

PART TWO

Homo Sacer

§ 1 Homo Sacer

1.1. Pompeius Festus, in his treatise *On the Significance of Words*, under the heading *sacer mons* preserved the memory of a figure of archaic Roman law in which the character of sacredness is tied for the first time to a human life as such. After defining the Sacred Mount that the plebeians consecrated to Jove at the time of their secession, Festus adds:

At homo sacer is est, quem populus iudicavit ob maleficium; neque fas est eum immolari, sed qui occidit, parricidi non damnatur; nam lege tribunitia prima cavetur “si quis eum, qui eo plebei scito sacer sit, occiderit, parricidia ne sit.” Ex quo quivis homo malus atque im-probus sacer appellari solet. (*De verborum significatione*)

The sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunitian law, in fact, it is noted that “if someone kills the one who is sacred according to the plebiscite, it will not be considered homicide.” This is why it is customary for a bad or impure man to be called sacred.

The meaning of this enigmatic figure has been much discussed, and some have wanted to see in it “the oldest punishment of Roman criminal law” (Bennett, “Sacer esto,” p. 5). Yet every interpretation of *homo sacer* is complicated by virtue of having to concentrate on traits that seem, at first glance, to be contradictory. In an essay of 1930, H. Bennett already observes that Festus’s definition “seems to deny the very thing implicit in the term” (ibid., p. 7), since while it confirms the sacredness of a person, it authorizes (or, more precisely, renders unpunishable) his killing (whatever etymology one accepts for the term *parricidium*, it originally indicated the killing of a free man). The contradiction is even more pronounced when one considers that the person whom anyone could kill with impunity was nevertheless not to be put to death according to ritual practices (*neque fas est eum immolari*: *immolari* indicates the act of sprinkling the *mola salsa* on the victim before killing him).

In what, then, does the sacredness of the sacred man consist? And what does the expression *sacer esto* (“May he be sacred”), which often figures in the royal laws and which already appears in the archaic inscription on the forums rectangular *cippus*, mean, if it implies at once the *impune occidi* (“being killed with impunity”) and an exclusion from sacrifice? That this expression was also obscure to the Romans is proven beyond the shadow of a doubt by a passage in Ambrosius Theodosius Macrobius’s *Saturnalia* (3.7.3 – 8) in which the author, having defined *sacrum* as what is destined to the gods, adds: “At this point it does not seem out of place to consider the status of those men whom the law declares to be sacred to certain divinities, for I am not unaware that it appears strange [*mirum videri*] to some people that while it is forbidden to violate any sacred thing whatsoever, it is permitted to kill the sacred man.” Whatever the value of the interpretation that Macrobius felt obliged to offer at this point, it is certain that sacredness appeared problematic enough to him to merit an explanation.

1.2. The perplexity of the *antiqui auctores* is matched by the divergent interpretations of modern scholars. Here the field is divided between two positions. On the one hand, there are those, like Theodor Mommsen, Ludwig Lange, Bennett, and James Leigh Strachan-Davidson, who see *sacratio* as a weakened and secularized residue of an archaic phase in which religious law was not yet distinguished from penal law and the death sentence appeared as a sacrifice to the gods. On the other hand, there are those, like Károly Kerényi and W. Ward Fowler, who consider *sacratio* to bear the traces of an archetypal figure of the sacred – consecration to the gods of the underworld – which is analogous to the ethnological notion of taboo: august and damned, worthy of veneration and provoking horror. Those among the first group are able to admit the *impune occidi* (as, for example, Mommsen does in terms of a popular or vicariate execution of a death sentence), but they are still unable to explain the ban on sacrifice. Inversely, the *neque fas est eum immolari* is understandable in the perspective of the second group of scholars (“*homo sacer*,” Kerényi writes, “cannot be the object of sacrifice, of a *sacrificium*, for no other reason than this very simple one: what is *sacer* is already possessed by the gods and is originally and in a special way possessed by the gods of the underworld, and so there is no need for it to become so through a new action” [*La religione*, p. 76]). But it remains completely incomprehensible from this perspective why anyone can kill *homo Sacer* without being stained by sacrilege (hence the incongruous explanation of Macrobius, according to which since the souls of the *homines sacri* were *dus debita*e, they were sent to the heavens as quickly as possible).

Neither position can account economically and simultaneously for the two traits whose juxtaposition, according to Festus, constitutes the specificity of *homo sacer*: *the unpunishability of his killing and the ban on his sacrifice*. In the light of what we know of the Roman juridical and religious order (both of the *ius divinum* and the *ius humanum*), the two traits seem hardly compatible: if *homo sacer* was impure (Fowler: *taboo*) or the property of the gods (Kerényi), then why could anyone kill him without either contaminating himself or committing sacrilege? What is more, if *homo sacer* was truly the victim of a death sentence or an archaic sacrifice, why is it not *fas* to put him to death in the prescribed forms of execution? What, then, is the life of *homo sacer*, if it is situated at the intersection of a capacity to be killed and yet not sacrificed, outside both human and divine law?

It appears that we are confronted with a limit concept of the Roman social order that, as such, cannot be explained in a satisfying manner as long as we remain inside either the *ius divinum* or the *ius humanum*. And yet *homo sacer* may perhaps allow us to shed light on the reciprocal limits of these two juridical realms. Instead of appealing to the ethnological notion of taboo in order to dissolve the specificity of *homo sacer* into an assumed originary ambiguity of the sacred – as has all too often been done – we will try to interpret *sacratio* as an autonomous figure, and we will ask if this figure may allow us to uncover an originary *political structure* that is located in a zone prior to the distinction between sacred and profane, religious and juridical. To approach this zone, however, it will first be necessary to clear away a certain misunderstanding.

§ 2 The Ambivalence of the Sacred

2.1. Interpretations of social phenomena and, in particular, of the origin of sovereignty, are still heavily weighed down by a scientific mythologeme that, constituted between the end of the nineteenth century and the first decades of the twentieth, has consistently led the social sciences astray in a particularly sensitive region. This mythologeme, which we may provisionally call “the theory of the ambivalence of the sacred,” initially took form in late Victorian anthropology and was immediately passed on to French sociology. Yet its influence over time and its transmission to other disciplines have been so tenacious that, in addition to compromising Batailles inquiries into sovereignty, it is present even in that masterpiece of twentieth-century linguistics, Emile Benveniste’s *Indo-European-Language and Society*. It will not seem surprising that this mythologeme was first formulated in William Robertson Smith’s *Lectures on the Religion of the Semites* (1889) – the same book that was to influence the composition of Freud’s *Totem and Taboo* (“reading it,” Freud wrote, “was like slipping away on a gondola”) – if one keeps in mind that these *Lectures* correspond to the moment in which a society that had already lost every connection to its religious tradition began to express its own unease. In Smith’s book, the ethnographic notion of taboo first leaves the sphere of primitive cultures and firmly penetrates the study of biblical religion, thereby irrevocably marking the Western experience of the sacred with its ambiguity. “Thus,” Smith writes in the fourth lecture,

alongside of taboos that exactly correspond to rules of holiness, protecting the inviolability of idols and sanctuaries, priests and chiefs, and generally of all persons and things pertaining to the gods and their worship, we find another kind of taboo which in the Semitic field has its parallel in rules of uncleanness. Women after child-birth, men who have touched a dead body and so forth are temporarily taboo and separated from human society, just as the same persons are unclean in Semitic religion. In these cases the person under taboo is not regarded as holy, for he is separated from approach to the sanctuary as well as from contact with men. ... In most savage societies no sharp line seems to be drawn between the two kinds of taboo just indicated, and even in more advanced nations the notions of holiness and uncleanness often touch. (Smith, *Lectures*, pp. 152-53)

In a note added to the second edition of his *Lectures*, under the title “Holiness, Uncleanness and Taboo,” Smith lists a new series of examples of ambiguity (among which is the ban on pork, which “in the most elevated Semitic religions appears as a kind of no-man’s-land between the impure and the sacred”) and postulates the impossibility of “separating the Semitic doctrine of the holy from the impurity of the taboo-system” (ibid., p. 452).

It is significant that Smith also mentions the ban in his list of examples of this ambiguous power (*patens*) of the sacred:

Another Hebrew usage that may be noted here is the ban (Heb. *herem*), by which impious sinners, or enemies of the community and its god, were devoted to utter destruction. The ban is a form of devotion to the deity, and so the verb “to ban” is sometimes rendered “consecrate” (Micah 4:13) or “devote” (Lev. 27: 28ff.). But in the oldest Hebrew times it involved the utter

destruction, not only of the persons involved, but of their property . . . and only metals, after they had passed through the fire, were added to the treasure of the sanctuary (Josh. 6: 24). Even cattle were not sacrificed, but simply slain, and the devoted city must not be revealed (Deut. 13: 6; Josh. 6: 26). Such a ban is a taboo, enforced by the fear of supernatural penalties (1 Kings 16: 34) and, as with taboo, the danger arising from it is contagious (Deut. 7: 26); he that brings a devoted thing into his house falls under the same ban itself. (*Lectures*, pp. 453-54)

The analysis of the ban – which is assimilated to the taboo – determines from the very beginning the genesis of the doctrine of the ambiguity of the sacred: the ambiguity of the ban, which excludes in including, implies the ambiguity of the sacred.

2.2. Once it is formulated, the theory of the ambivalence of the sacred has no difficulty extending itself over every field of the social sciences, as if European culture were only now noticing it for the first time. Ten years after the *Lectures*, the classic of French anthropology, Marcel Mauss and H. Hubert's "Essay on the Nature and Function of Sacrifice" (1889) opens with an evocation of precisely "the ambiguous character of sacred things, which Robertson Smith has so admirably made clear" ("Essai," p. 195). Six years later, in the second volume of Wilhelm Max Wundt's *Völkerpsychologie*, the concept of taboo would express precisely the originary indistinction of sacred and impure that is said to characterize the most archaic period of human history, constituting that mixture of veneration and horror described by Wundt – with a formula that was to enjoy great success – as "sacred horror." According to Wundt, it was therefore only in a later period, when the most ancient powers were replaced, by the gods, that the originary ambivalence gave way to the opposition of the sacred and the impure.

In 1912, Mauss's uncle, Emile Durkheim, published his *Elementary Forms of Religious Life*, in which an entire chapter is devoted to "the ambiguity of the notion of the sacred." Here he classifies the "religious forces" as two opposite categories, the auspicious and the inauspicious:

To be sure, the sentiments provoked by the one and the other are not identical: disgust and horror are one thing and respect another. Nonetheless, for actions to be the same in both cases, the feelings expressed must not be different in kind. In fact, there actually is a certain horror in religious respect, especially when it is very intense; and the fear inspired by malignant powers is not without a certain reverential quality. . . . The pure and the impure are therefore not two separate genera, but rather two varieties of the same genus that includes sacred things. There are two kinds of sacred things, the auspicious and the inauspicious. Not only is there no clear border between these two opposite kinds, but the same object can pass from one to the other without changing nature. The impure is made from the pure, and vice versa. The ambiguity of the sacred consists in the possibility of this transmutation. (*Les formes élémentaires*, pp. 446-48)

What is at work here is the psychologization of religious experience (the "disgust" and "horror" by which the cultured European bourgeoisie betrays its own unease before the religious fact), which will find its final form in Rudolph Otto's work on the sacred. Here, in a concept of the sacred that completely coincides with the concept of the obscure and the impenetrable, a theology that had lost all experience of the revealed word, celebrated its union with a philosophy that had abandoned all sobriety in the face of feeling. That the religious belongs entirely to the sphere of psychological emotion, that it essentially has to do with shivers and goose bumps – this is the triviality that the neologism "numinous" had to dress up as science.

When Freud set out to write *Totem and Taboo* several years later, the field had therefore already been prepared for him. Yet only with this book does a genuine general theory of the ambivalence of the sacred come to light on the basis not only of anthropology and psychology but also of linguistics. In 1910, Freud had read the essay "On the Antithetical Meaning of Primal Words" by the now discredited linguist Karl Abel, and he reviewed it for *Imago* in an article in which he linked Abel's essay to his own theory of the absence of the principle of contradiction in dreams. The Latin term *sacer*, "sacred and damned," figures in the list of words with antithetical meanings that Abel gives in his appendix, as Freud, does not hesitate to point out. Strangely enough, the anthropologists who first formulated the theory of the ambiguity of the

sacred did not mention the Latin concept of *sacratio*. But in 1911, Fowler's essay "The Original Meaning of the Word *Sacer*" appeared, presenting an interpretation of *homo sacer* that had an immediate effect on the scholars of religious studies. Here the implicit ambiguity in Festus's definition allows the scholar (taking up a suggestion of Robert Marett's) to link the Latin *sacer* with the category of taboo: "*Sacer esto* is in fact a curse; and *homo sacer* on whom this curse falls is an outcast, a banned man, tabooed, dangerous. . . . Originally the word may have meant simply taboo, i.e. removed out of the region of the *profanum*, without any special reference to a deity, but 'holy' or accursed according to the circumstances" (Fowler, *Roman Essays*, pp. 17-23).

In a well-documented study, Huguette Fugier has shown how the doctrine of the ambiguity of the sacred penetrates into the sphere of linguistics and ends by having its stronghold there (*Recherches*, pp. 238-40). A decisive role in this process is played precisely by *homo sacer*. While in the second edition of A. Walde's *Lateinisches etymologisches Wörterbuch* (1910) there is no trace of the doctrine of the ambivalence of the sacred, the entry under the heading *sacer* in Alfred Ernout-Meillet's *Dictionnaire étymologique de la langue latine* (1932) confirms the "double meaning" of the term by reference to precisely *homo sacer*; "*Sacer* designates the person or the thing that one cannot touch without dirtying oneself or without dirtying; hence the double meaning of 'sacred' or 'accursed' (approximately). A guilty person whom one consecrates to the gods of the underworld is sacred (*sacer esto*: cf. Grk. *agios*)."

✎ It is interesting to follow the exchanges documented in Fugier's work between anthropology, linguistics, and sociology concerning the problem of the sacred. Pauly-Wilson's "Sacer" article, which is signed by R. Ganschinietz (1920) and explicitly notes Durkheim's theory of ambivalence (as Fowler had already done for Smith), appeared between the second edition of Walde's *Wörterbuch* and the first edition of Ernout-Meillet's *Dictionnaire*. As for Ernout-Meillet, Fugier notes the strict links that linguistics had with the Parisian school of sociology (in particular with Mauss and Durkheim). When Roger Gallois published *Man and the Sacred* in 1939, he was thus able to start off directly with a lexical given, which was by then considered certain: "We know, following Ernout-Meillet's definition, that in Rome the word *sacer* designated the person or the thing that one cannot touch without dirtying oneself or without dirtying" (*L'homme et le sacré*, p. 22).

2.3. An enigmatic archaic Roman legal figure that seems to embody contradictory traits and therefore had to be explained thus begins to resonate with the religious category of the sacred when this category irrevocably loses its significance and comes to assume contradictory meanings. Once placed in relation with the ethnographic concept of taboo, this ambivalence is then used – with perfect circularity – to explain the figure of *homo sacer*. There is a moment in the life of concepts when they lose their immediate intelligibility and can then, like all empty terms, be overburdened with contradictory meanings. For the religious phenomenon, this moment coincides with the point at which anthropology – for which the ambivalent terms *mana*, *taboo*, and *sacer* are absolutely central – was born at the end of the last century. Lévi-Strauss has shown how the term *mana* functions as an excessive signifier with no meaning other than that of marking an excess of the signifying function over all signifieds. Somewhat analogous remarks could be made with reference to the use and function of the concepts of the sacred and the taboo in the discourse of the social sciences between 1890 and 1940. An assumed ambivalence of the generic religious category of the sacred cannot explain the juridico-political phenomenon to which the most ancient meaning of the term *sacer* refers. On the contrary, only an attentive and unprejudiced delimitation of the respective fields of the political and the religious will make it possible to understand the history of their intersection and complex relations. It is important, in any case, that the originary juridico-political dimension that presents itself in *homo sacer* not be covered over by a scientific mythologeme that not only explains nothing but is itself in need of explanation.

§ 3 Sacred Life

3.1. According to both the original sources and the consensus of scholars, the structure of *sacratio* arises out of the conjunction of two traits: the unpunishability of killing and the exclusion from sacrifice. Above all, the *impune occidi* takes the form of an exception from the *ius humanum* insofar as it suspends the application of the law on homicide attributed to Numa Pompilius: *Si quis hominem liberum dolo sciens morti duit, parricidas esto*, “If someone intentionally kills a free man, may he be considered a murderer.” The very formulation given by Festus in some way even constitutes a real *exceptio* in the technical sense, which the killer, invoking the sacredness of the victim, could have opposed to the prosecution in the case of a trial. If one looks closely, however, one sees that even the *nequefas est eum immolari* (“it is not licit to sacrifice him”) takes the form of an exception, this time from the *ius divinum* and from every form of ritual killing. The most ancient recorded forms of capital punishment (the terrible *poena cullei*, in which the condemned man, with his head covered in a wolf-skin, was put in a sack with serpents, a dog and a rooster, and then thrown into water, or defenestration from the Tarpean rock) are actually purification rites and not death penalties in the modern sense: the *nequefas est eum immolari* served precisely to distinguish the killing of *homo sacer* from ritual purifications, and decisively excluded *sacratio* from the religious sphere in the strict sense.

It has been observed that while *consecratio* normally brings an object from the *ius humanum* to the *ius divinum*, from the profane to the sacred (Fowler, *Roman Essays*, p. 18), in the case of *homo sacer* a person is simply set outside human jurisdiction without being brought into the realm of divine law. Not only does the ban on immolation exclude every equivalence between the *homo sacer* and a consecrated victim, but – as Macrobius, citing Trebatius, observes – the fact that the killing was permitted implied that the violence done to *homo sacer* did not constitute sacrilege, as in the case of the *res sacrae* (*Cum cetera sacra violari nefas sit, hominem sacrum ius fuerit occidi* “While it is forbidden to violate the other sacred things, it is licit to kill the sacred man”).

If this is true, then *sacratio* takes the form of a double exception, both from the *ius humanum* and from the *ius divinum*, both from the sphere of the profane and from that of the religious. The topological structure drawn by this double exception is that of a double exclusion and a double capture, which presents more than a mere analogy with the structure of the sovereign exception. (Hence the pertinence of the view of those scholars who, like Giuliano Crifò, interpret *sacratio* in substantial continuity with the exclusion from the community [Crifò, “Exilica causa,” pp. 460-65].) Just as the law, in the sovereign exception, applies to the exceptional case in no longer applying and in withdrawing from it, so *homo sacer* belongs to God in the form of unsacrificeability and is included in the community in the form of being able to be killed. *Life that cannot be sacrificed and yet may be killed is sacred life.*

3.2. What defines the status of *homo sacer* is therefore not the originary ambivalence of the sacredness that is assumed to belong to him, but rather both the particular character of the double exclusion into which he is taken and the violence to which he finds himself exposed. This violence – the unsanctionable killing that, in his case, anyone may commit – is classifiable neither as sacrifice nor as homicide, neither as the execution of a condemnation to death nor as sacrilege. Subtracting itself from the sanctioned forms of both human and divine law, this violence opens a sphere of human action that is neither the sphere of

sacrum facere nor that of profane action. This sphere is precisely what we are trying to understand here.

We have already encountered a limit sphere of human action that is only ever maintained in a relation of exception. This sphere is that of the sovereign decision, which suspends law in the state of exception and thus implicates bare life within it. We must therefore ask ourselves if the structure of sovereignty and the structure of *sacratio* might be connected, and if they might, from this perspective, be shown to illuminate each other. We may even then advance a hypothesis: once brought back to his proper place beyond both penal law and sacrifice, *homo sacer* presents the originary figure of life taken into the sovereign ban and preserves the memory of the originary exclusion through which the political dimension was first constituted. The political sphere of sovereignty was thus constituted through a double exclusion, as an excrescence of the profane in the religious and of the religious in the profane, which takes the form of a zone of indistinction between sacrifice and homicide. *The sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life – that is, life that may be killed but not sacrificed – is the life that has been captured in this sphere.*

It is therefore possible to give a first answer to the question we put to ourselves when we delineated the formal structure of the exception. What is captured in the sovereign ban is a human victim who may be killed but not sacrificed: *homo sacer*. If we give the name bare life or sacred life to the life that constitutes the first content of sovereign power, then we may also arrive at an answer to the Benjaminian query concerning “the origin of the dogma of the sacredness of life.” The life caught in the sovereign ban is the life that is originary sacred – that is, that may be killed but not sacrificed – and, in this sense, the production of bare life is the originary activity of sovereignty. 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 the relation of abandonment.

§ The *potestas sacrosancta* that lay within the competence of the plebeian courts in Rome also attests to the link between *sacratio* and the constitution of a political power. The inviolability of the court is founded on the mere fact that when the plebeians first seceded, they swore to avenge the offenses committed against their representative by considering the guilty man a *homo sacer*. The Latin term *lex sacrata*, which improperly designated (the plebeians were originally clearly distinct from the *leges*) what was actually only a *charte jurée* (Magdelain, *La loi*, p. 57) of the insurrectionary plebs, originally had no other meaning than that of determining a life that can be killed. Yet for this very reason, the *lex sacrata* founded a political power that in some way counterbalanced the sovereign power. This is why nothing shows the end of the old republican constitution and the birth of the new absolute power as clearly as the moment in which Augustus assumed the *potestas tribunicia* and thus becomes *sacrosanctus*. (*Sacrosanctus in perpetuum ut essem*, the text of *Res gestae* declares, *et quoad viverem tribuniciapotestas mihi tribuetur*, “So that I may be forever sacrosanct, and that the tribunitian power may be attributed to me for my whole life.”)

3.3. Here the structural analogy between the sovereign exception and *sacratio* shows its full sense. At the two extreme limits of the order, the sovereign and *homo sacer* present two symmetrical figures that have the same structure and are correlative: the sovereign is the one with respect to whom all men are potentially *homines sacri*, and *homo sacer* is the one with respect to whom all men act as sovereigns.

The sovereign and *homo sacer* are joined in the figure of an action that, excepting itself from both human and divine law, from both *nomos* and *physis*, nevertheless delimits what is, in a certain sense, the first properly political space of the West distinct from both the religious and the profane sphere, from both the natural order and the regular juridical order.

This symmetry between *sacratio* and sovereignty sheds new light on the category of the sacred, whose ambivalence has so tenaciously oriented not only modern studies on the phenomenology of religion but also the most recent inquiries into sovereignty. The proximity between the sphere of sovereignty and the sphere of the sacred, which has often been observed and explained in a variety of ways, is not simply the secularized residue of the originary religious character of every political power, nor merely the attempt to grant the latter a theological foundation. And this proximity is just as little the consequence of the “sacred” – that is, august and accursed – character that inexplicably belongs to life as such. If our hypothesis is correct, sacredness is instead the originary form of the inclusion of bare life in the juridical order, and the

syntagm *homo sacer* something like the originary “political” relation, which is to say, bare life insofar as it operates in an inclusive exclusion as the referent of the sovereign decision. Life is sacred only insofar as it is taken into the sovereign exception, and to have exchanged a juridico-political phenomenon (*homo sacer*’s capacity to be killed but not sacrificed) for a genuinely religious phenomenon is the root of the equivocations that have marked studies both of the sacred and of sovereignty in our time. *Sacer esto* is not the formula of a religious curse sanctioning the *unheimlich*, or the simultaneously august and vile character of a thing: it is instead the originary political formulation of the imposition of the sovereign bond.

The crimes that, according to the original sources, merit *sacratio* (such as *terminum exarare*, the cancellation of borders; *verberatio parentis*, the violence of the son against the parent; or the swindling of a client by a counsel) do not, therefore, have the character of a transgression of a rule that is then followed by the appropriate sanction. They constitute instead the originary exception in which human life is included in the political order in being exposed to an unconditional capacity to be killed. Not the act of tracing boundaries, but their cancellation or negation is the constitutive act of the city (and this is what the myth of the foundation of Rome, after all, teaches with perfect clarity). Numa’s homicide law (*parricidas esto*) forms a system with *homo sacer*’s capacity to be killed (*parricidi non damnatur*) and cannot be separated from it. The originary structure by which sovereign power is founded is this complex.

⌘ Consider the sphere of meaning of the term *sacer* as it appears in our analysis. It contains neither an antithetical meaning in Abel’s sense nor a generic ambivalence in Durkheim’s sense. It indicates, rather, a life that may be killed by anyone – an object of a violence that exceeds the sphere both of law and of sacrifice. This double excess opens the zone of indistinction between and beyond the profane and the religious that we have attempted to define. From this perspective, many of the apparent contradictions of the term “sacred” dissolve. Thus the Latins called pigs *pure* if they were held to be fit for sacrifice ten days after their birth. But Varro (*De re rustica*, 2. 4. 16) relates that in ancient times the pigs fit for sacrifice were called *sacres*. Far from contradicting the unsacrificeability of *homo sacer*, here the term gestures toward an originary zone of indistinction in which *sacer* simply meant a life that could be killed. (Before the sacrifice, the piglet was not yet “sacred” in the sense of “consecrated to the gods,” but only capable of being killed.) When the Latin poets define lovers as *sacred* (*sacros qui ledat amantes*, “whoever harms the sacred lovers” [Propertius, 3. 6. 2]; *Quis que amore teneatur, eat tutusque sacerque*, “May whoever is in love be safe and sacred” [Tibullius, 1. 2. 27]), this is not because they are accursed or consecrated to the gods but because they have separated themselves from other men in a sphere beyond both divine and human law. Originally, this sphere was the one produced by the double exception in which sacred life was exposed.

§ 4 'Vitae Necisque Potestas'

4.1. "For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death." Foucault's statement at the end of the first volume of the *History of Sexuality* (*La volonté*, p. 119) sounds perfectly trivial. Yet the first time we encounter the expression "right over life and death" in the history of law is in the formula *vitae necisque potestas*, which designates not sovereign power but rather the unconditional authority [*potestà*] of the *pater* over his sons. In Roman law, *vita* is not a juridical concept but instead indicates either the simple fact of living or a particular way of life, as in ordinary Latin usage (in a single term, Latin brings together the meaning of both *zoē* and *bios*). The only place in which the word *vita* acquires a specifically juridical sense and is transformed into a real *terminus technicus* is in the very expression *vitae necisque potestas*. In an exemplary study, Yan Thomas has shown that *que* in this formula does not have a disjunctive function and that *vita* is nothing but a corollary of *nex*, the power to kill ("Vita," pp. 508-9). Life thus originally appears in Roman law merely as the counterpart of a power threatening death (more precisely, death without the shedding of blood, since this is the proper meaning of *necare* as opposed to *mactare*). This power is absolute and is understood to be neither the sanction of a crime nor the expression of the more general power that lies within the competence of the *pater* insofar as he is the head of the *domus*: this power follows immediately and solely from the father-son relation (in the instant in which the father recognizes the son in raising him from the ground, he acquires the power of life and death over him). And this is why the father's power should not be confused with the power to kill, which lies within the competence of the father or the husband who catches his wife or daughter in the act of adultery, or even less with the power of the *dominus* over his servants. While both of these powers concern the domestic jurisdiction of the head of the family and therefore remain, in some way, within the sphere of the *domus*, the *vitae necisque potestas* attaches itself to every free male citizen from birth and thus seems to define the very model of political power in general, *Not simple natural life, but life exposed to death (bare life or sacred life) is the originary political element.*

The Romans actually felt there to be such an essential affinity between the father's *vitae necisque potestas* and the magistrate's *Imperium* that the registries of the *ius patrium* and of the sovereign power end by being tightly intertwined. The theme of the *pater imporiosus* who himself bears both the character of the father and the capacity of the magistrate and who, like Brutus or Manlius Torquatus, does not hesitate to put the treacherous son to death, thus plays an important role in the anecdotes and mythology of power. But the inverse figure of the father who exerts his *vitae necisque potestas* over his magistrate son, as in the case of the consul Spurius Cassius and the tribune Caius Flaminius, is just as decisive. Referring to the story of the latter, who was dragged down from the rostra by his father while he was trying to supersede the authority of the senate, Valerius Maximus defines the father's *potestas*, significantly, as an *Imperium privatum*. Thomas, who has analyzed these episodes, could write that in Rome the *patria potestas* was felt to be a kind of public duty and to be, in some way, a "residual and irreducible sovereignty" ("Vita," p. 528). And when we read in a late source that in having his sons put to death, Brutus "had adopted the Roman people in their place," it is the same power of death that is now transferred, through the image of adoption, to the entire people. The hagiographic epithet "father of the people," which is reserved in every age to the leaders invested with sovereign authority, thus once again acquires its originary, sinister meaning. What the source presents us with is therefore a kind of genealogical myth of sovereign power:

the magistrate's *imperium* is nothing but the father's *vitae necisque potestas* extended to all citizens. There is no clearer way to say that the first foundation of political life is a life that may be killed, which is politicized through its very capacity to be killed.

4.2. From this perspective, it is possible to see the sense of the ancient Roman custom according to which only the prepubescent son could place himself between the magistrate equipped with the *Imperium* and the lictor who went before him. The physical proximity of the magistrate to the lictors who always accompanied him bearing the terrible insignias of power (the *fasces formidulosi* and the *saeve secures*) firmly expresses the inseparability of the *imperium* from a power of death. If the son can place himself between the magistrate and the lictor, it is because he is already originally and immediately subject to a power of life and death with respect to the father. The *puer* son symbolically affirms precisely the consubstantiality of the *vitae necisque potestas* with sovereign power.

At the point in which the two seem to coincide, what emerges is the singular fact (which by now should not appear so singular) that every male citizen (who can as such participate in public life) immediately finds himself in a state of virtually being able to be killed, and is in some way *sacer* with respect to his father. The Romans were perfectly aware of the aporetic character of this power, which, flagrantly contradicting the principle of the Twelve Tables according to which a citizen could not be put to death without trial (*indemnatus*), took the form of a kind of unlimited authorization to kill (*lex indemnatorum interficiendum*). Moreover, the other characteristic that defines the exceptionality of sacred life – the impossibility of being put to death according to sanctioned ritual practices – is also to be found in the *vitae necisque potestas*. Thomas refers (“Vita,” p. 540) to the case recalled as a rhetorical exercise by Calpurnius Flaccus, in which a father, by virtue of his *potestas*, gives his son over to an executioner to be killed. The son resists and rightly demands that his father be the one to put him to death (*vult manu patris interfici*). The *vitae necisque potestas* immediately attaches itself to the bare life of the son, and the *impune occidi* that derives from, it can in no way be assimilated to the ritual killing following a death sentence.

4.3. At a certain point, Thomas poses a question concerning the *vitae necisque potestas*: “What is this incomparable bond for which Roman law is unable to find any expression other than death?” (“Vita,” p. 510). The only possible answer is that what is at issue in this “incomparable bond” is the inclusion of bare life in the juridico-political order. It is as if male citizens had to pay for their participation in political life with an unconditional subjection to a power of death, as if life were able to enter the city only in the double exception of being capable of being killed and yet not sacrificed. Hence the situation of the *patria potestas* at the limit of both the *domus* and the city: if classical politics is born through the separation of these two spheres, life that may be killed but not sacrificed is the hinge on which each sphere is articulated and the threshold at which the two spheres are joined in becoming indeterminate. Neither political *bios* nor natural *zoē*, sacred life is the zone of indistinction in which *zoē* and *bios* constitute each other in including and excluding each other.

It has been rightly observed that the state is founded not as the expression of a social tie but as an untying (*déliasion*) that prohibits (Badiou, *L'être*, p. 125). We may now give a further sense to this claim. *Déliasion* is not to be understood as the untying of a preexisting tie (which would probably have the form of a pact or a contract). The tie itself originally has the form of an untying or exception in which what is captured is at the same time excluded, and in which human life is politicized only through an abandonment to an unconditional power of death. The sovereign tie is more originary than the tie of the positive rule or the tie of the social pact, but the sovereign tie is in truth only an untying. And what this untying implies and produces – bare life, which dwells in the no-man's-land between the home and the city – is, from the point of view of sovereignty, the originary political element.

§ 5 Sovereign Body and Sacred Body

5.1. When Ernst Kantorowicz published *The King's Two Bodies: A Study in Mediaeval Political Theology* in the United States at the end of the 1950s, the book was received with great favor not only by medievalists but also and above all by historians of the modern age and scholars of political science and the theory of the state. The work was without doubt a masterpiece of its kind, and the notion that it advanced of a “mystical” or “political body” of the sovereign certainly constituted (as Kantorowicz’s most brilliant pupil, R. E. Giesey, observed years later) a “milestone in the history of the development of the modern state” (Giesey, *Cérémonial*, p. 9). Such unanimous favor in such a delicate area ought, however, to provoke some reflection.

In his preface, Kantorowicz himself notes that the book, which was born as an inquiry into the medieval precedents of the juridical doctrine of the king’s two bodies, had gone beyond the author’s first intention and had even transformed itself – as the subtitle indicates – into a “study in mediaeval political theology.” Kantorowicz, who had lived through and intensely participated in the political affairs of Germany in the 1920s, fighting alongside the Nationalists in the Spartacist Revolt in Berlin and the Republic of Councils in Munich, could not have failed to intend the reference to the “political theology” under whose insignia Schmitt had placed his own theory of sovereignty in 1922. Thirty-five years later, after Nazism had marked an irreparable rupture in his life as an assimilated Jew, Kantorowicz returned to interrogate, from a completely different perspective, the “Myth of the State” that he had ardently shared in his youth. In a significant disavowal, the preface warns: “It would go much too far . . . to assume that the author felt tempted to investigate the emergence of some of the idols of modern political religions merely on account of the horrifying experience of our own time in which whole nations, the largest and the smallest, fell prey to the weirdest dogmas and in which political theologisms became genuine obsessions” (*King's Two Bodies*, p. viii). And with the same eloquent modesty, the author writes that he “cannot claim to have demonstrated in any completeness the problem of what has been called ‘The Myth of the State’” (*ibid.*, p. ix).

In this sense it has been possible to read the book, not without reason, as one of our century’s great critical texts on the state and techniques of power. Yet anyone who has followed the patient work of analysis that leads from the macabre irony of *Richard II* and Plowden’s reports to a reconstruction of the formation of the doctrine of the king’s two bodies in medieval jurisprudence and theology cannot fail to wonder if the book really can indeed be read as only a demystification of political theology. The fact of the matter is that while the political theology evoked by Schmitt essentially frames a study of the absolute character of political power, *The King's Two Bodies* is instead exclusively concerned with the other, more innocuous feature that, according to Jean Bodin, defines sovereignty (*puissance absolue et perpétuelle*) – the perpetual nature of sovereignty, which allows the royal *dignitas* to survive the physical person of its bearer (*Le roi ne meurt jamais*, “The king never dies”). Here “Christian political theology” was, by means of analogy with Christ’s mystic body, directed solely toward the task of establishing the continuity of the state’s *corpus morale et politicum* (moral and political body), without which no stable political organization could be conceived. And it is in this sense that “notwithstanding . . . some similarities with disconnected pagan concepts, the king’s two bodies is an offshoot of Christian theological thought and, consequently, stands as a landmark of Christian political theology” (*King's Two Bodies*, p. 434).

5.2. Advancing this final thesis decisively, Kantorowicz evokes – but immediately sets aside – precisely the element that could have steered the genealogy of the doctrine of the kings two bodies in a less reassuring direction. Kantorowicz connects the doctrine of the kings two bodies with the other, darker mystery of sovereign power: *la puissance absolue*. In chapter 7, describing the peculiar funeral ceremonies of French kings in which a wax effigy of the sovereign, placed on a *lit d'honneur*, occupied an important position and was fully treated as the king's living person, Kantorowicz suggests that these ceremonies might well have their origin in the apotheosis of Roman emperors. Here too, after the sovereign dies, his wax *imago*, “treated like a sick man, lies on a bed; senators and matrons are lined up on either side; physicians pretend to feel the pulse of the image and give it their medical aid until, after seven days, the effigy ‘dies’” (*King's Two Bodies*, p. 427). According to Kantorowicz, however, the pagan precedent, while very similar, had not directly influenced the French ceremony. It was in any case certain to Kantorowicz that the presence of the effigy was to be once again placed in relation to the perpetuity of royal dignity, which “never dies.”

That Kantorowicz's exclusion of the Roman precedent was not a product of negligence or oversight is shown by the attention which Giesey, with his teacher's full approval, gives to the matter in a book that can be considered a fitting completion of *The King's Two Bodies*, namely, *The Royal Funeral Ceremony in Renaissance France* (1960). Giesey could not ignore the fact that a genetic connection between imperial Roman *consecratio* and the French rite had been established by such scholars as Elias Bickermann and the very eminent Julius Schlosser. Curiously enough, Giesey nevertheless suspends judgment on the matter (“as far as I am concerned,” he writes, “I prefer not to choose either of the two solutions” [p. 128]) and instead resolutely confirms his teacher's interpretation of the link between the effigy and the perpetual character of sovereignty. There was an obvious reason for this choice: if the hypothesis of the pagan derivation of the image ceremony had been taken into account, the Kantorowiczian thesis concerning “Christian political theology” would have fallen by the wayside or would, at least, have had to be reformulated more cautiously. But there was a different – and more secret – reason, and that is that nothing in Roman *consecratio* allowed one to place the emperor's effigy in relation to what is sovereignty's clearest feature, its perpetual nature. The macabre and grotesque rite in which an image was first treated as a living person and then solemnly burned gestured instead toward a darker and more uncertain zone, which we will now investigate, in which the political body of the king seemed to approximate – and even to become indistinguishable from – the body of *homo sacer*, which can be killed but not sacrificed.

5.3. In 1929, a young scholar of classical antiquity, Elias Bickermann, published an article titled “Roman Imperial Apotheosis” in the *Archiv für Religionswissenschaft*, which, in a short but detailed appendix, explicitly placed the pagan image ceremony (*funus imaginarium*) in relation to the funeral rites of English and French sovereigns. Both Kantorowicz and Giesey cite this study; Giesey even declares, without hesitation, that his own work originated in a reading of Bickermann's article. Both Kantorowicz and Giesey remain silent, however, about what was precisely the central point of Bickermann's analysis.

Carefully reconstructing the rite of imperial consecration from both written sources and coins, Bickermann had discerned the specific aporia contained in this “funeral by image,” even if he had not grasped all of its consequences:

Every normal man is buried only once, just as he dies only once. In the age of Antonius, however, the consecrated emperor is burned on the funeral pyre twice, first *in corpore* and then *in effigie*.... The emperor's corpse is solemnly, but not officially, burned, and his remains are deposited in the mausoleum. At this point public mourning usually ends. ... But in Antonius Pius's funeral, everything is carried out contrary to usual practice. Here *Justitium*, (public mourning) begins only after the burial of the bones, and the state funeral procession starts up once the remains of the corpse already lie buried in the ground! And this *funus publicum*, as we learn from Dio's and Herodian's reports of later consecrations, concerns the wax effigy made after the image of the deceased sovereign.... Dio reports as an eyewitness that a slave uses a fan to keep flies away from the face of the doll. Then Septimius Severus gives him a farewell kiss on the funeral pyre. Herodian adds that the image of Septimius Severus is treated in the palace as a

sick person for seven days, with doctors' visits, clinical reports, and diagnoses of death. All of these accounts leave no doubt: the wax effigy, which is "in all things similar" to the dead man, and which lies on the official bed wearing the dead man's clothes, is the emperor himself, whose life has been transferred to the wax doll by means of this and perhaps other magical rites. ("Die römische Kaiserapotheose," pp. 4-6)

Yet what is decisive for understanding the whole ritual is precisely the function and the nature of the image. Here Bickermann suggests a comparison that makes it possible to situate the ceremony in a new perspective:

Parallels for such picture magic are numerous and can be found all over the world. Here it suffices to cite an Italic example from the year 136. A quarter of a century before the funeral of the effigy of Antonius Pius, the *lex collegii culorum Dianae et Antmonoi* declares: *Quisquits ex hoc collegio servus defunctus fuerit et corpus eius a domino iniquo sepul-turae datum non, . fuerit..., eifinus imaginarium fiet* [If a servant of this college dies and an impious master does not bury the body, may a *funus imaginarium* be performed]. Here we find the same expression, *funus imaginarium*, that the "Historia Augusta" uses to designate the funeral ceremony of Pertinax's wax effigy at which Dio was present. In the *lex collegii* as in other parallel cases, however, the image functions as a substitute for the missing corpse; in the case of the imperial ceremony, it appears instead beside the corpse, doubling the dead body without substituting for it. (ibid., pp. 6-7)

In 1972, returning to the problem after more than 40 years, Bickermann places the imaginary imperial funeral in relation to a rite required for the warrior who, after having solemnly dedicated himself to the Manes gods before fighting, does not die in battle (*Consecratio*, p. 22). And it is here that the body of the sovereign and the body of *homo sacer* enter into a zone of indistinction in which they can no longer be told apart.

5.4. For a long time now, scholars have approximated the figure of *homo sacer* to that of the *devotus* who consecrates his own life to the gods of the underworld in order to save the city from a grave danger. Livy has left us a vivid, meticulous description of a *devotio* that took place in 340 B.C.E. during the battle of Veseris. The Roman army was about to be defeated by its Latin adversaries when the consul Pubhus Decius Mus, who was commanding the legions alongside his colleague Titus Manlius Torquatus, asked the pontifex to assist him in carrying out the rite:

The pontiff ordered him to put on the purple-bordered toga and, with his head veiled and one hand thrust out from the toga and touching his chin, to stand on a spear that was laid under his feet, and to say as follows: "Janus, Jupiter, Father Mars, Quirinus, Bellona, Lares, divine Novensiles, divine Indigites, you gods in whose power are both we and our enemies, and you, divine Manes – I invoke and worship you, I beseech and crave your favor, that you prosper the might and victory of the Roman People of the Quirites, and visit the foes of the Roman People of the Quirites with fear, shuddering, and death. As I have pronounced these words, even so in behalf of the republic of the Roman People of the Quirites, and of the army, the legions, the auxiliaries of the Roman People of the Quirites, do I consign and consecrate [*devoveo*] the legions and auxiliaries of the enemy, together with myself, to the divine Manes and to Earth. . ." Then, having girded himself with the Gabinian cincture, he rose up armed on his horse and plunged into the thick of the enemy. To both armies he appeared more august than a man, as though sent from heaven to expiate the anger of the gods. (Livy, *Ab urbe condita libri*, 8. 9. 4ff.)

Here the analogy between *devotus* and *homo sacer* does not seem to go beyond the fact that both are in some way consecrated to death and belong to the gods, even if (despite Livy's parallel) not in the technical form of sacrifice. Yet Livy contemplates a hypothesis that sheds significant light on this institution and makes it possible to assimilate the life of the *devotus* more strictly to that of *homo sacer*:

It seems proper to add here that the consul, dictator, or praetor who consecrates the legions of the enemy not only can consecrate himself but can also consecrate any citizen whatsoever who belongs to a Roman legion. If the man who has been consecrated dies, it is deemed that all is well; but if he does not die, then an image [*signum*] of him must be buried seven feet or more under the ground and a victim must be immolated in expiation. And no Roman magistrate may walk over the ground in which the image has been buried. But if he has consecrated himself, as Decius did, and if he does not die, he cannot perform any rite, either public or private, (ibid., 8. 9.13)

Why does the survival of the devotee constitute such an embarrassing situation for the community that it forces it to perform a complex ritual whose sense is so unclear? What is the status of the living body that seems no longer to belong to the world of the living? In an exemplary study, Robert Schilling observes that if the surviving devotee is excluded from both the profane world and the sacred world, “this happens because this man is *sacer*. He cannot be given back in any way to the profane world because it is precisely thanks to his consecration that the entire community was able to be spared the wrath of the gods” (“Sacrumetprofanum,” p. 956). This is the perspective from which we must see the statue that we have already encountered in the emperor’s *funus imaginarium* and that seems to unite, in one constellation, the body of the sovereign and the body of the devotee.

We know that the seven-foot-tall *Signum* of which Livy speaks is none other than the devotees “colossus,” which is to say, his double, which takes the place of the missing corpse in a kind of funeral *per imaginem* or, more precisely, in the vicarious execution of an unfulfilled consecration. Jean-Pierre Vernant and Emile Ben-veniste have shown the general function of the colossus: this figure, attracting and establishing within itself a double in unusual conditions, “makes it possible to reestablish correct relations between the world of the living and the world of the dead” (Vernant, *Mythe*, p. 77). The first consequence of death is the liberation of a vague and threatening being (the *larva* of the Latins, the *psyche*, *eidolon* or *phasma* of the Greeks) who returns, with the outward appearance of the dead person, to the places where the person lived, belonging properly neither to the world of the living nor to that of the dead. The goal of the funeral rites is to assure that this uncomfortable and uncertain being is transformed into a friendly and powerful ancestor, who clearly belongs to the world of the dead and with whom it is possible to maintain properly ritual relations. The absence of the corpse (or, in certain cases, its mutilation) can, however, impede the orderly fulfillment of the funeral rite. And in these cases a colossus can, under determinate conditions, be substituted for the corpse, thereby rendering possible a vicarious execution of the funeral.

What happens to the surviving devotee? Here it is not possible to speak of a missing corpse in the strict sense, for there has not even been a death. An inscription found in Cyrene nevertheless tells us that a colossus could even be made during the lifetime of the person for whom it was meant to substitute. The inscription bears the text of an oath that settlers leaving for Africa and the citizens of the homeland had to swear at Thera in order to secure their obligations to each other. At the moment they swore the oath, they threw wax *kolossoi* into a fire, saying, “May he who is unfaithful to this oath, as well as all his descendants and all his goods, be liquefied and disappear” (Vernant, *Mythe*, p. 69). The colossus is not, therefore, a simple substitute for the corpse. In the complex system regulating the relation between the living and the dead in the classical world, the colossus represents instead – analogously to the corpse, but in a more immediate and general way – that part of the person that is consecrated to death and that, insofar as it occupies the threshold between the two worlds, must be separated from the normal context of the living. This separation usually, happens at the time of death, through the funeral rites that reestablish the proper relation between the living and the dead that had been disturbed by the deceased. In certain cases, however, it is not death that disturbs this order but rather its absence, and the fabrication of the colossus is then necessary to reestablish order. Until this rite (which, as H. S. Versnel has shown, is not a vicarious funeral but rather a substitutive performance of a consecration [“Self-Sacrifice,” p. 157]) is performed, the surviving devotee is a paradoxical being, who, while seeming to lead a normal life, in fact exists on a threshold that belongs neither to the world of the living nor to the world of the dead: he is a living dead man, or a living man who is actually a *larva*, and the colossus represents the very consecrated life that was,

at the moment of the ritual by which he became a *devotus*, virtually separated from him.

5.5. If we now examine the life of *homo sacer* from this perspective, it is possible to assimilate his status to that of a surviving devotee for whom neither vicarious expiation nor substitution by a colossus is possible. The very body of *homo sacer* is, in its capacity to be killed but not sacrificed, a living pledge to his subjection to a power of death. And yet this pledge is, nevertheless, absolute and unconditional, and not the fulfillment of a consecration. It is therefore not by chance that in a text that has long appeared to interpreters to be confused and corrupt (*Saturnalia*, 3. 7. 6), Macrobius assimilates *homo sacer* to the statues (*Zanes*) in Greece that were consecrated to Jove with the proceeds from the fees imposed on oath-breaking athletes, statues that were in fact nothing other than the *collossi* of those who had broken their word and had therefore been vicariously consigned to divine justice (*animas. . . sacratorum hominum, quos zanas Graeci vocant*, “souls of the sacred men whom the Greeks call *Zanes*”), Insofar as he incarnates in his own person the elements that are usually distinguished from death, *homo sacer* is, so to speak, a living statue, the double or the colossus of himself. In the body of the surviving devotee and, even more unconditionally, in the body of *homo sacer*, the ancient world finds itself confronted for the first time with a life that, excepting itself in a double exclusion from the real context of both the profane and the religious forms of life, is defined solely by virtue of having entered into an intimate symbiosis with death without, nevertheless, belonging to the world of the deceased. In the figure of this “sacred life,” something like a bare life makes its appearance in the Western world. What is decisive, however, is that from the beginning this sacred life has an eminently political character and exhibits an essential link with the terrain on which sovereign power is founded.

5.6. We must examine in this light the rite of the image in the Roman imperial apotheosis. If the colossus always represents a life consecrated to death in the sense we have seen, this means that the death of the emperor (despite the presence of the corpse, whose remains are ritually buried) frees a supplement of sacred life that, as in the case of the man who has survived consecration, must be neutralized by means of a colossus. Thus it is as if the emperor had in himself not two bodies but rather two lives inside one single body: a natural life and a sacred life. The latter, regardless of the regular funeral rite, survives the former and can only ascend to the heavens and be deified after the *funus imaginarium*. What unites the surviving devotee, *homo sacer*, and the sovereign in one single paradigm is that in each case we find ourselves confronted with a bare life that has been separated from its context and that, so to speak surviving its death, is for this very reason incompatible with the human world. In every case, sacred life cannot dwell in the city of men: for the surviving devotee, the imaginary funeral functions as a vicarious fulfillment of the consecration that gives the individual back to normal life; for the emperor, the double funeral makes it possible to fasten onto the sacred life, which must be gathered and divinized in the apotheosis; for *homo sacer*, finally, we are confronted with a residual and irreducible bare life, which must be excluded and exposed to a death that no rite and no sacrifice can redeem.

In all three cases, sacred life is in some way tied to a political function. It is as if, by means of a striking symmetry, supreme power – which, as we have seen, is always *vitae necisque potestatem* and always founded on a life that may be killed but not sacrificed – required that the very person of sovereign authority assume within itself the life held in its power. And if, for the surviving devotee, a missing death liberates this sacred life, for the sovereign, death reveals the excess that seems to be as such inherent in supreme power, as if supreme power were, in the last analysis, nothing other than *the capacity to constitute oneself and others as life that may be killed but not sacrificed*.

With respect to the interpretation of Kantorowicz and Giesey, the doctrine of the king’s two bodies therefore appears in a different and less innocuous light. If this doctrine’s relation to pagan imperial consecration cannot be bracketed, the very meaning of the theory changes radically. The king’s political body (which, as Plowden says, “cannot be seen or touched” and which, “lacking childhood and old age and all the other defects to which the natural body is subject,” exalts the mortal body to which it is joined) is, in the last analysis, derived from the emperor’s colossus. Yet for this very reason, the king’s political body cannot simply represent (as Kantorowicz and Giesey held) the continuity of sovereign power. The king’s body must also and above all represent the very excess of the emperor’s sacred life, which is isolated

in the image and then, in the Roman ritual, carried to the heavens, or, in the French and English rite, passed on to the designated successor. However, once this is acknowledged, the metaphor of the political body appears no longer as the symbol of the perpetuity of *dignitas*, but rather as the cipher of the absolute and inhuman character of sovereignty. The formulas *le mort saisit le vif* and *le roi ne meurt jamais* must be understood in a much more literal way than is usually thought: at the moment of the sovereign's death, it is the sacred life grounding sovereign authority that invests the person of the sovereign's successor. The two formulas only signify sovereign power's continuity to the extent that they express, by means of the hidden tie to life that can be killed but not sacrificed, sovereign powers absoluteness.

For this reason, when Bodin, the most perceptive modern theorist of sovereignty, considers the maxim cited by Kantorowicz as an expression of the perpetuity of political power, he interprets it with reference to the absoluteness of political power: "This is why," he writes in the sixth book of *The Commonwealth*, "it is said in this kingdom that the king never dies. And this saying, which is an ancient proverb, well shows that the kingdom was never elective, and that it has its scepter not from the Pope, nor from the Archbishop of Rheims, nor from the people, but rather from God alone" (*La République*, p. 985).

5.7. If the symmetry we have tried to illustrate between the body of the sovereign and that of *homo sacer* is correct, then we ought to be able to find analogies and correspondences in the juridico-political status of these two apparently distant bodies. Material for a first and immediate comparison is offered by the sanction that the killing of the sovereign incurs. We know that the killing of *homo sacer* does not constitute homicide (*parricidi non damnatur*). Accordingly, there is no juridico-political order (even among those societies in which homicide is always punished with capital punishment) in which the killing of the sovereign is classified simply as an act of homicide. Instead it constitutes a special crime, which is defined (once the notion of *maiestas*, starting with Augustus, is associated more and more closely with the person of the emperor) as *crimen lesae maiestatis*. It does not matter, from our perspective, that the killing of *homo sacer* can be considered as less than homicide, and the killing of the sovereign as more than homicide; what is essential is that in neither case does the killing of a man constitute an offense of homicide. When we still read in King Charles Albert of Savoy's statute that "the person of the sovereign is sacred and inviolable," we must hear, in the adjectives invoked, an echo of the sacredness of *homo sacer's* life, which can be killed by anyone without committing homicide.

Yet the other defining characteristic of *homo sacer's* life, that is, his unsacrificeability according to the forms prescribed by the rite of the law, is also to be found in the person of the sovereign. Michael Walzer has observed that in the eyes of the people of the time, the enormity of the rupture marked by Louis XVI's decapitation on January 21, 1793, consisted not in the fact that a monarch was killed but in the fact that he was submitted to a trial and executed after having been condemned to capital punishment ("King's Trial," pp. 184-85). In modern constitutions, a trace of the unsacrificeability of the sovereign's life still survives in the principle according to which the head of state cannot be submitted to an ordinary legal trial. In the American Constitution, for example, impeachment requires a special session of the Senate presided over by the chief justice, which can be convened only for "high crimes and misdemeanors," and whose consequence can never be a legal sentence but only dismissal from office. When the Jacobins suggested, during the discussions of the 1792 convention, that the king be executed without trial, they merely brought the principle of the unsacrificeability of sacred life to the most extreme point of its development, remaining absolutely faithful (though most likely they did not realize it) to the *arcanum* according to which sacred life may be killed by anyone without committing homicide, but never submitted to sanctioned forms of execution.

§ 6 The Ban and the Wolf

6.1. “The entire character of *homo sacer* shows that it was not born on the soil of a constituted juridical order, but goes all the way back to the period of pre-social life. It is a fragment of the primitive life of Indo-European peoples. ... In the bandit and the outlaw (*wargus*, *vargr*, the wolf and, in the religious sense, the sacred wolf, *vargr y veum*), Germanic and Scandinavian antiquity give us a brother of *homo sacer* beyond the shadow of any doubt. . . . That which is considered to be an impossibility for Roman antiquity – the killing of the proscribed outside a judge and law – was an incontestable reality in Germanic antiquity” (Jhering, *L’esprit du droit romain*, p. 282).

Rodolphe Jhering was, with these words, the first to approximate the figure of *homo sacer* to that of the *wargus*, the wolf-man, and of the *Friedlos*, the “man without peace” of ancient Germanic law. He thus placed *sacratio* in the context of the doctrine of *Friedlosigkeit* that Wilhelm Eduard Wilda had elaborated toward the middle of the nineteenth century, according to which ancient Germanic law was founded on the concept of peace (*Fried*) and the corresponding exclusion from the community of the wrongdoer, who therefore became *friedlos*, without peace, and whom anyone was permitted to kill without committing homicide. The medieval ban also presents analogous traits: the bandit could be killed (*bannire idem est quod dicere quilibet possit eum offendere*, “‘To ban’ someone is to say that anyone may harm him” [Cavalca, *II banda*, p. 42]) or was even considered to be already dead (*exbannitus ad mortem de sua civitate debet haberi pro mortuo*, “Whoever is banned from his city on pain of death must be considered as dead” [ibid., p. 50]). Germanic and Anglo-Saxon sources underline the bandits liminal status by defining him as a wolf-man (*wargus*, *werwolf*, the Latin *garulphus*, from which the French *loup garou*, “werewolf,” is derived) : thus Salic law and Ripuarian law use the formula *wargus sit, hoc est expukus* in a sense that recalls the *sacer esto* that sanctioned the sacred man’s capacity to be killed, and the laws of Edward the Confessor (1030-35) define the bandit as a *wulfesheud* (a wolf’s head) and assimilate him to the werewolf (*lupinum enim gerit caput a die utlagationis suae, quod ab anglis wulfesheud vacatur*, “He bears a wolf’s head from the day of his expulsion, and the English call this *wulfesheud*”). What had to remain in the collective unconscious as a monstrous hybrid of human and animal, divided between the forest and the city – the werewolf – is, therefore, in its origin the figure of the man who has been banned from the city. That such a man is defined as a wolf-man and not simply as a wolf (the expression *caput lupinum* has the form of a juridical statute) is decisive here. The life of the bandit, like that of the sacred man, is not a piece of animal nature without any relation to law and the city. It is, rather, a threshold of indistinction and of passage between animal and man, *physis* and *nomos*, exclusion and inclusion: the life of the bandit is the life of the *loup garou*, the werewolf, who is precisely *neither man nor beast*, and who dwells paradoxically within both while belonging to neither.

6.2. Only in this light does the Hobbesian mythologeme of the state of nature acquire its true sense. We have seen that the state of nature is not a real epoch chronologically prior to the foundation of the City but a principle internal to the City, which appears at the moment the City is considered *tanquam dissoluta*, “as if it were dissolved” (in this sense, therefore, the state of nature is something like a state of exception). Accordingly, when Hobbes founds sovereignty by means of a reference to the state in which “man is a wolf to men,” *homo hominis lupus*, in the word “wolf” (*lupus*) we ought to hear an echo of the

wargus and the *caput lupinem* of the laws of Edward the Confessor: at issue is not simply *fera bestia* and natural life but rather a zone of indistinction between the human and the animal, a werewolf, a man who is transformed into a wolf and a wolf who is transformed into a man – in other words, a bandit, a *homo sacer*. Far from being a prejuridical condition that is indifferent to the law of the city, the Hobbesian state of nature is the exception and the threshold that constitutes and dwells within it. It is not so much a war of all against all as, more precisely, a condition in which everyone is bare life and a *homo sacer* for everyone else, and in which everyone is thus *wargus, gerit caput lupinum*. And this lupinization of man and humanization of the wolf is at every moment possible in the *dissolutio civitatis* inaugurated by the state of exception. This threshold alone, which is neither simple natural life nor social life but rather bare life or sacred life, is the always present and always operative presupposition of sovereignty.

Contrary to our modern habit of representing the political realm in terms of citizens' rights, free will, and social contracts, from the point of view of sovereignty *only bare life is authentically political*. This is why in Hobbes, the foundation of sovereign power is to be sought not in the subjects' free renunciation of their natural right but in the sovereigns preservation of his natural right to do anything to anyone, which now appears as the right to punish. "This is the foundation," Hobbes states, "of that right of Punishing, which is exercised in every Commonwealth. For the Subjects did not give the Sovereign that right; but only in laying down theirs, strength-ned him to use his own, as he should think fit, for the preservation of them all: so that it was not *given*, but *left* to him, and to him onely; and (excepting the limits set him by naturall Law) as entire, as in the condition of meer Nature, and of warre of every one against his neighbour" (*Leviathan*, p. 214, emphasis added).

Corresponding to this particular status of the "right of Punishing," which takes the form of a survival of the state of nature at the very heart of the state, is the subjects' capacity not to disobey but to resist violence exercised on their own person, "for ... no man is supposed bound, by Covenant, not to resist violence; and consequently it cannot be intended, that he gave any right to another to lay violent hands upon his person" (*ibid.*). Sovereign violence is in truth founded not on a pact but on the exclusive inclusion of bare life in the state. And just as sovereign power's first and immediate referent is, in this sense, the life that may be killed but not sacrificed, and that has its paradigm in *homo sacer*, so in the person of the sovereign, the werewolf, the wolf-man of man, dwells permanently in the city.

✧ In *Bisclavret*, one of Marie de Frances most beautiful lays, both the werewolf's particular nature as the threshold of passage between nature and politics, animal world and human world, and the werewolf's close tie to sovereign power are presented with extraordinary vividness. The lay tells of a baron who is particularly close to his king (*de sun seinur esteit privez* [v. 19]), but who, every week, after hiding his clothes under a stone, is transformed into a werewolf (*bisclavret*) for three days, during which time he lives in the woods stealing and preying on other creatures (*al plus espès de la gaudinels'i vif de prête e de ravine*). His wife, who suspects something, induces him to confess his secret life and convinces him to reveal where he hides his clothes, even though he knows that he would remain a wolf forever if he lost them or were caught putting them on (*kar si jes eusse perduz le de ceo j'eusse aparceuz / bisclavret serei a tuz jours*), "With the help of an accomplice who will become her lover, the woman takes the clothes from their hiding place, and the baron remains a wolf forever.

What is essential here is the detail, to which Pliny's legend of Antus also bears witness (*Natural History*, bk. 8), of the temporary character of the metamorphosis, which is tied to the possibility of setting aside and secretly putting on human clothes again. The transformation into a werewolf corresponds perfectly to the state of exception, during which (necessarily limited) time the city is dissolved and men enter into a zone in which they are no longer distinct from beasts. The story also shows the necessity of particular formalities marking the entry into – or the exit from – the zone of indistinction between the animal and the human (which corresponds to the clear proclamation of the state of exception as formally distinct from the rule). Contemporary folklore also bears witness to this necessity, in the three knocks on the door that the werewolf who is becoming human again must make in order to be let into the house:

When they knock on the door the first time, the wife must not answer. If she did, she would see her husband still entirely as a wolf, and he would eat her and then run away into the forest forever. When they knock on the door the second time, the woman must still not answer: she would see him with a man's body and a wolf's head. Only when they knock on the door the third time can the door be opened: for only then are they completely transformed, only then

has the wolf completely disappeared and has the man of before reappeared. (Levi, *Crista si è fermato a Eboli*, pp. 104-5)

The special proximity of werewolf and sovereign too is ultimately shown in the story One day (so the lay tells), the king goes hunting in the forest in which Bisclavret lives, and the dogs find the wolf-man as soon as they are let loose. But as soon as Bisclavret sees the sovereign, he runs toward him and grabs hold of his stirrup, licking his legs and his feet as if he were imploring the king's mercy. Amazed at the beast's humanity ("this animal has wits and intelligence / . . . I will give my peace to the beast / and for today I will hunt no more"), the king brings him to live with him, and they become inseparable. The inevitable encounter with the ex-wife and the punishment of the woman follow. What is important, however, is that Bisclavret's final transformation back into a human takes place on the very bed of the sovereign.

The proximity of tyrant and wolf-man is also shown in Plato's *Republic*, in which the transformation of the guardian into a tyrant is approximated to the Arcadian myth of Lycean Zeus:

What, then, is the cause of the transformation of a protector into a tyrant? Is it not obviously when the protector's acts begin to reproduce the myth that is told of the shrine of Lycean Zeus in Arcadia? . . . The story goes that whoever tastes of one bit of human entrails minced up with those of other victims is inevitably transformed into a wolf. . . . Thus, when a leader of the mob [*demos*], seeing the multitude devoted to his orders, does not know how to abstain from the blood of his tribe . . . , will it not then be necessary that he either be killed by his enemies or become a tyrant and be transformed from a man into a wolf? (*Republic*, 565d-e)

6.3. The time has come, therefore, to reread from the beginning the myth of the foundation of the modern city from Hobbes to Rousseau. The state of nature is, in truth, a state of exception, in which the city appears for an instant (which is at the same time a chronological interval and a nontemporal moment) *tanquam dissoluta*. The foundation is thus not an event achieved once and for all but is continually operative in the civil state in the form of the sovereign decision. What is more, the latter refers *immediately* to the life (and not the free will) of the citizens, which thus appears as the originary political element, the *Urphänomen* of politics. Yet this life is not simply natural reproductive life, the *zoē* of the Greeks, nor *bios*, a qualified form of life. It is, rather, the bare life of *homo sacer* and the *wargus*, a zone of indistinction and continuous transition between man and beast, nature and culture.

This is why the thesis stated at the logico-formal level at the end of the first part above, according to which the originary juridico-political relation is the ban, not only is a thesis concerning the formal structure of sovereignty but also has a substantial character, since what the ban holds together is precisely bare life and sovereign power. All representations of the originary political act as a contract or convention marking the passage from nature to the State in a discrete and definite way must be left wholly behind. Here there is, instead, a much more complicated zone of indiscern-ability between *nomos* and *physis*, in which the State tie, having the form of a ban, is always already also non-State and pseudo-nature, and in which nature always already appears as *nomos* and the state of exception. The understanding of the Hobbesian mythologeme in terms of *contract* instead of *ban* condemned democracy to impotence every time it had to confront the problem of sovereign power and has also rendered modern democracy constitutionally incapable of truly thinking a politics freed from the form of the State.

The relation of abandonment is so ambiguous that nothing could be harder than breaking from it. The ban is essentially the power of delivering something over to itself, which is to say, the power of maintaining itself in relation to something presupposed as nonrelational. What has been banned is delivered over to its own separateness and, at the same time, consigned to the mercy of the one who abandons it – at once excluded and included, removed and at the same time captured. The age-old discussion in juridical historiography between those who conceive exile to be a punishment and those who instead understand it to be a right and a refuge (already at the end of the republic, Cicero thought exile in opposition to punishment: *Exilium enim non supplicium est, sed perjugium portusque suppliai*, "Exile is not a penalty, but a haven and a refuge from penalty" [*Pro Caec*, 34]) has its root in this ambiguity of the sovereign ban. Both for Greece and for Rome, the oldest sources show that more ancient than the opposition between law and punishment is the status – which "cannot be qualified either as the exercise of a law or as a penal situation" (Crifo, *L'esclusione dall città*, p. 11) – of the person who goes into exile as a

consequence of committing homicide, or who loses his citizenship as a result of becoming a citizen of a *civitas foederata* that benefits from an *ius exilii*.

The originary political relation is marked by this zone of indistinction in which the life of the exile or the *aqua et igni interdictus* borders on the life of *homo sacer*, who may be killed but not sacrificed. This relation is more original than the Schmittian opposition between friend and enemy, fellow citizen and foreigner. The “estrarity” of the person held in the sovereign ban is more intimate and primary than the extraneousness of the foreigner (if it is possible to develop in this way the opposition established by Festus between *extrarius*, which is to say, *qui extra focum sacramentum iusque sit* [“whoever is outside the hearth, the sacrament, and the law”], and *extraneus*, which is to say, *ex altera terra, quasi exterraneus* [“whoever is from another land and almost extraneous”]).

Now it is possible to understand the semantic ambiguity that we have already noted, in which “banned” in Romance languages originally meant both “at the mercy of” and “out of free will, freely,” both “excluded, banned” and “open to all, free.” The ban is the force of simultaneous attraction and repulsion that ties together the two poles of the sovereign exception: bare life and power, *homo sacer* and the sovereign. Because of this alone can the ban signify both the insignia of sovereignty (*Bandum, quod postea appellatus fuit Standardum, Guntfanonum, italke Confalone* [Muratori, *Antiq-uitates*, p. 442]) and expulsion from the community.

We must learn to recognize this structure of the ban in the political relations and public spaces in which we still live. *In the city, the banishment of sacred life is more internal than every interiority and more external than every extraneousness.* The banishment of sacred life is the sovereign *nomos* that conditions every rule, the originary spatialization that governs and makes possible every localization and every territorialization. And if in modernity life is more and more clearly placed at the center of State politics (which now becomes, in Foucault’s terms, biopolitics), if in our age all citizens can be said, in a specific but extremely real sense, to appear virtually as *homines sacri*, this is possible only because the relation of ban has constituted the essential structure of sovereign power from the beginning.

§ Threshold

If the originally political element is sacred life, it becomes understandable how Bataille could have sought the fulfilled figure of sovereignty in life experienced in the extreme dimension of death, eroticism, excess, and the sacred, and yet also how Bataille could have failed to consider the link that binds that life to sovereign power. “The sovereignty of which I speak,” he writes in the book bearing that name, which was conceived as the third section of *The Accursed Share*, “has little to do with that of states” (*La souveraineté*, p. 247). What Bataille is attempting to think here is clearly the very bare life (or sacred life) that, in the relation of ban, constitutes the immediate referent of sovereignty. And to have proposed the radical experience of this bare life is precisely what, despite everything, tenders Bataille’s effort exemplary. Unwittingly following the movement by which life as such comes to be what is at stake in modern political struggles, Bataille attempted to propose the very same bare life as a sovereign figure. And yet instead of recognizing bare life’s eminently political (or rather biopolitical) nature, he inscribes the experience of this life both in the sphere of the sacred – which he understands, according to the dominant themes of the anthropology of his day taken up by Callois, as originally ambivalent: pure and filthy, repugnant and fascinating – and in the interiority of the subject, to which the experience of this life is always given in privileged or miraculous moments. In the case of both ritual sacrifice and individual excess, sovereign life is defined for Bataille through the instantaneous transgression of the prohibition on killing.

In this way, Bataille immediately exchanges the political body of the sacred man, which can be killed but not sacrificed and which is inscribed in the logic of exception, for the prestige of the sacrificial body, which is defined instead by the logic of transgression. If Bataille’s merit is to have brought to light the hidden link between bare life and sovereignty, albeit unknowingly, in his thought life still remains entirely bewitched in the ambiguous circle of the sacred. Bataille’s work could offer only a real or farcical repetition of the sovereign ban, and it is understandable that Benjamin (according to Pierre Klossowski’s account) stigmatized the Acéphale group’s research with the peremptory phrase “You are working for fascism.”

Not that Bataille does not discern that sacrifice is insufficient and that it is, in the last analysis, a “comedy.” (“In sacrifice, the one being sacrificed identifies with the animal struck with death. Thus he dies watching himself die, and even by his own will, at peace with the weapon of sacrifice. But this is a comedy!” [“Hegel,” p. 336].) Yet what Bataille is unable to master is precisely (as is shown by his interest in the pictures of the young Chinese torture victim, which he discusses in *The Tears of Eros*) the bare life of *homo sacer*, which the conceptual apparatus of sacrifice and eroticism cannot grasp.

It is Jean-Luc Nancy’s achievement to have shown the ambiguity of Bataille’s theory of sacrifice, and to have strongly affirmed the concept of an “unsacrificeable existence” against every sacrificial temptation. Yet if our analysis of *homo sacer* is correct, and the Bataillan definition of sovereignty with reference to transgression is inadequate with respect to the life in the sovereign ban that may be killed, then the concept of the “unsacrificeable” too must be seen as insufficient to grasp the violence at issue in modern biopolitics. *Homo sacer* is unsacrificeable, yet he may nevertheless be killed by anyone. The dimension of bare life that constitutes the immediate referent of sovereign violence is more original than the opposition of the sacrificeable and the unsacrificeable, and gestures toward an idea of sacredness that is no longer absolutely definable through the conceptual pair (which is perfectly clear in societies familiar with sacrifice) of fitness for sacrifice and immolation according to ritual forms. In modernity, the principle of

the sacredness of life is thus completely emancipated, from sacrificial ideology, and in our culture the meaning of the term “sacred” continues the semantic history of *homo sacer* and not that of sacrifice (and this is why the demystifications of sacrificial ideology so common today remain insufficient, even though they are correct). What confronts us today is a life that as such is exposed to a violence without precedent precisely in the most profane and banal ways. Our age is the one in which a holiday weekend produces more victims on Europe’s highways than a war campaign, but to speak of a “sacredness of the highway railing” is obviously only an antiphrastic definition (La Cecla, *Mente locale*, p. 115).

The wish to lend a sacrificial aura to the extermination of the Jews by means of the term “Holocaust” was, from this perspective, an irresponsible historiographical blindness. The Jew living under Nazism is the privileged negative referent of the new biopolitical sovereignty and is, as such, a flagrant case of a *homo sacer* in the sense of a life that may be killed but not sacrificed. His killing therefore constitutes, as we will see, neither capital punishment nor a sacrifice, but simply the actualization of a mere “capacity to be killed” inherent in the condition of the Jew as such. The truth – which is difficult for the victims to face, but which we must have the courage not to cover with sacrificial veils – is that the Jews were exterminated not in a mad and giant holocaust but exactly as Hitler had announced, “as lice,” which is to say, as bare life. The dimension in which the extermination took place is neither religion nor law, but biopolitics.

If it is true that the figure proposed by our age is that of an unsacrificeable life that has nevertheless become capable of being killed to an unprecedented degree, then the bare life of *homo sacer* concerns us in a special way. Sacredness is a line of flight still present in contemporary politics, a line that is as such moving into zones increasingly vast and dark, to the point of ultimately coinciding with the biological life itself of citizens. If today there is no longer any one clear figure of the sacred man, it is perhaps because we are all virtually *homines sacri*.