

Chronic Disorders of Consciousness and *Homo Sacer*

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Introduction

The purpose of this chapter is to develop a biopolitical response to certain ethical questions posed by chronic disorders of consciousness (CDoC). This response will draw on Giorgio Agamben's account of *homo sacer* (Agamben 1998). '*Homo sacer*' is a somewhat obscure term, found in Roman law, designating someone who has been expelled from the protection of the law. By addressing Agamben's own analysis of the 'overcoma' and the case of Karen Quinlan, it will be argued that a distinctive normative status can be ascribed to the CDoC patient: the CDoC patient exemplifies the condition of *homo sacer*, and as such of what Agamben calls 'bare life'. This argument poses a radical challenge to traditional approaches to bioethics and law. Precisely because *homo sacer* is placed outside the law, traditional legal or moral conceptions of rights are rendered inapplicable. However, it will also be argued that the Catholic tradition (defending the sanctity of life) or more utilitarian traditions (articulated in terms of quality of life) are rendered equally irrelevant. It will be concluded that the CDoC patient has moral status as a radical experience of bare life – and thus of what it is to be human – albeit one that cannot be expressed or articulated by the patient. The biopolitical challenge posed by CDoC thereby becomes that of facilitating the creative and poetic role of

those who bear witness to the patient's experience. The biopolitics of CDoC thereby rests in the articulation for the patient of a radically different ethical status.

The chapter will proceed by firstly offering an overview of the group of conditions classified as chronic disorders of consciousness, before outlining Agamben's biopolitics, his key terms, *zoē*, *bios* and 'bare life', and thereby explicating the idea of *homo sacer*. A series of Agamben's examples of *homo sacer* will be rehearsed, including that of the 'over-comatose' patient. This will provide the core material necessary for articulating a biopolitics of CDoC, and in particular to explicate the relationship between the patient and their 'witness'.

Chronic Disorders of Consciousness

The term 'chronic disorder of consciousness' embraces a number of conditions within which the patient's self-awareness is limited or absent. The permanent/persistent vegetative state (PVS) (Monti, Laureys & Owen, 2010), or unresponsive wakefulness syndrome (Laureys et al, 2010), is the most discussed example of a CDoC in the bioethics literature. This has been defined as 'wakefulness without awareness' (Jennett and Plum, 1972) or more subtly as 'a complex neurological condition in which patients appear to be awake but show no sign of awareness of themselves or their environment' (Monti, Laureys & Owen, 2010). Despite a lack of responsive to the environment, the patient's body functions, so that they do not need artificial support such as a respirator, and the will body will follow a cycle of sleeping and waking. The minimally conscious state (MCS) (Gosseries et. a., 2011), in which the patient is capable of brief periods of awareness, is also included in CDoC, as may conditions such as locked-in syndrome (where the patient is aware, but is unable to express that awareness) and chronic comas.

The moral problem of CDoC may be understood as lying in the challenge of articulating the nature of the condition. It appears to violate the usual categorical distinctions through which sense is ordinarily made of everyday experience. The patient in PVS is neither alive nor dead; the patient in MCS is neither conscious nor unconscious; neither an agent nor a passive object. The very identity of the person before and after the trauma that initiated the CDoC may be in doubt. The CDoC patient seemingly lacks memory of themselves prior to the trauma, and it is unclear how the intentions and preferences of that earlier person relate to or should be enacted on behalf of the patient.

The definition of condition may, further, be dependent upon the development of appropriate diagnostic techniques, be these behavioural measures (such as the Glasgow Coma Scale or more recent Coma Recovery Scale (Kalmar & Giacino, 2005)) or more technically complex approaches such as brain imaging (including electroencephalography). Medical diagnosis may thus shift as different techniques are employed. But even if stable, diagnoses may not easily map on to the condition as it is experienced by relatives and lay observers of the patient (see Edgar et. al. 2014). CDoC thereby becomes profoundly ambiguous, and the core concepts of traditional moral theory, such as 'autonomy', 'rights', 'dignity' and 'quality of life' cease to have an obvious or straightforward purchase.

Homo Sacer

Agamben finds the concept of '*homo sacer*' in the work of a second century Roman grammarian, Sextus Pompeius Festus. Here an archaic Roman law is recalled, according to which the judgement of a criminal to be '*homo sacer*' (a sacred man) entails that: 'It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide' (Agamben 1998, p. 71). *Homo sacer* may be killed, but not sacrificed (1998, p. 8]. This is to assert that this human's life has no meaning, either within the judicial order (for their killing would not amount to murder), nor in terms of any other cultural dimension. The death of this human cannot acquire the meaning or status of a sacrifice, be it a sacrifice to the gods or a sacrifice for any other cause, such as, say, the preservation of the state. The human is thereby reduced to what Agamben calls 'bare life'.

Upon first encountering this example, it seems to be little more than a historical curiosity. Agamben does find similar legal conceptions in other jurisdictions, such as the Anglo-Saxon notion of the bandit or 'wolf's head' (*wulfeshead*). The bandit (epitomised by the legends of Robin Hood) stands outside the law, and significantly the very term 'wolf's head' is indicative of the expulsion of the human into an animal state (Agamben 1998, pp. 104-5). Yet Agamben's claim is not simply that the form of *homo sacer* may be found elsewhere. His argument is the more radical one that *homo sacer* is exemplary of the very structure of Western politics, and thus of biopolitics.

Agamben's account of biopolitics draws upon, but significantly develops the work of Michel Foucault. Foucault presents biopower as a product of modernity. The exercise of sovereignty prior to the modern age is an exercise of power controlling 'legal subjects over

whom the ultimate dominion was death' (1978, p. 142). Due to the restricted development of technology, with its limited control over natural resources and dangers, death confronted the pre-modern subject as a continual threat. The core power that the state has over the citizen is that of depriving them of life. In contrast, as the forces of production develop in modernity, biopower can be realised as the control and promotion of life (and not the mere imposition of death). As Foucault expresses this, biopower is exercised at the level of the body, and on life itself. The life of the individual body, or the body of the species, is brought into 'the realm of explicit calculations' (1978, p 143). Exercised in order to promote economic productivity within capitalism, biopower adjusts the human subject to capital, inserting bodies into the machinery of production and adjusting populations to economic processes (1978, p. 141). Foucault summarises the historical break so:

For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question. (1978 p. 143).

Agamben challenges Foucault's account by arguing that biopower is not unique to modernity. There is no historical rupture between pre-modern and modern power. Rather it is only in modernity that it becomes clear that biopower is fundamental to sovereignty. For Agamben: 'It can even be said that the production of a biopolitical body is the original activity of sovereign power' (1998 p. 6).

While Foucault has a unified and singular conception of 'life', as the subject of biopower, Agamben appeals to the ancient Greek distinction between *zoē* and *bios*. *Zoē* 'expressed the simple fact of living common to all living beings' (and hence the modern 'zoology'). In contrast, *bios* 'indicated the form or way of living proper to an individual or a group' (1998, p. 1). While on this initial account *bios* suggests a normative conception of the good life, more generally it is suggesting a life that is qualified or given meaning through participation in culture and politics. Hence, the most obvious English term grounded in *bios*, in this specific sense, is not 'biology' (which continues to appeal to common living), but rather 'biography'. A biographical life is one that has meaning and form, and thus is necessarily lived within a culture.¹

The relationship of *zoē* and *bios* is further clarified, following Aristotle (in the *Politics* 1253a 10-18), as a distinction between 'voice' and 'language' (Agamben 1998, pp. 7-8). Animals have a voice, but this is merely the capacity to express pain and pleasure. It is only

through language that the human being can articulate an understanding of the difference between justice and injustice. For Agamben, to have a language presupposes living within the *polis* (and thus within a human culture). The distinction between *zoē* and *bios* thereby allows Agamben to offer a subtle reinterpretation of Foucault's own appeal to Aristotle's definition of the human noted above: 'a living animal with the additional capacity for a political existence'. For Agamben, this 'additional capacity' is the 'exclusive inclusion' of *zoē* within the *polis* (1998, p. 7). It is precisely this paradoxical 'exclusive inclusion' that is fundamental to understanding Agamben's conception of biopolitics, and to his argument that biopolitics has, historically, underpinned all forms of Western state power.

By using to the formulation 'exclusive inclusion', Agamben is arguing that *zoē* is not simply included in politics, as the raw material that is shaped by biopolitical techniques. Language is not merely added on to the voice of the animal. Rather, the identity of the political body also rests upon a simultaneous exclusion of *zoē*. It marks a moment of violence that underpins the law. Here Agamben complements his account of Foucault through an appeal to the work of the Nazi jurist and political philosopher Carl Schmitt. Two elements of Schmitt's work are in play in Agamben's argument. Firstly, Schmitt argues that the distinction between friend and enemy lies at the centre of all political thought and action (2007). Schmitt's point is that a community acquires an identity and self-understanding of who it is only by recognising an enemy who it is not. The task of the state is that of ensuring the existence of an enemy. Crucially, the election of another as an enemy need have no grounding other than the will of the sovereign. The categorisation of someone as 'enemy' is an act of arbitrary violence.

The role of the other in securing one's identity parallels Foucault's accounts of madness and criminality. The rational and enlightened subject knows who and what they are precisely in their contrast to those who they are not. Thus, while retaining the form of Foucault's and Schmitt's argument, that identity is secured by focusing upon that which it is not, Agamben argues that Schmitt's friend/enemy distinction is not the fundamental one. It is, rather, the distinction between *zoē* and *bios* that is fundamental. *Bios* has identity precisely because it is not the form of *zoē* that is excluded from the political body. The insane and the criminal are thus potentially returned to *zoē* (or more precisely, what Agamben terms 'bare life').

Schmitt's second contribution to this analysis lies in his definition of the sovereign, as the one who decides upon the state of exception (Schmitt 2005; Agamben 1998, p. 11). This is to argue that sovereign power lies, not merely in the capacity to formulate law, but more

fundamentally to suspend the rule of law, be this for society as a whole (as for example in the imposition of a state of emergency) or in the withdrawal of the protection of the law from an individual or group. For Foucault, the exercise of sovereignty is pre-modern, and thus prior to biopolitics. Agamben challenges this on two fronts. Firstly, he argues that liberal government, despite its self-understanding as being rationally grounded, and indeed as having given *zoē* its true and just form as *bios*, is underpinned by the violence of sovereignty. The rule of law is fragile, and can be suspended at any moment (see 1998 p. 9).ⁱⁱ Secondly, Agamben reinterprets the Schmittean notion of sovereignty in biopolitical terms. Sovereignty is the capacity to strip the status of *bios* from the political subject, and thus to return them to a condition of *zoē*. Agamben's contention is that the declaration of the state of exception is an act of excluding *zoē* from the *polis*, and is thus fundamentally biopolitical.

It is here that the significance of *homo sacer* as expressive of the fundamental structure of biopolitics may be understood. *Homo sacer* is the result of the exclusive inclusion. As such it has been abandoned by the state. The notion of 'abandonment' (and the 'ban') is crucial. *Homo sacer* is a subject who, prior to judgement, was included in the state, and thus was under the rule of law, as *bios* and as a possessor of language. Judgement upon them amounts to a decision, on the part of the sovereign, that the criminal is now an exception to usual legal processes. Their being excluded from the state's protection does not, however, entail simply that the rule of the law is removed from them. The very act of exclusion continues to include them within the law, for the category of '*homo sacer*' is itself a legal construct and an act of the sovereign. More precisely, *homo sacer* is not simply returned to a pre-political state of *zoē*. Rather, in being stripped of political status they are condemned to the (political) condition of 'bare life'. This term, 'bare life', is adopted from Walter Benjamin's essay 'The Critique of Violence' (1996), where it articulates the result of the sovereign violence that is seen to be fundamental to the exercise of the law (Agamben 1998, p. 65). In being judged, the language of *homo sacer* is no longer heard, and all biographical significance is being stripped from them, so that neither their life nor death can have meaning.

Overcoma

In his exploration of the fundamental biopolitical structure of *homo sacer*, Agamben offers a series of examples or vignettes. The most relevant to the chronic disorder of consciousness is that of the 'overcoma' or *coma dépassé* (1998, pp. 160f). What Agamben terms the classic

coma 'is characterised by the loss of relational functions (consciousness, mobility, sensibility, reflexes)'. The overcoma, as defined by the French neurophysiologists Mollaret and Goulon, entails a 'total abolition of relational life functions correspond[ing] to an equally total abolition of vegetative life functions' (1998, p. 160). The continuing survival of the patient in an overcoma is therefore dependent upon the functioning of life support technology (maintaining respiration, and the functioning of vital organs). The overcoma patient is 'anatomy in motion', or even 'death in motion', for it amounts to a mere illustration of the physiological functioning of the body, no longer directed to the purpose of sustaining the patient's life (1998 p. 186).

Considered as a purely natural process, which is to say as the result of disease or injury, the coma patient has been turned back to *zoē*. They have been stripped of language, and if incapable of responding to stimuli from their environment, then they have lost voice as well. Yet Agamben's interest in the overcoma lies specifically in its construction as a political and cultural phenomenon. The 'overcoma' is a technological and legal category. The overcoma exists not because of natural processes, but because of advancements in medical technology that make this condition, that is neither life nor death, possible. Crucially this entails that the status of the patient, as either living subject or as corpse (and thus as to whether they possess the right to further life-support), is a legal issue. Agamben seemingly delights in the defence offered by a man accused of murder. The victim does not die immediately, but falls into an overcoma after the assault. The victim dies only when doctors remove his life-support. The (unsuccessful) legal defence is that the assailant is innocent of murder, for it is the doctors who killed the victim (1998, p. 163).

The political position of the overcoma is further complicated by the development of organ transplant technology (and indeed in the above case, life-support is removed from the patient only after the heart is removed for transplantation). The overcoma patient is potentially an ideal organ donor, except for the fact that they are not, unproblematically, dead. This tension leads to the articulation of new definitions of death in the notion of 'brain death' (being the death of the entire brain) (1998, p. 162). Agamben finds this definition to be contradictory. While the diagnosis of brain death (which itself is dependent upon the development of appropriate diagnostic technology) comes to supersede the traditional criteria (the stopping of heartbeat and the cessation of breathing) that characterised systematic or somatic death, it is still defended on the grounds that 'most studies... demonstrated the inevitability of somatic death following brain death' (Agamben 1998, p. 163, citing Lamb

1988, p. 63). The concept of brain death is thus not free-standing. Brain death is death only because systematic death will occur shortly after the removal of life-support. Brain death exists only in terms of a pragmatic definition that facilitates the legal harvesting of transplantable organs. The biopolitics of technology and law thus combine to exclude the overcoma patient from the legal protection enjoyed by the living. The overcoma patient becomes not *zoē* (which is to say, the result of a purely natural process) but bare life (the product of politics).

It may be noted that the example of overcoma can be read as a further comment upon Foucault's historical distinction between sovereignty and biopolitics. For Foucault it is the sovereign whose ultimate sanction is that of killing their subject, while biopower is exercised to sustain life. In the case of the overcoma, biopower is indeed exercised to sustain the life of the organ recipient, but only by killing the donor. As *homo sacer*, the overcoma patient can be killed, but not murdered.

The case of Karen Quinlan further complicates this analysis. Quinlan as diagnosed as being in an overcoma, when legal permission to remove life support was granted at the request of her parents. Here the court adjudged Quinlan to be already dead. After the removal of life-support, she continued to breathe, and was thus recognised as being in a permanent vegetative state (PVS) (1998, pp. 163-4). Agamben does not explicitly refer to PVS, or indeed to CDoC. His interest in Quinlan's case is merely that it offers an extreme example of a body that has entered 'a zone of indetermination in which the words "life" and "death" have lost their meaning (1998, p 164). What is significant here is that the CDoC patient cannot have life-support technology removed from them in order to facilitate organ transplantation. Their (systematic) death can only be brought about prematurely by denying them hydration and nutrition, and so allowing them to die, or by actively killing them. Their constitution as a biopolitical subject by medical technology (be this life-support or transplant technology) is thus of a different order to that of the overcoma patient. The involvement of only minimal technological intervention in sustaining their life serves to highlight the role of the law in the constitution of the CDoC patient.

To understand either the overcomatose or the CDoC patient as *homo sacer* is to argue that they can be killed but not sacrificed. As Agamben expresses this, if the patient is not alive (given the legal constructions suggested above) then they cannot be murdered (as the failure of the above murder's defence demonstrated, for the doctor's who removed life-support

form the victim were not prosecuted for murder), and nor can they be sacrificed, for being already dead, there is no living being to sacrifice (1998, p. 165).

Orthodox bioethical approaches to the issue of CDoC may be articulated in terms of two broadly conceived strategies that challenge the implications of understanding the patient as *homo sacer*. On the one hand, it may be argued that the patient is unambiguously a living being – *bios* and not mere *zoē* – and as such either has the rights and legal protection of any other citizen, or that, as living, their life is sacred. Deontological and sanctity of life arguments may be marshalled in order to defend the patient, to conclude that the killing of the patient is, indeed, murder. On the other hand, it may be argued that the patient can be sacrificed. A quality of life argument can be formulated to the effect that the patient's body and life are no longer of any use to them (for lacking consciousness, they can have no quality of life). Their body (or at least its organs) can be of use to others, and will contribute to raising the organ recipient's quality of life. According to this argument the patient can be killed, but crucially their death can be given meaning, for their life is being sacrificed to the cause of another's medical treatment. Agamben himself does not explore these arguments, beyond noting the tension between positions defending the patient as alive and as dead (1998, p. 164). However, his analysis of *homo sacer* begins to highlight the fundamental inadequacy of these traditional bioethical approaches.

The antimony of deontology and consequentialist ethics, whereby seemingly valid arguments can be given both in favour of and against supporting the life of the patient, can be understood as a result of biopolitics. This is to argue that bioethics reproduces the structure of sovereign violence. It was noted above that Agamben criticises liberalism for assuming that it has secured the just *bios* for *zoē*. The liberal state is the normatively appropriate form of human life. Thus, liberal conceptions such as human rights and the rule of law are assumed to be rationally defensible as normative absolutes. For Agamben this assumption denies the sovereign violence (expressed, by Schmitt, both in the capacity to suspend the rule of law, and in the arbitrary designation of an enemy). Crucially law, as a political structure underpinned by sovereignty, is understood by Agamben, following Schmitt, as a purely positive structure, which is to say a structure without normative or moral content. Legal categories do not identify an entity that exists prior to and outside the law, and nor does the legal judgement express a moral truth. Rather they constitute, in an act of accusation, an entity within the law (see Agamben 2008). In a bioethics that is homologous with legal thinking, such as traditional deontology and consequentialism, antimonies occur because each side of the

antimony is grounded in a different and opposite, but equally arbitrary, categorisation of the legal subject (in this case, the CDoC patient). The failure of traditional ethics to respond coherently to CDoC is thus expressive of the biopolitical nature of legal and ethical thinking.

While this analysis may identify a problem in the bioethics of CDoC, it does little to resolve it. In practice, Agamben's own ethics remain tentative and critical, for while they are articulated in terms of the Aristotelian question of the good life, they appeal to a 'coming community', and a Messianic suspension of the law (and not, for example, to the ethics of contemporary or actual communities as might be found in communitarian approaches) (see Agamben 1993a). Yet the text of *Homo Sacer* does nonetheless offer further resources for understanding CDoC, and for articulating the ethical challenged that the conditions pose.

The *Muselmann*

Two further vignettes of *homo sacer* will be briefly reviewed as having relevance to understanding CDoC. These are a detail of ancient Roman law, *vitae necisque potestas*, where a father had power of life or death over a son; and the *Muselmann*, the most extreme victim of the death camp.

Under the law of *vitae necisque potestas* the Roman citizen had an absolute power of life and death over his sons, and absolute in the sense that this is neither the responsibility of the father to punish the son's criminality, nor yet a product of the structure of the patriarchal family (Agamben 1998, p. 87). Rather, the Roman citizen, as a son, enters political life as someone who can be killed. That is to say, they enter politics not as natural life (*zoē*) but rather as bare life, someone who has at once been defined legally, but thereby excluded from legal protection. As such, every citizen is at least initially *homo sacer* (1998, p 88).

Such an example may initially seem to have little to do with CDoC patients. Yet, as the example of Quinlan indicated, the survival of the patient may be dependent upon the decision of their relatives and carers. This may be articulated in terms of the deep and tragic problem of how relatives and carers can come to understand, with any assurance, what is the just way in which to treat the patient. The focus of the problem lies in the fact that the CDoC patient has typically lost language. While a patient in a state of minimal consciousness may have moments of lucidity, and thus language use, this will be rare or absent in the case of PVS patients. At best, the patient will have a voice, in the sense used above, in so far as they can express pain and pleasure in response to stimuli. The interpretation of this voice, and its

translation into language, becomes a challenge to which relatives and carers respond (see Edgar et. al., 2014). This interpretation may be expressed in attempts to discover a language for the patient by finding in the patient's movements and gestures an expression of, not merely their pain or pleasure, but rather their sense of justice concerning the condition they are in. Here the relative and carer must struggle with metaphysical issues of personal identity, as the intentions and preferences of the person prior to the trauma that delivered them into a CDoC are reconstructed and mapped, often awkwardly and with difficulty, onto the voice, the movements and gestures, of the patient.ⁱⁱⁱ The relative is left with questions as to whether the patient, as they are now, would want earlier intentions (expressed perhaps in a living will) to be put into action, and thus whether the patient now has any significant continuity with the pre-traumatic person. Also the patient acquires a proxy language through the relatives' and carers' continuing interaction with them, by talking to them, responding to and observing them, taking them out into the public world beyond the hospital ward, and thus by presenting them, through the care taken in arranging their clothing, hair or make-up, as prepared for social interaction.

The carers and relatives thus construct and maintain what may guardedly be described as an 'illusion' of a *bios* for the patient.^{iv} They struggle to sustain meaning for the patient, as a continuing member of a family and wider community, in the face of bare life. Yet crucially the patient ultimately has no language in order to participate in decisions about their care, or indeed their continued existence. The patient is unable to protest the justice or injustice of their own condition, to deny or affirm the interpretations that are imposed upon them. Thus the decision as to their continued existence falls upon those who can use language, the relatives and carers. If the carers' understanding of the patient's voice is inadequate, or is a projection of their own quite understandable desires and frustrations, then the *bios* that the carer attributes to the patient may approach the same arbitrariness that was seen in the sovereign decision on the state of exception. The CDoC patient becomes *homo sacer* to their relatives, akin to the Roman son to his father. The example of the *Muselmann* will help to clarify further the nature and implications of this observation.

The *Muselmann* (where the word is a derogatory term for 'Muslim') is for Agamben the most extreme figure within the Nazi death camps. (Agamben draws significantly on the writings of Primo Levi in articulating the nature of the *Muselmann*.) The death camp exemplifies much of the structure of modern biopolitics (and Agamben criticises Foucault for making the hospital and asylum, and not the camp, the institutional focuses of his account of

biopower (Agamben 1998, p. 4)). Under Nazism the Jew has the protection of the law systematically removed from them, rendering them *homo sacer*. Yet within the camp, the *Muselmann* experiences an even more extreme subjugation. The *Muselmann* loses the will to survive. Their humiliation and fear strips from them consciousness and personality, rendering them utterly apathetic. They are excluded even from the life of the camp, unable to communicate and shunned by other inhabitants. 'Mute and absolutely alone, he has passed into another world without memory and without grief' (Agamben 1998, p 185). The *Muselmann* lacks language, but in their apathy even their voice is threatened. They are unable to distinguish 'between the pangs of cold and the ferocity of the SS' (ibid.).

While the CDoC patient has not undergone the systematic and intentional acts of degradation suffered by the *Muselmann*, for, as noted above, the CDoC patient is typically the victim of disease or injury and their status as bare life (as opposed to natural *zoē*) rests upon the legal construction of their status. Yet there is still something in common. Both CDoC patient and the *Muselmann* experience bare life at its extreme. Both are stripped of language. Conceivably the CDoC patient is no more aware of the difference between human and natural stimuli than is the *Muselmann*. It is this extreme experience that is of normative importance for Agamben, and through which something akin to an ethical imperative can be derived from his analysis, and this in the role of the 'witness'.

The figure of the *Muselmann* is complemented by that of the witness. Agamben notes that a number of survivors of the camps are motivated by a desire to bear witness to what they have experienced (and indeed, it is exactly this witness that the Holocaust denier seeks to invalidate) (1999, p. 15). Yet, precisely by surviving the camp, the witness has not had the extreme experience of the *Muselmann*. They have not descended into those depths of inhumanity. The *Muselmann's* experience is the most profound and penetrating. It is, as it were, the pure experience of bare life. But the *Muselmann*, robbed of language, cannot explicate that experience. *Muselmann* and witness thus form a two-part structure, who 'like the tutor and the incapable person and the creator and his material, are inseparable; their unity-difference alone constitutes testimony' (1999, p. 150). The survivor bearing witness not to the camp itself but to the experience of the *Muselmann*, and that an experience that they did not share and that cannot, strictly, be spoken, 'speaks only on the basis of an impossibility of speaking' (1999, p. 164).

The moral status of the CDoC patient may be understood in these terms. The patient, like the *Muselmann*, has the most extreme experience of bare life. Agamben may be

interpreted here as offering something akin to a sanctity of life argument. Yet, the moral status of the patient lies not in the fact that they are alive (for they are only ambiguously so) and nor yet in that their existence is sanctified. They are not 'sacred' in the usual meaning of the term, but only in the obscure and ambiguous sense of *sacer* (see Agamben 1998, p. 78-9 on the interpretation of *sacer*). The moral status of the patient lies, rather, in the fact that they experience bare life and thus what it is to be human in the face of biopower. Like the *Muselmann*, it may be said of the CDoC patient that: 'the human being is the inhuman; the one whose humanity is completely destroyed is the one who is truly human' (1999, p. 133). As such, the CDoC patient requires a witness.

Agamben is arguing that experience cannot be adequately expressed in language. There is always a remnant. The failing of law, and a legally based bioethics, is that it does not acknowledge the fact that legal categories do not grasp the non-legal reality – legal thinking does not recognise a remnant. It does not recognise the constitutive moment of accusation, and as such assumes that the particular case, the experience of the unique and individual patient, may be adequately incorporated into the broad categories of law. An ethics of CDoC must, in contrast, be an ethics of witness. It would lie in the frequently frustrating and perhaps even futile struggle to find a language, unique and appropriate, to the individual patient, and one that does away with the traditional, legalistic, categories of bioethics thought, such as dignity and respect (see Agamben 1999, p. 69). It will offer a poetry that is shocking. It is shocking precisely in that it will expose the fact that it has ultimately failed to grasp the experience of the CDoC patient. It will be a poetry of 'an unprecedented lack of experience', as Agamben describes the poetry of Baudelaire (1993b, p. 47). As such, the struggle of the relative or carer to find a language to articulate the patient's experience, and as such to sustain a *bios* around the patient, will be one in which the relative and carer are aware of their own desires, biases and frustrations, and thus of how the patient continually escapes them. While the *bios* that is constructed may be an illusion, it is a necessary illusion, and the only thing upon which a genuinely ethical debate, and as such an aspiration to an understanding of CDoC outside the abandonment of contemporary legal structures and biopolitics, can be performed. A shocking poetry of witness will continue to challenge the illusory meanings constructed, maintaining a dynamism and invention in ethical debate.

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- i It may be noted that Aristotle's famous definition of the human being as *politikon zōon* does not undermine Agamben's interpretation. While humans may be social animals, they are not uniquely so. Ants, sparrows and lions are social. Yet such creatures lack a political life (*bios politikos*), which is to say a culturally chosen, developed and negotiated way of living together, that aspires to be the good life (and not merely that which is determined by nature).
 - ii Agamben interprets the Hobbesian state of nature, not as a condition prior to the establishment of the state, but rather as 'a principle internal' to the state (1998, p. 105). It marks the dissolution of the state in the state of war of all against all, where 'the man is a wolf to men' (pp. 105-6). Yet it is also the fact that the sovereign is at once a role constituted by (and thus included in) the state and the social contract, and yet stands outside it (excluded) as the power to dissolve that contract.
 - iii Technology complicates this issue somewhat. Research using brain imaging techniques has suggested that some PVS patients may have an active mental life that they cannot express (Monti et. al. 2010). This can involve responding to requests to think of specific events (such as to imagine playing tennis). Such research both compounds the biopolitical construction of the CDoC patient as a technological subject, and give further, often perplexing and ambiguous material by which the patient's relatives can expected to interpret the patient's intentions and attitudes, which is to say, to construct a language for them.
 - iv 'Illusion' here is used in the Hegelian sense of the German term '*Schein*' (see Hegel 1973). As such, it is a distorted representation of the truth (as opposed to a delusion, which is a deception, offering a representation of something that does not exist).