

## **Domestic War: Locke's Concept of Prerogative and Implications for U.S. “Wars” Today\***

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*This article explores Hobbes's and Locke's justifications for the exercise of prerogative power domestically. The argument challenges the conventional separation of the state into welfare and warfare and suggests that the State of Nature is not temporally displaced by civil society but rather exists alongside it. This analysis also contests the notion that prerogative power in a liberal democracy was only conceived of as being exercised internationally. Rather, it is deployed against individuals whose status places them in the State of Nature and marks them as “bare life” in Giorgio Agamben's words. Finally, it is contended that prerogative power is exercised through bureaucracy—that the rule of law can lead to the suspension of law—thus explaining how the War on Drugs and the War on Terror are examples of prerogative and yet involve the dispersion of power and reference to the rule of law.*

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“The tradition of the oppressed teaches us that the ‘state of exception’ in which we live is the rule.”

Walter Benjamin<sup>1</sup>

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1. Walter Benjamin, “Critique of Violence”, *Reflections*, quoted in Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 55.

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### Introduction

A dominant strand of contemporary liberal theory distinguishes between the largely extra-judicial exercise of sovereignty abroad and the domestic exercise of power which significantly follows the rule of law, treats citizens equally, and holds democratic values as the highest. In this line of argumentation, it is contended that the development of a spirit of capitalism and the increasing rationalization of law have led to the deployment of domestic power diffusely and impersonally, and both are dependent on the rule of law. Political power is legitimated through appeals to abstract notions of justice and the common good, hence underscoring rationality and a moral framework that rewards an individual's hard work, honesty, and integrity. This emphasis on rationality and the rule of law that form the basis of liberal capitalism's ethical structure seemingly entails the disavowal of irrationality, violence, and arbitrary power. The concept of a social contract symbolizes this rationality as well as implying mutuality between the government and the governed.<sup>2</sup> However, Western political theorists of the modern state have never really conceived of the absence of prerogative power within state boundaries. Rather, liberal theorists and theorists of the modern state such as Max Weber reconceived how this power could be deployed under modern conditions.

In this article, I investigate the conceptual roots and justification for prerogative power in early liberal theory in order to solve a number of puzzles. First, I explore theories about and the implementation of prerogative power beginning with the early liberals. I have chosen this as a starting point in order to answer two questions: how has prerogative power been deployed in a liberal democracy? And second, why did liberal theorists justify its exercise domestically? I focus on John Locke's arguments about prerogative in particular because he advocates the rule of law and the use of prerogative power.<sup>3</sup> His recommendations for the poor and for colonial administration demonstrate how he (partially) resolves this seeming paradox. As I elucidate below, these policy prescriptions demonstrate that the conventional distinction made by many political theorists between the welfare and warfare states is misguided: a liberal polity does not separate these spheres neatly but unites them in the notion of the common good.

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2. See Carole Pateman, *The Disorder of Women* (Stanford: Stanford University Press, 1992) and Sheldon Wolin, "Democracy and the Welfare State: the Political and Theoretical Connections Between *Staatsräson* and *Wohlfahrtsstaatsräson*," *The Presence of the Past: Essays on the State and the Constitution* (Baltimore: Johns Hopkins University Press, 1989).

3. "Locke is without doubt the only political theorist, among the major advocates of limited monarchy, to make prerogative a central element of his political theory (whatever most of his interpreters might think), and to construct from it a systematic constitutional theory of extralegal power." Pasquale Pasquino, "Locke on King's Prerogative," *Political Theory* 26 (April, 1998): 199.

Indeed to Locke, the use of prerogative power was the most expedient way to accomplish an end during special circumstances; he notes that written law cannot account for every event or problem. Hegel, and later Weber, also recognized that beyond liberal democratic power, the state must still act as a state. In contemporary times, Wendy Brown formulates the exercise of prerogative power in Weberian terms. It is the “legitimate arbitrary power in policymaking and legitimate monopolies of internal and external violence in the police and military. As the overt power–political dimension of the state, prerogative includes expressions of national purpose and national security as well as the whole range of legitimate arbitrary state action from fiscal regulation to incarceration procedures.”<sup>4</sup> In fact, the exercise of prerogative power becomes viable on a scale never possible before with the consolidation of the nation-state into a larger territory and its monopoly on violence as well as the development of scientific applications for exerting power. In this way, the deployment of prerogative power or *raison d'état* do not represent a historical rupture but rather are accommodated to liberal democratic notions. Nevertheless, there are clear tensions between certain democratic values that are the basis of liberal theory and institutions and the exercise of prerogative power, even as they are tied in two ways: in the end, prerogative power has been conceived as the precondition for liberal democratic power and second, liberal power and prerogative power while differing in ethical orientation, have material life as their base.

A second puzzle is how prerogative can be deployed with the rationalization of political power (as theorized by Weber and Habermas) and more broadly, the development and exercise of disciplinary power and bio-power (Foucault's notions). This line of argumentation holds that bureaucratic power has dispersed political power and thus acts of pure sovereignty appear few and far between, especially on the domestic front. If prerogative power was diffused in the hands of feudal lords and more significantly as the defining power of absolute monarchs, the question is how it is exercised when we have “cut off the king's head”?<sup>5</sup> As Wendy Brown notes, in late modernity “modes of power are far easier to determine than particular agents.”<sup>6</sup> However, if one considers Locke's theory of prerogative power in combination with his recommendations for the poor and colonial subjects, the use of prerogative even at this time was deployed through administrative (now bureaucratic) means. In this way, institutions that represented the rule of law could also suspend the law and sovereign agents were diffuse rather than being concentrated in the figure of a single leader.

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4. Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), 176.

5. Michel Foucault, “Truth and Power,” *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 63.

6. Brown, *States of Injury*, 167.

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Indeed, the dynamics of power in the liberal capitalist state have allowed for the coexistence of seemingly contradictory power mechanisms, both liberal (the rule of law) and prerogative (the suspension of law). However, in investigating Locke's ideas, this seemingly paradoxical coexistence is an integral part of liberal capitalism manifest in the interests of the common good, or in modern parlance, national security. The first crucial element of modern power is that arbitrary power must now be authorized through legal and often rational means. Second, the subject must be considered "bare life" in Giorgio Agamben's terms<sup>7</sup>—that is, less than a citizen—to justify the suspension of law. In this way, those whose status has been criminalized, politically excluded, or devalued can face arbitrary power and the suspension of law. Hence, those who are conceived of as bare life are not dehumanized through criminal acts *per se*, but through their status. For this reason, I believe this term is more appropriate than the word enemy (which would be used in an external war) given that subjects of domestic prerogative have not formally been declared enemies. Bare life is "biological life" in Agamben's words, but this is not a politically neutral rubric. This term is also useful in that it links the State of Nature to the private sphere and household labor<sup>8</sup> and undermines the notion that the State of Nature is temporal, preceding civil society. Given this conceptual framework, I propose that citizenship in the liberal modern-nation state is not founded on contracts or consent *per se* but the criteria of *ius soli* and *ius sanguinis* (that is, criteria which rest on status more than choice; roughly, *ius soli* is citizenship by birth and *ius sanguinis* is citizenship by descent).<sup>9</sup> At the end of this essay, I suggest some parallels between the power dynamics at work in Locke's thought and policy proposals and the U.S. War on Terror and War on Drugs. Given constraints of space, these contemporary examples can only be cursory but indicate how liberalism and the exercise of prerogative work together.

### Prerogative Power in Liberal Thought

In this section, I explore the link between bare life and prerogative power in early liberal thought. It has been noted that liberal thought beginning with the pre-liberal Hobbes, by taking human nature and human needs as its bases, brought politics down to the level of life. Whereas in the classical, Roman, and feudal ages, politics was a transcendence of the biological involving a nobility of the spirit and communion with others, liberalism addressed the right

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7. See Agamben, *Homo Sacer*, 110.

8. This formulation may be problematic in other contexts, but I believe it is adequate for the purposes of this article.

9. Even *ius soli*, the allegedly more democratic of the two, has been criticized as feudal and privileging the fact of birth over free choice.

to live, self-preservation and the preservation of others. Property rights, the basis of liberal thought in Locke, therefore are not purely driven by a concern for wealth as C.B. Macpherson mistakenly charged, but directed to sustaining life first and foremost as Richard Ashcraft demonstrated. Indeed, few have paid attention to the fact that Locke did not believe in unlimited accumulation of land *unless* it was compensated for by money, thus allowing for the survival of all.<sup>10</sup>

Indeed, all moral obligations to the early liberals—spanning from helping the poor or one’s neighbor to opposing the abuses of an absolute monarch—were rooted in natural law. The implication was that political power should no longer serve the interests of the few, but rather the general public. That is, political power would embody and protect rights, of which property was included but not the axis. Instead, rights such as free speech, freedom of religion, and a free press should constitute political power. Hence, the idea of political power was conceived of as a moral claim.<sup>11</sup> For this reason, Richard Ashcraft states that:

. . .the truly radical claim advanced by Locke. . .is that poor relief is a socially constitutive and necessary feature of any legitimate society, since societies are only legitimate to the extent that they realize the purposes and objectives of natural law.<sup>12</sup>

In this way, subsistence was conceptualized as a right and not a privilege and communal responsibility superseded that of the individual. Nevertheless, what must be emphasized is that morality was derived from natural law, which was reducible to human need and preservation, in the first place. Consequently, morality reflected an increasing concern with material well-being and biological existence. Second, as discussed below, the rights that originated from natural law led to the development of citizenship rights in the form of *protection* and thus, a passive form of political membership.

Why the emphasis on bare life when politics formerly aimed at the soul? As Foucault expressed it, “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.”<sup>13</sup> The

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10. John Locke, *Second Treatise of Government*, ed. C.B. Macpherson (Cambridge: Hackett Publishing, Classic Series, 1980), 20–24, 28–30 (section 31, 36, 37, 46, 50). See Richard Ashcraft, *Revolutionary Politics and Locke’s Two Treatises of Government* (Princeton: Princeton University Press, 1986), 262–83, n151 (266–67 in particular); Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1981), 170–72.

11. Richard Ashcraft, “Liberalism and the Problem of Poverty,” *Critical Review* (1993): 11, 12.

12. Ashcraft, *Critical Review*, 7.

13. Michel Foucault, *The History of Sexuality, Volume I: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1980), 143.

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rise of princely, that is absolute, power on the one hand and religious wars on the other precipitated pre-liberal and liberal treatises. The call for a separation of church and state by Hobbes and Locke, among others, removed any pretensions for a politics of the spirit or a radical transcendence of biological man. This is not to say that biological man was unaccounted for in the past; both Giorgio Agamben and Michel Foucault have remarked that biological life has been a significant feature of politics for the past 2000 years. Nevertheless, in ancient philosophy and governments, the *oikos* (household) was conceived of as the *precondition* for politics rather than constituting the substance of the political. Although this is still considering politics in terms of bare life—in this case, as the opposite of bare life—there remained a conceptual separation between bare life and politics. However, liberal theory made biological life a key feature of its politics in a way that had not been true in the past. Furthermore, in the notion that the populace itself must be allowed to survive, all were considered equal in this right even as this was a passive right. Hence, the conditions for totalitarianism, on the one hand, or mass democracy on the other, were created.

The State of Nature was for Hobbes and Locke a conceptual apparatus that allowed them to express these human needs as well as their views of arbitrary or prerogative power. Here, prerogative power is envisioned as being absolute, not following any particular law or rule, and justified by the political position of the one making prerogative decisions. To Hobbes, the fact that men have “a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death”<sup>14</sup> did not make them evil *per se* but did make the State of Nature essentially equivalent to a State of War. While sovereign power also had its origins in the State of Nature—and remained so by not being subjected to the laws<sup>15</sup>—its authority led to the creation of civil society and hopes for the preservation of all. In this way, Hobbes built a politics on the *absolute* right of the Leviathan to exercise prerogative power. Hobbes’s sovereign could do no wrong because it embodied human nature (the State of Nature) and the body politic. His portrayal of the Leviathan as the head of this body was firmly rooted in political conceptions of the time that the “king has two bodies,” one natural and mortal and one that represented sovereignty: political, absolute, and infallible.<sup>16</sup> This conception could be found in legal decisions dating back as early as the 1300s, but most notably during the Tudor period, which Giorgio Agamben has explicated in his work.

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14. Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1999), 70.

15. Hobbes, *Leviathan*, 122.

16. See Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1997). See, for example, chs 7, 8, and 505–06.

While Ernst Kantorowicz has argued that jurists of the time created this legal fiction by taking the idea of Christ and transposing it onto the king,<sup>17</sup> funeral rites for kings and emperors dating back to pagan times demonstrate that this notion of two bodies is not Christian *per se*. Rather, Agamben explains, the funeral of a king and the subsequent burning of his effigy were rituals that appeared to show that the body and dignity of the king were immortal and sovereignty perpetual. But the fact that this ritual dated back to the Romans has the unexpected implication for the intellectual history of sovereignty that the “metaphor of the political body no longer can be viewed as a symbol of perpetuity of *dignitas* but rather the cipher of the absolute and inhuman character of sovereignty.”<sup>18</sup> It is for this reason that the Leviathan remains in the State of Nature as something beyond the human and beyond conventional law. Accordingly, the State of Nature is not theorized as existing prior to the establishment of a commonwealth but is internal to it.<sup>19</sup> This is also why it is acceptable to kill the Leviathan when he has not fulfilled his duties. First, the absence of a truly strong Leviathan leads to a suspension of civil life and reversion to the State of Nature where each person has the inalienable right to defend himself. Second, *power* may be everlasting but the body of the king is not meant to be. Sovereign power in modernity is thus impersonal and absolute in a way that it could not be in the past.<sup>20</sup> What is presupposed in defining the State of Nature on the one hand and civil life on the other is that there are two types of life. First, there is “sacred” or biological life, which is not quite human and remains outside of the commonwealth. The sacred realm is analogous to the liberal conception of the State of Nature in that the rule of law no longer applies and when a subject enters this realm, he or she is considered bare life.<sup>21</sup> Accordingly, killing this individual cannot be an act of homicide or transgression of the law. A citizen, on the other hand, is subject to and protected by the rule of law. Since the Leviathan’s full powers are exercised in the former sphere, the true manifestation of political power occurs in the State of Nature.

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17. See Kantorowicz, *King's Two Bodies*, ch. 3.

18. Agamben, *Homo Sacer*, 101.

19. Agamben, *Homo Sacer*, 105.

20. Interestingly, comparable sentiments regarding the perpetuity of sovereignty can be found in an important Supreme Court decision upholding presidential prerogative in foreign relations. In the World War II-era *Curtiss-Wright* decision, Justice George Sutherland stated that “Rulers come and go; governments and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. . . . It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.” The president’s power does not have to be approved by Congress but must be exercised “in subordination to the applicable provisions of the Constitution.” Sutherland quoted in Major Fergus Paul Briggs, United States Marine Corps Reserve, “Formal Power and Prerogative: the Presidency and National Security,” CSC, May 9, 1988, <[www.globalsecurity.org/military/library/report/1988/BFhtm](http://www.globalsecurity.org/military/library/report/1988/BFhtm)> (cited May 28, 2005), ch. 3.

21. See Agamben, *Homo Sacer*, 109.

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While it may appear that Hobbes's sovereign could thereby exert absolute power on a citizenry without consequence, he, like Locke, claims that the laws of nature are immutable and eternal,<sup>22</sup> even if some—such as the right to revenge—are handed over to the sovereign authority in civil society. For this reason, contrary to conventional readings, in which Hobbesian politics is antithetical to the rule of law, I find that Hobbes does conceive of a sort of rule of law; he essentially argues that the sovereign should make decisions and laws based on his or their knowledge of mankind<sup>23</sup> and in accordance with the guidelines of natural law *except* when there are threats to the unity of the polity.<sup>24</sup> These threats can be internal or external, a point made clear by Hobbes's constant emphasis on the necessity for domestic unity. However, he acknowledges that this power may be abused, but contends that if the sovereign is protecting the population from internal and external threats, then this is a necessary evil. While Hobbes does not guarantee any fair application of the laws, he is perhaps more consistent than Locke in allowing for unlimited prerogative power that cannot be challenged, scrutinized, or overthrown. The limit of a sovereign's worth always comes down to preservation and security: that is, the threat of death. In the end, Hobbes provides for the conditions of liberal democracy—for example, equality before the law, the right to self-preservation, the separation of church and state and the notion of a social contract—but not democratic practices. However, Hobbes's theories were not only pre-liberal but conceptualized modern power and its basis—bare life—as no other theorist previously had.

Locke, in contrast, provides a much more complex (or complicated) view of these issues. First, he believes that men can live in peace outside of civil society and hence any sovereign power would not be instituted for the purposes of inspiring awe in its subjects but rather to protect the material means by which preservation could be attained and the body, which was property as Locke defined it. Arbitrary power—the abuse of prerogative power—thus constitutes a state of war, unfreedom, and irrationality. The foundation of Locke's civil society is not survival in Hobbes's terms, protection from other human beings, but the protection of material goods in order to allow for self-preservation and the preservation of all.<sup>25</sup>

While both authors are still concerned with bare life, what is being protected ostensibly changes the purpose and nature of government (to Locke:

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22. Hobbes, *Leviathan*, 110.

23. Hobbes, *Leviathan*, 10, 11.

24. Hobbes, *Leviathan*, 127.

25. It should be noted that the protection of property was indeed a concern of Hobbes also, but with certain key differences from Locke's theories of property; for example, there were no absolute rights to property as the sovereign defined property rights. Only in this way could all be equal. See Ashcraft, *Critical Review*, 28.

“government has no other end but the preservation of property”<sup>26</sup>). Hence, the terrifying power that Hobbes saw in other men is not the same terror to Locke; to the latter, the danger is a potentially abusive prince who can arbitrarily take away one’s means to live. To protect against the abuses of any political leadership in civil society, Locke then distances himself from Hobbes by arguing that any political leaders must also be subject to the laws of citizens.<sup>27</sup> He further ensures this by advocating the separation of powers and a system of checks and balances, consequently institutionalizing the rule of law rather than the capricious rule of a prince. In this way, he lays the ground for Max Weber’s more complex analysis of bureaucracy in which custom, family ties, and arbitrariness are rejected in favor of the rule of law, leadership by convention and not nature, and impersonal fulfillment of the law. A prince that is constantly exercising his prerogative in flagrant disregard of any law, conventional or natural, brings himself into a State of War with a populace. Finally, Locke provides for rebellion against any political leader who has overstepped his legal boundaries. None of these provisions can be found in Hobbes, nor would they be consistent with his political prescriptions. Nevertheless in Locke’s polity, to put it cynically, the people were allowed “to rebel but not rule.”<sup>28</sup>

In this way, Locke’s system of government is far closer to that of the United States than Hobbes’s and yet there remains the problem of prerogative power. For Locke indeed provides for prerogative power, albeit with limits. If in the past, prerogative represented the decisions of one man whose power was based on an alleged relation to Adam and Eve and therefore God, a more reasoned exercise of prerogative would come from a leader or leaders who are chosen for their political acumen rather than their lineage. In contrast to the exclusive rule of the prince, the rule of law and equality before the law would determine daily political life and prerogative would only be exercised during emergencies or when the law was too vague, outdated, or had not foreseen a special circumstance. Significantly, where prerogative power once meant the usurpation of goods and men for a prince’s own needs, the liberal deployment of prerogative power would have the common good and national security and well-being as its guidelines. Hence, prerogative would still deal with bare life but for the good of all and not the few.

Sheldon Wolin calls this *Wohlfahrtsstaatsräson*, reason of state guided by welfare, marking the transition from princely power to the protection of all.<sup>29</sup> In this way, warfare and welfare are not conceptually or practically separated but

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26. Locke, *Second Treatise*, 51 (section 94).

27. Locke, *Second Treatise*, 50 (section 93). This distancing is not absolute, however; see Tuck, *Natural Rights Theories*, 172–76.

28. Wolin, “Democracy and the Welfare State,” 168.

29. Wolin discusses this on 166, “Democracy and the Welfare State,” for example.

one and the same. Michel Foucault's notion of governmentality is analogous to Wolin's *Wohlfahrtsstaatsrason*:

In contrast to sovereignty, government has as its purpose not the act of government itself, but the welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health, and so on; and the means the government uses to attain these ends are themselves all, in some sense, immanent to the population; it is the population itself on which government will act either directly, through large-scale campaigns, or indirectly, through techniques that will make possible, without the full awareness of the people, the stimulation of birth rates, the directing of the flow of population into certain regions or activities, and so on.<sup>30</sup>

The common good in this view would not be monolithic, but implies a multitude of concerns such as the health of the population, birth rates, and economic well-being.

While Locke's limitations on prerogative power appear to be reasoned and measured, one significant provision challenges this sober quality. He argues that in the hands of a wise prince, citizens should allow unlimited prerogative power:

But since a rational creature cannot be supposed, when free, to put himself into subjection to another, for his own harm. . . *prerogative* can be nothing but the people's permitting their rulers to do several things, of their own free choice, where the law was silent, and sometimes too against the direct letter of the law, for the public good; and their acquiescing in it when so done: for as a good prince, who is mindful of the trust put into his hands, and careful of the good of his people, cannot have too much *prerogative*, that is, power to do good.<sup>31</sup>

Locke goes on to argue that in fact, "*prerogative is nothing but the power of doing public good without a rule.*"<sup>32</sup> Wolin notes that Locke achieves this trick by assigning prerogative to the domain normally dealing with external affairs: the federative power, which represents the power that assumes man's alienation of his right to self-defense from the State of Nature.<sup>33</sup> Wolin further argues that in Locke's provisions for prerogative power and its unlimited use, this reasoning "amounts to

30. Michel Foucault, "Governmentality," in *Power*, Essential Works of Foucault, 1954–1984, Vol. 3, ed. James D. Faubion, trans. Robert Hurley, et al. (New York: New Press, 1994), 216, 217.

31. Locke, *Second Treatise*, 86, section 164.

32. Locke, *Second Treatise*, 87, section 166.

33. Wolin, "Democracy and the Welfare State," 168; see Pasquino, "Locke on King's Prerogative," 198–208.

a criticism of the political system of his own creation, to a deconstruction of his own theory.<sup>34</sup> In contrast to Hobbes's consistency in theory, this is perhaps true. Locke's motivation was to eliminate the predominance of arbitrary power in political rule, and yet he advocates this very thing *if* the ruler is a wise one.

Nevertheless, Locke would defend himself in the following ways. First, the leadership of his ideal state is divided, in contrast to Hobbes's Leviathan, thus providing for checks and balances in his system of governance. This is further reinforced by the fact that Locke's leaders are subject to the law just like any other member, except in times of emergency. While it could then be argued that his prerogative power is essentially the same as Hobbes's in that it exists outside of the law and all conventions, Locke would respond that in contrast to the capricious rule of a selfish prince, the determinant of any action in his state would be the *common* good and *national* security, in our parlance. Although Hobbes has the welfare of the populace as a guideline, too, Locke seemingly ensures this outcome through his provision for the right to rebellion. Third, a leader is not chosen because of his nobility, but rather his wisdom and rationality; therefore, this leader is bound to act differently than a prince. Last, Locke only formulates the use of prerogative power as a *state of exception* (arguably, this is Hobbes's ideal also). This last provision is of key importance for future theorists and modern government (and all of these points are later used in the Founders' justification for prerogative).<sup>35</sup>

The limitation on prerogative or absolute power for both Hobbes and Locke is danger to one's self-preservation—that is, death—but, of course, this presents a paradox.<sup>36</sup> It is at this moment when Locke and Hobbes clearly provide for rebellion. Nevertheless, it is at this moment that it is clearly too late; the object of prerogative power has not only been stripped of political status and so is no longer protected by the law, but has also entered the political space of arbitrary power and potential violence. Freedom to act or rebel is precarious at best. To take up Wolin's point, liberal theory from Locke onward has allowed for a potentially dangerous loophole that can subsume the democratic or pluralistic in its pursuit of order, stability or purity of the national body in the future. This is further reinforced by the design of liberal government: the government is *representative* of the people rather than constituting rule of the people and the greatest contribution a member can make is through his economic participation. While Locke was an activist for an expanded franchise, his ideal civil society was

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34. Wolin, "Democracy and the Welfare State," 169.

35. See Federalist numbers 21, 24, 69, 74 and see Briggs, "Formal Power and Prerogative," ch. 3.

36. On this paradox, see Michael Walzer, "The Obligation to Die for the State," *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge: Harvard University Press, 1970); Leonard Feldman, "Violent Substitutions: Hobbes, Girard and Agamben on the Sacrifices of Politics," presented at the Western Political Science Association, Portland, Oregon, March 2004.

not an inherently political one; or, to put it differently, the means and ends of preservation became the *raison d'être* of quotidian political activity. Added to this rather apolitical vision of popular sovereignty is the emphasis on rationality rather than consent *per se*; legitimacy is derived from the degree of rule-boundedness or rationality (in the Weberian sense) rather than direct consent. That is, prerogative power is justified on liberal democratic terms not because explicit consent has been given but rather because decisionmaking must be wise and for the common good. In this regard, both Sheldon Wolin and Carl Friedrich argue, the linkage of rationality and the exercise of sovereign power is distinctly modern and a historical innovation.<sup>37</sup> While rationality was not necessarily absent in the past, rationality—particularly in the Weberian sense—assumes a primacy that it did not have before.<sup>38</sup> This emphasis on rationality over explicit consent can also be found in Locke's analysis of labor and property.

### Bare Life in Liberal Thought

Locke's emphasis on rationality was not only a precondition for political leadership but members of civil society in the form of labor: "God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience. The earth, all that is therein, is given to men for the support and comfort of their being. . . That *labour* put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right."<sup>39</sup> If one follows the line of argumentation in Locke's chapter, he contends that through reason—and *not* consent—we should recognize that labor makes property.<sup>40</sup> He goes on, in section 30 to call this the "law of reason." Inversely, those, such as capricious princes, who sinfully waste land violate this law. Alternatively, those who are idle also violate the "law of reason." Accordingly, he makes work and rationality central components of his political theory: work transforms raw material into property; labor and the fruits of labor are to be protected by liberal government; labor rather than noble title would determine who contributes to civil society; and rationality is exemplified through productive labor as well as providing the crucial link for the establishment of property and governance.

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37. Carl Friedrich, *Tradition and Authority* (New York and London: Praeger Publishers, 1972).

38. Although I do not wish to conflate seventeenth-century interpretations of reason and twentieth-century definitions.

39. Locke, *Second Treatise*, 18, 19 (sections 26 and 28).

40. This leads to Locke's defense of colonization. See Richard Tuck, *The Rights of War and Peace* (Oxford and New York: Oxford University Press, 1999), 171–73.

Nevertheless, the categories of productivity and thus socially meaningful labor, on the one hand, and rationality on the other would lead to the political subordination of the poor and anyone else not making an economic contribution (for example, women and slaves).<sup>41</sup> The poor were in a double bind where they were allegedly “equal” in a society with pre-existing inequalities (holdings) and could not labor in a society where labor presupposed property rights.<sup>42</sup> Hence, early liberal writers established a dual conception of citizenship in that the guarantee of one’s preservation laid a basis for passive (or protective) citizenship, while the provision for equal political power among economic independents constituted full citizenship. Full citizenship did not necessarily translate into daily political activity but ensured the treatment before the law as an autonomous citizen not needing guidance or protection; access to the franchise; and the possibility of holding office, among other things. Rationality was not only a precondition for productive labor but was evidenced through this activity. Given these tensions at this time, aid, charity, poor relief, or dependence on one’s husband (all forms of economic dependence) could by no means make the recipient a participant in the market, nor the economic or political equal of others. In this way, the categories of work (specifically defined work) and rationality had become central criteria of political power and both criteria led to internal exclusion based on status.

Locke’s thought process can be viewed in a more complex manner, however. It is not necessarily that he excluded women, the idle poor and “ideots”<sup>43</sup> *because of* how he defined work, but that notions of rationality at this time mutually reinforced the division between productive and non-productive (i.e. subsistence) labor. Modernity signaled a primacy of the rational that had never before taken such precedence; dichotomies were established such that one concept defined the other: civilization versus barbarity (most notably in Mill), agriculture and cottage industry versus hunter-gatherer societies, or individuals whose existence was guided by rationality versus individuals whose biology chained them to their bodies, hence only being capable of exercising rationality sporadically (this notion can be found in authors ranging from Hobbes to Rousseau to Freud). All of these categories could be reduced to species thinking: lower forms of the human species represented wildness and irrationality, and were satisfied with subsistence level existence. In contrast, higher forms of the species transcended subsistence level economies and carried out the important work of progress and civilization-making. Groups deemed irrational and biological needed guidance, even as they served an integral function in society. In other words, there was bare life and “life beyond bare life.” Inasmuch as political status was determined by

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41. See the work of Judith Shklar or Carole Pateman, for example.

42. See Locke, *Second Treatise* 287.

43. Locke, *Second Treatise*, 34.

these categories, “citizenship was not founded on egalitarianism” or a social contract, but rather birth (*ius soli*) or blood (*ius sanguinis*); hence modern sovereignty and citizenship were founded on bare life and the promotion of life.<sup>44</sup> The basis of the criteria is not only biological life but what biological life has provided: the foundation for political and economic life and identity. Consequently, in these writings, women are protected by the law but not as autonomous members; they are defined politically but have no independent political status. The status of the poor is perhaps harsher.

Since Locke was the first prominent liberal thinker to both write and actively participate in reformulating the Poor Law, his writing is especially interesting. The Old Poor Law at this time was actually the terminus of a series of laws enacted between 1597 and 1601 and it was the last one, the “43rd of Elizabeth,” that was considered their foundation. This law required each parish to tax the landowners who resided there in order to alleviate poverty. Additionally, the 1662 Act of Settlement allowed parish overseers to return strangers to their original parish, reinforcing local administration of the Poor Law.<sup>45</sup> Although Locke’s reforms were radical for his time<sup>46</sup> and his advocacy of education for poor children went above and beyond what many of his contemporaries felt the poor deserved, his policy recommendations and promulgations demonstrated that the poor had no political status and were treated as bare life. His proposed reforms demonstrated how prerogative power is exercised domestically, through bureaucratic means (if an anachronistic term is permitted here), and as a permanent state of emergency rather than a temporary one.<sup>47</sup> First, he believed that the poor were to blame for their poverty as exemplified by their “relaxation of discipline and corruption of manners,” “their debauchery” and their “idleness.” If alehouses were closed, he believed, vagrancy and begging outlawed, and aid difficult to obtain, poverty among the able-bodied would end.<sup>48</sup> What’s more, he advocated that paupers wear badges and their children from ages 3 to 14 years would attend a “working school” while older paupers would go to “houses of correction” and work hard labor. Anyone violating these rules could be whipped, lose their ears, be forced to work hard labor on ships, or be deported to the colonies.<sup>49</sup>

44. Agamben, *Homo Sacer*, 129.

45. Thomas A. Horne, *Property Rights and Poverty: Political Arguments in Britain, 1605–1834* (Chapel Hill: University of North Carolina Press, 1990), 64.

46. Horne, *Property Rights*, 157. See Richard Ashcraft, *Revolutionary Politics*, ch. 7, for example.

47. See Locke, “Draft of a Representation Containing a Scheme of Methods for the Employment of the Poor” and “The Fundamental Constitutions of Carolina,” in *Political Writings*, ed. David Wootton (Indianapolis: Hackett Publishing, 2003).

48. Horne, *Property Rights*, 64.

49. See Terence Hutchison, *Before Adam Smith: the Emergence of Political Economy, 1662–1776* (Oxford: Basil Blackwell, 1988); Locke, “Draft of a Representation Containing a Scheme of Methods for the Employment of the Poor” and “The Fundamental Constitutions of Carolina,” in *Political Writings*.

While he believed that local artisans and farmers should be forced to employ the able-bodied unemployed, he held that the latter should be paid a reduced rate.<sup>50</sup> As Terence Hutchison remarks: “These proposals, which might be considered profoundly illiberal, included rounding up adult males found begging ‘in maritime counties’, and sending them for compulsory service and hard labour at sea for three years, together with shipping and compulsory labour for children under fourteen found begging outside their parish, as well as a series of similar measures involving conscription and regimentation of the poor and unemployed.”<sup>51</sup> Compare these measures to Locke’s definition of political freedom: “A Liberty to dispose, and order, as he lists, his Person, Actions, possessions, and his whole Property, within the Allowance of those laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.”<sup>52</sup> Autonomy is central to the notion of liberty; conversely, “protection” amounts to the suspension of the law. Hobbes similarly believed that self-preservation was a right and not a privilege but also argued that the poor were to be subject to coercion:

But for such as have strong bodies, the case is otherwise: they are to be forced to work, and to avoyd the excuse of not finding employment, there ought to be such lawes, as may encourage all manner of Arts; as Navigation, Agriculture, Fishing, and all manner of Manufacture that requires labour. The multitude of poor, and yet strong people still encreasing, they are to be transplanted into Countries not sufficiently inhabited: where nevertheless, they are not to exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground, to snatch what they find; but to court each little Plot with art and labour, to give them their sustenance in due season. And when all the world is overcharged with Inhabitants, then the last remedy of all is Warre; which provideth for every men, by Victory, or Death.<sup>53</sup>

Hobbes’s and Locke’s arguments that sustenance and the means of preservation were absolute and inalienable rights were radical for the time and more radical than our own conceptions of welfare. The United States does not have a right to live, or a right to food, housing, or water. However, what is significant for the purposes of this argument is that prerogative power in this context was not the spontaneous act of a capricious sovereign but a regular and crucial function of liberal civil society, as exemplified by the poor law and colonial administration. This was possible in that the foundation of liberal political and moral edicts

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50. Ashcraft, “Critical Review,” 7.

51. Hutchison, *Before Adam Smith*, 72.

52. Locke, *Second Treatise*, 306.

53. Hobbes, *Leviathan*, 387, ch. 30.

became bare life with the allowance for prerogative power exercised on a scale never before imagined.

Accordingly, despite the egalitarian motivations in allowing all to live, there were two subjects of political power: first, relatively autonomous members, which established the basis for modern citizenship as we know it and second, those who need guidance, a strong hand and “protection,” and thus can be subjected to arbitrary power. At the time Hobbes and Locke were writing, the poor could be forced to work, held without having committed a crime, or deported. In this way, indigents, women, and the insane were not merely left by the wayside but served as the biological norm upon which politics was founded. They needed guidance, a strong hand, and “protection” while autonomous members did not; hence, they were not rational individuals who had broken the law but subjects whose way of life and very being needed care, handling and remolding. Perhaps poor men could escape this category by becoming rich, but the political status of Africans who became enslaved, Native Americans, and women was far more static. The hard work and execration of luxury was perhaps applied to the whole population by thinkers like Locke. However, it also reflected a desire to tame the “natural” and “irrational” elements embodied in all of these groups. In the poorhouse, it was a more naked form of coercion.

Certain thinkers argue that Locke’s proposals for the indigent were an anomaly and so cannot be considered part of his political thought,<sup>54</sup> while others would contend that despite these undemocratic features, Locke’s work must be considered in its historical context and for its radical implications.<sup>55</sup> Even as the second argument is indeed true, what must be recognized is that these policy reforms cannot be ignored in light of Locke’s discussion of prerogative power.<sup>56</sup> Locke’s reasoning regarding both the care and internment of the poor shows a new form of reason of state: *Wohlfahrtsstaatsräson*, reason of state guided toward the good of the people.<sup>57</sup> In other words, this new reason of state is the exercise of prerogative power deployed for seemingly democratic justification—the security and well-being of the public—even as its implementation is profoundly non-democratic. The exercise of prerogative power domestically thus becomes justified given its “democratic” aims.<sup>58</sup> Although it could be objected that Poor Law policy was codified and institutionalized, thereby undermining the definitional requisite that prerogative power is arbitrary (or, flexible), Wolin also

54. Jeremy Waldron, presentation, Harvard Department of Government, Political Theory Colloquium, Spring, 2002.

55. As Richard Ashcraft would argue.

56. As Richard Tuck recognizes. See Tuck, *The Rights of War and Peace*, 168, 171, 172 and 177.

57. Term used by Wolin in “Democracy and the Welfare State.”

58. Max Weber would call this a politics of ultimate ends, where the means are ignored. See “Politics as a Vocation,” in Max Weber *From Max Weber: Essays in Sociology*, ed. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958).

convincingly demonstrates that the dictates of the welfare state are founded on highly arbitrary decisions and reasoning. This challenges the welfare versus warfare dichotomy conventionally drawn by liberal political theorists. Those who become objects of prerogative power are stripped of political status (if they had it in the first place) and are subject to the whims of their husbands, judges, poor law officials, ship captains and colonial governors, among others. The laws merely enable the deployment of prerogative power rather than constituting its enactment and they evidence the deployment of prerogative beyond a unitary sovereign figure. In this context, bare life serves as the precondition for the political just as prerogative power is the precondition for liberal democracy.

Accordingly, there is less tension between democratic power and prerogative power in the liberal democracy Locke envisioned than in Alexis de Tocqueville's observations about democracy, for example. De Tocqueville clearly recognized that with an *active* democratic citizenry—made possible by strong local governments and citizens' groups and a weak federal government—the state might not be effective during times of domestic threat or war. While Locke provides the conditions for a procedural democracy in which the equality of all before the law, the rule of law and the end of preservation are the key elements of government and civil society, de Tocqueville recognizes at least two dangers in this arrangement. First, he warns that a population of isolated individuals focused only on material well-being and not the good of the larger community will pave the way for a highly centralized and despotic, government. If individuals become increasingly isolated and feel less connection towards one another, each will be independent and weak, proud and servile.<sup>59</sup> As the love of equality and the hatred for privilege grows endlessly, they will favor “the gradual concentration of all political rights in those hands which alone represent the state.” But he rightly sees the danger of this centralization: “Every central power which follows its natural instincts loves equality and favors it. For equality singularly facilitates, extends, and secures its influence.”<sup>60</sup> It is not equality that is the problem *per se*, but an equality of material conditions that holds bare life as its standard. To put it simply, equality in and of itself does not ensure democratic activity and participation.

With the increased power of the central government, the focus turns to security and well-being rather than debate, dissent, accountability, or responsibility: indeed the love of order could “induce private persons to sacrifice more and more of their rights for the sake of tranquility.”<sup>61</sup> This centralization and substantively empty legislation, favoring procedure and equality over democratic

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59. Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (New York: Perennial Classics, 2000), 672.

60. De Tocqueville, *Democracy*, 673.

61. De Tocqueville, *Democracy*, 677.

activity, would also be aided by the tyranny of the majority of which Montesquieu and de Tocqueville warned, as well as the creation of a new aristocracy in the form of industrial wealth. Sounding very much like his contemporary Karl Marx, de Tocqueville cautioned that as industrial enterprise increased and needed a new and better infrastructure and legislative protection, the state itself would become the “leading industrialist.”<sup>62</sup> In this way, two contradictory revolutions occur: one weakening supreme power and the other strengthening it.<sup>63</sup>

Karl Marx aptly formulated how this could be possible: a state’s emancipation from private property (or religion) did not eradicate it but presupposed its existence. In fact, “far from abolishing these *effective* differences, it [the state] only exists so far as they are presupposed. . . it manifests its universality only in opposition to these elements.”<sup>64</sup> Accordingly, political emancipation is not human emancipation and man leads a double life as an abstract citizen, on the one hand, and a member of civil society on the other. The material expression of this atomized political identity is private property and this “leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty.”<sup>65</sup> Hence Marx recognizes that state domination exists in this arrangement, but he believes that it proceeds directly from capitalism. The end of the state in his story is to make the rich richer and the poor poorer in the name of technological progress, abstract philosophy and a nation’s greatness.

While Marx does not analyze the exercise of political power beyond capitalist ends, he does describe the conditions of bare life—mere, biological life stripped of political status—in detail. First, workers were divested of all political status; they had no vote, laws prohibited “combination” and meetings of three or more people, and their work conditions were not protected. When they did attempt to unionize, the state did not hold back its violence or consider the letter of the law; it did not need to. Second, workers at this time lived a life of bare survival: “Light, air, etc.—the simplest *animal* cleanliness—ceases to be a need for man. *Dirt*—this stagnation and putrefaction of man—the *sewage* of civilization. . .—comes to be the *element of life* for him. Utter, *unnatural* neglect, putrefied nature, comes to be his *life-element*. None of his senses exist any longer, and not only in his human fashion, but in an *inhuman* fashion, and therefore not even in an animal fashion.”<sup>66</sup> Here we see what biological life (disenfranchisement) is in contradistinction to humanity or notions of what it is to be a human being (citizenship). The connection between bare life and disenfranchisement suggests how status

62. De Tocqueville, *Democracy*, 686.

63. De Tocqueville, *Democracy*, 688.

64. Karl Marx, “Economic and Philosophic Manuscripts of 1844,” in Friedrich Engels and Karl Marx, *The Marx-Engels Reader*, 2nd edn., ed. Robert C. Tucker (New York: W.W. Norton, 1978), 33.

65. Marx, *Marx-Engels Reader*, 42.

66. Marx, *Marx-Engels Reader*, 94.

rather than criminal acts make these subjects open to the violence of the state. While Marx recognized that the dangerous and even violent treatment of workers at the time was due to their disenfranchisement, on the one hand, and capitalist needs on the other, he ignored the development of the modern nation-state and its internal logic apart from capitalism. Rather, he attributed all moves by the state to economic motivation.

The less human aspects of liberalism were developed as industrial capitalism became more firmly established in the west and the treatment of workers became more scientific and inhuman, as evidenced by the population theories of Malthus, Ricardo and their intellectual heirs. What were ascetic prescriptions for the entire population—hard work, productivity, thrift, frugality, and prudence (advocated by Locke and Smith)—and a critique of the idle rich were, in practice, exercised on the poor. The democratic activity that could have restrained arbitrary state power, which de Tocqueville witnessed in the United States at first, gradually became subsumed by the growth of the nation-state, urbanization and the emphasis on material gain. Hence, political life as democratic *activity* and a significant check on governmental and prerogative power—to the degree that it existed—began to decline with the development of bureaucracy, the growth of scientific policies and administration, the increased role of capitalism and its ties to the state. In this way, the less democratic aspects of liberal theory were developed and consolidated alongside liberal governments and constitutions.

Most academics tend to treat Hobbes as the theorist of sovereignty and international relations and Locke as the theorist of civil society and domestic politics. What is forgotten is that Hobbes's treatment of power is distinctly modern and anticipates liberal writings, and thus his theories illuminate how the State of Nature is a crucial part of civil society rather than something prior to or outside of it. On the other hand, Locke's provision for prerogative power has also largely been neglected<sup>67</sup> (and this neglect includes Agamben) and its implications for a new reason of state embodying the welfare of the people and operating both domestically and externally. For this reason, Hobbes is usually not mentioned in discussions of contemporary citizenship and Locke is excluded from contemporary debates about the modern nation-state. Neither theorist is merely "liberal" however; each contributes to the intellectual history of the growth of the modern nation-state. Each theorist calls for the alienation of a man's natural right to defend himself and the monopoly on force and violence of the state. Hence, each author anticipates the growth and consolidation

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67. Obvious exceptions: Sheldon Wolin, Wendy Brown, Richard Tuck, or Straussians (such as Harvey Mansfield). As Pasquale Pasquino states, Locke's arguments about prerogative are "a concept and a chapter that most interpreters pass over in silence." Pasquino, "Locke," 199.

of territorial sovereignty and the categories of *ius soli* and *ius sanguinis* that mark modern citizenship and political belonging, despite the fiction of the social contract.<sup>68</sup> Locke's subordination of consent to rationality in property is one indication of this. Indeed, Locke's ideal polity is much more suited for modern warfare and other exercises of prerogative power than the truly democratic conditions that de Tocqueville observed in the United States' early history.

The contradictions between liberal democracy and the exercise of prerogative power cannot really be seen in Hobbes's writings, however. It is Locke we must turn to in order to view the inherent contradictions with which we live right now: a government that is subjected to law and yet, at the most crucial political moments, it is not; the rule of law and checks and balances, but on the other hand arbitrary power has absolutely no rules or guidance with regard to means; and the purpose of all political rule—the good of the people—which is so loosely defined that it could mean anything, in contradistinction to the rationalization of modern life. As it has been theoretically formulated and historically developed, prerogative power is the precondition for liberal government and democratic activity. This is evident not only in Locke, but also certain of the Founders' arguments for presidential prerogative, such as those of Alexander Hamilton.<sup>69</sup>

In discerning what this means for political subjects, the social contract, as a political theoretical concept, only makes sense if there is passage from the State of Nature to civil society in a temporal sense. Nevertheless, the difficulty of this construct has been discussed in much of the recent literature on citizenship. For example, Bonnie Honig shows how (perhaps paradoxically) true consent to American citizenship can only be enacted by immigrants.<sup>70</sup> That a group that can be subject to prerogative power “enters” civil society through naturalization evidences the fact that one sphere does not precede the other. Therefore, despite the academic treatment of the State of Nature as being outside civil society, on the one hand, and the exercise of prerogative power in a liberal polity as being the exclusive reserve of international relations and politics, on the other, it should be evident that neither assumption is true. The State of Nature has been incorporated into civil society and the deployment of prerogative power was

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68. See Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge: Harvard University Press, 1992), 32; *ius soli* is ascriptive and challenges the liberal notion of consent.

69. See, for example, Federalist papers #34 or #69, by Alexander Hamilton; also, Briggs, “Formal Power and Prerogative”; Nasser Hussain and Austin Sarat, “The Literary Life of Clemency: Pardon Tales in the Contemporary United States,” presented at the Association for the Study of Law, Culture, and Humanities, March, 2005, Austin, Texas; and Jeffery Alan Smith, *War and Press Freedom: the Problem of Prerogative* (Milwaukee: University of Wisconsin, 1999).

70. See Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 92–98.

never formulated specifically beyond the borders of the liberal polity, but in domestic *and* international relations. Hobbes and Locke ideally conceived of the use of this power in times of a state of emergency, thus constituting its exercise as an exception even if their own theories undermined this exceptional status. Nevertheless, their substantive theoretical shift to the biological and rational prefigured the greater emphasis on bare life in sovereign decisionmaking. The crucial element that links these deployments of power is bare life. In this way, we end up with subjects who enter the State of Nature within civil society—bare life—juxtaposed against autonomous subject-citizens who make their “life beyond bare life.”

### Prerogative Power in the Modern Nation-State

In early liberal writings, the notion of prerogative power and violence, then, were not simply designed to deal with an external enemy but also an internal enemy.<sup>71</sup> The possible abuse of power was worth the risk in the face of internal instability. Accordingly, dual strands of power have developed in liberalism and the modern nation-state—the legitimacy and will of the people and the power of the state. Where the two clash, the power of the state trumps the power of the people except in times of revolution. Nonetheless, de Tocqueville presciently noted that people *willingly* give more power to a centralized state as long as they are treated equally.

Governmental power in the United States was at first closer to the Tocquevillean conception of democratic governance and legitimacy. As described in Book I of *Democracy in America*, the town meetings, the significant degree of local political participation, the strength of secondary associations, and the freedom of the press were all possible in a country where states’ rights took precedence. The country at this time was not only decentralized but had no national military or coin. The economy, which was largely agrarian or composed of small entrepreneurs, also did not require a strong state. In modern times, this was probably one of the most democratic periods in Western history with regard to political participation and activity.<sup>72</sup>

At this time, the matter of prerogative was disputed by the founders and settled upon when the presidency was finally established in the late 1700s. Concerns about the abuse of prerogative were not just directed to the executive but also the legislative branch and later, the Supreme Court. So, the abuse of prerogative was

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71. See Federalist number 24 on the United States’ “natural enemies.”

72. Of course, as with ancient Greece, the most democratic circumstances coexisted with the most non-democratic: slavery, genocidal practices towards Native Americans, the exclusion of women, racism, incredibly harsh treatment of criminals and so on.

not conceived of as being the unbroken power of a single leader or king; rather it was broadly theorized as a *concentration* of power in any single branch or political body.<sup>73</sup> For this reason, the presidency was made stronger in the late 1700s in order to check legislative tyranny and, indirectly, the tyranny of the people. Two key elements of this prerogative were contained in Article 1 of the Constitution: the authority to declare war and grant clemency. Since the powers of the executive were never defined as clearly as those of the legislative branch, the president could potentially have “unlimited power.”<sup>74</sup> On the other hand, the authors of the Federalist papers are careful to distinguish between the U.S. presidency and the British monarch.<sup>75</sup> Like the difference between Hobbes’s and Locke’s sovereigns, the key differences are that the president can be held accountable for his or her actions, is subject to the rule of law, and acts according to the common good.

The presidency and federal government were nevertheless weak up until the Civil War. However, with the increasing control of the federal government during and after the Civil War, as well as the development of the United States into a modern nation-state, the tension between local, disperse power and state power became more pronounced.<sup>76</sup> At the same time, the presidency, from Lincoln onward, became stronger and set a historical precedent that was (arguably) not challenged until after the Nixon administration: a strong, activist presidency checked but not hindered by the legislature in both national and international affairs.<sup>77</sup>

More generally, the development of industrial capital further lent to demands for centralization. The increase in federal power had a more homogenizing effect and the idea of *national* identity became much more important. This tension became more profound with a second wave of increased bureaucracy (with the beginnings of the welfare state) and federal power during the Great Depression.<sup>78</sup> The dispersion and augmentation of bureaucratic power not only reflected this transformation from a country that had held states’ rights to be of supreme importance to a nationally defined conception of governance, hence marking the transition to a modern nation-state; it also gave rise to a branch of the government

73. Briggs, “Formal Power and Prerogative,” ch. 2.

74. See Briggs, “Formal Power and Prerogative,” ch. 2.

75. For example, see Alexander Hamilton, Federalist number 69, March 14, 1788.

76. See Giorgio Agamben’s discussion of Lincoln in *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 20. This transformation was earlier predicted by De Tocqueville.

77. See Agamben on Lincoln, *State of Exception*, ch. 1 and Briggs on an activist presidency and the legislative acts following the Nixon presidency that attempted to curb future presidents’ actions (and largely failed), ch. 1.

78. See James T. Patterson, *America’s Struggle Against Poverty, 1900–1985* (Cambridge: Harvard University, 1986), chs 2 and 4.

that is shaped by non-democratic power. As Wolin argues, the exercise of sovereignty domestically is just as important as internationally: “In the final analysis, in spite of all ‘social welfare policies,’ the whole course of the state’s inner political functions, of justice and administration, is repeatedly and unavoidably regulated by the objective pragmatism of ‘reasons of state.’ The state’s absolute end is to safeguard (or to change) the external and internal distribution of power. . . .”<sup>79</sup> With the development of bureaucracy, sovereignty is much more dispersed even as governmental actors—be they presidents, Supreme Court justices, governors, or the police—can be held accountable for their actions.<sup>80</sup> In this regard, Giorgio Agamben points out, the zone of indistinction between the juridical order and the state of exception in a liberal democracy must be highlighted, even if it is not absolute or unbroken as in a monarchy, fascist regime, or dictatorship.<sup>81</sup>

In contrast to monarchical prerogative, in a modern polity the rule of law facilitates the suspension of law and thus prerogative (and the State of Nature) is inextricably linked to the rule of law rather than signifying its absolute negation.<sup>82</sup> In this sense, prerogative is not akin to Carl Schmitt’s notion of dictatorship, but its analysis must be grounded in a more ambivalent “democratic” context.<sup>83</sup> In a Weberian sense, prerogative can be rational in that the rule of law and some sort of juridical process is needed to suspend the law. However, it can be irrational in a few senses: it indicates the suspension of law and so can be marked by unpredictability (although not necessarily), it can be fiscally costly despite rhetoric of rolling back the state,<sup>84</sup> and it can be initiated by an individual or individuals unhindered by the checks and balances of government. Finally, prerogative can also lead to benevolent acts, although the precariousness of this benevolence must be highlighted. The subject of prerogative power—whether treated compassionately, indifferently, or violently—has been stripped of all legal rights, whether *de facto* or *de jure*.

79. Weber, *From Max Weber*, 334.

80. That the exercise of prerogative is not conceived of as the president’s power alone is evident in contemporary treatments of the subject. For example, on states’ governors exercising the right to commute death sentences, see Hussain and Sarat, “The Literary Life of Clemency”; on the Supreme Court’s exercise of prerogative, see Rogers Smith, “Bush vs Gore,” in “Roundtable Discussion: the Uses and Abuses of the Constitution, Special Issue on the Constitution,” *Common Place* 2 (July 2002), <[www.common-place.org](http://www.common-place.org)> (cited May 28, 2005).

81. Agamben, *State of Exception*, ch. 1.

82. Nevertheless, this does not produce a black and white situation of law/outside of the law but a juridically undecidable situation. See Agamben, *State of Exception*, 21.

83. The mistake that is made is to call this absolute power in Carl Schmitt’s sense of a dictator—both Agamben, in *State of Exception*, and Pasquino discuss how this power can still be called prerogative or the state of exception despite its difference from monarchical prerogative and dictatorship in Schmitt’s conception. See Pasquino, “Locke”; Giorgio Agamben, *State of Exception*.

84. For example, the fiscal irrationality of criminalizing the homeless despite the fact that it often costs three times as much as simply providing housing subsidies and welfare.

## War

The clearest example of the contemporary U.S. exercise of prerogative power domestically is Guantánamo Bay. Although it can be argued that this is not a site of domestic power because the detention center is on foreign ground, this land is essentially an annex to the United States.<sup>85</sup> Further, it is not in a war zone and therefore, not conceived of as being temporary geographically or temporally. In fact, the suspension of law on the island was first declared when Haitian refugees were housed there in 1991;<sup>86</sup> therefore, this suspension was not first conceived of as a wartime necessity. The absence of any rule of law in this case is fairly obvious, but more so now that Iraqi detainees are viewed as enemy combatants rather than as prisoners of war (POWs), who would at least be protected by the Geneva Convention provisions.<sup>87</sup> However, the justification for this legally blurry geo-political space is the threat to national security that these individuals pose.

Correspondingly, the Patriot Act seemingly appeared as the result of exceptional circumstances and is apparently directed to a narrow group—male Arabs and Muslims. Amidst criticism and public debate of this act and the piecemeal adoption of provisions for “Patriot Act II,”<sup>88</sup> these measures continue to be implemented. The consequences are the abuses at Abu Ghraib,<sup>89</sup> the tactics used at Guantanamo Bay<sup>90</sup> and the continued surveillance of thousands of residents in the United States.<sup>91</sup> However, it is argued that the events of September 11, 2001, and the War on Terror force the American public to make hard choices, including the necessity of suspending some individual liberties for some residents for the time being.

Therefore, the events of September 11, 2001, have seemingly brought about a state of emergency that has called for extensive restructuring of surveillance, immigration services, and policing at home and abroad. Nevertheless, the regular detainment of non-resident immigrants evidences that the suspension of law is

85. See Daphne Eviatar, “Nowhere Land,” *Boston Globe*, April 18, 2004, E4.

86. Eviatar, “Nowhere Land,” E4.

87. See Agamben, *State of Exception*, ch. 1; Eyal Press, “Tortured Logic,” *amnestynow*, Summer, 2003; Charlie Savage, “Justices Struggle to Find Balance on Detainee Policy,” *Boston Globe*, April 29, 2004, A3; “Rationalizing Torture,” *Boston Globe*; Dana Priest, Joe Stephens, “Harsh Questioning Methods Were OK’d for Cuba Prison,” *Boston Globe*, May 9, 2004, A20.

88. See David Martin, “With a Whisper, Not a Bang,” *San Antonio Current*, December 24, 2003, <www.sacurrent.com>, (cited December 16, 2004). Measures continue to be passed as of this writing.

89. See Bryan Bender, “Activists Urge Probe of US Detention Policies,” *Boston Globe*, June 17, 2004, A2.

90. Scott Higham, “Camp Memos Tell of Detainees’ Fear,” *Boston Globe*, June 13, 2004, A3. See “Rationalizing Torture,” *Boston Globe*, June 13, 2004, H10.

91. See Beverley Lumpkin, “PatriotAct Redux,” abcnews.com, February 21, 2003, <abcnews.go.com/sections/us/HallsOf Justice> (cited July 7, 2004); Shelley Murphy, “Prosecutors Defend ‘Sneak and Peek’ Warrant,” *Boston Globe*, October 30, 2003, B3.

not exceptional (that is, only called forth during wartime), nor aimed at those suspected of terrorist activity or other violent crimes but rather deployed on groups that are perceived as bare life. The War on Terror (and the War on Drugs, which I discuss below) suggest how prerogative power is being exercised domestically (and not just in wartime or at the international level), regularly (rather than as a state of exception), and on individuals considered bare life (rather than “enemies” *per se*).<sup>92</sup>

Even before September 11, 2001, the U.S. government had begun jailing and deporting record numbers of immigrants as a result of the 1996 Antiterrorism and Effective Death Penalty Act of 1996 and Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA). Rather than terrorists being deported, however, individuals with drunken driving records from the 1970s, people who had written bad checks, or individuals whose visa status was indeterminate were targeted. In fact, under this provision, the number one destination country for deportation was Mexico, a country that has not been associated with Middle East terrorism.<sup>93</sup> Haiti is also technically at the top of this list but can escape this juridical classification because Haitians are most often intercepted in the water, consequently preventing them from ever having the right to an appeal or hearing, and thereby occluding the possibility of legal deportation.<sup>94</sup> The suspension of law is clearly not just for enemy combatants nor does it occur on foreign soil alone.

Similar to the detainees at Guantanamo and prominent brutality cases is the situation of would-be refugees and migrants detained indefinitely in holding cells. These cases receive far less media and political attention despite the fact that this is another example of the regular suspension of law. These individuals (about 4,000 a year), whose ages range from 2 months to the elderly, are held without charge, without legal recourse, often detained in cells with criminals (although future legislation may ensure that children will be housed separately), and can be

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92. As Agamben states, “The originary political relation is marked by this zone of indistinction in which the life of the exile. . . borders on the life of *homo sacer* who can be killed but not sacrificed. This relation is more original than Schmittian opposition between friend and enemy, fellow citizen and foreigner,” *Homo Sacer*, 110.

93. William Branigin, Gabriel Escobar, “INS Deportations Rising,” *Boston Globe*, April 25, 1999, A19; John Budris, “Jailed Immigrant a Man Without a Country,” *Boston Globe*, May 9, 1999, B6; Nancy Gertner, Daniel Kanstroom, “The Recent Spotlight on the INS Failed to Reveal its Dark Side,” *Boston Globe*, May 21, 2000, E1, E3; David L. Marcus, “Three Times and Out,” *Boston Globe*, October 14, 1998, A1; Patrick J. McDonnell, “Judges Rule Against Indefinite INS Jailings,” *Boston Globe*, July 12, 1999, A4; Teresa Mears, “As INS Jails Fill, a Release Plan Surfaces,” *Boston Globe*, February 14, 1999, A16; Teresa Mears, “The Woes of Immigrants Forced to Emigrate,” *Boston Globe*, March 26, 2000, A6; “Secret Trials in America,” *Boston Globe*, December 4, 1999, A18; “US Deportations at Record Level,” *Boston Globe*, May 14, 1997, A3.

94. See Viet D. Dinh, “Law and Asylum,” in *Arguing Immigration*, ed. Nicolaus Mills (New York: Touchstone, 1994); Jerry Seper, “U.S. Prepares for Haitian refugees,” *The Washington Times*, February 24, 2004, <[www.washingtontimes.com](http://www.washingtontimes.com)> (cited May 21, 2004).

detained indefinitely.<sup>95</sup> The suspension of law is not only clear but the benevolence of their guardians is entirely arbitrary. In the case of Abner Louima, the Haitian immigrant who was sodomized and beaten by police officers in August 1997, the suspension of law worked against him. Even though these police officers were brought to “justice,” detained immigrants are not citizens and do not receive the same protections; arguably, this is why abuses occur more frequently. Similarly, the prison guards at Abu Ghraib were also charged, but this does not change the precarious legal status of Iraqi prisoners. Alternatively, immigrants who are being rapidly deported or have no right to appeal decisions made about their residency status are also treated outside of the law.<sup>96</sup>

Since the implementation of the Patriot Act, not only have men of Arab, South Asian, and/or Islamic identity been detained and subject to surveillance, often charged with crimes other than terrorism (if charged at all),<sup>97</sup> but various other immigrants have been subject to the same controls despite their lack of affiliation with terrorism. Indeed, the Patriot Act should be seen on a continuum with the 1996 terrorism provisions rather than indicating an exception; the Patriot Act, and related legislation or deployments of prerogative, is aimed at the greater surveillance and control of *all* individuals rather than merely being directed at suspected terrorists. More broadly, the continuous updates on terror levels, the constant reminders of terrorist threats, and the implication that the mere presence of individuals from certain countries can pose a national security threat, suggests that we should all limit our own freedoms, policing ourselves and others, in this time of uncertainty.<sup>98</sup>

Hannah Arendt, Sheldon Wolin, and Giorgio Agamben have all variously argued that the suspension of law in these cases is precisely dependent on legislative authority. For example, the change of status for Iraqi detainees from POW to enemy combatant had to be argued and framed in terms of international

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95. See Monica Rhor, “Unwelcome Turn,” *Boston Globe*, August 7, 2003, B1; McDonnell, “Judges Rule Against Indefinite INS Jailings”; “US Frees Ethiopian Jew Held Nine Years,” *Boston Globe*, May 24, 1999, A6; Budris, B6; and David Oliver Relin, “Who Will Stand Up for Them?,” *Parade Magazine*, August 4, 2002.

96. See Lisa Getter, Jonathan Peterson, “Speedier Rate of Deportation Rulings Assailed,” *Los Angeles Times*, January 5, 2003, <[www.latimes.com](http://www.latimes.com)> (cited January 1, 2005); Carol J. Williams, “Rapid US Deportation Forces New Route on Haitian Refugees,” *Boston Globe*, July 13, 2003, A11; Branigin, Escobar, “INS Deportations Rising.”

97. See Vickie Chachere, “Fla. School Trustees Back Bid to Fire Palestinian Professor,” *Boston Globe*, December 20, 2001, A25; Judith Graham, “Congressman Wants Deportation of Immigrant Student,” *Boston Sunday Globe*, September 29, 2002, A15; Jane Wardell, “Amnesty Says Rights Are Casualty in War on Terrorism,” *Boston Globe*, May 29, 2003, A20.

98. See Sheldon Wolin, “Fear is Being Used as Re-election Tactic,” *Common Dreams News Center*, May 10, 2004, <[www.commondreams.org](http://www.commondreams.org)> (cited May 10, 2004); Adam Green, “Citizen Spies” *New Yorker*, August 5, 2002, <[www.newyorker.com](http://www.newyorker.com)> (cited May 31, 2004); Curt Anderson, “Ashcroft Expands FBI Arrest Powers,” *Boston Globe*, March 20, 2003, B2; Wayne Parry, “Man Freed After Almost 2 Years in Custody,” *Boston Globe*, April 15, 2004, A7; Curt Anderson, “Bush Seeks to Broaden US Powers with Special Subpoenas,” *Boston Globe*, September 14, 2003, A19.

law; a legislative act enabled the deployment of prerogative power. While it could be objected that these cases might be reprehensible on their own terms but say nothing about U.S. democracy or citizenship, this argument can only be made if the prerogative exercised on foreigners is viewed as entirely different than that which would be (but is not, according to this objection) exercised on U.S. citizens. I do not believe that this is the case.<sup>99</sup>

Connected to the power dynamics of the War on Terror, the War on Drugs allowed the United States to distinguish itself in the 1990s as the country with the highest imprisonment rate in the world.<sup>100</sup> As David Garland argues, “In a context where the federal government mostly lacks jurisdiction (other areas of crime control being the prerogative of the states and local authorities) the war on drugs was the American state’s attempt to ‘just say no.’”<sup>101</sup> Importantly, this “war” led to the highest incarceration of African American males in their prime since Jim Crow, indicating the use of law to suspend the law and the treatment of certain groups as inherently criminal and so posing a biological threat.<sup>102</sup> The cutbacks on legal aid in recent years, three strikes laws, and the indifference as to whether crimes were violent or non-violent<sup>103</sup> lead to the same arbitrary situation as the prisoners in Guantánamo or refugees in holding cells in Florida, Texas, and California, for example. More specifically, the shift in emphasis in drug enforcement from dealers to users led to shocking increases in the percentage of incarcerated non-violent offenders.<sup>104</sup>

The groups most affected by these policies were African Americans and women. While the majority of drug users are white, the majority of drug arrests were of African American individuals<sup>105</sup> and between 1986 and 1991, African American women’s incarceration rate for drug offenses increased by 828 percent. Moreover, a 1994 Justice Department study of federal prisoners found that women were over-represented among “low-level” drug offenders; these women were non-violent, had little or no prior criminal record, were not involved in drug trafficking, and received the same sentences as high-level offenders due to

99. See Giorgio Agamben, “Non au tatouage biopolitique,” *Le Monde*, October 10, 2004, <[www.lemonde.fr](http://www.lemonde.fr)> (cited January 31, 2004).

100. Harvard Law Review Association, “Note: Winning the War on Drugs: A ‘Second Chance’ for Nonviolent Offenders,” *Harvard Law Review*: 113 (April, 2000); Holly Sklar, “Reinforcing Racism with the War on Drugs,” *ZMagazine*, December, 1995; “Punishment and Prejudice: Racial Disparities in the War on Drugs,” Human Rights Watch: 12, no. 2, May 2000, <[hrw.org](http://hrw.org)> (cited January 3, 2005); Neal Pierce, “International Condemnation for Our ‘War on Drugs,’” August 28, 2001, *crimelynx*, <[www.crimelynx.com/intcon.html](http://www.crimelynx.com/intcon.html)> (cited January 3, 2005).

101. David Garland, *The Culture of Control* (Chicago: University of Chicago Press, 2001), 132.

102. See Glenn C. Loury, “The Conservative Line on Race,” *The Atlantic*, November, 1997, <[www.theatlantic.com/issues/97nov/race.htm](http://www.theatlantic.com/issues/97nov/race.htm)> (cited May 10, 2004), for example.

103. See Garland, *Culture of Control*, 132–35.

104. Harvard Law Review Association, “Note: Winning the War on Drugs.”

105. See Harvard Law Review Association, “Note: Winning the War on Drugs.”

mandatory sentencing.<sup>106</sup> What is more, as report after report has emphasized, one in three African American males is now somehow involved with the prison system, whether through jail time, parole, or probation. Observers note that because of the enormous costs of this war, including spending \$26.4 billion to increase the number of prison beds,<sup>107</sup> it cannot simply be scaled back. Although the War on Drugs is no longer at the forefront of media and public attention, the changes in the justice system and emphasis on prison sentences over rehabilitation or education cannot easily be undone. Nor can the damage to African American communities, families, and economic well-being. The public rhetoric of a crack epidemic linked to African Americans did not simply disappear with the events of September 11, 2001.<sup>108</sup> The creation of the Office of Counternarcotics Enforcement in 2004 under Homeland Security is one example of the linkage between the prerogative exercised on foreigners and inner city residents or, rather, links the War on Drugs to the War on Terror.

In theory and policy, John Locke conceived of the use of prerogative domestically. Further, Locke conceptualized prerogative power as the wise decisionmaking of one leader for the common good, and yet his recommendations for the Poor Law and colonial administration advocated the use of sovereign authority through administrative organs. While the brief treatment of these cases can only suggest a parallel with Locke's ideas, the deployment of prerogative in a liberal democracy is evident. The Founders and Locke believed that democratic safeguards were provided in notions of the common good, constitutional checks, and the possibility of prosecuting political actors who abused prerogative power. Nevertheless, in all of these cases, "war" is being waged against individuals who are *de facto* or *de jure* disenfranchised and it is really the subjects of prerogative who are the litmus test of democracy.

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106. Sklar, "Reinforcing Racism."

107. Pierce, "International Condemnation."

108. See Joseph Barnes, "Book Review: The End of Racism by Dinesh D'Souza," December, 1995, ZMagazine <[www.zmag.org/zmag/articles/dec95reviews.htm](http://www.zmag.org/zmag/articles/dec95reviews.htm)> (cited May 10, 2004); Adam Miller, "Professors of Hate," *Rolling Stone* 693 (New York: October 20, 1994); Executive Summary, "Wrong Then, Wrong Now: Racial Profiling Before and After September 11, 2001," May 10, 1994, <[www.civilrights.org/publications/reports/racial\\_profiling/](http://www.civilrights.org/publications/reports/racial_profiling/)> (cited May 10, 2004), Amnesty International's website for updated information; ([www.amnestyusa.org](http://www.amnestyusa.org)); Deborah Ramirez, Jack McDevitt, Amy Farrell, monograph: "A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned," sponsored by the U.S. Department of Justice (Wheaton: Northwestern University, November 2000); Mikal Muharrar, "Media Blackface: 'Racial Profiling' in News Reporting," September/October 1998 <[www.fair.org/extra/9809/media-blackface.html](http://www.fair.org/extra/9809/media-blackface.html)> (cited May 10, 2004); Executive Summary, "Massachusetts Racial and Gender Profiling Final Report," (Boston: Northeastern University, Institute on Race and Justice, May 4, 2004); American Civil Liberties Union (ACLU), "Racial Equality: Racial Profiling—Press Releases," n.d. <[www.aclu.org/RacialEquality/RacialEqualitylist.cfm?c=133](http://www.aclu.org/RacialEquality/RacialEqualitylist.cfm?c=133)> (cited May 10, 2004).