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Revocability, Exception, Disqualification: Reproduction After Roe and Foucault

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I. Trollito[1] and "raw power"

In 2022, in the wake of the Dobbs v Jackson decision draft's leaking, one word, "power," ricocheted: from Alicia Keyes' tweet that the decision was "not only about abortion, but about power," to the abortion rights activist who commented on Supreme Court justices and the Republican strategies responsible for the Court's new configuration: "they don't give a shit about actual human children. All they give a shit about is exerting power over people,"[2] to the scathing assessment by legal commentators of the outcome-driven constitutional interpretation retrofitting cherry-picked legal justifications to conservative agendas, as in Kate Shaw's description: Dobbs was "really just raw power . . . an exercise of power, they have the votes and they did it."[3] But in the widespread use of that term, wasn't this also the moment to ask, what was meant by "power", and, "what kind of power"?

For Justice Alito's opinions were also characterized with an ingenuity productive of new terminologies— from the comedians engaging in political commentary to the law professors offering public-facing podcasts. The turn to an innovative vocabulary was seen in references to the Supreme Court decision's "bad faith," its trolling, its Yolo approach, its fan fiction, the opportunistic itinerancy of its alternating appeals to and disregard for precedent, impact, established principles, consequences, facts, consistency, competency, empathy— and in Merriam-Webster's selection of the term "gaslighting" as its word of the year. As many angrily observed that several judges had either mislead or lied to Congress, the references to duplicity were given an extra intensity by commentators such as Jon Stewart — who suggested that the Supreme Court had devolved into the Fox News of justice: the semblances of journalism and justice were being used to give the patina of fairness and balance to a cynical political institution.[4]

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[1] "Trollito" – the term suggested by the public facing podcast offering commentary on Supreme Court decisions and culture, *Strict Scrutiny.*
[2] David Eisenberg, abortion provider, St. Louis Metropolitan 1A, "A Post-Roe America: Part Two: The Abortion Providers", The Daily, (New York Times podcast, May 11th, 2022), discussion in similar terms to the exertion of power, *Pod Save America*, May 14, 2022.
[3] Kate Shaw, interviewed by Jon Stewart, on The Trouble with Jon Stewart, (episode of June 30, 2022: "Limber Up and Pack a Lunch: The Post-Roe Fight Ahead."
[4] "The Problem with Jon Stewart" (episode of June 30: "Limber Up and Pack a Lunch: The Post-Roe Fight Ahead.")

Perhaps this widespread impetus to capture the moment with the innovation of new vocabularies has also sought to scrutinize more closely the forms of power at work? Perhaps commentators were also recognizing a proliferation of those types of power, seeking a more adequate vocabulary for power's complexity? In this paper, I seek to augment this recognition, by asking how some of the familiar terms associated in a post-Foucauldian climate with power (such as the biopolitical, disciplinary, and securitizing) are most promisingly understood with a combinatory language — where "combinatory" would mean, overlapping, or hinging together, and as such not necessarily separable (except as a typological abstraction). I find a promising tendency in Foucault's post 1970 work towards multiple terms for thinking about this interrelationality ("penetration," "imprinting," "ballast," "expression," "reactivation," "complementing,") and see such combinations as a basis for specifying further terminologiest pertinent to politicized reproduction such as revocability, exception (and, I shall argue, "disqualifying qualification). So, I will also ask: how does this relate to the type of rights-bearing and rights revocability, associated with potential pregnancy? And: do politicized reproduction, and politicized abortion more specifically, function as a "super-hinge" between multiple forms and techniques of power?

II.

One near uncanny indication of this possibility was to be found in the wording of the Dobbs v. Jackson decision itself. To some eyes, its language could almost have served as a primer for how interest in reproduction emerges as belonging to the multiple types and techniques of power explored by Michel Foucault. Think of the decision's affirmation of a pastoral concern to "protect" fetal life (*77-78*), of the onerous regulative conditions that professed to articulate the state's concern to ensure maternal health (*78*), the citation of [5] a biopolitically-inflected report on the shortage of "domestic supply of infants relinquished at birth or within the first month of life and available to be adopted," (*34*)[6] and its affirmative reiterations of a state's "legitimate interest" in protecting "potential life." We could think of the thanatopolitical attempt to refer to the negative racial impact, conceived demographically, of the nation's overall abortion patterns (30).[7] From a sovereign perspective there

[5] "These legitimate interests include …the protection of maternal health and safety;" (p. 78). See also Roberts, concurring, citing the Mississippi law's reference to techniques of abortion judged to be "dangerous for the maternal patient" (p. 2)

[6] "See, *e.g.*, CDC, Adoption Experiences of Women and Men and Demand for Children To Adopt by Women 18–44 Years of Age in the United States 16 (Aug. 2008) ("[N]early 1 million women were seeking to adopt children in 2002 (*i.e.*, they were in demand for a child), whereas the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent"); CDC, National Center for Health Statistics, Adoption and Nonbiological Parenting, https://www.cdc.gov/nchs/nsfg/key_statistics/a-keystat.htm#adoption (showing that approximately 3.1 million women between the ages of 18–49 had ever "[t]aken steps to adopt a child" based on data collected from 2015–2019)," (p. 34).

[7] "Other *amicus* briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African- American population. See Brief for African-American Organization et al. as *Amici Curiae* 14–21; see also *Box* v. *Planned Parenthood of Ind. and Ky., Inc.*, 587 U. S. ___, ___–___ (2019) (THOMAS, J., concurring) (slip op., at 1–4). And it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black. See,

was reference to the various competing stakeholders of sovereign authority (federal, state, and individuals), as if pregnancy and fetal life were matters of contested authority over domain. There were projections of a national disorder, and implications that it was, moreover, available to be repaired;[8] there was reference to the problematic affective state of a nation and its political culture[9] as if available for some kind of judicial management, or redirection. There was neoliberal reference to whether a woman, her career and, effectively her ability to invest in herself and to plan a future had to be seen, or had still to be seen, as inevitably hindered in contemporary times by pregnancy and risk of pregnancy (34).[10] There was the concern, as if progressivist, that the nation not avail itself of "*particularly gruesome or barbaric"* techniques (78). There was reference to legitimate governmental interest in preserving the overall integrity of the medical profession (78) [11] And from a disciplinary perspective there were appeals to pregnancy as a matter of good conduct: thus it was made a point of relevance to the legal judgment (and for Roberts' assenting opinion) that some states – the relevant case here being Mississippi — would, in fact, still "allow" women to seek abortions within the first trimester[12] threshold. This was expressed as thereby giving them "adequate opportunity." There was the reminder that women could now turn (as it was asserted) in the conduct of their pregnancies to all the resources of medical insurance, governmental assistance (34),[13] not to mention a reassuring reference to the availability of so-called safe-haven facilities — such as public lock-box system for relinquished newborns widely considered a bone-chilling alternative to adequate social support for crisis situations (34). With reference to subjectivation, the ruling asserted that unmarried pregnancy no longer incurred stigma and blame (33), and indications of multiple social paths for the optimal good conduct of pregnancy, as if these invalidated complaint about abortion's inaccessibility. From this

e.g., Dept. of Health and Human Servs., Centers for Disease Control and Prevention (CDC), K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Report, Surveillance Summaries, p. 20 (Nov. 26, 2021) (Table 6)," (p. 30).

[8] "The decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division." In the words of Kavanaugh, concurring, "The national division has not ended," (p. 9).

[9] "The decision …. sparked a national controversy that has embittered our political culture for a half century," (p. 3).

[10] "Without the availability of abortion, [the defenders of *Roe* and *Casey*] maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors" (p. 33)

[11] This and the interest in averting fetal pain as a reference to Gonzalez is also to be found in Roberts' concurrence: "Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. See, *e.g.,* Ala. Code §26–23B–2 (2018). Assuming that prevention of fetal pain is a legitimate state interest after *Gonzales*, there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is true of laws designed to "protect[] the integrity and ethics of the medical profession" and restrict procedures likely to "coarsen society" to the "dignity of human life." *Gonzales*, 550 U. S., at 157. " (p. 4) see also Roberts on Mississippi's reference to some abortion techniques as "demeaning to the medical profession."

[12] "Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. See A. Ayoola, Late Recognition of Unintended Pregnancies, 32 Pub. Health Nursing 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity." (Roberts, concurring, p. 2)

[13] "The Affordable Care Act (ACA) requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which include maternity and newborn care. See 124 Stat. 163, 42 U. S. C. §18022(b)(1)(D). The ACA also prohibits annual limits, see §300gg–11, and limits annual cost-sharing obligations on such benefits, §18022(c). State Medicaid plans must provide coverage for pregnancy-related services—including, but not limited to, prenatal care, delivery, and postpartum care—as well as services for other conditions that might complicate the pregnancy. 42 CFR §§440.210(a)(2)(i)–(ii) (2020). State Medicaid plans are also prohibited from imposing deductions, cost-sharing, or similar charges for pregnancy-related services for pregnant women. 42 U. S. C. §§1396o(a)(2)(B), (b)(2)(B).," (p. 34)

disciplinary perspective, Alito also referred positively to how pregnancy has now come to be conducted through the mediation of the sonogram's individualizing techniques (34). He referenced this technology as helpfully assisting prospective parents to project their fetuses more specifically as "boys and girls," binding his vision of the meaningfulness of anticipated life to his construction of sex in terms of sexual difference. So, if this is a judgment imprinted, however indirectly, with reference to various forms of power, it is also imprinted with the ambiguity of how these forms interrelate.

III. Rights-bearing and heterogeneities of power

From the perspective that certain types of sovereign power associated with juridical decisions about rights can hinge together with a further heterogeneity of formations of power, and in so doing, create further dimensions of revocability and unease, I will work towards further characterizations of some corresponding new vocabularies in politicized reproduction.

A starting point is how a heterogeneity of formations of power manifests in: the deeming of women and pregnant people as members of rights-bearing political bodies, who are thereby asserted to have a legitimate political interest in legal and political decisions over "life," all the while that that they also comprise, through a further proliferation of biopolitical techniques of power, the lives over which these decisions are made. In this, I reconsider a suggestion made by Foucault, concerning one of several ways to understand the relation between disciplinary and sovereign power.

> A right of sovereignty and a mechanics of discipline.:. between these two limits… power is exercised. The two limits are, however, of such a kind and so heterogeneous that we can never reduce one to the other. (SMBD, 38)

The fact that, as Foucault argues, "The discourse of discipline is alien to that of the law," [14] (*Le discours de la discipline est étranger à celui de la loi),* doesn't mean they do not hinge together in certain ways, some of them strategic, or productive. Indeed, that strategic dimension might be reinforced by the heterogeneity emphasized here. While an adequate account of such hinging isn't necessarily to be found in Foucault's accounts alone, some of his Collège de France lectures of the 1970s included indications in that direction. For example, when, in *Society Must Be Defended,* Foucault discusses the emergence of the personal exercise of rights as part of the democratization of sovereignty — the

[14] Michel Foucault, *<<Il faut défendre la société>>: Cours au Collège de France 1976* (Paris: Gallimard, 1997), p.35. (*Society Must Be Defended,* pp. 38-9).

political development that "guarantees that everyone can exercise his or her own sovereign rights thanks to the sovereignty of the State" (SMBD 37) —, he qualifies this with the claim that:

> In modern societies power is exercised through, and on the basis of, and in the very play of the heterogeneity between a public right of sovereignty and a polymorphous mechanics of discipline. (SMBD 38)[15]

But how should we understand that play of heterogeneity? Foucault offers numerous answers. Among them, in the passages referenced here, one of his suggestions is that the disciplines, like other components of biopower offer a kind of ballast to sovereign power. (A different argument about mutual reinforcement is made in *Psychiatric Power* concerning the bourgeois family as a relay point of numerous heterogeneous formations of power.) These are the directions of thought that have been greatly augmented by post-Foucauldian theorists, particularly within political theory and elsewhere,

IV. A lexicon for heterogeneities of power

In a range of disciplines including political theory, recent trans*, feminist, queer theory, critical race theory and Black studies, the work or terminology of Foucault has been invoked (albeit in a post-Foucauldian mood) specifically to consolidate an account of how securitizing, disciplinary, pastoral, sovereign and biopolitical formations of power combine. Where an alternative viewpoint might have seen some of these as replacing each other, or replacing eachother in importance,[16] they are instead construed as sometimes intensifying each other's effects, or as linking together to produce new forms of power — to which combinatory forms of resistance could also (as argued by Bargu's *Starve and Immolate*) be considered to respond. These arguments have also given rise to terminological innovations, just a few of which include the hybrid term "biosovereignty" as used by Bargu, the account of a "sovereign right to maim" (linking the sovereign, securitizing and necropolitical) proposed

[15] See also Foucault's situation of medicine in this context, as "taking place on the front where the heterogeneous layers of discipline and sovereignty meet," (SMBD, p. 39), and for his discussion of a colonial version of this intersection, Santiago Castro-Gómez, *Zero Point Hubris*.
[16] For a broader discussion of Foucault's point that heterogeneous mechanisms of power do not necessarily succeed and replace each other, "the appearance of the new causing the earlier ones to disappear. There is not the legal age, the disciplinary age, and then the age of security. Mechanisms of security do not replace disciplinary mechanisms, which would have replaced juridicolegal mechanisms," see Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, trans. Graham Burchell, ed. Michel Senellart (New York: Palgrave Macmillan, 2009), p. 8; see Penelope Deutscher, "Qualifizierende Disqualifizierung und ihre Umkehrungen: Macht nach Foucault und die Verteilungen von Unvermögen," *Deutsche Zeitschrift für Philosophie* 70.2 (2022): 195-225 (forthcoming translation, slightly modified, as "Qualifying Disqualification and its Inversions: Power After Foucault and the Distributions of Incapacity," in *Graduate Faculty Philosophy Journal* 43.1 (2022): 3-30.

by Jasbir Puar, and "burdened individuality,"[17] a crucial forerunner elaborated in Saidiya Hartman's *Scenes of Subjection*. *Scenes* included a number of responses to Foucault, conceptualizing racial domination's linkage of the sovereign and the disciplinary, as forms of power whose combinations have, historically, both de-subjectivized and re-subjectivized — viciously.[18] Though not foregrounding this part of the argument, the work also makes clear the error that would result from abstracting out one formation of power, but it is also clear how insufficient the term "ballast" would be to characterize these interrelations— or else the idea of ballast would have to be thought in terms of multiple planes.

Before turning to that argument, the following instances each — differently — exemplify a political engagement with reproduction, construed in terms of a specific formation of power, while also exemplifying the need to further think its relationality with heterogeneous forms.

i. **Heterogeneities:** *Sovereign rights, biopolitics*

For one perspective on the "exercise [of one's] sovereign rights thanks to the sovereignty of the State," consider an image used in the 2017 political platform and advertising of the AfD, Germany's extreme-right, anti-abortion, and anti-immigration party: a heavily pregnant woman, a representation of smiling whiteness, attached to the slogan: "New Germans? We'll make them ourselves."[19] About this, we can ask: what are the senses in which reproductive capacity becomes political in an electoral campaign or is mobilized by a party's platform and policy? We might say that an overlapping embodiment emerges by way of the problematized conducts of reproduction, producing voters who are at once part of the political bodies to which far-right politicized images of their nationally defensive pregnant bodies are supposed to appeal, as well as being the biopoliticized bodies through and about which those appeals are made, and in this respect, seemingly becoming their own political medium –but distanced from themselves, as such. At the same time, those who historically were associated with a reproductive and domestic role, and on that basis historically excluded from political rights, have eventually emerged differently — as politically central— by virtue of the modern biopoliticization of the reproduction with which they are associated, with the result that reproductive capacity as a politicized matter (albeit according to a different construal of

[17] Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century* America (New York and Oxford, Oxford University Press, 1997); Banu Bargu, *Starve and Immolate: The Politics of Human Weapons* (N.Y: Columbia Univ. Press, 2014); Jasbir Puar, *The Right to Maim: Debility, Capacity, Disability* (Durham: Duke University Press, 2017).
[18] A linkage also seen, I'll argue, in a number of construals of reproduction in Michele Goodwin's *Policing the Womb* (Cambridge: Cambridge University Press, 2020)
[19] This campaign image is also discussed in Penelope Deutscher, "Paradoxes of Reproduction, Grammars of Power," *Diacritics* 49.2 (2021): 139-148.

politics) is now the corporeal medium putatively defending some visions of national futurities against a depreciated alternative.

That these conjunctions hinge together becomes all the clearer with attention to the relationality between sovereign, rights-bearing, and those whose embodiment and/or conduct form part of the substance of biopolitical governmentality, in disciplinary terms.

ii. **Heterogeneities:** *Sovereign rights, the disciplines*

Thus, second, we can ask what happens when potentially pregnant people are referred to at once as rights-bearing citizens but also as irresponsibilized agents. This is exemplified in the following, different instance of the politicization of abortion and of reproduction as part of a political platform. Here, too, the political status of women divides and redoubles — but not in the same way.

When interviewed about the anti-abortion trigger bill he authored, and that passed into state law in Oklahoma in anticipation of the eventual overturning of Roe v. Wade,[20] Republican State Representative Jim Olsen (Oklahoma City) invoked the hypothetical fetal lives he constructed as those of "innocent babies." Given his expressed concern, he was inevitably asked: where then was Republican concern for universal pre K, for health care, parental leave, child support, easy availability of contraception, and, his interviewer might have added, for the finance of health care to reduce the rate of miscarriages and infant mortality? [21] [22] Defending an abortion ban by projecting a victim in advance of its own existence,[23] Olsen was asked the following questions:

> White (NPR): "What are you doing to ensure financial and social support for these parents and children is there after pregnancy? "
>
> Olsen: "There is a case for appropriate welfare programs in certain situations. But the overarching reality is that responsibility belongs to the parents."
>
> White (NPR): "So are you extending access to contraceptive care as part of your plan?"
> Olsen: "There is not really a need, they are widely available."
> White (NPR): "And do you plan to ensure they remain so in Oklahoma?"

[20] A near-total ban,formulating penalties for abortion providers of up to 10 years in prison and a fine of up to $100,000.
[21] One month later, the *New York Times* would publish a study correlating anti-abortion states as having the highest rates of maternal death from complications in pregnancy, the highest rates of miscarriages, of infant mortality, of poor maternal and neonatal health. (NPR, IA, 4th May 2022.) (https://www.npr.org/programs/1a2022/05/04/1096655374?showDate=2022-05-04)
[22] https://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html
[23] On Olsen's account, "You've got the baby, who's certainly innocent," IA, 4th May.

> Olsen: "That, that's really a non-issue. But the overarching truth is that parents are responsible for taking [sic] their own children." [24]

As a technique, Olsen performs a shunting between fields of arguments. His argument might seem to suppose techniques of contraception, and its public funding, but he is not making a case for either. His seemingly favorable reference to their ready availability is provisional, bolstering only the moral condemnation of unwanted pregnancies. In consequence, his reference to contraception's easy access is patently indifferent to whether that is false. Challenged, Olsen shunts, shifting his focus to the consensual aspect of sex, as the real factor imposing the onus of good decision-making:

> Olsen: "Well, let's understand where the responsibility primarily lies… people need to make decisions ahh, before they, before the clothes come off."

But responding reference to the unwanted pregnancies that result not from shared reflection, but from unequal power, or sexual violence, have only been met with further displacements, including attacks on immigration policies sometimes said to explain the presence of assailants. [25]

This is not just a crude evasiveness, or incoherence, but a specific technique whose outcome is the generation of pregnancy's cumulative culpability (since each individual anti-abortion argument is secured by the continuous displacement of its justification). Pregnancy emerges conjoined to regimes of blame with an *as if* character: it is *as if* contraception were freely and easily available and immune to failure, *as* if all sex were free of assault, the product of reflection and mutual consent. At the same time, this is also more than a technique of cumulative culpability, because, despite the seemingly neutral language, it does not target all equally.

With respect to the multiple formations of power at work in these two types of political examples, the first example communicates a political platform on immigration which also presupposes, and is conjoined to, the governmentality of biopoliticized birth, as a means of addressing a voting population assumed to bear political agency and voting capacity, some part

[24] Interview with Jenn White, NPR's "1A" NPR,, 4th May 2022. (https://www.npr.org/programs/1a2022/05/04/1096655374?showDate=2022-05-04)

[25] Olsen's bill passed (74 to 14) in Oklahoma, not allowing exceptions for rape or incest. When, some weeks later, Republican politicians were forced separately to address the widely-reported case of a raped and pregnant ten-year old unable to obtain an abortion in her own state, one way in which they could further pivot again was to displace blame onto liberal politicians on whose immigration policies they blamed the presence in the country of the accused.

of which is also configured as bearing the births in question — some of those births favored, some disfavored. The Olsen interview is a moralizing construction of reproductive conduct. It is also concerned with a distribution of state resources (alimentary, contraceptive, family support…), the regulation of medical services, and a production of problematic reproductive subjectivity through alternating allocations of responsibility and irresponsibility. Both express the state's interest in conducts of reproduction. Their devices overlap, but are distinguishable in type. Their devices can be heterogeneous, and yet act in concert, the relationalities between different forms of power including those ascribed to sovereign law and rights-bearing; those pertaining to biopoliticized reproduction; those pertaining to party platforms, in addition to the differentiating identification of problematized subjectivities, responsibilities, and capacities sometimes referred to as disciplinary. But if we assume there is an interdependence between "rights -bearing," biopolitical, and "disciplinary" mechanisms, and a coordination of forms that are heterogeneous, again the question to ask is *how* they coordinate, and what play does occur between them?

Intersectionalities of power

Amongst those who have engaged in a significant modification of Foucauldian resources, while redeploying, in various ways, his lexicon, I've mentioned Puar's theorization of a sovereign right to maim. More generally, in a dialogue with intersectional approaches, while rethinking the mutual inter-action of constructions of sexuality, reproduction, biopolitics, race, colonialism, nationalism, and nationhood, and the conditions under which some queer subjects are enfolded into life, Puar earlier gestured towards the inclusion of such Foucauldian conceptualities as "population" and "sexuality," as intersecting.[26] We could also see this as a further step down the route of exploring how the formations of power articulated by Foucault, and those with which the latter must be augmented, intersect (in Puar's case, homonationalism and the sovereign right to maim.) In light of the argument that they can hinge together, mutually intensify each other, and mutually intensify effects of domination, I'll turn first to the account of burdened individuality whose techniques of culpabilizing subjectivity are also exemplified by Olsen, and then revisit their intersectional dimension in the further sense

[26] Puar, *Terrorist Assemblages*, p. 14, 206. (See in particular Puar's elaboration of the point that : "while Foucault's formulation hails the feminist heuristic of 'intersectionality' [. . .] the entities that intersect are the body (not the subject, let us remember) and population," p. 206 (and see p. 159.)

suggested by Puar. I'll then link this argument with Michèle Goodwin's account of the making of pregnancy as differentially criminalized in advance – and, one could add, as thanatopolitical, and necropolitical.

iii. **Heterogeneities :** *Sovereign racial ∂omination, "freeδom," the ∂isciplines*

When Saidiya Hartman analyzes the post-Emancipation Proclamation climate that problematized how Black subjects, understood to be newly emancipated, would conduct their freedom, she shows how the expectation of appropriate conduct was bound to the technologies of racial domination. Those technologies included the circulation of manuals from philanthropic organizations targeting formerly enslaved persons with putatively helpful expectations for the good conduct of freedom. Their promotion of industriousness, diligent housework, optimized child-nurturing, residential stability, stable marriages, orderly households, family values, respectful demeanors, the maintenance of employment, taking on modest, manageable debt, and striving for self-advancement, are certainly the techniques of the disciplines. But their explicitly white benchmarks and postures of kindly explanation are racially divisive in a sense that exceeds the explanatory capacities of the Foucauldian account of disciplinary power: in part because they so clearly anticipate the failure of those they addressed. Hartman shows how an adequate understanding of disciplinary techniques must include their role in racially dividing populations in at least six ways: first, by projecting in advance the race-based failure of some of the addressees of disciplinary techniques; second, through the techniques that stimulated a burdened, responsibilized, endebted Black subjectivation deemed guilty of that failure. Third, Hartman points out how tightly this variation on disciplinary technique binds together with sovereign forms of racial domination. The latter can be found in the structural reasons for that "failure" or "inadequacy" being anticipated by the techniques of racial dominations: structural poverty, elaborate systems of arbitrary penalty and easy arrest, exposure to unpunished discrimination, prejudice, inequalities, extreme violence, to legal and policing injustice, injustice in finance, medicine, service, educational, housing, and employment, layers of systematic incarceration, and abuse and profit from deliberately generated prisoner populations, new forms of highly constrained labor, systemically unpunished extreme violence. Fourth, sovereign and disciplinary forms of power also coordinate in that the latter punitively re-routed to a matter of personal responsibility (as if the "proper" conduct of one's freedom, as promoted, were available to all) the "failure" attributed to Black subjects, thereby making its structural conditions less visible.[27] Fifth, although whiteness was

[27] (Also as a technique of reversed responsibility: it is as if the previously enslaved owed an unusual or intensified debt to white society, or to the nation, rather than the reverse.

demarcated in the conduct manuals as the reference point for the "proper" conduct of the freedom that only appeared to have been delivered to the formerly enslaved by the Emancipation Proclamation, sovereign and disciplinary techniques were also simultaneously coordinating to render its normative dimension a technology of exemption. The formerly enslaved were actively expected to "qualify," through their good conduct, for the freedom they technically already possessed by maintaining the standards promoted by whites (and, as if these standards really were proper to whiteness) for the use of freedom. But in this climate, the real mark of this perverse qualification would be white exemption from its expectations. In this context, for all there is explicit reference to norms as if exemplified by whiteness, the real mark of that privilege was the ongoing exemption from, not the privileged fulfilment of, the norms newly attributed to Blackness as an onerous expectation. In short, while the dominant concern of Hartman's argument is certainly not to recalibrate the work of Foucault (Foucault being just one of her many points of reference in *Scenes of Subjection*), the hinges between heterogeneous forms of power emerge vividly in the work, including a crucial hinge between sovereign force, what presents as sovereign right and disciplinary technique. This relationality itself assumes an augmented construal of Foucauldian discipline, just one version of which binds, I have suggested, the phenomenon of "qualifying disqualification" to that of its inverse, "qualifying disqualification."[28] (This terminology is suggested to express just one of the ways that sovereign and disciplinary power modify each other, with the latter thereby including a particular form of sovereign exception.) The result is that, in addition to Foucault's account, disciplinary power *also* articulates a difference between those who are not, and those who are, scrutinized by a tacit expectation that their conduct must be "qualifying" [including the qualification for the freedom they technically already possess], an expectation that is morally punitive and sceptical. That scepticism interrelates with the type of privilege exempting some from the same expectation to qualify, all the while that those exempted nonetheless continue to be associated with an incarnation of the norm in question. Where discipline is remade as a population dividing expectation to qualify by its terms, the very expectation to do so is in fact "disqualifying" (it produces its candidate as an object of disdain) in interconnection with its opposite: qualifying disqualification (to which I turn below). This provides one answer to the question proposed at the outset — how do heterogeneous forms of power interconnect —, along with a terminological contribution to analytic fluency in these interconnections.

In this account it is true, but in a sense quite other than that indicated by Foucault, that the disciplines and sovereign power provide each other mutual ballast.[29] As a fundamental divide backing the more general, "inclusive" differentiations effected by disciplinary techniques, the latter coordinate

[28] See footnote 16.
[29] ("democratization of sovereignty was heavily ballasted by the mechanisms of disciplinary coercion," *Society Must Be Defended*, p. 37.)

with rights-bearing by construing freedom's adequate conduct as that which some have failed in advance and from which others have been exempted. Even where race is no longer supposed to be relevant to rights holding, the disciplinary expectations of rights-bearing continue to be racially population-dividing. Hartman's seminal work speaks to how "burdened individuality" was *also* imposed more specifically on Black women in relation to expectations for good household management and the conduct in homes of marriage and childraising.[30] In Michèle Goodwin's *Policing the Womb*, that burdened individuality (conjoined with its exemptions) is shown to be at work in contemporary North America, in the seemingly pastoral, punitive, surveillance-oriented, racially-dividing, and unequally imposed medical, bureaucratic, and literal policing of pregnancy and childraising, leading to disproportionate child-removal, prosecution of pregnant persons for pseudo-crimes associated with fetal harm, if not incarceration, for a wide range of daily conduct deemed "fetal" or child endangerment, in an unequally distributed projection in advance of (ir)responsibilization, if not criminalization of pregnancy.

iv. Policing pregnancy

It is not hard to connect the regime of solicitious, yet disdainful, and finally systematically vicious expectations for freedom's proper conduct, as depicted in *Scenes of Subjection*, with Jim Olsen's contempt for how some sexual and reproductive agents use their freedom, and with his anticipatory projection of the refusal by seemingly racially unspecified sexual agents to take their "children" or to take adequate care of them. When Olsen presents as a general category the blameworthy pregnancy that has already failed in advance, he does not need to specify its racial connotations, for these are already in circulation.

Nor does Olsen need to state what is generally understood: that privileged pregnant persons will be able to access elsewhere and otherwise the reproductive options he aimed to prohibit in his state. In these differential regimes of scrutiny and responsibilization, it goes without saying that exception is core to the political techniques at work. Importantly — as a means of properly understanding these burdening forms of moralization — we'll find that no-one properly "takes the children," in the sense meant by Olsen. This for two reasons: first, because the "children" to which he refers are entirely an effect of these strategies, whether as a matter of rhetoric or as material reality. Second, to be the object of this disdain is already to be the projected parent in advance of oneself,

[30] And see Saidiya Hartman, "The Belly of the World: A Note on Black Women's Labors," ***Souls:*** *A Critical Journal of Black Politics, Culture, and Society* 18:1 (2016): 166-173,

having the children whose hypothetical existence is also in advance of itself, but in the specific sense of the care that will not have been adequately taken, and only, as Goodwin demonstrates meticulously in *Policing the Womb*, in relation with the role of exemption of privileged others from this targeting, for the children the latter will already have had in advance, have already fallen outside this rubric of vulnerability to "being taken".[31]

v. Qualifiying disqualification

If a "qualifying disqualification," characterizes how sovereign power and disciplinary power can hinge together, altering eachother in the variation on normalization described here, with those assumed to most fully comply with criteria disdainfully imposed on the less fully enfranchised, simultaneously exempted from having to do so, with an accompanying disdain directed at those vulnerable to assessment according to those same expectations, we could think of that privileged self-exemption from "qualification" as exemplifying an Ubu-esque, grotesque, performative power, whether it takes the form of Trumpism in political leadership, an identificatory annexing of that type of self-exempting authority by ordinary citizens thereby given the sensation of privilege, or whether it is, arguably, annexed also by some instances of this type of power at the judicial level.

It would be plausible, in other words to so designate the conduct of Supreme Court judges in performing conducts of seeming indifference to their unpopularity, opportunist inconsistency, contradiction in the espousal of principles, originalism, precedent, bad faith, gaslighting, impropriety and ethical lapses or corruption, and trolling. From the contemptuous dismissal of eloquent and expert dissent, amicus briefs, through the indifference to public and brethren concern about the judgment's impact, down to the public talks given outside the courtroom, Alito's resorting to an "Am I right?" humor has seemed a deliberate performance of the conduct usually considered unworthy of a Supreme Court justice. Here, too, there has been a noticeable performance of self-exemption. It linked with a performance of disingenuousness, as the ruling professed to be returning to the state's democratic process, the matters claimed to be "beyond the court's authority," matters on which it must maintain "neutrality", matters it was "unable" to judge, could not say, or know.

vi. Political qualification

[31] Goodwin demonstrates the disportionality with which techniques for policing and criminalizing the womb fall on the economically disadvantaged, Black women, and women of color (Goodwin 2020).

It is here that the judgment's language- the performance of a self-restriction of the Court's boundaries of authority, its claim to neutrality, and the occasional performance of "inability" [to know, to predict consequence, or to adjudicate on behalf of states], connected its account of the overreach it attributed to Roe (as an "exercise of raw judicial power," p.2) to a claim about the "power of women" in a different sense, effectively returning us to the perspective of the two political campaigns with which I began:

> Our decision returns the issue of abortion to those [state] legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.[66] In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi,[67] constituted 55.5 percent of the voters who cast ballots. (65-6)

Here, North American "women" are interpellated as voters who have now secured their access to democratic process. They are therefore free, in their various states, to seek political redress for the inability to access abortion — and anticipated to do so. That this recourse (to seeking rights) is available to them is offered as one more justification of the decision (to revoke the same rights).[32]

In tandem with this remark, the judgment's wording refers repeatedly to its role in restoring a decision-making power over life to the bodies of citizens whose autonomy had been encroached on. This is, of course, not a reference to women, nor potentially pregnant people. Instead, in one of a number of instances of what was taken to be trolling and gaslighting, Roe is being characterized as having deprived the "citizens" of individual states of their own decision-making authority over life. Of course, as widely observed, Alito was redirecting and redeploying the language of autonomy and decision-making used in pro-abortion politics just as, in the same summer, politicians such as Lindsay Graham were similarly annexing that language to defend abortion bans by expressing respect for states who could be "trusted to make their own decisions" about abortion.[33] [34] Alito's parallel references to these state-based collective bodies are systematically sex-neutral: "the citizens," and

[32] *Strict Scrutiny,* "What's Next in a Post-Roe World," May 16, 2022.
[33] (Interview CNN, commentary in Strict Scrutiny, 8-22-22)
[34] Similarly , Mehmet Oz, in his debate with John Federman, claimed to be pro- life, and to oppose its federal regulation, to ensure a situation in which "states can decide for themselves." (Pennsylvania Senate Debate , Harrisburg, October 25, 2022).

similarly the "people"[35] into which sex difference is, here as a technique, deliberately dissolved and lost. In saying this, my point is not that there is already a prior sex difference before the law to which one could refer unproblematically and that is being lost. Rather, I suggest, this is an effort to dissolve strategically into a sex-neutral body the sex difference that "would have been" —to make a new wounded category, effectively— and is better understood as an effect of a tactical strategy of dissolution, in this specific sense.) This could be understood as a variation of the type of sovereign power sometimes characterized (as by Judith Butler) as installed retroactively as authoritative. Given the concurrent reference to percentages of women within state populations, what is installed is not sexual difference, but the sexual difference as "what will have been denied" within a population. And, given the putatively concerned reference to abortion's impact on Black life, the judgment also installs Black women as those the judgment will have doubly dissolved — both in its (racially) undifferentiated reference to "women," and also in its (sexually) undifferentiated reference to "the people." That too is a hinge of power, linking its pseudo-biopolitical performance of care for "life" and "futures" to its indirect installation of neutralized rights claimants as retroactively politically dissolved. These techniques do more than hinge together: in these combinations there is a mutual change of meaning or effect, with the result that rights become a reason for claiming the new rights bearer is not in need of those rights. As the political status of those historically depoliticized as "women" is multiply divided and redoubled. On the one hand, and particularly given its detailed appendix, the judgment is effectively creating continuity with a historical period in which neither Black women, nor (though differently so) any women, were considered part of the political body: it cites case precedents from periods in in which that is the case. [36] In contrast, Roe is identified by Alito as revocable precisely because "women" can now be fully counted among the body of citizens. "Count" becomes a literal reference" — as when Alito literally refers to them in numerical proportions such as 51.1 percent and 55.5 percent. But women's political status has never been a matter of simple exclusion versus inclusion, nor of the percentages in which they make up the electoral body, vote, represent others politically, and serve office. When the identification of women with the capacity for political dissent becomes the justification for a weakening of the rights otherwise attributed to them, the imagery of that legal decision doubly situates them, given they are also being reduced the bodies *about which* the seemingly sex-neutral "citizens" or "people" of individual states conduct their own decision-making, liberated (according to this narrative) from the interference of Roe v Wade's invasive abortion legalization.

[35] "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives,:" "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U. S., at 979 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.", p. 6.

[36] The appendix material contains a number of references to the status of abortion at a time when white women's status was that of the feme covert (when lacking independent legal status, decision making was undertaken either by husbands or fathers).

V. Resistance and revocability

As heterogeneous forms of power combine, they modify each other. A combination, or interrelationality of disciplinary power with sovereign power, can make the latter ubu-esque, and the former is an alternation of exemption and imposition effecting an alternative, or augmented, meaning of Foucauldian normalization.

Certainly, we can further proliferate our understanding of the forms of power manifesting in the post-Dobbs moment. Many legal and political innovations are at once securitizing and agents of environmental unease. For example, we could give our attention to how a production of numerous climates of deterrence is also remaking the meaning of exception. Consider how, prior to Roe, abortion was available through hospital board and psychiatric exceptions granted under circumstances such as threat to maternal health, including psychic health. In this, medical interest and psychiatric power hinged together in one way with juridical power, determining whether or not an individual would fall under the latter's scope. I have mentioned, also, Michèle Goodwin's argument that under Roe, medical authority could then hinge together differently with legal and policing authority, becoming the latter's auxillary in assuming a reporting function in cases where medical personnel construe fetuses as at risk from pregnant persons. In both cases, those hinges suppose a further relationship between qualifying disqualification and disqualifying qualification, as seen in their differential application. That hinge manifests in the differentials demonstrated by Goodwin concerning those for whom an exception is made from such scrutiny, concurrently with the imposition of that scrutiny on others (disproportionately Black, of color, young, or economically disadvantaged), itself as an exception from rights that might otherwise apply.

At the same time, we are amidst a multiplication of the meaning of "exception." In the first case, those who could afford psychiatric consultation and legal-medical process were granted exceptions to abortion's illegality by medical authority. In the second case, as Goodwin has argued, pregnancy and maternity are used to justify exceptions to the legal protections that would otherwise apply to pregnant persons (such as right to medical confidentiality, right to decline treatment, and right to treatment in life-threatening circumstance). In all cases, race and poverty overdetermine whether exception (from the law) becomes a matter of privileged exemption or becomes a grounds for revoking rights that would otherwise be assumed to apply with respect to medical care (confidentiality, privacy, autonomy, etc). The intersection of medical care (thought of biopolitically and thanatopolitically, in terms of the alternations of those to whom it is extended and those whom it

abandons), psychiatric power and juridical power (again understood in terms of those alternations) produces, as they mutually inflect each other, the different meanings of "exception."

Consider, then the transition from the pre-Roe period in which hospital boards and psychiatric experts could grant exceptions to abortion's illegality,[37] and the current meaning of the term "exception" in debates concerning reproductive politics in the United States. It is a reasonably common view that even extreme abortion bans ought to make an exception in cases of rape, incest, and endangerment to a pregnant person's life. Since these exceptions are technologies of power, again, the salient question is: what kind? This is a debate that — colloquially, in the outraged response to the extremity of unconditional bans—misconstrues the intersection of power at work.[38] By comparison with pre-Roe technologies of privileged, occasional exception from abortion's illegality, its contemporary replacement intersects differently with techniques that function at once to "securitize" and "insecuritize." On the one hand, identifiable techniques create environments in which the behavior of medical providers, in addition to that of those seeking abortions, is "likely." That "likelihood" is not unrelated to, but is far more salient than, what is lawful, and as such reflects a singular intersection of juridical and medical power.

Whereas, in the pre-Roe environment, medical power annexed and acted as an auxillary of juridical power, bearing an authority under certain conditions it adjudicated to grant waivers. By contrast, in the post-Dobbs environment of North America, medical authority may still adjudicate exceptions but it does so under newly securitizing conditions in which abortion providers are subject to loss of license, prosecution, fine, and in some cases imprisonment. Securitization is a technique of power that operates through the environmental management and deterrence of such risk. In consequence, a pregnant person may be denied — and it can be anticipated that they will be denied — an abortion for which they legally qualify because practitioners will not tolerate (or are instructed not to tolerate) the new forms of legal risk to which the latter are exposed. A hospital's legal advisors might advise providers to prefer the possible malpractice suit from a patient denied care to the risk of possible prosecution for illegal abortion provision. Here the difference between legal and "supposedly legal" combines powerfully. Politicians seeking to appease hostility to unpopular extreme bans, lay claim to a more compassionate stance under the guise of supporting exceptions. But the resulting environment is satisfying also to those pursuing more radical bans. According to one study in Mississippi, no doctor was willing to provide an abortion under the allowable exceptions of rape for fear of the harsh penalties. This climate of provider deterrence combines with deterrence through the

[37] A phenomenon that itself must be understood in conjunction with the alacrity with which sterilization has been imposed on women of color,

[38] SMBD offers one of Foucault's multiple account of erroneous identification of forms of power, in this case he points out the coincidence of that confusion with references to heterogeneous combinations (SMBD, p. 38-9).

imposition of unrealistically short time limits, and law enforcement reporting requirements, where extreme versions —as favored in Tennessee —freight those reporting requirements with the threat of prosecution and three year minimum prison sentences should police determine a claimant made a false accusation. In this case, the term "exception" could be reinterpreted in terms of revocability's more general paradigm — the exception is always already revoked, for it combines with the reality that, as in the words of Jessica Valenti: "no one is getting an abortion under an incest and rape exception… no one is able to use these exceptions."[39]

I suggested that these are not just judicial powers but intersections of two different techniques: the creation of law and the creation of likelihood. Yet the two cannot be separated, for the question is not just whether an exception is available, and accessible, but also, whether it is likely. In an anti-risk environment targeting the medical auxillary for potential prosecution or loss of license, providers are likely to over-impose the law, to be uneasy about their legal competency, and to avoid ambiguity: the eight week cutoff is likely to be applied, in anti-risk environments, as a seven week cutoff. And, to make mention of recent, prominent cases, the threshold at which medical practitioners are positive that a pregnant person's life is unequivocably endangered by pregnancy (and would be so judged in the case of prosecutorial scrutiny) has become, in some states, life-threateningly conservative.[40]

From a legal and popular perspective, Dobbs is considered to have revoked Roe. But, this may be a further context in which to consider Foucault's astute indications of the proneness to misidentify the forms of power with which we contend (SMBD 38-9) and to augment the consternation at revoked rights with attention to the broader techniques of revocability — many of which had long been in place, but may also be differently intensified in the current moment.

[39] Valenti points the many legitimate reasons (including self protection) a complainant might recant— observing doing so might expose the complainant to prosecution.

[40] The Texas SB 8 model is a paradigm case of conjoining legal provision with the creation of extreme risk deterrance environments, producing the possibility of the civil suit and with financial penalties for those who assist another in obtaining an abortion. Rather than leading to a proliferation of law suits, (which might have been unsuccessful, or appealed) SB 8 succeeded in other terms: by proliferating an environement of deterrence and the avoidance legal risk.