

Giorgio Agamben and the Task of Health Law in a Biopolitical Age

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- Giorgio Agamben, [The Use of Bodies](#) (2015, translated 2016).
- Giorgio Agamben, [Homo Sacer: Sovereign Power and Bare Life](#) (1995, translated 1998).

Ordinarily, jots feature forthcoming or just published works of scholarship that we find useful or notable. These are no longer ordinary times. As events depart increasingly from our usual frames of reference, I find myself seeking scholarship with a longer historical horizon. In doing so, I have encountered two remarkable books: [Giorgio Agamben's *Homo Sacer: Sovereign Power and Bare Life*](#) and [The Use of Bodies](#). These two represent the first and last installments of Agamben's nine-volume *Homo Sacer* series, and speak most directly to our [work as students of health law](#) as it intersects with the political darkening we are living through today.

[After 9/11](#), Agamben's [State of Exception](#) (2003, translated 2005) was [discussed](#) amid the rise of [emergency powers](#). But his work on "bare life" is [rarely](#) mentioned by American legal scholars (with some [exceptions](#)) even as bodies and bare lives have become ever more politicized and manifestly tied to the problem of sovereign power in the age of Trump. I believe that our work as health law scholars cannot avoid orienting itself in some way to Agamben.

Homo Sacer itself is an obscure term from Roman law indicating someone who can be killed without punishment, yet, having no more political stature in the community, cannot be sacrificed to the gods. *Homo Sacer* is humanity doomed to "bare life." For Agamben, this excluded figure lies at the foundation of Western political sovereignty. Without a sovereign act of line-drawing, to exclude some persons from those otherwise within the polis, no political community exists. This fundamental fracture is, in his analysis, related to characteristic divisions throughout in our intellectual history, starting from Aristotle's distinction of simple life, or *zoe*, from *bios*, the life of men qualified for politics. This separation of bare life, to which women and slaves were relegated, from politically qualified form of life also reflects the ontological divisions between *physis* and *nomos*, body and mind, substance and accident from which Western thought has descended. *Homo Sacer* is also lurking in the [Hobbesian sovereign origin myth](#). In a state of nature, everyone is bare life for everyone else. But the sovereign retains this power over bare life that everyone else has instead renounced. State power, if not based on social contract, is in Agamben's view founded on the investiture of the sovereign with power to demarcate life that may be harmed without punishment or acknowledgment.

And this is evident in the founding norms of the Western nation-state. Though the modern nations invoked ringing assertions of the "rights of man," states afford rights only to qualified citizens, not to humans *qua* humans. Protection and acknowledgement apply only to those within the *polis* by virtue of birth or other sovereign inclusion. Though we pay lip service to rights that obtain solely based on the human life of the bearer, never do we see this norm fulfilled, as the [worldwide migrant crisis illustrates](#).

That state sovereignty is only imperfectly grounded in liberal humanist ideologies means that sovereignty must ground its power instead by demonstrating the ability to undertake the original act of demarcating vulnerable bare life from "qualified" life. This imperative contributes to the ongoing pattern of crises of legitimacy followed by the urgent marshaling of loyalties around national security, [trade](#)

[wars](#), and other [emergency threats](#). Agamben says, “State sovereignty can only affirm itself by separating bare life from its form in every sphere.” (*Bodies*, P. 213.) At the same time, “because power today has no form of legitimation other than emergency, [it] everywhere and continually refers to it, and, at the same time, secretly works to produce it.” (*Bodies*, P. 209.)

So far so familiar. Trump’s rhetoric is saturated with references to bare life, reducing women to sexualized parts, [mocking the disabled](#), attacking Hillary Clinton’s [stamina](#), lying about his own weight and [health](#). Trump’s claims to power also center pointedly on abandoning bare life. The border crises, with the exclusion of asylum seekers, is only the most obvious [example](#) as has been noted in the [press](#). In the immigration context, his use of language like “[infestation](#)” similarly depends on the framework of exclusion from the body politic. This Agambian theme of bare life also characterizes his [abandonment](#) of Puerto Ricans to devastation and [mortality](#).

Given Trump’s need to demonstrate power over bare life, it is no surprise that control of health system and its institutions are what our political system in crisis has sought to achieve. Thus Trump is [abandoning people with preexisting conditions](#) to the depredations of insurance market discrimination. He has effectively relegated the [victims of gun violence](#) to the status of *homines sacri*, unprotected and unacknowledged. Meanwhile, the upcoming Supreme Court nomination fight centers on whether to declare [the fetus as politically qualified life](#). Trump has pushed to inscribe a boundary of [exclusion between the working and non-working body](#), leading to the conditioning of Medicaid on work in ways contrary to the purpose of providing medical assistance, as at least one court has [ruled](#).

Agamben thus helps us understand our times, but does he offer a way out? This question is one I believe we as scholars could take up. Agamben does admonish us “to learn to recognize this structure of the ban [of *Homo Sacer*] in the political relations and public spaces in which we still live....In our age all citizens can be said...to appear virtually as *homines sacri*.” (*Bodies*, P. 211.) Indeed, our political and economic structures immiserate us all, abandoning us to the consequences of “[winner-take-all, blame-the-victim](#)” market competition.

By extension, we should, as I have written elsewhere, attend to risks and probabilities of harm that we have been told to simply accept out of [acquiescence to the smooth economism of cost-benefit analysis shorn of attention to lives and health](#). One category of *Homo Sacer* in our world is thus the “[statistical person](#).” As [Heinzerling says](#), “she is no one’s sister, or daughter, or mother,” and her absorption of social costs is written off in quality-adjusted life years.

We should recognize the separation of bare life from the type of life that qualifies us for political participation, derived from the exhausted paradigm of substance and attribute. This separation lets Facebook and pollsters reduce us to our [demographic attributes](#), and “[disqualify](#)” voters from political participation. This same broken subject-attribute schism is evident in the fracture of Medicaid eligibility into a [dizzying array of categories](#) while [leaving us the paperwork burden of piecing](#) ourselves back together.

Health institutions can be part of the solution or part of the problem. Health care is the rare remaining social institution that in aspiration, if not in practice, meets us where we are, rather than presuming qualifying conditions of autonomy and full information. Who understands better than those of us in the health sector that the [mind and the body are not divided when it comes to human flourishing](#)? Agamben warns, “we will have to abandon decidedly, without reservation, the fundamental concepts through which we have so far represented the subjects of the political....and build our political philosophy anew.”¹

Today our politics is in crisis. Agamben tries to heal that rift, recover a different strand of our intellectual

and political inheritance, and central to that is recognition of the figure of the body in use. Can we build a politics upon that, a politics that recognizes humans in their embodied selves? Health law could be ground zero for that task.

1. Giorgio Agamben, *Beyond Human Rights*, Univ. of MI Press (2000).

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