

## Four Theses on the Powers of Life and Death\*

Mitchell Dean

Aristotle said that while the *polis* “comes into existence for the sake of life, its exists for the good life.”<sup>1</sup> Today the good life has come to require a politics “for the sake of life.” At the beginning of the twenty-first century, we appear to be crossing ever-new thresholds towards learning the secrets of the creation of life itself. Rarely a week goes by when there is not a new biotechnological discovery or application which allows us to use and manipulate the processes of life itself for any number of ends. Post-menopausal women can now bear children. Infertile women and men can become parents. The genes from an animal can be implanted into a vegetable. Sheep and other animals can be cloned. Evidence of criminality or innocence can be discovered through DNA testing. With the Human Genome Project—in competition with private companies—engaged in completing the map of the human genome, we are issued with extraordinary promises in disease detection, prevention and eradication. We are also issued with warnings concerning ‘designer babies’, the new eugenics, and the uses of genetic information by governments, private companies and employers.

The possibilities for the manipulation of the very biological processes life are not limited to what has been called the ‘genetic age’ made possible by molecular biology and human genetics. There are advances in organ transplantation and in our medical capacities to sustain life. All of these processes of the manipulation of life contain what we like to think of as ‘ethical’ questions. Notions of ‘brain death’ and the ensuing ‘futility’ of further attempts to restore normal life functioning redefine problems of euthanasia. Various forms of prenatal testing and screening of pregnant women redefine the conditions of acceptability of abortions. Other such ethical questions concern the harvesting of organs for transplantation, or of the maintenance of the integrity and diversity of biological species in the face of genetically modified crops and seeds, etc. The capacity to manipulate our mere biological life, rather than simply to govern aspects of forms of life, implies a biopolitics that contests how and when we use these technologies and for what purposes. It also implies a redrawing of the relations between life and death, and a new ‘thanatopolitics’, a new politics of death.

At some distance from these advances in biomedicine and biotechnology are the issues of life and death that are played in various arenas of international politics and human rights. These concern the effects of the break-ups of nation-states from Yugoslavia and the Soviet Union to Indonesia, the subsequent movement, detention, expulsion, processing, and mass death of refugees and illegal immigrants, and the conditions and forms under which military action, 'peacekeeping' and 'humanitarian intervention' are acceptable. They concern the international coalition against the polycentric network of terrorism. Detention camps are again becoming a feature of modern liberal-democratic states. On the one hand, the twentieth century gave us a name for the death of a whole people or 'race', genocide. On the other, it sought to promote the universal rights of individuals by virtue of their mere existence as human beings. Bio-politics and thanato-politics are played out in war, in torture, and in biological, chemical and atomic weapons of mass destruction as much as in declarations of human rights and United Nations' peacekeeping operations.

The potentialities for the care and the manipulation of the biological processes of life and of the powers of death have never appeared greater than they do today. But how do we consider this problem as a political problem? How are issues of life and death related to our conceptions of politics and political community to the way in which we think about states and societies, and their futures? Are the ideas of powers of life and death peculiarly modern, or do they lie at a deeper strata?

My concern in this paper is to consider issues of life and death as political issues, to locate a 'bio-politics', a politics of life, and a 'thanato-politics', a politics of death, within our ways of thinking about and imagining politics. I follow two recent theorists, Michel Foucault and Giorgio Agamben, who are convinced that not only must we consider how we exercise powers of life and death in modern politics but how the very notion of politics and political community are intimately related to such issues. At issue is the power we call sovereign power, and its relation to this politics of life and death. I shall in turn consider four possible theses that can be derived from the work of these thinkers and from other twentieth century critical and legal theorists.

*First Thesis. The right of death is ancient. The power over life, by contrast, is quite new. Its emergence in the eighteenth century has brought the most devastating of consequences.*

This thesis can be attributed to a certain reading of Foucault, particularly the final chapter of the first volume of his *History of Sexuality*, where he states that:

what might be called a society's 'threshold of modernity' has been reached when the life of the species is wagered on its own political strategies. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being into question.<sup>2</sup>

The issues that are raised by this passage are legion. They involve not only the threshold of modernity but the threshold of the political.

According to this first thesis, however, the salient threshold is a temporal one. Politics for centuries entailed the exercise of a form of power, sovereign power. Sovereign power is characterized by a particular right, the right to decide life and death. Sovereign power has a definite history and takes on many forms, including the ceremonial one characteristic of absolutism, but at its core lies the right of the sovereign to put his internal and external enemies to death—a right, as Foucault puts it, to take life and to let live.<sup>3</sup>

We know that in his historical studies Foucault focused on other forms of power, such as those of discipline, bio-power, and government. He often suggested these are more characteristic of ‘modern man’. Indeed, it is bio-power, or the power over life, which is alluded to in the above passage. We also know that Foucault sought a post-sovereignist and non-juridical conception of power. Neither of these points, however, undermine the centrality and complexity of his conception of sovereign power. If anything, they reinforce and define his distinctive contribution. In developing his own account of peculiarly modern powers, and in offering a conception of power outside the antinomies of what he called the ‘juridical theory of sovereignty’, Foucault, perhaps paradoxically, provided quite a full characterization of sovereign power. The risk of course is that in its identification with what temporally went before modernity and intellectually needs to be abandoned, sovereign conceptions of power would tend to be forgotten, or, at least, displaced.

The elaboration of the concept of sovereignty—and its relation to modern powers—provokes Foucault to make his most sustained reflections on some of the most deeply devastating events and themes of the twentieth century, including National Socialism, the Holocaust, genocide, atomic weaponry and state racism.<sup>4</sup> It also provides some of the darkest passages in his lectures and prose. In both these respects it connects with a rich vein of twentieth-century critical and legal theory: the critique of violence by Walter Benjamin,<sup>5</sup> the definitions of sovereignty of Carl Schmitt,<sup>6</sup> and the notions of sovereign life found in Georges Bataille.<sup>7</sup>

For these thinkers, sovereignty is far more interesting than Jean Bodin’s definition as ‘absolute and perpetual power of the republic’ would appear to suggest. It is the most ancient of powers, the most mysterious, the darkest, the most allied with the sacred, the mythical, the divine and the demonic. It is the power of powers. Its symbols are blood, the sword and the executioner. Its mechanisms are the ceremonials of public execution and rituals of torture, with their motifs of confrontation, revenge, terror and what Foucault called “atrocities.”<sup>8</sup> Sovereignty for Foucault is connected to a “juridico-discursive” conception of power, that is, a power which operates as a command embodied in law. As Carl Schmitt has shown, however, no matter how closely law is associated with sovereignty it never completely exhausts it.

Foucault’s peculiar contribution to the theory of sovereignty is the focus on the right of death. His genealogy here echoes Bataille’s theme of sovereignty as linked to the denial of the sentiments that death controls. “Life beyond utility is the domain of sovereignty,” states Bataille.<sup>9</sup> The implication of this is that sovereign existence is the capacity to

live in the present moment beyond the concern for the needs to sustain life. The moral corollary is that “sovereignty requires the strength to violate the prohibition against killing.”<sup>10</sup> Bataille claims his definition of sovereignty has little to do with the sovereignty of states. This is a basic insight. Sovereignty—the power of killing—is today practised in the biomedical domain by health professionals and administrators, by relatives and carers, and by prospective parents and mothers, all under the watchful guardianship of institutional ethical committees, legal regulation and therapeutic expertise.

For Foucault, at least in the *History of Sexuality* and related texts, modern powers are more closely aligned to a bio-politics, a politics of life. This bio-politics emerges in the eighteenth century with the concerns for the health, housing, habitation, welfare and living conditions of the population. Such an observation leads him to place his concerns with health, discipline, the body, and sexuality within a more general horizon. Again the notion of bio-politics is quite complex. The idea of the population as a kind of ‘species body’ subject to bio-political knowledge and power operating in concert with the individual body subject to disciplinary powers would appear central.<sup>11</sup> No matter how bloody things were under the exercise of sovereign power with its atrocious crimes and retributions, it is only with the advent of this modern form of the politics of life that the same logic and technology applied to the care and development of human life is applied to the destruction of entire populations. The link between social welfare and mass slaughters can at times appear to be a fairly direct one. Of one of its first manifestations in German police science, Foucault argues, “it wields its power over living beings as living beings, and its politics, therefore has to be a bio-politics. Since the population is nothing more than what the state takes care of for its own sake, of course, the state is entitled to slaughter it. So the reverse of bio-politics is thanato-politics.”<sup>12</sup>

Despite such statements, there is a hesitation, a point of indeterminacy, in this relation between bio-politics and thanato-politics. Foucault seems to identify a puzzle or an *aporia* of contemporary politics, which he cannot resolve or which may itself be irresolvable. “The coexistence in political structures of large destructive mechanisms and institutions oriented to the care of individual life is something puzzling,” he states.<sup>13</sup> But he immediately adds “I don’t mean that mass slaughters are the effect, the result, the logical consequence of our rationality, nor do I mean that the state has the obligation of taking care of individuals since it has the right to kill millions of people.” After proceeding through this set of inconclusive negatives he avers, as if trying to defer the answer to the questions he poses: “It is this rationality, and the death and life game which takes place in it, that I’d like to investigate from a historical point of view.”

One aspect of this historical investigation occurred in Foucault’s 1976 lectures. These lectures cover such concerns as the seventeenth-century historical-political narrative of the “war of the races,” and the biological and social class re-inscriptions of racial discourse in the nineteenth century.<sup>14</sup> He concludes with the development of the biological state racisms and the genocidal politics of the twentieth century, including a radical analysis of the Nazi state and of socialism. From this perspective, there is a certain potentiality within the human sciences which, when alloyed to notions such as race, can help make

intelligible the catastrophes of the twentieth century. Such lectures seem to make the totalitarian rule of the twentieth century a capstone on the histories of confinement, internment and punishment that had made up his genealogical work.

This thesis is perhaps close to the work of the first generation of the Frankfurt School and a certain reading of Max Weber. Here the one-sided development of rationality and application of reason to 'man' in the human sciences has the consequence of converting instrumental rationality into forms of domination. Bio-politics in this reading is the application of instrumental rationality to life. The dreadful outcomes of the twentieth century then result from this kind of scientization and technologization of earlier notions of race. There is also a similarity in this reading of Foucault and the work of Zygmunt Bauman.<sup>15</sup> The latter presents the Holocaust as something that must be understood as endogenous to Western civilization and its processes of rationalization rather than as an aberrant psychological, social or political pathology.

One fears, however, that such a reading does not quite do justice to Foucault. There is a more sophisticated version of the same idea.

*Second Thesis: It is not merely the succession or addition of the modern powers over life to the ancient right of death but their very combination within modern states that is of significance. How these powers are combined accounts for whether they are malign or benign.*

According to this view, it is not the moment that life became a political object in the eighteenth century that defined the disturbing features of modern states. Rather, the different ways in which bio-politics is combined with sovereign power decide their character. Certain passages from Foucault's lectures and from the *History of Sexuality* can be interpreted in this way.

In a passage from the latter, Foucault shows that the genocidal character of National Socialism did not simply arise from its extension of bio-power.<sup>16</sup> Nazism was concerned with the total administration of the life, of the family, of marriage, procreation, education and with the intensification of disciplinary micro-powers. But it articulated this with another set of features concerned with "the oneiric exaltation of a superior blood," of fatherland, and of the triumph of the race. In other words, if we are to understand how the most dramatic forces of life and death were unleashed in the twentieth century, we have to understand how bio-power was articulated with elements of sovereignty and its symbolics. *Pace* Bauman, it is not simply the development of instrumental rationality in the form of modern bio-power, or a bureaucratic power applied to life that makes the Holocaust possible. It is the system of linkages, re-codings and re-inscriptions of sovereign notions of fatherland, territory, and blood within the new bio-political discourses of eugenics and racial hygiene that makes the unthinkable thinkable.

The fact that all modern states must articulate elements of sovereignty with bio-politics

also allows for a virtuous combination. The virtue of liberal and democratic forms of government is that they deploy two instruments to check the unfettered imperatives of bio-power, one drawn from political economy and the other from sovereignty itself.<sup>17</sup> Liberalism seeks to review the imperative to govern too much by pointing to the quasi-natural processes of the market or of the exchanges of commercial society that are external to government. To govern economically means to govern through economic and other social processes external to government and also to govern in an efficient, cost-effective way. Liberalism also invokes the freedom and rights of a new subject—the sovereign individual. By ‘governing through freedom’ and in relation to freedom, advanced liberal democracies are able to differentiate their bio-politics from that of modern totalitarian states and older police states.

This thesis overcomes the successionist view of forms of power connected with our first thesis, even if it tends to reproduce its bipolar structure. The problem with the latter however is that somehow the source and point of articulation of sovereign and bio-politics seems to escape intelligibility. Why should our societies become “really demonic” when they combine within themselves the powers over life with rights of death, or Hebraic understandings of the duties of the shepherd towards his flock with the virile and agonistic relationships between free citizens found within the Greek *polis*, as Foucault maintained?<sup>18</sup> Can one simply make a virtue out of an absence of intelligibility of the articulation—is it the very heterogeneity of these forms of power that accounts for their devilish potential? Can we democratise sovereignty and use notions of rights to check the totalitarian impulses of bio-politics? Can we redress such despotic potentialities by an appeal to an outside of the sphere of limited government? At times Foucault appears to endorse such possibilities. At others, he seems to suggest that liberalism and democracy are flawed means for this task and that we should not become complacent. Perhaps, in this case, sovereignty can always return to an atavistic form as in Nazism, or liberalism can reveal its horribly illiberal side. Perhaps, to try another suggestion, bio-politics simply puts incredible technological means (the atomic, the biological and the chemical weapons and the organization of the modern military, and the applications of bio-science and biomedicine) in the service of sovereign powers—a kind of biotechnological account of genocide.

If...but...perhaps...Foucault has identified a problem and a language to investigate the problem without identifying how and why these elements form the problem. Before moving to a new thesis, let us note that there is one problem with the view that liberalism can act to check totalitarian administration of life. Both of the means by which it hopes to do so refer principally to nothing but simple existence. On the one hand, the economic rationality that provides a limit to government refers before all else to the means of the sustenance of life. On the other, the sovereign individual has rights, especially in the era of international human rights, simply by virtue of merely living itself. “All human beings are born free and equal in dignity and rights” reads the first article of the Universal Declaration of Human Rights. If there is optimism in Foucault’s approach, it is one that cannot rely on a movement that checks the powers over life. The more liberalism and modern rights movements seek to defend us from the dangers of bio-powers, it would

seem, the more they make possible its extension.

A third thesis then needs to be tried.

*Third Thesis. The powers over life are as ancient as sovereign power and law themselves. We do not need to ask for a historical point of connection between the powers of life and death because they are constitutive of the sacred character of political community.*

There are two more points to note about the bipolar view (second thesis) that help us make sense of this third thesis. The first is the cognitivist tendency to understand politics as ways of thinking about ruling rather than, say, as conflict over rule that draws upon emotional as well as cognitive elements. Such an account tends to downplay the possibility that the non-rational, the obscure, and the mysterious might enter into the constitution of political forms.

The other point is that the bipolar view denies the possibility that life is fundamentally linked to political concepts except in modern times and forecloses the investigation of sovereign powers over life, except as a function of the decision to let live. The exploration of sovereign powers over life since antiquity and of the non-cognitive dimensions of politics, forms the background of this thesis, and of its enunciation by Giorgio Agamben.<sup>19</sup>

One way of approaching Agamben's dense, multi-layered and referenced prose is to focus on his concern to define the structure of sovereignty through a series of thresholds that contain the potential of what he calls 'zones of indistinction'. We have seen that Foucault focuses on one, temporal threshold and ends up in a kind of unresolved indeterminacy. Agamben, in contrast, draws upon the texts, law and myths of antiquity, and modern critical and legal theory, to specify thresholds of exclusion and inclusion, rule and exception, law and nature, violence and justice, fact and life, and most centrally perhaps bare life and moral and political life. The paradox of sovereignty defined through its capacity to suspend the rule in a state of exception means that these distinct categories cannot be prevented from entering into a space in which their differences decompose into a zone of actual indistinction. The task of critical analysis is not to define the impossible point of intersection of heterogeneous rationalities but to delineate the co-ordinates of this philosophical twilight zone.

According to Agamben, the connection between politics and life is fundamental to the Western tradition and that there is a close and originary bond between sovereignty and this politics of life. Agamben argues that the Greek understanding of politics contained two conceptions of life: *zōē*, or bare life, is distinguished from *bios*, or politically or morally qualified life, the particular form of life of a community. The constitution of a political community is made possible by an exclusion of bare life from political life that simultaneously makes bare life a condition of politics. Life is included in politics, not by the eighteenth-century emergence of bio-politics, but at the very genesis of Western

conceptions of politics, in an act that is also its very exclusion.

Something like this distinction can indeed be found in the following passage from Aristotle which the Loeb edition translates as:

The good life then is the chief aim of society, both collectively and individually; but they [i.e. “men”] also come together for the sake of life merely, for doubtless there is some element of value contained in the mere state of being alive, provided that there is not too great an excess on the side of the hardships of life, and it is clear that the mass of mankind cling to life at the cost of enduring much suffering, which shows that life contains some measure of well-being and sweetness in its essential nature.<sup>20</sup>

Agamben interprets Aristotle as saying that in politics men come together to collectively create the good life, to transform bare life (*zōē*) or the ‘mere state of being alive’ into a particular kind of existence (*bios*). It is “as if politics were the place in which life had to transform itself into the good life and in which what had to be politicized were always already bare life. In Western politics, bare life has the peculiar privilege of being that whose exclusion founds the city of men.”<sup>21</sup> From this perspective, Foucault is wrong to maintain that life only becomes a political object in early modern Europe and that a sovereigntist account of power cannot deal with this entry of life into politics. While Agamben, like Foucault, might reject a concern for *who* has power within the political order, he holds that it remains necessary to examine the role of sovereignty as constituting the threshold of the juridical-political order.<sup>22</sup> Politics has always been about life, in so far as the good life might be the end of a political community, and questions of basic existence, once satisfied by human association, can be placed as outside properly political concerns.

To understand further this question of threshold and sovereignty, consider Carl Schmitt’s definition of the sovereign as “he who decides the state of exception.”<sup>23</sup> For Schmitt sovereignty is not simply the highest and most perpetual of law-making powers but a power that defines both the law and the limits of the law. It defines not only the law but the cases and situations in which the law no longer holds, or needs to be suspended. Schmitt calls these situations ‘the state of exception’, a concept which encompasses those circumstances in which the law is suspended such as might occur in a revolution or *coup d’état*, or in the dismissal of an elected government. Sovereignty is thus outside and inside law. It is a structure of simultaneous inclusion and exclusion.

Schmitt’s presentation of sovereignty clarifies Foucault’s discussion of modern rationalities of ‘government’ in an important respect. Foucault juxtaposes the ‘self-referring circularity’ of sovereignty as found in Hobbes and Pufendorf to the productive arts of government from ‘reason of state’ thinkers and the German cameralists who succeed in giving content to the achievement of public order and security.<sup>24</sup> Foucault is correct to identify these intellectual formations as contributing to modern rationalities of government. Schmitt’s point, however, reminds us that such observations cannot

write sovereignty out of the picture. The sovereign decides not only what the ends of government are but how to understand such ends and the practical content when applied to life. “(S)overeignty (and thus the state itself) resides in deciding this controversy, that, in determining what constitutes public order and security, in determining when they are disturbed, and so on.”<sup>25</sup> A discussion of the various rationalities of the government of the state, including liberalism and bio-politics, cannot avoid sovereignty as a structure of decisions that define the thresholds at which order and security obtain and how they are to be applied to life. Modern powers over life and individual and collective conduct cannot do without sovereignty, at least when it comes to the government of the state. Or as Kant might have defended the enlightened ruler with a standing army: “argue, as much as you want about the means and purposes of governing, only obey!”

Where Foucault tends to identify a government of life and the living as a feature of distinctively modern political formations, Schmitt’s view of sovereignty already contains a notion of a power concerned with life. He writes that “Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations... For a legal order to make sense, a normal order must exist, and he is sovereign who definitely decides whether this normal situation actually exists.”<sup>26</sup> Sovereignty thus is a structure that decides on what this normal everyday frame of life is and whether or not this normal frame of life is effective.

The implication of this view is that the sovereign structure of law refers not simply to a juridical and political order or a power that is external to law but to how life itself is captured by this. Thus Schmitt shows how law already refers to a normal standard of existence. “The law has a regulative character and is a ‘rule’,” he writes, “not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and *make that reference regular*” (original emphasis).<sup>27</sup> The sovereign aspect of law is also able to decide on the form of life to which its rules are applicable, and how to regularize that form of life, how to make it governable, through the exclusion of the exception. For Agamben, sovereignty is “the originary structure in which law refers to life and includes it in itself by suspending it.” The ‘force of law’, then, is that it holds life in its ban by abandoning it.”<sup>28</sup> The relation of exception is one of the ban: in abandoning individuals, the law does not merely put them in a sphere of indifference, but rather leaves them “exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable.” To be banned is to be placed outside the juridical-political order that defines the normal frame of life of a political community. But in the act of being placed outside this order, who or what is banned is included in the power that places he, she, them or it there.

Schmitt helps bring notions of life into the concepts of sovereignty and law. Benjamin’s essay on the “Critique of Violence” begins the task of connecting sovereignty and law to life, violence and the sacred. In this essay, Benjamin shows the irreducible relation between law and violence. He distinguishes between violence as a means to achieve what lawmaking seeks to establish and violence as an inseparable component of the law that is established.<sup>29</sup> He thus distinguishes between lawmaking violence and law preserving

violence, the oscillation between which defines the rise and fall of various kinds of state power. Benjamin thus emphasizes the permanent relation between law and violence, and, in a Schmittian vein, offers a critique of liberal parliaments as cultivating compromises that ignore the latent presence of violence in legal institutions, including contract.<sup>30</sup>

Benjamin claims that “every conceivable solution to human problems...remains impossible if violence is totally excluded in principle.”<sup>31</sup> To move beyond legal violence, he therefore looks for a different kind of violence unrelated to the justification of the means or preservation of the ends of law. He first seeks this in the violence of the Greek gods. Their mythical violence, however, replicates the structure of lawmaking violence, while what he calls divine violence is truly law destroying. Mythical violence works through guilt and retribution for those who challenge fate. It can be viewed in constitutional law and treaties that leave one party, like Anatole France’s bridge-dwelling poor, more exposed to the equality of legal violence. Divine violence strikes with lethal force without blood in a way that is ‘unalloyed’ with law. Benjamin argues that, while the mythical violence involved in the making of the juridical order is “bloody power over mere life for its own sake”, only divine violence can truly purify life, not simply by expiating the guilt of mere life, but by purifying the guilty of law itself.<sup>32</sup> Only in the final sentence of the essay, does Benjamin violence link to sovereignty: “Divine violence, which is the sign and seal but never the means of sacred execution, may be called sovereign violence.”<sup>33</sup>

Without offering a full exegesis of this text,<sup>34</sup> we can say that in these passages Benjamin identifies relations between sovereignty, life and sacredness, and introduces the figure of mere life and the sacred man who bears it, together with guilt and retribution, into the critical theory of sovereignty and violence. Benjamin’s deliberations lead him to a reflection on the meaning of the sanctity of human life and the proscription of murder in the constitution of sovereign power and violence. The latter he argues does not exist as a ‘criterion of judgement’ but as a guideline which individuals and communities have to wrestle with and “in exceptional cases, to take on themselves the responsibility of ignoring it.”<sup>35</sup> He regards the sacredness of life as a relatively recent dogma, “the last mistaken attempt by a weakened Western tradition to seek the saint it has lost in cosmological impenetrability.” At a minimum, it is clear from these passages that the analysis of sovereignty and violence cannot be dissociated from our ideas of life and its sanctity, and the exceptions we make to the commandment ‘thou shalt not kill’.

Agamben too takes up this theme of the sacred man in whom mere existence of bare life is first sanctified. He finds it in the obscure figure of archaic Roman law of *homo sacer* as one who may be killed but not sacrificed. The killing of this man cannot be condemned as homicide, according to Pompeius Festus.<sup>36</sup> The life of *homo sacer* is sanctified because it authorizes sovereign killing rather than because it is a reflection of the image of God. The figure of *homo sacer* thus both personifies a life made sacred and stripped bare by a power that captures life in a sovereign ban. In this sense the “production of bare life is the originary activity of sovereignty.”<sup>37</sup> Responding to Benjamin on the origin of sanctity of life, Agamben sums up the structure of sovereignty in the following way:

What is captured in the sovereign ban is a human victim who may be killed but not sacrificed: *homo sacer*. The sacredness of life, which is invoked today as an absolutely fundamental right in opposition to sovereign power, in fact originally expresses precisely both life's subjection to a power over death and life's irreparable exposure in a relation of abandonment.<sup>38</sup>

For Agamben, however, *homo sacer* is not just a figure uncovered by legal philology of ancient Rome; it is subject to recurrent materialisations in history. These include its paradigmatic manifestation in the concentration camps, notions of universal human rights, the emergence of mass refugee movements from the early twentieth century, those on life-support systems, medical judgments on euthanasia, and in the *Versuchspersonen* or human guinea pigs of the Nazi doctors. Some might want to say that *homo sacer* can also be found in the myriad petri dishes, test-tubes and ante-natal clinics of our times. Bare life, is today found—at its most elemental—in the sequences of the letters A, G, C, T, that stand for the chemical bases, the purines and the pyrimidines, that make up the genetic code. *Zoē* has found a new representation in the colour-coded sequences of three billion letters of the genome.

The positive side of Agamben's thesis is first that it avoids the recurrent bipolar structure of Foucault's attempts to investigate the character of modern politics and its relation to life. For Foucault, politics can only be approached as the articulation or displacement of the poles of a series of oppositions: the right of death *and* the power of life, sovereignty *and* bio-politics, the 'city-citizen' *and* 'shepherd-flock' games, individualizing *and* totalizing character of modern powers, techniques of government *and* techniques of self, reason of state *and* liberalism, etc. But the point at which they link, overlap, interact, or enter a zone of indistinction is difficult to discern. Foucault proposes their relations are demonic, but cannot tell us why or how. Agamben proposes a possible topography of the state of exception in which the sovereign ban captures life in the political order but outside the political community, and *zoē* and *bios* enter into irreducible indistinction.

Second, it does indicate the possibility that Foucault has underestimated the extent to which sovereign forms of power were constituted in relation to notions of life, and a failure to distinguish different concepts of life. In so doing, Agamben might be read as contributing to an analysis of how modern democratic conceptions of sovereignty already contain assumptions about life in relation to politics that open them to a ready and somewhat surreptitious colonization by bio-political imperatives. Thus on one reading, Foucault and certain of his followers might be understood as offering an optimistic view of liberal-democratic politics, one in which democratic and human rights are used to check the advance of bio-politics. Thus the ethical regulation of aspects of biomedical interventions into the processes of life can be viewed as a practical dialog between individual rights and bio-political forces. This is because rights, citizenship and sovereignty are held to stand outside the circle of the bio-politics. For Agamben,<sup>39</sup> declarations of rights represent not the locus of the resistance to bio-politics, but the point of inscription of bare life into the juridical-political order of the nation-state, which then becomes indistinguishable from

the political right of citizens. One might make the point *a fortiori* with regard to universal human rights or ethical principles concerning informed consent or privacy where rights can be applied irrespective of citizenship and nationality.

However, an evident problem remains. Agamben gives an originary structure to sovereignty in *homo sacer*, which is also materialized in different historical instances and is an actuality in contemporary society. Is there not a problem here of essentialism that seeks a trans-historical form of sovereignty? Is there not a lack of historical sense? Above all, does such a view not miss the rupture identified by Foucault in the eighteenth century? I am content to simply raise the first two questions, but the third gives rise to fourth thesis.

*Fourth thesis: Bio-politics captures life stripped naked (or the zoē that was the exception of sovereign power) and makes it a matter of political life (bios). Today, we seek the good life though the extension of the powers over bare life to the point at which they become indistinguishable.*

In this formulation, the emergence of a government over life in the eighteenth century does mark a rupture in forms of rule, which the search for an ‘originary structure’ of sovereignty cannot capture. For Foucault, the nature of this rupture is the displacement, articulation or re-inscription of sovereignty within a peculiarly modern form of politics, bio-politics. However, this capture of the government of the state by bio-powers is already present in the structure of sovereignty. It would be a mistake, in this sense, to view Agamben’s quest for the structure of sovereignty, with its multiple thresholds, as ahistorical, that is, as insensitive to temporal thresholds. His thesis offers a kind of history of modernity. Here, the demonic character of modern states lies in the possibility that the thresholds that maintained bare life as a state of exception are breaking down. *Zoē* is entering into a sphere of indistinction with *bios* in modern politics. For Agamben the paradigm of modern politics — the new *Nomos* — is not the liberal governing of freedom, but the concentration camp. The camp is the material form of the stabilization of the state of exception, the excluded inclusion, both inside and outside modern political and legal ordering. Because the camp is established by law as a space of exception, it is subject to no order itself, only direct police command. It is thus a space of ordered disorder in which bare life enters into a zone of indistinction with legal order. While such views may appear to lead to a kind of radical condemnation of many instances of bio-politics, such as the attempt to develop humane processing procedures for asylum seekers, the idea of mapping zones of indistinction would seem to locate arenas of analysis and spheres of contestation rather than a site of dogmatic rejection.

We have become used to a style of criticism in which liberal notions of the individual citizen have been revealed to be constituted through a series of exclusions (of women, the disabled, prisoners, the insane, the poor, the indigene, the refugee, etc). Note that

bio-power today holds the promise of extraordinary solutions to disability, criminality and insanity. The inclusion of women through their state of exclusion, also, would appear to raise interesting questions concerning sovereign violence given women's historic biological relationship to the reproduction and care of human life. This relationship, itself excepted under the universality of law, is thus produced as bare life; and women are required to take responsibility for sovereign decisions. If we are to take Agamben seriously, this desire for inclusion may have the effect not simply of widening the sphere of the rule of law but also of hastening the point at which the sovereign exception enters into a zone of indistinction with the rule. Our societies would then have become truly demonic, not because of the re-inscription of sovereignty within bio-politics, but because bare life which constituted the sovereign exception begins to enter a zone of indistinction with our moral and political life and with the fundamental presuppositions of political community. In the achievement of inclusion in the name of universal human rights, all human life is stripped naked and becomes sacred. Perhaps in a very real sense we are all *homo sacer*. Perhaps what we have been in danger of missing is the way in which the sovereign violence that constitutes the exception of bare life—that which can be killed without committing homicide—is today entering into the very core of modern politics, ethics, and systems of justice.

Mitchell Dean  
Macquarie University

\*This paper was written in the year 2000 which accounts for the examples mentioned and not mentioned in the first two pages. Please excuse the anachronisms of a world prior to not only September 11, 2001, but also a twice-elected George W. Bush. I have resisted the temptation to change either my examples or the theoretical argument which, it should be evident, was always intended to be expository.

## Notes

1. Aristotle, *Politics*, trans. H. Rackman (London: Heinemann, 1957) 9, I.i.8.
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3. Foucault, *History of Sexuality* 138.
4. See Michel Foucault, "*Il faut défendre la société*" (Paris: Gallimard/Seuil, 1997).
5. Walter Benjamin, "Critique of Violence," trans. Edmund Jephcott, *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Demetz (New York: Schocken Books, 1977) 277-300.
6. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge: MIT Press, 1985).

7. Georges Bataille, *The Accursed Share: an Essay on General Economy*, vol. 3: *Sovereignty*, trans. Robert Hurley (New York: Zone Books).
8. Michel Foucault, *Discipline and Punish: the Birth of the Prison*, trans. Alan Sheridan (London: Allen Lane, 1979) 55-56.
9. Bataille, *The Accursed Share* 198.
10. Bataille, *The Accursed Share* 221.
11. Foucault, *History of Sexuality* 139.
12. Michel Foucault, "The Political Technology of Individuals," *Technologies of the Self: a Seminar with Michel Foucault*, ed. Luther H. Martin, Huck Gutman, and Patrick H. Hutton (London: Tavistock, 1988) 160.
13. Foucault, "The Political Technology of Individuals," 147-148.
14. Michel Foucault, "One must defend society," *The Essential Works 1954-1984, vol. 1 Ethics, Subjectivity and Truth*, ed. Paul Rabinow (The New Press: New York, 1997) 60-65. Foucault, "Il faut défendre."
15. Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca, New York: Cornell UP, 1989).
16. Foucault, *History of Sexuality* 149-150.
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19. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford UP, 1998)
20. Aristotle, *Politics*, 201-202, III. iv. 3.
21. Agamben, *Homo Sacer* 7.
22. Agamben, *Homo Sacer* 12.
23. Schmitt, *Political Theology* 5.
24. Michel Foucault, "Governmentality," *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon and Peter Miller (London: Harvester Wheatsheaf, 1991) 87-104.
25. Schmitt, *Political Theology* 9.
26. Schmitt, *Political Theology* 16.
27. Schmitt, *Political Theology* 26.
28. Agamben, *Homo Sacer* 28-29.
29. Benjamin, "Critique of Violence" 295.
30. Benjamin, "Critique of Violence" 288.
31. Benjamin, "Critique of Violence" 293.
32. Benjamin, "Critique of Violence" 297.
33. Benjamin, "Critique of Violence" 300.
34. See, of course, Jacques Derrida, "Force of Law; the "Mystical Foundation of Authority",", trans. Mary Quaintance, *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfield and David Gray Carlson (New York: Routledge, 1992) 3-67.
35. Benjamin, "Critique of Violence" 298-299.
36. Agamben, *Homo Sacer* 71.
37. Agamben, *Homo Sacer* 83.
38. Agamben, *Homo Sacer* 83.
39. Agamben, *Homo Sacer* 126-131.

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