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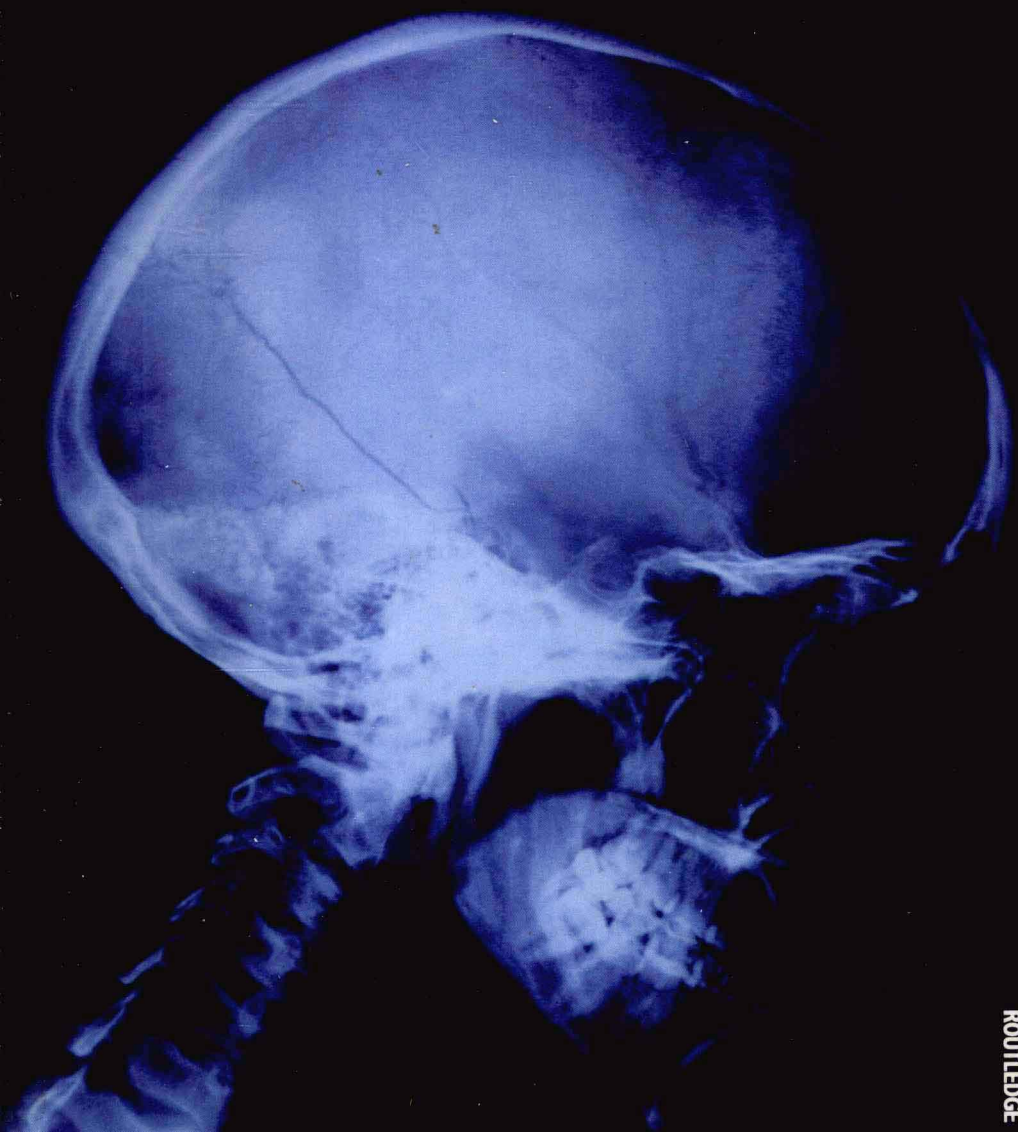
LAW, ETHICS AND THE BIOPOLITICAL

AMY SWIFFEN



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Introduction

This book is a consideration of the relationship between law and morality in new forms of ethical and political thought emerging in light of challenges to the legal and moral authority of national sovereignty. Notable in this respect is the rise in the last half of the twentieth century of bioethics, an ethical paradigm derived from medical ethics and born in the twentieth century. Bioethics appeals to the idea of a 'common morality' based on the universal desire for survival and value of life. An ethics based on life is seen as a natural morality (Cascais 2003) and a form of ethical thinking that can encompass all moral problems (Gert *et al.* 2006: 4). As a result, the relationship between bioethics and political concepts has yet to be considered. Another notable development that will be explored is a renewed interest in natural law theory, which is an approach to law that defines its authority in terms of universal principles found in nature, not political institutions or social conventions. Both of these are significant developments in cultural contexts where, until recently, universal principles have been regarded with incredulity, and faith in the ability of reason to lead universal maxims and the discovery of valued social goods is lacking (Pavlich 2007).

The present work draws on alternative theoretical paradigms, which, in different ways, denaturalise the idea of life. The ethics of psychoanalysis are drawn upon to elaborate an analytical framework for scrutinising the position of enunciation behind the invocation of the value of life. Theories of biopolitics are then taken up to elaborate an understanding of life as a politically determined concept beyond the good. Three literatures are drawn on in order to undertake this analysis. The first is the ethics of psychoanalysis developed by Jacques Lacan (1992), which will be developed in the first two chapters to provide an alternative ethical framework for looking at morality, specifically notions of goodness. The second is political theory, where concepts of biopolitics and biopower are playing an increasing role in debates on law and morality, largely because they are focused on power at the level of the life and death of legal subjects. The third is selected strands of legal philosophy: natural law theory and legal positivism. It is worth outlining briefly each of these fields in the context of the present analysis.

The ethics of psychoanalysis

In the opening lecture of the seminar on the ethics of psychoanalysis, Lacan invokes a distinction between morality and ethics, and explains that his choice of the latter term is precise: 'I chose a word which to my mind was not accident ... If I say "ethics", you will soon see why. It is not because I take pleasure in using a term less common' (1992: 2). The concept of morality is a term for a focus on the relationship between the subject and its action in relation to 'a direction, a trajectory, in a word, a good that appeals to ... an ideal of conduct' (Lacan 1992: 3). Ethics, on the other hand, is not directly concerned with the good but with the relationship between the action of a subject and their desire (1992: 219). Thus, in choosing to discuss the 'ethics' of psychoanalysis in contrast with 'morality', Lacan is emphasising the idea that while morality is premised on an ideal of the good, in order to consider ethics from the point of view of desire 'a radical repudiation of a certain ideal of the good is necessary' (1992: 230). Lacan invokes Aristotelian ethics, using it as a contrast point, and suggests that his own position can be seen in sharp relief in comparison: 'Perhaps the question will only be seen in sharp relief, when one compares the position ... with that which is, for example, articulated in the work of Aristotle in connection with ethics' (1992: 5).

Aristotle's major contribution to the domain of ethics is found in a text called *The Nicomachean Ethics*. He opens the discussion with the premise that every action is undertaken with some end or purpose, no matter how basic: 'every skill and every inquiry, and similarly, every action and choice of action is thought to have some good as its goal' (1999: 1.1). He therefore defines the idea of the good as the goal of all human action. What is the idea of the good for human beings? In the most general sense, the good is happiness. Aristotle felt that no matter what we are doing we are ultimately always trying to achieve happiness, even if we do not always seek it out in the most prudent way. Furthermore, he reasoned that the experience of pleasure is what makes human beings happy; thus, if happiness is a universal good, the guide to happiness is pleasure. Thus, happiness is the highest good in Aristotle's morality and the path to the good is blazed by pleasure.

However, true happiness is not attainable by just any kind of pleasure; it is blazed by rational pleasure. The use of reason in satisfying the desire for pleasure is essential to achieving happiness according to Aristotle. Living a happy life involves harmonising our natural inclination towards pleasure and our natural ability to reason. The method for doing this is often referred to as the golden mean. Aristotle defined the golden mean as a path between the extremes of excess and lack in any given matter. Thus, it would be accurate to say that this ancient morality is based on living according to our nature as rational and pleasure-seeking animals. The idea of happiness is the ideal reference point for the golden mean and living in accordance with the

satisfaction of desires in a rational and moderated way. Living in such a fashion engenders a state of happiness or the 'good life'.

What I want to highlight in this framework is how the moral connection between pleasure and rationality is derived from a prior division between different forms of pleasure and delimitation of unnatural pleasure (Lacan 1992: 3). The division in question is mentioned briefly amid a much longer discussion of pleasure and how vice and virtue are different attitudes towards pleasure. Aristotle begins with distinguishing three forms of badness. The one that is relevant in this context is called brutishness and is different from the others. The other two are degrees of deviation from the golden mean, called incontinence and vice respectively. The issue with brutishness is not how much it deviates from the golden mean, but the nature of the pleasure involved in the first place.

Simply put, 'brutish' pleasure involves enjoying things that are not naturally pleasurable. Things that are naturally pleasurable are those that stimulate the activity of a given nature, which is why humans enjoy rational activity; it is stimulating to our capacity for reason (Aristotle 1999: 1148b15–1149a2). Those pleasures that are not naturally pleasurable are ones that cannot lead to happiness and to which the golden mean cannot apply. Aristotle's examples include cannibalism, women who eat foetuses, nail biting, and hair pulling. He explains that brutishness comes about in three ways. One, an individual might have an innate deformity in their nature; the modern idea of the psychopath is probably akin to what Aristotle was imagining. Second, through acquired habit, and by this he probably was referring to abusive treatment in childhood (Sihvola 2002). Third, a brutish nature arises from 'sickness' such as a fever (Aristotle 1999: 1149a2–24). Regardless of the origin, however, the point is that a brutish nature comes about naturally, not from bad moral choices. Thus, for Aristotle not only is brutishness not morally blameworthy, it is not even part of the moral domain. The idea of happiness can thus be seen as a limit and threshold beyond which a 'whole register of nature ... is literally situated by Aristotle outside the moral field' (Lacan 1992: 5). From the point of view of the ethics of psychoanalysis, this is 'surprising, primitive, paradoxical, in truth, incomprehensible' (ibid.).

Thus, one of the major themes of the ethics of psychoanalysis is the way that the ideal of the good (such as happiness) presents with a seeming naturalness but can also be conceived in a non-moral sense. If considered from the perspective of desire, the good can be seen as a threshold and limit. Thus, the ethics of psychoanalysis is not centred on the good or concerned with determining the value of action in relation to an ideal, but in the relationship between action and the desire that inhabits it (Lacan 1992: 8). In other words, it is based on a non-moral perspective:

> the ethics of psychoanalysis – for there is one – involves effacement, setting aside, withdrawal, indeed, the absence of a dimension that one

> only has to mention in order to realise how much separates us from all ethical thought that preceded us. I mean the dimension of habits, of good and bad habits.
>
> (Lacan 1992: 10)

At one point, Lacan puts the issue to the audience in terms of the clinic and the cure as an ideal of the good. In contrast to the desire to cure, which Lacan calls a benevolent fraud, the ethics of psychoanalysis is based on a 'non-desire to cure' (1992: 219). In the absence of the normative dimension to adjudicate good and bad, the question of ethics becomes: 'Which good are you pursuing precisely as far as your passion is concerned?' (Lacan 1992: 218). This perspective is completely new in ethical thought and even a 'reversal' of the Aristotelian morality (1992: 13). At minimum, it opens up a dimension of meaning and action to ethical consideration that is occluded if we conceive of ethics in terms of the good. The good, once seen to function as a limit, also becomes a threshold of power.

The morality of law

The issue of morality and legal authority has been discussed at various points in the history of legal theory. The debate that crystallises the issues at stake in this discussion began in the mid-twentieth century and the protagonists were Harvard professors H.L.A. Hart (1961) and Lon Fuller (1969). At the time, it was the catastrophe of Nazism and the acquiescence of German jurists that figured as the background for their discussions. The heart of their disagreement was whether a law can really be considered *law* if it is supporting a morally reprehensible political form. On the one hand, Hart's 'positive law' perspective was that morality is a subjective judgement; definitions of justice and goodness are normative in the last instance, so to what degree a form of law approximates morality can only be decided from a point of view internal to a legal order, not from an objective outside. Thus, from this perspective law is a matter of purposive activity while morality is concerned with a judgement about the value of purposes themselves. According to the positive concept of law, identifying when law is present is distinct from saying that it ought to be obeyed, which is another way of saying that it has moral force. Thus, Hart formulated the 'separability thesis', which states that law and morality should be separated in legal analysis (Schauer 1996). One should clearly distinguish the conditions of legality from the conditions of morality and leave the latter to ethicists. According to the separability thesis, there are no necessary moral limits on legal validity.

Indeed, one of the hallmarks of the positivist approach is to believe that 'legal norms can have any kind of content and be valid' (Kelsen 1945: 113). The idea of 'validity' here relates to the status of laws inside a legal system, not to their status relative to general or universal moral standards. For

example, from the positivist perspective, legal violence is valid if it is exercised within the bounds of legality as defined in a given order (Benjamin 1968). This suspends the question of whether a particular legal system is morally good or bad. Suspending morality means that legal analysis may potentially go beyond the limit of the good and view law scientifically as a form of rational activity. Thus, while morality is subjective, the existence of law is objective. Indeed, legal positivism has been 'mainly concerned to produce a rich and accurate *description* of law and legal systems as they function in human societies' (George 1996: 339).

Fuller's counter to this was the 'overlap thesis', which states that law and morality are not dissociable; moreover, some overlap with morality is necessary for a rule to qualify as law at all. The naturalist view is that legal authority comes from human beings' own ability to recognise objective moral principles, which ostensibly exist and relate to justice. The idea is that rational reflection reveals an objective moral order that is not metaphysical but basic to nature (Finnis 1980). This was a 'natural law' approach insofar as it defined law as having a moral purpose of its own that does not depend on social norms or political institutions. Thus, from the naturalist point of view, it is fair to say that humans do not create law so much as discover it. And, the purpose of law is to instantiate principles conducive to the common good of a community (Murphy 2006: 3). Law based on such principles is binding in human societies because of our common human nature. Law that is counter to this morality is not valid. Legal violence is justified when it is a means to the ends of this morality (Benjamin 1968). Hence, the natural law quip that an unjust law is no law at all.

What is at stake in the different conceptions of the connection between law and morality can be effectively illustrated by Hart's review of Fuller's book called *The Morality of Law* (1965). In his review, Hart essentially aims to show that Fuller's natural law approach obscures the operative difference between legality and morality, and he uses the analogy of poisoning to make the point. He writes that poisoning 'is no doubt a purposive activity and reflections on its purpose may show that it has its internal principles of better and worse poisoning' (Hart 1965: 1285–86). In other words, rational reflection upon the art of poisoning allows for the elaboration of rules that members of a community of poisoners might agree on to distinguish between good and bad poisoning (for example: do not administer poisons that cause a slow death, do not administer poisons that cause vomiting, etc.). The analogy is meant to show that recognising *legal* validity in a society of poisoners is distinct from having the belief that poisoning itself is a morally correct organising principle for a legal order. The point is that defining law as a moral concept hampers the capacity to make a distinction between the *desire* for efficiency internal to a purpose (such as good poisoning) and a value judgement about the purpose itself (Hart 1965: 1285–86). In this sense, poisoning is meant to be analogous to any particular political ethos elevated

to a universal purpose of law. Hart even suggests that the particular morality of law that Fuller describes actually corresponds to a liberal democratic ethos, and values of autonomy and personhood connected to it (Allan 2001).[1]

The heart of the issue in the debate is the source, scope and legitimacy of the authority of law. The naturalist view holds that 'positing a law and recognising something as law are not distinct activities' (Finnis 1996: 205). Thus, the complete meaning of the overlap thesis is also a rationale for the coercive aspect of law. This moral intuition is a hallmark of the naturalist approach. The idea of an overlap between law and morality justifies the force of law in, for example, the criminal law power of the state. Natural law theories argue that the morality they draw on is not particular but universal, and thus, that the force of law essentially comes from an extra-legal referent. The force of law derives from the fact that law is necessary for human survival. Given the nature of human beings and their circumstances, the existence of legal authority is what enables people to live together in communities (Braybrooke 2001: 125). This seeming fact of nature is the source of legal validity from the naturalist perspective. In this way, the idea of a 'natural' relationship between law and morality is also a meta-ethical explanation and justification for the 'obligatory force' of law (in the fullest sense of 'obligation') (Finnis 1980: 23–24).

Indeed, one difficulty for the positivist approach in recent years lies in the fact that in place of an extra-legal support, the concept of sovereignty has historically functioned as a de facto and apparently analytically neutral explanation for legal authority (George 1996). The concept of sovereignty is most fundamentally defined in terms of two properties. First, sovereignty refers to the highest authority or power in a legal order. Something is sovereign when there is no external limit on what it can do and no higher power that can check its actions. This is one essential attribute of sovereignty; it is said to be 'unlimited'. The power of the king in a monarchy would be one example of unlimited sovereignty, as was the status of the nation state in international law prior to the twentieth century. The second defining property of sovereignty is that it is the only force that can make laws within a given jurisdiction. Something is sovereign when there are no competing or equivalent powers inside its territory. For example, a state is sovereign within the borders of a nation and sovereignty is the force that maintains the rule of law at the national level. So, this is the second defining feature of sovereignty; it is also an internally indivisible power, which is one reason why pulls for sovereignty by sub-state groups are so resisted by national governments.

Eighteenth-century political theorists John Austin and Jeremy Bentham are generally regarded as the first to articulate sovereignty along these lines (Veitch *et al.* 2007: 12). Their so-called command theories of law rejected the theologically informed naturalist accounts of legal authority circulating during the eighteenth century, and turned instead to a conception of sovereignty to explain its existence (Austin 1954; Bentham 1977). Both saw it as

an exclusive property of the state whose existence in perpetuity was a plain political fact or, as sociologists would tend to say, a social fact, which nicely explained both the source and the scope of law. The essence of the social fact thesis is the premise that legal authority is self-evident in the person or assembly of persons that people in a given territory habitually obey, for whatever reason (MacCormick 1996). The concept of sovereignty is therefore also a point beyond which inquiry into legal authority is not possible. In legal theory, sovereignty thus functioned as a quasi-universal meta-concept limit beyond which legal inquiry serves no practical purpose (Capps 2006: 20; Waldorn 1991).

Hart was addressing this issue when he elaborated the difference between perpetuating sovereignty by threat of violence and perpetuating sovereignty by the acceptance of a rule of recognition. The latter feature, he argued, was a part of a veritable and legitimate form of law, while the former was a characteristic of a deficient legal system. The difference involves the existence of what he termed 'secondary' rules. Primary rules govern behaviour and conduct of legal subjects while secondary rules set the terms for the creation and adjudication of the primary laws. Secondary rules are meta-laws that have as their content the primary laws themselves. As Hart explains, they are:

> said to be on a different level from the primary rules, for they are all about such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.
>
> (Hart 1994: 92)

Unlike the command theories, Hart's concept of law did not base legal authority on the fact of sovereignty alone, but on the existence of a social consensus on secondary rules for its recognition. If the 'recognition' is lacking a law cannot be said to be valid (Hart 1994: 50–61).[2] The force of law depends on the existence of such a 'general social practice' for recognising the right to make law (Hart 1994: 54–55). In this way, Hart retained the social fact thesis by understanding legal authority as normative in the last instance.

This response was an important development in legal positivism because by understanding legal authority as based on rules commonly accepted by those that follow them, Hart's work was seen to have quelled the naturalist 'myth' that legal authority comes from something extra-legal, such as nature, reason or violence (MacCormick 1996: 178). The positivist concept of law instead defines law in terms of 'the union of primary and secondary rules' (Hart 1994: 107). If it is acknowledged that sovereignty is an internally

generated property constituted by the acceptance of rules, one of the implications is that sovereignty cannot intelligibly be regarded as the source of all the laws that make up a legal system (Waldorn 2006: 1701). Thus, it is possible to entertain the idea that a legal system can be constituted in ways that do not involve a state. Hart's account opens up the possibility that a legal system need not have state-based sovereignty at its base.

The reason I focus on these philosophical approaches to law is because of the way that the politics of law is bracketed by the assumption of social consensus.[3] For example, neither the positivist nor naturalist perspective justifies the authority of law in principle; in the last instance both defer to criteria for cases of its use. That is, neither approach can answer the question of whether legal violence 'as a principle, can be a moral means even to just ends' (Benjamin 1968: 278). From the naturalist perspective, the question is answered by the justness of the morality to which law naturally refers and uses as a criterion for making distinctions between 'good' and 'bad' cases of the use of violence. In this sense, the conventionality thesis is also operative in the naturalist view at a formal non-normative level (i.e. as an ontological fact). From the positivist perspective, the normativity of law provides the answer in specific cases. A social fact (of consensus) determines the standard of legality in a given legal order.

However, in the context of law, the maintenance of consensus depends on disciplining behaviour destructive to the common good. Maintaining standards of proper behaviour is not separable from the use of violence against those who do not share the common vision (Finnemore 2003). A legal order that regulates behaviours destructive to the common good is at the same time using coercion against those who do not share that morality. In the context of international law, for example, many argue that there are international legal norms but there is no consensus as to what they are (Goldsmith and Posner 2005: 201). This is why, for example, doctrinal analyses alone that show the legality of coercion by international law in the name of human rights vis-à-vis state sovereignty are not adequate to generate the force of law.

According to Hart, the authority of secondary rules comes from the existence of a consensus among officials to regard them as valid and govern their behaviour in accordance with them. This is known as the conventionality thesis. It is a version of what is known in sociological theory as the consensus view of law. The consensus thesis defines society by common interests and shared norms, which the law then confirms. While this thesis has been displaced in many ways in sociological theory, in legal studies social consensus is still often assumed. It shifts the problematic of the rationale for legal authority on to normativity. However, this does not avoid the problem. The issue remains of the force behind secondary rules: why do rules come to be commonly accepted at all? In positivism, the role of consensus is contingent, yet still necessary to the concept of law. The authority of law is justified by its status with regards to a consensus on the meaning of legality within a given order.

In this regard, it is worth recalling that even die-hard positivist Hart granted that there is a minimum content of natural law in all forms of legal order: what he called the natural law of survival (1958: 593). Several new natural law thinkers, such as Finnis (1980), Fuller (1969) and Murphy (2006) have turned to conceptions of morality in nature to develop a natural law theory that does not depend on a notion of the divine or of sovereignty. Hart's widely respected emphasis on life as the only admissible natural purpose of law seems to provide additional testimony to the intuitive acceptability of the value of life (as, for example, in discourses of human rights) as an objective morality basic to nature that exists over and above particular political institutions and cultural norms (Kainz 2004). As he writes:

> What makes sense of this mode of thought and expression is something entirely obvious: it is the tacit assumption that the *proper end* of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue its existence.
>
> (Hart 1994: 187)

Moreover, with the formulation of a natural law of survival underlying the tendency to develop legal systems in the most generic sense, Hart offered the possibility that a legal system can survive arguably even the loss of national sovereignty and remain legitimate in some sense. The sense of legitimacy derives from an appeal to conventionality like the original command aspect of positivist theories of law that Hart rejected. For it is seemingly obvious that human beings normally desire life and continued survival, and life is therefore the basis for, at least, a nearly universal consensus. Thus, a common morality based in nature subtends the very concept of law and legal authority in all human societies and can be a natural motivation for the obligation to obey the law in any political setting.

Thus, while sovereignty has long been tied to the legal positivist side of things, and seen as a meta-ethically neutral concept which marked the source, scope and authority of law in a legal order (with or without some moral system), the attempts to define legal authority first as a social fact based in a population's 'habits' of obedience and later in the acceptance of secondary rules, nonetheless relied on some conceptions of a natural tendency to form political orders. Such a tendency 'is latent in our identification of certain human needs which it is good to satisfy' (Hart 1994: 186). Thus, even Hart's attempts to define sovereignty nonetheless relied on some conceptions of a 'natural' tendency to form political orders. Therefore, it makes sense to expose and further articulate that order itself rather than relying on a sovereign solution that is proving not to be permanent.

There are two issues that will be addressed from these debates in this study. The first is the relationship between nature and reason. And second is life as the form of the good, in particular how the consensus it implies is not

simply found in nature, but is rather a politically determined concept. These are issues that have not been considered in legal philosophy but they are points where new theories of biopolitics begin.

The biopolitical

Michel Foucault opens his study of the operation of power in modern society in *Discipline and Punish: The Birth of the Prison* (1977) with an account of the torture and execution of Robert-François Damiens. Damiens was condemned by the Parliament of Paris in 1757 for a plot to kill King Louis XV of France (3–8).[4] The case exemplifies how sovereignty was traditionally constituted through public displays of an excessively negative power that used extreme violence on the body of an individual to the point of death. Foucault mentions the incident in order to contrast the operation of power evident in Damiens' horrifying execution with the finely detailed and organised routines of life in nineteenth-century prisons. The two examples juxtaposed are meant to throw into relief another dimension of the operation of power in society, a new and positive aspect that is productive and creative. Foucault was highlighting mechanisms of power that are based less on public displays of violence and more on control and management of populations (Foucault 1978: 89).

In Foucault's analysis, classic sovereignty operated like 'a means of deduction, a subtraction mechanism' that imposes levies on subjects and manifests in the 'right to appropriate a portion of wealth, a tax of products, goods and services, labour and blood' (Foucault 1978: 136). It is most evident in the legislative, prohibitive and censoring dimension of law, which will ultimately kill if it is threatened, but normally allows living. In this sense, sovereignty is the right to take life or let live, and its ultimate symbol is the sword (Ojakangas 2005: 6). This form of power was based on the enactment of violence that ceased hold of life in order to suppress it (Foucault 1978: 136). Describing how such public executions were already in decline when Damiens was executed, Foucault's subsequent study describes how the operation of power of law changed with the transition from monarchy to constitutional rule in Europe from the seventeenth century onwards. Under classic sovereignty, law was considered an extension of the body of the sovereign, and so the punishment for attacking the integrity of the legal order is no different from attacking the body of the sovereign. Thus, under this form of law, the sovereignty of the law enacts revenge upon the offender's body for having been 'injured' by a crime. Classical sovereign power manifested in localised and negating displays of violence (Foucault 1978: 94–95).

The reason for discussing Damiens' execution is to exemplify the public executions characteristic of classic sovereignty that quickly became – in the context of the needs of modern state and industry – an ineffective use of the

body by the law; it was not only too haphazard, but also contradicted the techniques of discipline that were emerging to create 'docile bodies'. The open displays of violence associated with classical sovereignty that negated life began to elicit outrage and sympathy from the public for the body that was the target, signalling the retreating efficacy of such displays. Humanitarian challenges to the classic operation of sovereign power came hand in hand with the emergence of new political problems related to the health, housing, habitation, and living conditions of populations (Dean 2004: 19). This is part of a process where new techniques of power emerge that centre on the administration of life, rather than the power over death.

In *The History of Sexuality* (1978), Foucault describes more specifically how in the eighteenth century the localised manifestations of sovereign violence declined as legal authority became based on the sovereignty of nation states, the power of which depended on the life and health of their populations more than the fear of punishment. As the health of populations became a primary concern for the state, increasingly the unilateral and negating aspect of sovereignty makes room for a form of 'biopower' that also becomes a political force. Biopower is the name for power that is fused with life and concerned with fostering life. Since the eighteenth century the power of life has become an increasingly important component of politics and law (Foucault 1977: 194). On the one hand, it involves the regulation of population-level phenomena such as birth, death, sickness, disease, health, sexual relations, etc., and on the other, disciplining individual bodies in institutionalised settings, through techniques that were first cultivated in prisons, the military, hospitals, factories and schools (1978). These techniques were gradually applied to social regulation and management more broadly in order to foster the usefulness and docility of individual bodies and populations (Foucault 1978: 138–39; 2007: 62). Thus, whereas classic sovereign power subtracted life, biopower is productive and creates forms of life.[5] In this sense, it is internal to a social body, relational, circulating, capillary, unpredictable and a matter of knowledge, not an external intervention that destroys life and brings death.

Unlike the localised displays of violence, these techniques circulate throughout every life in the social particularly in institutional settings such as factories, hospitals and schools. Biopower is a:

> new method of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus.
>
> (Foucault 1978: 89)

These techniques of power are not repressive, nor do they have a central point from which they emanate; it is exclusively focused on generating forces, making them grow and ordering them (1978: 136). Therefore, in the context

of biopower, law becomes associated with the management of life and keeping death, if not at bay, at least under control; in this sense, death figures as a limit of a form of power that seeks to control life. Legal authority in post-monarchic, state-centred contexts comes to have a stake in the life of subjects and is concerned less with establishing an absolute limit than with normalising:

> In the course of the eighteenth century the establishment of an explicit, coded and formally egalitarian juridical framework, was made possible by the organization of a parliamentary, representative regime. But the development and generalization of disciplinary mechanisms constituted the other, dark side of these processes. The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines.
>
> (1977: 222)

While initially biopower and sovereignty seem opposed, much in the same way that life and death seem opposed, they are in fact not mutually exclusive. The censoring, negating, life-extinguishing aspect visible in the displays of classic sovereignty is now one element among others in a power bent on making forces grow, not destroying them (Foucault 1978: 136). This analysis identifies a profound shift in the operation of power in the form of law in society.

At moments it may seem that Foucault overstates the shift from one to the other, especially in the introduction to *The History of Sexuality*, but fundamentally the process he is referring to is one of overlap and interconnection. Sovereignty has gradually been 'penetrated' by new mechanisms of power that took charge of human existence, specifically the existence of the living body (Foucault 1978: 88). Biopolitics emerges when the ultimate reference point for political authority is no longer the threat of death but the very biological existence of the population (Foucault 1978: 137).[6] A stark example is the scale of modern warfare:

> As the technology of wars have caused them to tend increasingly toward all-out destruction, the decision that initiates them and the one that terminates them are in fact increasingly informed by the naked question of survival ... If genocide is indeed the dream of modern powers, this is not because of a recent return of the ancient right to kill; it is because power is situated and exercised at the level of life.
>
> (Foucault 1978: 137–38)

In other words, the death that was based on the right of sovereignty is now manifested as the inverse of the right of the social body to ensure, maintain or develop its life (Foucault 1978: 136):