



Plaguing Segregations: Paradigms of Rule at The Cape of Good Hope

George Pavlich 

Abstract

Power, while fundamental to sociality, might be exercised with haphazard ferocity or more judiciously in legally constrained ways. Such constraint requires us first to understand how ruling paradigms work, and the effects of their powers, before entertaining suitable forms of legal limitation. Transposing Kuhn's famous concept, this paper examines a ruling paradigm of biopolitical sovereignty at the Cape of Good Hope through two examples: the 1891 census' racialized categorizations of the "population"; and a racialized segregation responding to the 1901 bubonic plague. Prefiguring apartheid, both examples indicate how colonial laws authorized discretionary biopowers and yet exempted themselves from monitoring how officials demarcated and governed racialized population groups. The paper touches on the growing maladroitness of positivist ideas about a sovereign "rule of law" in regulating arbitrary biopolitical forces. It concludes by briefly indicating the promise of legal pluralism and Indigenous legalities to check capricious biopowers while pursuing legitimate life-affirming forces.

Keywords: Foucault and governance, law and society, colonial rule of law, biopolitics and law, Cape of Good Hope

Résumé

Le pouvoir, bien que fondamental pour la socialité, peut être exercé avec une férocité aléatoire ou d'une manière plus judicieuse lorsque ledit pouvoir est régulé par des moyens juridiquement limités. Une telle régulation exige toutefois, avant d'envisager des formes appropriées de limitation juridique, que nous comprenions comment fonctionnent les paradigmes dominants et quels sont les effets de leurs pouvoirs. En transposant le célèbre concept de paradigme de Kuhn, cet article examine un paradigme de souveraineté biopolitique au Cap de Bonne-Espérance à travers deux exemples : les catégorisations racialisées de la « population » du recensement de 1891; et une ségrégation racialisée en réponse à la peste bubonique de 1901. Préfigurant l'apartheid, les deux exemples montrent comment les lois coloniales autorisaient des biopouvoirs discrétionnaires et comment ces exemples étaient exemptés de toute mesure de contrôle sur la manière dont les fonctionnaires

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délimitaient et gouvernaient les groupes de population racialisés. L'article évoque l'incapacité croissante des idées positivistes sur un « État de droit » souverain à réguler les forces biopolitiques arbitraires. Il conclut en indiquant brièvement la promesse qu'offre le pluralisme juridique et les légalités autochtones en matière à la fois du contrôle des biopouvoirs capricieux et de la poursuite des forces légitimes d'affirmation de la vie.

Mots clés: Foucault et la gouvernance, droit et société, état de droit colonial, biopolitique et droit, Cap de Bonne-Espérance

Introduction

E. P. Thompson famously described efforts to subject modern state powers to the rule of law as “an unequivocal good” (1975, 267). However, such rule is never a simple matter of looking to the content of positive state laws to declare political legitimacy. More importantly, it involves fashioning normative and socio-political horizons that cultivate judicious powers by framing “*de jure* authority” and paying “attention to the way in which the relationship between those who wield authority and those subject to it can be said to be one of right rather than might” (Dyzenhaus 2022, 354).

On the flipside, Krygier argues that sheer might or “wild” power, whether of the despotic state or anarchic variety, is a “terrible thing”: “Arbitrary power is liable to be wild, but even when not it is odious enough. And the road from arbitrary to wild is an unhappy place to travel. Arbitrary is bad, and more is worse... Societies that value the rule of law seek ways to tame and moderate its exercise” (Krygier 2017a, 318).

Power then, while fundamental to sociality, might be exercised with haphazard ferocity or in legally constrained ways. If modern powers stem from various intersecting roots—whether broadly sovereign, disciplinary, or governmental (e.g., biopolitical)—contingent ruling paradigms invite socio-political quests for legal forms that “temper” haphazard governmental forces (Krygier 2017a, 2017b).

In combination, these perspectives pose distinctive questions about “states of exception” that govern by exempting designated powers from legal purview (Agamben 2005, 35). These states have close colonial ties, especially where local sovereigns as a matter of course ringfenced biopolitical arenas from normative legal restraint (Scott, 1995). Such governance circumvented what Fuller called a morally framed governmental “craft” anchored to “subjecting human conduct to the governance of rules”—including the conduct of governors (Fuller 1965, 109). To be clear, Agamben’s (2005, 40) dismissal of modern law as normatively incapable of limiting biopolitical sovereignty runs counter to the above noted sense that certain legal forms might curb haphazard powers in context. Positivist state law, let us recall, does not capture the extent of legal possibility (Napoleon 2019). Opening to plural ideas of legality changes deliberations, but it also allows for the possibility of regulating different forms of power.

Yet that possibility depends on a close understanding of how power operates in context, and the foundational paradigms from which it emerges. To illustrate such

stakes, this paper analyzes two Cape colonial examples that show how biopolitical sovereign powers exceeded sociopolitical crafts of law, leaving subjects exposed to discretionary forces. The analysis serves as a prelude to further research into legal deliberation in search of legitimate biopolitical forms.

Colonial rule at Cape of Good Hope around the turn of the nineteenth century sheds light on earlier biopolitical paradigms. The creation of racialized categories in census enumerations, and the subsequent use of those categories to respond to a bubonic plague at the Cape of Good Hope, provide examples of how biopolitical and sovereign powers together came to shield racializing governing authorities from legal restraint. On one hand, haphazard conglomerations of colonial biopower generated racial categories that the colonial state represented as biological compulsion. On the other, versions of such categories were imposed on putative subject groupings to segregate populations with arbitrary ferocity (Beinart and Dubow 2003; Dubow 1989; 1995). In both instances, state laws authorized wide powers but then excepted their flexible exercise from further legal purview—prefiguring paradigms of apartheid rule. This exception permitted the shadowy exercise of discretionary biopolitical forces, with dispossessing consequences for racialized subjects. Positivist lawmakers here crafted legal exceptions—as opposed to legal crafts of effective restraint—and placed techniques of power exercised through racialized population enumeration and segregation beyond legal purview.

Biopolitical Rule and Legal Shadows

Colonial rule may be approached as a “paradigm,” analyzing singular examples of power as indicative of wider discursive horizons “to constitute and make intelligible a broader historical—problematic context” (Agamben 2009, 9). However, as noted, one need not follow Agamben’s anarchic abandonment of modern law, nor abjure the possibility of a life-affirming biopolitics (Esposito 2008). To highlight the dangers of discretionary biopower in the shadows of law, one also need not follow his problematic leap into quagmires of vaccine regulations, anti-bioscience stances, and so on (Bratton 2021). Rather, historical examples show elements of a biopolitical colonial paradigm where census categories and segregating plague regulations allowed capricious powers to divide putative populations and subject racialized categories to enforced segregation with mordant social effects. While positive state laws exempted themselves from regulating these social effects, the promise of other forms of legality might have enabled more legitimate and life-affirming paradigms of biopower to surface.

Evoking ideas of a “paradigm” in relation to socio-political rule in a colonial context, one unavoidably evokes Kuhn’s (1968) famous analysis of physics as a product of scientific paradigms. As is well known, the latter deployed assumptive universes through which “normal science” investigated implicitly agreed upon “puzzles,” or “problems,” relying on exemplary forms of practice. Kuhn nicely illustrates how scientists worked from tacit historical agreements on what they took science to be, until revolutions or consequential changes in thinking occurred. Substituting “colonial rulers” for “scientists,” one might detect hidden assumptions and unspoken presumptions concerning the nature of “proper” ways to rule.

Colonial problems and puzzles revolved around procuring racially dispossessing, supremacist ambitions without provoking “disorderly” resistance. They also involved seeking local powers that could divide or subjugate populations by “natural” (biopolitical) devices (Nichols 2019; Simpson 2016; 2010; Butler and Athanasiou 2013). Whether signifying a revolution or not, Cape biopolitics drew on then privileged knowledge regimes (e.g., eugenics, sanitation science, demography, epidemiology), while offering tangible exemplars of biopolitical rule (Mbembe 2017; 2019; Field 1911). Examples of census enumerations and racially segregating responses to a pandemic at the Cape of Good Hope exemplify how local agents understood the practice of governing within biopolitical horizons (Lemke 2019; Southall 2022).

To be sure, biopolitics has been theorized more generally in other contexts (e.g., Foucault 2003; 2000; 2015; see also Swiffen 2010; Lemke 2019). Foucault, for instance notes that by the end of the eighteenth century, a certain “bioregulation by the State” enabled “a whole series of sub-state institutions such as medical institutions, welfare funds, insurance, and so on” (Foucault 2003, 250). Assemblages of sovereign and disciplinary powers were realigned by a “life administering power,” or biopower, that traded a sovereign’s divine right to take life for governance centred on enumeration and statistics, aiming to secure colonial visions of “advanced” life (Mills 2018, 138; Mbembe 2017). That governance trained colonial sovereignty on biologically imagined populations and drew discipline into shaping individuals within these (Foucault 2003, 253). Biopower also contrived racial assemblages with claims to being “natural” elements of populations—apparently rendering them beyond legal or political consideration (Foucault 2003, 254).

Resonantly, our Cape examples show how colonial biopower targeted racialized groups supposedly comprising an amorphous “population,” embracing techniques that naturalized contingent categories to narrow the scope of politics and law. The paradigm thus took form by depoliticizing normative decisions to pursue dispossessing settler-colonial forms of life, banishing legal rule from selected biopolitical arenas (Mills 2018; Lemke 2011; Esposito 2012; Pandian 2008). Sovereign law here simultaneously authorized certain political practices and excepted itself from moderating the exercise of key powers—leaving marginalized lives perilously exposed to the naked powers of an allied biopolitical sovereignty (Rifkin 2014; Agamben 2005; Butler 2006). The two Cape examples highlight facets of such rule where state law authorized a politics of life but then withdrew from regulating how naturalized population categories were forged, or how racial segregations appeared as medical responses to epidemics. In other words, biopolitics hybridized sovereignty and disciplinary powers, emphasizing racialized population divisions framed as beyond legality—such capricious separations were to form political sources for apartheid’s violent lineage (Beinart and Dubow 2003).

Example 1: Racialized enumerations in late-nineteenth-century Cape censuses

The intricacy of biopolitical techniques may be gleaned from various nineteenth-century censuses claiming to “enumerate” the Cape “population”—in 1865, 1875,

and then again in 1891 (Cape of Good Hope 1865; 1877; 1892). Together they declared racialized groups as “natural” phenomena to be governed as part of a population. However, the flexible powers that first asserted divisions and categories (race, sex, age, health, etc.), and then attributed these to populations, remained hidden. Census creators worked off a ruling paradigm that assumed enumeration to be a reality-discovering technology; they claimed to capture and represent a naturally and racially divided population, with groups at variable stages of social evolution (Mbembe 2017; Ross 2008; Giliomee and Mbenga 2007). Such claims obscured political decisions that declared what was to be taken as “natural.”

The 1891 census opened with a sense of the importance of censuses to colonial governance by noting that from “the commencement of the colonization of the Settlement at the Cape of Good Hope it was the practice to have annual enumerations of the Population” (Cape of Good Hope 1892, ii). Reflecting the extent to which a biopolitical paradigm had taken root at the Cape, census enumerators took for granted that populations existed naturally—the possibility of their demographic or statistical enumeration went without saying. Moreover, the paradigm required that this population be approached through sub-groupings (e.g., race, sex, age, etc.) that could also be targeted as governmental objects. An interconnected sovereign and life politics was directed to biological phenomena, enabling colonial visions of social progress, or chauvinist ideas of “civilization” (Mbembe 2017). By claiming to represent natural orders, this biopolitics deflected attention away from the enumerators’ undisclosed modes of categorization and, paradoxically, cloaked itself in degrees of necessity beyond political, moral, or legal choice.

The 1891 Cape census at least suggests how racialized categories were forged. It declared that from 1713 to 1743, “the available statistics of population are imperfect,” and noted that the “enumeration” of 1744 improved on previous censuses because it referenced racially tinged population groupings: a “Garrison,” a “Burgher population,” and “a Coloured one.” However, these categories were regarded as too rudimentary, and so a colonial Act (1) of 1862 legislated basic census categories: “for the taking on one day of a Census to comprise the following particulars: *Schedule A.* Houses and Huts, Sex, Relationship, Age, Race, Country of Birth, Occupation, Education, Attendance at School (distinguishing Government from Private), Infirmities. *Schedule B.* Live-stock, Land held, Land under cultivation for different crops, quantity of seed sown and Agricultural Produce” (Cape of Good Hope 1892, iii).

While this law required and named certain categorizations to represent key characteristics of Cape populations, to facilitate the governance of “life” for settler colonies, it did not stipulate how these were to be realized or legally controlled. It merely required that geographical areas (e.g., eastern and western divisions, field corner areas, municipalities, etc.) assemble data on local populations through statistical variables to aid governance for predetermined ends (e.g., economic activity, “conjugal condition,” occupational spreads, health, infirmities, etc.). It is worth noting that the census emphasized racialized population divisions, though it took for granted the significance of economic, reproductive, health, mortality, ableist, and other such categories (Cape of Good Hope 1892, cvii; see also Pavlich 2009).

Such modes of categorization specified in advance what a census was required to see, how a population was to be represented, and what could, as a result, be presented as enumerated data. Those data forged objects for powers no longer centred on asserting a right to take lives or manufacturing correctable abnormal individuals. Instead, they were directed to the supposed nature of the Cape's population, seeking to enhance its condition in areas such as those mentioned in the previous paragraph. Mostly framed around biological ideas, biopower worked in legal shadows, governing in the interests of dispossessing settler-colonial forms of life and neglecting others to the point of their expected decline or even elimination (Mbembe 2019; Pandian 2008). Here, paradigms of colonial rule silently moulded specific identities through segregation and divisions and then rendered them as natural and amenable to enumerative representation. Local census officials worked within knowledge-producing horizons that allowed for racialized categories which were then made available to (say) medical officials to govern epidemics and the like.

This biopolitics then enunciated racialized categories through political stealth. It sought to shape opinions by “popularising the enterprise” and making its categories seem beneficial to African subjects, even as it declared its partitions as biologically fixed (Cape of Good Hope 1892, vii–viii). The political work involved in creating—as opposed to discovering—racialized categories is evident in the census director's instructions:

...it is presumed that the Resident Magistrates in the several Districts have taken steps towards explaining to the Natives the scope and objects of the Census. If this has not been done, the proper official should be requested as soon as possible....to call together the...people and explain to them the intent and object of the Census Act...no time should be lost in convening meetings, through the Headmen of the different Locations...and every means employed towards popularising the enterprise. (Cape of Good Hope 1892, viii).

The magistrates were to “make the Natives see that, as members of the Commonwealth, a successful and reliable Census will be to their advantage,” encouraging them to “enlist the cooperation not only of Headmen, but of Missionaries, Native Evangelists, and other leaders of Native opinion” (Cape of Good Hope 1892, viii). The politics here involved, “by every means,” convincing a categorized grouping of their supposed unity, and underscoring the benefits of a “reliable census.”

Bickford-Smith adds that while shapers of opinion used such powers to mobilise fluid categories, these were achievable when they “made sense” to subjects: “Labels like ‘Native’ or ‘Coloured’ may have been imposed by whites and used by black élites to challenge state policies or to demand resources. But the labels had to continue to make sense to those they wished to mobilize. The content of ethnicities could not be purely ‘imagined’ by élites” (1995a, 465; 1995b).

No doubt biological meaning suppositions were historically situated. However, they were also tied to power relations that forged categories and enumerated individual bodies to spark identifications with the categories. Part of the issue here was not only whether these groupings made sense to the categorized, but also what

powers “opinion leaders” could mobilize to shape subjects’ meaning universes, striving to make enunciated categories appear as ordinary. Here, one detects exemplars for a biopolitical paradigm of rule enabling conditions of possibility that simultaneously made sense of, and moulded, racialized identifications—all authorized by law, but excepting the precise modes of category formation from legal purview.

In broad terms, the 1891 census developed the racializing categories used by its two predecessors, emphasising “a return of the population, distinguishing European or ‘Whites’ from Aboriginal Natives, and from all Other Coloured persons of Mixed races” (Cape of Good Hope 1892, vii). As we shall see below, the early designation of “Aboriginal Natives” as a category would later reappear in a different form. Yet within those categorizations, a privileged “white” racialized category was initially cast as “European,” with an emphasis on English, Dutch, and French as determined by a “mother tongue” (“moeder taal”), but sensing limited gains to fragmenting this putative dominant group, census officials “abandoned” the idea (Cape of Good Hope 1892, xvi). This national and racialized category was to be distinguished from “coloured persons of mixed race” as well as “others” who were to be delineated by continually improvised sub-categories: “Chinese, Hindu, Mozambique, Malay, Hottentot, Bushman, Bechuana (including Basuto), Fingo or Damara. If [derogatory term]....add whether Xosa, Tembu, Pandomise, Baca, Xesibe, or Bomvana” (Cape of Good Hope 1892, xvii).

The “class” of “Mixed and other Coloured Races” was asserted as including, “... the great and increasing population which has sprung from the intercourse of the colonists with the indigenous races, and which fills the interval between the dominant people and the natives” (Cape of Good Hope 1892, xvii).

To give practical effect to inexplicable population categories, where, say, a “coloured” majority could be classed as other to the “dominant people,” directors gave special instructions to census takers regarding the category for “Malay,” noting that religious, social, and cultural matters defined this putative group whose “distinctive existence” emerged from “the bond of a common and uniform faith” more than “any feeling of race” (Cape of Good Hope 1892, xvii). Regardless, arbitrary biopolitical classification techniques distinguished another “race” as “Hottentot” (further delineated as “Namaquas, Korannas, and Bushmen”) (*ibid.*). And with yet another haphazard flourish, the census designated a group as “The Fingoes,” classed in a unique way: “The Fingoes form part of the Bantu Family, but their peculiar relations with the Colony as involuntary immigrants within its boundaries, and their intelligence and progress in civilization lead to their being here separately considered” (Cape of Good Hope 1892, xvii).

The emphasis on a so-called “progress in civilisation,” fuelled by imperial notions of social evolutionism, thus assumed racialized historical forms—all tied to biopolitical paradigms of rule (Mbembe 2017).

Governmental rationales and practices were accordingly directed at depoliticized, racializing categories to which colonial problems and solutions could be tied. No doubt, obscured powers of categorization and enumeration formed a key, if not always emphasized, line of descent for apartheid’s “separate development” policies (Beinart and Dubow 2003). Despite the elaborateness of these racialized

distinctions, the director of the census, the head enumerator, noted that, “[t]he population, as tabulated from the forms filled up in accordance with the above instruction, falls naturally into two main classes, the European or White and the Coloured” (Cape of Good Hope 1892, xvii).

Behind such spurious, flexible but naturalized assertions, the powers and political choices that belied category creations were suppressed. Notions of “falling naturally” denied the presence of a creative politics that invented and categorized supposed life forms; they also rendered enumerator modes of categorization invisible.

In other words, biopolitics contrived elaborate population divisions, and was authorized by laws that granted census officials considerable latitude to enunciate racialized boundaries and decide on whom to count within groupings. To be sure, local deliberations on borders and categories involved powers that paraded their products as natural forms of life. Subsequent statistical enumerations of such categories added discursive sediments to support racialized forms of life as biological matters rather than socio-political processes. This stealthy operation of power was made possible by a biopolitical paradigm that accepted law’s authorization but not its tempering of or restraint on capricious census powers. Sovereign law may have legislated the authority for censuses, but it also licenced a biopolitical exception to its rule that permitted officials discretionary flexibility in what they categorized, enumerated, and moulded as naturalized, material beings.

Example 2. Racialized Responses and a Bubonic Plague at Cape Town

An allied paradigm of biopolitical governance shaped the regulation of a bubonic plague that struck the Cape in 1901. Silhouetted against a broader socio-political and cultural environment—with changing and intersecting categories of class, race, and gender—Cape technologies of governance were mobilised around hierarchically and racially conceived groupings of colonial life. They were grounded in eugenic ideas of purity and social evolution (Mbembe 2017; Pavlich 2009; Hirst 2010). When tabulated by medical knowledge regimes (epidemiology, medical demography, sanitation science), racializing enumerations of disease and illness created new targets for the biopolitical governance of epidemic pestilence (Deacon 2000).

Following the Anglo-Boer war, the censuses’ racialized groupings abetted a segregationist response to the 1901 bubonic plague at the Cape (Dooling 2004; Bickford-Smith 2016). This response happened at a crucial time since “[t]he Cape Town plague epidemic marks a pivotal moment in which medical practices calibrated imperial concerns over the maintenance of health in white European populations to produce novel forms of racial governance that would later be concretized and reproduced across South Africa” (White 2018, 136).

In particular, the biopolitics that responded to the plague signalled an early attempt to formally segregate a predefined, racialized population grouping. Following the war, an influx of poverty-stricken urban “Africans” into Cape Town proved to be an easy target for medical officials trying to appear to be responding to the plague that raged from February to September. Swanson describes a

background to their peculiar though deplorable official response, indicating that Cape Town was seen as “an old, slum-ridden town composed of a colonial society in which, in general, whites existed in favoured circumstances surrounded and served by ‘coloured,’ Malay, ‘Asiatic’ and... ‘native servants.’ Since the onset of the war, rapidly increasing numbers of black rural migrants from the eastern Cape and Transkei had been left on their own to ‘pig it’ where and how they could” (2003, 29).

In a draconian and capricious use of delegated powers, with appalling effects, medical officials had the 6000 to 7000 impoverished migrants forcibly removed from Cape Town to a location that was once a sewage farm, known as Uitvlugt. The latter would later become Ndabeni, one of the earliest “locations” or “townships” under apartheid regimes. Prior to the Cape response, other districts had already mobilized fears aroused by epidemics of cholera, smallpox, and the bubonic plague to segregate Africans and Peoples of Indian descent in municipal locations, under the auspices of preventing the spread of disease (Dube 2012; White 2018; Swanson 2003). While recurring outbreaks of smallpox at the Cape since 1713 had far more devastating effects than the plague, it was the latter that attracted a drastic, racially segregationist response (White 2018, 139; Ross 1977). No doubt, as we shall see, this arbitrary response became possible within a biopolitical paradigm where power could be exercised in regulatory shadows defined by law—a kind of politics that would resound through apartheid’s racialized segregations (see Forth 2017; Dube 2012; Swanson 2003; White 2018; Bickford-Smith 1995b).

According to Swanson, the management of epidemic disease took form as public health and safety matters, dealing with overcrowded conditions generated by urban migrations. In this respect, “urban public health administration was of considerable importance in accounting for the ‘racial ecology’ of South Africa and of colonial societies generally” (Swanson 2003, 26).

Biopolitical techniques were activated around previously noted knowledge regimes (sanitation science, eugenics, etc.) and adapted by settler colonialism working off logics of dispossession and elimination (e.g., Wolfe 2006; Harris 2020). In the Cape colonial context, Swanson highlights a pervasive “sanitation syndrome,” imbued with a racialized demeanour, that rose to surprising local prominence (2003, 26). Indeed, as a symbol, this idea became so entrenched in everyday lives that “urban race relations came to be widely conceived and dealt with in the imagery of infection and epidemic disease” (2003, 26). Bickford-Smith (2003) further discusses how this syndrome even contoured Cape Town’s municipal politics at the time. In popular media, for instance, an intense municipal debate took form around views associated with either a “clean” or “dirty” party (Bickford-Smith 2003, 53–54; 132). The so-called “clean” party coalesced around a quest to establish separate “locations” which could socially segregate racial population groupings. By contrast, the “dirty” party in power had economic and labour interests more firmly in mind—it believed that labourers should be located close to workplaces, and that they could still be separated within the city limits (Bickford-Smith 2003, 75). Both parties, however, accepted racialized eugenic and epidemiological conceptions, which inflected their respective visions of sanitation as a social symbol.

Some analysts caution that, while apt, the notion of a syndrome does not readily explain why Cape Town's responses to smallpox and the bubonic plague differed. For instance, we are told that the main reason was that the plague threatened to interrupt the Cape's imperial and global economic relations. Indeed, for White, "the global threat of plague to European economic interests was central to the continued success of the British Cape Colony that provided the justification to enact the local quarantining and permanent surveillance of black African persons in Cape Town" (2018, 137).

Legassick (2003) elaborates on this theme by noting that broader imperialist and capitalist stakeholders favoured an "ideology" of segregation. Regardless, for the present discussion, suffice to say that the societal imagery of a syndrome that Swanson describes played a part in categorizing racist hierarchies of purity, even as they were born to wider global economic pressures. An underlying paradigm of rule rendered racial segregation feasible: new biopolitical arrangements had made it possible to enumerate (as with the censuses) and categorize populations in racialized ways beyond the immediate powers of state sovereigns and their laws. Here one finds discursive conditions of possibility for thinking in ways congruent with the wholesale power to isolate African Peoples from Cape Town. Their arbitrary forced removal from the city followed concocted ideas that impoverished labourers were likely to spread the plague (Swanson 2003, 26, 31).

The randomness of these powers is exposed when considering that medical discourses at that time considered the Black Death, or bubonic plague, to be the product of a bacillus transported by fleas and rats. Humble fleas, as chief carriers, were thought to release waves of illness and death over centuries around the world (White 2018). Plague outbreaks at the Himalayan border of China and India in 1855 were followed by outbreaks on ships in Hong Kong (1894), and it is presumed that the bacillus migrated to the Cape during the Anglo-Boer war—seemingly with the British army's forage provisions (Swanson 2003, 29). Echoing materially Albert Camus's (1991) fictional *The Plague*, workers found many dead rats at the Cape Town docks, and then on 2 February 1901, John Gregory, the acting Medical Officer of Health for the Cape Colony, confirmed the first case of the disease (White 2018, 138).

This finding alarmed Cape governors, and they quickly established an *ad hoc* Cape Peninsula Advisory Council (with mayors from affected municipalities along with medical officers of health) to recommend appropriate responses. But to what problem did medical officials offer racialized segregation as a solution? Within the Cape's biopolitical paradigm—despite the "fleas on rats" claim—a local response directed to a racialized population group took form. It developed when Gregory (the acting medical officer) ordered daily "inspections" of "lower class houses" requiring far less surveillance over "better class houses" (cited in White 2018, 137). Infected persons were frequently unhoused and removed to a special plague hospital and their dwellings sanitized—a process that could be lengthy and might even result in permanent closure. The devastating effects of such unrestrained powers are clear from this recollection:

As the Cape Town resident Sam Ntungwana recalled, soldiers forbade him from entering his house to retrieve his belongings, which he had already packed in anticipation of removal, and when he later returned, his property had been incinerated. Foreshadowing famous forced removals under

South Africa's apartheid government, Cape Town's District Six was almost entirely depopulated as a result of British plague operations (Forth 2017, 94).

This unequal, haphazard, and forceful response was grounded in a racialized biopolitics where colonial medical officials "viewed racial separation in colonial spaces as central to the medical health and long-term success of colonial projects" (White 2018, 143).

But the racialized reaction was taken to further levels of arbitrariness when a certain Dr. Simpson, who previously wrote a "scientific" paper endorsing the rat-flea hypothesis, was appointed to head the Cape response (in consultation with the already noted Gregory). Against his previous thinking, Simpson now blithely asserted that the plague was transmitted by "unhygienic" conditions that he imputed to impoverished, migrant African Peoples in the city. And from this assertion, Simpson "largely had carte blanche to direct Cape funds to their policy directives as a result of the public health laws in place in the city" (White 2018, 147). Simpson's actions no doubt emerged from a biopolitical paradigm contoured by debates on whether to set up an "African reserve," along Canadian lines (Swanson 2003, 30). With such mindsets, yet another medical officer offered extra-legal, racist, and gratuitous assertions blaming impoverished African migrants for the plague (Swanson 2003, 30). Bigoted and prejudicial biopolitical categorizations ignored prevailing epidemiological views that "the number of Africans contracting the plague was less than either whites or coloureds" (ibid.). Irrespective of their contact with the plague, from March to May 1901, numerous persons were forcibly marched out of Cape Town to Uitvlucht, without any legal checks on using this haphazard show of might (White 2018, 139; Swanson 2003, 31).

The colonial authority for the violent exercise of such segregating powers came from a broadly framed *Public Health Act* (No. 4 of 1883 as amended by Act No. 23 of 1897). The Act granted broad, ministerially delegated, discretionary powers to medical officers who were required to contain the plague, with little to no legal restraint on their discretionary powers. Section 15 of this Act, for example, noted that, in situations of "urgent necessity arising from the prevalence or threatened outbreak in any district of infectious disease," the Minister could lawfully "proclaim such regulations to be in force" by granting medical officers wide flexible powers "to prevent the outbreak, or check the progress of, or eradicate such disease" (cited in Swanson 2003, 41 at note 18; Cape of Good Hope, Act of Parliament, 1897). In effect, this Act relinquished legal oversight and enabled a legally unfettered biopolitical segregation with rippling effects across the Cape and beyond.

Law in effect here excluded its own operation in situations of "urgent necessity," allowing a medical officer forcibly to remove people categorized as a racialized unity without legal oversight. When the plague at the Cape subsided, segregated subjects began to drift back to the city as municipal politics centred around an abiding racism and the need for accessible labour pools (Bickford-Smith 2003; 1995b). In the end, Cape Town's municipal politics remained split between strong adherents of racial segregation and an economic elite who focused on uninterrupted labour supplies (Bickford-Smith 2003). A watered-down *Native Reserve Locations Act* (No. 40 of 1902) allowed for (but did not compel) racial segregation *within* municipal boundaries (Swanson 2003, 38; see also Cape of Good Hope, Act of

Parliament 1902). Regardless, the responses to the bubonic plague at Cape Town established markers for a racist biopolitical paradigm of rule that exercised legally allowed, but not lawfully supervised, powers.

In short, one might echo Swanson's view that the Cape Town example transcends its "purely epidemiological dimensions" in that the plague "had been identified with...black populations and they with it" (2003, 39). Moreover, "Sanitation and public health provided the legal means to effect quick removals of African populations" and provided the grounds for "permanent urban segregation" (*ibid.*). A biopolitical paradigm then licenced medical experts to enforce racializing powers posing as a necessary governmental solution. If law authorized this haphazard biopolitics, it did not superintend its atrocious racialized implementation. Appealing to purported hygienic necessities framed around a racialized group, colonial governance unleashed horrors staged repeatedly through apartheid's many enforced segregations.

Concluding Reflections on Ruling Legalities

In retrospect, these two examples highlight a biopolitical paradigm of rule wherein discretionary powers posited racialized population subgroups as routine governmental targets. As is clear, law and sovereignty may have authorized the work of Cape colonial officials, with disciplinary exemplars enabling enumerative (statistical) or epidemiological truths; but biopolitics led them to forge racialized population groupings and to render these as natural targets beyond the reach of law. The effects were forbidding and exposed selected subjects to capricious powers without focused legal deliberation or oversight. Cape colonial law, that is, authorized but exempted itself from regulating how basic biopolitical categories were formed, or how they might be employed for racist social goals.

The examples also support the view that racism had become a "basic mechanism" of biopolitical sovereignty that worked by "separating out the groups" and "establishing a biological type of caesura within a population that appears to be a biological domain" (Foucault 2003, 255). By seeking to depoliticize their operations, ascendant biopolitical forces naturalized racializing decisions and unleashed biopolitical sovereignty without legal restraint. Power was here exercised around obligations "to use race, the elimination of races and the purification of the race" (Foucault 2003, 258). As seen, in a colonial context, discriminatory governance targeted fluidly designated racialized population groups, forged through techniques of categorization and segregation. When posited as biologically natural to populations, or their hygiene, thereby limiting the scope of legality, these categorizations (or enforced segregations) sheltered in depoliticized shadows rebuffing legal oversight or challenge. By stealth, they proceeded to expose subject lives precariously to the whims of racialized patterns of rule (Butler 2006; Watson 2012).

To avoid such injustices, one might underscore our opening claim that legitimate power requires normative legal review and restraint. This is especially important when, as repeatedly noted, emerging powers espouse decisions as conforming to biological necessity. But what might such deliberations on restraining legality entail within sovereign-biopolitical paradigms of rule? To be sure, there

are historical components to any such reflections. Within medieval and early modern ruling paradigms, the “rule of law” might have checked excesses of spectacular sovereign force. As Thompson (1975) noted, a rule of positive law did at times constrain the powers of centralized state forces. However, where ruling paradigms shift, and where positive laws routinely suspend jurisdictional claims over biopolitical governance, different approaches to legality become vital. In other words, Fuller’s craft of subjecting governors to legal rule may be interpreted to assume a non-positivist, socio-political and normative countenance that aims to distinguish legitimate from illegitimate ways of governing.

As with one strand of natural law theory, pursuing that sort of legality immediately evokes the age-old tussle between socio-political contexts that *rule by law* as opposed to those that seek valid *rules of law*. The latter may seek legally to distinguish forms of authority considered broadly by the governed as legitimate, or at least sufficiently so to obey—even if the history of legality underlines the ease with which law can slip from restraining device to governor’s servant (Beatty 2022). Regardless, a historical normative “arc” of legality may be recovered from socio-legal discourses seeking to confirm that might does not triumph over right, and that subjects are not routinely exposed to gratuitous powers in the absence of operative legality (Dyzenhaus 2022; Krygier 2019, 2017b). There is a persistent danger when paradigms of rule (like the Cape examples) embrace a legally shadowed biopolitics that pursues a dispossessing racialized politics. Such paradigms govern not to affirm life forms, with legal limitation, but to tie subjects to persistent categorizations of inferiority or logics of elimination—at times falling prey to a hazardous politics around death or a “necropolitics” (Mbembe 2019, 2003; Esposito 2008).

Looking back to the previous colonial examples, one might ponder how even to approach socio-political crafts of legality to regulate subtle and stealthy biopowers, tempering their exercise in ways that the governed, especially those directly affected, encounter as valid authority. Of course, there is a large historical element to this matter, but one might also detect some basic deliberative provisions. To begin with, as already suggested, the age-old fascination with a state-invested, positivist, rule of law to limit arbitrary state powers requires a basic rethink. We have seen how census directors used discretion to fabricate racialized enumerative divisions within a population and how Cape medical officers flexibly, and forcibly, segregated a racialized category in response to the 1901 bubonic plague. In both cases, it was positive state law that authorized discretionary forces as well as legality’s retreat. This finding makes clear why positive law has proved itself wanting as a mechanism to mobilize socio-political crafts that might effectively subject biopolitical authorities to the superintendence of legality—both to locate and then to regulate subtle, arbitrary biopowers. If biopolitics, as noted, has the potential to be socially constructive or damaging, it is crucial to institute socio-political legalities that can recognize and curtail dangerous powers. Positive state laws that simply accept naturalized, or reified, biopolitical claims as reasons to exempt themselves will have limited purchase. Moreover, positivist laws that hide behind veneers of relatively inscrutable technicalities are unlikely to cultivate socio-political contexts that deliberate publicly on, and engage, suitable forms of legality to determine right or legitimate exercises of biopower.

Secondly, and relatedly, local fields of law are always plural—resurgent Indigenous legalities exemplify this point in the face of colonial law’s claims to monopolistic jurisdiction (Napoleon 2019). Indigenous legal scholars have long recognized that plural socio-political arenas are foundational to legal deliberations, as well as to the diverse ethical ideas and stories that make the very idea of law possible (Borrows 2019). Noting that positive state laws never encompass law, such thinking opens to different ways of deliberating on how plural legal fields might interact to restrain feral powers. Legal pluralism accepts that power is exercised in many ways and in different social fields. A singular and centrally removed sovereign law is unlikely to detect, let alone restrain, subtle and stealthy exercises of biopower. However, federated socio-political orders with effective local commitments to legality, to Fuller’s craft, are more likely to curb wild ruling forces in context.

Finally, as is implied, the normative, deliberative, ethical, social, and political auspices of such legalities are key. If legality descends from multiple historical sources, its overall call to distinguish right, or legitimate, exercises of power repeats as a resonant theme. Then the question turns to the normative foundations for deliberations and struggles around which precise restraining legality to deploy. No doubt here we face the difficult heart of normative legal deliberation that may not surrender to easy ahistorical resolution, but which cannot be abjured without abandoning the very idea of legality. However, in the context of a paper devoted to highlighting features of Cape biopolitical paradigms of rule, one might do well to echo Esposito’s call for a new language that recalibrates positivist law, modern sovereign politics, and the subjects (persons) who inhabit sovereign legal forms. Such an approach certainly understands that one strand of biopolitics may be deathly in its management of social forms (as per Mbembe 2019); but biopower may be reconfigured as an “affirmative biopolitics” that seeks new ways to affirm life, legitimate ways to govern, and respectful ways to be with one another (Esposito 2012; 2008). What paradigm of legality might be implicated in *that* quest?

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George Pavlich

H.M. Tory Chair, Professor, Law and Sociology, University of Alberta, Canada
gpavlich@ualberta.ca