Law and the Sacredness of Life.

An Introduction to Giorgio Agamben's Biopolitics

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1. *Homo Sacer* in the context of contemporary political philosophy and biopolitics.

The beginning of the 21st century has been characterized by puzzling and unexpected events which have cast into doubt a number of normative certainties and theoretical distinctions acquired during the last fifty years. The advent of what some have called a "liberal" eugenics based on the most recent breakthroughs in genetic manipulation and experimentation; the return of concentration camps and secret torture areas for "enemy combatants" in the centre and at the borders of the advanced liberal democratic countries (Bosnia, Guantanamo Bay, U.S.-occupied Iraq); cosmopolitan cities like London or New York turned into gigantic surveillance compounds; the massive and resounding entry of world religions and theologies into the public sphere, silencing all the modernist chatter about "secularization" and the "loss of traditional values": these and other analogous phenomena seem to blend together aspects of liberal democracy with aspects of totalitarianism.[1] Giorgio Agamben's *Homo sacer* is perhaps the single most innovative work of political philosophy of the last decade because it is the first to offer a conceptual framework within which to begin to make sense of this "brave new world." Although the experiment in theorizing that Agamben carries out in this work may be flawed, nonetheless its great merit resides in having opened for us new points of orientation without which we could hardly begin to think about our own

[1] On liberal eugenics, see (Habermas 2003); on the return of totalitarian categories in the "war on terror," see (Butler 2006); on the new politics of security and discipline, see (Dillon 2004).

present. The purpose of this essay is to introduce the reader to the political thought of Giorgio Agamben by way of an interpretation of his main treatise.

The categories Agamben first displays in *Homo sacer* ("bare life," "sovereignty," "state of exception," "homo sacer," *inter alia*) have by now become common currency in the vocabulary of any self-respecting student of philosophy and politics anywhere in the world. They presume to explain why the sacredness of life has become the fundamental value for the most diverse and opposed political movements. They also account for a related phenomenon, namely, the global trend towards the normalization of states of legal exception. The proliferation of "emergency powers" and of "crisis government" spells a return of sovereign power, but in a different form than the one theorized by a Bodin or a Hobbes, because now sovereignty is associated with the creation of lawless zones (within and without the frontiers of nation-states), in which it is no longer possible to separate what is "fact" from what is "right," and where any human life that gets trapped within it is liable to be killed, or be left to die, or be kept barely alive, without incurring in any crime. At the beginning of the 21st century, power is ever more the power over biological life that Michel Foucault called "biopolitics," but by offering an hypothesis as to how the same life that is valued as sacred can also become the object of sovereign domination, *Homo sacer* turned the idea of biopolitics and biopower into the main theoretical socio-political paradigm of the coming decades.[2]

The conceptual machinery of *Homo sacer* generates this explanatory power because it ably weaves together the thought of Michel Foucault and of Hannah Arendt, the two towering figures (along with John Rawls and Jürgen Habermas) of political thought in the second half of the 20th century (Agamben 1998: 119-120), while

[2] On the history and the variety of meanings of the term "biopolitics", see (Esposito 2004) and now (Lemke 2007).

revealing a completely new pattern running throughout the tradition of Western politics: the sovereignty of law as mythical power. Arendt and Foucault dedicated their life's work to analyzing not the possibilities of justice and truth in the late modern world, but rather the new forms of "total" power and domination which came to light with the totalitarian regimes of the 20th century. In so doing, they thought it necessary to cast aside both the idea of sovereignty and the idea of law, and instead bring out the biopolitical ground of total domination. On Arendt's account, the decisive condition for totalitarian politics is the appearance of the *animal laborans*, a human being who works in order to live and lives in order to work. Since labor is, for Arendt as for Marx, the condition through which the human being relates to its biological life, the reduction of all cultural and political forms of human life (*bios*) to the natural life maintained by labor (*zoe*) could have no other outcome than the thorough zoo-logization of politics characteristic of totalitarian regimes: the creation of a "superior race" of men, on the one hand, and the production of a "worthless" life-form that could be completely controlled, manipulated, and eventually exterminated, on the other (Arendt 1973). Likewise, Foucault's investigations into modern forms of power reveal how the legal and economic systems of civil society require free and responsible subjects who are themselves constituted through the most meticulous subjection of their bodies and biological processes to impersonal technologies of surveillance and normalization (Foucault 1990).

Still, despite the fact that Foucault and Arendt coincide over the idea that total domination consists in a power over life, for Agamben their thought leaves the inner structure of total domination a mystery. Arendt seems caught up in defending the traditional belief that politics is not essentially biological and life is not immediately political, and thus fails to see that the destiny of Western politics is biopolitical (Arendt

1958). Foucault, similarly, identifies how the privileged object of politics has become life itself, in the sense that political power is no longer identified with the sovereign power to put to death, but gets progressively understood in terms of public policies that attempt to police and secure the life of entire populations. But, according to Agamben, Foucault's account of "biopolitics" cannot explain how this new control over life could turn so quickly and decisively into a power of extermination of biological life in totalitarian regimes, a "thanatopolitics" (Foucault 1990) (Agamben 1998: 4).

Agamben believes that the total domination of life that both Arendt and Foucault were trying to explain can be understood only if one reverses, to a certain extent, their philosophical premises. In the first place, pace Arendt, the domination of life is already at work in its division into the biological life of the species (*zoe*) and the form of life of the individual (*bios*). This division is the result of what Agamben calls the *sacralising* of life: separating a part of animal life in order to give it a human form, while debasing another part of this life into an inhuman, living matter. It is impossible to believe, like Arendt seems to do, that these two aspects are abstractly separate: for Agamben, one is the condition of the other. There is no "humanity" without the simultaneous "bestialization" of man.[3]

Likewise, Foucault's opposition between a sovereign form of power that manifests itself in the power to put to death and a biopolitical form of power that is visible in the power to keep alive, is an abstract opposition that does not do justice to how the idea of sovereignty works in the Western political tradition. For Agamben, pace Foucault, sovereignty is precisely a function that undoes the distinction between keeping alive and putting to death, just as it undoes the distinction between right and violence, value and fact. The condition of political life is sovereignty, and he is

[3] Since *Homo sacer*, Agamben has developed this part of his argument in *The Open* (Agamben 2004).

sovereign who grants subjects their right to life because he has always already banished their life to death.[4]

In claiming that the secret to biopolitics lies with the logic of sovereignty Agamben departs from both Foucault and Arendt since they both believe that biopower requires thinking about politics and law beyond sovereignty.[5] Because Agamben's theory of sovereignty makes power over life identical to the captivation of life within law for the sake of exerting violence on it, this theory is able to connect directly biopolitical practices with the legal or juridical "superstructure" in a way that both Arendt and Foucault are, arguably, unable to do, since for them (for different reasons) law is a secondary phenomenon with respect to politics and power. In other words, in biopolitics Agamben finds a discourse that promises to undo the structure-superstructure dualism that Marx had bequeathed to social criticism, and that neither Foucault nor Arendt had been able to shed entirely.[6] After decades in which the arguments of Hayek, Rawls or Habermas had accustomed most of us into accepting the inevitability of the reduction of politics to the rule of law, the return of sovereignty (and thereby of an understanding of politics as essentially above or before the law) advanced in *Homo sacer* came as a veritable provocation. Amidst a global resurgence of religiosity, no less shocking is Agamben's thesis that the most murderous instincts in human beings are tied to the belief that life is sacred. It is now time to try to understand the originary traumatic experiences which these shocked reactions are trying to shield us from.

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[4] In her good introduction to Agamben's thought, Eva Geulen points out how, under a different reading, both Arendt and Foucault could be brought closer to Agamben's central thesis that modern power over life is a radicalization of sovereign power to give death (Geulen 2005: 129-132).
[5] For the critique of sovereign power, see (Arendt 1990) and (Foucault 1997).
[6] The attempt to undo the dualism between economic basis and political superstructure is another leitmotif in Agamben's thought, as can be seen already from one of his earliest writings (Agamben 1979).

2. Violence Before the Law: Sovereignty and the Logic of Exception

The novelty of Agamben's treatment of biopolitics consists in the fact that he understands the political domination of biological life to occur through law, and law is in turn reinterpreted by means of the concepts of the *sacred* and of *sovereignty*. The hypothesis is that law is capable of capturing and controlling the life process only by making life into something sacred. Following an intuition of Benjamin, which I shall discuss below, Agamben suggests that the idea of the sacred has a legal, not a religious, origin. The tradition of anthropology and sociology for the most part understands the phenomenon of the sacred in primitive societies as a function of what Freud calls "emotional ambivalence": to be sacred means to be set apart from what is "common" in such way that this being-apart could be interpreted both as an honor and as a form of abjection. "The taboo does not only pick out the king and exalt him above all common mortals, it also makes his existence a torment and an intolerable burden and reduces him to a bondage far worse than that of his subjects…. The ceremonial taboo of kings is ostensibly the highest honour and protection for them, while actually it is a punishment for their exaltation, a revenge on them by their subjects."[7] Agamben rejects the Freudian connection between the sacred and the taboo as an inappropriate psychologization of a phenomenon whose origins are of a strictly legal and political nature (Agamben 1998: 79-80). Agamben wishes to derive his concept of the sacred from an archaic Roman law concerning the *homo sacer*, whereby someone or something is declared to be sacred (*sacer esto*) by excluding it from the protection afforded by the law, thereby separating from the context of human life a rest of life, which he calls "bare life." This "bare life"

[7] (Freud 1950). On other theories of the sacred deriving from ambivalence, see (Girard 2005), (Otto 1958), (Kristeva 1982), among others. (Geulen 2005: 89) finds Agamben's critique of the traditional idea of the sacred persuasive, so does Haverkamp in his essay "Anagrammatics of Violence. The Benjaminian Grounds of *Homo Sacer*" in (Norris 2005: 138). Peter Fitzpatrick, in his essay "Bare Sovereignty. *Homo sacer* and the Insistence of Law" (Norris 2005:54), is far more critical of Agamben's sweeping claims with respect to 19th and 20th century anthropology and psychology of religion. I show below that the category of ambivalence makes an important, if unacknowledged, return in Agamben's own idea of the sacred.

is defined in terms of what can be killed with impunity.[8] In this sense, perhaps his understanding of the sacred can be considered a radicalization of Freud's suggestion that by turning something into a sacred object one is also manifesting latent aggressive impulses towards that object.

The concept of sovereignty, in the tradition of political philosophy in the West, refers to the necessary reliance on the part of the rule of law (or, more generally speaking, of any constitutional regime) on a power which has a prerogative over that constitution, which has the power to take exception from the legal order, for the sake of establishing peace or normality in times of crisis.[9] Just as he does for the concept of the sacred, Agamben both undermines and radicalizes this traditional sense of sovereignty by understanding it as the category that makes possible the rule of law (sovereignty is always the sovereignty of law itself, *nomos basileus*), but which directs this rule of law towards the exertion of violence rather than towards the maintenance of peace and justice (Agamben 1998: 30-31).

The function of sovereignty is charged with the selection of "bare life," which bans some part of human life from civil or political society and opens it up to violence. But since sovereignty reveals itself to be the essence of law, Agamben is led to his fundamental thesis according to which all civil and political life, which permits the protection and flourishing of human life, is built upon the possibility of sacralising some part of itself. The idea of the sacred allows Agamben to reconnect the idea of biopolitics as "a power that exerts a positive influence on life, that endeavors to administer, optimize, and multiply it" (Foucault 1990: 137) back to "a formidable power of death" (Foucault 1990: 137), a "thanatopolitics" (Agamben 1998: 122-123), at the basis of

[8] Agamben returns to the traditional idea of the sacred in his most recent book (Agamben 2005).
[9] As defined classically in (Schmitt 1988).

every legal system.[10] The *arcanum imperii* of all legal systems is the exertion of violence "on the living" as a way to exact retribution for its presumed "guilt." Far from law being the province of reason and justice, in reality law would be inseparable from a mythical conception of power. These two points, the priority of sovereignty with respect to the rule of law, and the mythical identity of law with violence over the living, Agamben owes to his creative appropriation of Schmitt and Benjamin, respectively, in a way that I shall explain below. I return to Agamben's analysis of the sacred in the section that follows this one.

This new elaboration of the concept of sovereignty takes off from Schmitt's famous claim that valid law is applicable only in state of normalcy and not in chaos or anarchy, where everything is an exception to a rule (Schmitt 1988: 19-22) (Schmitt 2004). For Schmitt, the function of the sovereign is to decide whether a normal state of affairs exists or whether there is a state of exception. Such a sovereign act of decision or will is presupposed by the validity of every law. Agamben suggests that Schmitt's concept of sovereignty in turn presupposes a paradoxical "logic" of the exception whose central axiom is that "the rule applies to the exception in no longer applying, in withdrawing from it" (Agamben 1998: 18). This axiom seems to beg the question: How can a law or rule become "applicable," that is, have validity, in and through a sovereign act that requires the suspension of the law's validity? Is this not self-contradictory? Since most of the argument connecting law to sovereignty, and sovereignty to violence, made in *Homo sacer* rests on Agamben's understanding of sovereignty in terms of the logic of exception, it is important to try to explain this logic as clearly as possible.

If I understand Agamben correctly, his response to the above objection would contain two points. First, the sovereign, and thus the state of exception on which he

[10] On thanatopolitics see now (Esposito 2004).

decides, is actually a part of the legal order: sovereignty is not the abstract negation of all legality. "Since 'there is no rule that is applicable to chaos,' chaos must first be included in the juridical order through the creation of a zone of indistinction between inside and outside, chaos and the normal situation – the state of exception" (Agamben 1998: 19).[11] Second, what suspends the law is the law itself, in and through the sovereign act. The law is not suspended by a sovereign decision which befalls it from somewhere outside of the legal sphere: the exception to the law which is the object of the sovereign's decision is not an extra-legal determination, a "natural" given.[12] "The rule, *suspending itself*, gives rise to the exception and, maintaining itself in a relation to the exception, first constitutes itself as a rule" (Agamben 1998: 18). The capacity of the law to suspend itself, and thus to be sovereign with respect to its own normative validity, is according to Agamben the originary meaning of the term "sovereignty of law," *nomos basileus*, as this is found in Pindar's fragment 169: "The nomos, sovereign of all… justifying the most violent [agei dikaion to Biaiotaton]" (Agamben 1998: 30ff). Law appears to justify the most violent acts because of its sovereign capacity to suspend itself as law in order to become enforceable. Put in more Schmittian terms, by suspending itself in a sovereign decision on the state of exception, the law decides what is a normal situation from what is an exceptional one (for Agamben, the sovereign is he

[11] Previous interpreters of Agamben's logic of exception have also pointed out that, in Agamben's reading, the exception belongs to the functioning of law, but for the most part they have either not explained why it must be the case that the sole content of law is its exception, as in (Geulen 2005: 74), or, as in Fitzpatrick, they have tried to account for the sense in which the exception belongs to the norm, such that the "exception is unexceptional," in terms of a putatively "normal" functioning of the law, namely, as a function of the law's need to be open to what is exterior to it (the facts which it has to adjudicate) and which it cannot determine from itself (Norris 2005: 58-62). Agamben's claim is much more radical: the only content which the law has is whatever it judges to be an exception to it: the law is nothing but its own (virtual) state of exception; there is no real difference between the two.

[12] In this sense, the exception is not to be identified with the occurrence of a "natural" calamity. The "state of emergency" is always declared; it is the result of a decision that something unexpected has happened and which requires a particular response. On this point, see the further elaboration by Agamben in (Agamben 2003:41-47).

who determines what is normal by declaring or not the state of exception), and once the normal situation is so determined, it is again the law which allows itself to apply.

Agamben's work on the logic of exception, and thus on the idea of a state of exception or emergency, has since led to a considerable amount of juridical and historical studies on the topic, which, since September 11 and the Patriot Acts has increased exponentially.[13] Most of this literature questions Agamben's (and Schmitt's) assumption that the exception is logically prior to the rule with regard to the conditions of possibility of legal validity. Where Agamben argues, paradoxically, that the rule confirms the exception, his critics hold to the older adage: the exception confirms the rule. On the latter view, "for an exception to be a meaningful concept, it has to be evaluated and understood against the background of an ordinary case. The very term 'exception' points to something that stands outside the normal rule or state of affairs, and does not conform to the ordinary case" (Gross 1999-2000: 1833). It is typical for these critics to derive the state of exception from the institution of the Roman dictatorship which was a temporary, emergency provision on the part of the Roman state intended to face an unexpected crisis, and having as its sole finality the overcoming of the crisis and the restoration of the normal juridical order. "The exception is thus defined by the norm" (Gross 1999-2000: 1835).[14]

Furthermore, on this view, if one were to accept Schmitt's and Agamben's point that the sovereign decides on whether a normal state of affairs exists, then it follows that "it is not only that the exception confirms the rule and that the rule's very existence 'derives only from the exception,' but rather that the exception gobbles up the normal

[13] Agamben reviews the classic literature on the state of exception in (Agamben 2003: 9-40). For the literature on state of exception and emergency powers since Agamben, and which does not take into consideration his work, see (Gross 1999-2000) and (Gross 2006).

[14] Most work on emergency powers takes as its starting point Schmitt's interpretation of the Roman dictatorship as a commissarial dictatorship intended to save the Roman constitution in times of crisis (Schmitt 1994). For the analogous case in relation to the United States Constitution, see (Rossiter 1948) and the reading given of this argument in (Gross 1999-2000: 1834ff).

case and becomes, in and of itself, the ordinary, general rule. In that respect, there is no place to continue talking about rule and exception. The exception becomes everything; the rule is reduced to nothing. The exception is no longer merely normless; it is also exceptionless" (Gross 1999-2000: 1841). If the distinction between what is normal and what is exceptional is left in the hands of the sovereign, then it becomes a merely "rhetorical" distinction: the exception has become "exceptionless." In this case, it becomes "meaningless" (Gross 1999-2000: 1848-1850) to speak of a "juridical order" which the unlimited authority of the sovereign is supposed to restore. So much for the "constitutional" understanding of the state of exception.[15]

Agamben's radical theoretical proposal is to consider the possibility that the "normal" state of affairs presupposed by legal validity makes sense only on the background of a permanent state of exception. There are two aspects to this claim, which it is crucial to distinguish (most interpreters to date have by passed this point). What makes an exception something more than a punctual event that interrupts a continuum of normality, what makes it a "state" of exception, is, first of all, precisely the fact that an exception to the law can only come about through the sovereign self-suspension on the part of the law itself. Because it is *the law* that suspends itself (and the exception does not come from a "reality" that lies outside the law, considered as a natural cause of the "emergency"), and in so doing it creates the exception, there is a sense in which Agamben accepts the premise that the rule is prior to the exception, and therefore his understanding of the exception is immune to the kind of prima facie criticisms referred to above. But what distinguishes Agamben from constitutionalists is that it is the *sovereign moment* in every legal system that is prior to the exception, not a basic law, like a written constitution. In particular, the objection addressed to Schmitt

[15] For further examples, see now (Arato 2006) and (Levinson 2006).

according to which giving the power to declare what is an exception over to a sovereign is tantamount to making the distinction between normal and exceptional a matter of "rhetoric," is accepted by Agamben: every state of exception declared by the juridical order is always a "willed" state of exception, not a "real" one, and partakes of the "fictional" (Agamben 2003). But where Agamben parts company with the constitutionalist critics of Schmitt is that for the latter the law is thought to have an objective or independent existence apart from the decision on the exception, i.e., they believe that law is enabled to exercise its rule (the "rule of law") in a "normal" way, without recourse to the logic of exception. For Agamben, on the contrary, the law is through and through a matter of fiction, in the sense that, considered by itself, the law lacks any objective referent.[16]

This leads me to the second point: Agamben argues that in order to be in force, to rule, the law must be given from the outside its referent. What is given to it as reference is "bare life" itself; and the manner in which law captures this life is through the declaration of the state of exception. "The statement 'the rule lives off the exception alone' must therefore be taken to the letter. Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the *exception*: it nourishes itself on this exception and is a dead letter without it. In this sense, the law truly 'has no existence in itself, but rather has its being in the very life of men'" (Agamben 1998: 27). The logic of the exception, therefore, is not simply a (paradoxical) piece of formal logic. It only makes sense within the larger claim that the law lacks all meaning unless it has life as its object, and that it can gain life as its object only through taking exception to itself in an internal moment of sovereignty. This explains the great weight that Agamben gives to the citation of the German jurist Savigny in *Homo sacer* as a whole.

[16] The "fictional" character of law plays an important part in Agamben's theory of law. It also explains why Agamben will often recur to texts of fiction, in particular those of Kafka, to understand the fiction of law. For another, more standard, view on the analogy between law and literature, see (Dworkin 1986).

The citation appears three times in the book, including in its exergue and reads: "Das Recht hat kein Dasein für sich, sein Wesen vielmehr ist das Leben der Menschen selbst, von einer Seite angesehen." Together with another citation, drawn from Schmitt and which I shall comment on below, it conforms the scant textual basis on which Agamben erects his fundamental claim that the only "object" of law is the "bare life" of human beings, which law is able to capture only in virtue of taking exception to itself: "life… can in the last instance be implicated in the sphere of law… only in an *exception*. There is a limit-figure of life, a threshold in which life is both inside and outside the juridical order, and this threshold is the place of sovereignty" (Agamben 1998: 27). What Savigny means is that law does not impose a purpose or form to human life from the outside, but rather it expresses the conditions for the enactment of such life; to speak like Oakeshott, law gives the manner, the how, of any human action, not its purpose or end. Agamben twists Savigny's dictum in another, opposite direction: he takes it to mean that the only "object" of law (in the sense of, the only referent of legal norms) is the life "itself" of men, their bare life (as if Agamben reads "das Leben der Menschen selbst" as "das Leben selbst der Menschen"). What separates men's actions from their bare lives and ultimately what turns politics away from action and towards bare life as its object, is nothing but law itself.

But why is it that the law can have as object only a life that stands in a state of exception with regard to the law, and which can therefore be killed with impunity, a "bare" or "sacred" life? In his most extended explanation of how the discourse on the sovereignty of law collapses into a discourse on the violence of the law, Agamben writes:

> The law has a regulative character and is a 'rule' not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and make that reference regular…. [which it does by] the repetition of the same [transgressive] act without sanction, that is, as an exceptional case. This is

> not a punishment of the first act [sanctioning a transgressive fact], but rather represents its inclusion in the juridical order, violence as a primordial juridical fact (Agamben 1998: 26).

According to this logic of exception, if a law prohibiting murder is to have reference, i.e., is to apply to some fact, namely, to an act of killing someone, then this fact cannot be, as such (i.e., positively, merely in virtue of its being a fact), determined as a murder because the act becomes a murder only once it can fall under the rule. But if the act of killing is not murder (in the sense explained above), then this negative determination is also not something "positive," but is a determination made possible only because the law prohibiting murder has taken exception to itself, has suspended itself. This means that the law, in its sovereign exception to itself, pre-supposes the same killing, but determined not to be murder, which it explicitly prohibits (when it determines it as murder), as a condition of its applicability in normal conditions. The law that, in the normal state of affairs, prohibits murder requires, in the state of exception, that some act of killing not be murder; the law requires, in other words, the kind of unpunishable violence that Agamben associates with the figure of the *homo sacer*.

The logic of exception points out the existence of a violence before the law, which is to be distinguished from a violence after the law. The latter is simply legal punishment. Its presence signals that a law has been consciously violated: a fact has come under the rule (inclusion) qua something that breaks the rule (exclusion).[17] The former violence before the law, though, signals that something which does not break the rule (exclusion) comes under the rule qua something that can be violated without

[17] This relation of law to violence lies at the basis of Hegel's theory of punishment, for instance, according to which the punishment of a crime restores to the criminal his or her human dignity because it recognizes in him or her the consciousness of having done something that one ought not to do, and thus restores the moral personality to the criminal. On the possibility of a violence "before" the law, see also (Derrida 1994) and Derrida's essay on Kafka's "Before the law" which Agamben discusses in (Agamben 1998: 49-54). Agamben's discourse on a primordial violence comes from Benjamin, but it is also clearly influenced by Derrida's early discourse with respect to metaphysics as a history of violence (Derrida 1967). On the relation between Agamben and Derrida, see the indications found in (Geulen 2005: 127-128) and especially Adam Thurschwell, "Cutting the Branches for Akiba" in (Norris 2005: 173-197).

breaking rules (inclusion). The violence before the law is what Agamben calls "the pure force of law" which corresponds to the idea of a life that is inherently "guilty" and thus demanding of punishment or violation: the legal order is this violation of life, the "inscription of natural life in the order of law and destiny" (Agamben 1998: 28).

The connection that Agamben establishes between law and life, as absolutely mediated through violence, comes to him from Walter Benjamin, not from Savigny or Schmitt. In an early text entitled "Fate and Character," Benjamin writes that "another sphere must therefore be sought in which misfortune and guilt alone carry weight, a balance on which bliss and innocence are found too light and float upward. This balance is the scale of law. The laws of fate – misfortune and guilt – are elevated by law to measures of the person" (Benjamin 1996: 203). For Benjamin, the "order of law" must be opposed to that of justice, as the order of myth must be opposed to that of religion: whereas the former belongs to "the demonic stage of human existence," the latter is related to the religious release from "natural life." On the contrary, when life is considered merely from a natural standpoint, then it falls prey to the mythical: "fate is the guilt context of the living. It corresponds to the natural condition of the living" (Benjamin 1996: 204).

In another, slightly posterior essay entitled "Critique of Violence," Benjamin advances the thesis that fate manifests itself mythically as violence over life, and additionally claims that the violence of fate is "identical to lawmaking violence":

> For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, what is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence but one necessarily and intimately bound up with it, under the title of power. Lawmaking is powermaking, assumption of power, and to that extent an immediate manifestation of violence. Justice is the principle of all divine endmaking, power the principle of all mythic lawmaking (Benjamin 1996: 248).

Benjamin's essay is meant to question the traditional belief that law employs violence only as a means to attain moral ends, such as the establishing of justice.[18] For Benjamin this assumption becomes questionable, first, because violence seems to have a lawmaking capacity (and that is the reason why legal systems have an interest in controlling violence and keeping it only as a means functional to the maintenance of the already established legal system). But, second and more importantly, the way in which violence generates law is by punishing those who are considered to be "guilty" not because of some infraction to a given positive law, but simply in virtue of their being alive. The violence that law purportedly employs as a means to establish its own legal ends, in reality is a manifestation (and no longer a means) of something else, namely, power over life. The symbol of this power over life is expressed for Benjamin in the Greek myth of Niobe, punished by the gods for her pride in her powers of child-bearing. The myth signals to him that law itself functions for the sake of fate; law does not take into account the happiness or the innocence of human beings. The use of law to exert violence on the living, and in that way determine life as guilty (prior to any law), is Benjamin's definition of biopower: "mythic violence is bloody power over bare life for its own sake" (Benjamin 1996: 250). In conclusion, for Benjamin law is as much about placing life in a state of exception, where it becomes the pure or sacred object of mythical violence and biopolitical power, as violence is a means of law. In this sense, Agamben's logic of exception stretches between two points: Schmitt's theory of the sovereignty of law and Benjamin's theory of mythical violence over bare life.

[18] On Benjamin's essay, see (Derrida 1994) and, for a very different interpretation, see now (Honneth 2007: 112-135).

3. The End of Law: the Messiah Against the Sovereign

Judging from the recent debate on Benjamin's essay on violence opened up by Derrida's interpretation of the piece, what is most shocking to the reader is not the unmasking of the mythical aspects of legal systems, as much as the remedy that Benjamin suggests. Famously, he opposes to the mythical violence of law another kind of violence, a divine one: "just as in all spheres God opposes myth, mythic violence is confronted by the divine" (Benjamin 1996: 249). In explaining what divine violence is, and how it calls "a halt to mythic violence," Benjamin makes the following opposition:

> The dissolution of legal violence stems (as cannot be shown in detail here) from the guilt of mere natural life, which consigns the living, innocent and unhappy, to a retribution that 'expiates' the guilt of bare life – and also doubtless purifies the guilty, not of guilt, but of law. For with bare life, the rule of law over the living ceases…. Divine violence is pure power over life for the sake of the living (Benjamin 1996: 250).

What disturbs interpreters, from Derrida to Honneth, about this passage is that the relation between mythic violence and divine violence is far less antithetical than it may appear at first sight. To begin with, both are manifestations of "power over life," but whereas mythic violence pursues this power as an end in itself, and therefore seeks to maintain everything that lives in its context of guilt and needful of punishment, divine violence pursues power in order to "expiate" the guilt of bare life and thus put an end to the rule of law over the living.

The intuition here, it seems to me, is that only the punishment exerted by divine violence on life allows "natural life" to be determined as "bare life": once natural life is reduced to bare life by the mythical violence manifested in legal systems, then bare life can be annihilated through divine violence, and in that way, through that punishment or expiation, "the living" can be freed from the law that ties them to their guilt (but not to punishment, which is a category that belongs to the religious: see "Fate and character" cited above, and the analogy between divine violence and punishment in education in

"Critique of violence") and delivered over to a "supernatural" life of innocence and happiness.[19] That is why Benjamin emphasizes that "man cannot, at any price, be said to coincide with the bare life in him" (Benjamin 1996: 251).

Agamben's great merit is to have highlighted the importance of the crucial sentence, "with bare life, the rule of law over the living ceases," in the economy of Benjamin's discourse on violence. This mysterious sentence seems to disclose the possibility that power over bare life does not only have a thanatological character, but also contains the root of a "positive" or life-preserving power over life whose manifestation is the bloodless violence of divine, expiatory punishment. For that reason, Agamben thematizes "bare life" in a section of the book entitled "Threshold," which closes the part dedicated to sovereignty. The intimation is that bare life is at once sovereignty's sole object or product, and the only form in which human subjectivity is capable of escaping the captivity of the law.

The ambiguous or liminal character[20] of bare or sacred life in Agamben's discourse is examined in greater detail through the work of Kafka. Kafka's legends and novels describe the threshold, that figure of in-distinction that is perhaps the only definable feature of the state of exception. In Agamben's readings, Kafka's texts perform a passage or exchange between the mythical and the messianic sides of bare life; the situate themselves at the point of contact, and also of separation, between the tradition of revealed law and the modern, legal system. As an illustration of his approach to Kafka, and to the ambiguity of bare life, Agamben offers his reading of "Vor dem Gesetz," Kafka's famous legend of the "man from the country" who stations himself before the open gate of the Law and waits, to the point of death, for the

[19] For Benjamin's idea of the "supernatural" life or the "afterlife," see (Benjamin 1996: 230, 254, 308).
[20] It another classic work of anthropology, not cited by Agamben, Victor Turner thematizes the experience of the sacred as a liminal experience, as an experience of and at the threshold of experience proper.

doorkeeper to let him in. On dying, the doorkeeper reveals to him that this entrance to the Law had been left open only for him, and that it would henceforth be closed again. Agamben reads this legend, first, as an illustration of the way in which the law captivates life in and through its exclusion. "According to the schema of sovereign exception, law applies to him in no longer applying, and holds him in its ban in abandoning him outside itself. The open door destined only for him includes him in excluding him and excludes him in including him" (Agamben 1998: 50).

Explaining this power of the law to keep life under a ban, Agamben employs an expression that Scholem once used in a letter to Benjamin to describe the status of revealed Law in Kafka's stories. According to Scholem, the addressees of the Law have lost the keys to unlock its meaning, and consequently for them the Law appears as Nothingness, it "does not signify, yet still affirms itself by the fact that it is in force" (Agamben 1998: 51). The law, although devoid of all meaning, demands more obedience and remains more in force than ever, because the gate to it remains open. For Agamben, "life under a law that is in force without signifying resembles life in the state of exception…. And it is exactly this kind of life that Kafka describes, in which law is all the more pervasive for its total lack of content…. The empty potentiality of law is so much in force as to become indistinguishable from life. The existence and the very body of Joseph K. ultimately coincide with the Trial; they *become* the Trial" (Agamben 1998: 53). The life of the man from the country, just as the life of K., the protagonist of *The Trial*, are lives lived in the state of exception from the law: the law, in itself, has no content; whatever content it has is constituted by the life it captures in its exception or ban. That is why in the state of exception the law has become mere life, or life develops completely as fated. The violence done by the law "before" it is "applicable" or "valid" law (i.e., "before" it ceases to be nothing), punishes life ahead of its having done

anything, whether guilty or innocent. One is already guilty before being charged of any offense, and life itself is the unfolding of a trial which is not designed to demonstrate that one is guilty "as charged" but, rather, is a collection of material intended to finally produce the charge itself, corresponding to the guilty life that has been lived to that point, and that with the formulation of the charge comes to its end.

In response to Scholem's interpretation of the Law in Kafka as Nothingness, Benjamin suggests that the Law cannot still be considered to be "open" or "in force" if one has lost the keys to it: "without the key that belongs to it, the Scripture is not Scripture, but life. Life as it is lived in the village at the foot of the hill on which the castle is built. It is in the attempt to metamorphize life into Scripture that I perceive the meaning of reversal [*Umkehr*] which so many of Kafka's parables endeavour to bring about" (Benjamin 1994: 453). Agamben takes Benjamin's response to mean that the life in the village is the life lived in "the state of exception turned into rule." In other words, for Agamben the meaning of the term "life" in Benjamin's answer is the same as "bare life" in his essay on violence, which makes the life that is lived in the village at the foot of the Castle (an allusion to Kafka's *The Castle*) analogous to the "natural life" that contained the mythical powers which divine violence was called upon to "expiate." At the same time, when the state of exception realizes itself and becomes indistinguishable from bare life, then this state of affairs "signals law's fulfilment and its becoming indistinguishable from the life over which it ought to rule…. Benjamin proposes a messianic nihilism that nullifies even the Nothing and lets no form of law remain in force beyond its own content" (Agamben 1998: 53). Explaining further this idea, Agamben writes: "But insofar as law is maintained as pure form in a state of virtual exception, it lets bare life (K,'s life, or the life lived in the village at the foot of the castle) subsist before it. Law that becomes indistinguishable from life in a real state of

exception is confronted by life that, in a symmetrical but inverse gesture, is entirely transformed into law. The absolute intelligibility of a life wholly resolved into writing corresponds to the impenetrability of a writing that, having become indecipherable, now appears as life" (Agamben 1998: 55). Here Agamben takes up Benjamin's suggestion that to the realization of law into bare life, which is a process whereby the state of exception that is the hidden essence of every legal system becomes more and more a real state of exception (and all vestiges of rule of law give way to the sovereignty of the law being contained in the person of the sovereign dictator), there corresponds a reverse movement in which bare life "metamorphizes" into law and becomes what Agamben, in another text, has called a "form-of-life… a life that can never be separated from its form, a life in which it is never possible to isolate something such as bare life" (Agamben 2000: 3-4).[21] In this condition, where life itself is lived out as if it were written ahead of time, or where life is lived out as being a law unto itself, human existence would, for the first time, be completely intelligible or meaningful to those living it: life itself would be saved.

The Kafkian legend of "Before the law" is ultimately interpreted by Agamben as containing within itself a messianic "reversal" of the meaning of bare life, in the following sense: "The messianic task of the man from the country… might then be precisely that of making the virtual state of exception real, of compelling the doorkeeper to close the door of the Law (the door of Jerusalem). For the Messiah will be able to enter only after the door is closed, which is to say, after the Law's being in force without significance is at an end" (Agamben 1998: 57). Benjamin's "messianic nihilism" as a political program, therefore, entails doing everything necessary to "provoke" the rule of law into finally declaring a real state of exception, for only out of

[21] For another reading of the fundamental transition from bare life to form-of-life, see (Quintana 2006). Where I disagree with her is on the claim that Agamben's idea of a form-of-life is "beyond" biopolitics. It seems to me the relation between bare life and form-of-life is far more dialectical.

this state of affairs, where the distance between fact and norm is no longer existent and "everything is possible," the bloodless divine violence will be able to "expiate" bare life and purify it from law itself. At that point, we will be living in a messianic kingdom in which law shall only have content and no form; in which law shall only do justice to each singular event and thing, and will therefore cease to be a law whose form is that of universal validity and whose content is bare life. But the path which leads to Agamben's messianic turn appears very narrow indeed, since it entails embracing a political nihilism in which the messianism of a Sabbatai Zevi, who proclaims the motto "the fulfilment of the Torah is its transgression" (Agamben 1998: 57), and the "everything is possible" that Arendt placed as the motto of the concentration camp, blend into one another in awe-inspiring ambiguity.

4. The Sacred Life of Citizens, Or: Nihilism as Politics

In Agamben's reading of *Vor dem Gesetz*, it was left unclear in what form, under what guise or gesture, the equivalent of divine violence, the expiation of bare life, appears in the story. Is the entire lapse of time, in which the man of the country is made to wait before the law, not only representative of the mythical violence on the living exerted by the law in its state of exception, but is also a manifestation of the expiation of bare life at the hands of divine violence? Or does divine violence manifest itself in clear opposition to mythical violence, in an unprecedented and completely unexpected manifestation of "pure, immediate violence" (what we would nowadays call "irrational" violence)? Benjamin left the matter undecided in his essay: "For only mythic violence, not divine, will be recognizable as such with certainty, unless it be in incomparable effects, because the expiatory power of violence is invisible to men" (Benjamin 1996: 252). In *Homo sacer* one is sometimes tempted to see Agamben's efforts to provide historical evidence that, in all epochs, the rule of law has always been a virtual state of exception, as being but the other side of a narrative of progressive nihilism, a long series of divine expiations on the part of bare life, moving towards a final provocation that would convince each and everyone of us to finally bring to a closure the series of fantasies that the main tradition of political philosophy has entertained with respect to constitutional rule and the virtues of citizenship.

The analysis of the logic of sovereignty leads Agamben to claim that "the originary relation of law to life is not application but abandonment." Sovereignty places life under a "ban"; the law includes life under its protection only on condition that it excludes it, abandons it, leaves it to be killed with impunity (Agamben 1998: 29).[22] Such is the unconfessable, originary traumatic experience that every legal order needs to

[22] Despite the infelicitous expression, Agamben does not mean to oppose abandonment to application, rather abandonment is a consequence of the Agamben's radical interpretation of the problem of legal application. Agamben has since recognized the primacy of the problem of application (Agamben 2003).

repress in order to exist. To find the archeological traces of such a traumatic experience, Agamben has recourse to an obscure figure of archaic Roman law, the figure of the *homo sacer*. When the Roman people seceded from the Roman monarchical social order and retired to the Aventine Hill, they issued a judgment that whomever attacked their representatives was liable to be killed without the killer thereby committing an homicide, but equally without there having occurred a sacrifice (of innocent life to worship the gods). This sanction to kill is called *sacratio*; he who can be killed in this way is the *homo sacer*. Agamben believes that in this archaic law he has found empirical evidence for his theory of sovereignty: here we seem to have a law that identifies the life of the *homo sacer* (which Agamben calls "bare life") as a life which is "banned" with respect both to human and divine laws, and thus is deserving of being killed with impunity.[23] "Life than cannot be sacrificed and yet may be killed is sacred life" (Agamben 1998: 82).

The consequences that Agamben draws from his interpretation of the practice of *sacratio* are momentous. Since he believes that declaring someone to be "a sacred man" (*homo sacer*) is a function of sovereign power, he concludes that "the sacredness of life, which is invoked today as an absolutely fundamental right in opposition to sovereign power, in fact originally expresses precisely both life's subjection to a power over death and life's irreparable exposure in the relation of abandonment" (Agamben 1998: 83). In other words, the right to life that is associated with the idea of "sacred life," and which gives the ultimate justification to any sovereign power, in reality signals that life has already been captured by sovereign power and is at its mercy: the citizen is but a "dead man walking."

[23] Agamben has been severely criticized for basing his historical evidence on a piece of archaic Roman legislation, the meaning of which seems to be quite undecidable. See, for example, Rainer Maria Kiesow, "Law and Life" in (Norris 2005: 253).

Agamben sees evidence of this connection between sacredness and sovereignty, which undermines the very concept of the citizen and, indeed, the usual justification of the political order as condition for a "flourishing life" (*eudaimonia*), in two further institutions, an ancient and a modern one. First, he interprets the Roman institution of *patria potestas* in terms of a supposed absolute power that fathers have over the lives of their sons until they reach maturity and become citizens. But, for Agamben, when a Roman acquires the status of a citizen, this does not bring immunity from the *patria potestas*: the political relationship between equal citizens reveals its true foundation in the frequent episodes throughout the history of the Roman republic in which a military commander has killed his son for disobeying orders and thus placing the *patria* in peril. These martial acts of violence were traditionally interpreted as exemplary of political virtue, for instance in Machiavelli.[24] They were intended to symbolize that the citizen's attachment to his *patria* is of a higher order than any family or blood tie. For Agamben, to the contrary, these symbolic acts reveal that the protection which the *patria* offers its citizens (and for the sake of which they are willing to sacrifice their lives), is based on the prior placing of their "bare life" under the ban of a sovereign power, from which citizens are never released: "every male citizen (who can as such participate in public life) immediately finds himself in a state of virtually being able to be killed, and is in some way *sacer* with respect to his father" (Agamben 1998: 89).

The second example Agamben offers of the internal link between *sacratio* and sovereignty is modern, and refers to the constitution of the state as Leviathan in Hobbes's political philosophy. The Leviathan is charged with the protection of the life of each citizen. Thanks to its sovereign power, individuals can to leave the state of nature and enter civil society. Nevertheless, this power and the protection it affords

[24] See the description of "Manlian orders" in (Machiavelli 1996: III,22) to which Agamben seems to be referring.

depends, in turn, on the Leviathan remaining outside of the civil order, and in a state of nature, with respect to each and every citizen. In other words, according to Agamben, each citizen remains "banned" from civil society in relation to the sovereign power as a condition for establishing civil relations, based on law, with every other citizen (and thus achieving the protection of their lives). Whether one is talking about the ancient or the modern political order, in both cases the civil condition depends on a prior state of exception, and political life (*bios*) depends on a sovereign power over "bare life" (*zoe*), which reveals the state as the mythic force of history. Agamben is here rehearsing and radicalizing the well-known motif of "the myth of the state," that is, of the mythical power of the state, which is not only found in Benjamin, but also in Schmitt, Cassirer, and Arendt, among others.[25]

It is clear that much of the shock value of Agamben's theory of sovereignty depends on whether the connection he establishes between it and the sacred (*sacer*), for instance in his reading of archaic Roman Law, is tenable. This is not the place to enter into such a discussion (which ultimately takes us back to Agamben's claim that the origin of the sacred is the law, and not vice versa). But if there is something that speaks against the above connection, at least with respect to the figure of the *homo sacer*, is the fact (which Agamben mentions in passing, but does not pause to consider its implications) that the practice of *sacratio* originates from a people who has broken away from political society and is thus, technically, completely lacking in legitimacy to issue laws of any kind. By seceding, the Roman people de facto placed themselves outside of both civil and religious law. Whatever they deemed to be a "crime" against their members therefore could not be punished in virtue of being a transgression of either civil or religious law because they themselves were in transgression with respect

[25] See (Schmitt 1982), (Cassirer 1974), and (Arendt 1990).

to these institutions. Hence the need to come up with a new kind of "right" that would simultaneously protect the people (who were not "citizens") and sanction the killing of their enemies (who happened to be the "legitimate" powers). In other words, it seems possible to argue that the practice of *sacratio* originates in a situation where what needs to be protected and what needs to be killed is exactly the opposite of what Agamben suggests. After all, the reason for the popular secession was the tyranny of the Roman king. Thus the *homo sacer*, the enemy of the seceded people, was none other than the Roman king himself, and the *sacratio* would appear to be one of the first instances of what the Western political tradition has since called *the right to revolution* or *the right to rebellion*, in short, it would be the earliest figure of the republican justification of regicide.[26] If this alternative reconstruction of the *homo sacer* is plausible, then, the original referent of *homo sacer* is none other than the sovereign himself. In that case, it would not be sovereignty that sacralises some life, but sovereignty itself would be the object of sacralisation on the part of a stateless people. The archaic institution of the *homo sacer* may, in the end, stand closer to Freud's theory of the sacred as a manifestation of ambivalence than to Agamben's theory of the sacred as a manifestation of mythical violence. In the moment of secession, the people give expression to their ambivalence towards the king, who was revered within political society, but who can be reviled and even killed with impunity outside it. Having realized what their unconscious desire was all along, the people demand a *patria* without a sovereign, in other words, they found a republic.

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[26] In other words, the practice of *sacratio* may originally have belonged to the *plebs* not the *populo*, to the "people" not to the "People," to employ a distinction that Agamben uses (Agamben 2000:32ff). In this case, the right to resistance could be understood as the properly political expression of *homo sacer*, no longer as object of sovereign power, but as living a political life free from sovereign power. In (Agamben 2003: 24-25) Agamben discusses the right to resistance as implying a kind of state of exception, but he inscribes this right (as well as all other rights, as I show below) within the mythical side of the state of exception, not within its messianic flip-side. Thereby all resistance to sovereignty is denied any emancipatory or redemptive signification.

The connection between biopolitical discourse and legal discourse that Agamben attempts to make becomes all the more relevant, because if he is right, and the rule of law is nothing short of the means through which an ever wider network of spaces that are states of exception are established, then the greatest and most dangerous illusion lies in the belief that liberal democratic regimes have defeated totalitarian forms of political life, or, even, are the best protection against the return of totalitarianism (Agamben 1998: 10, 121-122, 179).[27] But to argue this point, Agamben is required to show that the modern system of individual liberties of rights, both in its republican and in its liberal variants, which were explicitly intended to make a sovereign power impossible, turn out to be in the end but a variant of sovereign power in the age of democracy.

The interpretation of Hobbes's Leviathan, which under the pretence of protecting the lives of human beings ends up placing this life under a ban, prompts Agamben to posit the fundamental hypothesis regarding the modern system of rights as the system in which modern biopolitics is more effectively realised:

> 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 individual's 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 (Agamben 1998: 121).

Liberal democracies, whose constitutional system limits the sovereignty of the state with respect to a system of laws based on inalienable individual rights, turn out, on this hypothesis, to be in collusion with the capture of biological life by sovereign power. The rights that protect individual *zoe* at the same time bring *zoe* under sovereign power and transforms every individual endowed with human rights into a potential *homo sacer*. The modern biopolitics of liberal regimes that sees politics as a "decision on life" can no longer be separated from the modern thanatopolitics of totalitarian regimes that

[27] On a recent calling into question facile distinctions between liberal democracy and its other, see (Geuss 2001). I will not rehearse here the "scandal" caused by this thesis, nor the rather obvious objections that can be addressed to it. See (Norris 2005) and (Lemke 2007) for some examples.

sees politics as a "decision on death" (Agamben 1998: 122). The frontier between a politics of life and one of death is now "in motion."[28]

Agamben's most polemical thesis in *Homo sacer*, namely: that nowadays liberalism and totalitarianism, Left and Right, private and public have entered into a "zone of indistinction" (Agamben 1998: 122), depends on connecting bare life to human rights. Agamben offers two grounds to support his claim that the subject of modern individual rights is a "sacred man" and so completely unprotected against the mythical violence of the state (despite the illusions to the contrary that it may harbour). The first argument turns on an interpretation of the 1679 Habeas Corpus Act, one of the foundational sources of modern theories of individual rights. On Agamben's reading of the writ, bare life (here identified with the *corpus* or body of the accused) is posited as the "new political subject" of rights. Through *habeas corpus* "nascent European democracy thereby placed at the centre of its battle against absolutism not *bios*, the qualified life of the citizen, but *zoe* – the bare, anonymous life that is as such taken into the sovereign ban" (Agamben 1998: 123). Through the right to *habeas corpus*, it is the "bare life" of the *homo sacer* which gets "disseminated into every individual being" (Agamben 1998: 124). To clarify this idea Agamben cites a famous passage from Hobbes's *De Cive* (and assumes a continuity which does not exist between Hobbes and the principle of *habeas corpus*) where the natural equality of all human beings is grounded on their capacity to be killed by anyone: "the absolute capacity of the

[28] Thomas Lemke has recently criticized Agamben's biopolitics, in comparison's to Foucault's, on the grounds that "Agamben verkennt, dass Biopolitik wesentlich politische Ökonomie des Lebens ist, die sich weder auf staatliche Apparate reduziert noch notwendig die Form des Rechts annimmt" (Lemke 2007). I leave for another occasion the treatment of the question whether Agamben develops a "political economy" of life.

subject's bodies to be killed forms the new political body of the West" (Agamben 1998: 125). Individual rights, on this view, are directly biopolitical instruments.[29]

Agamben's interpretation of the *habeas corpus* turns on emphasising the role played by the idea of *corpus* but does not mention the full formula of *habeas corpus* which reads, since its very earliest origins in the 14th century, *habeas corpus cum causa captis et detentionis*. "As the name indicated, it required the production of the person in court along with a showing of the cause of detention" (Meador 1966: 10). The point being that the *habeas corpus* as Agamben reads it is a Kafkian interpretation of the writ where only the body of the accused, but not the record of what law the accused is supposed to have broken, is invoked in court. The matter of the record is essential because it is on this terrain that the battle to inscribe *habeas corpus* within sovereignty unfolded over several hundred years. On the one hand, by demanding that an inferior court provide the record of charges on which a person stood incarcerated, the superior courts managed to centralize the process of lawmaking and law-adjudication, thereby serving the interests of the sovereign power.[30] But, on the other hand, precisely by demonstrating that "a mere order of the King" was not sufficient "record" to detain anyone, John Selden and other defenders of the writ in the 17th century managed to turn the writ into an instrument against sovereign power, and establish the fundamental "distinction between government under law and government by law"(Meador 1966: 14-15), where the former nullifies sovereign power whereas the latter does not. Once again, Agamben is perhaps too quick to dismiss the possibility that a discourse of rights, suitably reinterpreted, may very well be a "pure means" by which bare or sacred life

[29] Here Agamben is at his most distant from Foucault's reading of the system of individual rights, since for the French philosopher these rights do not share the same logic as biopower or disciplinary power, and the relation between these powers and the rights of individuals is, to say the least, overdetermined. Foucault was by no means a critic of the modern discourse of individual rights. In this he broke with the Marxist tradition that interpreted such rights as mere bourgeois class ideology.

[30] I rely throughout on the brilliant discussion of these points in (Meador 1966).

"reverses" its domination and acquires a new political life, no longer under a sovereign ban.

The second argument Agamben offers to show that the discourse of rights falls within the purview of sovereign power takes off from Arendt's now well-known critique of human rights in chapter nine of *The Origins of Totalitarianism*. Arendt had argued, on that occasion, that human rights had always been linked to the rights of citizens of nation-states. When the system of nation-states went into crisis, and entire peoples became stateless masses, the individuals also found themselves in a condition of rightlessness, thereby casting into question the idea that human beings "in virtue of their nature" are endowed with inalienable human rights (Arendt 1973). Agamben takes this suggestion by Arendt to mean the following: already in the French *Déclaration des Droits de l'Homme* of 1789 (that is, at the apogee of the republican nation-state), rights are constructed in a biopolitical fashion because they tie the humanity of man to his or her "bare life," to the kind of "nakedness of being human" found at birth (Arendt 1973: 296). The first article of the *Déclaration*, in which it is stated that "men are born and remain free and equal in rights," makes birth the "earthly foundation of the state's legitimacy and sovereignty" and thereby, through birth, it is the bare life of individuals that gets taken up by sovereign power. The fact that such a *Déclaration* will also clothe these bare individuals with the attire of the *citoyen* is simply a way to repress the foundation of modern politics on the domination of bare life. When, in the third article of the *Déclaration*, the nation (from *nascio*) is identified as the proper subject of sovereignty, to Agamben this signals that, by way of birth, individual life has fallen prey to the sovereign power of the nation of placing its subjects in a state of exception. This capture of life under law in and through the connection of rights to birth will reveal its hidden, deadly potential with the subsequent birth, from out of the nation-state, of

nationalism, imperialism and, finally, racism and genocide. Agamben's deconstructive reading of the declaration of human rights works only on the assumption that it is no longer possible to distinguish a republic from a nation-state; and on the further assumption that the reference to a freedom "from birth," contained in the discourse on human rights, refers to the birth of the nation and the birth of individuals into a nation, and not to another sense of birth. Both assumptions, interestingly enough, are rejected by Arendt, for whom the crisis of modern republic is due to the principle of the nation taking over the republican idea of the state; and for whom the fact of birth, understood as natality, is the ontological condition for political freedom understood as "the right to action… the right to have rights (and that means to live in a framework where one is judged by one's actions and opinions)" (Arendt 1973: 296). [31] Again, Agamben's reading of the discourse of human rights is Kafkaesque: under his description, they become the rights to be judged only by one's national, ethnic, sexual or racial identity, rather than by who one has become in action and speech before one's equals (and not before a tribunal of law).

[31] On the difference between republic and nation-state in Arendt, see (Brunkhorst 1999) and (Forti 1996). On natality as source of freedom, see (Vatter 2006).

3. Agamben's Critique of Schmitt: Authority and State of Exception (from *Homo sacer* to *State of Exception*)

The reduction of biopolitics to law, and of law to violence, in Agamben's *Homo sacer* is the result of his combination of the thought of Schmitt and Benjamin. I have shown that, on Agamben's view, biopolitics as power over life finds its central mechanism in the sovereignty of law, where sovereignty was interpreted along Schmittian lines as the power to determine a state of exception. But why it is that law "must" be the capture of life is never fully accounted for in *Homo sacer*. Agamben's biopolitical reading of Schmitt is itself based on a single line in Schmitt ("In der Ausnahme durchbricht die Kraft des wirklichen Lebens die Kruste einer in Wiederholung erstarrten Mechanik"),[32] where the German jurist states that in order for law to become something living, rather than merely mechanical, the exception is of more importance than the rule. In *State of Exception* this problematic basis of his entire discourse undergoes a revision of sorts, in the sense that Agamben is now more concerned to clearly separate and oppose Benjamin to Schmitt on the question of the state of exception, and leave the difference between a "virtual" and a "real" state of exception less indeterminate. He now states explicitly that the connection between law and life is not "necessary" or "internal" at all, but that a new conception of the political is possible on the basis of the separation between law and life, one that maintains both in a different use.

State of Exception is dedicated to further explain the central paradox found at the start of *Homo sacer*: namely, how can the suspension of legal validity entailed in the state of exception be seen to lie at the basis of all legal order (Agamben 2003:42)? In other words, in this continuation of the *Homo sacer* project Agamben is interested in

[32] (Schmitt 1996: 21).

demonstrating what it means for the state of exception to become the rule, something "normal" and not "exceptional." Agamben sees Schmitt's importance to lie in the answer he gives to this question:

> L'apport spécifique de la théorie schmittienne est justement de rendre possible une telle articulation entre état d'exception et ordre juridique. Il s'agit d'une articulation paradoxale, parce que ce qui doit etre inscrit dans le droit est quelque chose d'essentiellement extérieur à lui, c'est-à-dire rien de moins que la suspension de l'ordre juridique lui-meme (d'où la formulation aporétique : «au sens juridique, il existe encore un ordre, meme si ce n'est pas un ordre juridique ») (Agamben 2003: 58).

Agamben is here citing from a passage in *Political Theology* where Schmitt writes: "Weil der Ausnahmezustand immer noch etwas anderes ist als eine Anarchie und ein Chaos, besteht im juristischen Sinne immer noch eine Ordnung, wenn auch keine Rechtsordnung" (Schmitt 1996: 19). What Schmitt means thereby is made clear by a passage that Agamben does not cite: "Die zwei Elemente des Begriffs 'Rechts-Ordnung' treten hier einander gegenüber und beweisen ihrer begriffliche Selbstständigkeit" (Schmitt 1996: 19). Schmitt's point is that the concept of state of exception brings to evidence the relative autonomy of the concept of *law* (*Rechtsordnung*) with respect to the concept of *order* (*Ordnung*). The validity of law (*Norm*) depends on the prior existence of a normal situation where norms are applicable.[33] This normal situation is a situation of order, not of chaos or anarchy. Whether a situation of order exists or not is a matter of decision; and he who has the authority to make this decision is sovereign.[34] What mediates between the norm and its

[33] "Es gibt keine Norm, die auf ein Chaos anwendbar wäre. Die Ordnung muss hergestellt sein, damit die Rechtshandlung einen Sinn hat. Es muss eine normale Situation geschaffen warden, und souverän ist derjenige, der definitive darüber entscheidet, ob dieser normale Zustand wirklich herrscht…. Darin liegt das Wesen der staatlichen Souveranität, die also richtigerweise nicht als Zwangs- oder Herrschaftsmonopol, sondern als Entscheidungsmonopol juristisch zu definieren ist" (Schmitt 1996: 19).
[34] "Hier sondert sich die Entscheidung von der Rechtsnorm, und (um es paradox zu formulieren) die Autorität beweist, dass sie, um Rect. Zu schaffen, nicht Recht zu haben braucht" (Schmitt 1996: 19).

application in Schmitt is therefore a conception of order, based on the authoritative decision.[35]

For Agamben, on the contrary, the suspension of the validity of legal norms in a state of exception designates a juridical vacuum. "L'état d'exception sépare donc la norme de son application pour rendre celle-ci possible. Il introduit dans le droit une zone d'anomie afin de rendre possible la normation effective de la realité" (Agamben 2003: 64). The state of exception suspends the legal norm (in such a way that the law no longer applies) in order to make the application of the norm possible in the first place by deciding on the normal situation. For Agamben this suspension of the legal norm is just "anomie" and "pure violence," whereas for Schmitt it designates "order" and "authority."

It is not of vital importance to decide who, if anyone, is right between Schmitt or Agamben. The point is that Agamben can conclude from the problem of legal application to the priority of violence on the basis of a reading of Schmitt's theory of the state of exception that does not take into account the concepts of order and authority which lie at the basis of the latter's jurisprudence. Where the state of exception in Schmitt is revelatory of a (juridical) order that is prior to a (juridical) norm, and which is associated by Schmitt to the priority of the state over the law, in Agamben the state of exception is revelatory of "un 'état de la loi' dans lequel d'un part, la norme est en vigueur, mais ne s'applique pas (n'a pas de force) et où, de l'autre, des actes qui n'ont pas valeur de loi en acquièrent la 'force'" (Agamben 2003: 67) which he calls "une force de loi sans loi." For Agamben, the state of exception is therefore the reality of every legal order: it describes a juridical "state" in which a constitution exists, but remains inapplicable, while government is exercised by decrees which have "force of

[35] "Auch die Rechtsordnung, wie jede Ordnung, beruht auf seiner Entscheidung und nicht auf einer Norm" (Schmitt 1996: 16).

law." The fact that the law does not contain, within itself, its own application is taken to mean that such an application must become possible only by way of the suspension of the law and the activation of a "force of law" that is nothing short of "une pure violence sans logos" (Agamben 2003: 70).[36] It is in this sense that Agamben understands the idea that the state of exception has become the rule.

Schmitt argues that between law and life there is the dimension, and the question, of order. For one, he denies that the sovereign is defined by holding a "monopoly of violence;" the sovereign rather detains a "monopoly of decision"(Schmitt 1996: 19). Agamben is not entirely unaware of this dimension of Schmitt's discourse, but *State of Exception* is designed to refute its premises, on two grounds. The first has to do with the relation between Schmitt and Benjamin. Agamben argues that Schmitt develops his theory of sovereignty in response to Benjamin's earlier "Critique of Violence" where Benjamin posited the dependence of every legal order on a mythical violence which establishes power, and is opposed by a "divine violence" which has "justice" as its goal, as discussed above. According to Agamben, Schmitt attempts to internalize within the juridical order Benjamin's idea of divine violence in the shape of the state of exception which is decided upon by a sovereign (who secularizes the idea of God) (Agamben 2003: 91-93). In other words, Schmitt would have masked the violence that is constitutive of the state of exception under a discourse on authority. The state of exception in Schmitt is something that should permit the functioning of the legal machinery, and so, in Benjamin's terms, the continuation of mythical violence and accumulation of power for its own end. When Benjamin, therefore, writes his Eighth Thesis on the concept of history, according to which the state of exception has become

[36] "L'état d'exception est, en ce sens, ouverture d'un espace où application et norme montrent leur séparation et où une pure force-de-loi réalise (c'est-à-dire applique en dés-appliquant) une norme dont l'application a été suspendue…. Cela signifie que pour appliquer une norme, il faut, en dernière analyse, suspendre son application, produire une exception" (Agamben 2003: 70).

the rule, and it is time to bring about the real state of exception, he would be addressing Schmitt on two counts: first, once the exception is the rule, the machinery of the law comes to a halt; and, second, the real state of exception is brought about by freeing divine violence from the machinery of the law. In Agamben's words: "la violence pure se révèle seulement comme exposition et déposition du rapport entre violence et droit" (Agamben 2003: 104). Benjamin's idea of a divine violence is therefore meant to separate life from law, such that law can be given another "use" (one not confined to the biopolitical finality of dominating life) (Agamben 2003: 105).

The second ground on which Agamben attacks Schmitt's jurisprudence of sovereign authority is with regard to the idea of *auctoritas* itself. Agamben hypothesizes that the origin of the state of exception is to be found in the Roman political institution of the *justitium*: a council, on the part of the Senate, that authorizes the suspension of the magistracies and of their legal orders for the sake of the security or salvation of the public welfare. The point of Agamben's analysis is to show that the state of exception does not have at its origin the Roman institution of the dictatorship, as Schmitt had himself claimed in (Schmitt 1994), because the state of exception does not emanate from a magistracy, and from the plenitude of powers given to one magistracy in cases of emergency, but rather is what suspends the *potestas* of all magistracies on the basis of the *auctoritas* of the Senate: the state of exception (as *justitium*) is a *Stillstand des Rechts*, a "vacuum juridique," an "espace anomique" (Agamben 2003: 78,83).[37]

Furthermore, the fact that the *justitium* was only possible thanks to the *auctoritas* of the Senate, and this authority needs to be understood in opposition to every instituted

[37] It is important to note that, if Agamben is correct, then he nullifies every attempt to revitalize Schmitt's theory of emergency powers while leaving aside the theory of the exception, that is, every attempt to fashion a discourse of emergency powers within a constitutional framework, as Oren and others have argued for. Agamben does explicitly the opposite: he rules out the very idea of an emergency power as a concept that is ideological to the extreme, and highlights the primordiality of the logic of the exception (both to establish the willed state of exception and to bring out the messianic one).

potestas, permits Agamben to connect the state of exception as juridical vacuum and space of anomie and violence to the idea of authority, thereby rejecting Schmitt's principled separation of authority and decision from power and violence. Basing himself on a few studies on the idea of *auctoritas* as it develops under Augustus's principate, Agamben essentially claims that authority is tied not to an office, but to a person (who occupies an office), leading him to assert that: "Les qualités de Duce ou de Führer sont liées immédiatement à la personne physique et appartiennent à la tradition biopolitique de l'*auctoritas* et non à la tradition juridique de la *potestas*" (Agamben 2003: 140). Thus, in a radical reduction, he not only deprives the very concept of *auctoritas* of any connection to the idea of law, but also, and subreptitiously, associates it to the figure of contemporary dictators and tyrants, and only in this way gives it a biopolitical signification which seems to be completely lacking in its original sense.

In conclusion, one is left wondering, given that the link between life and law remains on frail grounds in Agamben, not about the very existence of biopower, whose facticity is unassailable, but about the wisdom of reducing biopower exclusively to the sphere of law, thereby distorting not only our view of what biopower really is, but also of the essence of law. With this doubt, there emerges the suspicion that law, and its peculiar authority, may still harbour resources to emancipate political life from sovereignty. We have to thank Agamben for having revitalized this project, but we must free it from the Kafkaesque dimension in which he has seen fit to enclose it.

References

Agamben, Giorgio. 1979. *Infanzia e Storia*. Turin: Einaudi.
Agamben, Giorgio. 1998. *Homo sacer. Sovereign Power and Bare Life*. Translated by D. Heller-Roazen. Stanford: Stanford University Press.
Agamben, Giorgio. 2000. *Means without End. Notes on Politics*. Translated by V. B. C. Casarino. Vol. 20, *Theory out of Bounds*. Minneapolis: University of Minnesota Press.
Agamben, Giorgio. 2003. *État d'exception*. Paris: Seuil.
Agamben, Giorgio. 2004. *The Open: Man and Animal*. Translated by K. Attell. Stanford: Stanford University Press.
Agamben, Giorgio. 2005. *Profanierungen*. Frankfurt: Suhrkamp.
Arato, Andrew. 2006. Their Creative Thinking and Ours: Ackerman's Emergency Constitution after Hamdan. *Constellations* 13 (4):546-572.
Arendt, Hannah. 1958. *The Human Condition*. Chicago: University of Chicago Press.
Arendt, Hannah. 1973. *The Origins of Totalitarianism*. New York: Harcourt, Brace & Company.
Arendt, Hannah. 1990. *On Revolution*. New York: Penguin.
Benjamin, Walter. 1994. *The Correspondence of Walter Benjamin 1910-1940*. Edited by T. W. A. Gershom Scholem. Chicago: University of Chicago.
Benjamin, Walter. 1996. *Selected Writings. Volume 1: 1913-1926*. Edited by M. B. a. M. W. Jennings. Cambridge: Harvard University Press.
Brunkhorst, Hauke. 1999. *Hannah Arendt*. Muenchen: Beck.
Butler, Judith. 2006. *Precarious Life. The Power of Mourning and Violence*. London: Verso.
Cassirer, Ernst. 1974. *The Myth of the State*. New Haven: Yale University Press.
Derrida, Jacques. 1967. *L'écriture et la différence*. Paris: Éditions du Seuil.
Derrida, Jacques. 1994. *Force de la loi*. Paris: Galilée.
Dillon, Michael. 2004. The Governance of Security. In *Global Governmentalities*, edited by W. L. a. W. Walters. New York: Routledge.
Dworkin, Ronald. 1986. *Law's Empire*. Cambridge: Harvard University Press.
Esposito, Roberto. 2004. *Bios. Biopolitica e filosofia*. Turin: Einaudi.
Forti, Simona. 1996. *Vita della mente e tempo della polis: Hannah Arendt tra filosofia e politica*. Milan: Franco Angeli.
Foucault, Michel. 1990. *The History of Sexuality. Volume I: An Introduction*. Translated by R. Hurley. New York: Vintage Books.
Foucault, Michel. 1997. *"Il Faut Défendre la Société." Cours au Collège de France, 1976*. Paris: Gallimard Seuil.
Freud, Sigmund. 1950. *Totem and Taboo*. New York: W.W. Norton & Company.
Geulen, Eva. 2005. *Giorgio Agamben zur Einfuehrung*: Junius.
Geuss, Raymond. 2001. *History and Illusion in Politics*. Cambridge: Cambridge University Press.
Girard, René. 2005. *Violence and the Sacred*. London: Continuum Publishers.
Gross, Oren. 1999-2000. The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy. *Cardozo Law Review* 21:1825-1868.
Gross, Oren. 2006. What 'Emergency' Regime? *Constellations* 13 (1):74-88.
Habermas, Juergen. 2003. *The Future of Human Nature*. Cambridge: Polity Press.

Honneth, Axel. 2007. *Pathologien der Vernunft*. Frankfurt: Suhrkamp.
Kristeva, Julia. 1982. *Powers of Horror: An Essay on Abjection*. New York: Columbia University Press.
Lemke, Thomas. 2007. *Gouvernementalitaet und Biopolitik*. Wiesbaden: VS Verlag fuer Sozialwissenchaften.
Levinson, Sanford. 2006. Preserving Constitutional Norms in Times of Permanent Emergencies. *Constellations* 13 (1):59-73.
Machiavelli, Niccolò. 1996. *Discourses on Livy*. Translated by N. T. Harvey Mansfield. Chicago: University of Chicago Press.
Meador, Daniel John. 1966. *Habeas Corpus and Magna Carta*. Charlottesville, Virginia: The University Press of Virginia.
Norris, Andrew, ed. 2005. *Politics, Metaphysics, and Death. Essays on Giorgio Agamben's Homo Sacer*. Durham: Duke University Press.
Otto, Rudolf. 1958. *The Idea of the Holy*. Oxford: Oxford University Press.
Quintana, Laura. 2006. De la nuda vida a la forma-de-vida. Pensar la política con Agamben desde y más allá del paradigma del biopoder.
Rossiter, Clinton. 1948. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. New York.
Schmitt, Carl. 1982. *Der Leviathan in der Staatslehre des Thomas Hobbes*. Stuttgart: Klett-Cotta.
Schmitt, Carl. 1988. *Political Theology. Four Chapters on the Concept of Sovereignty*. Cambridge: MIT Press.
Schmitt, Carl. 1994. *Die Diktatur*. Berlin: Duncker & Humblot.
Schmitt, Carl. 1996. *Politische Theologie*. Berlin: Duncker & Humblot.
Schmitt, Carl. 2004. *Legality and Legitimacy*. Durham, NC: Duke University Press.
Vatter, Miguel. 2006. Natality and Biopolitics in Hannah Arendt. *Revista de Ciencia Política* 26 (3):137-159.