

# For a Right to Health Beyond Biopolitics: The Politics of Pandemic and the ‘Politics of Life’

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### Abstract

We argue, drawing on the work of Didier Fassin, that the right to health can be understood as an essential part of a radical politics of life. Since the right to health implies fostering the well-being of individuals in a way that is structural, progressive and non-discriminatory, the right not only problematises the ‘governmentality’ approach to power but allows push-back against statist and market discourses through a specific phenomenology of right. The discourse of rights – like the pandemic itself – oscillates between general and particular in a way that makes normative responses unstable. Nonetheless it is this dialectic that is characteristic of human rights discourse and allows a right to health to be the proper response to pandemic without it being subsumed within neoliberal logic. A politics of life is a multi-focussed analysis of life, health and society potentially resisting the appropriation of biological life by neoliberalism.

### Keywords

Biopolitics, COVID-19, Fassin, Foucault, Health, Human Rights, Pandemic, Politics of Life

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## I. Introduction

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [ . . . ] (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

International Covenant on Economic, Social and Cultural Rights, Article 12

Against and beyond a contemporary critical theory framework that tends to encapsulate the right to health as a manifestation of neoliberal biopolitics, that is, a mere (health) management of populations for late capitalistic purpose, we argue in this paper that the right to health bears basic dimensions that challenge and overcome those biopolitical interpretations. On the one hand, biopolitical interpretations of the right to health have persuasively shown how health has been appropriated by neoliberal power relations that have turned (human) lives into commodities that can be marketised or into worthless forms of existences that can be discarded, especially in situations of health and economic crisis.<sup>1</sup> In relation to this latter case, during the COVID-19 pandemic, scholars have rightly applied the Foucauldian biopolitical strategy of ‘letting die’ to specific human groups.<sup>2</sup> On the other hand, and notwithstanding the relevance of those approaches, reframing the right to health *merely* into a biopolitical lens imposes one single descriptive interpretation. It also tends to foreclose the possibility of novel discourses of (in) justice, equality and solidarity. In essence, the ‘human’ of human rights need not be taken exclusively as a victim requiring humanitarian protection, and the ‘health’ of the right to health need not be taken to be the (Darwinian) ‘fitness’ required by the market.

It is the latter set of issues that we address in this paper, and our argument is twofold. First, the right to health implies a care for human life that debunks the neoliberal/biopolitical framework. We will argue this right can be better understood as a genuine and radical ‘politics of life’ drawing on Didier Fassin’s insights on the matter. We will discuss this point mainly in the first two parts of the paper. Second, since the right to health implies protecting and fostering the well-being of individuals *per se* (and not for instrumental reasons), we also consider how the right problematises the broader ‘governmentality’ approach that informs the relations of power in society. This is consistent with, indeed invites, a strategic deployment of human rights not simply as a useful discourse to push-back against statist and market discourses but as a way of maintaining a specific phenomenology of right. Thus, the second half of the paper argues that the discourse of rights – like the pandemic itself – oscillates between general and particular in a way that

1. A. Pele, “The Rise (and Fall) of Authoritarian Dignity. Political Struggles and Tropical Necropolitics in Brazil,” in *Dignity, Diversity, Anarchy* (K. Matthis, Ed.) (Heidelberg: Springer, forthcoming 2021). E. Kenny, “The Biopolitics of Global Health: Life and Death in Neoliberal Time,” *Journal of Sociology*, 51 (1) (2015), 9–27.
2. In the case of Brazil, the collection of essays “Pandemia Crítica” by *N-1 Edições* is particularly telling: <https://n-1edicoes.org/textos-1> (accessed July 10, 2020).

makes normative responses unstable. Nonetheless it is precisely this dialectic that is characteristic of human rights discourse – connected, as it is, with the indivisibility of human rights – and allows a right to health to be the proper response to pandemic without it being subsumed within neoliberal logic. A politics of life is a multi-focussed analysis of life, health, and society potentially resisting – not co-opted by – the appropriation and structuring of biological life by neoliberalism.

## II. Clearing the Ground: From Biopolitics to a ‘Politics of Life’

When Foucault refers to biopolitics, he intends to show how our modern and contemporary societies have, since the end of the 18th century, crossed the ‘biological threshold of modernity’.<sup>3</sup> Since then, the life of human beings understood as a species has increasingly become a central issue for social and political decisions. Public health and health-insurance, old-age pension, public hygiene, housing public policies, social medicine and welfare funds illustrate how the management of human existences has become one of the fundamental aspects of contemporary governance.<sup>4</sup> Foucault identifies two poles of this ‘power over life’. First, he coins the notion of an ‘*anatomo-politics of the human body*’ that tends to discipline, optimise and use the capacities of each individual body so it can be integrated into ‘efficient and economic controls.’ Second, Foucault mentions ‘an entire series of interventions and *regulatory controls: a biopolitics of the population.*’ This second pole targets and regulates the ‘processes’ and ‘mechanics’ of life such as ‘propagation, births and mortality, the level of health, life expectancy and longevity.’<sup>5</sup> Therefore, and as a first crucial aspect, biopolitics implies taking life as a novel object of political interventions. It is important to stress that, within this Foucauldian interpretation, if populations have now become the main object of political interventions it is not due to an alleged moral recognition of the worthiness of human life nor the ‘awakening of humanitarian feelings’.<sup>6</sup> Biopolitics has been designed and evolved only and strictly for economic purposes and to enable the ongoing development of capitalism. For Foucault, biopolitics – along with disciplines – have succeeded in adjusting the ‘phenomena of population’ to economic processes and inserted human/individual bodies into ‘the machinery of production.’<sup>7</sup> The ‘biopolitical management’ of the population,

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3. Michel Foucault, *History of Sexuality. Volume 1: An Introduction* (R. Hurley, trans.) (New York: Pantheon Books, 1978), p. 143. The English version refers simply to the ‘threshold of modernity’ while the original French version mentions le ‘seuil de modernité biologique’ in M. Foucault, *Histoire de la Sexualité I. La Volonté de Savoir* (Paris: Gallimard, 1976). (Consulted in Epub format, see ‘Chap. V. Droit de mort et pouvoir sur la vie’).
  4. Michel Foucault, “*Society must be Defended*,” (D. Macey, trans.) (New-York: Picador, 2003), pp. 249–51; Michel Foucault, *The Birth of Biopolitics* (G. Burchell, trans.) (New York: Palgrave Macmillan, 2008), p. 336.
  5. Foucault, *History of Sexuality. Volume 1*, p. 139.
  6. S. Riley, *Human Dignity and Law. Legal and Philosophical Investigations* (New York: Routledge, 2018). See Foucault, *History of Sexuality. Volume 1*, p. 138.
  7. Foucault, *History of Sexuality. Volume 1*, p. 141; Michel Foucault, *Discipline & Punish. The Birth of the Prison* (A. Sheridan, trans.) (New York: Vintage Books, 1995), p. 221.

through its regulation and optimisation, is therefore a means for a *better* ‘government of the living’ for economic and capitalist objectives. Simultaneously, since biopolitics is understood only as a more effective way to enhance capitalism, there is no intrinsic value attached to human individual existences. The latter can therefore be modulated and even discarded. The notorious Foucauldian motto to ‘make’ live and ‘let’ die intends to epitomise this biopolitical oscillation between the care and the careless administration of the population.<sup>8</sup> It is therefore particularly interesting to note that when Foucault intends to describe how capitalist/liberal mechanisms intersect and guide biopolitics, he provides examples where human deaths are naturalised. That is, death as the consequence of choice (injustice) becomes naturalised as a natural occurrence (not injustice but tragedy). When he refers to the liberal administration of scarcity that took shape in Europe by the end of the 18th century, he mentions the so-called ‘apparatus of security’ that prevents any public interventions (e.g. pricing policies) and understands scarcity (*disette*) as a natural phenomenon. Under this perspective, the market is self-regulated (in particular) by letting people ‘die of hunger.’<sup>9</sup> When Foucault examines the early liberal/biopolitical management of epidemic (studying the case of smallpox), he refers to the so-called ‘procedures of normalization’ that intend to define the accepted and ‘natural’ average levels of mortality with regards to ages and social conditions.<sup>10</sup> Along with the production of disposable existences for capitalist/liberal goals (an underpinning necropolitics), those examples reveal also another subtler aspect of biopolitics. The latter does not only refer to a novel form of power that takes life/population as the main target of political interventions, it is also a power that is all the more pervasive because its techniques of governance imitate the very mechanisms of life. Indeed, both the security and normalisation procedures quoted above rely on the understanding and regulation of the ‘internal forces’ of events and operate therefore ‘as if they were vital’, following Maria Muhle’s observation.<sup>11</sup> Consequently, biopolitics is therefore (and first) a mode of power that aims at governing populations and that (second) mimics life’s intrinsic mechanisms in order to reach this objective. It relies on economic/liberal rationalities (e.g. ‘*laissez-faire, laissez-aller*’) in order to penetrate those vital mechanisms and to govern society. As noted above, what it is striking in Foucault’s views is that this entanglement between biopolitics and economic policies/rationalities entails, almost inevitably, naturalisation of the processes of the deaths of the population (or at least part of it). It is true that Foucault has notoriously highlighted how, under our biopolitical era, racism has enabled us to define ‘what must live and what must die’ and contemporary debates have rightly explored the biologisation of life underpinning those processes.<sup>12</sup> It is not less true that for Foucault, the economic/

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8. Foucault, “*Society must be Defended*”, p. 241.

9. Michel Foucault, *Security, Territory, Population* (Graham Burchell, trans.) (New York: Palgrave Macmillan, 2007), p. 42.

10. Foucault, *Security, Territory, Population*, p. 63.

11. Foucault, *Security, Territory, Population*, pp. 64–68. M. Muhle, “A Genealogy of Biopolitics: The Notion of Life in Canguilhem and Foucault,” in *The Government of Life: Foucault, Biopolitics and Neoliberalism* (V. Lemm and M. Vatter, eds) (New York: Fordham University Press, 2014), p. 87.

12. Foucault, “*Society must be Defended*”, p. 254. See for instance R. Esposito, *Bios. Biopolitics and Philosophy* (Timothy Campbell trans.) (Minneapolis: University of Minnesota Press, 2004).

liberal rationalities on which biopolitics is expressed also entails administrating human existences through a constant exposure to death (symbolic, social, economic).

In his *Cours on The Birth of Biopolitics*, Foucault has exclusively dedicated his lectures on (neo)liberalism (e.g. German ordoliberalism and the American ‘anarcho-capitalism’), offering his apologies for not having examined thoroughly this idea of biopolitics.<sup>13</sup> He has nonetheless intended to provide some basic clues with regards the relationship between biopolitics and (neo)liberalism. He briefly highlights in particular that biopolitics is ‘being part of something much larger’, that is, liberalism, understanding the latter as a novel ‘governmental regime’ that relies on ‘economic truth.’<sup>14</sup> In the introduction of the ‘Course Summary’ of those lectures, Foucault also insists that biopolitics is ‘inseparable from the [liberal] framework of political rationality’. Indeed, liberal and neoliberal governmentalities also intend to manage ‘the phenomena of the population.’<sup>15</sup> To put it briefly, there are two main aspects of the entanglement of biopolitics and (neo)liberal modes of governance. Biopolitics is first deployed *within* liberal and neoliberal types of rationalities and governmentalities (understood as ways of governing people’s conducts). Second, both biopolitics and (neo)liberalism are interested in grasping ‘reality’, and the regulation of the binomial ‘life-population’ is (only) the main expression of this radical aspect.<sup>16</sup> It is easy to understand why this Foucauldian framework is attractive to define contemporary issues underpinning global health in general and the right to health in particular. It enables us to posit cause/effect type relations between the deployment of neoliberal governmental practices since the late 1970s and the limitations, failure and risks that public health policies have been facing since then. Albeit the fundamental heuristic and political dimensions of Foucault’s approach to biopolitics that are prescient for contemporary health-related questions, it is also important to avoid, as Daniele Lorenzini suggests, the ‘blackmail of biopolitics’.<sup>17</sup> Indeed, the Foucauldian/biopolitical approach to health might not only limit the interpretations on the matter, but also and foremost, may produce discursive effects that actually shape the materiality and substance of fundamental stakes (e.g., rights, justice, and choices) that underpin health-related issues.

Therefore, Didier Fassin rightly notes that Foucault’s approach to biopolitics is less about life and more about different sets of knowledge and techniques designed to govern the population. With the notion of ‘politics of life,’ Fassin intends to reintroduce the political dimensions that shape the very issue of life in our societies.<sup>18</sup> Fassin’s analysis is not so much a point of view that aims at defining life as the supreme principle that should guide legal and social norms, but a meticulous empirical and moral examination

13. Foucault, *The Birth of Biopolitics*, pp. 78 and 185.

14. Foucault, *The Birth of Biopolitics*, pp. 22 and 32 (see manuscript footnote).

15. Foucault, *The Birth of Biopolitics*, p. 318.

16. Foucault insists on the ‘naturalness’ of wealth and individuals as the main objects of liberal political practices (see *The Birth of Biopolitics*, pp. 15 and 21–22). He also considers ‘*Homo Oeconomicus* is someone who accept reality.’ It is indeed ‘sensitive to modification in the variables of the environment’, turning it into a highly *governmentable* subjectivity (see *The Birth of Biopolitics*, p. 269).

17. D. Lorenzini, “Biopolitics in the Time of Coronavirus,” *Critical Inquiry, Posts From the Pandemic*, April 4, 2020: <https://bit.ly/2CcFZUd> (accessed July 17, 2020).

18. D. Fassin, *Life. A Critical User’s Manual* (Cambridge/Medford: Polity Press, 2018).

on how different and unequal values of life are distributed, visibly and very often invisibly, in ordinary life and the social. For instance, in his study of recent French politics of immigration, Fassin coins the expression ‘biolegitimacy’ to describe how health-related issues (e.g. urgent need of medical care) have increased the chance of asylum-seekers of being regularised and obtain access to medical care and other economic/social rights, while political claims (e.g. based for instance on religious/ethnic persecutions) have not reduced the chance to grant such status.<sup>19</sup> Fassin also emphasises ‘bioinequalities’ when he stresses how differences in life expectancy in Western countries (France in particular) draw less on biological determinism and more on ‘political choices in terms of social justice.’<sup>20</sup> Fassin’s ‘politics of life’ explores therefore the relations and tensions between two basic dimensions of life: on the one hand, what one might describe as biological life, and on the other, social life. The former may broadly refer to the ‘naked life,’ the *zoé*, the life that is explored nowadays by all sets of medical, biotechnological and scientific disciplines and techniques. This first pole would represent, following Fassin, ‘*le vivant*’ (the living). The second pole refers to ‘*le vécu*’ (the lived) and encapsulates the so-called *bios*, the political life, the collective/individual experiences and social policies.<sup>21</sup> The ‘politics of life’ is precisely (but not only) the exploration of the dynamics and the stakes when both dimensions of life (the living and the lived) meet and produce generally various disparities in the recognition and the value of different lives. In this paper, we consider the right to health can be understood at the crossroad of both dimensions. On the one hand, it comes from political choices and social/health policies (*the lived*) and on the other, it depends and shape our material representation of *the living*. In order to unpack our point of view, we will subsequently address three main issues associated with the right to health: the state, subjectivity and justice. Only then we will be in a position to assess how it is that a (human) right is able to ground a successful normative claim that straddles the living and the lived.

### III. The Right to Health and the State

The right to health speaks both to non-discriminatory access to health care and protection of infrastructure to ensure its fair distribution. Broadly speaking the right to health ‘refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realisation. This is why it is more accurate to describe it as the right to the highest attainable standard of physical and mental health, rather than an unconditional right to be healthy.’<sup>22</sup> This was recently reiterated by the United Nations (UN), insisting states should ‘[u]se maximum available resources at national and international

19. Fassin, *Life. A Critical User’s Manual*, (consulted in Epub format), see. Chap. III “Politics of Life.”

20. D. Fassin, “Another Politics of Life is Possible,” *Theory, Culture & Society* 26(5) (2009), p. 56.

21. D. Fassin, “La Biopolitique n’est pas une Politique de la Vie,” *Sociologie et Sociétés* 23(2) (2006), pp. 39–40 & ‘Another Politics of Life Is Possible,’ pp. 47–48.

22. UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 31, The Right to Health*, June 2008, No. 31, available at: <https://www.refworld.org/docid/48625a742.html> (accessed September 20, 2020) p. 5.

levels to ensure availability, accessibility and quality of health care as a human right to all without discrimination, including for conditions other than COVID-19 infection; and ensure that the right to life is protected throughout'.<sup>23</sup> In terms of concrete entitlements we can demand from the state that 'health goods, services, and facilities are available in adequate numbers; accessible on a financial, geographical, and non-discriminatory basis; acceptable, including culturally appropriate and respectful of gender and medical ethics; and of good quality [. . .]'.<sup>24</sup> Thus the right entails immediate requirements: to provide individuals with (at least) that level of resources that can be given to all others within a jurisdiction. The right therefore also has a programmatic structure: to enhance and improve the overall standard of health applicable within the state and maintain (or expand) the range of individuals able to exercise the right. This is to be conducted in relation to determinants or standards of health that have universal application. 'These underlying determinants include safe drinking water, adequate sanitation, sufficient and appropriate food, safe housing, healthy occupational and environmental conditions, and education.'<sup>25</sup> And this structural realisation of the right has been realised in concert with other rights. Accordingly, the Office of the High Commissioner for Human Rights goes on to note: 'Since all human rights are indivisible and interdependent, the right to health can only be fully realised in conjunction with other civil, political, social, economic, and cultural rights.'

It is important to emphasise this programmatic element and how it connects with a conception of human rights as 'indivisible'. A state's project of affording a right to health will be progressively realised – realised relative to resources in that state and relative to the responsibility to realise all other human rights. Thus, the state cannot sacrifice the realisation of one set of rights to support another, and nor can a state prioritise those rights that it considers to be most ideologically consistent with its own domestic law and politics. In other words, not only are there some global standards of health, but 'granting health' is not one option among others, it is a presupposition of any commitment to human rights at all.

The indivisibility of rights in turn connects with the idea of human rights having a single foundational principle in human dignity which itself demands the progressive realisation of economic and social rights in parallel to other civil rights: 'we may construct an argument to the effect that [. . .] Dignity generates a right to health because illness provides a social context ripe for interpersonal subordination. Those who are sick but cannot afford the care they need are often forced into relations of subordination inconsistent with their reciprocal dignity for the sake of obtaining the funds required for their care.'<sup>26</sup> This allows us to unify a number of the foregoing themes: distribution,

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23. UN Policy Brief: 'Covid-19 and Human Rights: We are all in this together' (April 23, 2020) [un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](#) (accessed September 20, 2020), p. 21.

24. D. Pūras "The Right to Health must Guide Responses to COVID-19," *The Lancet* 395 (10241) (June 2020), 1888–90.

25. OHCHR Factsheet 31 (*supra*), p. 6.

26. A. Zylberman, "The Indivisibility of Human Rights," *Law and Philosophy* 36.4 (2017), 389–418, see p. 408.

discrimination, the lived and the living. As a rights claim, the right to health works as a ‘shield’ against direct discrimination, and a ‘sword’ to demand the extension of the entitlements we can claim, by right, of the state. The right is inseparable from life: qualitative and quantitative indices of illness. But it also concerns living social life generally and *in extremis* in pandemic; direct and indirect discrimination; discerning what counts as a reasonable distribution of resources given basic human needs. This interaction of living and life, and its relationship with universal and particular in our normative claims will be returned to.

This nonetheless invites us to consider the wider complexities of the right’s interaction with the state. The conception of the state implied by the orthodox conception of rights is the state understood as a benign actor faced with difficult challenges (though addressed in good faith) of distribution without discrimination in a situation like pandemic. But there are deeper complexities here concerning health, the state and subjectivity, e.g. the experience of governance and governmentality (discussed in the next section), and complexities around the scope of *governance* more generally and the possibility of a right to health inviting an expansion, by the state, into our lifeworlds. Foucault has notoriously claimed that neoliberalism implies a fundamental premise according to which there is always ‘the risk of governing too much’, which entails, in particular a new regime of truth/power based on ‘market veridiction.’<sup>27</sup> Following Foucault’s words, liberal and neoliberal practices and theories have launched a ‘curse’ against modern state since the latter is now imbued in an ‘economic ignorance’ and ‘cannot know’ what is good (or not) in the economics field. Of course, this situation has been mitigated with the so-called *Vitalpolitik* of a German ordoliberalism.<sup>28</sup> However, even if the latter has intended, through social/public policies, to bring about a ‘society for the market’, this neoliberal governmentality still reckons on a ‘phobia’ of the state.<sup>29</sup>

This (self)imposed ignorance of the state has not been limited to strict economics realms but also to health-related issues, justifying (amongst other things) the ongoing privatisation of (public) health. The so-called ‘marketisation of health care’ has been, since the late 1980s, an ongoing issue in Western countries and have increased since the 2008 crisis.<sup>30</sup> Besides, this ignorance of the state has precisely been the mode of governance chosen by the Bolsonaro’s administration to deal with the COVID-19 pandemic. As Francisco Ortega and Michael Orsini explain, Bolsonaro’s government is a ‘conscious intensification of a state of neglect’ that draws on ‘strategic ignorance’ of public health policies (e.g. denial of medical/social causes of COVID-19) in order to enhance a neoliberal form of authoritarianism.<sup>31</sup> In the present case, the ignorance ‘curse’ imposed by

27. Foucault, *The Birth of Biopolitics*, pp. 56 & 319.

28. See T. Biebricher, “The Biopolitics of Ordoliberalism,” *Foucault Studies* 12 (October 2011), 171–91.

29. Foucault, *The Birth of Biopolitics*, pp. 76 & 242.

30. G. Schöpflin, “The Dangerous Politics of Market Radicalism,” *Open Democracy*, 16 December 2008 <https://www.opendemocracy.net/en/the-dangerous-politics-of-market-radicalism/> (accessed September 20, 2020).

31. F. Ortega and M. Orsini, “Governing COVID-19 without Government in Brazil: Ignorance, Neoliberal Authoritarianism, and the Collapse of Public Health Leadership,” *Global Public Health* (online first) (2020).

the state not only implies a retreat of the state in favour of the market. It is a mode of (non) governmentality of public health that is consciously and strategically implemented to produce disposable lives (e.g. black/brown/indigenous Brazilian citizens) that must continue to work in order to keep the Brazilian on track.<sup>32</sup> Similar strategies are in evidence in the UK where a national project of ‘Protecting the NHS’ was accomplished by moving the sick, without monitoring, into private care homes where private actors could be held responsible for deaths and infection.<sup>33</sup> In France, during the first wave of the COVID-19 pandemic, many elderly victims died in twilight homes (called EHPAD) that are entirely private institutions. Social solidarity should not be limited to the public sphere and might clash with neoliberal and market-oriented type of domination that let *some* people die.<sup>34</sup> These themes – wilful prioritisation of economy over life, shifting burdens to private actors, naturalising deaths that were the product of political decision – are not only inconsistent with the right to health under international law, but recall classic instances the invidious forms of biopolitics. Again, however, this picture must be deepened and problematised, not only as an issue of governance but also of subjectivity.

#### IV. The Right to Health and Subjectivity

We have seen above how the Foucauldian framework of (neo)liberalism and biopolitics implies a governing of populations through direct and indirect exposure to death. Death is indeed inherent to the biopolitical/neoliberal modes of governmentality. Both liberalism and neoliberalism shape different necro-technologies in order to turn some lives less worthy than others. In his archaeological approach, Foucault already noticed this ‘imminence of death’ in our modern times (our ‘modern episteme’), noticing how modern biology has come up with a concept of life under the constant threats of death.<sup>35</sup> Relying and interpreting the modern and economic notion of ‘scarcity’, Foucault also described how early liberal thinking, introduced the management and production of subjectivities through this death exposure. From now and onwards, the *Homo oeconomicus* is the human being who ‘wastes his life evading the imminence of death’.<sup>36</sup> When Foucault describes some basic traits of liberal and neoliberal governmentality, he also highlights how populations are governed through constant exposure of risk and dangers. ‘Live

32. A. Pele, “‘The King is Naked’: Bolsonaro & the Pandemic (Critique in Time of Coronavirus),” *Critical Legal Thinking*, April 10, 2020: <https://bit.ly/3hckUIk> (accessed July 10, 2020). See also, A. Pele, “Survivre c’est Résister. Résistances et Néropolitiques au Brésil,” *Sens Public*, article 1520, June 07, 2020. <https://www.sens-public.org/articles/1520/> (accessed November 09, 2020).

33. P. F. Dutey-Magni, “Covid-19 infection and attributable mortality in UK Long Term Care Facilities: Cohort study using active surveillance and electronic records” in [medrxiv.org/](https://medrxiv.org/) (March-June 2020) medRxiv; doi: <https://doi.org/10.1101/2020.07.14.20152629> (accessed September 20, 2020).

34. For this point, we are grateful to one of the reviewers’ observations.

35. Michel Foucault, *The Order of Things*, (no translator identified) (New York: Vintage Books, 1994), 220–22.

36. Foucault, *The Order of Things*, p. 256.

dangerously' would have become the motto of liberalism according to Foucault.<sup>37</sup> Under this perspective, the notorious economic figure of the *Homo oeconomicus* that is commonly used to describe neoliberal governance brings about different dimensions. This 'entrepreneur of oneself',<sup>38</sup> that invests in one's own 'human capital' and skills is not only a subjectivity that is produced through the self-management of risks and social/economic instability.<sup>39</sup> It also entails a 'psychic life' that evolves around emotions such as resentment, denial of vulnerability, disavowing of inequalities, self-insecurities and blaming of others.<sup>40</sup> Within this framework, health is perceived neither as a right nor a crucial aspect of social justice. It is much more one element of one's 'biological human capital' that also implies political and social hierarchies between bodies and lives. 'Healthism,' 'bodyism' and even 'biosociality' refer to neoliberal subjectivities that govern themselves through health-related practices, often tied to biotechnologies.<sup>41</sup> New subjectivities would now be produced through the combination of neurosciences and pharmaco-industries.<sup>42</sup> Health issues are therefore related strictly to one's personal responsibility, conceived of modes of governing individuals, and most and foremost, as a prosperous commodity for our contemporary neoliberal markets.

In contrast the experience of pandemic – the *lived* – resists cultivation of productive life in this sense. Respecting others through distancing, through masks, through symbolism of solidarity (the rainbow, the NHS sign, the new forms of greeting) represented a performance of care that took greater hold amongst populations.<sup>43</sup> This rendered, by contrast, the performance of such solidarity by leaders (Trump, Bolsonaro) clearly tainted by bad faith and inauthenticity. This emerging practice of respect (and the difference between authentic and inauthentic performances of solidarity) connects with an emerging internal critique of human rights. This critique of the inauthenticity of human rights argues they may have international diplomatic significance but systematically fail to integrate with grassroots 'moral systems': practices of respect, virtue and solidarity. And indeed, it is unlikely that actions demonstrating respect during the pandemic would have

37. Foucault, *The Birth of Biopolitics*, p. 66.

38. Foucault, *The Birth of Biopolitics*, p. 226.

39. See respectively, I. Gershon, "Neoliberal Agency," *Current Anthropology* 52 (4) (August 2011), 537–55 and M. Lazzarato, *The Making of the Indebted Man* (J. D. Jordan, trans.) (Cambridge, MA: The MIT Press, 2012).

40. See D. Fassin, "On Resentment and 'Ressentiment'. The Politics and Ethics of Moral Emotions," *Current Anthropology* 54(3) (June 2013), 249–67; C. Scharff, "The Psychic Life of Neoliberalism: Mapping the Contours of Entrepreneurial Subjectivity," *Theory, Culture & Society* 33(6) (2016), 107–22.

41. See P. Rabinow, "Artificiality and Enlightenment: From Sociobiology to Biosociality," in *Essays on the Anthropology of Reason* (Princeton: Princeton University Press, 1996), pp. 91–111.

42. See P. B. Preciado, *Testo Junkie: Sex, Drugs, and Biopolitics in the Pharmacopornographic Era* (B. Benderson, trans.) (New York: The Feminist Press at CUNY, 2013); F. Vidal and F. Ortega, *Being Brains: Making the Cerebral Subject* (New York: Fordham University Press, 2017); N. Rose, "Neurochemical Selves," *Society* 41 (2003), 46–59.

43. See A. Lefebvre, *Human Rights and the Care of the Self* (Durham, NC: Duke University Press, 2018).

been conceptualised via right to health. Nonetheless, this is not a falsification of such a right. If we agree that access to whatever treatments for COVID-19 are available at this time should be fairly allocated, and that different areas and institutions within a state should not have greater access to resources on arbitrary grounds, then the essence of the right is being endorsed. The fact that the language of rights might be unpopular, or that sections of the population may see themselves as having greater right to resources than others, is immaterial. Rights can be engaged without their being subjectively endorsed. It is also the case that we can endorse a structurally just programme while at the same time being suspicious about the presuppositions of rights is a theme we now turn to.

## V. The Right to Health and Injustice

Foucault's political life and *engagement* against injustices and discrimination contrast with his *apparent* lack of interest in theorising inequalities and injustices, a situation that can be explained, as Fassin suggests, by Foucault's distance towards Marxism and Foucault's nominalist and materialist philosophical approach.<sup>44</sup> When Foucault describes the basic mode of power circulation in our societies, he mainly draws on the notion and practices of governmentality. With this idea, he refers to the different knowledge, techniques and strategies of conducting the conduct of people, from the classical techniques of the self to pastoral power, from the consideration of modern state as an effect of this 'governmentalization' to liberal and neoliberal types of governmentality, based on 'environmental techniques' of regulation.<sup>45</sup> It is also true that Foucault has emphasised the fragility of prevailing power relations and the actuality of new form of resistances, drawing in particular on the notion the different types of struggles.<sup>46</sup> However, it seems those modes of resistances are always, in some ways, reframed within the broader framework of governmentality and especially when Foucault refers to the politics of rights. For instance, while he refers to 16th century discourses on natural law and individual rights he defines them as 'critical' attempts to resist sovereign legitimacy, but he also encapsulates them as different ways of 'being governed' differently.<sup>47</sup> When he emphasises how nowadays, 'life' has become the center of political struggles that evolve around the "right" to life, to one's body, to health, to happiness, to the satisfaction of needs (. . .) Foucault also reframes those struggles within biopolitical governmentality.<sup>48</sup> When he defends the idea of 'human rights' (*droits de l'homme*) and relates the latter to the solidarity of an 'international citizenship,' Foucault grounds this insight on the fact 'we are

44. Fassin, "La Biopolitique n'est pas une Politique de la Vie," p. 43.

45. Respectively Foucault, *Security, Territory, Population*, p. 382 & *The Birth of Biopolitics*, pp. 260–61.

46. See M. Foucault, "The Subject and Power," in *Michel Foucault. Beyond Structuralism and Hermeneutics* (H. Dreyfus and P. Rabinow, eds) (Chicago: The Chicago University Press, 1983), pp. 208–26. Particularly interesting are the questions raised previously by the editors on truth, resistance and power in Foucault, see pp. 205–06.

47. M. Foucault, "What is Critique?," in *The Politics of Truth. Michel Foucault* (S. Lotringer and L. Hochroth, eds., L. Hochroth, trans.) (New York: Semiotext(e), 1997), pp. 30–31.

48. Foucault, *History of Sexuality. Volume 1*, p. 145.

all governed' ('*nous sommes tous gouvernés*').<sup>49</sup> To put this in a nutshell, and relying on Foucault's words, resistance is conceived of as different strategies of 'not being governed quite so much' or the 'art of not being governed like that and at that cost'.<sup>50</sup> On the one hand, this approach has been recently qualified inasmuch it would be much more critically and heuristically fruitful to start conceiving individual and collective modes of *ungovernmentality* rather than different ways of being governed.<sup>51</sup> On the other, and in relation to our topic, the right to health implies thinking the question of justice and injustice,<sup>52</sup> beyond and against the issue of the conduct of people. Indeed, the governmentality framework prevented Foucault from arguing in favour of a right to health, with such a right (like others) being assumed to be susceptible to state domination.<sup>53</sup>

Undoubtedly Foucault's strategic relationship with rights was an attractive one. While the discourse of rights can be harnessed to resistance, by denying rights intrinsic or stable normative force we can challenge Enlightenment presuppositions about the nature and entitlements of the human.<sup>54</sup> Indeed, a constructive account of human rights in the context of biopolitics and pandemic is best accomplished through analysing the deficiencies of human rights discourse to isolate those aspects that do admit strategic use. The key deficiencies relate to discourses of *vulnerability* and the politics of *humanitarianism*. In contrast, the best strategic and constructive conception relates to the *interplay of universal and particular* in our normative judgements. This broadly dialectical understanding of human rights allows a certain kind of flexibility in justification. It is tied neither to emancipation through reason, nor fidelity to specific revolutionary events, but rather maps onto the phenomenology of justice and injustice.

*Vulnerability* is a tempting narrative when attempting to justify human rights and to tie them to health and the body. Vulnerability provides a certain form of universality while also maintaining a connection with embodiment. It is also closely tied to justice in the case of the current pandemic, since the access to the vaccine should be given to individuals belonging to the vulnerable groups. The attendant danger lies in *reducing* human ontology to vulnerability and victimhood. This allows a simple justificatory narrative of rights protective of the body. It thereby problematises or denies those rights concerning positive agency and self-governance. And, by extension, a narrative of vulnerability makes the state a necessary condition of security and of well-being: only the state can protect us from each other and ensure the positive structural grounds of well-being.

49. M. Foucault, "Face aux Gouvernements, les Droits de l'Homme," in *Dits et Écrits*, vol. IV (Daniel Defert and François Ewald (Orgs.)) (Paris: Gallimard, 1994), pp. 707–08.

50. Foucault, "What is Critique?" p. 29.

51. B. Harcourt, *Critique & Praxis* (New York: Columbia University Press, 2020).

52. E. Renault, *The Experience of Injustice: A Theory of Recognition* (R. A. Lynch, trans.) (New York: Columbia University Press, 2019).

53. M. Foucault, "Un Système Fini face à une Demande Finie," in *Dits et Écrits* (D. Defert and F. Ewald, Orgs.), vol. IV, pp. 367–83.

54. Put in the idiom of rights-theory, we cannot reconcile a theory of rights as arising from human interests and a theory of rights based on exercise of will if these are assumed to have a *rational* reconciliation in a theory of knowledge or a philosophical anthropology. Rights are, rather, the site of the contestation of a theory of the human articulated through interests and a theory of the human articulated through the will.

Suffice it to say, this move from vulnerability to the Hobbesian grounds of the state – fear and vulnerability – is contestable both as a philosophical anthropology and as a politics of agency and freedom. This is further exposed in a shift to a discourse of humanitarianism.

*Humanitarianism* is connected with vulnerability to the extent that it minimises (but seeks thereby to strengthen) legal and political obligations to insist upon protection of basic needs and protection. Like vulnerability this allows a point of political unity that is difficult to contest; like vulnerability humanitarianism aligns normativity closely with the protection of the body. But humanitarianism represents a wider, negative project of identifying injustice. Humanitarianism finds its fullest form of expression in a distinctive form of ‘negative liberalism’, a key version is ascribable to Shklar<sup>55</sup> and has modern proponents.<sup>56</sup> This discourse only permits certainty in the experience of *injustice*. It eschews a positive project of establishing a liberal polity in favour of constantly resisting descent into illiberal politics. The challenge this poses is not simply to find a ‘positive liberal project’ to replace the purely negative rejection of egregious injustice. The challenge presented by humanitarianism is twofold.

First, we should recognise that this is already incomplete as a theory of *injustice*. Negative liberalisms will privilege egregious wrongdoing and (like many modern constitutions) take their point of certainty and solidarity from rejection of the past. The injustices of the past are, importantly, not the injustices of the present and future. Regarding the present and future, ‘radical injustice’ – injustice that challenges the conditions of the possibility of justice – is part of our lifeworld now. It is present and real not in its active form of genocide or crimes against humanity, but in the structural forms of global injustice and harm to future generations.<sup>57</sup> Such problems cannot be captured by vulnerability (they are too structural in their origins and too diverse in their impact) and nor can they be confronted by negative humanitarian law ‘prohibiting injustice’. Our lifeworlds have to change radically if these radical injustices are to be avoided; mere prohibition is not ground of resistance. Note that in this there is important overlap with the problem of pandemic: namely that the characteristic sovereign move – to forbid – is exposed as a residue of the domination of politics by the sovereign and the figure of the prohibiting monarch. In contrast, active citizenship, solidarity and radical global structural readjustment are necessary to negate radical injustice and to combat pandemic, not prohibition.

Second, a politics of human rights requires a normative and epistemological openness to the tensions between the particular and universal. Liberalism in the form of the *Rechtsstaat* – defence of the rule of law – no doubt encompasses aspects of the importance of the universal (law, including cosmopolitan law) and the particular (legal judgement, particularly legal judgement against the powerful). But there is much more to say about their interplay than that these should together prevent degradation.<sup>58</sup>

55. J. N. Shklar, *The Faces of Injustice*. (Yale: Yale University Press, 1990).

56. See Renault, *The Experience of Injustice*.

57. A. Mbembe, *Necropolitics* (S. Corcoran, trans.) (Durham: Duke University Press, 2019).

58. Negative liberalism, and rule-of-law liberalism, are kindred to the equally limited project of neo-Republicanism. See C. Larmore, “A critique of Philip Pettit’s republicanism,” *Philosophical Issues* 11 (2001), pp. 229–43.

In essence, humanitarianism cannot encompass the dialectic of universal and particular. Rather it encourages the ‘universalisation of the notion of the victim’<sup>59</sup>: for example, our key normative symbol and point of normative certainty being the victim of war and injustice. Human rights are distinct from this not only because they include positive entitlements (expression, assembly, health, education etc.) but because they are litigated and contested in a way open to the human as both agent and victim. In this they are imperfect, and law tends to prefer the specificity of victimhood to the positive entitlements of the agent. Nonetheless, the human of human rights should not be conflated with the humanity of the humanitarian: the former is dynamic, the latter is closer to a charity and pity of *ressentiment*.<sup>60</sup>

Consequently, the discourses of injustice within which we conceptualise any right to health has to encompass aspects of the lived and living to avoid reductionist moves towards vulnerability and humanitarianism. The lived experience of our particular situated present, and its connection with the global or universal vulnerabilities. A conception of the living which certainly encompasses our vulnerabilities, but also of life as, for instance, ‘natality’ the persistence of human birth and with it the possibility of reinventing the species.<sup>61</sup> In this respect it is noteworthy that the early Marx was a critic of human rights while theorising on the basis of our species-being.<sup>62</sup> This is, at least for present purposes, doubly wrong as an approach to justice and injustice. Rights can be emancipatory. And we have no need to appeal to a stable species-being – a stable human ‘life’, and stable human ‘living’ – in order to theorise the particular and universal in human affairs. Hence, we should not only move beyond established ‘repressive hypotheses’ about power and pandemic, but certain limited readings of biopolitics itself.

## VI. Human Rights and the Dialectic of Pandemic

What, then, of human rights discourse or human rights politics is to be salvaged? The normative content of human rights arises from tracking basic or self-evident aspects of the human good and human interests. But their instantiation in law and judgement requires the reconciliation of these universalising claims with particular people and contexts. This amounts to, to put it differently, a distinctive phenomenology of right: the appearance of human rights between the universality of basic human need, and the particularity of individual entitlements. This dialectic provides the inescapable backdrop of contemporary political and legal practices. *Particular* state responsibility and *global* networks; an indivisible network of *universal rights* and their realisation through a state’s *particular constitutional rights*; a *general right to health* as a claim of non-discrimination and the *health of each individual*. This dialectic is also crucially important in the

59. S. Žižek, *The Metastases of Enjoyment: Six Essays on Women and Causality* (London: Verso, 2005).

60. F. Nietzsche, *On the Genealogy of Morals* (I. Johnston & I Crowe, trans.) (London: Vintage, 1989).

61. H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 2013).

62. K. Marx, “On the Jewish Question,” in *Early writings* (Marx, Karl. ed.) (Birmingham: Penguin UK, 200), p. 5.

pandemic context: *general* public health measures with the health of *each individual* as their rationale; *global* pandemic lived *locally*; the *particular* challenges of disease in the lifeworld and the *universal* problem of ‘returning’ to ‘normality’.

This then is the best jumping-off point for connecting a theory of human rights with pandemic and biopolitics. During pandemic we *must have recourse to the language of human rights* to life and to health: these force the state to adopt non-discriminatory approaches to fighting the pandemic; they also (via the indivisibility of rights, and existing international law) demand international cooperation to fight the pandemic. The right to health, on these bases, has very direct implications for our present situation. First, that any vaccine should be made universally available and states should not be hampered in the work of finding vaccines. Second, that a fair a global response be facilitated by the World Health Organization and international organisations should not be hampered in this work. And, third, that there is structural support (including debt relief) for developing countries so that they can pursue the right to health without being hampered by historic injustices. Each of these steps are necessary, directly or indirectly, for states to realise their responsibility to protect the right to health. They are concrete requirements flowing inevitably from the right itself and all relevant case law.<sup>63</sup>

The question then is how we conceptualise our responses to ‘during’ and ‘after’ pandemic without implying that appeal to the human right to health is merely strategic, that there is no real justification for this right and it is simply a rhetorical response to state action during pandemic. After pandemic we may be able to forge a new conception of life which has elements of the right to health, elements of sustainability and a new relationship with embodiment. This could be expressed or summarised in the language of dignity. Nonetheless, this still demands a role for human rights as our principal, normative means of reconciling the universal and the particular and hence a novel phenomenology of right.

Another aspect of this needs to be underscored. The relationship between human rights and the state is itself problematised in the foregoing account. Human rights are not simply an implication of the *Rechtsstaat* but nor do human rights *presume* a welfare state or *permit* a neoliberal state. The movement of universal and particular only presupposes the indivisibility of rights, for example, that human rights cannot be selectively adopted by states, that they must be accepted *en masse* and interpreted in the light of one another. Accordingly, any rights claim presupposes rights protecting freedom and, at the same time, presupposes rights protecting well-being. The implications this has for states is far-reaching – elements of socialism and liberalism are inexorably intertwined, they cannot be an ‘either–or’ – but the principal implication for theoretical purposes is that human rights retain part of the critical and strategic power precisely because they connect the universal and particular prior to any special obligations claimed by the state. Although health has rarely been a paradigmatic instance of a human right for the liberal or socialist traditions, there is much to suggest that the right to health pinpoints the core element shared by both traditions: the embodied individual as simultaneously

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63. For instance *Miranda Cortez v. El Salvador*, Case 12.249, Inter-Am. C.H.R., Report No. 27/09 OEA/Ser.L/V/II., doc. 51, corr. 1 (2009).

vulnerable, social and self-determining within structural confines relative to the state and economy.

To give priority to life and living is not to negate the significance of freedoms. It means careful construction of freedom and its protection. The normal functioning of the state should *not* pursue ‘the fullest range of freedoms compatible with the preservation of life and health’. This is already a threat to freedom in its assumption of emergency powers and allied reduction in the enjoyment of rights. It means, among other things, ‘the fullest range of freedoms are necessary for – indivisibility connected with – the rights to life and health’. This in turn means a fair system that can stabilise supply of life-saving resources and services. This logically presupposes cooperation with other states. And this, in turn, means a supply of life-saving services and resources without discrimination at the highest level possible given medical consensus.

## VII. Conclusions

It might appear that one paradoxical implication of a right to health is transcending rights discourse altogether. If we are agreed that a just response to the pandemic (and a rational response to threats to human survival) are structural transformation, that the realisation of human rights is always (through indivisibility) tied to this structural transformation, and if the human life within human rights discourse is not to be co-opted by neoliberalism, this is not going to be captured at the level of individual *laws* however constitutive or symbolically important like human rights. It is, naturally, at the meeting place of the legal and the political at *life* itself.

And indeed, there is an element of transcending human rights at work in our analysis and might be said to have two elements. A positive one, in the positive conception of biopolitics from Fassin. And a negative one, in a rejection of justificatory narratives based on vulnerability and the humanitarian. Taken together, these might encourage strategic invocation of human rights and the right to health but without treating this as expressive of any stronger or more substantial politics of resistance. We should emphasise, however, that given the urgency of the pandemic a strategy that speaks of prevailing ideology and standards (human rights) has a pragmatic value especially where at least some conventional party politics has been legitimately suspended in favour of emergency government. But, more strongly, any progressive politics should be conditioned by human rights. Foreshadowed by Bloch for instance,<sup>64</sup> it is individuating discourses like human rights and human dignity that insist that we reject prevailing dichotomies – ‘life or economy’ – which hide the more insidious forms of biopolitics.

This kind of division – between an insidious biopolitics and a different or defensible biopolitics – is difficult to conceive where so much contemporary and no doubt urgent acts of government combine the worst kinds of assumption of emergency powers combined with crude impulses to make live or let die. A right to health does not countenance such exercises of power or conceptions of the populace. Not because it is a perfect

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64. E. Bloch, *Natural Law and Human Dignity* (D. J. Schmidt, trans.) (Cambridge, MA: MIT Press, 1986).

normative tool for demanding justice and structural change. But rather precisely because of its internal tension between the particular individual's health and 'health per se' and a tension between the lived experience of pandemic (discrimination as well as illness) and the demands of life and simply going on living.

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