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Please cite this publication as follows:

Hardes, J. (2014) Biopolitics and the enemy: on law, rights and proper subjects. Law, Culture and the Humanities. pp. 1-21. ISSN 1743-8721.

Link to official URL (if available):

<http://dx.doi.org/10.1177/1743872114524879>

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Biopolitics and the Enemy: On Law, Rights and Proper Subjects

Abstract

This paper examines the operation of ‘enmity’ in right to die legal appeals. The paper asks: (1) why does the law rely on articulations of enmity to rationalize its decisions and (2) what might this tell us about how biopolitics operates in the contemporary neoliberal moment? Drawing on the insight of Roberto Esposito the paper makes three key points. First, it notes that biopolitics operating in the contemporary neoliberal moment is increasingly focused on closures around individual human subjects, or what Esposito calls mechanisms of ‘immunization.’ Second, it notes that discourses of enmity are perpetuated through legal right to die appeals that shore up these immunity mechanisms, which can partly explain why right to die claims fail on appeal. Finally, it considers more affirmative ways forward in both theory and practice relating to legal right to die appeals.

Key Words: Biopolitics; Right to Die; Enmity; Esposito; Foucault

I. Introduction

In his insightful account of reproductive rights in Italy, Patrick Hanafin detailed the tenuous grounds upon which Italian law dealt with the question of the legal status of the embryo. A significant question he raised was how Italy, which considers itself a nominally liberal pluralist state, has negotiated its Catholic culturalist underpinnings within its legal structure. One

particularly contentious issue in relation to this question was the passing of a new act in 2004 that would regulate assisted reproductive technology (ART). This act stipulated, quite contrary to the Constitution of the Italian Republic, that the embryo had legal rights (to life and to protection) independently of the mother. Hanafin noted that the Catholic Church played a significant role in shaping this act, whereby it employed the embryo by way of various tactical biopolitical maneuverings “as a weapon in the war” against what it called a “culture of death.”¹ Most interesting for the present discussion was the notion that this act, which was grounded on the basis of a ‘politics of life’ and a ‘war against death,’ established not only the embryo as a sovereign entity—or indeed, a ‘potential’ sovereign—but also established this sovereign status by constituting the mother as a necessary *enemy* of this ‘embryonic sovereign.’ The mother was thus conceived as a monstrous other who threatened the embryo’s life.²

This particular example that Hanafin points to is not in isolation. As this paper argues, enmity also figures as a central articulation in the rationalization of what have colloquially been termed ‘right to die’ legal appeals. In particular, this paper focuses on how enmity emerges as a key discourse within legal cases concerning the right to die. In dealing with this uptake of enmity the paper asks: why does the law generate or, moreover, *rely* on articulations of enmity in its rationale regarding life and death decisions? Further, and more broadly, it asks: what might this discourse of enmity tell us about how biopolitics—that is, a ‘politics of life’ – operates in the contemporary moment? This latter question is particularly pertinent given that it was Foucault who claimed that biopolitics was no longer bound to adversarial relations underscored by enmity, but was rather bound to a construction of ‘threat’ leveled at the ‘population’ as species.³ Responding to these questions, the paper makes the following key assertions. First, it provides a brief overview of the relationship between biopolitics and legal ‘rights’ appeals. It suggests that

we are in a new era of biopolitics that is decidedly ‘neoliberal,’ illustrated by way of contemporary rights appeals to liberal autonomy in relation to the biological body. The paper notes that we must be cautious in advocating for these types of rights appeals because they invariably imitate neoliberal norms of self-governance, whereby freedom comes to be associated with personal or private choice. This is problematic because such self-governance is often articulated on the basis of a defensive and closed relationship between self and other, grounded in enmity. The paper then suggests that we can turn to what Roberto Esposito calls the ‘immunization paradigm.’⁴ The paper notes how Esposito’s framework of immunity provides us with the conceptual tools to reconcile the necessary embeddedness of enmity within a neoliberal variation of biopolitics that is intensified through a closing off of subjects from one another. It argues for the importance of recognizing the operation of enmity as a necessary discourse that is constituted through law and legal decisions in order to enunciate a contemporary neoliberal political rationality that serves to divide subjects from one another, doing what the New York Task Force on Assisted Dying called the shoring up of the ‘limits of human relationships.’⁵ In this discussion of the centrality of enmity, the paper also emphasizes the necessity of its associated discourse, vulnerability. Both enmity and vulnerability are articulated in legal decisions on assisted dying appeals in such a way as to fix particular subjects of law and affirm law’s decisions on the need to protect or immunize subjects from one another. In discussing this immunization paradigm the paper also explains how enmity is a defining feature of immunization that constitutes ‘proper’ subjects. The paper draws on Hanafin’s example of the embryonic sovereign in association with examples embedded in right to die legal cases to show how this relationship between enmity, immunity, and the ‘proper’ occurs, and to what effect.

Finally, the paper concludes by suggesting a way forward through a discussion of Esposito's affirmative biopolitics in association with his notion of the 'improper.'

II. Rights, Biopolitics, Selves

While we may not be beyond biopolitics we certainly do appear to be in a new era of the biopolitical. According to Foucault, biopolitics emerged as a political rationality attached to liberalism that was focused on protecting and cultivating life; it was not strictly concerned with managing individuals as disciplinary technologies were, but was instead concerned with managing the population as "general phenomena" and intervening in this "generality."⁶ Despite this insight into the operation of biopolitics, in the contemporary moment it appears that this focus primarily on the way biopolitics operates at the level of the species is not adequate to explain how life is governed.⁷ One example of new forms of governance is the emerging sphere of rights claims in relation to the biological body. Although legal discussions concerning the beginning and end of life are not new per se, something appeared to be set in motion circa the 1970s that incited a different approach to these discussions. For instance, the inaugural 1973 case in the United States of *Roe V Wade* established precedent regarding the liberal feminist right to privacy, invoked in debates opposing the broader 'right to life' movement,⁸ and the 1976 US case of *Karen Ann Quinlan* spurred debates concerning what is now colloquially termed 'the right to die.'⁹ In his discussion of euthanasia in the United States, Shai Lavi refers to this new era as a "regulatory-rights-regime,"¹⁰ which is informed, in part, by an emphasis on legal claims to liberal autonomy in relation to the biological body.¹¹

Other scholars have also endeavored to theorize this relationship between the biological body and claims to liberal autonomy in law. Nikolas Rose, for example, has drawn on Foucault's

account of biopolitics and its underpinning political rationality of liberalism, alongside Foucault's later work on technologies of the self. Rose has argued that the claiming of rights in relation to the body can be regarded as instances of 'self-stylization' that are brought in line with broader governance objectives. This type of self-stylization presents us with new ways of considering how persons turn themselves into subjects of rights.¹² Rose has also taken this analysis further and has noted with his colleague, Carlos Novas, that through practices of self-governance subjects can turn themselves into 'biological citizens;' the biological body can become an avenue to claim legal citizenship rights and forge new subjectivities.¹³ For Rose, the appearance of new subjectivities in relation to the biological body points to a shift away from techniques of discipline and biopolitics toward new techniques of individualization and responsabilization. He calls this a newly emerging 'ethopolitics.'¹⁴ According to Rose, while Foucault's thesis on biopolitics "...implied a separation between those who calculate and exercise power and those who were its subjects," we can see a democratization of biopolitics throughout the twentieth century whereby we witness an alliance forged between "political" and "personal" aspirations.¹⁵ Since ethopolitics has merged with biopolitics in the twenty-first century, Rose then argues that we have found ourselves in an era whereby governance objectives have emphasised the encouragement of individual self governance. As Rose writes of ethopolitics:

...life itself, as it is lived in its everyday manifestations, is the object of adjudication. If discipline individualizes and normalizes, and biopower collectivizes and socializes, ethopolitics concerns itself with the self-techniques by which human beings should judge themselves and act upon themselves to make themselves better than they are.¹⁶

Others have pointed to the affirmative potential in these self-stylizing techniques that are

indicative of ethical ‘care of the self’ practices that Foucault had broached in his later work.¹⁷ Hanafin, for instance, acknowledges the ethical potential found in self-stylizing practices in legal claims concerning the right to access reproductive technologies. He notes how ‘micropolitics,’ (which he associates with an affirmative kind of ethopolitics) foregrounds the material body and allows the individual to “take responsibility for her own autonomous self and works on the political terrain to bring about real political change.”¹⁸

Despite this optimism, some scholars have broached ethopolitics with more caution, noting the potential for ethopolitical practices of ‘self-care’ to ultimately replicate internalized ‘neoliberal’ norms.¹⁹ These critics suggest that practices of autonomy have a tendency to reproduce the neoliberal imperative to stake ownership of, and responsibility over, one’s body. As McNay notes, these neoliberal practices reorient social relations around enterprise and are highly contentious: “The orchestration of individual existence as enterprise atomizes our understanding of social relations, eroding collective values and intersubjective bonds of duty and care at all levels of society.”²⁰ Timothy Campbell is also particularly skeptical and critical of what he calls a “neoliberal entrepreneurship of the self.”²¹ Similar to McNay, he notes the potential for this type of self-stylization to replicate insidious neoliberal tendencies of autonomy, individual agency, and self-responsibility. The danger lies precisely in the moment that biopolitical thought does “the dirty intellectual work of neoliberalism,” he argues.²² This occurs when ‘ethical’ practices are associated with autonomous ‘selves’ operating as subjects of neoliberal biopolitical norms. Thus, it is problematic when we consider the way an individual is “harvesting” his or her own biopower²³ as a process of ‘becoming bios’ (or turning himself or herself into a political subject), without considering how this is often articulated on the basis of “a defense of the self and its borders” rather than “as an opening toward the relational.”²⁴

It is this latter part of Campbell's argument that is most convincing for the argument presented in this paper. It is convincing and insightful because it pushes us to consider the tenets upon which we are critical of conceptual accounts like ethopolitics. It is not that the articulation of an affirmative biopolitics, such as that which Rose or Hanafin purports, is impossible; rather, what is important is that we consider how this affirmative biopolitics is articulated. That is, we must be cautious in considering what this affirmative biopolitics attempts to do politically that might potentially reconfigure borders around the self and replicate insidious neoliberal tendencies that Campbell and McNay prudently note. In the same instance, we must also consider instead how we might conceptualize a politics that errs on the side of relationality and openness. Reflecting on the tenets of our critical responses is also important because it ensures we tread cautiously in advocating for an outright dismissal of 'rights' since this, too, is not always affirmative. Consider, for instance, Hanafin's concerns regarding the way that a dismissal of rights might be used for more conservative purposes. He argues that a critique of liberal rights sometimes gets attached to a critique of neoliberalism in order to affirm other draconian, dogmatic arguments that ultimately conceptualize a politics based on a different idea of the 'good' or 'truth.' This dismissal of liberal rights was made effectively in Italy by the then-Cardinal, now-Pope Ratzinger, who declared that liberal rights were mere reflections of egoistic neoliberal desires of self-determining women, which he argued overshadowed the truly sanctified notion of life that he sought to appeal for by way of the embryo's legal protection. In this instance an attack on liberal rights was made as part of the Catholic Church's 'war against death.' This type of response by Ratzinger is highly problematic because it challenges rights claims on the basis of an appeal to a divergent account of a 'proper' way of living; Ratzinger's declaration of the Church's war on death and the promotion of embryonic right to life was

merely another reification of this same problem of rights. From his vantage the liberal rights appeal was articulated on the basis of desire, in contrast to the Catholic rights appeal that was articulated on the basis of a Truth claim. The distinction between desire and truth, and the moral weighting of the latter over the former, thus legitimated, from his perspective, the protection of the defensive borders around the potential person: the embryonic sovereign. We must be cautious, therefore, in considering how politics—that is, both liberal political appeals to ‘rights’ that reify what we might call ‘proper’ politics, as well as the conservative dismissals of liberal rights—affirm their political posturing on the basis of closures, which thereby reaffirm borders around the self that impede more relational ways of conceiving of life and politics. It is this relation between the defense of subjects, law, and rights that is of principal concern for this paper.

One of the fundamental issues when attempting to articulate an affirmative biopolitics that might need to break with ethopolitics or other accounts that close off around defensive articulations of the self as Campbell had suggested is to pay attention to the centrality of relationality and community. As will become clearer throughout this paper, it is this defense of the self that proliferates the active constitution of enmity in bioethics and the law. We can call again on Hanafin’s account by way of example to note that, while he does invoke the notion of the ‘responsible,’ ‘autonomous’ self as part of an affirmative biopolitics, elsewhere in his analysis he clearly makes the case that his description of ethopolitics refers to ‘difference’ and emphasizes ‘disruption.’²⁵ Without this clarification, we might envisage how this type of ethopolitical practice could easily cause a slippage and, instead, perhaps inadvertently, do the bidding of neoliberalism in the safeguarding of defensive borders around the self. The more important issue at hand is thus how the invocation of rights – and other articulations of the

‘proper’ – lends itself to a closing off of the subject. When this subject is considered one that is ‘closed’ or ‘proper’ it is necessarily conceived as thus on the basis of enmity.

This distinction between a self enclosed by defensive borders, and a relational or communal self as opening outward, is found in the work of Italian philosopher, Roberto Esposito. Arguably, Esposito gives us an insightful theoretical toolbox with which to unpack some of these complexities regarding the relationship between neoliberal appeals to selfhood articulated through rights, the biopolitical emphasis on life in relation to law, and the very ways that ‘rights-regimes’ close off the self from its relations to and with others. In this sense, Esposito’s paradigm of immunization helps us explore the challenges that we are presented with when the subject is constituted as a ‘self’ – that is, as a self-referential sovereignty—which, as this paper argues, occurs through the creation of the constitutive ‘enemy.’

III. Esposito, Immunization and Enmity

Esposito’s account of biopolitics is indebted to Foucault’s. He praises Foucault’s ‘bio-historical’ approach to life, which removes life from a deterministic theoretical framework and allows us to conceptualize how political rationalities of governance can manipulate, mould, and shape life.²⁶ In this regard, Esposito suggests that: “life as such doesn’t belong either to the order of nature or to that of history. It cannot simply be ontologized, nor completely historicized, but is inscribed in the moving margin of their intersection and their tension.”²⁷ Despite this agreement with Foucault, Esposito relentlessly moves beyond him. In particular, one of his main grievances is the historico-political distinction Foucault makes between sovereignty and biopolitics. For Esposito, these two modes of governance—sovereignty and biopolitics—are better understood when reconciled in one paradigm, which he calls ‘the paradigm of immunization.’²⁸

According to Esposito, the paradigm of immunization can be traced to the Latin root word *munus*, which immunity shares with its coterminous concept, community. Esposito notes that the *munus* is understood as an obligation to gift-give, which is fundamental to the heart of community. The *munus* is therefore an expropriative demand: it is a “gift that one gives, but not that one receives.”²⁹ One might draw a parallel here to Derrida’s notion of the gift, which he understands as an impossible kind of giving.³⁰ Functioning at the same time as this expropriative demand of gift giving is an exemption from giving, in the form of immunity. Thus, Esposito notes, immune is he or she who is exempt from giving. This exemption from giving was seen as a protective endeavor to safeguard the individual from the expropriating demands of community.

From Esposito’s perspective, ‘biopolitics,’ or the deep association between politics and life, came about with the rise of immunization, which Esposito claims is what “links the sphere of life with that of law.”³¹ Life and politics each only have meaning on the basis of their interrelation.³² While Esposito notes that protective mechanisms over life had been employed for centuries, and therefore this idea of protection was nothing new per se, he argues that immunity gave rise to modernity when protection was torn from the realm of transcendence (e.g., religion) and made artificial: immunity thus emerged when there was a need for a ‘prosthetic’ mechanism of defence against risk.³³ One such artificial mechanism was, according to Esposito, sovereignty. Far from sovereignty’s originary function being a power of ‘making die,’³⁴ Esposito notes that it was a protective endeavor: it was a contract forged through the desire for a dispensation from immanent threat to individual life. It is for this reason that Esposito states that sovereignty was “the first and most influential [immune mechanism] that the biopolitical regime assumes.”³⁵

As Esposito posits, sovereignty also arose alongside the associated immunity mechanisms of personhood and liberty. Thus, through concepts like personhood, property, and

rights, sovereignty politics is very much internal to a politics of life. Campbell neatly summarizes this in his introduction to Esposito's *Bios*, stating: "Sovereignty doesn't transcend biopolitics but rather is immanent to the workings of the immunitary mechanism that he [Esposito] sees driving all forms of modern biopolitics."³⁶ We might add to this account that, where liberalism is one mode of immunization that tightens its protective enclaves around the subject of rights, neoliberalism in its contemporary form appears to further tighten these protective barriers. Thus, we are not merely in an era of ethopolitics that can explain how persons turn themselves into self-responsible and individualized subjects according to broader rationales of governance in the name of a 'politics of life'; rather, these practices of subjectivization are deeply embedded in the same logic that binds all political modes of life's protection together through immunization. It is important to note here that Esposito's reconciliation of these two modes of governance does not seek to collapse their contextual specificity; rather, Esposito's point is to suggest that both biopolitics and sovereignty share a similar goal or political orientation, which is to emphasize the preservation of individual life. In the contemporary neoliberal era, in which we have moved into a new terrain of rights discourses focused on the individual body or what Lavi called 'regulatory-rights-regimes' and others called ethopolitics, arguably we witness an intensification of immunization mechanisms. This is not to suggest that neoliberalism is essentially dissimilar to other forms of immunization, but rather that it is an extension and proliferation of immune mechanisms that operate on the basis of the closure of individual life or what Campbell had called an increase in the defensive borders around the subject. As Campbell has noted, for instance, neoliberalism in its increasing emphasis on privatization and individualization signals a crisis of the current moment, a tightening and

intensification of immunity.³⁷ Esposito, too, notes what he regards as a “substantial growth in immunization” in the contemporary neoliberal era.³⁸

In Foucault’s account of the neoliberal individual as a biopolitical subject, the ‘entrepreneurial self’ that emerges³⁹ is one that is deeply embedded in an immunity mechanism. Increased privatization, modes of self-responsibility, and the push for autonomy and independence are all indicative of the growing demands on the subject to be self-sufficient and entirely immunized from the other. Neoliberal rationalities of governance encourage the taking care of, and ‘protection’ of, one’s self and one’s interests. Moreover, it is also often a disadvantage or a direct risk to help one’s neighbor given that the self is positioned in direct competition to this neighbor who is considered the ‘other.’ In this regard, immunization helps us conceptualize how neoliberalism increasingly sets up borders between the self and other such that we become isolated selves. As Todd May notes in his critical reflections on neoliberalism, it shapes social relations by fostering a negative anthropology of humanity. May argues that a neoliberal governmentality attempts to reify the idea that human nature is economic and calculative, which influences how we are able to relate to one another. This is not a natural condition of humanity—indeed it is one that May wants to rectify through new discourses of friendship and trust— but rather it is one that is perpetuated in our current neoliberal condition as a truth of the ‘nature’ of the human condition and in that contextual sense it places limits on the kinds of social relationships that we can forge.⁴⁰ Indeed as Esposito notes, one of the problems with the immunization of life is precisely that when law imposes modes of immunization of individual life, which it does so by articulating discourses that enunciate truths about subjects that “shore up the limits of human relations,” as the New York Task Force on Assisted Dying had so astutely noted, it closes life off to other possibilities and ways of being.⁴¹ For Esposito

this closure of life does not simply confine life to particular norms; it also always risks the prospect of life itself. Thus, while immunity, as noted, presents itself as a protective endeavor, Esposito also notes the dangers associated with immunization. He suggests that, at a certain point in its protective endeavors—as we see in this instance of neoliberalism and individualism—immunization also resultantly closes us off from relations with the other. In its attempt to curb the expropriating demands of the *munus*, immunization mechanisms became ‘appropriating:’ they forge something ‘proper’. As Esposito notes, in the process of immunizing us from the demands of what is common, we instead start to appropriate this common and, in doing so, begin to communicate what is properly one’s own. In the name of life’s protection, immunization has led us to forge new relations to one another that are grounded in a mechanism that closes us off and secures us from one another. Arguably, as indicated, we increasingly see this separation of the self and other through this type of neoliberal rhetoric. We might suggest here that those scholars such as Christopher Lasch and Robert Putnam, who have written about the culture of the individual, were speaking to the very problematic features of the immunization paradigm.⁴²

Esposito describes this intimate relation between protection and the constitution of the proper by way of the example of sovereignty. He notes that, when we are brought into ‘unity’ with one another under the sovereign contract (and we can extend this to the Foucaultian biopolitical equivalent of ‘unity’ – that is, the mechanism of ‘population’ or ‘species’ management), we are not brought into relation as friends, but instead remain enemies. In being brought together in unity under the immune mechanism, we are held in a certain non-relation. Thus, he writes:

The relation that unites men [through immunization] does not pass between friend and enemy and not even between enemy and friend, but between enemy and enemy, given

that every temporary friendship is instrumental...with regard to managing the only social bond possible, namely enmity.⁴³

Here, Esposito means to suggest that the immunity mechanism of sovereignty (and also neoliberal biopolitics) did not offer us protection and bring us together as friends in relation to one another; that is, immunization did not offer us protection such that we would live in relational harmony with one another. Rather, through immunization we are brought into “reciprocal dissociation” or a “unity without relation.”⁴⁴ This is also why Esposito suggests the immunization mechanism both totalizes us and divides us from one another. The state of being immune that we so ‘enjoy’ to this present day can be summarized by the de Tocquevillian adage whereby we live “side by side unconnected by a common tie.”⁴⁵ Moreover, it is enmity that maintains this reciprocally dissociative relation.

In short, then, immunization is an artificial construct that, through various dispositifs, such as personhood, rights, law and so on, closes us off from the other under the auspices of trying to protect us from the other who is one’s immanent enemy. Indeed, this notion of the enemy is vital to retaining immunity since it rationalizes the very need for protection, and therefore legitimates the immunity mechanism itself. Given this centrality of enmity to immunization, it is here I want to turn to the way that enmity operates in bioethics right to die legal appeals.

IV. Enmity in Assisted Dying

It is not only in beginning of life decisions as Hanafin had noted in which the discourse of enmity emerges in law. In legal cases that appeal to voluntary active euthanasia or physician assisted suicide (PAS), war-like relations or theatrical ‘presentations’ of fear as Foucault stated,⁴⁶

are consistently employed to justify immunization mechanisms. For instance, in the recent 2012 case of *Nicklinson V Ministry of Justice*, the plaintiff's appeal to the right to die was rejected through this very constitution of enmity.⁴⁷ Two key examples within this case framed such a reading. In one instance, the case drew on precedent set in *Re A Conjoined Twins*.⁴⁸ In the case of *Re A*, we were presented with the conjoined twins, Jodie and Mary. The case posed the question of whether the twins could be separated, whereby this separation would have inevitably 'killed' one twin in order to save the life of the other. The death of one twin to save the other was not rationalized in a biopolitically affirmative manner, for instance on the basis that one life was better than no life but, rather, through a pessimistic, indeed adversarial, discourse, whereby one twin was articulated as directly threatening the life of her sister, "draining her life blood."⁴⁹ In addition to the precedent of *Re A*, Justice Charles Smith of *Nicklinson's* case also drew on the historical example of the duel, whereby a case was made that asking for the right to die was consistent with asking for consent to death through 'battle.' By noting the illegality of dueling, the case was made that even if one 'consents' to death at the hands of an other, this does not grant impunity under law for the taking of such life. Again, employing war-like rhetoric did not frame the right to die in any light that might allow one to consider it as a compassionate moment of being with the other or an openness to otherness. Instead, it necessarily implicated the right to die in a discourse of enmity. Even with a compassionate motive and a consensual, indeed, pleading individual who is appealing to the other, making themselves absolutely vulnerable and willingly so, the person who commits this act is, under law, no less than a murderer.⁵⁰

In Canada's *Sue Rodriguez's* case, many of the same points were raised regarding the association between assisted death and murder. The dissenting opinion given by Justice McLachlin noted that the opinion of Justice Sopinka had staked its denial of assisted dying in the

claim that any “... active participation by one individual in the death of another is intrinsically morally and legally wrong.”⁵¹ McLachlin noted the argument that “...the prohibition on assisted suicide is justified because the state has an interest in absolutely criminalizing any willful act which contributes to the death of another.”⁵² In Nicklinson and Rodriguez’s case, the absolute association of the act of taking life with unlawful murder as if this were ‘inevitable’ is curious. In the case of the right to die, this appears to occur by framing compassionate killing in the context of a criminal act whereby the other is always, inevitably, a ‘murderer’. Indeed, this inevitability of judgment lies at the very heart of Esposito’s account of immunization. Deciding on a guilty verdict in advance of an act, “regardless of whether the circumstances merit it” is how mechanisms of immunizing subjects from one another operate.⁵³ As Esposito further notes: “Life is not condemned because it is guilty but in order to make it guilty.”⁵⁴ If the “stated aim of law is to preserve life...life can be preserved only if held in the fold of an inexorable anticipation that judges life to be guilty even before any of its acts can be judged.”⁵⁵ The point here that is central to the paper’s thesis is to suggest that the law must create truths about human nature in order to judge it as guilty and condemn an act before it has even been performed.

Deferring to bellicose examples such as the vampiric twins and dueling in case law when dealing with the prospect of assisted dying are two instances in which we see the law operate in such a way as to create a groundless fiction about the limits of human relationships that requires “shoring up” by reifying a binary between friend and foe. Even within a regime of governance that advances the values of liberal individualism – that is, freedom of self-determination, and therefore an individual ‘sovereignty over oneself’ of sorts— the law appears to need to cultivate the notion that one’s neighbor is to be feared through recourse to the ‘essence’ of human nature as wolf-like. Indeed this is the kind of governmental approach to ‘conducting conduct’ that

Foucault had noted:⁵⁶ discourses of enmity are enunciated that perpetuate a particular truth of human relationships that rationalizes divisions between subjects on the basis of knowable behavioural ‘traits’⁵⁷ and a particular ‘anthropology’ of humankind.⁵⁸ The following commentary in Nicklinson’s case also makes this clear:

...recognizing a partial excuse of acting out of compassion would be dangerous. Just as a defence of necessity ‘can very simply become a mask for anarchy’, so the concept of ‘compassion’ – vague in itself— could very easily become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives.⁵⁹

It was Thomas Hobbes and Carl Schmitt who had also noted this necessary deferral to man’s essence in order to legitimate a political mechanism of protection, the latter of whom noted the “anthropological basis for political theory” was “a pessimistic anthropology, which has a vision of man as bad, corrupt, dangerous, fearful and violent.”⁶⁰ Derrida has written on this aspect of Hobbes and Schmitt’s theorizing, noting how their deferrals to human nature as wolf-like is a legitimization of a mechanism of sovereignty that reifies divisions between subjects.⁶¹

Speaking to the prospect of solidarity that might break from the individualizing tendencies of immunization more generally and neoliberal immunization more specifically, May writes: “Because of the individualizing tendency of neoliberalism we often find it difficult to think in terms of solidarity...we don’t possess ways of thinking in terms of solidarity, because we are discouraged from thinking these ways.”⁶² Solidarity is unable to emerge on the very basis that borders have been shored up between “the same (of friendship) and the other (of enmity).”⁶³

Another discourse that emerges in association with enmity in right to die legal appeals is that of vulnerability. This discourse emerges most prominently in the recent 2013 case of *Fleming v Ireland* in which Marie Fleming, the appellant, requested an assisted death.⁶⁴ In this

case a symbolic type of enmity was framed through the discourses of ‘burden’ and ‘vulnerability.’ It is important to establish as background to this case that in 2012 a discussion emerged in a Canadian right to die appeal from Gloria Taylor, in which Justice Lynn Smith granted a constitutional exemption that allowed Taylor the right to assisted death. Justice Smith ruled out the concern that Taylor had internalized a belief that she was a burden on her family, and therefore ruled out the argument that this internalized burden would coerce Taylor into seeking an assisted death that she might not otherwise have desired.⁶⁵ It was in direct response to Justice Smith’s ruling that Ireland’s Justice Nicholas Kearns provided ‘evidence’ that the threat of burden was still an ever-present possibility and, on account of this, dismissed Ireland’s Marie Fleming’s appeal to die. The judgment summary notes:

The evidence from other countries shows that the risks of abuse are all too real and cannot be dismissed as speculative or distant. One real risk attending such liberalisation is that even with the most rigorous system of legislative checks and safeguards, it would be impossible to ensure that the aged, the disabled, the poor, the unwanted, the rejected, the lonely, the impulsive, the financially compromised and emotionally vulnerable would not avail of this option in order to avoid a sense of being a burden on their family and society. The safeguards built into any liberalised system would, furthermore, be vulnerable to laxity and complacency and might well prove difficult or even impossible to police adequately.⁶⁶

Not only was Marie Fleming constituted as vulnerable in this case summary, but also her vulnerability was constituted in relation to the conditions of enmity and immunity. Kearns drew on the argument that right to die appellants would conceive of themselves as burdens due to the

direct pressure they would place on their families and caregivers. To support this claim he drew on what one witness, Professor George, called ‘care fatigue’ whereby:

...as a clinician treating patients in the final stages of their lives I have come across it in the most loving family environments. It is easy in such circumstances for seriously ill people to feel a sense of obligation to remove themselves from the scene.⁶⁷

While the discourse of enmity may not appear to be immediately apparent in this case, it is implicit in the rationale through neoliberal discourses of burden and vulnerability. These discourses invoke an immunity mechanism bound to a double relation of enmity. On the one hand, the statement rationalizes a discourse of self-responsibilization that frames Fleming as a burden and ‘enemy’ in the sense that she infringes on the freedom of her loved ones (hence, causing them ‘care fatigue’).⁶⁸ Responsibilization is a typical discourse associated with neoliberal governance rationalities that pushes individuals to take care of themselves.⁶⁹ On the other hand, the statement rationalizes the need to protect and immunize Fleming from the possibility—indeed, the inevitability—that this care fatigue may lead to a state of tension or a ‘war’ of the household, thus coercing Fleming into desiring a death out of fear and obligation. In a political climate in which care is frequently pushed onto families of individuals to remove the burden from the state,⁷⁰ arguably what is set in motion is new ways that enmity can get introduced as a rationale for increased legal ‘protection’ (or ‘immunization’), which penetrates law to protect us, even when we do not desire it, from those often deemed most ‘close’ to us: our loved ones.

Nicklinson’s case also realizes this problematic of vulnerability as it operates alongside legal protection from the constitutive enemy who is alleged to deliver harm. As Nicklinson clearly says:

By all means protect the vulnerable. By vulnerable I mean those who cannot make decisions for themselves just don't include me. I am not vulnerable, I don't need help or protection from death or those who would help me. If the legal consequences were not so huge i.e. life imprisonment, perhaps I could get someone to help me. As things stand, I can't get help.⁷¹

Writing in the context of restorative justice, socio-legal scholar George Pavlich notes the problematic uptake of ethical arguments used to defend certain legal decisions. In the context of the discussion of vulnerability this is particularly pertinent as he argues that ethical claims such as those said to 'protect' the vulnerable "operate in the name of supposedly universal principles of harm, or absolute conceptions of general community interests."⁷² For him, this assumption is damaging because this does not allow us to "seek out ways to envisage entirely new forms of social life."⁷³ It also narrows the very possibilities for considering what indeed constitutes 'harm' or, in this case, to consider what we imagine by vulnerability. In the instance of right to die appeals, this commentary is absolutely germane: one must surely note the ways that a law based on an uptake of the discourse of vulnerability that claims to be an ethical universal norm reflecting community interests instead does much damage to many members of this community who do not subscribe to the same account. Those persons appealing to the right to die like Nicklinson certainly do not consider themselves within the same universal context of vulnerability, nor do they wish to be considered thus. Indeed, rather than considering themselves vulnerable to other persons, whom the law establishes as proper enemies that it claims to protect them from, right to die appellants such as Nicklinson instead typically articulate themselves vulnerable to the law itself that they claim sentences them to a fate worse than death: life. Not only does Nicklinson's statement give us insight into the problematic that Pavlich has outlined above, but also it speaks more specifically to the implications of law acting as a conduit of a

neoliberal political rationality that divides subjects from one another. By perpetuating discourses that constitute proper types of persons (vulnerable) who inevitably require protection, this protection is grounded in a division that sustains and reifies the particular logic of the political rationality itself. Despite the relatively different ways enmity is called upon in the cases of Nicklinson, Rodriguez, and Fleming, common to the legal discussions is the necessity to ‘immunize’ and to forge artificial parameters that can be drawn around the self and other. The discursive enunciation of the presence of a possible enemy, either a direct enemy or the enemy of the community that is pressuring persons to die in particular ways, is necessary to permit and indeed constitute ‘legal protection’ as a necessity that sustains a neoliberal governance rationality that serves to reinforce appropriative, individualized divisions between subjects. The effect of this is that such discourses of enmity and vulnerability shore up the limits of human relationships in such a way that they block the prospect of an opening out to alternative ways of being in relation to others.

On the other side of this divide however we must also ask in what ways the refusal of vulnerability (i.e. Nicklinson’s claim that he is not vulnerable) and the depiction of law as a mechanism of communal force or violence imposed on subjects is also complicit in another type of immunizing function, this time by way of the articulation of legal rights themselves. Judith Butler for instance seems to critique the rejection of vulnerability as a way to establish and legitimate a violent self-centered subject.⁷⁴ It is important to bear in mind that she is speaking in a very different context to the subject matter in question, and that she is also speaking to a very different subject per se (specifically that of the nation as a subject). However, her insights are still apt. She writes that the denial of vulnerability (in the context of the nation) is a way to re-instill boundaries and to erect defensive apparatuses around the subject. In what ways might the

rights claims of appellants themselves also be invoking a denial of vulnerability to both shore up the enmity of the other – in this case the law itself or the community of persons who seek to deny assisted dying – and also to shore up the subject’s own prospects as a self-directing individual sovereign subject? Describing the violent, self-centered subject, Butler notes:

Its actions constitute the building of a subject that seeks to restore and maintain its mastery through the systematic destruction of its multilateral relations ... It shores itself up, seeks to reconstitute its imagined wholeness, but only at the price of denying its own vulnerability, its dependency, its exposure, where it exploits those very features in others, thereby making those features ‘other to’ itself.⁷⁵

Indeed, Derrida had also noted a similar point regarding the liberal individual who attempts to immunize himself or herself against the violence of the state. He writes, “There are different and sometimes antagonistic forms of sovereignty, and it is always in the name of one that one attacks the other.”⁷⁶ From the vantage of governmentality, one might note the ways that the subjective appeals to the right to die, particularly as they refuse a status of vulnerability, are not simply neutral or innocent but also are inscribed in the shared neoliberal political rationality that serves to close off the borders around the self. One must therefore consider how such liberal rights appeals also, to some degree, endeavor to fix a ‘proper’ subject. In denying vulnerability and appropriating a self-directing subjectivity, liberal right to die appeals themselves seem to be complicit with the constitution of a subjectivity that is complete, protected and defended from the fear and enmity that the other poses.⁷⁷

V. War, Immunity and the Proper

Following Esposito’s political project as well as the insights that Campbell has added, we can explain in more detail this critical concern that both scholars hold in terms of the creation of

proper subjects that serves to establish us in reciprocal dissociation with one another and confines us to the ‘defensive barriers’ that enclose the self. This enclosure, which occurs through immunization and is arguably most rife in the contemporary context, is what creates the appearance of someone who is ‘proper’; hence, it creates the appearance of the individual sovereign subject who appears to be an ‘absolute’ or ‘indivisible’ self. As previously noted, the rationale that constitutes this proper subject is articulated through the discourses of enmity and vulnerability. In this regard, we can say that neoliberal governance articulates the discourses of enmity and vulnerability to legitimate legal decisions that forge a separation between a ‘proper’ self and a ‘proper’ other. The establishment of the proper subject is necessary in order for law to fix its target and make a decision.⁷⁸ However, in forging proper subjects of law, which is necessary for a legal judgment to be made, the constitution of the ‘proper’ also closes us off to the possibility of a relational ethics.⁷⁹ ‘Otherness’ itself is central to this proper constitution: the other must be a ‘proper’ other, which is, ultimately, a ‘known other’. Moreover, this other is ‘made known’ as an ‘other’ by calling on what is proper to it: its status as an enemy or as a vulnerable subject. In the same way that Esposito noted that life must be determined as guilty in order to found law itself, we could say the same thing about the way that discourses operate in order to already define a particular anthropology of humanity that legitimates legal decisions to deny assisted dying. The subject of the right to die—the appellant—must be made known as both a vulnerable subject and as an enemy such that he or she can be brought within law’s sphere and judged accordingly. Likewise, the subject who would otherwise help the appellant to die must also be made known before an act of killing even occurs such that he or she can be labeled and judged as guilty. In the cases presented we see how the other or enemy is made known. For instance, it was only possible to grant the embryonic sovereign a proper status by making known

an enemy that constituted it as a proper subject; it was defined negatively through its relation to the mother that gave it a property and that made it a subject. To thwart Nicklinson's appeal to the right to die, a known other, an enemy, had to be created. Even though there was not an enemy per se in Nicklinson's case, an artificial enemy was necessary to rationalize a denial of the appeal. Thus, the legal status of 'murderer' was called upon to directly constitute the other through this 'known' lens, without even demanding a performance of the 'murderous' act. In this regard we can claim that law rationalizes its decisions on denying assisted dying through an enunciation of discourses that allow law to fix its gaze by creating proper subjects of law. These proper subjects are also individual, immunized subjects who must remain divided from one another. Law operates as a conduit of a political rationality of governance that demands that human relations are shored up to the extent that all actions can be made known according to specific normalized criteria and judged accordingly. Law and legal judgments must continue to uphold the differentiation between self and other, and it must hold these two apart through the discourses of enmity and vulnerability.

Despite this logic that operates through a political rationality of governance, such a logic is not a 'truth' of human nature per se. The paper has already noted that this is the case. Legal decisions on the right to die serve to sediment human relationships as necessarily divided from one another by bringing into effect these discourses of enmity and vulnerability. Esposito says something similar about the operation of enmity as part of his account of immunization and the way that immunization mechanisms close off the self from others. Esposito notes, for instance, the 'mythic' idea of enmity. This appeal to myth is akin to Derrida's claim that sovereignty is only ever a 'performance.'⁸⁰ From Esposito's vantage, discourses that enunciate political rationalities of governance that operate on the basis of the need to divide subjects from one

another do so with the goal of presenting these divisions as natural and necessary: they do so through the establishment of a war-like division between subjects that is grounded in a defense of the individual self, as we have seen articulated in legal cases where the other is articulated as an enemy of the self. However, from Esposito's vantage, much like Foucault's and Derrida's, such war-like states are governance mechanisms that 'make known' the enemy and, as such, rely on a static division between self and other.⁸¹ He or she who is other (the enemy) can be made known, and this known enemy can be defeated. The discourse of enmity makes possible the legal rationalization of denying assisted dying by making known the other (as a proper subject), and immunizing the subject from this other absolutely: "With the corpses of the enemies removed or reused for exercises", Esposito writes, "...the battlefield has now been cleared. The body has regained its integrity: once immunized, it can no longer be attacked by an enemy."⁸² However, rather than being something that is "immortal," and final, as Esposito notes, the process of division of subjects and the immunization of subjects from one another is a process embedded with "structural aporias."⁸³ Immunity is not a mechanism of absolute closure, despite invoking discourses and dispositifs that make it appear as such; rather, the closing off of the self from other that is articulated as a part of human nature within the contemporary context must be read from Esposito's vantage as something that can always, and will always, open back up to the prospect of more relational ways of being in common. For Esposito this is so given the intimate relation of immunity (or the closure and appropriation of the self) with community that is bound to an originary dependency that we share with one another in the *munus*.

In his reflections on neoliberalism, communitarian scholar Olssen also notes that a neoliberal governmentality has a tendency to forge closures around subjects through the constitution of proper human relationships by attempting to promote ideals of "self-

reliance...responsibilization...and an enterprise culture.”⁸⁴ However, he notes that this detracts from the ways that we are intimately bound together through a shared dependency that at base shapes our human relationships. He writes for instance that “...dependency is, in effect, a part of interconnectedness, or relationality, by which our lives are defined by our commitments to others.”⁸⁵ Even in the contemporary climate in which we find that governance mechanisms endeavor to appropriate or forge divisions between subjects and constitute each subject as proper through making one another ‘known’ as a threat or enmity of the other, what Olssen points to, and what Esposito also notes, is that this condition is not necessary. Moreover, this condition of division, immunization, and the proper can always be reversed to an opening toward other ways of being in common that are grounded in ideas of solidarity, community, and mutual dependency. This is what Esposito finds in his concept of *munus* and what this paper poses most simply as the interconnectedness of the human condition in which we might find new prospects of opening up the defensive borders of the self, and deconstructing them to imagine other ways of being.⁸⁶ For Esposito, once we have revealed the way that this ‘proper’ is forged we can in turn critique and deconstruct it. In the constitution of proper subjects, this unpleasant mode of ‘protection’ unequivocally closes off our relation to the other by defining this other as one’s absolute enemy, despite the appeal to this other for help at the end of life. Likewise, one might posit in the same vein that creating an artificial mode of protection around an embryo, which forges its proper status in opposition to a known enemy that is its mother, is another insidious cruelty that disregards the very relationality of life, or the relationality of the ‘subject.’

This depiction of the operational features of immunity and its creation of the proper subject may be used to highlight how immunity does the ‘work’ of conservative discourses that frame the mother as an enemy of the fetus, thus rationalizing Christian, Catholic, and right wing

beliefs. However, it is important to note that this proper status of the subject is equally used to do the work of 'liberal democratic' politics, for instance from the vantage of 'liberal' right to die appeals. In this regard, the constitution of the proper subject has implications for both sides of the political debate. The key problem in both cases, as the paper has argued, is the attempt to close off relations between subjects through the insistence on immunity and the proper, particularly when immunity is conceived through a lexicon of war that utilizes enmity to articulate the individual 'self' in modern politics. Just as conservative discourses of enmity are dangerous, so, too, can liberal democratic discourses slip when they rely on the constitution of 'proper' subjects.

VI. Conclusion

By understanding how enmity and its coterminous discourse vulnerability operate in such a way as to enunciate a neoliberal rationality of politics that shores up limits of human relationships, we can also reconsider how to reframe the problem. For instance, in this paper I have noted that human relationships are shored up in two ways. The first is through law's articulation of the subject who would help the person die as necessarily an 'other' by way of fixing the gaze on them as performing an act of murder, without considering other motives for taking life. This fixes the appellant as vulnerable and the assister as enemy. The second is through the appellant's 'right' to die appeal itself, which also does not escape this problematic. The appellant's articulation of the right to die through law, by refusing vulnerability and claiming instead to assert self-direction and self sovereignty, also ascribes to the same neoliberal rationality of governance that operates on the basis that subjects are able to take care of themselves, be self sufficient individual subjects, and therefore conform to the social conditions in which they find

themselves shaped as subjects.⁸⁷ In this sense, one can ask to what extent rights claims also shore up the limits of human relationships whereby in appealing to the prospect of assisted dying they are also paradoxically asking the law to immunize them. Neither of these positions necessarily challenges the conditions of a neoliberal governmentality that divides or immunizes subjects from one another; rather, it seems that both positions are fixed within a rationality that continues to erect borders around the self and shore up human relational limits. The question then becomes: how can we imagine an affirmative politics of assisted dying without relying on discourses of enmity that constitute the ‘proper’ subject as he or she in need of protecting from an adversarial other? Or, perhaps better put, how can we envisage a more ‘relational’ ethics that notes, and works against, the performative features of these utterances of the ‘absolute enemy’ and the ‘proper’ more broadly conceived?

As the paper has noted, despite the way that the discourse of enmity is used to fix subjects through immunity’s protective enclaves, the ‘other’ who is constituted as this enemy is not strictly an ‘other’ but instead is always reciprocally related to us. For Esposito, this kind of relational ethic is crucial to an affirmative instance of biopolitics that he wants to salvage. Such a relational ethic is one that does not close us off from one another through immunity mechanisms, but that puts us ‘outside ourselves,’ back into relation. Drawing on the reciprocity of community and immunity, Esposito gestures to a type of ‘contagion’ that might break with the constitution of the self. Rather than the threat of the other merely causing us to immunize, instead this threat may relate us. In order to think this kind of relational contagion, or “contagion that relates,”⁸⁸ Esposito pushes us to consider new ways to relate to one another through difference, or plurality, as ‘improper’ subjects. Improper subjects do not share an ‘entity’ or something ‘proper’ in common, but rather share the very relationality of being. As Esposito states, it “isn’t the *inter* of

esse but rather *esse* as *inter*, not a relationship that shapes being [*essere*] but being itself as the relation.”⁸⁹

In the legal appeals discussed this relational contagious experience would not rationalize a type of self-stylization in which the individual and autonomous subject turns himself or herself into a subject of rights by seeking ‘privacy’ or other immune-bound concepts like ‘dignity’ and ‘liberty.’ These problematically endeavor to protect the proper subject of rights. Rather, Esposito’s affirmative plea would ask us to reconsider the relationality of one’s subject position. This type of relational approach would ask the law to respond on the basis of one’s actions as a relational subject, as opposed to law responding on the basis of what one ‘is’ as a ‘proper’ subject. This might therefore be more akin to the type of politics Hannah Arendt had envisaged.⁹⁰ For instance, we might argue that the use of enmity in legal rationale forecloses a number of relational moments by already constituting ‘what’ one is in law, without considering ‘who’ one is on account of the actions one takes. Right to die cases tell us as much when the law has already decided, before any action occurs, that the person who takes the life of another is, inevitably, a murderer, even if the action reveals a different characteristic of the subject as compassionate and loving. In considering this affirmative biopolitics in such a relational way it also helps us note the way that life “evolves” when we open ourselves up to these new relational possibilities.⁹¹ Thus, Esposito provides us with an ethics that points to a process of ‘becoming other,’ or a way that we can open ourselves up to otherness by dissolving the very meaning of ‘otherness’ into a reciprocal relation with the self.

To draw to a conclusion, this paper has argued that Esposito’s insight into immunization, which brings together sovereignty and biopolitics, is not only revealing of the way that bioethics legal cases appear very much bound to the discourse of sovereignty and adversarial relations

underscored by enmity, but also suggests that his ‘immunity paradigm’ is absolutely integral to appreciating how biopolitics operates in the contemporary neoliberal political climate. Where Foucault had noted that enmity was bound with sovereignty, and that the articulation of enmity had therefore dissipated in biopolitical modes of governance, arguably through the intimate link between biopolitics and contemporary rights claims that reify the proper self we see the re-articulation of enmity and immunity as a central operational feature of modern neoliberal biopower. In particular, reading legal cases through the immunity paradigm helps us comprehend how right to die cases appear to fail on appeal because they tend to articulate themselves according to a particular narrative of enmity, which is a defining moment in the operation of immunity. Moreover, this insight into the immunity mechanism also asks us to carefully question those cases we might otherwise consider ‘liberally affirmative’ that give us the outcome we might desire, but use the same damaging and potentially closed rationale that is embedded in the discourse of their conservative counterparts (for instance, cases that affirm rights on the basis of being a liberal individual and private self).

In making these claims, the paper has further noted that we ought to be careful when employing discourses of liberal affirmative theoretical frameworks such as ‘ethopolitics’ without considering the ways that they may also close off the self through the same mechanisms of immunity when they relate autonomous ‘selves’ to political change. This does not mean that all ethopolitical conceptions of politics are problematic. Yet, Esposito’s account of immunity, and the ways in which these legal cases appeal to immunization mechanisms underscored by enmity, reminds us that the affirmative potential is found more so when biopolitical analyses are considered through a lens that is receptive to notions of difference and relationality. This account

therefore implores us to tread with caution, to avoid closing off the borders of the self, and instead remain open and relational.

Word Count: 10979

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²³ Ibid, p. 74.

²⁴ Ibid, p. 119.

²⁵ Ibid, p. 98. Arguably this clarification is necessary because it disrupts the notion of an ‘autonomous’ subject who is not relationally constituted through modes of subjectification and subjectivization.

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³² Esposito, *Communitas*, p. 45-6.

³³ Esposito, *Communitas*, p. 55

³⁴ See, for example, Michel Foucault, *The History of Sexuality, An introduction*. (New York: Random House, 1990). He says: “One might say that the ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death” (p. 138).

³⁵ Esposito, *Bios*, p. 57.

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- ³⁶ Campbell, *Bios, Translator's Introduction*, p. xxxvii.
- ³⁷ Campbell, *Improper Life*, p. 72-73.
- ³⁸ Roberto Esposito, *Terms of the Political: Community, Immunity, Biopolitics*, Rhiannon Noel Welch (Trans), (New York: Fordham University Press), p. 130.
- ³⁹ Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-79*. G. Burchell (Trans.) (New York: Palgrave Macmillan, 2008), p. 226
- ⁴⁰ Todd May, *Friendship in an Age of Economics: Resisting the Forces of Neoliberalism*. (Maryland: Lexington Books, 2012).
- ⁴¹ New York Task Force on Life and Law.
- ⁴² See, for example, Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations*, (London & New York: W. W. Norton & Company; Revised edition, 1991); Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community*. (New York: Simon & Schuster, 2000).
- ⁴³ Esposito, *Communitas*, p. 27.
- ⁴⁴ *Ibid*, p. 28
- ⁴⁵ Esposito, *Bios*, p. 76
- ⁴⁶ See Foucault, *Society Must be Defended*, p. 92.
- ⁴⁷ Nicklinson V Ministry of Justice, EWHC 304 (QB), 2012.
- ⁴⁸ Re A (Children) (Conjoined Twins: Surgical Separation), 2 WLR 480, 2000.
- ⁴⁹ *Ibid*, 7.7.
- ⁵⁰ See Jennifer Hardes, "Fear, Sovereignty and the Right to Die", *Societies*, 3(1), 66-79, 2013.
- ⁵¹ Rodriguez v. British Columbia (Attorney General) [1993] 3 S.C.R. 519, p. 601; p. 616.
- ⁵² *Ibid*, p. 616.

⁵³ Esposito, *Immunitas*, p. 32.

⁵⁴ Ibid.

⁵⁵ Ibid pp. 32-33.

⁵⁶ Michel Foucault, “Governmentality”, in: Graham Burchell, Colin Gordon and Peter Miller (Eds), *The Foucault Effect. Studies in Governmentality*, pp. 87-104. (Chicago: Chicago University Press, 1991).

⁵⁷ Mikko Joronen, “Conceptualising New Modes of State Governmentality: Power, Violence and the Ontological Mono-Politics of Neoliberalism”, *Geopolitics*, 18(2), 356-370, (2013).

⁵⁸ Jason Read, “A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity”, *Foucault Studies*, 6, 25-36, (2009).

⁵⁹ Nicklinson V MOJ, para.54, s7.7.

⁶⁰ Jacques Derrida, *The Beast and the Sovereign Volume One*, (The University of Chicago Press: Chicago and London, 2009)

⁶¹ Ibid.

⁶² May, *Friendship in an Age of Economics*, p. 135.

⁶³ Ibid.

⁶⁴ Fleming V Ireland & Ors, I EHC 2, 2013.

⁶⁵ Carter V Canada (Attorney General), BCSC 886, 2012.

⁶⁶ Fleming V Ireland & Ors, Judgment, I EHC 2, 2013

⁶⁷ Ibid, para. 66.

⁶⁸ See Sarah Glasgow, “The Politics of Self-Craft: Expert Patients and the Public Health Management of Chronic Disease”, *Sage Open*, 1-11, 2012.

⁶⁹ See *ibid*; May, *Friendship in an Age of Economics*; Wendy Brown, “Neoliberalism and the End of Liberal Democracy”, in *Edgework: Critical Essays on Knowledge and Politics* (Princeton, NJ: Princeton University Press, 2005); Mark Olssen, *Liberalism, Neoliberalism, Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education*. (London : Routledge, 2010).

⁷⁰ See Wendy Larner, 2000, “Neoliberalism: Policy, Ideology, Governmentality”, *Studies in Political Economy*, 63, 5-25, 2000.

⁷¹ See *Nicklinson V MOJ*, para. 3

⁷² George Pavlich, “Towards and Ethics of Restorative Justice”, In Lode Wolgrave (Ed), *Restorative Justice and the Law*, (Devon: Willan Publishing, 2002), p. 5.

⁷³ *Ibid*.

⁷⁴ Judith Butler, *Precarious Life: The Powers of Mourning and Violence*, (London: Verso, 2004)

⁷⁵ *Ibid*, p. 41.

⁷⁶ Derrida, *Beast & Sovereign*, p. 76.

⁷⁷ See Sophia Mihic, “Neoliberalism and the Jurisprudence of Privacy: An Experiment in Feminist Theorizing”, *Feminist Theory*, 9(2), 165-184, 2008.

⁷⁸ See Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*, (Oxford: Hart Publishing, 2009). See also George Pavlich, “Criminal Justice and Cape Law’s Persons”, *Social & Legal Studies*, 1-18, 2013.

⁷⁹ Campbell, *Improper Life*

⁸⁰ Derrida, 2009, p. 28.

⁸¹ Esposito, *Immunitas*, p. 159

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Olssen, *Liberalism, Neoliberalism, Social Democracy*, p. 174).

⁸⁵ Ibid.

⁸⁶ Esposito, *Communitas*.

⁸⁷ Mihic, *Neoliberalism and the Jurisprudence of Privacy*.

⁸⁸ Vanessa Lemm, Introduction to Roberto Esposito, *Terms of the Political: Community, Immunity, Biopolitics*, Introduction by Vanessa Lemm, Rhiannon Noel Welch (Trans), Bronx, (New York: Fordham University Press. 2012), p. 7.

⁸⁹ Roberto Esposito, “Appendix Nihilism and Community” in *Communitas*, 2010, p. 139

⁹⁰ See, for example, Hannah Arendt’s discussion of the ‘who’ and the ‘what’ of political action in Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1958), p. 180.

⁹¹ Roberto Esposito, *Bios*, p. 88.