistic conception of existing social, political, and cultural reality” and a “desire for re-enchantment of the world.”<sup>114</sup>

Agamben's philologically driven formalism thus leads to a remarkable flattening of the differences between different political, ethical, and institutional conjunctures (this, essentially, is Rancière's complaint), a homogenization that is a direct consequence of the severe delimitation of the realm of the "genuinely" political. As a result, as LaCapra notes, attempts to mitigate the legacy of slavery or apartheid, or protests against the genetic manipulation of life or the uneven effects of globalization would not be recognizable as genuine historical or political undertakings.<sup>115</sup> In this light, it is entirely characteristic that in the recent essay "What Is An Apparatus?," Agamben deploys a familiar form of etymological chaining—what Laurent Debreuil has called "philology for show"<sup>116</sup>--to tether Foucault's concept of apparatus, via the root of *dispositif* in *dispositio*, to the "theological legacy" of *oikonomia* and "the redemptive governance of the world and human history" via Providence.<sup>117</sup> And not surprisingly, that same essay ends with the suggestion that the only authentic political project for "the most docile and cowardly social body that has ever existed in human history" is the "profanation" of contemporary apparatuses (cell phones, mass media, and the like) whose ceaseless work of subjectification and desubjectification are "indifferent and "do not give rise to the recomposition of a new subject."<sup>118</sup> The essay thus ends on the characteristically apocalyptic note we have been discussing:

Rather than the proclaimed end of history, we are, in fact witnessing the incessant though aimless motion of this machine, which, in a sort of colossal parody of the theological *oikonomia*, has assumed the legacy of the providential governance of the world; yet instead of redeeming our world, this machine (true to the original eschatological vocation of Providence) is leading us to catastrophe. The problem of the profanation of apparatuses—that is to say, the restitution to common use of what has been captured and separated in them—is, for this reason, all the more urgent. But this problem cannot be properly raised as long as those who are concerned with it are unable to intervene in their own processes of subjectification, any more than in their own apparatuses, in order to then bring to light the Ungovernable, which is the beginning and, at the same time, the vanishing point of every politics.<sup>119</sup>

Not surprisingly, such a view of what counts as "genuinely" political in Agamben's work leads to a similar flattening of the category of "the animal" itself, and this in two senses. First, as LaCapra notes, animals in all their diversity "are not figured as complex, differentiated living beings but instead function as an abstracted philosophical topos"<sup>120</sup>—what Derrida calls the "asininity" of the designation "*the* animal." And second--a consequence of the first--Agamben's position provides no means for a politically focused questioning of "the extent to which certain animals, employed in factory farming or experimentation, may be seen in terms of the concept of bare or naked, unprotected life."<sup>121</sup> What gets lost, in other words, is our ability to think a highly differentiated and nuanced biopolitical field, and to understand as well that the exercise of violence on the terrain of biopower is not always, or even often, one of highly symbolic and sacrificial ritual in some timeless political theater, but is often—indeed, maybe usually--an affair of power over and of life that is regularized, routinized, and banalized in the services of a strategic, not symbolic, project.

But if Rancière is right that Agamben's mode of analysis "sweeps aside the heterogeneity of political dissensus" by "infiniteing the wrong, substituting for the processing of a political wrong a sort of ontological destiny," he himself nonetheless shares Agamben's scorn for humanitarian efforts—and not only for NGOs.<sup>122</sup> As Rancière writes,

the age of the "humanitarian" is one of immediate identity between the ordinary example of suffering humanity and the plenitude of the subject of humanity and its rights. The eligible party pure and simple is then none other than the wordless victim, the ultimate figure of the one excluded from the logos, armed only with a voice expressing a monotonous moan, the moan of naked suffering, which saturation has made inaudible. More precisely, the person who is merely human then boils down to the couple of the victim, the pathetic figure to whom such humanity is denied, and the executioner, the monstrous figure of a person who denies humanity.<sup>123</sup>

As Elmer rightly notes, "there is a weird and unsettling version of blaming the victim going on here" in which "the 'merely human' can be understood to have harbored and produced its own contemptuous executioner only by one who shared that contempt."<sup>124</sup> While Rancière's skepticism toward the discourse and mechanisms of "rights" is surely worth heeding, such is the poison fruit, I think, of a dogmatic confidence in the difference between the "genuinely" political and the merely well-intentioned "reformist," as is (a corollary) scorn for an ethics that takes seriously such instances of suffering (regardless of their political context), which then gets rescripted by as complicit in the very suffering whose political causes it refuses to address. Or as Rancière puts it, ethics means "the erasure of all legal distinctions and the closure of all political intervals of dissensus."<sup>125</sup> I will leave aside for the moment Rancière's remarkably wooden characterization of ethics as "the infinite conflict of Good and Evil" and simply note that such a pitched posture is shared—to take only two more examples—by both Slavoj Žižek and Alain Badiou, for whom ethics "defines man *as a victim*." "[T]his 'living being' is in reality contemptible," Badiou writes, "and *he will be held in contempt*. . . . On the side of the victims, the haggard animal exposed on television screens. On the side of the benefactors, conscience and the imperative to intervene. . . . Every intervention in the name of a civilization *requires* contempt for the situation as a whole, including its victims."<sup>126</sup> No doubt Badiou is right, as Elmer notes, to alert us to the hypocrisies of "civilizing" discourses, but the *requirement* of contempt for this "haggard animal" is born from Badiou's own lust for redemption and transcendence, a repudiation of "the 'pathetic figure' of the 'merely human' in favor of a principle of immortality" (or what Badiou calls "the Infinite.")<sup>127</sup> Badiou puts it baldly enough: if there is anything such as the "rights of man" they are surely not "rights of survival against misery" but rather "the rights of the Immortal, affirmed in their own right, or the rights of the Infinite, exercised over the contingency of suffering and death."<sup>128</sup>

Žižek, for his own part, finds much to admire in Badiou's posture, and indeed endorses his "*mieux vaut un désastre qu'un désêtre*, so shocking for the liberal sensitivity: better the worse [*sic*] Stalinist terror than the most liberal capitalist democracy." Žižek immediately adds that "of course" when one compares the "positive content" of the two, the latter is "incomparably better," but what is important is "the formal

aspect” opened up by the former *vis à vis* “normal” social life.<sup>129</sup> For this reason, Žižek admires the practice employed by the Vietcong (made famous in the film *Apocalypse Now*) of cutting off all of the arms of village children that had been vaccinated by US forces the day before. And he adds, with a truly remarkable lack of irony, “although difficult to sustain as a literal model to follow, this thorough rejection of the Enemy precisely in its helping ‘humanitarian’ aspect, no matter what the costs, has to be endorsed in its basic intention.”<sup>130</sup> “In a similar way,” he continues,

when Sendero Luminoso took over a village, they did not focus on killing the soldiers or policemen stationed there, but more on the UN or U.S. agricultural consultants or health workers trying to help the local peasants. . . . Brutal as this procedure was, it was sustained by the correct insight: they, not the police or army, were the true danger, the enemy at its most perfidious, since they were “lying in the guise of truth”—the more they were “innocent” (they “really” tried to help the peasants), the more they served as a tool of the United States. It is only such a strike against the enemy. . . .that displays a true revolutionary autonomy and “sovereignty.”<sup>131</sup>

Here, as in Agamben’s discussion of the “profanation” of apparatuses, we find the romance of a clean, single line between the space of “genuine” versus merely reformist politics, only here, it is the space not of *désœuvrement* but of an “act” that makes no sense within the existing Symbolic order, an act that is “impossible” and for that very reason “political.”<sup>132</sup> And here, as in Agamben and Badiou, Žižek’s language is telling. In such a space, “everything is to be endorsed” including “religious ‘fanaticism’”; what is wanted is a “leap of faith,” the ability to “*step out* of the global circuit.”<sup>133</sup> Gestures of “*pure expenditure*,” “pure self-destructive ethical insistence, with, apparently, no political goal” are to be endorsed.<sup>134</sup> Though Žižek tries to finesse the point, it is clear that the genuinely political involves the subordination of strategic political interventions to this new space which, defined as it is by its pure *not-*ness in relation to the existing Symbolic structure, partakes of the logic of negative theology. Transcendence or nothing—that is “true” politics.

Now I hasten to add that I agree with Žižek’s discussion of “democracy” and his critique of the liberal knee-jerk reaction toward “fanaticism,” just as I endorse Rancière’s insistence on the importance of the specific conjunctures of political dissensus that get steam-rolled by Agamben’s ontotheological procedure. But what is fascinating in all these examples is the almost hysterical condemnation and disavowal of embodied life as something constitutively deficient, something that always already has to be redeemed by its radical subordination to a “genuinely political” project for which it is merely the vehicle, merely the gateway to “the immortal” or “the infinite.” And so one has to wonder, *pace* Rancière, if the problem here is not with ethics but with *politics* now conceived as the realm of “Good versus Evil.” One might pause at this juncture to entertain any number of obvious questions: Are we not witnessing here (as even the most sophomoric psychoanalytic analysis would surely note) a nearly stereotypical disavowal of the fact of our embodied existence that links us fatefully to mortality, and thus to a domain of contingency over which we finally have less than complete control? Is it possible—to stay with that well-worn psychoanalytic motif a bit longer—that we are seeing here the “acting out” of a generation of older (white)

(male) (Western) intellectuals who, embittered by the failure during their lifetimes of a “genuinely” “revolutionary” politics, cling ever more desperately to a new sort of “jargon of authenticity” (to use Adorno’s phrase), a stark manichean opposition of “strong” vs. “weak,” “radical” vs. “reformist,” “true” vs. “illusory,” “inside” vs. “outside,” and so on? Do we not indeed find here, as Simon Critchley and others have observed, a tiresome posturing of heroism, machismo, and virility that ought to beg the very kinds of psychoanalytic questions that Žižek himself would be the first to call to our attention (or so one would think)?<sup>135</sup> Why, indeed is this not simply a rather familiar type of theology, indeed a “keeping of the faith” in the face of the “televangelization” and suburbanization of religion in the West? In fact, as a number of critics have noted, the rescripting of various religious impulses and imperatives as part of a reclamation of Marxism as an authentic revolutionary moral legacy perhaps should give us pause in an era defined by the Manichean struggle between Bush’s evangelism and Bin Laden’s fundamentalism.<sup>136</sup>

## IV.

We are returned, then, not just to the thanatopolitical site of the camps that takes center stage in Agamben's work, and not just to the question of the biopolitical status of Nazism, but also to the central function of race—and by extension, species—in modern biopolitics. As is well known, Foucault explores this topic in the lectures from 1975-6 collected in *"Society Must Be Defended."* Racism, as Foucault notes, creates "caesuras within the biological continuum addressed by biopower"; it is "a way of fragmenting the field of the biological that power controls" so that some populations may be killed or allowed to die—what Foucault bluntly calls "indirect murder."<sup>137</sup> "In a normalizing society," he writes, "race or racism is the precondition that makes killing acceptable."<sup>138</sup> And it has a second function, he argues: "the death of the bad race, of the inferior race (or the degenerate, the abnormal) is something that will make life in general healthier: healthier and purer."<sup>139</sup>

As we have seen, Esposito's immunitary paradigm seizes upon and develops this realization by Foucault, but the point I want to emphasize here is Foucault's recognition that you can't talk about biopolitics without talking about race, and you can't talk about race without talking about species, simply because both categories—as history well shows—are so notoriously pliable and unstable, constantly bleeding into and out of each other. Exhibit A here, of course, is the analogy between humans and animals that characterizes much of the literature on the Holocaust. As is well known, the word means "burnt offering" and was taken from the Greek word *holokauston*, which referred to the ancient practice of sacrificing animals.<sup>140</sup> And even more well known, perhaps, is that fact that a common refrain of those subjected to the violence of the camps is that "we were treated like animals."<sup>141</sup> But as Esposito's bracing analysis of Nazi genocide shows, the mainspring of this process cannot exactly be said to be the "animalization" pure and simple of the Jews and other victims:

More than "bestializing" man, as is commonly thought, [Nazism] "anthropologized" the animal, enlarging the definition of *anthropos* to the point where it also comprised animals of inferior species. He who was the object of persecution and extreme violence wasn't simply an animal (which was indeed respected and protected as such by one of the most advanced pieces of legislation of the entire world), but was an *animal-man*. . . . [T]he regime promulgated a circular that prohibited any kind of cruelty to animals, in particular with reference to cold, to heat, and to the inoculation of pathogenic germs. Considering the zeal with which the Nazis respected their own laws, this means that if those interned in the extermination camps had been considered to be *only* animals, they would have been saved.<sup>142</sup>

While Esposito overstates his case here (as Singer points out, following Boria Sax's extensive work on the topic, the Nazis routinely conducted painful and even brutal experiments on animals such as primates<sup>143</sup>), his analysis does have the virtue of complicating our understanding of the relationship between the human/animal distinction and the *bios/zoe* doublet of biopolitics (a point I'll return to in more detail below). And with this more complicated conceptual topography in mind, we can revisit the "animal

Holocaust” analogy that has been widely used to describe our treatment of animals in factory farming and biomedical testing.

Jacques Derrida is particularly forceful on this point in his later work, where he pulls no punches in criticizing “this violence that some would compare to the worst cases of genocide,” a genocide made even more perverse by the fact that millions of animals are “exterminated *by means of their continued existence or even their overpopulation.*” Derrida (an Algerian Jew) is well aware of the complexities of the analogy here, of course, and he reminds us that “one should neither abuse the figure of genocide nor too quickly consider it explained away.”<sup>144</sup> Indeed, his ending observation—“*by means of their continued existence*”—points us toward some important differences between the two cases that Esposito will explore as well. For example, in the Nazi camps, we find those who *had been* citizens, members of the community, now stripped of every legal protection and right by means of the declaration of a “state of exception,” whereas in the factory farm, we find those who *never were* members of the community nevertheless afforded at least some minimal protection (as in humane slaughter laws, for example), even if those laws are in fact minimally enforced.<sup>145</sup> Similarly, the “animal Holocaust” of factory farming does not abide by the logic of genocide *per se*, since the minimal conditions of genocide agreed upon by most scholars are that a sovereign state declares an intention to kill a particular homogeneous group not for economic or political reasons but rather because of that group’s biological constitution, and that such a project of killing is potentially complete, resulting in the extermination of all members of the targeted group.<sup>146</sup> Indeed, this is part of what makes the “animal Holocaust” not just horrible but in an important sense perverse—what Derrida calls a “virtually interminable survival, in conditions that previous generations would have judged monstrous, outside of every presumed norm of a life proper to animals.”<sup>147</sup> And this “interminable survival” leads, in turn, to a massive difference in sheer scale between the two cases, as nearly ten *billion* animals are raised for food each year in the US, the vast majority of them in factory farms. In fact, nine hundred million of these animals each year never even make it to the slaughterhouse for their merciful end, because they die first of stress, disease, or injury.<sup>148</sup>

At the same time, it hardly needs pointing out that the practices of modern biopolitics have forged themselves in the common subjection and management of both human and animal bodies—a fact brought very sharply into focus in scholarship that examines the analogies between the technological manipulation of life in the factory farm and in the Nazi camps. As one writer notes, “the methods of the Holocaust exist today in the form of factory farming where billions of innocent, feeling beings are taken from their families, trucked hundreds of miles through all weather extremes, confined in cramped, filthy conditions and herded to their deaths.”<sup>149</sup> As another points out, “American eugenics and assembly-line slaughter crossed the Atlantic Ocean and found fertile ground in Nazi Germany.”<sup>150</sup> In fact, the assembly line processes used to kill Jews in Nazi Germany derived from production models originally developed by Henry Ford (a notorious anti-Semite), who in turn reveals in his autobiography that the inspiration for his assembly-line method came from a visit to a Chicago slaughterhouse and witnessing its mechanized *disassembly* line for making meat out of animal carcasses.<sup>151</sup>

From the vantage of a Foucauldian biopolitics, then, we are forced to conclude that current practices of factory farming and the like—while crucially different from the logic of the Holocaust and of genocide in the ways I have just noted—constitute not just some embarrassing sideline of modern life that has nothing to do with politics proper, and which can be well regulated by an adjacent set of anti-cruelty laws that do not intersect with politics as such in any fundamental way. Rather, such practices must be seen not just as political but as in fact *constitutively* political for biopolitics in its modern form. Indeed, the practices of maximizing control over life and death, of “making live,” in Foucault’s words, through eugenics, artificial insemination and selective breeding, pharmaceutical enhancement, inoculation, and the like are on display in the modern factory farm as perhaps nowhere else in biopolitical history. It can hardly be debated, I think, that “the animal” is, today—and on a scale unprecedented in human history—the site of the very ur-form of that *dispositif* and the face of its most unchecked, nightmarish effects. Insofar as the biopolitical *per se* is tethered to the question of sovereignty as its constitutive term, the treatment of animals in factory farming, product testing, and so on, could not be deemed properly “political” at all. And an appeal for something like “animal rights” would, from a Schmittian point of view, fare no better than an appeal for “human rights” that exceeds or comes “before” the claims of the sovereign nation-state. Indeed, as Derrida summarizes it in *The Beast and the Sovereign*, from Schmitt’s point of view, wherever calls for universal human rights that exceed the contingent rights of the citizen are made, whenever one invokes the idea of “crimes against humanity” to implement a universal or international right, the authority and sovereignty of the nation state is called into question—and always, in fact, by another sovereignty.<sup>152</sup> Such a call is, Schmitt argues in *The Concept of the Political*, a “de-politicizing” predication, an “an ideological disguise,” as Derrida puts it. And so “Humanity is only a word, then, a name in the name of which particular and momentary interests of particular states are served.”<sup>153</sup>

We have already touched upon some of the problems with this concept of the political in our discussion of Arendt at the outset of this essay, but a different sort of challenge to the sovereignty/decisionist line that runs from Schmitt to Agamben is posed, as Penelope Deutscher notes, by the problem of abortion and fetal “life”—a topic about which Agamben, as she points out, is almost entirely silent.<sup>154</sup> As we have already seen, Agamben draws our attention to the “beyond” or the “before” of the human in the form of the *bios/zoe* difference. But what if we ask, with Andrew Norris, what we do when we confront the question of those entities that have not already been recognized as rights bearers.<sup>155</sup> From Deutscher’s perspective, the fetus is neither *zoe* nor *bios* but in public clashes over abortion is “rhetorically and varyingly depicted as all of these,” so that it is often erroneously represented in antiabortion contexts as “as a form of politicized bare life exposed to sovereign violence”—namely the violence of the woman considering an abortion who may be “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.”<sup>156</sup> From this vantage, she argues, “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.”<sup>157</sup> At which point, she rightly suggests, we realize some of the

dangers attendant upon the radical formal symmetry of sovereign and bare life in Agamben's work, and we would do well instead to pay attention, say, to "the interconnections between biopower and women's reproductivity," and the overdeterminations of both in the history of abortion regulation.<sup>158</sup> We would do well, that is, to recalibrate our understanding of the biopolitical in terms of the *dispositifs* of biopower and their political articulation rather than the metaphysics of sovereignty.

The same holds for "the animal," of course, which is, if anything, even *more* differentially and heterogeneously situated, depending on its status as factory farm commodity, companion animal, wildlife, and much else besides. The "fetus that is falsely figured as *homo sacer*" is literally *nothing like* the fully formed creatures whose physiological plasticity registers, remembers, and responds to the history of what has befallen it in the form of hopes, expectations, fears—a point I'll come back to momentarily.<sup>159</sup> What all of this suggests is that the accent we find in Lazzarato's reading of Foucault makes sense—and with it, that we need to differentiate more than Esposito would between Foucault and Agamben, drawing out how a reading of biopolitics that focuses on *dispositifs* rather than sovereignty enables us to think a much more complex and highly differentiated biopolitical field. What is needed, then, is another *thought* of the biopolitical in which human and non-human lives are deeply woven together *de facto* even if, *de jure*, they "politically" have nothing to do with each other (and how could they, if animals are "things" and humans are "persons"?).

For example, a recent study by the Pew Commission on Industrial Farm Animal Production points out that factory farming may be good at producing edible animal products at the lowest possible cost, but "there is evidence," as the *New York Times* puts it, "that this model is economically viable only because it passes on health costs to the public—in the form of occasional salmonella, anti-biotic resistant diseases, polluted waters, food poisoning and possibly certain cancers."<sup>160</sup> A nearly one hundred-page report done in 2008 by the Union of Concerned Scientists lists in excruciating detail the costs—both direct and indirect—borne by society for the mass produced and industrialized killing of animals for food. Between 1997 and 2005, US taxpayers handed over to CAFOs roughly 3.8 billion dollars a year in the form of "indirect" subsidies—chiefly in the form of government handouts to growers of corn and soybeans, the majority of which is eaten by livestock animals each year. Such subsidies artificially reduce the price of meat, poultry, and pork, and other direct subsidies further artificially reduce the costs of factory farming by shifting costs to the taxpayer. Chief among these is the Environmental Quality Incentives Program, which gives CAFOs about 100 million dollars per year, in effect forcing taxpayers to help pay the environmental cleanup costs for factory farms. Added to these are the massive but more difficult to quantify "external" costs of CAFOs, which include environmental degradation and pollution of air and water that results from the large amount of energy use and animal waste generated by CAFOs, reduced quality of life for rural communities (including lower property values), and so on. To even modestly reduce the water and air pollution they create would cost CAFOs more than \$1 billion per year, and other external costs would likely run into the billions.<sup>161</sup>

Given the “immunitary” paradigm we have been discussing, one of these external costs—those associated with the use of antibiotics in factory farms—is worth dwelling on for a moment. As a recent *New York Times* article reports, 80 percent of the antibiotics used in the United States go to livestock on factory farms—nearly all of it administered in their food and water—and typically to healthy animals to prevent them from becoming sick from the cramped and squalid conditions they endure. In fact, the single state of North Carolina uses more antibiotics for its livestock than the entire country uses for its human population. Not surprisingly, this has led to a startling increase in antibiotic resistant pathogens—chief among them, MRSA, an antibiotic-resistant *Staphylococcus* bacterium that annually kills more people than AIDS. It was recently found in 70 percent of hogs on one factory farm, and in 45 percent of employees at another.<sup>162</sup> When such pathogens, born of our own maltreatment of farm animals, pose a risk to national biosecurity, the results are depressingly familiar and send us back to our earlier discussion of “animal Holocaust”: in England, millions of pigs, cows, and sheep shot and bulldozed into graves and burned during the foot-and-mouth disease epidemic of 2001; in California in 1970s, the killing of nine million hens to thwart Newcastle disease; in the spring of 2004, millions of chickens, turkeys, and ducks killed worldwide—80 million alone in Southeast Asia, 19 million more in Canada—to combat H5N1 avian influenza.<sup>163</sup>

The fundamental biopolitical logic identified by Foucault and developed by Esposito is unmistakable here. As Foucault writes in his analysis of medicalization, the harmful effects of medication are “due not to errors of diagnosis or the accidental ingestion of those substances, but to the action of medical practice itself. . . precisely because of their efficacy,” leading humankind “into a perilous area of history.”<sup>164</sup> As Esposito notes, “as in all areas of contemporary social systems, neurotically haunted by a continuously growing need for security, this means that the risk from which the protection is meant to defend is actually created by the protection itself”—a logic that is, as we have seen, “inscribed at the heart of modern biopolitics.”<sup>165</sup>

What we need to remember here is that biopolitics acts fundamentally not upon the “person” or the “individual,” nor even, finally, on “the body,” but rather at the even more elemental level called “flesh,” which is “nothing but the unitary weave of the difference between bodies. It is the non-belonging, or rather the intra-belonging,” Esposito writes, “which allows what is different to not hermetically seal itself up within itself, but rather, to remain in contact with its outside.”<sup>166</sup> To put it in systems theory terms, we might say that “the body” obtains at the level of autopoietic “organization” and its closure, while “the flesh” obtains at the level of “structure,” opening the autopoietic unity to the flows of energy and organic material that both sustain it and potentially threaten it.<sup>167</sup> Flesh “is neither another body nor the body’s other: it is simply the way of being in common of that which seeks to be immune,” for which the distinction between “human” and “animal” is no longer an adequate lexicon, as even Nietzsche realized.<sup>168</sup> “Flesh” thus becomes the communal substrate shared by humans with other forms of life in and through which “the body” is both sustained and threatened, and the more we attempt to maximize the former through the micrological manipulations of biopower, the more the threat increases. So when we consider the use of CAFOs to

feed the majority of the population—its effects on public health (and therefore on public health policy and its escalating costs), the devastating, literally unsustainable effects on the environment, and the use of massive government subsidies to prop up the entire system--is it really possible to isolate all of these from the political “per se”? And if so, is it not a thin and impoverished understanding of the “political” that is the result?

As Foucault puts it in an interview from 1977,

The political is not what ultimately determines (or overdetermines) elementary relations. . . . All relations of force imply a power relation. . . and each power relation can be referred to the political sphere of which it is a part, both as its effect and as its condition of possibility. . . . Political analysis and critique, for the most part, have to be invented----but so do strategies that will allow both modifying these relations of force and coordinating them in such a way that this modification will be possible and register in reality. That is to say that the problem is not really defining a political “position” (which brings us back to a choice on a chessboard that is already set up), but to imagine and to bring out new schemas of politicization.<sup>169</sup>

Indeed, over and against the predictable Manichean idea of the political that announces itself in Badiou, Žižek, et al., we find here a fundamental rethinking of political effectivity itself, one that is not simply a site of an ontological repetition compulsion, one that does not simply take for granted traditional notions of the political “agent” or “subject” counterpoised over and against the world or “objects,” but is rather addressed precisely to the new conceptualization of politicization opened up by biopolitics—to those (that is to say, *all* of us) who are caught up in the play of biopower, whose status as “subjects” or as “objects” is floating, indeterminate, and always subject to strategic rescripting.

From this vantage, opposing factory farming would constitute a “new schema of politicization,” not just in resisting the formative *dispositifs* of modern biopolitics in their most brazen form, but also in articulating with other dimensions of political resistance, such as opposition to the commodification and private ownership of life in the services of late capitalism. In this light, paying attention to the question of non-human animal life has the potential to actually *radicalize* biopolitical thought beyond its usual parameters. As Nicole Shukin points out, the problem with biopolitical thought, from whatever location on the political compass, has been twofold. First, time and again it “bumps up against its own internal limit at the species line”; and second, biopolitical analyses have been “constrained by their reluctance to pursue power’s effects beyond the production of human social and/or species life and into the zoopolitics of animal capital.<sup>170</sup> This is patently true in both the tacitly liberal democratic orientation of Nikolas Rose in *The Politics of Life Itself* and in the sort of post-Marxist work that would oppose it, such as Paolo Virno’s *A Grammar of the Multitude*.<sup>171</sup> As Shukin’s study makes abundantly clear, the question of the animal that biopolitics has ignored is not just conceptual or analytical but *material*, involving not just “the semiotic currency of animal signs” but also “the carnal traffic in animal substances.”<sup>172</sup> As she puts it, the private ownership and manipulation of animal bodies, where they “are reproductively managed as protein and gene breeders under chilling conditions of control,” are crucial to the flows of speculation and investment

in biocapitalism that Rose describes but doesn't quite critique.<sup>173</sup> Moreover, as phenomena such as "Mad Cow" disease and "Avian flu" make clear, the "formerly distinct barriers separating humans and other species are imaginatively, and physically, disintegrating under current conditions of globalization."<sup>174</sup>

Taking such questions seriously poses rather direct *political* challenges and radicalizes biopolitical thought in ways not possible if we remain within the usual purview of anthropocentrism. Think, for example, about the immediate practical consequences of eliminating the legal designation of animals as property. As Matthew Calarco puts it,

On this political terrain, neohumanist arguments concerning the merits of the democratic tradition have little if any weight. Even if one were to inscribe animal rights within a democratic liberatory narrative of expansion and perfectibility (as is sometimes done), such gestures can only appear tragicomic in light of the massive institutionalized abuse of animals that contemporary democracies not only tolerate but encourage on a daily basis.<sup>175</sup>

One thing seems clear: Such practices are part of a matrix that, under conditions of globalization, increasingly takes as its political object planetary life itself, at the level of "flesh," and they constitute a biopolitics that encompasses and conjoins the putatively opposed political regimes of liberal democracy, fascism, and communism. They involve the exponential expansion and routinization of mechanisms and logics that extend from the Chicago slaughterhouses of the turn of the twentieth century, through the assembly lines developed by Ford, to the Nazi death camps and back again, traversing what we are now forced to call a newly expanded community of the living.

## VIII.

We are now in a better position to articulate the relationship between the “before” of the law and its addressee, “whoever it might be,” antecedent to the law’s historical contingency and social conventions, and the law’s “after,” its “conditional” and “performative” character, or what Niklas Luhmann will theorize, more stringently still, as the law’s “autopoiesis.” Luhmann’s work, because of its larger set of theoretical commitments—for example, his contention that the basic elements of social systems are not people but communicational events--provides a particularly stringent example of how the law is necessarily denaturalized and differentiated from any moral or naturalistic ground in the sense of a Kantian regulative Idea. Like Derrida, he would insist (but even more strongly) on the *difference* between law and justice (or what Luhmann tends to frame as questions of law versus morality). But--and this is typical, as I’ve argued elsewhere, of the relationship between Luhmann’s work and Derrida’s<sup>176</sup>--where Derrida would see the difference between the pragmatic immanence of legal doctrine and the question of justice as a resource or reservoir for keeping the law honest, as it were, confronting it with its own “impossibility,” Luhmann’s *functional* account would see that difference simply as a *problem* that the legal system must find ways to handle in terms of its own autopoiesis.

For Derrida, justice can’t *simply* be the routine carrying out of the legal system’s norms. As he puts it in *Rogues* (reprising one of the central points of “Force of Law”),

Where I have at my disposal a determinable rule, I know what must be done, and as soon as such knowledge dictates the law, action follows knowledge as a calculable consequence: one *knows* what path to take, one no longer hesitates. The decision then no longer decides anything but is made in advance and is thus in advance annulled. It is simply deployed, without delay, presently, with the automatism attributed to machines<sup>177</sup>

--and, ironically enough, to animals as those who can only “react” by means of an instinctive program but cannot “respond,” and thus cannot act with responsibility. For Luhmann, on the other hand, the immanence and self-reference of the legal system is precisely what it *enables* it to address the problem of justice (or “morality”) by changing the question, as it were, into something that can actually be answered, functionally speaking, by the law. The function of law, Luhmann argues, “does not lie in the alternative of recognizing a naturally binding minimal order or an unrestrained arbitrariness,” but rather in using the schematism legal/illegal to secure the broader “autopoiesis of society’s communication system as much as possible against as many disturbances produced by this system as possible.”<sup>178</sup>

This radical “denaturalization” of the law via its own autopoietic closure decisively separates Luhmann’s view from Esposito’s, and it also reveals a difficulty with Bruno Latour’s “political ecology”--It further denaturalizes Latour’s denaturalization, you might say. Latour’s political ecology makes it clear that the distinction between “life” or “nature” and their others—all their others—cannot be rigorously maintained. Instead, political ecology “dissolves boundaries and redistributes agents” across what used to be opposed ontological domains.<sup>179</sup> Very much along the lines of our earlier discussion of “biosocial

collectivities,” it multiplies “hybrid” political entities out of “actants” (both human and non-human), and in so doing it enables non-human entities to participate in the larger political process by means of their resistance and “recalcitrance.” Political ecology thus becomes a process, as Latour winningly puts it, of “*collective experimentation* on the possible associations between things and people.”<sup>180</sup>

The problem with Latour’s position from the vantage systems theory, however, is that it ignores the autopoiesis of the law—and, more broadly, the phenomenon of functional differentiation, the hallmark of modernity if we believe Luhmann, of which it is a part. It ignores, in other words, how what is “before” the law and outside it in the form of “perturbations” and “resistances” is always addressed in terms of the law’s “after,” its own self-reference. As legal theorist Gunther Teubner puts it, Latour imagines a “great unified collective” where professions make their contributions to the decision-making process in a single conversation, but in fact there is little evidence to suggest that “an overarching societal discourse” called “political ecology” will emerge. Indeed, the phenomenon of functional differentiation suggests quite otherwise, and thus, the sites on which Latour’s political ecology plays out are fragmented, “dispersed over different social institutions.”<sup>181</sup> Each social subsystem operates “under sharply defined conditions” for attributing actions, responsibilities, rights, duties, and so on.<sup>182</sup> “Using their specific models of rationality,” Teubner writes, “each institution produces a different actor, even where concretely it is the same, human or non-human, that is involved.”<sup>183</sup> This doesn’t mean that the question of non-human actants—specifically, animals and electronic agents in Teubner’s analysis—doesn’t affect the operations of the law or of other social subsystems; it means, rather, that they affect them in a quite specific way. And it also means that these new social actors thus “lead a highly fragmented existence in society,” appearing “in very different guises in politics, in the economy, in the law, and in other social contexts.” Indeed, this is precisely what we have already seen in the case of companion versus food animals.<sup>184</sup> And thus, as Teubner puts it, the result is “not a compromise on the conditions of agency” between the various social subsystems to form a single political ecology, “but, rather, a multitude of new differences—now *within* each institution.”<sup>185</sup> “Social systems do listen to the needs of other social systems,” Teubner writes—just as the law has listened to both the educational system (cognitive ethology, zoology) and the economic system (factory farming) quite differently in the case of non-human animals—“but they do not give up their own requirement of agency.”<sup>186</sup>

Still, as he notes, whenever the law grants new rights and duties, whenever it gives “associations between humans and non-humans a legal voice,” the law opens itself to the ecology of its broader environment and the changes taking place there.<sup>187</sup> In the systems theory model, then, we have a picture of the legal system as both open *and* closed: open to its environment but responding to changes in it in terms of the autopoietic closure of its own self-reference. Such a model gives us, in fact, a more nuanced and complex way to explain what we examined at the outset in Arendt’s work: the relationship between “rights” (and its ad hoc, ungrounded attribution) and the “right to have rights,” a set of ontological or phenomenological attributes that falls outside the juridico-political as part of its environment and serve as

a provocation or perturbation to the system itself. “The result of all this,” Teubner concludes, “is that indeed non-humans gain access to social communication, albeit in a rather indirect way.”<sup>188</sup>

From a systems theory point of view, the law may thus be seen as serving an “immunitary” function for society, as Esposito himself has emphasized. Indeed, he notes that Luhmann’s thesis “that systems function not by rejecting conflicts and contradictions, but by producing them as necessary antigens for reactivating their own antibodies” places “the entire Luhmannian discourse within the semantic orbit of immunity.”<sup>189</sup> As Luhmann explains in *Social Systems*, the code legal/illegal that steers the legal system “is supplemented by a binary coding of permitted/forbidden. This too serves to increase contradiction and to direct immune events in a precise way. . . . It helps to separate law from morality, setting law free to steer itself.”<sup>190</sup> Crucially, this self-reference of the law’s autopoiesis protects the communicative actions that take place in the legal domain from being steered or recoded by the moral distinction of “right vs. wrong”—a danger, I would add, that is dramatized daily in what is called the “public sphere” in the United States. Indeed, as Teubner notes, for a German intellectual of Luhmann’s generation, that danger, and more broadly the “specifically German experience with mysticism and religiosity in the public sphere,” is particularly resonant.<sup>191</sup> In Luhmann’s account, the problem is that the moral code, under functional differentiation “has detached itself,” as William Rasch writes, “from its premodern locus in religion and has become a self-replicating, parasitic invader of the various modern, functionally differentiated social systems. . . . The danger comes, according to Luhmann, when the moral code—good/bad—attaches itself ‘isomorphically,’ one might say, to the prevailing codes of the respective function systems,” so that what counts as knowledge in the education system, for example, gets recoded as morally “good” or morally “bad.”<sup>192</sup> And “the effects Luhmann fears,” as Rasch points out, “can be elucidated historically by listing the countless crusades, wars, inquisitions, and persecutions that moral discourse has fueled.”<sup>193</sup>

For Luhmann as for Derrida, then, we find a permanent disjunction between ethics and law, or “justice” and “law” in Derrida’s terms, and for both, it is a good thing, too. For both, the law is radically aporetic or paradoxical in its self-reference and immanence; the difference between legal and illegal is (paradoxically) is itself instantiated by the legal, hence the tautological self-reference, “legal is legal.” Or as Derrida puts it in “Force of Law,” since “the foundation or ground, the position of the law can’t by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of ‘illegal.’ They are neither legal nor illegal in their founding moment. They exceed the opposition between founded and unfounded.”<sup>194</sup> In fact, they are constituted by what Derrida calls a *coup de force*.<sup>195</sup>

More technically speaking, the law is aporetic and without ground because of its “conditional” and “performative” character that simultaneously opens and propels it toward futurity by means of that which it has, in its contingent decisions, already excluded and, as it were, pushed to the position of the “next” or the “not yet fully addressed.” Derrida articulates the problem quite precisely in “Force of Law”:

An address is always singular, idiomatic, and justice, as law (*droit*), seems always to suppose the generality of a rule, a norm or a universal imperative. How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case?<sup>196</sup>

Derrida's argument is not only that each "pragmatic instance" and iteration of the difference between law and justice must be attended to, but that indeed it is only in and through such iterative instances, and not in some transcendental ether, that law itself exists.<sup>197</sup> As Richard Beardsworth sums it up, "the law is, on the one hand, unaccountable," but "on the other hand it is *nowhere* but *in* its inscriptions in history, whilst not being reducible *to* these inscriptions either."<sup>198</sup> And this means that law is both unconditional *and* conditioned; it is the difference-as-iterability of the unconditional and conditioned.

Law and justice thus cannot be understood to be in a relationship of *opposition*, exactly, and in fact, as Martin Hägglund suggests, it is more useful to understand it as an "autoimmune" relation.<sup>199</sup> From this vantage, we might say that the problem with the Esposito's Simondonian/Deleuzean tack at the end of *Bios* is that it deals with only the first component of the aporia, only with what Derrida will call "unconditional hospitality," and not with the "after," the "conditional" character of law. It ignores, in other words, the fundamentally "autoimmunitary" character of the law—autoimmunitary not in the sense of "bad" or "negative" but in the sense of what I have elsewhere called the "openness from closure" principle, the fact that the inescapable self-referential closure of law is precisely, in its contingency, what opens it to the future and the outside, the as yet unaddressed subjects—who knows how many?—of justice.<sup>200</sup> As Derrida puts it in the interview "Autoimmunity: Real and Symbolic Suicides" (and this, explicitly in the context of a critique of the liberal pluralist—but also finally Christian--concept of "tolerance"), "Pure and unconditional hospitality, hospitality *itself*, opens or is in advance open to someone who is neither expected nor invited, to whomever arrives as an absolutely foreign *visitor*, as a new *arrival*, nonidentifiable and unforeseeable, in short, wholly other."<sup>201</sup> On the other hand—and this is what gets overleapt in Esposito's conjugation of the radical equality of all "life" and the "norm" at the end of *Bios*—"suspending or suppressing the immunity that protects me from the other might be nothing short of life-threatening," and so "an unconditional hospitality is, to be sure, practically impossible to live; one cannot in any case, and by definition, organize it." Thus, Derrida concludes, "this concept of pure hospitality can have no legal or political status," but at the same time, without it we would not "be able to determine any rules for conditional hospitality (with its rituals, its legal status, its norms, its national or international conventions)."<sup>202</sup>

In this sense, "Unconditional hospitality, which is neither juridical nor political, is nonetheless the condition of the political and the juridical."<sup>203</sup> But like justice, it can only take place in and through specific, pragmatic instances of iteration—instances that are by definition selective, exclusionary, and therefore "conditional." "I cannot expose myself to the coming of the other and offer him or her anything

whatsoever,” Derrida reminds us, “without making this hospitality effective, without, in some concrete way, giving *something determinate*. This determination will thus have to re-inscribe the unconditional into certain conditions. . . . Political, juridical, and ethical responsibilities have their place, if they take place, only in this transaction—which is each time unique, like an event—between these two hospitalities, the unconditional and the conditional.”<sup>204</sup> In this light, if we want to salvage the Deleuzian impulse of Esposito’s conjugation of life and norm—do we extend “unconditional hospitality” to anthrax and ebola virus, to SARS?—then we are necessarily driven back upon a pragmatist rather than ontological reading of Deleuze (a point I’ve taken up in some detail elsewhere).<sup>205</sup> When I say “pragmatist” here I have in mind not the Rortyan variety, but rather the sense that Derrida sounds in “Force of Law”: not to “remain enclosed in purely speculative, theoretical, academic discourses but rather. . . to aspire to something more consequential, to *change* things.”<sup>206</sup> By a pragmatist account, philosophy for Deleuze, as Paul Patton puts it, “is the invention or creation of concepts, the purpose of which is not accurate representation” but rather to provide “a form of description which is immediately practical,” one “oriented toward the possibility of change.”<sup>207</sup> Like Derrida’s “beyond” and the “to come” which is not to be thought as a kind of Kantian regulative idea<sup>208</sup> but rather has the form of a promise, Deleuze and Guattari’s “absolute deterritorialisation takes place in the virtual—as opposed to the actual—order of things,” and “remains an unrealisable or impossible figure, manifest only in and through relative deterritorialisation.”<sup>209</sup> On this reading, deterritorialisation obeys the logic of Derrida’s iterability in and through which the “conditioned” and “unconditioned” are conjugated.<sup>210</sup> As Patton notes, Deleuze and Guattari “do not dwell on the aporetic character of the extreme or unconditioned form of the concepts outlined in *A Thousand Plateaus*” such as becoming, deterritorialization, and so on, but their essentially paradoxical and aporetic character is nonetheless clear.<sup>211</sup> All of which is made more difficult to see, in both Deleuze and Derrida, by an unfortunate reliance on terms such as “pure,” “absolute,” “authentic,” “genuine,” and so on.

The exercise of justice, then, while it would seem to require a kind of autonomy, indeed sovereignty, something on “the order of the ‘I can,’ ipseity,”<sup>212</sup> is in fact dependent upon the pragmatic iteration of law, which is itself structured by the complex paradoxical relationship between “autonomy” and “automaticity” in Derrida’s thought (a point I’ll return to in some detail in a moment). As Derrida puts it in *Rogues*, if the event of justice “is to arrive or happen, it must, beyond all mastery, affect a passivity. It much touch an exposed vulnerability, one without absolute immunity, without indemnity. . . . In this regard, autoimmunity is not an absolute ill or evil. It enables exposure to the other, to *what* and to *who* comes—which means it must remain incalculable.”<sup>213</sup> Here, we reach a key nexus in Derrida’s thought regarding the performative, sovereignty, the immunitary, and the theological. As he writes in “Faith and Knowledge”—and in direct opposition to Schmitt’s attempt to severely limit the political<sup>214</sup>—“Religion and reason develop in tandem, drawing from this common resource: the testimonial pledge of the performative. . . . The same unique source divides itself mechanically, automatically, and sets itself reactively in opposition to itself: whence the two sources in one. This reactivity is a process of *sacrificial indemnification*, it strives to restore the unscathed (*helig*) that it itself threatens.”<sup>215</sup>

As Derrida suggests in his rather remarkable discussion in *The Beast and the Sovereign*, we find this process at work in the very paradigm of the “ipseity” that characterizes the sovereign subject on the terrain of *both* the religious and the political: the phallus. Reaching all the way back to the worship of “fecundity or the generative potency of the Dionysiac mysteries,” what is most striking here is “the *colossal automaticity* of the erection.” On the one hand, it is “the maximum of life to be kept unscathed, indemnified, immune and safe,” but on the other hand, “and precisely by virtue of its reflex-character,” it is “that which is most mechanical, most separable from the life it represents.”<sup>216</sup> The phallus is then both the very figure of sovereignty, ipseity, and at the same time “automatic, independent of will and even of desire,” “mechanical, already in itself prosthetic.” “Is it proper to man,” he asks, “or else, already cut from man, is it a ‘something,’ a thing, an a-human, inhuman *what*, which is, moreover scarcely more masculine than feminine? Neither animal nor human?”<sup>217</sup> It is against this “con-fusion,” we might say—against the fact that the phallus is, indeed, *bêtise*<sup>218</sup>—that the regime of sacrifice institutes itself, to reassert ipseity against automaticity, but only, fatefully, to performatively reiterate the very problem it attempts to solve. For as Hägglund notes in his discussion of Derrida’s engagement of Schmitt, “the structure of decision undercuts. . . the possibility of an indivisible sovereignty.” If the sovereign is to meet Schmitt’s requirements of indivisibility and authority, then “he has to know who his enemy is and who he himself is in relation to his enemy.” But if there is such knowledge, then there is no—can be no need for—the sovereign decision, which *is* a decision only insofar as there is no such knowledge. This means not only that sovereignty is subject to the “law of law” *qua* the performative; it also means that “there has *never* been an autonomous domain for the political.”<sup>219</sup>

At stake here, then, is sovereignty in several different registers—not just of the nation state but of the family, the familiar, the domestic, the “proper” to man, the *oikos* of the ecological the economic, the *ethos* and the place of dwelling, of that which is “ours” or “mine” and deserves immunity protection.<sup>220</sup> All of these are iterations of the “ipseity” of the autonomous subject (and the “auto-“ of the “autobiographical animal”), whose very paradigm is the “head” of State.<sup>221</sup> It is worth recalling in this connection Derrida’s discussion of the “*sacrificial* structure” of “carnophallogocentrism” in “Eating Well”<sup>222</sup> and his apparently (but only apparently) playful question there: “in our countries, who would stand any chance of becoming a *chef d’Etat* (a head of State), and of thereby acceding ‘to the head,’ by publicly, and therefore exemplarily, declaring him- or herself to be a vegetarian?”<sup>223</sup> The “ipseity” of sovereignty, in other words, requires not just “sacrificial indemnification” in some abstract sense but “carnivorous sacrifice” (“Eating Well” 113) as testament to its autonomy, its phallic “freestandingness,” you might say.<sup>224</sup>

Derrida’s apparently playful analysis is even more resonant, I think, against the backdrop of the contemporary development known as synthetic or in vitro meat. Research into synthetic meat began in the late 1990s, and in 2008, the animal rights group PETA announced that it would award a one million dollar prize to anyone who designs a process for commercially viable in vitro meat production by 2012.<sup>225</sup> The process is relatively new and involves variations, but typically, scientists place myoblast cells from an

animal in a nutrient medium where they multiply and then attach themselves to a scaffolding structure made of collagen or a similar substance. From there, the tissue continues to grow in a bioreactor until it reaches sufficient scale. The primary challenge of the technology is that the tissue grows in thin sheets, so achieving the proper three-dimensional density and texture of steak is presently impossible. The most likely commercial applications in the short run will therefore be in ground and processed foods. But the potential benefits of the technology, even beyond the signal virtue of reducing massive amounts of animal suffering, are enormous. Synthetic meat would no doubt reduce the incidence of epidemic zoonoses (such as “mad cow disease”) because it could be engineered under much more controlled conditions than are possible in traditional livestock production, let alone the antibiotic saturated practice of factory farming. And in terms of environmental impact, world meat production contributes to between 15 and 24 percent of total greenhouse gases (more than all cars, trains, planes, and ships combined) and it is water-, grain-, and energy-intensive to sustain—all of which is made even more pressing by the fact that total worldwide meat consumption is estimated to be 72 percent higher in 2030 than in 2000.<sup>226</sup>

Even without Derrida’s anatomy of carnophallogocentrism, the example of synthetic meat makes palpable (if the expression may be allowed in this context) the value of a biopolitical framework for addressing these kinds of issues. From the point of view of, say, Peter Singer’s utilitarian argument for animal rights on the basis of their fundamental interest in avoiding suffering, or Martha Nussbaum’s argument for animal welfare from the standpoint of protecting their ability to “flourish,” there *is* no ethical problem with synthetic meat.<sup>227</sup> But within the framework of biopolitics—particularly with an emphasis on its constitutive *dispositifs* such as we find in Foucault—the ethical and even political issues around synthetic meat take on a different cast. From this vantage, synthetic meat might not even appear to be an “animal” issue *per se*, and would instead be seen as utterly continuous with the technologies and *dispositifs* that are exercising a more and more finely tuned control over life and “making live” at the most capillary levels of social existence. Indeed, it would seem continuous with the practices of domestication, manipulation, and control of life that characterize the factory farm to which, from an animal rights point of view, it seems opposed.

It is all the more significant in this regard that current research in *in vitro* meat involves teams whose primary research has often been in fields of biomedicine such as vascular biology, regenerative medicine, and tissue engineering for human patients.<sup>228</sup> Given his remarks earlier on cloning, there is little doubt that Derrida would direct our attention, as Foucault’s casting of biopolitics would as well, to the fundamentally mixed and ambivalent quality of these developments. But what Derrida’s particular contribution to biopolitical thought helps us to plumb even more deeply are questions barred not just to the animal rights line of argument in support of synthetic meat but also to Esposito’s invocation of “life” and even to Foucault’s historical approach to *dispositifs*. He would push us to ask, is synthetic meat “life?” Would many of us feel that “real” meat is “better,” more authentic, than synthetic meat because it indexes the sovereignty and ipseity of a subject who engages in sacrifice? Does sacrifice make meat taste better? Indeed, is it what makes meat “meat?” In light of Derrida’s analysis of the alienating and “expropriative”

effects of technoscience and how we respond to it—in the name of religion, in the name of “blood and soil”<sup>229</sup>--would eating synthetic meat be ‘eating well’ in Derrida’s sense? And why, indeed, would we otherwise ever think that eating meat had anything at all to do with patriotism and sovereignty, with the “*chef d’etat?*”<sup>230</sup>

In this light, we can perhaps tease out an important deep structure of the locavore/“ethical carnivore” phenomenon: the fact that its followers “do not sacrifice sacrifice,” as Derrida puts it in “Eating Well.”<sup>231</sup> It enables us to explain the otherwise odd fact, as an essayist for *The Atlantic* notes, that many of the most prominent advocates of sustainable agriculture actually *oppose* synthetic meat. As one, a representative for the group Friends of the Earth, puts it, “At a time when hundreds of small-scale, sustainable farming operations are filing for bankruptcy every day, it is unethical to consider purchasing Petri dish meat.” Another, speaking for the group Slow Food USA, suggests that cruelty to food animals is created primarily by the very growing gap between producers and consumers, a gap that is only widened by synthetic meat: ““This is a technology that’s just going to give more to companies and create a larger distance between us.”<sup>232</sup> Against the alienating and derealizing mechanicity of “tele-technoscientific capitalism,” we find here, in Derrida’s words, if not a “fundamentalism,” then an “integrist” of “blood and soil” that drives us back to “the family (*heimisch*, homely), to the familiar, to the domestic, to the proper, to the *oikos* of the ecological and of the economic, to the *ethos*, to the place of dwelling,” only to reenact the “auto-immune auto-indemnification” that results from the sacrificial closure and securing of the “proper.”<sup>233</sup> After all, why eat animals *at all*? We have to account here, then, for “a double postulation: *on the one hand*, the absolute respect of **life**, the “Thou shalt not kill” (at least thy neighbour, if not the living in general), the ‘fundamentalist’ prohibition of abortion, of artificial insemination, of performative intervention in the genetic potential, even to the ends of gene therapy, etc.; *and on the other*. . .the no less universal sacrificial vocation.”<sup>234</sup>

When we ask what “the *mechanics* of this double postulation” are, as Derrida puts it, we find an “apparently very simple” but disarming principle which we will have already guessed from Derrida’s analysis of the phallus: “life has absolute value only if it is worth *more than* life. . . . It is sacred, holy, infinitely respectable only in the name of what is worth more than it and what is not restricted to the naturalness of the bio-zoological (sacrificeable). . . . Thus, respect of life in the discourses of religion as such concerns ‘human life’ only in so far as it bears witness, in some manner, to the infinite transcendence of that which is worth more than it (divinity, the sacrosanctness of the law).”<sup>235</sup> And here, we should recall, with Esposito, perhaps the most brazen manifestation of this logic in the history of the modern political (or is it theological?) stage: Hitler, in Telegram Number 71 sent from his bunker in Berlin as the Allies were approaching, ordered that all means of subsistence for the German people, who had shown themselves unworthy of the Reich, should be destroyed. “Here the limit point of the Nazi antinomy becomes suddenly clear,” Esposito writes; “the life of some, and finally the life of one, is sanctioned only by the death of everyone.”<sup>236</sup> Against this multiply inflected background, it is all the more suggestive, I think, that the leading figure in the scientific push toward synthetic meat, eighty-seven year old Willem

van Eelen—who in 1999 was granted the first US and international patents for the “Industrial Production of Meat Using Cell Culture Methods”—spent most of World War II in prison camps, where the similarities between how prisoners and animals were treated left an indelible impression on him, fueling what he later discovered as his life’s work.<sup>237</sup> Were we to put Derrida’s words in his mouth, he might well say: “no more sacrificial indemnification!”

Here, it seems to me, we find an advance beyond Luhmann’s functionalist analysis of the “immunitary” logic of the law. As Gunther Teubner observes, “It is this transcendence of positivity wherein Jacques Derrida’s contribution” lies.<sup>238</sup> As he notes, for systems theory,

secularization is supposed to be a de-transcendentalization of all social subsystems and a concentration on transcendence in only one system of meaning, that of religion. But is this not at variance with the tough resistance to secularization of social utopias (socialism, fascism, neo-liberal doctrines of salvation), palpable even, and especially, in the highly rationalized subsystems of politics, law, the economy or science? Is there not an otherwise inexplicable manifestation here of salvific doctrines, eschatological hopes?<sup>239</sup>

Indeed, speaking in the context of the contemporary “wars of religion” that occupy so much of the discussion in *Philosophy in a Time of Terror*, Derrida writes in “Faith and Knowledge” that “The fundamental concepts that often permit us to isolate or to *pretend* to isolate the *political*—restricting ourselves to this particular circumscription—remain religious or any case theologico-political.”<sup>240</sup> This does not mean that Derrida becomes late in his career a “philosopher of religion,” nor is it to suggest that there is a fundamental “religious turn” during that same period. It is simply to say that both religion and politics are constituted by the same logic of “autoimmune autoindemnification,” and for that very reason they inflect and “infect” each other.<sup>241</sup>

From this vantage, we can appreciate more readily the deeply imbricated relationship between globalization (or *mondialisation*, as Derrida prefers to say) and the “globalatinization” Derrida takes up in “Faith and Knowledge,”<sup>242</sup> a process that involves “this strange alliance of Christianity, as the experience of the death of God, and tele-technoscientific capitalism,”<sup>243</sup> a “return of the religious” (both Christian and Muslim)<sup>244</sup> at the very same moment of the most extreme “expropriative and delocalizing” effects of capitalism and its constitutive technologies.<sup>245</sup> As Derrida writes in *Rogues*, this globalization is “more inegalitarian and violent than ever,” confiscating and concentrating wealth and natural resources with enormous force and efficiency and reserving “for that small part of the world those two great forms of immunity that go by the names of public health and military security.”<sup>246</sup> This process presents itself—justifies itself—as a peacekeeping or “*pacifying*” gesture that, in the name of prosperity, disguises a war “without limit” against “the religious cultures, states, nations or ethnic groups they represent” in the name of access “that is immediate and potentially without limit, to the same world market.”<sup>247</sup> What this means, as Leonard Lawlor observes, is that for Derrida “*globalization is war `by other means.*” Even more, the violence of this war, which is violence against the living in general, is autoimmune precisely because it is global and therefore limitless.<sup>248</sup>

The explicitly biopolitical character of this fact—and its obvious resonances with Foucault's work—are clear in *Philosophy in a Time of Terror*, where Derrida asks, “does terrorism have to work only through death? Can't one terrorize without killing? And does killing necessarily mean putting to death? Isn't it also 'letting die'? Can't 'letting die,' 'not wanting to know that one is letting others die'—hundreds of millions of human beings, from hunger, AIDS, lack of medical treatment, and so on—also be part of a 'more or less' conscious and deliberate terrorist strategy?”<sup>249</sup> Here, it seems to me, what needs to be added to Derrida's analysis of “not wanting to know” is an element not precluded by it but not exactly amplified by it either: the specific role and character of industrially produced meat as a central element and tool in the biopolitical process of globalatinization, in which we find the “prosperity” and “well-being” of the subject-consumer channeled through not just the consumerist “choice” that capitalist globalization says it offers and on which it depends, but also through the complex psychodynamics of sacrifice and eating flesh as a sign of the subject's autonomy, security and “indemnification,” “an ipseity that includes within itself, as the etymology would also confirm, the androcentric positioning of power in the master or head of the household, the sovereign mastery of the lord or seigneur, of the father or husband.”<sup>250</sup> In other words, “carnophallogocentrism” is a key export for the success of capitalist globalization, one born on the backs of billions dead animals.

Take China, for example—a country known for thousands of years for its predilection for vegetables over meat—where per capita intake of poultry, pork, fish, and meat has more than tripled since 1970. As a recent article notes, “In nearly every country where meat consumption was low (even in countries such as China, where some Buddhist practices encouraged vegetarianism), per capita intake has paralleled economic development.”<sup>251</sup> And because of the scale of the Chinese population, the extreme inefficiency of meat as a food source (it takes 40 kilograms of feed to produce 1 kilogram of beef), and the scarcity of farmland in China, “China's meat mania is implicated in everything from deforestation in Brazil to food-price inflation in Africa.”<sup>252</sup> Here, in the name of “prosperity” and “public health” (as Derrida puts it) we find a massive “not wanting to know,” but a “not wanting to know” of a rather specific sort: not just “not wanting to know” that non-human animals are being put to death on a new and unprecedented scale, but also a not wanting to know that the very ecological sustainability of the planet is at stake in the repression of this violence against non-human animals. For as Paul Roberts notes, over the next forty years, worldwide meat consumption is expected to more than double current levels, as cheap, industrially produced meat follows in the wake of capitalist development under globalization. And yet it is far from clear that the planet can support, let alone sustain, the ecological fallout of this newly exported sign of “prosperity.” As he puts it, “In a strange way, such bleak forecasts bring a welcome clarity to a discussion long confined to the margins of society. . . . Now the idea that meat-eating is purely an individual choice, and the costs affect only the individual, has been blown wide open.” Thus, he argues, eating meat has “graduated from the category of lifestyle choice to that of collective responsibility.”<sup>253</sup>

By way of moving toward a conclusion, then, we can mark a series of advances, I think, in deepening and broadening our understanding of the place of non-human animals and our relations to them in a biopolitical frame—or rather, *places*, given how multiple and conflicted that status is: from the crucial move in Agamben that insists upon not just one set of terms but two—not just “human/animal” but also *bios/zoe* in shifting transposition within and across species lines; to the finally excessive formalism of his rendering of the biopolitical symmetry between the sovereign and *homo sacer*; to the Foucauldian shift toward the constitutive *dispositifs* of biopolitics that cut across species lines and knit together bodies of whatever kind; to Esposito’s analysis of the crucial function of race (and therefore, I have been arguing, species) and his framing of the immunitary logic of biopolitics; and finally to Derrida’s anatomy of “auto-immune auto-indemnification.”<sup>254</sup> For Agamben, the relationship between the growth and export of industrially produced meat to capitalist globalization would not be political, much less biopolitical, at all; for Foucault, it would be biopolitical in the sense of being continuous with the radical ambivalence attendant upon the ever-increasing rationalization and control of “life” as a political and economic resource, of “making live” and “letting die,” that is constitutive of the biopolitical in its modern form; and it would be, moreover, potentially integral to a “new schema of politicization”<sup>255</sup>; for Esposito, the emphasis on its biopolitical character would surely fall not just on the fact that here we find that “the body that experiences ever more intensely the indistinction between power and life is no longer that of the individual, nor is it that sovereign body of nations, but that body of the world that is both torn and unified,”<sup>256</sup> but also on the fact of an immunitary mechanism that would allow us to explain the differences between how the Nazis treated their pets, their meat, and their Holocaust victims. What Derrida adds to this already impressive list of advances is not just his anatomy of the fundamental psychic and cultural mechanisms that are crucial to the biopolitical regimes of the (auto)immunitary and the “sacrificial” via the essential “carnophallogocentrism” of sovereignty in both the political and theological registers—the matrix in which the “auto-” of “man” as the “autobiographical animal,” the “autoimmune,” “autonomy,” and “automaticity” reside—but also the *direct* address he gives, alone in this group, to (at least some—who knows how many?) non-human animals as potential subjects of justice, as those to whom the “thou shalt not kill” of immunitary protection might apply.

Here, then, the biopolitical finds a new vocation, precisely by sustaining and deepening the logic that already constitutes it—a logic that, if pushed far enough, breaks down the stark opposition between the thanatopolitical and the affirmative that has tended to paralyze biopolitical thought: *either* unconditionally embrace all forms of life as subjects of immunitary protection, *or* suffer the autoimmune consequences that follow. But what this either/or logic misses is that the performative structure and logic of immunitary indemnification is precisely the condition of possibility for any possible affirmation, thus opening the community to its others—potentially, *all* its others, wherein reside the inseparable possibilities of both promise and threat. Hospitality, *to be* hospitality, to be real, must be something “determinate” and “conditioned”; my laws will not protect you if they aren’t. But this act of selection and discrimination, in its contingency and finitude, is precisely what opens it to the other and to the future. This is why

discrimination, selection, self-reference, and exclusion cannot be avoided, and it is also why the refusal to take seriously the differences between different forms of life—bonobos versus sunflowers, let's say—as subjects of immunitary protection is, as they used to say in the 70s, a “cop out.” This very act of immunitary selection and protection on the basis of the capacity to “respond”—a capacity itself based on a constitutively prosthetic relation to technicity—can never be juridical, however, because it is always already traced with the automaticity and mechanicity of a reaction. It is a “line,” to use Derrida’s formulation, that is always already “multiple” and non-linear, always folded and in motion, always under erasure. We *must* choose, and by definition we *cannot* choose everyone and everything at once. But this is precisely what ensures that, *in* the future, we *will have been wrong*. Our “determinate” act of justice now will have been shown to be *too* determinate, revealed to have left someone or something out. Indeed, this is precisely what has unfolded over the past few decades regarding our rapidly changing understanding of non-human animals and how we relate to them. *All* of them? How many? Who knows? These are not rhetorical questions. But I have suggested in the foregoing at least a place to start, since all cannot be welcomed, nor all at once. As Derrida notes in “Autoimmunity: Real and Symbolic Suicides,” we are thus always returned to a fundamental aporia that we must confront in two registers. Logically, “the demos is *at once* the incalculable singularity of anyone, before any ‘subject,’ . . . beyond all citizenship, beyond every ‘state,’ indeed every ‘people,’ indeed even beyond the current state of the definition of a living being as living ‘human being,’ *and* the universality of rational calculation, of the equality of citizens before the law.”<sup>257</sup>

In the end, then—to return to where we began—the biopolitical frame has the virtue of recasting our current legal and political norms to enable us to see the irony (if one wants to call it that) of the Spanish Parliament’s decision with regard to human rights for Great Apes at the very moment when the violence of biopolitics against “the body of the world” has never been more virulent and more systematic, nowhere moreso than in today’s practices of factory farming. Nor has it been less concerned with the distinctions in taxonomy between human and non-human life with regard to “making live” and “letting die.” So even as granting basic rights to Great Apes—or indeed to other non-human animals as well—no doubt constitutes a monumental and historic step forward for our relations with animals within the political purview of liberal democracy and its legal framework, it might well be seen, within the biopolitical context opened up by Foucault, Esposito, Derrida, and others, as essentially a kind of tokenism in which non-humans who are “racially” similar enough to us to achieve recognition are protected, while all around us a Holocaust—if that is indeed the word we want—against our other fellow creatures rages on and indeed accelerates. An affirmative biopolitics need not—indeed, as I have argued, *cannot*—simply embrace “life” in all its undifferentiated singularity, even as Esposito is surely right that confronting “the biojuridical node between life and norm” is “neither the content nor the final sense of biopolitics, but is at a minimum its presupposition.”<sup>258</sup> What is useful about biopolitical thought is that it puts us in a position to articulate the disjunctive and uneven quality of our own political moment, constituted as it is by new forces and new actors not very legible by the political vocabulary of sovereignty we have inherited, enabling us to see not

just the dramatic, affirmative shift announced by the Spanish Parliament's decision, but also the radically ambivalent character of the biopolitical: that that decision is shadowed, indeed haunted, by the mechanized killing of billions of animals each year, in factory farming, in aquaculture, in the fishing of the seas to the point of collapse, in the sixth largest extinction event in the history of the planet that we are now experiencing—what Jonathan Safran Foer rightly calls a “war” on our fellow creatures.<sup>259</sup> The biopolitical point is no longer “human” vs. “animal”; the biopolitical point is a newly expanded community of the living and the concern we should all have with where violence and immunitary protection fall within it, because we are all, after all, potentially animals before the law.

## Notes

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<sup>1</sup> Martin Heidegger, “The Question Concerning Technology,” trans. William Lovitt, in *Basic Writings*, ed. and intro. David Farrell Krell (New York: Harper and Row, 1977), 302.

<sup>2</sup> *Ibid.*, 287, 294.

<sup>3</sup> As David Wills aptly summarizes it, *Gestell* “is coined in the context of two other words, namely *Gebirge*, the gathering of mountains that produces the mountain ‘range,’ and *Gemut*, the gathering of emotions that produces a ‘disposition.’ In comparison with a natural gathering on the one hand and human gathering on the other, *Gestell* will be the frameworking of what is set out, produced by and in the same movement ordered into instrumental service.” David Wills, *Dorsality: Thinking Back Through Technology and Politics* (Minneapolis: University of Minnesota Press, 2008), 30.

<sup>4</sup> “The Question Concerning Technology,” 309.

<sup>5</sup> *Ibid.*, 308.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, 299.

<sup>8</sup> *Ibid.*, 310.

<sup>9</sup> *Ibid.*, 300.

<sup>10</sup> *Ibid.*, 294.

<sup>11</sup> For as Timothy Campbell points out, the decisive question here is this: “What kind of man masters technology? The change in the species of man that attempts to extend his domination over technology. . . is in fact what is most dangerous about technology.” Timothy Campbell, *Improper Life: Technology and Biopolitics from Heidegger to Agamben* (Minneapolis: University of Minnesota Press, 2011), 7.

<sup>12</sup> “Letter on Humanism,” trans. Frank A. Capuzzi and J. Glenn Gray, in Heidegger, *Basic Writings*, 200.

<sup>13</sup> See Cary Wolfe, *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory*, foreword W.J.T. Mitchell (Chicago: University of Chicago Press, 2008), chapter two. As Heidegger puts it in the “Letter,” “man is not only a living creature who possesses language along with other capacities. Rather, language is the house of Being in which man ek-sists by dwelling, in that he belongs to the truth of Being, guarding it.” Heidegger, “Letter on Humanism,” 213.

<sup>14</sup> Campbell, 28.

<sup>15</sup> Throughout this essay, I roughly alternate between the more technically correct term “non-human animal” and the more concise and felicitous term “animal,” it being obvious that *homo sapiens* is but one member of the animal kingdom—and a member who has often sought to maintain that the “human” is not.

<sup>16</sup> For Derrida’s discussion of “ipseity,” see the following: *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford: Stanford University Press, 2005), 143 and *The Beast and the Sovereign*, volume one, trans. Geoffrey Bennington, ed. Michel Lisse, Marie-Louise Mallet, and Ginette Michaud (Chicago: University of Chicago Press, 2009), 71. The canonical locus for the discussion

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of “bare life” in Agamben is *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

<sup>17</sup> See Jacques Derrida, “*Geschlecht II: Heidegger’s Hand*,” trans. John P. Leavey, Jr., in *Deconstruction and Philosophy*, ed. John Sallis (Chicago: University of Chicago Press, 1986), 173.

<sup>18</sup> “The Parergon,” trans. Craig Owens,” *October* 9 (Summer 1979): 33. As Wills notes, *Gestell* is a kind of technology through which the human paradoxically reveals its essential, pre-technological, ontological nature to itself only on the basis of its prosthetic dependence on something external, technical, inorganic (34).

<sup>19</sup> See Roberto Esposito, *Immunitas: The Protection and Negations of Life* (London: Polity Press, forthcoming 2011), ms. p. 18.

<sup>20</sup> Hannah Arendt, *The Human Condition*, second edition, intro. Margaret Conovan (Chicago: University of Chicago Press, 1998), 2.

<sup>21</sup> Hannah Arendt, *The Origins of Totalitarianism*, new edition (New York: Harcourt, 1976), 302.

<sup>22</sup> Arendt, *Origins of Totalitarianism*, 292. For an incisive discussion of this moment in Arendt, see Alistair Hunt, “The Rights of the Infinite,” in *Qui Parle* 19:2 (Spring/Summer 2011): 223-251.

<sup>23</sup> Jacques Derrida, *The Animal That Therefore I Am*, trans. David Wills, ed. Marie-Louise Mallet (New York: Fordham University Press, 2008), 30. See also Jacques Derrida, *Of Spirit: Heidegger and The Question*, trans. Geoffrey Bennington and Rachel Bowlby (Chicago: University of Chicago Press, 1989), 56. On “bare life,” see Agamben, *Homo Sacer*.

<sup>24</sup> Arendt, *Origins of Totalitarianism*, 295-6.

<sup>25</sup> *Ibid.*, 296-7.

<sup>26</sup> As Arendt writes in her overview of the idea of politics inherited from the Greeks, in a passage whose direct lines of descent to Heidegger’s humanism are clear enough, and in one of the great articulations of the biopolitical distinction between *bios* and *zoe* before Foucault, “The distinction between man and animal runs right through the human species itself: only the best (*aristo*), who constantly prove themselves to be the best (*aristeuein*, a verb for which there is no equivalent in any other language) and who ‘prefer immortal fame to mortal things,’ are really human; the others, content with whatever pleasures nature will yield them, live and die like animals” (*The Human Condition* 19). See also 13, 24, 37.

<sup>27</sup> See in particular her discussion of what she calls, in quotation marks, the “‘language’ of mathematical symbols” versus language proper, which partakes of the *topos* we have already discussed in Heidegger of the improper versus proper use relation to language as mere communication, information, in contrast to authentic expression and comprehension (*The Human Condition* 3-4). See also *Origins of Totalitarianism* 297.

<sup>28</sup> Arendt, *The Human Condition*, 3; see also 27.

<sup>29</sup> Arendt, *Origins of Totalitarianism*, 300.

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<sup>30</sup> See Jacques Derrida, “Structure, Sign, and Play in the Discourse of the Human Sciences,” in *Margins of Philosophy*, trans. Alan Bass (Chicago: University of Chicago Press, 1978), 278-94.

<sup>31</sup> As she writes in the “Prologue” to *The Human Condition*, “wherever the *relevance* of speech is at stake, matters become political by definition, for speech is what makes man a political being” (Arendt, *The Human Condition*, 4, *emph. mine*). So speech is “natural” but, regarding its function as a foundation for rights, it may be *either* relevant or irrelevant. Indeed, as she notes in discussing Aristotle’s political writings, “according to this opinion, everybody outside the *polis*—slaves and barbarians—was *aneu logou*, deprived, of course, not of the faculty of speech, but of *a way of life* in which speech and only speech made sense and where the central concern of all citizens was to talk with each other.” (27, *emph. mine*). All of the foregoing clarifies why Hunt is not quite right when he says of Arendt that “Insofar as the right to have rights is claimed by those reduced to a condition of rightlessness, perhaps the author of *The Human Condition*, one of the most magnificent humanist treatises of the twentieth century, is in her own way also an advocate of animal rights” (225). The right to have rights would be barred to non-human animals because it rests upon the foundation of the capacity for speech.

<sup>32</sup> Derrida, *The Animal That Therefore I Am*, 27-9.

<sup>33</sup> If it belonged to everyone,” he continues, “like a biological characteristic, language or the ability to walk, for example, a right would not be a right, but simply a fact with no need for specific juridical denomination. In the same way, if the category of person coincided with that of human being, there would have been no need for it. Ever since its original juridical performance, personhood is valuable exactly to the extent to which it is not applicable to all, and finds its meaning precisely in the principled difference between those to whom it is, from time to time, attributed and those to whom it is not, or from whom, at a certain point, it is subtracted. Only if there are men (and women) who are not completely, or not at all, considered persons, can others be or become such.” Roberto Esposito, “The Person and Human Life,” trans. Diana Garvin and Thomas Kelso, in *Theory After “Theory,”* ed. Jane Elliott and Derek Attridge (London: Routledge, 2011), 209.

<sup>34</sup> “Eating Well,” or the Calculation of the Subject: An Interview with Jacques Derrida,” trans. Peter Connor and Avital Ronnell, in *Who Comes After the Subject?*, ed. Eduardo Cadava, Peter Connor, and Jean-Luc Nancy (New York: Routledge, 1991), 112. It is worth voicing a clarification here with regard to “sacrifice.” Sacrifice in Agamben would appear to be *opposed* to, not a part of, Derrida’s “sacrificial symbolic economy” when Agamben’s asserts that *homo sacer* “is a human victim who may be killed but not sacrificed” (*Homo Sacer*, 83). But what “sacrificed” references here for Agamben is, additionally, an earlier religious order out of which the properly political emerges, which is assimilated in Derrida’s reading to the same essential logic. “The political sphere of sovereignty. . . takes the form of a zone of indistinction between sacrifice and homicide,” Agamben writes (*Homo Sacer* 83). In other words, *homo sacer* as he who may be “killed but not sacrificed” means, as it does in Derrida, “killable but not murderable” but retains in Agamben the earlier religious sense as well.

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<sup>35</sup> Derrida's title is taken, it should be noted (while speaking of frames), from the short story by Kafka of the same title, which itself appears as part of Kafka's longer text *The Trial*—and, moreover, as a text centrally engaged by Agamben in *Homo Sacer*, 49-57. Jacques Derrida, "Before the Law," trans. Avital Ronnell, in *Act of Literature*, ed. Derek Attridge (New York: Routledge, 1992), 193-4, 197-8.

<sup>36</sup> It is, Derrida observes, "linked with the upright position, that is, to a certain *elevation*. The passage to the upright position raises man, thus distancing his nose from the sexual zones, anal or genital. This distance ennobles his height and leaves its traces by delaying his action. Delay, difference, ennobling elevation, diversion of the olfactory sense from the sexual stench, repression—here are the origins of morality" (Derrida, "Before the Law," 193). For a fuller discussion, see Wolfe, *Animal Rites*, chapter three.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, 194.

<sup>39</sup> Derrida, "Eating Well," 112, 114.

<sup>40</sup> Paola Cavalieri and Peter Singer, eds. *The Great Ape Project: Equality Beyond Humanity* (New York: St. Martin's Press, 1993), 4. A similar bill, The Great Ape Protection Act (HR 1326), focused on prohibiting invasive research and providing for suitable retirement and care of great apes already used in research, was introduced in the US House of Representatives on April 17, 2008, and again on March 5, 2009, with a companion bill, S3694, reaching the US Senate on August 3, 2010.

<sup>41</sup> "Average and Total Numbers of Animals Who Died to Feed Americans in 2008," United Poultry Concerns, last accessed July 19, 2011, <http://www.upc-online.org/slaughter/2008americans.html>.

<sup>42</sup> *Putting Meat on the Table: Industrial Farm Animal Production in America: A Report of the Pew Commission on Industrial Farm Animal Production*, foreword John Carlin, preface Robert P. Martin, 38. Last accessed July 19, 2011, <http://www.ncifap.org/bin/ej/PCIFAPFin.pdf>.

<sup>43</sup> Erik Marcus, *Meat Market: Animals, Ethics, & Money*, Boston: Brio Press, 2005, 45-6.

<sup>44</sup> See, for example, Marcus 46-7 and Jonathan Safran Foer, *Eating Animals* (New York: Little, Brown, 2009), 133-6.

<sup>45</sup> Evelyn Thiess, "Should the USDA Make Dietary Guidelines While It Promotes the Meat and Dairy Industry?," *Cleveland Plain Dealer*, March 7, 2011. Last accessed July 19, 2011, [http://www.cleveland.com/healthfit/index.ssf/2011/03/should\\_the\\_usda\\_make\\_dietary\\_g.html](http://www.cleveland.com/healthfit/index.ssf/2011/03/should_the_usda_make_dietary_g.html).

<sup>46</sup> D. Smith, "Rats, Mice, and Birds Excluded from Animal Welfare Act," *American Psychological Association: Monitor on Psychology*, 33: 7 (July 2002). Last accessed July 19, 2011, <http://www.apa.org/monitor/julaug02/rats.aspx>.

<sup>47</sup> As it appears in Section 2, item A of the original 1966 Animal Welfare Act.

<sup>48</sup> See Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Cambridge, Mass. Perseus Publishing, 2000), 4, 267-8.

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<sup>49</sup> Richard A. Epstein, “Animals as Objects, or Subjects, of Rights,” in *Animal Rights: Current Debates and New Directions*, ed. Cass R. Sunstein and Martha C. Nussbaum (New York: Oxford University Press, 2004), 158.

<sup>50</sup> Richard A. Posner, “Animal Rights: Legal, Philosophical, and Pragmatic Perspectives,” in *Animal Rights: Current Debates and New Directions*, 51.

<sup>51</sup> *Ibid.*, 57.

<sup>52</sup> Epstein, 55. See Cary Wolfe, *Animal Rites: American Culture, The Discourse of Species, and Posthumanist Theory* (Chicago: University of Chicago Press, 2003), chapter one.

<sup>53</sup> Posner, 58.

<sup>54</sup> Though Singer’s *Animal Liberation* and Regan’s *The Case for Animal Rights* are more well-known—indeed, they are the founding philosophical texts of the animal rights movement—it is probably Cavalieri’s *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (New York: Oxford University Press, 2001), that provides the most compelling argument, within analytic philosophy, for adapting the rights framework to (at least some) non-human animals.

<sup>55</sup> Posner, 57-8.

<sup>56</sup> Epstein, 157. Tom Regan, “The Case for Animal Rights,” in *In Defense of Animals*, ed. Peter Singer (New York: Harper and Row, 1985), 17.

<sup>57</sup> Regan, 17. Singer’s zeroes in on Posner’s contention that “I believe that ethical argument is and should be powerless against tenacious moral instincts” and offers his version of Regan’s charge in the *Slate* reply: “If this supports our current treatment of animals, why should it not also be used to support other preferences for ‘our own,’ which appear to be just as much a brute fact about human beings as a preference for our own species? Here is one example: ‘We must be honest, decent, loyal, and friendly to members of our blood and no one else. What happens to the Russians, what happens to the Czechs, is a matter of utter indifference to me.’ The speaker is Heinrich Himmler. He goes on to say, ‘Whether the other races live in comfort or perish of hunger interest me only insofar as we need them as slaves for our culture; apart from that it does not interest me.’” Peter Singer, “Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner,” in *Animal Rights: Current Debates and New Directions*, 87.

<sup>58</sup> Singer, 87.

<sup>59</sup> Posner, 59.

<sup>60</sup> Epstein, 156.

<sup>61</sup> Posner, 59.

<sup>62</sup> Singer, 90.

<sup>63</sup> For a brief overview, see James Rachels, “Drawing Lines,” in *Animal Rights: Current Debates and New Directions*, 162-3. For an excellent detailed discussion of current law and enforcement as it pertains to factory farming, see, in that same collection, David J. Wolfson and Mariann Sullivan, “Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable,” 205-233.

<sup>64</sup> See Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983), 174-185.

<sup>65</sup> Joel Feinberg, "The Rights of Animals and Future Generations," in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980), 184. It is worth noting, however—in both Feinberg's discussion and in essays that examine his seminal work in a special issue of the journal *Legal Theory*—that the category of "the animal" is subject to the sort of generic flattening that Derrida warns us about in his criticism of the locution "*the Animal*" (even though Feinberg himself does at least differentiate between what he calls "higher" from "lower" animals at the end of his essay). The problem in these discussions is not just that the category of "animals" is extraordinarily undifferentiated—as if bonobos, stingrays, and mosquitoes could be discussed in the same breath. It is also that the analogy between the interests of animals and those of human infants bears crucial weight in Feinberg's argument. As Christopher Heath Wellman points out, "Feinberg's case in favor of animal rights hinges upon a *reductio ad absurdum*, he argues that one cannot deny that animals can have rights unless one is similarly willing to deny that wee babies can have rights" (Christopher Heath Wellman, "Feinberg's Two Concepts of Rights," *Legal Theory* 11 [2005]: 219). But this ignores the obvious fact that at least some animals (i.e., at a minimum, ones Feinberg calls "higher") obviously have *greater* "conative urges" than human infants, and thus bear a greater range of interests.

<sup>66</sup> Jacques Derrida and Elisabeth Roudinesco, *For What Tomorrow: A Dialogue*, trans. Jeff Fort (Stanford: Stanford University Press, 2004), 64, 74. I have discussed the work of both Derrida and Diamond in greater detail elsewhere. See, for example, my essay "Exposures," in Stanley Cavell, Cora Diamond, John McDowell, Ian Hacking, and Cary Wolfe, *Philosophy and Animal Life* (New York: Columbia University Press, 2008), 1-41.

<sup>67</sup> Derrida and Roudinesco, 65.

<sup>68</sup> *Ibid.*, 74.

<sup>69</sup> *Ibid.* As Derrida observes, "In general, in the European philosophical tradition, there is no conception of a (finite) subject of law [*droit*] who is not a subject of duty (Kant sees only two exceptions to this law [*loi*]: God, whose rights are without duty, and slaves, who have duties but no rights). It is once again a matter of the inherited concepts of the subject, the political subject, the citizen, the sovereign self-determination of the subject of law. . ." (74). On the French distinction between *droit* and *loi*, see 212, n.19.

<sup>70</sup> Cora Diamond, "The Difficulty of Reality and the Difficulty of Philosophy," in Cavell et al., *Philosophy and Animal Life*, 74.

<sup>71</sup> Cora Diamond, "Injustice and Animals," in *Slow Cures and Bad Philosophers: Essays on Wittgenstein, Medicine, and Bioethics*, ed. Carl Elliott (Durham, N.C.: Duke University Press 2001), 121, 136.

<sup>72</sup> Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 1.

<sup>73</sup> Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), 26, 27.

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<sup>74</sup> Ibid., 30.

<sup>75</sup> See, for example, Marc Bekoff, *The Emotional Lives of Animals* (Novato, CA: New World Library, 2007).

<sup>76</sup> "There is a Person Here: An Interview with Judith Butler," in *International Journal of Sexuality and Gender Studies* 6:1/2 (2001): 16.

<sup>77</sup> "Antigone's Claim: A Conversation with Judith Butler," in *Theory and Event* 12: 1 (2009): 7.

<sup>78</sup> Judith Butler, *Frames of War: When Is Life Grievable?* (London: Verso, 2009), 18, 16.

<sup>79</sup> Ibid., 19.

<sup>80</sup> For an enlightening discussion of this topic, see Rebecca Skloot, "Creature Comforts," *New York Times Magazine* (December 31, 2008). Last accessed July 19, 2011, <http://www.nytimes.com/2009/01/04/magazine/04Creatures-t.html?scp=1&sq=service%20animals&st=cse>.

<sup>81</sup> I discuss this matter in some detail in "Exposures," esp. 21-34.

<sup>82</sup> See, for example, her refutation of the charge that "I may seem to be positing a new basis for humanism." This is not so, she argues, because "a vulnerability must be perceived and recognized in order to come into play in an ethical encounter," and "when a vulnerability *is* recognized, that recognition has the power to change the meaning and structure of the vulnerability itself." Hence "it follows that vulnerability is fundamentally dependent on existing norms of recognition if it is to be attributed to any human subject" (*Precarious Life*, 42-3). This exempts Butler from the Heideggerian humanism problem, but only to thrust upon her the problem of a reciprocity model of ethics, as I am about to take it up.

<sup>83</sup> Butler, *Precarious Life*, 44.

<sup>84</sup> Ibid., 45.

<sup>85</sup> Ibid., 31.

<sup>86</sup> Or moral agents vs. moral patients, see Cavalieri, 29-30.

<sup>87</sup> See my "Postmodern Ethics, the Question of the Animal, and the Imperatives of Posthumanist Theory," the conclusion to *Animal Rites: American Culture, the Discourse of Species, and Posthumanist Theory*, esp. 194-99. The closest the Butler comes to this position is her contention that "*Whether or not we continue to enforce a universal conception of human rights at moments of outrage and incomprehension, precisely when we think that others have taken themselves out of the human community as we know it, it a test of our very humanity.* We make a mistake, therefore, if we take a single definition of the human, or a single model of rationality, to be the defining feature of the human" (*Precarious Life*, 89-90).

<sup>88</sup> Butler, *Precarious Life*, 31.

<sup>89</sup> Ibid., 91.

<sup>90</sup> Ibid., 104.

<sup>91</sup> Qtd. Roberto Esposito, *Bios: Biopolitics and Philosophy*, trans. and intro. Timothy Campbell (Minneapolis: University of Minnesota Press, 2008), 33.

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- <sup>92</sup> Michel Foucault, *"Society Must Be Defended": Lectures at the Collège de France, 1975-1976*, trans. David Macey, ed. Mauro Bertani and Alessandro Fontana (New York: Picador, 2003), 247.
- <sup>93</sup> *Ibid.*, 35-6.
- <sup>94</sup> Esposito, *Bios*, 29.
- <sup>95</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, trans. Graham Burchell, ed. Michel Senellart (New York: Palgrave Macmillan, 2008), 271-2.
- <sup>96</sup> *Ibid.*, 272.
- <sup>97</sup> *Ibid.*, 274.
- <sup>98</sup> Diamond, "Injustice and Animals." For a comprehensive discussion of Diamond's position, see Cary Wolfe, *What Is Posthumanism?* (Minneapolis: University of Minnesota Press, 2010), chapter three.
- <sup>99</sup> Foucault, *The Birth of Biopolitics*, 271.
- <sup>100</sup> *Ibid.*, 274.
- <sup>101</sup> *Ibid.*, 282, 283.
- <sup>102</sup> *Ibid.*, 294-5.
- <sup>103</sup> Foucault, "Society Must Be Defended," 243; see also 246, 249-50.
- <sup>104</sup> Esposito, *Bios*, 4.
- <sup>105</sup> Giorgio Agamben, *The Open: Man and Animal*, trans. Kevin Attell (Stanford: Stanford University Press, 2004), 75.
- <sup>106</sup> Jacques Rancière, "Who Is the Subject of the Rights of Man?," *South Atlantic Quarterly* 103:2/3 (Spring/Summer 2004): 300.
- <sup>107</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 84.
- <sup>108</sup> Jonathan Elmer, "Torture and Hyperbole," *Law, Culture, and the Humanities* 3:1 (2007): 20.
- <sup>109</sup> *Ibid.*, 30.
- <sup>110</sup> Agamben, *Homo Sacer*, 133-4.
- <sup>111</sup> Rancière, "Who Is the Subject?," 301.
- <sup>112</sup> Agamben, *The Open*, 91.
- <sup>113</sup> *Ibid.*, 92.
- <sup>114</sup> Dominick LaCapra, *History and Its Limits: Human, Animal, Violence* (Ithaca: Cornell University Press, 2009), 167.
- <sup>115</sup> LaCapra, 165.
- <sup>116</sup> Laurent Dubreuil, "Leaving Politics: *Bios*, *Zoe*, Life," trans Clarissa C. Eagle with the author, *Diacritics* 36:2 (Summer 2006): 88. As he characterizes it, "Agamben's philology suggests disciplinary procedures, but it is *foremost* intended for the readers who do not possess the means of verification." Specifically, Agamben's valorization of the Greek "thus plays into an overall strategic approach. The number of readers capable of verifying case by case the arguments surrounding the Hellenic corpus is proportionally

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as slight as the risk contesting any of these” (88). And this allows Agamben, in turn, to recast history as “more or less ‘beginning,’ or origin. One returns to the Greeks so as to plunge into the causality of the past,” and “history is precisely a *fall* out of the initial paradise.” Thus, “historical and local fractures are the hypostasis of an originary fissure in the origin” (87).

<sup>117</sup> Giorgio Agamben, *What Is an Apparatus? and Other Essays*, trans. David Kishik and Stefan Padatella (Stanford: Stanford University Press, 2009), 11.

<sup>118</sup> *Ibid.*, 21.

<sup>119</sup> *Ibid.*, 23-4.

<sup>120</sup> LaCapra, 166.

<sup>121</sup> *Ibid.*, 172.

<sup>122</sup> Rancière, “Who Is the Subject?,” 308.

<sup>123</sup> Qtd. Elmer, 30-1.

<sup>124</sup> Elmer, 31.

<sup>125</sup> Rancière, “Who Is the Subject?,” 309.

<sup>126</sup> Badiou, qtd. in Elmer, 31.

<sup>127</sup> Elmer, 32.

<sup>128</sup> Qtd. Elmer, 32.

<sup>129</sup> Slavoj Žižek, “From Politics to Biopolitics. . . and Back,” in *South Atlantic Quarterly* 102: 2/3 (Spring/Summer 2004): 513.

<sup>130</sup> *Ibid.*, 512.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*, 510-11.

<sup>133</sup> *Ibid.*, 512.

<sup>134</sup> *Ibid.*, 511.

<sup>135</sup> John Baldwin, “Don’t Worry, Be Happy: On ‘Ethics as a Figure of Nihilism,” *Subject Matters* 1:2 (2004): 29.

<sup>136</sup> Nick Haeffner, “The Ethic of Truths and Faith-Based Intelligence,” *Subject Matters* 1:2 (2004): 43. Haeffner’s article also contains an engaging and illuminating discussion of Terry Eagleton’s musings in his autobiography on why many people raised Catholic find the transition to Marxism an easy one to make. As LaCapra aptly describes it, in Žižek, Agamben, and Badiou, “a seemingly extreme leftism merges with an extreme conservatism reminiscent of theologians for whom the radical evil or ontologically warped nature of ‘man’ requires strict and even cruel normative strictures” (43). As Simon Critchley and others have argued, the either/or-ism around the “genuinely political” in Badiou et al. is actually not “political” at all, since it is conceptually incapable of thinking the different political logic of the modern period to which Foucault’s work—and not just Foucault’s of course—devotes itself (see Baldwin, 29-30),

which is one reason for Foucault's own trajectory, as it moves from the model of "war" and "battle" early in *Society Must Be Defended* to thinking political effectivity in terms of the strategic and the compositional.

<sup>137</sup> Michel Foucault, "*Society Must Be Defended*": *Lectures at the Collège de France, 1975-1976*, trans. David Macey, ed. Mauro Bertani and Alessandro Fontana (New York: Picador, 2003), 255-6.

<sup>138</sup> *Ibid.*, 256.

<sup>139</sup> *Ibid.*, 255.

<sup>140</sup> Karen Davis, *The Holocaust & The Henmaid's Tale* (New York: Lantern Books, 2005), 11, 12.

<sup>141</sup> *Ibid.*, 5, 16.

<sup>142</sup> Roberto Esposito, *Bios: Biopolitics and Philosophy*, trans. and intro. Timothy Campbell (Minneapolis: University of Minnesota Press, 2008), 129-30.

<sup>143</sup> Peter Singer, "Ethics Beyond Species and Beyond Instincts: A Response to Richard Posner," in *Animal Rights: Current Debates and New Directions*, ed. Cass R. Sunstein and Martha C. Nussbaum (New York: Oxford University Press, 2004), 91 n12. Singer draws upon Boria Sax, *Animals in the Third Reich: Pets, Scapegoats, and the Holocaust* (New York: Continuum, 2000).

<sup>144</sup> Jacques Derrida, *The Animal That Therefore I Am*, trans., David Wills, ed. Marie-Louise Mallet (New York: Fordham University Press, 2008), 26.

<sup>145</sup> As Agamben puts it, "Insofar as its inhabitants were stripped of every political status and wholly reduced to bare life, the camp was also the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life, without any mediation" (Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen [Stanford: Stanford University Press, 1998], 171).

<sup>146</sup> Esposito, *Bios*, 137.

<sup>147</sup> Derrida, *The Animal That Therefore I Am*, 26.

<sup>148</sup> Humane Farming Association website, <https://hfa.org/factory/index.html>, last visited September 8, 2008.

<sup>149</sup> Davis, 9.

<sup>150</sup> Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (New York: Lantern Books, 2002), 53.

<sup>151</sup> *Ibid.*, 72.

<sup>152</sup> Derrida, *The Beast and the Sovereign*, volume one, trans. Geoffrey Bennington, ed. Michel Lisse, Marie-Louise Mallet, and Ginette Michaud (Chicago: University of Chicago Press, 2009), 71.

<sup>153</sup> *Ibid.*, 71-2. But as Derrida writes in "Faith and Knowledge" (glossing a critique he develops in more detail in *Politics of Friendship*), "Schmitt was obliged to acknowledge that the ostensibly purely political categories to which he resorted were the product of a secularization or of a theologico-political heritage. . . . Even supposing that one accepts such premises, the unprecedented forms of today's wars of religion could also imply radical challenges to our project of delimiting the political." Jacques Derrida, "Faith and

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Knowledge: Two Sources of 'Religion' at the Limits of Reason Alone," trans. Samuel Weber, in *Religion*, ed. Jacques Derrida and Gianni Vattimo (Stanford: Stanford University Press, 1998), 26.

<sup>154</sup> Penelope Deutscher, "The Inversion of Exceptionality: Foucault, Agamben, and 'Reproductive Rights,'" *South Atlantic Quarterly* 107:1 (Winter 2008): 57.

<sup>155</sup> *Ibid.*, 59.

<sup>156</sup> Deutscher, 66-7.

<sup>157</sup> *Ibid.*, 59.

<sup>158</sup> *Ibid.*, 58.

<sup>159</sup> *Ibid.*, 67.

<sup>160</sup> Nicholas D. Kristof, "Cleaning the Henhouse," *The New York Times*, Sept. 1, 2010. Last accessed 9/3/2010, [www.nytimes.com/2010/09/02/opinion/02kristof.html](http://www.nytimes.com/2010/09/02/opinion/02kristof.html).

<sup>161</sup> Doug Gurian-Sherman, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations*, Union of Concerned Scientists, April 2008, 65. Last accessed 11/25/2010, [http://www.ucsusa.org/assets/documents/food\\_and\\_agriculture/cafos-uncovered.pdf](http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf).

<sup>162</sup> Nicholas D. Kristof, "When Food Kills," *The New York Times*, Sunday, June 12, 2011, Week In Review section: 10.

<sup>163</sup> Davis, 21-2.

<sup>164</sup> Qtd. Roberto Esposito, *Immunitas: The Protection and Negations of Life* (London: Polity Press, forthcoming 2011), ms. 34.

<sup>165</sup> Esposito, *Immunitas*, ms. 35.

<sup>166</sup> *Ibid.*, ms. 12.

<sup>167</sup> On organization versus structure, see Humberto Maturana and Francisco Varela, *The Tree of Knowledge: The Biological Roots of Human Understanding*, rev. ed., trans. Robert Paolucci, foreword by J.Z. Young (Boston: Shambhala Press, 1992), 46-7.

<sup>168</sup> *Ibid.*

<sup>169</sup> Michel Foucault, "Power Affects the Body," in *Foucault Live: Collected Interviews 1961-1984*, ed. Sylvère Lotringer (New York: Semiotexte, 1989), 211.

<sup>170</sup> Nicole Shukin, *Animal Capital: Rendering Life in Biopolitical Times* (Minneapolis: University of Minnesota Press, 2009), 11.

<sup>171</sup> See Nikolas Rose, *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century* (Princeton: Princeton University Press, 2007), in particular 255, 167, 257, and the rewriting of biopolitics in terms of human labor-power in Paolo Virno, *A Grammar of the Multitude*, trans. Isabella Bertolotti et al, foreword Sylvère Lotringer (New York: Semiotext[e]), 2004), 81-4.

<sup>172</sup> Shukin, 7.

<sup>173</sup> *Ibid.*, 12.

<sup>174</sup> *Ibid.*, 46.

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<sup>175</sup> Matthew Calarco, *Zoographies: The Question of the Animal From Heidegger to Derrida* (New York: Columbia University Press, 2008), 97.

<sup>176</sup> See Cary Wolfe, *What Is Posthumanism?* (Minneapolis: University of Minnesota Press, 2010), chapter one.

<sup>177</sup> Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford: Stanford University Press, 2005), 85.

<sup>178</sup> Niklas Luhmann, *Social Systems*, trans. John Bednarz, Jr. with Dirk Baecker, foreword Eva M. Knodt (Stanford: Stanford University Press, 1995), 375-6.

<sup>179</sup> *Ibid.*, 258.

<sup>180</sup> Bruno Latour, "To Modernize or Ecologize? That Is the Question," in *Technoscience: The Politics of Interventions*, ed. Kristen Asdal et al. (Oslo: Oslo Academic Press, 2007), 264. For a full discussion of these and related ideas in Latour, see his *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford: Oxford University Press, 2007).

<sup>181</sup> Gunther Teubner, "Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law," *Journal of Law and Society* 33: 4 (December 2006): 518.

<sup>182</sup> *Ibid.*, 518.

<sup>183</sup> *Ibid.*, 519.

<sup>184</sup> *Ibid.*, 520.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*, 515.

<sup>189</sup> Roberto Esposito, *Bios: Biopolitics and Philosophy*, trans. and intro. Timothy Campbell (Minneapolis: University of Minnesota Press, 2008), 49.

<sup>190</sup> Luhmann, 375.

<sup>191</sup> Gunther Teubner, "Dealing with Paradoxes of Law: Derrida, Luhmann, Wietholter," trans. Iain L. Fraser, in *Paradoxes and Inconsistencies in the Law*, ed. Oren Perez and Gunther Teubner (Oxford: Hart, 2005): 60.

<sup>192</sup> William Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford: Stanford University Press, 2000), 146.

<sup>193</sup> *Ibid.*, 148. As Rasch notes, "If we remain within the immanence of systems that Luhmann not only advocates but sees as inescapable, we are left with this paradox. Ethics emerges as the by-product of a system's attempt to preserve its own reproduction from the ravages of moral infection. The only moral preselection said to be ethically permissible is the preselection that guarantees the freedom of selection" (149). Here we find Luhmann's final take on a paradox of ethics familiar to us from Lyotard's work: namely, that in the ethical task of respecting and preserving the "differends" that obtain between discrete

and singular “language games,” the only language game that is privileged is the one (namely ethics) that says “thou shalt not privilege one language game over another” (92). It is precisely this rescue of the authority of ethics and an ethical imperative in some more-than-immanent (if not, in Lyotard, quite transcendental) sense that Luhmann’s work is calculated to short-circuit. Because for Luhmann communications, and not concrete individuals, subjects, or social actors, are the basic elements of social systems, Rasch notes that “the notion of systemic closure and functional differentiation can be conveyed by saying that the ‘language’ of one system cannot be adequately translated into the ‘language’ of another system. Much like Wittgenstein’s language games or Lyotard’s genres, Luhmann’s system languages are incommensurable, a fact that guarantees their autonomy (or, as Lyotard would say, a fact that guarantees the lack of a grand, totalizing narrative)” (145).

<sup>194</sup> Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority,’” trans. Mary Quaintance, *Cardozo Law Review* 11 (1990): 943.

<sup>195</sup> *Ibid.*, 941. In his analysis of Freud’s *Totem and Taboo* in “Before the Law”—and here the points of connection with Luhmann’s account of law become even clearer—Derrida demonstrates, as Richard Beardsworth puts it, that “The origin of law is an ‘impossible’ invention, and the condition of all inventions of law.” Freud’s attempt to account for the origin of law in the guilt and sin surrounding the primal patricide of *Totem and Taboo* “narrates an event that never takes place as such. For the brothers to feel guilty for the murder of their father, the moral law would *already* have to be in place prior to the crime. To have felt remorse the brothers must have already transgressed a prior law, not produced it; otherwise their remorse is incomprehensible.” Richard Beardsworth, *Derrida & the Political* (London: Routledge, 1996), 31.

<sup>196</sup> Derrida, “Force of Law,” 949; see also 961-3.

<sup>197</sup> As an example of the sort of pragmatic instance of the law iteration that Derrida identifies, we might point to the discourse of “human rights” which is often invoked in contemporary discussions as a counter to increasingly unequal effects of globalization—that is to say, invoked as an instance of immunity closure and protection. That iteration of the principle of justice, however—as we have already seen in our discussion of Arendt—immediately begs the question that Derrida will not let us ignore: why *human* rights? What is it that is taken to be “proper” to the human, securing its ontological and ethical standing, that is barred to all other forms of life? As Derrida writes in *Rogues*, “It is rational, for example, at the very moment of endorsing, developing, perfecting, and determining human rights to continue to interrogate in a deconstructive fashion all the limits we thought pertained to life, the being of life and the life of being (and this is almost the entire history of philosophy), between the living and the dead, the living present and its spectral others, but also between that living being called ‘human’ and the one called ‘animal.’” Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford: Stanford University Press, 2005), 151.

<sup>198</sup> Beardsworth, 28.

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- <sup>199</sup> Martin Hägglund, *Radical Atheism: Derrida and the Time of Life* (Stanford: Stanford University Press, 2008), 41-2.
- <sup>200</sup> On “openness from closure,” see the introduction to Wolfe, *What Is Posthumanism?*
- <sup>201</sup> *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, ed. Giovanna Borradori (Chicago: University of Chicago Press, 2003), 128-9.
- <sup>202</sup> *Ibid.*, 129.
- <sup>203</sup> *Ibid.*
- <sup>204</sup> *Ibid.*, 129-30.
- <sup>205</sup> See Cary Wolfe, *Critical Environments: Postmodern Theory and the Pragmatics of the “Outside”* (Minneapolis: University of Minnesota Press, 1998), chapter three.
- <sup>206</sup> Derrida, “Force of Law,” 932-3.
- <sup>207</sup> Paul Patton, “Future Politics,” in *Between Deleuze and Derrida*, ed. Paul Patton and John Protevi (London: Continuum, 2003), 15, 16, 17.
- <sup>208</sup> See Borradori, ed., 34 and Hägglund, *Radical Atheism*, 43.
- <sup>209</sup> Patton, 24, 22.
- <sup>210</sup> *Ibid.*, 22.
- <sup>211</sup> *Ibid.*
- <sup>212</sup> Derrida, *Rogues*, 84.
- <sup>213</sup> *Ibid.*, 152. And here, we need to remember a point I emphasized in the previous section: that the term “vulnerability” in Derrida’s late work references not just the finitude we experience as embodied beings; it also names the *double* finitude, the performativity and autoimmunity, whereby we are subjected to the *machinalité* of semiotic code, archive, and iterable trace. In that light, we can better appreciate his declaration later in that same text that “It is a question here, as with the coming of any event worthy of this name, of an unforeseeable coming of the other, of a heteronomy, of a law come from the other, of a responsibility and decision of the other—*of the other in me, an other greater and older than I am*” (*Ibid.* 84, *emph. added*).
- <sup>214</sup> See also in this connection Jacques Derrida, *The Beast and the Sovereign*, volume one, trans. Geoffrey Bennington, ed. Michel Lisse, Marie-Louise Mallet, and Ginette Michaud (Chicago: University of Chicago Press, 2009), 73-4.
- <sup>215</sup> Jacques Derrida, “Faith and Knowledge: Two Sources of ‘Religion’ at the Limits of Reason Alone,” trans. Samuel Weber, in *Religion*, ed. Jacques Derrida and Gianni Vattimo (Stanford: Stanford University Press, 1998), 28.
- <sup>216</sup> *Ibid.*, 48. In fact, as he notes, “the *phallos*, which is not the penis,” “first designated in Greece and Rome for certain ceremonies, that simulacrum, that figure presentation of an erect penis, hard, stiff, rigid, precisely like a gigantic and artificially made-up puppet, made of tensed springs and exhibited during rituals and processions” (Derrida, *The Beast and the Sovereign* 222).

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<sup>217</sup> Derrida, *The Beast and the Sovereign*, 222.

<sup>218</sup> *Ibid.*, 223.

<sup>219</sup> Hägglund, *Radical Atheism*, 181.

<sup>220</sup> Derrida, "Faith and Knowledge," 42.

<sup>221</sup> Derrida, *Rogues*, 45; Jacques Derrida, *The Animal That Therefore I Am*, trans., David Wills, ed. Marie-Louise Mallet (New York: Fordham University Press, 2008), *The Animal That Therefore I Am*, 47, 49-50; Jacques Derrida, "Eating Well," or the Calculation of the Subject: An Interview with Jacques Derrida," trans. Peter Connor and Avital Ronnell, in *Who Comes After the Subject?*, ed. Eduardo Cadava, Peter Connor, and Jean-Luc Nancy (New York: Routledge, 1991), 114.

<sup>222</sup> Derrida, "Eating Well," 112-3.

<sup>223</sup> *Ibid.*, 114.

<sup>224</sup> *Ibid.*, 113. Derrida's analysis of sovereignty and carnophallogocentrism is born out by what I'm guessing is a very common experience among vegetarians: that when you tell people you don't eat meat, you are more likely to find acceptance if you say it's because "It's against my religion" than if you try and offer a reasoned analytical explanation along the lines of a Peter Singer or a Tom Regan (animals are such and such kinds of beings, with such and such characteristics that we take to be relevant to moral standing, and so on). For more traditional analyses of the phallic character and heavily gendered topology of meat, see Carol J. Adams, *The Sexual Politics of Meat*, rev. ed. (London: Continuum, 2010) and Nick Fiddes, *Meat: A Natural Symbol* (London: Routledge, 1992).

<sup>225</sup> D. J. Siegel, "In Search of a Test-Tube Hamburger," Wednesday, April 23, 2008, last accessed July 23, 2011, <http://www.time.com/time/health/article/0,8599,1734630,00.html>.

<sup>226</sup> I. Datar and M. Betti, "Possibilities for an In Vitro Meat Production System," *Innovative Food Science and Emerging Technologies* 11:1 (January 2010): 14, 22; Michael Specter, "Test-Tube Burgers," *The New Yorker* (May 23, 2011), 34.

<sup>227</sup> See Peter Singer, *Animal Liberation* (New York: Harper Perennial, 2009), and Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass.: Harvard University Press, 2007). In this connection, it is useful to remember Tom Regan's thought experiment in *The Case for Animal Rights* which he brings to bear against the argument from suffering that we find in Singer: namely, that if we could engineer an animal that could not feel pain, would it then be permissible to abuse it? Nussbaum makes a different argument against the principle of suffering in *Frontiers of Justice*, nothing that suffering cannot be said to be a universal negative purely and simply (i.e. suffering is involved in all sorts of processes of learning, accomplishment, and so on—think of the training of a ballerina or classical musician—that in turn may lead to even greater flourishing).

<sup>228</sup> Specter, "Test-Tube Burgers," 32-4.

<sup>229</sup> Derrida, "Faith and Knowledge," 46.

<sup>230</sup> Derrida, "Eating Well," 112.

<sup>231</sup> Ibid., 113.

<sup>232</sup> James McWilliams, "Eating (Synthetic) Animals," *The Atlantic*, last accessed July 23, 2011, <http://www.theatlantic.com/food/archive/2010/06/eating-synthetic-animals/58930>.

<sup>233</sup> Derrida, "Faith and Knowledge," 42. For a powerful, if rapid, indictment of the "ethical carnivore" position of Pollan and others, see Jonathan Safran Foer, *Eating Animals* (New York: Little, Brown, 2009), 214, 256-7.

<sup>234</sup> Derrida, "Faith and Knowledge," 50.

<sup>235</sup> Ibid., 51-2.

<sup>236</sup> Roberto Esposito, *Bios: Biopolitics and Philosophy*, trans. and intro. Timothy Campbell (Minneapolis: University of Minnesota Press, 2008), 116.

<sup>237</sup> Specter, "Test-Tube Burgers," 32-3.

<sup>238</sup> Gunther Teubner, "Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter," in *Paradoxes and Inconsistencies in the Law*, ed. Oren Perez and Gunther Teubner (Oxford: Hart, 2005), 58.

<sup>239</sup> Ibid.

<sup>240</sup> Derrida, "Faith and Knowledge," 25. And he then gives "a single example," namely Schmitt's acknowledgment "that the ostensibly purely political categories to which he resorted were the product of a secularization or of a theologico-political heritage," so that even as he lamented the process of "depoliticization" and the "neutralization of the political"—as, for example, Luhmann would—this was, as Derrida notes, explicitly with reference to "a European legal tradition that in his eyes doubtless remained indissociable from 'our' thought of the political" (25-6). See also in connection with this discussion of Schmitt in Derrida, *The Beast and The Sovereign*, 70-75.

<sup>241</sup> For a convincing rejoinder to the reading of Derrida as a fundamentally religious thinker, see chapter four of Hägglund, *Radical Atheism*.

<sup>242</sup> Derrida, "Faith and Knowledge," 46-7.

<sup>243</sup> Ibid., 13.

<sup>244</sup> Ibid., 41.

<sup>245</sup> Ibid., 55.

<sup>246</sup> Derrida, *Rogues*, 155-6.

<sup>247</sup> Derrida, "Faith and Knowledge," 43.

<sup>248</sup> Leonard Lawlor, *This Is Not Sufficient: An Essay on Animality and Human Nature in Derrida* (New York: Columbia University Press, 2007), 16-7. As Lawlor notes, the texts that occupy Derrida in *Rogues*, *Politics of Friendship*, and "Force of Law"—Husserl's *The Crisis of European Science*, Benjamin's *The Critique of Violence*, Schmitt's *The Concept of the Political*—all date from between the two world wars, and this is no coincidence. "It seems to me," Lawlor writes, "that Derrida focuses on this period, the time between the two world wars, because a world war is *already* a form of globalization; it announces

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globalization" (17) in its world-encompassing form and in its necessary embrace of technoscience to achieve its objectives (both key components of globalization, and not just in Derrida's analysis).

<sup>249</sup> Ibid., 108.

<sup>250</sup> Derrida, *Rogues*, 142.

<sup>251</sup> Paul Roberts, "Carnivores Like Us," *Seed* (May 15, 2008): last accessed July 23, 2011, [http://seedmagazine.com/content/article/carnivores\\_like\\_us/P1/](http://seedmagazine.com/content/article/carnivores_like_us/P1/).

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Derrida, "Faith and Knowledge," 42.

<sup>255</sup> Michel Foucault, "Power Affects the Body," in *Foucault Live: Collected Interviews 1961-1984*, ed. Sylvère Lotringer (New York: Semiotexte, 1989), 211.

<sup>256</sup> Esposito, *Bios*, 11.

<sup>257</sup> Borradori, ed., 120.

<sup>258</sup> Esposito, *Bios*, 194.

<sup>259</sup> Foer, *Eating Animals*, 33.