

Giorgio Agamben and the politics of the exception

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Two main sets of problems need further consideration. The first is 'the exception' as a problem of exceptional contingency and limit. The second is the problem of the politics of exceptionalism, particularly its discursive and socio-political processes and conditions of possibility. Carl Schmitt uses the former - the idea of the exception as a metaphysical and philosophical problem of limit and contingent event - to construct a legitimation of the latter - a politics of exceptional policies and practices. Schmitt's suture of the problem of 'the exception' to a politics of exceptionalism is both overdetermined with an authoritarian nation-statist ethic and rests on some slippery theoretical and textual moves, namely the conflation of the *exceptional event* with both the exceptional sovereign *response* to that event and the sovereign *decision* that the event is exceptional in the first place.

In this paper I will focus on the first of these sets of problems - the exception as limit and contingency. The question is whether the exception can be addressed in a way that resists the move to a Schmittian politics. If Schmitt's strategy is to present the problem of the exception in such a way that it appears to carry an inherent set of political determinations, necessities and imperatives, is there a way of addressing the problem of the exception which does not produce or imply these same political effects?

The contemporary Italian philosopher Giorgio Agamben has produced some of the most serious work on the problem of the exception. Indeed it would be fair to credit him, at least in part, with the current revival of interest in the concept. His work in this area is presented in two books: *Homo Sacer: Sovereign Power and Bare Life*, first published in Italian in 1995 and translated in 1998, and what is described as its sequel, *State of Exception*, first published in Italian in 2003 and translated in 2005. The two books are of a slightly different order. *Homo Sacer* is the longer and more original text. It lays out some rather innovative ideas regarding sovereignty and the figures of man and life. *State of Exception* is a shorter text that is less far-reaching in its ambition, but engages more closely with the debates in the literature concerning the idea of a 'state of exception'.

This paper will take the form of an exposition, analysis and critique of Agamben's work. Through a close reading of his two texts I will seek to establish what Agamben is doing, why it is important, where it is limited or problematic, and what needs to be addressed differently or considered further. I will make reference to contemporary empirical concerns and also engage closely with Agamben's

readings of key theorists for the problem of the exception, specifically Carl Schmitt, Walter Benjamin and Michel Foucault. I will highlight Agamben's most important insights in these readings and provide a critical commentary that draws out the specific implications for this project. The overriding concern will be to question the political and methodological implications of Agamben's response to the problem of the exception.

Biopolitics, sacred life, and sovereignty as a relation of abandonment

In *Homo Sacer*, Agamben argues that the exception is the original relation of the entire Western paradigm of politics. The Greeks, Agamben argues, made a key distinction between the simple fact of living – *zoē* – and the qualified political life – *bios*. While the mere fact of living in itself had a “natural sweetness” for Aristotle, the end of politics was not simply this “bare life”² but the politically-qualified “life according to the good”³. Agamben asserts that this account of politics become canonical for us moderns, centring on competing articulations of the ‘good life’.

Agamben then invokes Foucault's distinction between this classical paradigm and the identification of a distinctively modern ‘biopolitics’, in which biological life (of both the individual and the species) becomes what is at stake in politics. As Foucault writes: “For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for political existence; modern man is an animal whose politics calls his existence as a living being into question.”⁴ For Foucault, biopolitical modernity is marked by political processes, principles and practices which question the very existence of man as a species. Examples might include nuclear deterrence and weapons of mass destruction, environmental degradation and catastrophe, demographic and migratory shifts, epidemiological threats, and the biological sciences.

Agamben argues that in the transition from the classical to the biopolitical paradigm, the “bare life” that was excluded from politics and the polis as the simple unqualified fact of living becomes included

² Giorgio Agamben, *Homo Sacer : Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, Calif.: Stanford University Press, 1998), p. 4.

³ *Ibid.*, pp. 1-2.

⁴ Michel Foucault, *The History of Sexuality, volume 1*, trans. Robert Hurley (New York: Random House, 1978). Cited in Agamben, *Homo Sacer*, p. 3.

in the realm of politics. The concept of biopolitics allows Agamben to claim that this exclusion - which for the Western episteme marked the original distinction between the political and the non-political - in fact marks the “the fundamental categorical pair of Western politics...that of bare life/political existence, *zoē /bios*, exclusion/inclusion.”⁵ Agamben argues that the original exclusion of “bare life” from political life has in fact become an “inclusive exclusion”. In being excluded from properly-qualified political life, “bare life” is thrown into a more basic and fundamental political relationship with the sovereign power that excluded it. As such, “bare life” is all the more political in being excluded. The exclusion of “bare life” from properly-qualified political life has become, in light of a biopolitics at the level of species existence, a kind of political inclusion.

In this way, Agamben takes the dialectical character of modern Western politics seriously. He understands that the modern Western subject does not simply exist in opposition to sovereign political authority, but is produced through an originary sovereign relation. For Agamben, sovereign exceptionalism is not simply an oppressive abuse of what should otherwise be a properly-balanced relationship between liberty and security, subject and sovereign. Rather, exceptionalism is the very structure of sovereignty itself.

As such, those who are excluded or excepted from liberty and law - perhaps those designated as ‘fundamentalists’ or ‘terrorists’ – are not simply placed *outside* modern politics (as those ‘over there’ or ‘back then’) but rather brought *into* a more fundamental political relation. As such, Agamben takes seriously Schmitt’s axiom that: “The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception.”⁶ For Agamben, the exception is not simply an aberration of modern politics but an essential and basic expression of its fundamental structure. Sovereign exceptionalism cannot be opposed to the principles of modern liberty without the potential contradiction of sovereign power defending liberty by destroying liberty. Agamben avoids the contradictions of this dualistic opposition by considering Western sovereignty as an original, co-constitutive, dialectical relation between modern subjectivity and its negation. As such, Agamben argues that:

⁵ Agamben, *Homo Sacer*, p. 8.

⁶ Carl Schmitt, *Political Theology : Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, Mass. ; London: MIT Press, 1985), p. 15.

“the inclusion of bare life in the political realm constitutes the original – if concealed – nucleus of sovereign power. *It can even be said that the production of a biopolitical body is the original activity of sovereign power.* In this sense, biopolitics is at least as old as the exception.”⁷

For Agamben, the exception is the limit condition in which forms of unqualified or excluded life dwell and are produced, but this is in fact the production of a more fundamental biopolitical relation. For Agamben, sovereign power does not affirm its power over life by asserting its dominion, or by presiding over a progression from natural life to politically-qualified modern life, but by withdrawing its protection and thus abandoning bare life to a realm of violence and lawlessness. This is the sovereign “ban”, the exclusion which is in fact an inclusion, an inclusive exclusion, because sovereign power applies all the more in withdrawing its protection. As Agamben explains:

“He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable. It is literally impossible to say whether the one who has been banned is outside or inside the juridical order.”⁸

Agamben brings this originary political exclusion into focus by calling upon the archaic Roman figure of *homo sacer* – sacred man. Here the term sacred means not simply holy but rather the more ambiguous meaning explored in 19th century anthropology by such thinkers as Freud and Durkheim. The sacred is a realm in which the holy and the taboo, the divine and the profane, are ambiguous and often touch. Hence *homo sacer* is one who has been excluded from normal human law and as such is placed in a ‘limit condition’ between this world and the next, between properly-qualified human life and death. This limit condition corresponds to the sphere of the sovereign ban, in which bare life is included through its exclusion. The consequence is that:

“The sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life - that is, life that may be killed but not sacrificed – is the life that has been captured in this sphere.”⁹

⁷ Agamben, *Homo Sacer*, p. 6.

⁸ *Ibid.*, pp. 28-9.

⁹ *Ibid.*, p. 83.

For Agamben, the sovereign exception is the withdrawal of the law from excluded life, and therefore the exposure of that life to the peril of death. One who kills *homo sacer* will face no sanction. And in being excluded from the normal prohibition on killing, *homo sacer* is also excluded from sacrifice, from the normal ritualised forms of killing and punishment. For example, the bandit, a traditional object of the ban,

“is in a continuous relationship with the power that banished him precisely insofar as he is at every instant exposed to an unconditioned threat of death. He is pure *zoē*, but his *zoē* is as such caught in the sovereign ban and must reckon with it at every moment.... In this sense, no life, as exiles and bandits know well, is more “political” than his.”¹⁰

Agamben argues that this sovereign sphere in which life “may be killed but not sacrificed”¹¹ is made concrete in the site of the camp. Agamben describes the figure of the camp as the absolute biopolitical space, in which “power confronts nothing but pure life, without any mediation.”¹² The camp, Agamben argues, is the state of exception made permanent in factual basis. It is precisely here that the threshold between law and violence is manifested, in a zone of indistinction in which fact and law become indistinct, and in which every camp guard is effectively sovereign. Agamben raises the spectre of the often deadly scientific experiments that were conducted on both concentration camp inmates in Nazi Germany and death row prisoners in the US, who, because already deemed life not worthy of being lived and destined for death, could be killed without murder.¹³ The camp, Agamben argues, is “the fundamental biopolitical paradigm of the West.”¹⁴ Provocatively, Agamben claims that the inclusive exclusion of the camp, both as figure and in fact, resides at the heart of every model of citizenship and public space in the West.

Before developing a critique of these ideas, it is worth highlighting the relevance of Agamben’s formulations for contemporary political concerns. Agamben’s formulations touch quite incisively on some of the issues raised by contemporary deployments of exceptional sovereign violence. The Guantanamo Bay detention camp is an exemplary site of contemporary exceptionalism that easily demonstrates the application of Agamben’s ideas. Guantanamo cannot be explained in the regular

¹⁰ Ibid., pp. 183-4.

¹¹ Ibid., p. 83.

¹² Ibid., pp. 170-1.

¹³ Ibid., pp. 154-9.

¹⁴ Ibid., p. 181.

terms of law or criminal investigation. The intended purpose of the camp's location outside the regular territory of the United States has been precisely to separate the entire process from normal American legal procedures and constitutional rights. Despite a Supreme Court ruling on 15th July 2005 giving the detainees the right to file petitions of habeas corpus, the legal status of the detainees remains ambiguous and contested. To apply Agamben's words, it exists in a "state of exception". The account of detention given by the "Tipton Three", three British Muslims held there for over two years, demonstrates this description. As one of them explains: "we were never given access to legal advice. I asked at various points but they just said that this is not America this is Cuba and you have no rights here."¹⁵ Similarly, in reference to the countless beatings and abuses the prisoners received, the report explains that "there was never any redress when they were mistreated or rules were broken."¹⁶

Likewise, a letter alleged to be from another British Guantanamo detainee, Moazzam Begg, released by US officials uncensored either "by mistake or because someone in the US has a conscience",¹⁷ relays details of his detention in both Afghanistan and Cuba. It goes so far as to make allegations of murder committed with impunity:

"I was subjected to pernicious threats of torture, actual vindictive torture and death threats – amongst other coercively employed interrogation techniques... The said interviews were conducted in an environment of generated fear, resonant with terrifying screams of fellow detainees facing similar methods... This culminated, in my opinion, with the deaths of two fellow detainees, at the hands of U.S. personnel, to which I myself was partially witness."¹⁸

The Guantanamo prisoners could be considered as Agamben's *homines sacri*. They have been excepted – etymologically meaning "taken outside" as Agamben points out¹⁹ – from what might be called the normal rituals of sacrifice. Here the normal rituals of sacrifice would translate as the American legal processes that can culminate in the death penalty. Instead, the prisoners have been abandoned by the law and are left facing the violence of sovereign power. They can be killed without legal ritual or

¹⁵ Shafiq Rasul, Asif Iqbal, and Rihel Ahmed, *Report of Former Guantanamo Detainees. Composite statement: Detention in Afghanistan and Guantanamo Bay* (New York: Centre for Constitutional Rights, 2004, available at <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>), paragraph 252.

¹⁶ *Ibid.*, paragraph 155.

¹⁷ Clive Stafford Smith, legal counsel to Moazzam Begg, quoted in The Guardian, "Guantánamo Briton 'tortured in US custody' ", *The Guardian*, (London and Manchester), 1st October 2004.

¹⁸ Moazzam Begg, *Letter from Moazzam Begg* (5th July 2004, available at http://image.guardian.co.uk/sys-files/Guardian/documents/2004/10/01/guan_letters.pdf).

¹⁹ Agamben, *Homo Sacer*, p. 18.

homicide. As Agamben argues, “the sovereign is the one with respect to whom all men are potentially *homines sacri*, and *homo sacer* is the one with respect to whom all men act as sovereigns.”²⁰ Those who deal with the detainees operate outside the law, and as such, they “act as sovereigns.”

The politicization of bare life, birth/nation/biopolitics

Agamben’s understanding of the sovereign exception is a direct response to dualistic contradictions in modern liberal politics in which liberties and rights mark not a domain free from sovereign political authority but precisely the opposite. Agamben begins here by citing Hannah Arendt’s critical observations on the declining fate of the rights of man. Arendt wrote:

“The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had lost all other qualities and specific relationships – except that they were still human.”²¹

For Arendt it is the refugee - relieved of citizenship and as a consequence relieved of the very rights that were supposed to be held on account of being human alone - that reveals the predicament of the rights of man. Liberties and rights only appear to be possible *under* sovereignty, and thus cannot be considered in simple dualistic opposition to sovereignty. The refugee, no longer a subject of a sovereign power, no longer has rights in any practical sense of the word. Any rights the refugee holds on account of being merely human are only realisable through the help or protection of sovereign states. (Even the humanitarian agencies of the UN are entirely reliant and more often than not severely constrained by the purse strings tightly held by states).

Agamben takes this radical crisis of rights and extends the analysis in terms of biopolitics. The exclusion of human life deprived of all belonging, citizenship and identity is not simply a paradox, but the “hidden paradigm of the political space of modernity”.²² Agamben tackles the rights of man not as a founding achievement of the Enlightenment, but as a paradigmatic sign of the further encroachment of sovereign power:

²⁰ Ibid., p. 84.

²¹ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Bruce Jovanovich, 1979), p. 299. Cited in Agamben, *Homo Sacer*, p. 126.

²² Agamben, *Homo Sacer*, p. 123.

“It is almost as if, starting from a certain point, every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals’ lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.”²³

Taking his cue from Foucault, Agamben interprets the crisis of rights as evidence of the increasing confoundedness of classic liberal conceptions of politics. The liberties and rights that are supposed to protect individuals against sovereign oppression and enshrine the subject as ‘sovereign’ do quite the opposite. Liberties and rights cannot be opposed to sovereign exceptionalism because those liberties and rights are already included in the domain of sovereign power. For Agamben, as for Foucault, it is not the rights-bearing citizen that marks the beginning of the modern age, but the entry of the “bare life” of the basic human body into political calculations.

Agamben demonstrates this argument with a particularly apt reference to *habeas corpus* – the writ served against the authorities to assert the right against detention without trial - which has of course become a key legal battleground regarding anti-terrorist policies in the US and UK. As per Arendt, it is precisely on account of being merely human, and not domestic citizens, that “terrorist suspects” have been denied the right of *habeas corpus*. Agamben inverts the conventional meaning of this ‘right’ in order to draw attention to its original ambiguity: the ancient writ that preceded *habeas corpus* was originally intended to assure the presence of the accused in a trial, rather than the release of a body held without charge.²⁴ As such, Agamben considers that *habeas corpus* is a deeply ambiguous extension of biopolitical power: “*Corpus is a two-faced being, the bearer both of subjection to sovereign power and of individual liberties.*”²⁵

Thus Agamben invokes Foucault’s problematization of the ‘sovereign subject’ as both ‘free’ and *made subject to sovereign power*.²⁶ This double-edged relationship between sovereign power and sovereign

²³ Ibid., p. 121.

²⁴ Ibid., p. 125.

²⁵ Ibid.

²⁶ Ibid., p. 124.

subject leads Agamben to posit a reformulation of Schmitt's "Sovereign is he who decides on the exception."²⁷ in the claim that:

"In modern biopolitics, sovereign is he who decides on the value or the nonvalue of life as such. Life – which, with the declarations of rights, had as such been invested with the principle of sovereignty – now itself becomes the place of a sovereign decision."²⁸

Agamben considers that the fact of being born is no longer, if indeed it ever was, a case of being "born free", but the beginning of the biopolitical relation of subject and sovereign. Natural man is for Agamben the "immediately vanishing ground...of the citizen",²⁹ who is included in the nation-state relation of sovereignty by the very fact of being born in its territory. Hence Agamben draws attention to the etymology of the concept of 'nation', from *nascere* – to be born. It is precisely this historical innovation from the French revolution – that sovereignty should reside in the nation – which "inscribed this element of birth in the very heart of the political community."³⁰ The nation-state comes to include man in its sphere by the very fact of his birth in its territory, and thus comes to decisively establish its dominion over life at precisely the moment when man's liberty was meant to be guaranteed.

Sovereign nominalism

Agamben's take on the problem of the sovereign exception is built around an extremely bold set of claims. Beginning with concepts posited by Carl Schmitt and Michel Foucault in the form of 'the exception' and 'biopolitics' respectively, Agamben erects a productive relation of political/biological life and the sovereign exception as the central pillar of the whole paradigm of Western politics. As an initial response, I will invoke Foucault's rebuke to those who would erect a sovereign consciousness at the centre of philosophy and history: "What makes you seek beyond all this the great historico-transcendental destiny of the Occident?"³¹ What are the political implications of understanding the problem of the exception in this totalizing way? What is at stake? I will try to answer these questions as I proceed.

²⁷ Schmitt, *Political Theology*, p. 5.

²⁸ Agamben, *Homo Sacer*, p. 142.

²⁹ *Ibid.*, p. 128.

³⁰ *Ibid.*

³¹ Foucault, *The Archaeology of Knowledge*, p. 231.

At first glance, there is an immediate advantage to Agamben's totalization of the relation of the sovereign exception. By arguing that the limit condition of the state of exception is *produced* by the originary sovereign relation, Agamben provides a way of resisting Schmitt's slippery textual strategies. To recall, Schmitt justifies sovereign exceptionalism as being necessitated by exceptional events and situations that fall outside the scope of the law. Sovereign power is obliged to step in to fill these unforeseen legal gaps or *lacunae* because of the inherent and contingent dangers posed by them. Schmitt's strategy is to argue that beyond the limits of the law, there is a more basic existential imperative – a natural law if you like - for sovereign power to act exceptionally; an imperative which is causally brought about by unforeseen exceptional events or situations.

Schmitt's move rests on dubious metaphysical ground because it blurs and conflates three different things: first, the exceptional *event, situation* or *lacuna*; second, the nominalist sovereign *decision* that the event or situation is indeed exceptional; and third, the exceptional sovereign *response* to the event or situation. Schmitt posits the exceptional event, situation or lacuna as a kind of objective condition that brings about certain exceptional imperatives. Yet if this were the case, why must the sovereign be "he who decides on the exception"?³² If there *were* such an *objective* condition as a state of necessity/exception, there would be no need for this exclusive sovereign act of naming; instead, the recognition of a state of necessity/exception would be obvious and could be reduced to a mere technical procedure rather than a sovereign declaration. What Schmitt does, therefore, is use the idea of an objective necessity to justify a sovereign response that is *more* than a simple response, because it claims the prerogative to declare the existence of the very thing it is responding to. Schmitt's case for exceptional sovereign power is built on a dubious circular logic: sovereign exceptionalism is justified by conditions that sovereign power itself declares. Thus sovereign exceptionalism is potentially just the arbitrary and unlimited use of power, speciously justified upon the disappearing ground of the exceptional event.

Because Agamben's understanding of sovereignty is as the central relation of the entire Western paradigm, he is able to resist Schmitt's deployment of an 'objective' state of necessity. Agamben

³² Schmitt, *Political Theology*, p. 5.

understands that sovereignty is from the beginning built upon a relation between norm and exception; it needs no ‘objective condition’ to bring exceptional sovereignty about. Agamben calls Schmitt’s device a “normative lacuna” – a supposed gap in the law which brings forward its own imperatives, its own demands of what ought to be done. Agamben makes the point that I have just made about the problematic nature of this ‘objective necessity’: “far from occurring as an objective given, necessity clearly entails a subjective judgement, and... obviously the only circumstances that are necessary and objective are those that are declared to be so.”³³ Because Agamben understands sovereignty as a nominalist and productive relation, he also understands that there is no room for an ‘objective necessity’ to occur – the ‘objective necessity’ is only declared as such by a ‘subjective judgement’. If the declaration of a state of exception is not a response to an objective ‘normative lacuna’, then it must have some other purpose. Agamben argues that:

“Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation.”³⁴

The point is that under the logic of a totalizing sovereign relation, there *cannot* be a gap in the law. Any gap in the law is by default and in effect already filled by sovereign power, especially since in the ‘inclusive exclusion’ of its relation of abandonment, sovereign power applies all the more in not applying.

“In analogy with the principle according to which the law may have lacunae, but the juridical order admits none, the state of necessity is thus interpreted as a lacuna in public law, which the executive power is obliged to remedy.”³⁵

Therefore, Agamben brands the “normative lacuna” a “fictitious lacuna” in which sovereignty asserts its totality by demonstrating that even potential gaps are already within its reach and remit. For Agamben these ideas of limits, gaps and lacunae are: “fictions through which the law attempts to encompass its own absence and to appropriate the state of exception, or at least to assure itself a relation with it.”³⁶

³³ Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, Ill.; London: University of Chicago Press, 2005), p. 30.

³⁴ *Ibid.*, p. 31.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 51.

Ostensibly, Schmitt's understanding of modern politics is founded not on *principle* but on existential *necessity*. Beneath the law there is a more fundamental 'law' of necessity. "The concept of the state presupposes the concept of the political",³⁷ Schmitt argues, precisely because "the political" is the potential for existential conflict inherent in life that necessarily requires the constricting order of the state. Conflict is not a problem provided it is kept within necessary limits. As such, Schmitt often seems fairly open to all the kinds of political and social relations that may take place in a given territory, so long as it is understood that at the exceptional limit the sovereign decision on the enemy or the exception will kick in. "Argue as much as you like and about whatever you like, but obey!" he might proclaim, adopting the words of Kant.³⁸

Similarly, contrary to some common liberal dualisms, sovereign political authority exists not in opposition to the principle of the free subject, but *because* of the existential necessities brought about by the free subject. The idea of the terrifying conflict that would occur between free humans outside a relation of political authority serves precisely as a limit condition that justifies the existence of a sovereign political order, even though that terrifying limit condition must never be allowed to come about, and indeed never 'really' existed in the first place. In parallel, although the hypothetical danger posed by the lacuna beyond the law is a justification for the existence of exceptional sovereign power, that lacuna must never be allowed to come about. Hence Agamben argues that: "the juridical void at issue in the state of exception seems absolutely unthinkable for the law;...this unthinkable thing nevertheless has a decisive strategic relevance for the juridical order and must not be allowed to slip away at any cost."³⁹

Although for Agamben there is no objective condition that brings exceptionalism about, he considers that sovereignty is from the beginning built upon a relation between norm and exception, between law and the force of law, the law that applies all the more in not applying. The point is that sovereignty applies both to the norm and the exception from the beginning. Sovereignty produces the exception as a

³⁷ Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), p. 19.

³⁸ Immanuel Kant, "An Answer to the Question: 'What is Enlightenment?'" in *Kant : Political Writings*, ed. Hans Reiss, translated by H. B. Nisbet, pp. 54-60 (Cambridge: Cambridge University Press, 1990), p. 55.

³⁹ Agamben, *State of Exception*, p. 51.

relation of abandonment in which a more fundamental relation of sovereignty is affirmed. The state of exception does not exist as an objective condition beyond the limits of the law, but is produced by sovereign power in order to affirm a more fundamental ‘natural law’ or ‘nomos’, which affirms the necessity of sovereignty not simply as the executor of the law, but as the fundamental condition of the Western political paradigm itself – “the great historico-transcendental destiny of the Occident”.⁴⁰

Law/order/escape – Schmitt and Benjamin

What is really at stake for Agamben is whether or not it is possible to escape from the sovereign dialectic. Beyond the state of exception that remains trapped in a dialectic of sovereignty, is there a *real* state of exception? These stakes emerge in what is by far the most impressive and valuable element of Agamben’s book *State of Exception*: his forensic analysis of the relationship between the work of Schmitt and that of Walter Benjamin. Agamben describes a series of arguments and counter-arguments between the two theorists, with evidence provided through analysis of their correspondence, footnotes that point to common sources, the likelihood that they would have read each other’s work in the same journals and so on. Agamben presents this as a kind of hidden dialogue of text and counter-text.

The first set of arguments in this dialogue is contained in Schmitt’s 1921 work, *Die Diktator*. As Agamben explains, the basic argument of this work revolves around two different kinds of exceptional political authority. The first is “commissarial dictatorship” - a temporary dictatorship brought about constitutionally, the purpose of which is to defend the constitution by provisionally suspending it in a state of emergency; and second is “sovereign dictatorship” - an unconstitutional constituent power intended to bring about something new, which as such is legitimated on the basis of an embryonic, future, more just constitution.⁴¹ The crucial point for Schmitt is that both of these figures maintain a relation to a deeper continuation of juridical order, and as such the sovereign relation of norm/exception cannot be escaped.

⁴⁰ Foucault, *The Archaeology of Knowledge*, p. 231.

⁴¹ Agamben, *State of Exception*, pp. 32-40.

On the one hand, under “commissarial dictatorship” the law remains in force, but its *application* is suspended. Agamben describes the law’s being-in-force without applying as the “force-of-law”⁴²: the residual and more fundamental force of a general juridical will that continues to exist even under the suspension of the law. Even when the law is suspended, “commissarial dictatorship” continues to act in the *name* of the law:

“In this sense, the state of exception is the opening of a space in which application and norm reveal their separation and a pure force-of-law realizes (that is, applies by ceasing to apply) a norm whose application has been suspended.”⁴³

Although the “commissarial dictatorship” that acts outside the law in the name of the law cannot be included in the constitution without paradox, it maintains a relation to the wider juridical order. It is, according to Agamben’s analysis, a fiction “through which the law attempts to encompass its own absence”.⁴⁴

On the other hand, “sovereign dictatorship” bears a relationship not to the old constitution but to a constitution-to-come. Sovereign dictatorship is a constituent power that bears the “minimal form” of the new constitution, and as such, “represents a state of law in which the law is applied, but is not formally in force”⁴⁵ – the inverse of the “force-of-law”. In both situations, political authority maintains a relation to the law whether law is in force but not applied, or applied but not formally in force. The point is that even a state of exception beyond the law remains in an inescapable relation to a more fundamental form of juridical order.

Agamben argues that it was these Schmittian formulations that Benjamin was responding to in his essay “Critique of Violence”.⁴⁶ In this, similarly to Schmitt, Benjamin posits two figures of authority, which he calls “lawmaking violence” and “law-preserving violence”. Law-preserving violence maintains the current constitution, while lawmaking violence posits new laws. These pose a similar all-encompassing relation; as Benjamin writes: “*All violence is either lawmaking or law-preserving. If it*

⁴² Ibid., p. 39.

⁴³ Ibid., p. 40.

⁴⁴ Ibid., p. 51.

⁴⁵ Ibid., p. 36.

⁴⁶ Ibid., pp. 52-3.

lays claim to neither of these predicates, it forfeits all validity."⁴⁷ As such, these figures closely correspond to Schmitt's commissarial dictatorship and sovereign dictatorship.

Benjamin then attempts to subvert this dual structure - which he considers to encompass the limit possibilities of juridical order - by positing a "pure violence" placed outside these categories.⁴⁸ This "pure violence" would be (if its form were known) justified neither by an appeal to a *legitimate means* of obtaining a political end, nor by an appeal to *just ends* which justify the illegitimate means needed to obtain them. It would neither make law nor preserve law. Rather, as Agamben describes it, it would simply be a "pure medium"⁴⁹ with no relation other than to itself; perhaps a manifestation of anger with no aim other than expressing itself. As Agamben explains: "pure violence exposes and severs the nexus between law and violence and thus appears in the end not as violence that governs or executes but as violence that purely acts and manifests."⁵⁰

Benjamin imagines this "pure violence" manifested as some kind of post-legal, perhaps messianic, epoch. This works not so much as a substantive political vision but as a symbol of what is at stake in the discourse. Benjamin is trying to proffer an emancipatory line of flight that breaks free of Schmitt's seamless structures of juridical order. He does this by asserting the possibility of a violence beyond any relation to law, and hence beyond the categories of norm and exception which for Schmitt form a seamless and inescapable dialectic. Agamben's quotes from Benjamin reveal these stakes quite clearly; for example:

"If violence is also assured a reality outside the law, as pure immediate violence, this furnishes proof that revolutionary violence – which is the name for the highest manifestation of pure violence by man – is also possible."⁵¹

Schmitt's counter-move is, by Agamben's analysis, to neutralise this wayward figure of "pure violence".⁵² The response is the sovereign *decision*. This subsumes the apparent free-floating, non-

⁴⁷ Walter Benjamin, "Critique of Violence," in *Walter Benjamin : Selected Writings, vol. 1 1913-1926*, eds. Marcus Bullock and Michael Jennings, translated by Edmund Jephcott (Cambridge, Mass. ; London: The Belknap Press of Harvard University Press, 1996), p. 63.

⁴⁸ *Ibid.*, p. 69.

⁴⁹ Agamben, *State of Exception*, p. 62.

⁵⁰ *Ibid.*

⁵¹ Benjamin, "Critique of Violence." Cited in Agamben, *State of Exception*, p. 53.

⁵² Agamben, *State of Exception*, p. 54.

relational, undetermined, undecidable quality of “pure violence” by bringing it back under the aegis of sovereign power. Schmitt ties the undecidability and indeterminacy of “pure violence” to the extreme circumstances of the exceptional situation, linking it to the necessity of a decision in the state of exception. Precisely because the extreme situation falls outside the legal order, which was Benjamin’s deliberate intention in positing his figure of “pure violence”, the sovereign must have the capacity to make a decision where none is possible. This strategic inversion is Schmitt’s way of neutralising Benjamin’s anomic and revolutionary line of escape. As Agamben explains, “the state of exception is the device by means of which Schmitt responds to Benjamin’s affirmation of a wholly anomic human action.”⁵³ Schmitt must at all costs maintain the juridical order, for this is what is at stake. The *anomie* of a pure indeterminate violence outside the law must not be allowed to break free.

Benjamin posits his response in his work on baroque sovereignty, *The Origin of German Tragic Drama*.⁵⁴ Unlike Schmitt’s sovereign, Benjamin’s sovereign is in power but cannot decide. Whereas Schmitt’s sovereign is essentially a secularised God and the sovereign exception akin to a miracle,⁵⁵ Benjamin’s sovereign is a heathen creature, and the exception a catastrophe.⁵⁶ The eschatological moment of the redemption from the state of exception does not lead to restoration, as it does in Schmitt, but to an “absolutely empty sky”.⁵⁷ Benjamin’s sovereign does not occupy the transcendental realm of Schmitt’s, but is “confined to the world of creation; he is the lord of creatures, but he remains a creature”.⁵⁸

There is much at stake in this play of move and counter-move. The most difficult question must be that of which figure, Schmitt or Benjamin, is the more dangerous. On the one hand the possibility of a redemptive return to legal order can be seen in Schmitt, while Benjamin brings in a heathen anarchy of fallen creatures. On the other hand Schmitt stands for the tyranny of categories and the impossibility of escaping the dialectical structures of sovereign order, while Benjamin posits the possibility of a violent and wildly uncertain line of flight that breaks free of the dialectic of lawmaking/law-preserving,

⁵³ Ibid.

⁵⁴ Ibid., pp. 55-7.

⁵⁵ See Schmitt, *Political Theology*, pp. 36-54.

⁵⁶ Agamben, *State of Exception*, pp. 55-7.

⁵⁷ Ibid., pp. 56-7.

⁵⁸ Walter Benjamin, *The Origin of German Tragic Drama*, trans. John Osborne (London: Verso, 1998). Cited in Agamben, *State of Exception*, p. 57.

leading to a previously unthought mode of emancipation. This much is at stake; both see the possibility of redemption at the end of opposing paths – where Schmitt sees miracles Benjamin sees tyranny; where Schmitt sees chaos Benjamin sees escape.

Anomie and bare life

The prize in the battle between Schmitt and Benjamin is anomie. Agamben sets out an analysis of the obscure Roman condition of *iustitium* to illuminate this concept. As he explains, *iustitium* was a period of the complete transgression of all law and structure, often tied to the threat of war or to a period of mourning after the death of the sovereign.⁵⁹ In this condition, the authority of public offices became open to all private citizens, and any localization or hierarchy of authority was radically dispersed. In these conditions, “he who acts... neither executes nor transgress the law... [his actions] will be absolutely undecidable”.⁶⁰ From this, the argument that Agamben makes is that:

“The state of exception is not a dictatorship... but a space devoid of law, a zone of anomie in which all legal determinations – and above all the very distinction between public and private – are deactivated.”⁶¹

This he ties to a direct riposte to Schmitt and all those theories that seek, paradoxically, to tie this condition without law to law itself:

“fallacious...are those theories, like Schmitt’s, that seek to inscribe the state of exception indirectly within a juridical context by grounding it in the division between norms of law and norms of the realization of law, between constituent power and constituted power, between norm and decision. The state of necessity is not a “state of law”, but a space without law (even though it is not a state of nature, but presents itself as the anomie that results from the suspension of law).”⁶²

Agamben is at pains to stress that any idea that anomie is somehow tied to law or a wider juridical order is false. Yet although it is now very clear what is at stake for Agamben, it should be more difficult than it is for him to truly posit a free-floating, non-relational anomie. Is it really possible to conceive of human action in a completely unmediated condition? Agamben wishes to posit anomie as a

⁵⁹ Agamben, *State of Exception*, p. 41.

⁶⁰ *Ibid.*, p. 50.

⁶¹ *Ibid.*

⁶² *Ibid.*, pp. 50-1.

line of flight that escapes any kind of residual juridical relation, a “pure medium” in which the dialectic of norm and exception dissolves. The state of exception is for him - as a zone of indistinction - a condition in which life and law, fact and law, coincide. Law ceases to provide a mediation between office and authority, sovereign and subject. As Agamben explains early on in his analysis:

“in the forms of both the state of exception and revolution, the *status necessitatis* appears as an ambiguous and uncertain zone in which de facto proceedings, which are in themselves extra- or antijudicial, pass over into law, and juridical norms blur with mere fact – that is, a threshold where fact and law seem to become undecidable.”⁶³

Although the state of exception may be the end of a dialectic or distinction between life and *law*, I want to argue that life does not necessarily cease to have relation or mediation. Human action may still bear relation to the memory of the rule, or to less tangible norms such as those expressed by class, culture, family, ethnicity, and so on. Recalling *Antigone*, for example, the headstrong heroine steadfastly adheres to an older, more ancient notion of right, even against the emergency decrees issued in a state of war. In the theoretical situation of total anomie that Agamben presents, he effectively subscribes to an early-modern notion of the individual who is only an abstract figure with no history, subjected only to the immediate forces of violence and desire, who amounts to nothing more than his capacity to kill or be killed.

Instead it should be considered that the subject can never be truly unmediated, least of all when released from the dialectic of law. Even if not mediated by law, the subject is still enmeshed in psychological, cultural, discursive and bodily mediations either in its present relations, or in the history of its production as a subject. Even without law, the subject remains within a web of constitutive relations with social forces, institutional discipline, custom, capital, belief, sexuality, memory, trauma, desire, and so on. And even in the radical deprivation of these things, the subject is forced into a relation with their absence, legacy and memory, just as Schmitt’s sovereign bears a relation to the law even in its absence. It should be no more possible to imagine an unmediated, bare, subject-in-itself in anomie than it is possible to access an unmediated thing-in-itself behind the glass wall of perception, representation and interpretation.

⁶³ Ibid., p. 29.

With this in mind, it should also be questioned whether life can ever really be “bare”. Agamben sets much stall by the fact that the Jews were formally stripped of their (at that stage residual) citizenship before being placed in concentration camps. In juridical and biopolitical terms, they were expunged from the national citizenry, and as such, “bare life” was produced by sovereignty through a relation of abandonment. However, although the Jews may have been stripped of their political status as citizens, they still continued to have cultural, religious, social and political identities. Although perhaps they were considered “bare life” by the logic of the Nazi ideology and from the perspective of those convinced by it, the people held in the camps were humans who continued to be mediated not only through their personal degree of affiliation with a Jewish identity, if any, but through their relationships, their origins, their memories, their dialects, their skills and their physical traits.

In fact there *are* examples of what might be called “bare life” in the two exceptional sites I have discussed so far, the Nazi concentration camps and Guantanamo Bay. In “If This is a Man”, Primo Levi’s testimony of life in the camps, he describes a figure known only as “null achtzehn” – zero eighteen, the last three digits of his camp number.⁶⁴ This young man had completely lost any sense of identity, the ability to communicate, and the ability to offer any resistance to commands. “I think that even he has forgotten his name, certainly he acts as if this was so”, Levi writes.⁶⁵ His only quality was absolute passivity and compliance. The ‘Tipton Three’ describe similarly abject characters in Guantanamo. One man, Michal from Saudi Arabia, tried to hang himself and passed out from asphyxiation. The guards took him down and beat him, and “now he is basically a cabbage.”⁶⁶ They go on to describe that,

“For at least 50 of those so far as we are aware their behaviour is so disturbed as to show that they are no longer capable of rational thought or behaviour. We do not describe in detail here the behaviour but it is something that only a small child or an animal might behave like.”⁶⁷

These figures could be considered truly abject “bare life”, stripped of all qualities other than the simple fact of being alive. But nonetheless, it is still hard to imagine the total loss of mediation of residual traits like appearance, language and so on. In the concentration camps, certainly, the detainees were

⁶⁴ Primo Levi, *If This is a Man ; The Truce*, trans. Stuart Woolf (London: Vintage, 1996), p. 48.

⁶⁵ Ibid. See also Jenny Edkins and Véronique Pin-Fat, “Through the Wire: Relations of Power and Relations of Violence,” *Millennium: Journal of International Studies* vol. 34, no. 1 (2005), pp. 1-24, p. 10.

⁶⁶ Rasul, Iqbal, and Ahmed, *Report of Former Guantanamo Detainees*, paragraph 266.

⁶⁷ Ibid., paragraph 267.

reduced to a terrible condition of abjection and prostration, where the limits of their humanity toward themselves and each other were frequently exceeded. Yet there was still politics in the camp, even if not the ‘high’ sovereign politics that Agamben talks about. Levi wrote about the guilt he felt at having been able to reach a relatively privileged position in the camp hierarchy by working in a chemistry laboratory. There was a politics to his position.

Similarly, in Guantanamo, although the physical and psychological breaking-points of many of the detainees were often breached, in some cases permanently, the entire structure of the camp seems to be built around an intense political relation or even contest. The entire structure of physical and environmental manipulation in Guantanamo is constructed around breaking down the multiplicity of resistances, large and small, offered by the detainees, particularly under interrogation. Repeated hunger strikes against camp conditions and the denial of due process, for example, have at the time or writing been met with a regime of force feeding. One of the Tipton Three describes how “I scratched ‘have a nice day’ on my Styrofoam cup and this was seen as a disciplinary offence for which I spent another week in isolation.”⁶⁸

The constitution of sovereignty, the authorization of authority, and the historical conditions of possibility for sovereign exceptionalism

The problem with Agamben’s work lies in his understanding of sovereignty. For him, sovereignty is pure constitutive nominalism – it produces “bare life” and the “fictitious lacuna” of the state of exception in order to maintain a totalizing relation even to the spectre of its own absence. This is why it is so important for Agamben to posit a “*real* state of exception” beyond that totalizing dialectic. Agamben does resist the banal dualisms of the popular liberty/security discourse, in which liberty is opposed to security (and subject is opposed to sovereign) in some kind ‘balance’; instead he understands that in the history of Western political thought the problem of sovereignty grows directly out of the problem of modern subjectivity and does not appear as some kind of oppressive hindrance to it. Agamben understands that the modern subject has only ever been seriously considered possible *under* a relation of sovereignty. The subject is thus constituted by that relation, which at the same time

⁶⁸ Ibid., paragraph 149.

brings in the whole problem of limited subjectivity and potentially unlimited sovereign power – the problem of sovereign exceptionalism.

Yet although Agamben understands the constitutive relation of modern sovereignty to the modern subject (in which the subject is both constituted as a properly-qualified subject but simultaneously made subject *to* sovereign political authority), he pays no attention to the constitution of modern sovereignty itself. Sovereignty may constitute, but how is it constituted as that which may constitute? Under what conditions of possibility does the sovereign have the capacity to decide on the exception? How must society be constituted in order for sovereignty to have the capacity to decide upon the enemy or the exception? Agamben seems to miss that these are questions of deep concern for Schmitt, who discusses them at length in *The Concept of the Political* with regard to the possibility of the sovereign decision being lost, weakened, compromised or usurped. This, as I will explain, sheds a different light on Schmitt's insistence on the continuation of some kind of residual order or *nomos* even beyond the law.

This missing dimension to sovereignty is visible in a quote Agamben uses but does not fully take up. With regard to the concern that “constitutional dictatorship, which seeks to safeguard the constitutional order,” can easily turn into “unconstitutional dictatorship, which leads to its overthrow”,⁶⁹ Agamben quotes a certain Carl J. Friedrich, who writes:

“There are no ultimate institutional safeguards available for insuring that emergency powers be used for the purpose of preserving the Constitution. Only the people's own determination to see them so used can make sure of that...”⁷⁰

This touches on what is largely missing from Agamben's analysis, which is any consideration of the ‘democratic’ elements - conceived in the broadest possible way - of the state of exception. Friedrich posits “the people” as a restraining actor that can prevent emergency powers becoming arbitrary or unlimited. This raises vital questions about the dialectic of sovereign exceptionalism. Are there limits to government action which cannot be encapsulated in constitutional, legal or juridical formulae? How

⁶⁹ Agamben, *State of Exception*, p. 8.

⁷⁰ Carl J. Friedrich, *Constitutional Government and Democracy*, 2nd ed. (Boston: Ginn, 1950), p. 584. Cited in Agamben, *State of Exception*, p. 8.

do those limits operate and find expression? Under what conditions is sovereign exceptionalism possible or impossible?

The invocation of “the people” as an expression of social, cultural and historical conditions and limits, and not simply as a biopolitical object, opens up a vital dimension in the problem of exceptional sovereign power which Agamben neglects. What Agamben excludes from his analysis is a consideration of what Rob Walker might call the ‘authorisation of authority’, the deeper historical and discursive conditions that enable authority to be authoritative. Despite Agamben’s continual invocation of Schmitt, he does not recognise Schmitt’s sustained concern with these problems. In a text such as *The Age of Depoliticizations and Neutralizations* for example, Schmitt is concerned not so much with the singular, totalizing figure of the sovereign, but with questions about how decisive political authority emerges according to the central social and technological conditions of the day.⁷¹ Max Weber explores similar questions in *Politics as a Vocation*, articulating concerns about the new forms of leadership and political power that will emerge under new historical and social conditions.⁷² Although the work of both of these theorists ultimately closes down the problem of political authority in different ways (in the rather right-wing reification of charismatic leader figures for example), Agamben’s analysis seems rather unhistorical and undialectical in comparison.

This takes us back to the problem of anomie which is so important for Agamben. If it is considered that sovereign exceptionalism is not simply a problem of constitutive sovereign decision at the limit, but a wider problematization of the relation between limits and historical socio-political conditions and processes, then a different light is shed on Schmitt’s “strategic” insistence on the continuation of a form of juridical order, natural law or *nomos* even in relation to an anomic space devoid of law. In Agamben’s formulations, the reason for Schmitt’s insistence on the impossibility of escape from the sovereign dialectic of norm/exception or law/nomos is because he cannot admit the possibility of an outside to the juridical order. As Agamben argues: “the juridical void at issue in the state of exception seems absolutely unthinkable for the law;...this unthinkable thing nevertheless has a decisive strategic

⁷¹ Carl Schmitt, “The Age of Neutralizations and Depoliticizations,” *Telos* no. 96 (1993).

⁷² Max Weber, “The Profession and Vocation of Politics,” in *Weber: Political Writings*, eds. Peter Lassman and Ronald Speirs, pp. 309-69 (Cambridge: Cambridge University Press, 1994).

relevance for the juridical order and must not be allowed to slip away at any cost.”⁷³ In contrast to Agamben’s argument, it could instead be considered that the reason why it is impossible to escape the dialectic of norm/exception is not because of the singular, constitutive totality of sovereign power, but because sovereignty is an effect of the historical and socio-political authorization of authority, an effect of processes which constitute the sovereign as that which can constitute, and a product of the conditions of possibility under which, to paraphrase Schmitt, the sovereign *can be* he who has *the capacity* to decide upon the exception. If scepticism about the possibility of true anomie is insisted upon, then it is possible to interpret Schmitt’s insistence on the continuity of a relation between sovereign power and a deeper, extra-legal order with more understanding. A more engaged reading of Schmitt would note his concern with the decisive political outcomes of changing social and historical conditions, rather than only seeing a single-minded obsession with totemic figures of power and authority.

The reason why the dialectic of norm/exception cannot easily be escaped is not because law and sovereign order continue even in their absence, but because the socio-political conditions and processes that mediate and constitute sovereign political authority never cease to bear a relation to life. This is because they are not simply immediately-acting forces that can be switched on or off like an electric current but constitutive historical processes, the imprint of which cannot simply be erased, suspended or forgotten. To try to imagine the true absence of the mediating and constitutive features of life which constitute and authorize sovereign political authority is to erase the history of the constitution of specifically modern subjects, modern nation-states and modern sovereignties. Life can only be bare and devoid of its historical and socio-political modes of constitution in the abstract formulations of philosophy books. Similarly, the historical and socio-political conditions under which authoritative sovereign decisions are normally possible can never truly cease, except as a rhetorical device akin to Hobbes’s powerful but mythical state of nature. Although a formal relation of law or juridical power may be suspended, forms of authority in general will continue as long as the history of the constitution of subjects and their socio-political relations remains within memory and within the ontological constitutions of subjects themselves.

⁷³ Agamben, *State of Exception*, p. 51.

It is precisely because Agamben reifies the modern sovereign nation-state and the dialectic between law/exception as an originary and constitutive boundary that the wider historico-political conditions for the constitution of forms of sovereign authority are erased. By projecting a singular dualism of law/life as the structure of the sovereign exception, and as such as “the great historico-transcendental destiny of the Occident”,⁷⁴ Agamben erases any consideration of the hard and violent historical and political work that was done to make what is a historically-contingent mode of being and sovereign political authority central to the political ontology of the West, and more importantly, the world. He erases the long and bloody history of the establishment of the nation-state as the universal unit of political organisation. The modern sovereign nation-state has only ever been a historically-contingent idealisation of what political authority should look like. It is not a timeless principle, but the outcome of often violent historical and socio-political practices.

In contrast for example, Foucault argues in “*Society Must be Defended*” that the ‘nation’ is not simply the originary ‘biopolitical’ structure of sovereign power, but a principle and practice that emerged through war and violence as a radical new political and historical claim.⁷⁵ The nation was an expression of collective identity that served the highly-political function of *countering* monarchical sovereign power in a relation of war. Then, through a long history of both defeat, victory and cooptation, the nation became synthesised with monarchical sovereignty to constitute a new form of sovereign political authority in the form of the nation-state. The nation worked as political claim, but also a claim about the content of history itself; claims about nationhood were claims that the nation was the very subject of history. Through Agamben it is only possible to understand the static position of the body within the sovereign populace, but through Foucault it is possible to understand that claims to nationhood and nation-statehood have been driven by violent practices and powerful accounts of identity, value, aspiration and history. It is only by adding this dimension that it is possible to grasp the way the nation-state has operated as a claim about salvation, belonging, collective aspiration, and the realisation of universal principles through time and in particular spaces. The relation of birth, body and nation should be understood not simply as the originary biopolitical structure of the West, but as a constitutive process which gave rise to a specifically modern form of sovereign political authority.

⁷⁴ Foucault, *The Archaeology of Knowledge*, p. 231.

⁷⁵ Michel Foucault, “*Society Must Be Defended*” : *Lectures at the Collège de France, 1975-76*, trans. David Macey (New York: Picador, 2002b).

In contrast to the methods of Agamben, it should not be a question of imagining how things could be otherwise, but of understanding the historico-political reasons why things are not otherwise. It is not a question of imagining lines of flight (or philosophical flights of fancy), but of asking how so many lines of flight were historically closed down in the process of making the modern nation-state the universal organising political unit of the world. It is a question of asking how today, lines of flight are closed down by contemporary expressions of sovereign exceptionalism. What is needed for the problem of the politics of the exception is not *escape* but *critique*. What are the conditions of possibility for sovereign exceptionalism? Considering the array of subject positions implicated and constituted by the problem, the institutional structures of authority at work, the concepts and discourses being deployed, and the strategies being executed, what kind of critique is needed?

State of exception/permanent state of exception

There is a final criticism to be made about Agamben's treatment of the idea of the state of exception. Agamben's work is highly valuable in that it allows an understanding of the state of exception as a description of political discourses and structures at their limits. As such, it is a way of situating contemporary political practices at those limits. Agamben explains the use of the idea of the state of exception as follows:

“If, as has been suggested, terminology is the properly poetic moment of thought, then terminological choices can never be neutral. In this sense, the choice of the term *state of exception* implies a position taken on both the nature of the phenomenon we seek to investigate and the logic most useful for understanding it.”⁷⁶

The use of the terminology of the state of exception is both a methodological and political strategy for engaging with a set of political and philosophical problems which find particular expression today. While I could not agree more with this statement, I find that both Agamben's “position” and “logic” are confused by his frequent invocation of the idea of a *permanent* state of exception, as I will explain.

⁷⁶ Agamben, *State of Exception*, p. 4.

The value of Agamben's work lies in his theorisation of how a politics of the limit works: for example, how sovereignty works as a constitutive relation of abandonment. For the most part, the logical operation of the term 'state of exception' is taken to mean a limit condition and a constitutive threshold. It is the potential for sovereignty to actualise itself by withdrawing the protection of the law, abandoning subjects to a state of lawlessness and violence where they can be killed without sanction: "the sovereign is the one with respect to whom all men are potentially *homines sacri*, and *homo sacer* is the one with respect to whom all men act as sovereigns."⁷⁷

I have already discussed how Agamben treats the dialectic of the exception as a singular relation of law/life rather than as a problematized relation of limit and historico-political process. Agamben's constitutive relation of exceptional sovereignty is undermined by operating in only one direction, with no consideration of how sovereignty is constituted as that which can constitute. I have argued that Agamben reifies a singular relation of norm/exception as the "great historico-transcendental destiny of the Occident."⁷⁸ Agamben's analysis is not presented as a position on the logic of a historically-contingent *discourse* or *ideology* of biopolitical sovereignty. Rather, for Agamben, "The fundamental activity of sovereign power is the production of bare life as originary political element and as threshold of articulation between nature and culture, *zoē* and *bios*."⁷⁹ The thesis is a dualistic, neo-Platonist essentialism; it is a claim about the fundamental nature of sovereign power.

With this in mind, I have also already discussed how a more critical mode of analysis is required for dealing with the problem of the exception. What is needed is a more subtle understanding of the way in which particular instances of sovereign exceptionalism emerge according to specific historico-political conditions. The concept of exception captures the way in which a politics operates at the limits of a given set of historical and socio-political structures and processes. It is not so much that the sovereign decides where political, legal and social limits are, but rather that sovereign political authority is constituted in historically-contingent ways as "he" who has the capacity to decide on the exception at the exceptional limit.

⁷⁷ Agamben, *Homo Sacer*, p. 84.

⁷⁸ Foucault, *The Archaeology of Knowledge*, p. 231.

⁷⁹ Agamben, *Homo Sacer*, p. 181.

When Agamben invokes the idea of a *permanent* state of exception, it is another symptom of the criticisms I have levelled so far. With this idea, Agamben undermines the clarity of his analysis of the problem of the exception. For example, in *Homo Sacer*:

“the “juridically empty” space of the state of exception... has transgressed its spatiotemporal boundaries and now, overflowing outside them, is starting to coincide with the normal order, in which everything again becomes possible.”⁸⁰

And similarly in *State of Exception*: “the state of exception has by now become the rule.”⁸¹ These statements do not fit with the complex logic of relationality that Agamben attributes to sovereignty and the state of exception. The idea of a *permanent* state of exception undermines the value of the terminology of the exception: to invoke a permanent state of exception is to collapse the dialectics of norm/exception.

In an extended note on the empirical history of the state of exception, Agamben describes how the exceptional delegation of powers from parliament to the executive - establishing executive rule by decree - became normal practice for all European democracies during, and then frequently after, the First World War. He argues that the passage to executive rule is underway to varying degrees in all the Western democracies, with parliaments becoming only secondary actors in the legislative process. Even more pertinently, he maintains that the “tendency in all of the Western democracies,” is that “the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government.”⁸²

While it may be the case that legal states of exception became normalized historically, to describe the present as a permanent state of exception is to undermine the value of the exception as a dialectical concept. If exceptions have become the norm historically, the problem of the dialectic of norm/exception is compounded, not simplified, because the dialectic of norm/exception plays out not just across spatial, legal and political boundaries but through less-tangible historical boundaries too. How does an ‘exception’ cease to be ‘exceptional’? What socio-political or discursive processes are at work in the process of normalization? What is the effect of normalized exceptions on new invocations

⁸⁰ Ibid., p. 38.

⁸¹ Agamben, *State of Exception*, p. 9.

⁸² Ibid., p. 14.

of exceptionality? If the dialectic of norm/exception has a historical dimension, then that process must not be erased with the invocation of a permanent state of exception but described and analysed critically. When Agamben argues that in a permanent state of exception “everything again becomes possible”,⁸³ it is another attempt at escape, not critique.

Whatever the fate of ‘the norm’ - whether it is descended from unrepealed emergency powers or coming to resemble what was once considered exceptional - the value of the concept of the ‘state of exception’ is that it provides a “position” and “logic” regarding the dialectical relationship between contemporary exceptions and the norm. To distinguish contemporary exceptions as the limit and threshold of the norm is to investigate how the one constitutes the other and vice versa. Put simply, it is a way of characterising and analysing the ‘new’ in relation to the ‘same’. Even if it is considered that contemporary sovereign invocations of exceptionality seem to have no clear end point (e.g. some Guantanamo detainees are to be held until the intangible ‘war on terror’ is over, whatever that might look like) both the exceptional practices themselves and the victims of that exceptionality who find themselves in a state of legal abandonment are still most incisively understood in terms of an exceptional relation with ‘the norm’.

The argument about a permanent state of exception undermines the value of the terminology of the exception: a sharp way of understanding contemporary political transformations as practices that operate at the conceptual and material limits of conventional understandings of liberty and security. A permanent, generalized state of exception defines the present as a situation in which life in general has become exceptional - we have all had our liberties compromised, power relations are being altered at the biopolitical level and so on. This mirrors the way in which the whole discourse about the ‘balance’ between liberty and security is wrong, or at least flawed. It is not ‘our’ liberties that are being exceptionally compromised or suspended, but the liberties of particular target individuals or groups. When ‘we’ are asked to accept ‘necessary compromises’ of our liberty for security, it does not mean ‘we’ are asked to accept some degree of liberty loss, but that ‘we’ are asked to accept the exceptional abuse of the liberties of a small minority. It is not a public choice problem, but a legitimation problem. It is the constitution and mobilization of an embattled and unified ‘we’ in the legitimation of

⁸³ Agamben, *Homo Sacer*, p. 38.

exceptional practices against the exceptional few who will actually suffer. The only liberties 'we' will lose or compromise are those abstract liberties that have only ever been constituted *under* a relation of modern nation-state sovereignty. The real stakes are the violent practices that will be legitimated in the name of those abstract liberties. This is a 'particular' exception - not a generalized state of exception - in which exceptions apply only to a few individuals or a specific minority. This needs to be understood in relation to the continuation of a legitimating 'norm' elsewhere, even if that norm is changing in radical ways.

This is why it is important to understand the problem of the exception as dialectical and not dualistic. It is not a case of liberty vs. security, subject vs. sovereign, but a problem in the principle, discourse, constitution and practice of liberal forms of both modern subjectivity and modern sovereignty. Liberty already implies a relation between those constituted as properly-qualified modern subjects with civilized civil liberty and those deemed to be in a condition of dangerous natural freedom. The principle of liberty works to legitimate exceptional practices against exceptional enemies in exceptional circumstances, precisely when liberty is claimed to be 'under threat'. What is needed, therefore, is an appropriate mode of critique for analysing the discourses, structures, principles, objects, concepts and subject positions involved in the deployment and legitimation of practices and discourses of exceptionalism – the entire constellation or discursive formation of the exception and exceptionalism. What should this mode of critique look like, and what will be its political and methodological implications?

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