UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

School of Law

Agamben, the Exception and Law

by

Thomas Michael Frost

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<u>ABSTRACT</u>

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Giorgio Agamben's work has been at the forefront of modern debates surrounding sovereign exceptionalism and emergency powers. His theory of the state of exception and engagements with Michel Foucault appear to focus upon sovereign power's ability to remove legal protections from life with impunity, described by the figure of *homo sacer*. Much secondary scholarship concentrates upon this engagement. This thesis contends that this approach is too narrow and assimilates Agamben's work into Foucault's own thought.

Through his engagement with Foucault, Agamben's thought is argued to be *immanent* and directed toward questions of fundamental ontology. Agamben contends that the human being, and all social structures, including law, are defined negatively through being held in relation to an ineffable transcendent ground. This negativity is transmitted through the exception. In challenging foundational *mythologemes*, Agamben questions received conceptualisations of sovereignty, arguing that sovereignty is a *mythologeme* used to legitimate and justify governmental *praxis*.

Agamben's *immanent* thought seeks to philosophically justify a messianic politics and form-of-life no longer grounded in negative foundations. This form-of-life Agamben terms "whatever-being", a life lived beyond relationality.

This thesis transposes Agamben's thought on exception, sovereignty, the human and power into the realm of legal reasoning. A form of ethical decision-making and precedent charitable to Agamben's thought is constructed, constituting a unique contribution to jurisprudence. This ethical decision focuses on whatever-being's singularity.

However, Agamben's eschewing of relationality means this ethical decision-making is *aporetic*, still reliant upon a derivate form of relationality. This thesis illustrates how Agamben's thought is constructed through a misreading of Heideggerian hermeneutics and a failure to acknowledge its debt owed to Levinasian ethics. Agamben remains trapped within two critiques of his non-relationality, one drawn from Heidegger's hermeneutic circle of Being, the other drawn from Levinas's ethics of the Other. Ultimately, Agamben's philosophical conclusions are contended to be unsustainable.

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DECLARATION OF AUTHORSHIP

I, THOMAS MICHAEL FROST

declare that the thesis entitled

AGAMBEN, THE EXCEPTION AND LAW

and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

- this work was done wholly or mainly while in candidature for a research degree at this University;

- where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

- where I have consulted the published work of others, this is always clearly attributed;

- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;

- I have acknowledged all main sources of help;

- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;

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  Tom Frost, 'Agamben's Sovereign Legalization of Foucault' (2010) 30 OJLS 545

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Abbreviations

Agamben's Works

CC	*The Coming Community*
HS	*Homo Sacer: Sovereign Power and Bare Life*
IH	*Infancy and History: On the Destruction of Experience*
LD	*Language and Death: The Place of Negativity*
ME	*Means Without Ends: Notes on Politics*
N	*Nudities*
O	*The Open: Man and Animal*
P	*Profanations*
PA	'Philosophical Archaeology'
PT	*Potentialities: Collected Essays in Philosophy*
RA	*Remnants of Auschwitz: The Witness and the Archive*
RG	*Il Regno e la Gloria*
SA	*The Signature of All Things: On Method*
SE	*State of Exception*
SL	*The Sacrament of Language: An Archaeology of the Oath*
TTR	*The Time That Remains: A Commentary on the Letter to the Romans*
WA	*What is an Apparatus?: and Other Essays*

Heidegger's Works

BT	*Being and Time*
IM	*Introduction to Metaphysics*
WCT	*What is Called Thinking?*
OET	'On the Essence of Truth'
EPTT	'The End of Philosophy and the Task of Thinking'
BPP	*Basic Problems of Phenomenology*
LH	'Letter on Humanism'
WTL	'The Way to Language'

Levinas's Works

OB   *Otherwise than Being or Beyond Essence*

TI   *Totality and Infinity: An Essay on Exteriority*

AT   *Alterity and Transcendence*

EI   *Ethics and Infinity: Conversations with Philippe Nemo*

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Introduction

The primary question in this work concerns the exploration of the work of Giorgio Agamben with respect to law and legal reasoning. This exploration is conducted with respect to how Agamben's works engage with the works and thought of a number of philosophers, in particular Michel Foucault, Emmanuel Levinas and Martin Heidegger. The ultimate aim of this thesis is to re-site Agamben's thought in relation to law and legal reasoning. This aim is based upon readings and interpretations of Agamben's thought that I have viewed as not developing the full potential and implications of his works.

This task is conducted through two parallel and mutually constituting paths. The first engages with Agamben's philosophy, taking as its starting point Agamben's own interpretations and use of the work of Foucault. The second path attempts to apply Agamben's thought in the sphere of legal reasoning, and in doing so exploring the implications of Agamben's thought for the law and legal order more generally.

This twin focus is reflected in this thesis's structure. This study should not be read as an attempt to discuss Agamben's philosophy and then discuss Agamben's impact upon legal reasoning and the law. Agamben's influence to legal reasoning can be best seen through an investigation of his philosophy. Agamben's influence on legal reasoning can then illustrate strengths and *aporias* within Agamben's thought. Both investigations help inform and constitute one another, revealing paths for future research that extend beyond the scope of this work.

However, it can broadly be contended that this work forwards three main arguments or contentions.

The first argument made by this thesis focuses upon the proper position of Agamben's work. It is argued that Agamben should not be thought of as a scholar of emergency powers, even though his most well known works are found in this area in his writings on the exception. Rather, Agamben's thought is better situated as an attempt to construct an ontology, based upon a radical political aim that re-casts not just the law and other social structures, but also the figure of the human being itself. The driving force behind this political project is an attempt on Agamben's behalf to re-think the very basis of Western philosophical thought. As

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such, Agamben aims to overcome the deficiencies that he claims are present in other philosophers' works. Agamben's writings on emergencies and exceptionalism should be seen as forming part of this wider project.

The second argument traces Agamben's attempt to construct an ontology and radical politics. This path is traced from Agamben's engagements with Foucault in respect of biopower and governmentality, through to the connection Agamben makes between sovereignty and ontology. It is this turn to ontology that leads to the work of Martin Heidegger, Agamben's philosophical mentor.

This thesis contends that Agamben bases his ontology and the move upon which he grounds his politics upon a selective reading of Heidegger. In particular, Agamben's critique of Heidegger is founded upon a misreading of Heidegger's construction of *Dasein*. Agamben's reading of *Dasein* does not do justice either to Heidegger's writings or the richness of the hermeneutic tradition. This is because Agamben strives to trace an originary negativity in Heidegger's thought that he uses to generate distance between his own politics and Heidegger's work. However, Agamben only finds this originary negativity through a cursory and in my view unsatisfactory treatment of Heidegger's hermeneutics. Such a position by necessity calls into account the overall coherence of Agamben's ontology, as well as the justification for his radical politics. Specifically, Agamben's treatment of Heidegger illustrates a poverty of thought in relation to the prominent position that hermeneutics plays in structuring not just law, but additionally human experience.

The third argument of this thesis focuses upon the unspoken relation between Agamben and Emmanuel Levinas. It is contended that Agamben's thought, and his framework for an ethical politics, contains an unspoken and deep influence from the works of Emmanuel Levinas. In particular, what this thesis argues is that Agamben's thought as it currently stands contains *aporias* and contradictions that are only reconcilable if it is admitted that Agamben's thought has a basis in Levinasian ethics, and that Levinasian ethics are used to ameliorate Agamben's philosophical and political positions. Therefore Agamben's attempt at constructing an ethical framework from his ontology is underpinned by Levinasian ethics. This study argues that an 'anxiety of influence' from Levinas has led Agamben to both deny Levinas's influence over his work and at the same time conceive a derivative Levinasian ethics as his own ethical philosophy.

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Ultimately, this thesis argues that Agamben's thought, as it stands, is penned between two powerful critiques which serve to undermine the political aims Agamben holds. In order for his ethical politics to be coherent, these two critiques need to be countered The first focuses upon Heidegger's ontology. The second focuses upon the ethics of Levinas, derivatively interpreted by Agamben. The importance of this position Agamben finds himself in relates to his philosophical aims. Agamben aims to re-think how philosophy is thought of. The fact that Agamben remains open to a critique grounded within the very way of thinking he attempts to overcome is injurious to his philosophical project.

A Journey from Emergency to Philosophy

As this thesis concerns itself with Agamben's thought, as well as explicitly considering the thought of Foucault, Heidegger and Levinas, an accusation can be levelled towards this work that it is too attached to individual philosophers' names and what they produced in terms of works, without paying due attention to the political aims and impacts their thought can provide. In a very broad sense, this accusation cannot be denied. However, to accept this point without further explanation would only tell half a story. The approach taken in this thesis is dependent upon my own political beliefs and the methodology with which I approach philosophical works.

The main impetus behind this thesis was a realisation that Agamben's work and thought had a far greater potential than he had been given credit for in much of legal academia. This realisation was driven by my first engagement with the work of Agamben. This engagement occurred through a continuation of my interests from my undergraduate studies which began in the field of anti-terrorism law and human rights laws, and especially the interplay and conflicts between the two.

I was drawn to this field due to an underlying interest in how the law and the legal order interact with politics and how politics can shape and mould the discipline of law. My interest in the law and politics also been driven by an interest in 'first principles'. By first principles I refer to the philosophical foundations of a particular political viewpoint that are held by an individual and upon which their viewpoints and opinions ultimately rest. I feel that by exploring such first principles, it is possible to better understand and comprehend a certain

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political view or way of being. I also feel that it is possible to better construct arguments and especially arguments that focus upon political issues by understanding those first principles that your own arguments are founded upon. These general interests have led to my ongoing interests in how legal orders operate in states (and especially post-colonial states) to entrench, rather than counteract disadvantage.

However, in trying to conceive of a form of law and legal order that can challenge such disadvantage and oppression, I have tried to keep in mind Isaiah Berlin's caution against the distortion of positive liberty, and the dangers of forcing people to be free.[1] Berlin's caution has stayed with me throughout my doctoral studies, and has made me question any form of thought that has implications of arbitrary decision-making.

If I could summarise my research in terms of the themes it covers, it would centre around the themes of ethics, community and law. By ethics I focus upon what an 'ethical' existence entails, and how the law can contribute (if at all) to ensuring that individuals are respected and not discriminated against or oppressed. This leads on to community, which aims to focus upon finding a mode of belonging that can respect differences between individuals. Viewing law as a theme connotes a focus upon how law as an instrument of power can shape and help constitute each individual's way of being in the world as well as how the law can serve to repress and coerce. These three themes underpin the analysis found in this thesis, as well as underpinning the decision I made to focus upon Agamben's thought.

The original focus of my research was directed towards how governments around the world curtail human rights in emergency or exceptional times. The question that my research attempted to answer was to what extent it was possible to find the right balance between human rights and state security. It was in conducting this research that I was introduced to the work of Giorgio Agamben, and specifically his volume *State of Exception*. Many academics I had read had cited Agamben's *State of Exception* and used this book to analyse the legal situation at Guantanamo and the Bush Administration's counter-terrorism policy after the terrorist attacks of 11th September 2001. Agamben claimed in *State of*

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[1] See Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty* (Henry Hardy ed, OUP 2002) 166.

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Exception that the exception, rather than being a form of emergency governance, was actually a tool of power that enabled sovereign power to repress and cast out individuals from legal protections. It was this claim that led to Agamben's work being treated with much scepticism.

In reading both *State of Exception*, and how this tome was utilised in research regarding anti-terror legislation and emergency powers, I realised that Agamben's stated aim in his works was much more far-reaching. Instead of being a commentator who over-emphasised excessive government responses to terrorism, which is how many legal academics writing on emergency powers had portrayed him, Agamben's works encompassed a broad philosophical project that contained a vision for a radical politics. It was this radical politics that appealed to me, as it offered a view of law and the legal order that I had not seen in my legal studies. This view also chimed with the themes that underpin my research project. However, Agamben's form of radical politics had at its centre a conception of an ethical politics that seemed to counter Berlin's critique of the abuse of positive liberty, being as it was centred on the singularity of the human being. This interest led to a desire to fully explore the potential consequences and desirability of Agamben's project.

My growing interest in continental forms of thought was coupled with a growing unease with the writings on law I was familiar with. Although my interest in law was driven through an interest in how law and politics interact, I was deeply unsatisfied with and apathetic towards many articles and judgments that I was reading. The issues that interested me – age-old political questions first and foremost relating to how best to live one's life and how best to conceive of political belonging – appeared to be eschewed in favour of formal legal reasoning, focusing upon narrower questions of statutory interpretation or precedent.

My exposure to continental philosophy and radical politics through Agamben's work opened new possibilities for my research. At this point I decided to shift the emphasis of my thesis to a detailed analysis of Agamben's philosophical (and political) projects. This change of direction allowed me to explore my interest in first principles , how to live ethically and how to best conceive of a community with respect to law, with respect of Agamben's thought and political aims. Agamben directly connects philosophy and the law in his

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thought, which allowed me to explore these political questions that interested me in a doctoral thesis written in the discipline of law. Agamben has written that:

> Philosophy is always already constitutively related to the law, and every philosophical work is always, quite literally, a decision on this relationship.[2]

Following Agamben's phraseology, this thesis can be characterised as reaching a decision upon the relationship between Agamben's writings on philosophy and how they relate to the law. Before I can explain how I approach Agamben's writings, it is necessary to outline Agamben's thesis.

Immanence, Negativity, whatever-being

Agamben's ontology is driven by a focus upon *immanence*. Within this thesis, *immanence* is used to refer to 'existing or remaining within'. The notion of immanence focuses upon the plane of existence as it is experienced. This can be contrasted with *transcendence*. By *transcendence* this thesis refers to 'that, which goes beyond'. In phenomenology, the transcendent is that which transcends our own consciousness. Agamben's philosophy is an *immanent* ontology.

This point is vital for the analysis this thesis conducts. Underpinning Agamben's attempt to re-think philosophical thought is a distinct claim. The whole of Agamben's works focus upon how life itself is defined and structured by power and law. It is Agamben's main thesis that political existence has always been defined *negatively*.

By 'negativity', this study refers to a distinct philosophical claim that is made by Agamben. Agamben contends that the human being, and by extension all social structures that the human being founds, are structured upon a 'fracture'. This is a fracture between *immanent* and *transcendent* realms.

The human being and social structures exist *immanently*. This immanent existence is the grounded existence that human beings experience every day. However, Agamben's key thesis is that this immanent existence is not defined immanently. It is instead defined with reference to a transcendent sphere.

Therefore, human life exists in a relation between an immanent existence and a transcendent realm that remains ineffable and ungraspable. Immanent

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[2] Giorgio Agamben, 'The Messiah and the Sovereign' in *PT* 161.

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existence is therefore defined not through its existent properties, but through its relation to a transcendent sphere that it can never grasp. It is this relation that Agamben defines as *negative*. Human existence is defined not through what it is (immanently), but through what it is not (by comparing immanent existence to transcendent existence). Human potential is defined negatively by being placed in relation to a transcendent realm that determines what is possible and what is not. This transcendent realm is only grounded through an immanent existence.

This negative relation remains unchallenged for Agamben. Moreover, it is *transmitted* through social structures, including the law. These social structures share the same negative relation. For law, Agamben claims there exists a fracture between a transcendent origin and a founding 'Power' or 'Law' and a founded, immanent 'power' or 'law'. These structures are *mythologemes*. They are *mythologemes* as the immanent realm remains bound to an ineffable and therefore mythic transcendent sphere. The exception, rather than referring to a constitutional principle, actually operates as an apparatus for the transmission of this negative ground.

Perhaps most important of all are the consequences of this negative relation. Humanity itself is defined through the law by virtue of an abstract, transcendent notion that Agamben argues needs to fail and produce a remainder in order to justify its continued existence and use. It is this remainder of humanity that Agamben posits as 'bare life', *homo sacer*, a life lived beyond all legal protections whose existence is both denied by the law and needed by the law in order to justify its self-referential proliferation.

The human being remains trapped within a negative relation, transmitted by law through the continued positing of a self-referential transcendent origin that serves to justify the immanent realm of law. This problem of origins has been traced by Agamben to politics, philosophy, language and the human being.

In this way, the exception, central to Agamben's analyses on emergency, should be seen as a remainder, resulting from the transcendent/immanent relation that operates to structure the legal order. It is for this reason that Agamben's thought should be considered as an attempt to form an ontology, rather than solely on the plane of emergency powers.

For Agamben, it is only by challenging this mythological structure that anything like an existence without bare life is possible. As such, Agamben's

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thought is properly a philosophy of *immanence*. Agamben's thought is immanent as it aims to think 'the thing itself', away from all negative relations and transcendent schema.

The proper target of criticism within Agamben's work is the relation transcendence/immanence. This relation seeks to define the immanent realm of existence by reference to a transcendent sphere that remains ineffable and ungraspable. In turn, the ineffable transcendent sphere only exists in relation to a determinate immanent realm. Agamben's work targets this negative presupposition. It is the focus on the plane of immanence that is important. The plane of immanence is the simple fact of one's own existence as possibility, with no reference to a transcendent or beyond.

It is this immanent existence or form-of-life that Agamben terms "whatever-being".[3] Whatever-being is the absolute singularity of the individual, defined through their purely immanent existence as-such. It cannot be held in relation to any transcendent ground, and as such it is not defined negatively. Whatever-being holds the hope for a new thought. It is this immanent thought that Agamben sees as properly *ethical*.

Methodology

Although I have tried to avoid using labels in this thesis as much as possible, as to do so can potentially caricature a point of view and provide an uncharitable account, labels and generalisations are impossible to avoid in a finite work, and it is necessary to have recourse to them here.

This thesis concerns itself primarily with thinkers who can broadly be placed in the continental tradition of philosophical thought. However, this thesis approaches these thinkers with a methodology that owes a great debt to the analytic tradition within philosophy. This approach reflects the overall aims of my thought and work.

My legal education was strongly influenced by the Anglo-American school of analytic philosophy. My legal studies emphasised a focus upon the importance of defining terms as well as argumentative clarity and precision in the legal arguments that I was to make. I have continued with this analytic method in

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[3] *CC* 1.

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this work, in particular paying particular attention to the coherence of his works and claims. As such, my focus has been upon whether Agamben's thought is logically coherent, and whether there are any contradictions within his beliefs and claims. In undertaking this analysis which aims to be rigorous this work does not simply aim to deconstruct Agamben's thought. Through this analysis it is possible to tease out hidden consequences and explore the desirability of the work of a thinker like Agamben.

As stated previously, this approach can lead to a claim that this work focuses too heavily upon individual thinkers rather than the political utility of their thought. This can seem contradictory, especially as I have stated that my interests in Agamben are driven by the political nature of his work. However, this thesis is not a 'political' text in the narrow sense of utilising elements of a thinkers work and applying them to a specific problem. I would rather characterise this thesis as 'political' in a broader sense.

Although I would class myself as adopting a broadly hermeneutic method, I have chosen not to adopt Foucault's 'toolbox' method of interpretation with respect to the thinkers engaged with here. Instead, the broad scope taken is intentional, aiming not to focus upon one specific aspect of Agamben's thought but upon the coherence of Agamben's stated radical political and philosophical aims. This thesis aims to analyse Agamben's wider philosophical arguments and particularly his attempt to forward an ethical form of political and legal belonging. This does reflect a form of trepidation when approaching Agamben's works. Keeping Berlin's caution against the abuse of positive liberty in mind, I set out to explore whether the implications of Agamben's thought could lead to suppression or even entrenching structures of power and domination. However, this approach was necessary for me as I viewed Agamben's philosophical aims favourably. His attempt to conceive of an ethical politics that could challenge the oppressive use of power and the legal order was attractive, not least because it was in no way programmatic. Instead of providing a schematic to follow, Agamben's focus upon the figure of whatever-being encourages a politics that does not appeal to divisive factors such as race, nationality or ethnicity.

Thus this thesis attempts to understand Agamben's thought and explore the potential for his ethical philosophy and politics through a detailed rigorous analysis of the smaller analyses and approaches Agamben uses to construct his

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wider philosophy. Primary amongst these is the exception. The exception is used as an analytic tool with which to trace not only what I see as interpretations of Agamben's work that do not do justice to the scope of his aims, but also to explore the implications and consequences of his political project.

This method reflects my own position within legal theory. My work aims to investigate the relation between the human condition and the law. I remain fascinated by how human life is ordered and constructed by legal and political processes, and how such processes can be used to dominate and oppress. Instead of forwarding an explicit political project, my method has been to investigate certain thinkers and aim to find connections between insights they provide. This enables me to develop detailed arguments based upon the connections and implications I find to positions held by others. I view philosophical investigation in much the same way as an analytic philosopher such as Tyler Burge:

> Philosophy is not primarily a body of doctrine, a series of conclusions or systems or movements. Philosophy, both as product and as activity, lies in the detailed posing of questions, the clarification of meaning, the development and criticism of argument, the working out of ideas and points of view. It resides in the angles, nuances, styles, struggles, and revisions of individual authors. In an overview of this sort, almost all the real philosophy must be omitted. For those not initiated into these issues, the foregoing is an invitation. For those who are initiated, it is a reminder- a reminder of the grandeur, richness, and intellectual substance of our subject.[4]

The clarification of meaning, the teasing out of connections between thinkers, the development of detailed arguments and questioning of the implication of certain positions held are all necessary precursors to make sense of the political possibilities of Agamben's thought, and of deciding whether these political possibilities are worth pursuing.

Agamben, Law and Legal Reasoning

This thesis interrogates Agamben's thought in relation to law and legal reasoning. Agamben sees ethics as focusing upon the absolute singularity of the individual as whatever-being. What is more, Agamben's thought is *messianic* in nature. Agamben sees messianism as focusing upon the world that is 'to come'. This is a

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[4] Tyler Burge, 'Philosophy of Language and of Mind: 1950-1990' (1992) 101 The Philosophical Review 3, 51.

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world where the foundational negativity that Agamben identifies as underpinning the human and social structures is *deactivated*. This use of 'deactivation' is quite deliberate and used by Agamben in his works. Agamben makes it clear that any attempt to 'overcome' this negativity is simply to posit a transcendent referent, and thus will not properly challenge the problem of negative foundations.

This thesis explores, through an analytic method, what this messianic world will look like. It does this through constructing through detailed argumentation, a messianic legal order. This legal order is little different from the current legal order. It still contains institutions and norms, but instead focuses upon whatever-being in every decision. It is this little difference that appeals, as Agamben does not attempt to pursue a revolution in terms it would be conventionally understood. Instead, what is emphasised is a focus upon the way the individual is thought about.

This form of thinking lends itself well to being applied into the sphere of legal reasoning. This move was deliberate, motivated by objections I had heard at conferences and from academics stating that continental thinkers such as Agamben were far detached from the legal order as it is experienced by solicitors and barristers. By applying Agamben's philosophical project to the area of legal reasoning, I aimed to understand Agamben's messianism by seeing how a messianic legal order would function. I also wanted to illustrate that Agamben's radical politics does not need to destroy the current order. Thus this thesis posits a form of precedent that accords with Agamben's messianic thought. This precedent does not rely upon self-referential foundations to justify its authority. This way, the messianic order no longer transmits law's negative foundations.

It is this move to a messianic, immanent philosophy that illustrates Agamben's relation to Foucault. It is contended that Agamben should not be thought of as a Foucauldian or post-Foucauldian thinker. Despite Agamben admitting that he is philosophically close to Foucault, I see Agamben's philosophical project and methodology as differing markedly from Foucault's. Agamben radicalises Foucault's philosophical methodologies and uses these radicalised methods to support his immanent philosophical treatise. Whilst Agamben's project is immanent in nature, Agamben reads Foucault's thought as retaining a transcendent nature. As such, both philosophers have different, rather than similar philosophical projects.

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As this is a thesis that deals primarily with Agamben's thought, it can read as though Foucault's works are being minimised. I certainly have not used Foucault's works as a toolbox for my own political ends. Rather, my intention has been to defend Agamben as a political thinker whose aims need not be read through Foucault, as many English speaking academics have done. This aim is driven by the fact that Agamben appeals to me in a way Foucault does not. By explicitly connecting his political analyses to a religious origin, Agamben appealed to my interest in first principles in a way that Foucault does not. This is not to state that Foucault's work does not deal with ontology or first principles. It is simply I find that Agamben's work speaks to me in a manner that Foucault's does not.

Agamben's immanent philosophy and critique of foundational *mythologemes* presents an original and important re-thinking of sovereignty. Agamben traces the origins of the relation between sovereignty and government to the Christian Trinity. He argues that they exist in a negative relation. Sovereignty is presented as an ineffable and transcendent realm that requires governmental action in order to be exercised. Thus government structures and carries out sovereign acts. Such a move places government, not sovereignty, as the most important actor in modern democracies. Thus in the messianic world the law would no longer have recourse to sovereignty as a *mythologeme* with which to justify its decisions. *True* sovereign decisions focus solely upon the thing itself, whatever-being.

This move from Foucault through sovereign governmentality is underpinned by Agamben's treatment of Heidegger, and indicates a deeper problem with Agamben's thought. This thesis does critique Agamben in relation to Heidegger. It does so through an analytic method that aims to show contradictions and inconsistencies that are present in Agamben's move away from Heidegger. Through this analytic method this thesis contends that Agamben's move towards whatever-being is marked by an attempt to trace a foundational negativity in the thought of Heidegger. Agamben attempts to avoid being read as a Heideggerian by distancing his thought from Heidegger's. It is this distancing that is argued to be based upon a fundamental misreading of Heidegger's *Dasein* and hermeneutic circle. Due to this, Agamben appears to equate hermeneutics and all

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forms of relationality with the foundational negativity that he attempts to deactivate.

It is this move that has profound implications for Agamben's thought. It is contended that both hermeneutics and relationality are profoundly important for the law and legal reasoning. Any political existence that is to avoid domination and repression must take account of that relationality. It is contended that Agamben implicitly admits of this within his work. Agamben's opus stresses a non-relational messianic politics. However this does not explain how individuals are to exist alongside one another in the messianic world to come. In addition, if the ethical decision focuses upon the singularity of whatever-being, then such a decision must always-already be hermeneutic. In this manner, I have found that Heidegger's construction of *Dasein* and *Dasein*'s relationality are more persuasive to me than Agamben's insistence upon a non-relational messianic. In fact, like Foucault I view Heidegger as "the essential philosopher".[5] Therefore in attempting to apply Agamben's thought to the sphere of legal reasoning I have been greatly influenced by Heidegger in trying to tailor Agamben's thought to avoid the potential contradictions it has given rise to.

Between Hermeneutics and the Other

It was this twin influence of the analytic method and Heidegger's ontology that led to the twin critique of Agamben constructed by this thesis.

The first critique is grounded in an analysis of Heideggerian hermeneutics. By following the implications of Agamben's critique of the ordering of *Dasein* it is argued that whatever-being retains a vestige of the negative relation Agamben attempts to deactivate messianically. In other words, this thesis alleges that Agamben is unsuccessful in his attempt to challenge the foundational negativity of Western philosophy. By clarifying the meaning of Agamben's critique, and by developing his arguments in as charitable a manner as was possible, this thesis contends that Agamben's avoidance of hermeneutics leads to an absurd situation where his work becomes *hyper-hermeneutic*. It is hyper-hermeneutic in the sense that Agamben attempts to render Heidegger's hermeneutic circle inoperative

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[5] Michel Foucault, 'The Return of Morality' in *Michel Foucault – Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984* (L D Kritzman ed, Routledge 1988) 250.

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through his own paradigmatic method. This leads to a view of law that is potentially deterministic in character.

The second critique is heavily influenced by my readings of Heidegger. It was through my engagements with Heidegger that I have alleged that Agamben's thought eschews conventional forms of relationality. It was this finding, coupled with my belief that a just and ethical politics must involve relationality that led to my critiquing Agamben in respect of Levinas's thought. Whilst Heidegger's influence over Agamben has been well documented by many, Levinas's influence has received little attention. This is in part due to the swift and cursory treatment given to Levinas's works in Agamben's thought. It is argued that Agamben's work owes an unspoken debt to Levinas's thought. This is a debt that Agamben denies exists.

Agamben's way of thinking about ethics, seen most clearly in the construction of a form of messianic legal reasoning, appears very close to Levinas's own ethics. I started to see a similarity between Agamben's figure of whatever-being and his insistence that whatever-being stands as a singularity, and Levinas's writings on the other. I found that when Agamben's ethical politics is transposed to the sphere of legal reasoning, his ethical decision that focuses upon the singularity of whatever-being has a parallel in Levinas's ethics of the other. This connection was important as Levinas's ethics explicitly rely upon relationality. This calls into question Agamben's attempt to posit a non-relational existence, and undermines the coherency of Agamben's political project.

This leaves Agamben in a precarious position. Despite his attempt to posit a *non-relational* existence, critiques from both Levinas and Heidegger suggest that whatever-being must be relational in nature. In particular, Levinas's ethics provide a very attractive foundation for an application of an ethical relationality into political existence and political movements. Levinas's thought offers a form of ethical reasoning that ameliorates the drawbacks of Agamben's thought, providing the relationality Agamben appears to overlook.

As this thesis has focused upon Agamben's thought what is not offered here is a detailed analysis of Levinas's thought and the implications of this thought. This is a task for a future project. In particular, the potential conflicts and areas of agreement between Heidegger and Levinas are not dwelt upon here. What

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this thesis does aim to do is provide a detailed analysis of Agamben's thought, and Levinas has been vital in completing this analysis.

It is clear to me that Agamben's thought has enormous implications for law. His critique of foundational *mythologemes* and the theological foundations of sovereignty will no doubt greatly influence future research. In addition the figure of whatever-being has the potential to stand as a paradigmatic figure of resistance against forms of state domination. However, the heart of his immanent project appears to contain an *aporia* that Agamben may not be able to escape from. It is this *aporia* that has led to the twin critique offered here.

Several sources have been invaluable in tracing these arguments. The first is the work of Thomas Carl Wall, which first exposed me to the potential influence between Levinas and Agamben. The second is the critiques of Agamben from Peter Fitzpatrick. Fitzpatrick's critiques opened up the debate between Foucault and Agamben, and directly lead to an understanding of how Agamben relates his thought to Foucault. The third source I would like to mention is the work of Andreas Philippoulos-Mihalopoulous. It was Philippopoulos-Mihalopoulos's work that first crystallised the connections between Agamben and the realm of legal reasoning and judicial decision-making for me.

The final source, and the catalyst for the majority of this thesis's arguments, was the work of Thanos Zartaloudis. Zartaloudis's work is cited and relied upon throughout this work. In particular, it has been invaluable for its commentary on the as yet untranslated volumes of Agamben's works, which would otherwise not have been available to me. Foremost amongst these is *Il Regno e la Gloria*. The sections in this work that refer to Agamben's untranslated works draw upon and analyse Zartaloudis's account of Agamben. This point is important for the reader to note. I have made the effort throughout this thesis to be clear when my analysis draws upon the primary literature of Agamben and when it draws upon the secondary literature on Agamben. Zartaloudis's work represents an attempt to transpose Agamben's wider works into thinking about the law and legal practice. Without Zartaloudis's work, this thesis's arguments and analysis would not have been possible.

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Chapter 1 begins this thesis by outlining paradigmatic views of the exception and emergency powers. The purpose of this is to set the stage for demonstrating how Agamben's conception of the exception differs from most scholars of emergency powers. This chapter contends that paradigmatic views of the exception characterise the exception as existing within a dialectic of norm and exception. This position is traced through a number of writers, including Thomas Hobbes, John Locke, Niccolò Machiavelli, Jean-Jacques Rousseau and Carl Schmitt. Agamben's thought is placed as being heavily influenced by Schmitt, and importantly as distinct from conceiving the exception as part of a norm-exception dialectic.

Chapter 2 builds upon the first chapter's attempt to position Agamben's writings on the exception as more than a commentary on emergencies. It does so by introducing the work of Agamben and his writings on the exception in detail and places it in relation to the influence of Michel Foucault. It is argued that Agamben's own reading of Foucault is mischaracterised in order for Agamben to generate critical distance between his and Foucault's work. It is also maintained that Agamben should not be thought of as a Foucauldian or post-Foucauldian philosopher. This is due to Agamben's philosophy of immanence, which stands in conflict with the transcendent schema of Foucault. However, Agamben's work is critiqued as not being as nuanced or as historically accurate as Foucault's. This move sees Agamben and Foucault as pursuing philosophically distinct projects, as well as detailing the central position of the exception to Agamben's work.

Chapter 3 builds upon the contention that Agamben's philosophy is a philosophy of immanence. This links into Agamben's argument that law has always-already been conceived of as a division between the transcendent and immanent realms. This division provides a negative basis for the law, and is traced back to a theological origin in the Christian doctrine of the Trinity. Agamben argues that it is not sovereignty but government or *oikonomia* that represents the proper political paradigm of the West. This argument is supported by reference to the different roles Agamben and Foucault ascribe to sovereignty and governmentality as well as the writings of Hans Lindahl on 'a-legality'. Finally, the chapter links Agamben's writings on sovereignty to ontology, explored though a redefinition of potentiality. This move aims to show how

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Agamben's project is ontological in nature, underlined by an aim to posit an ethical politics that counters the negativity Agamben traces in the law.

Chapter 4 explores Agamben's ontology. Agamben's ontology is traced to the pure existence of language. As such, Agamben's writings are distinguished from those of Jacques Derrida and Deconstruction. This is due to the proximity of Agamben's exception with Derrida's contention that the law is radically undecidable. The main thrust of the chapter concerns Agamben's critique of Martin Heidegger. Agamben argues that Heidegger's writings transmit the originary negativity expounded upon in Chapter 3. It is contended that such an argument is based upon a selective and reductivist reading of Heidegger that does not do justice to the breadth and scope of Heidegger's work. Specifically, Agamben's critique of Heidegger is based upon a mis-reading of Heidegger's construction of *Dasein*. This means that Agamben's ontology leaves itself open to a Heideggerian critique based in hermeneutics. This has profound implications for the application of Agamben's thought to the sphere of legal reasoning.

Chapter 5 traces Agamben's figure of whatever-being, the human being whose definition is not based upon the foundational negativity Agamben sees in *Dasein*. Whatever-being is a life lived beyond all relationality. A form of Agambenian legal reasoning is constructed focusing upon the singularity of whatever-being. For Agamben, in order to do justice to the figure of whatever-being and avoid slipping into a relationality that on his argument would lead to the creation of bare life, it is necessary to think the singularity of whatever-being in every legal decision. However it is argued that this conception of an ethical existence pays a large debt to the philosophy of Emmanuel Levinas. Levinas operates as a profound yet silent influence over Agamben. This chapter concludes by maintaining that Agamben's ethics and focus of whatever-being are a derivative version of Levinas's ethics of the Other.

Chapter 6 develops the implications of an Agambenian form of legal reasoning. Agamben's critique of foundational *mythologemes* forcefully challenges conventional understandings of the doctrine of precedent. An anti-foundational form of precedent is proffered, informed by readings of Edmund Burke. Agamben's focus upon the absolute singular of whatever-being can be reconciled with an anti-foundational precedent. Burke is supported by writings on repetition by Agamben and Søren Kierkegaard in making this contention.

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However, such a construction of legal reasoning is argued to be impossible without support from Levinasian ethics. This further reinforces the notion that Agamben's work is derivative to and inspired by Levinas. However, this move leads to Agamben's originality being questioned, as this account of legal reasoning can be critiqued by extant forms of particularistic legal reasoning. This move ultimately opens up a sphere of questioning relating to hermeneutics in relation to Agamben's work.

Chapter 7 focuses upon a hermeneutic critique of Agamben, and links back to the connections made in Chapter 4. Viewing Agamben's work through the lens of legal reasoning allows for the implications of Agamben's philosophical move away from Heidegger's hermeneutics to be seen. It is argued that Agamben's exception and form of reasoning is *hyper*-hermeneutic, in that he attempts to deactivate the hermeneutic circle. Due to Agamben's unsympathetic reading of the hermeneutic approach, his work is open to a challenge from the hermeneutic tradition. This ultimately calls into question Agamben's originality, as he remains trapped between Heidegger's hermeneutics and a Levinasian ethics of the Other.

Chapter 1: State of Exception

This thesis begins its investigation of Giorgio Agamben's thought from the position of the ongoing debate regarding the validity and the scope of exceptional powers in the time of emergencies. This position is chosen as it is within this debate that Agamben's works emerged into the consciousness of legal academia in the past decade. The radical nature of Agamben's politics is demonstrated here by illustrating Agamben's own critique of standard accounts of emergency powers, and linking his work to that of Carl Schmitt, which shows the close connection between the exception and sovereignty, the implications of which are explored in full in the following chapters.

Since the terrorist attacks upon the United States of America in 2001 there has been much political and academic debate concerning what amounts to acceptable responses by liberal, democratic societies to emergencies and crises. One area of this debate has focused upon finding the correct 'balance' between the requirements of security and the rights and liberties of individuals.

Within this debate, scholars of emergency powers have seized upon Agamben's conception of the 'exception' as informing the contemporary debate over anti-terror measures.[1] This can be traced to Agamben's attempt to trace the history of emergency powers within the twentieth century.[2] Allied with Agamben's claim that there is neither an overarching theory of the exception, nor of emergencies within public law,[3] this has lead to his work being seen as a repetition of themes familiar to the public law theory of constitutionalism.[4] However, Agamben does not repeat familiar themes but rather his work implicitly critiques them.

Agamben's claim of a lack of theory of the exception is in one sense inaccurate. There have been numerous attempts to theorise emergencies. These include proposals of alternative systems of dealing with emergencies to ensure that liberties and rights are protected in times of crisis.[5] However Agamben's

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[1] Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's *State of Exception*' (2006) 17 Eur J Intl L 677.

[2] *SE* 11-22.

[3] ibid 1.

[4] Vik Kanwar, 'Book Review: Giorgio Agamben, *State of Exception*' (2006) 4 Intl J Const L 567, 572.

[5] See for example, Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale L J 1029; Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?'

references to the 'state of exception' and 'exception' do not refer to a comprehensive juridical theory of emergency powers. Agamben's work on the exception maintains that the exception is a constitutive part of political existence, which ultimately affects not just the operation of the legal order, but also the very definition of life itself.

To illustrate Agamben's radical politics, and how his work on the exception has implications far beyond emergency powers, this chapter argues that the historical discourse on emergency powers transmits an underlying assumption that emergencies and exceptional times can be kept conceptually and temporally distinct from times of normality. This view has been characterised as the 'doctrine of exceptionalism' by Nomi Lazar, and envisions a dichotomous relation between the norm and the exception.[6] Although Agamben's work has been read as reflecting a "standard account" of exceptionalism that repeats this dichotomy then discusses the interpenetration of norm and exception, this paints too narrow an account of Agamben's work and its implications for legal thought.[7]

To show how Agamben's exception differs greatly from conventional views on emergency powers, this chapter forwards three arguments. First, the 'Business as Usual' model is considered.[8] This model contends that when a State is faced with an emergency or crisis, no emergency powers are necessary as the State's ordinary laws or constitution contain all the powers necessary to deal with any exigency. This model is criticised on the basis that such a view masks the actual operation of power and law that occurs within a State. The model is 'absolute' in the sense that it does not allow for a deviation from the 'normal' or 'ordinary' laws of the land. Even here, this model is still premised upon a conceptual separation of norm and exception.

Second, this chapter introduces a reading of scholarship on the exception through the works of Agamben. Agamben divides the scholarship of the exception into two broad groups. This division and separation is expanded upon in this chapter. These frameworks for thinking about the exception are critiqued on the

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(2003) 112 Yale L J 1011; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006).

[6] Nomi Claire Lazar, 'Must Exceptionalism Prove the Rule?' (2006) 34 Politics & Society 245, 246. See also John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 Intl J Const L 210, 221.

[7] Kanwar (n 4) 573.

[8] Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 88. The term 'Business as Usual' model was formulated by Gross and is used in this chapter.

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grounds that it remains impossible to conceptually separate the norm and the exception.

The first group of scholars Agamben identifies consider the exception as an extra-juridical question. The exception is 'outside' rather than 'inside' the law. The exception and the measures taken under it are primarily political decisions which may have legal implications. It is viewed as either impossible or undesirable to limit State actions during an emergency with standard legal accountability mechanisms.[9] The works of Thomas Hobbes and John Locke fall into this category. Hobbes put forward the notion of a supreme sovereign who would have the power to declare war and make peace as they saw fit, and respond to any crisis in any way necessary.[10] Locke proposed a system of extra-legal prerogative powers, exercisable by the executive for the benefit of the public. Locke's prerogative could be used to legitimate actions that were taken in a way that contravened existing law. Throughout their works, Locke and Hobbes accept the position that the exception may be separated and delimited from the norm – they both see the exception as exceptional.

The second group of scholars Agamben identifies are those that consider the exception to be contained 'within' the law. Such a view is mirrored in measures that allow for derogation from certain constitutional safeguards in certain specified situations.[11] The process of derogation and the existence of derogation clauses are examples of a 'model of accommodation'.[12] Models of accommodation are models of emergency powers which assume that the pressures of an emergency will lead to some kind of accommodation. Normal legal rules and principles are applied as much as possible, but the nation's legal or constitutional structure is relaxed or suspended to some extent. Whilst rights may have to be suspended, restrictions exist upon state power which aim to control the

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[9] See Gross, 'Chaos and Rules' (n 5) 1021-4; Tom Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 MLR 655, 658. Gross argues in favour of an extra-legal approach – in effect, a legal space which allows the state to act unconstrained by the law, but only for the time it takes to respond to the emergency.

[10] Thomas Hobbes, *Leviathan* (Richard Tuck ed, CUP 2004).

[11] *SE* 23. For example, Article 15 of the European Convention of Human Rights (ECHR) allows for derogation from certain rights of the ECHR as long as certain conditions are satisfied, for example there must exist a public emergency that threatens the life of the nation. See Humphreys (n 1) 678-9.

[12] See Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 17. The terminology coined by Gross and Ní Aoláin is used throughout this chapter.

state's excesses and prevent it from having unchecked power.[13] The classical example often given is the Roman Republic's system of dictatorship, a model of accommodation that provides the basis for many modern systems of emergency rule.[14] Roman law provided for a temporary dictatorship that was invested with special, extra-legal powers for the duration of an emergency, with a large number of formal and informal checks and balances aimed to stop it being abused. The Roman system of emergency governance was preserved into modernity through the writings of Jean-Jacques Rousseau and Niccolò Machiavelli. It is this view that most clearly adopts the doctrine of exceptionalism as the basis for its thinking, with the law clearly delimiting times of normality and times of emergency from one another.

Third, this chapter builds upon the claim that the distinction made by Agamben between an exception internal and external to the legal order is very difficult to maintain. This inter-penetration is borne out most clearly in the writings of the Roman dictatorship. Carl Schmitt's writings are introduced at this point to illustrate this difficulty in conceptually separating norm and exception. Schmitt's writings are also relied upon by Agamben in linking sovereignty to the operation of the exception. Before this connection is developed in the following chapter, this chapter traces the observation first made by Schmitt of the importance of the exception to the legal order. This serves as a route into exploring how the exception is used by Agamben to develop his critique of Western politics and his own messianic philosophy.

Schmitt was a Weimar legal and political theorist who became infamous when he joined the Nazi party after its rise to power in 1933. Schmitt's critique on liberalism caused a sea-change in thinking on emergency powers. He argued that liberalism's structure and operation meant that it was incapable of dealing effectively with exceptional situations. He proposed a response similar to that of Thomas Hobbes: A God-like sovereign would have absolute power in emergencies, and therefore would be able to deal with them effectively.

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[13] See Eric A Posner and Adrian Vermuele, 'Accommodating Emergencies' (2003) 56 Stanford L Rev 605, 606-7. Derogation creates a 'space between fundamental rights and the rule of law', allowing states to act inside the law, whilst at the same time transgressing the rights of individuals - in Tom Hickman's words, this creates a 'double-layered constitutional system'. See Hickman (n 9) 657.

[14] Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 17.

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However Schmitt was no extra-legal thinker, nor is his work here intended to serve as a defence of extra-legal thinking in relation to the exception. Schmitt denied that the exception could be effectively or conceptually divorced and separated from the norm. In effect, the exception *becomes* the normal system of government and comes to define sovereignty itself. Schmitt therefore connects the difficulties in separating norm and exception with the question of sovereignty. This 'solution' places sovereignty at the centre of every political and legal decision. The exception is the constitutive element at the heart of every decision. It is this premise that heavily influences Agamben's own work.

While Schmitt's theories have been criticised as anathema to the idea of liberal democracy and the rule of law by many theorists of emergency powers, it is argued that Schmitt should not be thought of as a mere fascist theorist. It is Schmitt's emphasis upon sovereignty that reveals a tension at the heart of the doctrine of exceptionalism. This tension exists between theories that accept the dichotomy of norm and exception and focus upon the correct balancing exercise between legal norms and emergency powers, and a claim that the exception is the very instance of sovereignty. Such a claim moves away from the dichotomy of norm and exception and reflects Agamben's later attempts to think of the exception as a constitutive part of modern political existence, apart from any dichotomous relation with a norm.

This chapter ends by showing how Schmitt posed the problem of the exception as fundamental to political existence. This sets the stage for the exposition of Agamben's work, which uses the exception as an analytical tool with which to gain purchase upon the implications and consequences of Agamben's thought for politics and law.

Historical Perspectives on Emergency Powers

The theoretical framework underlying received doctrine on emergency powers talks in terms of norms and exceptions, which exist in a continuing dialectic. This relationship describes the norm as the regular form of government that exists when there is not an emergency, and the exception is used to describe "circumstances that cannot be governed by regular means".[15] The two main schools of thought on the exception that Agamben identifies both accept this conceptual divorce.[16] Before considering these two schools, a third conceptual model should be addressed, namely the one which denies that any emergency powers are necessary at all to deal with any situation, no matter how grave.

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[15] Ferejohn and Pasquino (n 6) 221, 226. See also Plato, *The Laws* (Trevor J Saunders tr, Penguin Books 1970) 164.

[16] *SE* 23.

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The 'Business as Usual' model

The Business as Usual model is not a true model of emergency powers. It rejects the idea that special legislative, constitutional or judicial measures should be introduced into the legal order for the purposes of combating the particular emergency or crisis.[17] The regular legal order provides all the answers to any crisis which may arise, and there is no need to provide special governmental or executive powers, even on a temporary basis. Such statements that declare the legal order to be the same in times of war as in peace project a belief not only in the perfection of the law, but also a belief in its consistency and justice. This view has been endorsed by the judiciary, most famously by Lord Atkin in his dissenting judgment in *Liversidge v Anderson*:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[18]

The Business as Usual model has been touted as useful to any consideration or study of emergency powers as it reflects an 'ideal' that is seldom if ever reached. The argument follows that the model provides a symbolic attachment to sustaining ordinary legal principles, rules and norms, even during crises. By keeping committed to the existing legal structure it may be possible to discover what measures are actually necessary to deal with each given emergency.[19]

It is argued that this view, however idealistic, serves to mask the real operation of the legal order. An idealistic perception of the legal order reinforces the view that the legal order is, or should be, a system of norms that should be applied in every possible scenario that arises. Such a position is a legal fiction, a desire to encompass the entirety of the social order within legal rules and norms. It also ignores the scholarship on legal reasoning that focuses upon a critique of

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[17] Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 88.

[18] *Liversidge v Anderson* [1942] AC 206, 244 (HL). For a discussion on Lord Atkin's judgment and those of the majority see David Dyzenhaus, 'Intimations of Legality amid the clash of arms' (2004) Intl J Const L 244, 250-8.

[19] Tom Sorell, 'Morality and Emergency' (2003) 104 Proceedings of the Aristotelian Society 21, 33.

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such a formal view of the legal order. H L A Hart gave the example of a by-law that prohibits a person from taking a vehicle into a park.[20] There is an ambiguity surrounding the interpretation of the word 'vehicle' that means the word is susceptible to different interpretations. For instance, what would be the decision in a case involving a man who entered the park pushing a baby's pram? The judge would face an interpretative choice in determining exactly what was meant by the word 'vehicle'. For Hart, some events would clearly fall under the rule and other borderline cases, such as the pram should be left to the judge's discretion.

The Business as Usual model seems to share this formalistic approach. If the rules can cover every possible scenario, then those self-same rules should be applied in both unambiguous as well as ambiguous cases. If we ascribe this view to Lord Atkin, then the role of the judge is to interpret those rules to ensure that they always apply to any possible scenario. However this formalistic approach has never been without criticism. Lon Fuller maintained that an exception could be made to the rule prohibiting by-laws in the park in relation to a truck erected by war veterans as a monument. In such a case construing a truck as a vehicle could be quite improper, or at least open to debate.[21]

This jurisprudential example calls into question the Business as Usual model's arguments. If it is to be maintained that the model rejects special measures by government and the executive to deal with emergencies, what is to happen to the discretion accorded to the judge? Would such discretion in applying the rules not also be considered as a special measure that could be used in emergencies? Fuller's example shows how a judge, faced with a seemingly clear rule, can use its ambiguities and contextual application to create an exception. In this sense, the judge's decision making and his discretion would be constrained. More than this, such a position would admit the existence of exceptions to the rules, which the Business as Usual model appears to preclude.

Thus the model presents a version of law as an ideal that effaces the complexities of legal reasoning that occur in courts. Instead, a fiction is striven for where every aspect of the law is regulated and delimited by norms. Such a view reflects a rigid formalism that was criticised by Hart in *The Concept of Law*. For

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[20] H L A Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 124-6.
[21] Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 Harvard L Rev 630, 663.

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Hart, the absolute quality of rules is tempered by the 'open-textured' nature of language and law.[22] The law uses general linguistic terms in its operation that will always require external application, in particular due to the relative ignorance of fact of the law and the indeterminacy of its aim.[23] In short, it is not possible to foresee every situation that will come before the courts and so, to that extent, the law is indeterminate.

The indeterminacy thesis was developed by the Critical Legal Studies (CLS) movement in the United States. In short, CLS theorists contended that the law is indeterminate because it allows any outcome to be justified.[24] However, the indeterminacy thesis did not originate with CLS, but rather with philosophy. Ludwig Wittgenstein meditated profoundly upon the nature of rules and their indeterminate and context-dependent nature in his *Philosophical Investigations*.[25] Rules can never have stilled or determinate meanings due to the changing nature of language itself or the changing meaning of words over time. It is not as important to dwell on Wittgenstein's wider thesis as it is to note this point, which was itself taken up and developed by H L A Hart in *The Concept of Law*. Due to this lack of determinacy within language, the exercise of legal reasoning in every case will be 'hermeneutic'.

Hermeneutics is an act of translation in which an original meaning is unlocked and communicated.[26] Hans-Georg Gadamer places the interpreter (in the legal sphere the lawyers and judge) at the heart of this hermeneutic tradition:

> The word "hermeneutics" points back ... to the task of the interpreter, which is that of interpreting and communicating something that is unintelligible. ... The interpreter of what is written ... has the task of overcoming and removing strangeness and making its assimilation possible.[27]

The interpreter is thus placed at the heart of the hermeneutic exercise, which in turn points to the fact that such interpretation becomes, to some extent, subjective and based upon the interpreter. The meaning of a text is not to be compared with a

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[22] Hart (n 20) 128.
[23] ibid.
[24] For an exposition and critique of this indeterminacy thesis, see Ken Kress, 'Legal Indeterminacy' (1989) 77 California L Rev 283.
[25] Ludwig Wittgenstein, *Philosophical Investigations* (G E M Anscombe tr, Basil Blackwell 1958).
[26] Peter Goodrich, 'Legal Hermeneutics; An Essay on Precedent and Interpretation' (1985) 7 Liverpool L Rev 99, 109.
[27] Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G Marshall trs, 2nd edn, Continuum Books 2006) 533.

fixed point of view. Rather, a hermeneutic understanding of a text involves the interpreter's own thoughts, which have gone in to re-awakening the text's meaning.[28]

What does this mean for legal reasoning and the exception? For the Business as Usual model, it appears highly unlikely that one interpretation of a text will be possible. This interpretation maintains that there is no need for the exception within the legal order. Due to the plurality of interpreters that exist within the legal order, and the fact that each interpretation is unique to the interpreter and expresses the meaning of the text in common,[29] the notion that the exception can be excluded from the legal order entirely appears utopian and highly unrealistic.

The hermeneutic exercise of legal reasoning means it is highly unlikely that one interpretation will be possible due to the plurality of interpreters that exist within a legal order. In this way, the exception, rather than being excluded from all considerations, results from the complexities of legal reasoning and interpretation. The Business as Usual model appears to stand as a political imperative, insisting that courts renege on any hermeneutic exercise that would create an exception to a legal rule.

The 'Ideal' System

This notion that emergency powers are not necessary in any situation is one that has been rejected by many judicial authorities as overly naïve in the sense that is foolish to think that nations will slavishly adhere to the 'Rule of Law' in the face of grave threats, especially when adherence to the norm may in fact lead to the destruction of the State itself. As Justice Jackson stated in the Supreme Court: "[T]he constitution is not a suicide pact".[30]

The notion of the 'ideal' order has been appropriated by courts and academics in order to justify the necessity of emergency powers. The legal rigidity of the ideal order in the face of severe crises is thought of as detrimental to long-term notions of the Rule of Law. A point to develop here is exactly what is meant by the 'Rule of Law'. Whilst the term may appear self-evident, Brian

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[28] ibid 390.
[29] ibid.
[30] *Terminiello v City of Chicago*, 337 U.S. 1 (1949) 37 (Supreme Court of the United States).

Tamanaha has noted that the Rule of Law is "an exceedingly elusive notion" that gives rise to a "rampant divergence of understandings".[31] Whilst there may be broad support for the Rule of Law, writers have contrasting convictions about what it is. Tom Bingham suggested that at the core of the Rule of Law is a principle that:

> All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of laws publicly and prospectively promulgated and publicly administered in the courts.[32]

Such a reading of the Rule of Law can be argued to be at the heart of the Business as Usual model's reasoning. The belief that all bodies should act within the law is implicit in the suggestion that the legal order should allow for no emergency or exceptional powers under any circumstances.

However, such 'legal absolutism' could allow a government to superficially agree that the Rule of Law will be adhered to when an emergency arises, but leads to it "turning a blind eye to what is going on beneath the surface".[33] The ideal legal order provides an opportunity for States to formally adhere to legal norms whilst acting extra-legally in protecting themselves against external threats. Bruce Ackerman argues that such a position may actually lead to more, rather than less, curtailing of liberties and rights:

> If respect for civil liberties requires governmental paralysis, serious politicians will not hesitate before sacrificing rights to the war on terrorism. They will only gain popular applause by brushing civil libertarian objections aside as quixotic.[34]

In his seminal article, 'Political Action: The Problem of Dirty Hands', Michael Walzer argues that those in political power may be faced with a choice between two courses of action, both of which may be unpalatable or even wrong for them to undertake.[35] One decision may lead to the law being broken or violated, another may lead to a terrorist attack occurring. Walzer argues that sometimes the 'right'

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[31] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 3.

[32] Tom Bingham, 'The Rule of Law' (2007) 66 CLJ 67, 69.

[33] 'Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity' (1989) 23 Israel L Rev 146. See also Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 95.

[34] Ackerman (n 5) 1030.

[35] Michael Walzer, 'Political Action: The Problem of Dirty Hands' (1973) 2 Philosophy and Public Affairs 160. For a contemporary discussion of this issue of 'dirty hands', in the form of a philosophical defence of targeted killings in the war on terror, see Daniel Statman, 'Targeted Killing' (2004) 5 Philosophical Inquiries in Law 179.

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decision may amount to a moral wrong, or involve ignoring or usurping the law. There is an apparent congruence between this ideal system of law and approaches such as Walzer's in that such extra-legal measures require 'business as usual' in the application of the law.[36]

Despite these criticisms, both hermeneutic and ideological, it can be maintained that the Business as Usual does accept and adopt the conceptual separation of norm and exception. The law is conceived of as a formal system of norms, maintained in a completely normative, rigid order. The norm has primacy, but only because of the exception's exclusion from the law. The exception thus limits the scope of the law, and the scope of the Rule of Law, by marking out areas which the law is not permitted to encroach upon.

Due to the model's acceptance that the norm and exception can be conceptually separated, and the acceptance that the law is comprised of a system of legal norms, the notion of 'balance' enters the legal lexicon. This refers to the quest to find an appropriate balance between security and civil liberties in responding to exceptional circumstances. Security here accords to times of exception, and civil liberties accord to times of normality. This presupposes that in times of normality, civil liberties will not be curtailed. Civil liberties may be curtailed in times of emergency in order to protect security. In either sense, a balancing exercise presupposes that a correct level of security and civil liberties can be reached, which is only possible if the two remain distinct from one another.[37]

Any such balancing exercise made in periods of extreme emergency is likely to be heavily biased in favour of security rather than liberty. It is worth noting that historical evidence suggests that creating exceptions and modifications to the normal legal order as part of this balancing exercise has a pernicious effect on general legal rules and principles in those countries.[38] Temporary emergency acts become permanent; restrictions of rights in certain situations get expanded to deal with all circumstances; emergency powers become institutionalised.[39]

Using the balancing exercise between liberty and security there has been an attempt to try and legislate for the exception and include it in a relation with

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[36] Tom Hickman, 'Law in Times of Crisis' [2009] PL 175, 177.
[37] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2005) 445-7.
[38] Hickman, 'Law in Times of Crisis' (n 36) 176.
[39] Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 228-43.

the law. It is these attempts that Agamben has separated into two groups – the exception that is extra-juridical and the exception that is internal to the law. Whilst the two groups appear to approach the problematic of the exception and law in different ways, they share two important features. First, both theories attempt to conceptually and temporally separate norm and exception. Second, these attempts are ultimately impossible. It is impossible to conceptually and temporally separate norm from exception. Any attempt will lead to an ambiguity between the two terms. It is this claim that characterises not only the works of Schmitt, but Agamben as well. It is to these two groups of scholarship that this chapter now turns.

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The Extra-Juridical Exception

Thomas Hobbes' and John Locke's works support the idea of an extra-juridical exception, where the exception is other to the law. As such in an emergency the sovereign power can act outside of legal constraints in order to contain and control the situation, and to restore the normal order. The exception remains separated from the normal legal order, being invoked at times when the normal legal order cannot deal with a situation or set of events.

Hobbes's *Leviathan* is a detailed defence of a State where the subjects deferred all decisions to a supreme power. The State is instituted along a social contract model for the security of all of the subjects, and places the security of the general populous as the primary concern of modern government. The sovereign can take whatever measures necessary to ensure the security of the populace and the State. Hobbes' world is characterised by the violence of human behaviour and human nature which renders effective government by normative structures impossible.[40]

In the *Two Treatises of Government*, Locke adopts a similar social contract model and details his theory of prerogative powers, granted to the executive and exercisable for the "public good".[41] Locke is often considered as a liberal political theorist, but this work demonstrates that even he felt it was necessary to allow for a discretionary executive power. From this position, it can be argued that the exercise of this power for the 'public good' would logically include times of crisis and emergency, and not just times of 'normality'.

The State of Nature

Both Hobbes' and Locke's works expound the notion of a pre-legal state of nature, a pre-existing society which must be overcome through the adoption of a social contract between the ruler and the people. This hypothetical scenario was, and still is a necessary component of all theories of social contract.

Hobbes and Locke differ on their interpretations of the state of nature. Hobbes's state of nature is one where men are guided by their emotions. This leads to conflict between individuals over scant resources and attacks on one

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[40] Lazar, 'Must Exceptionalism Prove the Rule?' (n 6) 259.
[41] John Locke, *Two Treatises of Government* (Peter Laslett ed, CUP 1988) paras 158, 160, 164, 166, 210. All further references are to the *Second Treatise of Government*.

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another for their own safety or a sense of glory.[42] This perpetual competition leads to a state of perpetual war, "of every man, against every man",[43] and means that the life of man is "solitary, poor, nasty, brutish and short".[44] Locke's state of nature also pre-supposed that all men were equal within it, but is not a perpetual state of war.[45] Instead, every individual's main aim is self-preservation, and everyone must try to respect others rights as far as it is possible to do so.[46] For both men the state of nature is something that needs to be overcome in order for an orderly society to be established.

Agamben rejects the position of the social contract as a fiction on which the legitimacy of the State is built.[47] The state of nature thus does not exist. Rather, it is a fictional construct used to justify and legitimate the social contract, from which the State draws its power. In making this claim Agamben is following a tradition of scepticism when faced with social contract theories, and in particular the idea that social contracts have 'origins'.

This tradition can be traced to the philosopher David Hume. Scott Veitch has summarised Hume's twofold criticisms of the social contract succinctly: first, Hume argued that it was not possible to create from scratch social obligations through a contract when the institution of promising requires the idea of social obligations in the first place. Second, Hume argued that if there were good reasons for creating social obligations then these would hold regardless of whether there was a contract or not.[48] The construct of a social contract outlines a fictional origin of State power. This critique being made, it is now possible to take a closer look at the social contracts of Hobbes and Locke.

The Social Contracts of Hobbes and Locke

The solutions proposed by the two philosophers have elements of similarity. Hobbes' solution to free men from perpetual war in the state of nature is to erect a

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[42] Hobbes (n 10) 87-8.
[43] ibid.
[44] ibid 89.
[45] Locke (n 41) para 19.
[46] ibid para 6.
[47] *HS* 181.
[48] Scott Veitch, 'Doing Justice to Particulars' in Emilios Christodoulidis (ed), *Communitarianism and Citizenship* (Ashgate Publishing 1998) 220-34, 226. See also David Hume, *Essays Moral, Political and Literary* (Liberty Classics 1987) 471, 474.

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commonwealth with a common power ruling over men.[49] This is done through a covenant, where each individual transfers all of their rights to this sovereign power:

> This done, the Multitude so United in one Person, is called a COMMON-WEALTH, in latine CIVITAS.
> This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of that Mortall God…
> For by this Authoritie, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength conferred on him, that by terror thereof, he is inabled to conforme the wills of them all, to Peace at home, and mutuall ayd against their enemies abroad.[50]

Without the possibility of decisive actions and decisions being taken by a single man, or a small group of men, the state of nature will not be overcome. Men transfer their rights in order to be made safe and the sovereign rules primarily in order to keep the people safe – this is the principle of *salus populi*. Public safety is to be achieved through 'good' laws and institutions – those which exist for the good of the people, not the sovereign.[51]

Leviathan advances a view that the best responses to any set of circumstances are not those based on a normative set of rules or values, but those based on an absolute sovereign's own decision. The Leviathan is granted a huge amount of discretionary power, and is in effect a mortal God whose only constraint is the principle of *salus populi* – the Leviathan's obligation to keep the population safe, the primary reason behind its creation. As long as the Leviathan acts in accordance with the *salus populi*, it may do whatever is necessary to preserve peace, including making the rules of the civil law and for property, as well as making war or peace as they see fit.[52]

Locke's contention that civil government is the correct means to address the ills of the state of nature is aligned with Hobbes's thinking. However the system of civil government proposed by Locke is far less absolute than Hobbes, and based upon the principle of the protection of private property.[53] The social contract is made amongst the people, rather than between a Leviathan and

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[49] Hobbes (n 10) ch 17.
[50] ibid 120.
[51] ibid 240.
[52] Hobbes details the sovereign's powers in chs 18, 121-6.
[53] Locke (n 41) para 124.

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subjects. Civil government has three factors that the state of nature does not: an established, settled law; a judge with authority to determine all differences according to the established law; and the power to back up and support the sentence when right, and to give it due exception.[54] Locke maintains that this power is strictly limited to the purpose for which it was given.

This commonwealth includes a legislative power, including a supreme legislative government and an executive power.[55] Locke defines executive power as that which is involved in the execution of the laws, and exists only when the law has summoned it into being.[56] Locke favours that executive power, which should be a permanent position, be vested in an individual as it will therefore not be subordinate to the legislative.[57] Importantly for Locke, these powers given to the legislature and executive remain on trust and must be used to benefit the wider population.

The 'Norm' and 'Exception' of the Leviathan

Despite the 'God-like' appearance of Hobbes' sovereign, *Leviathan* still accepts the doctrine of exceptionalism. Hobbes actually strives to make existence under the Leviathan as 'normal' as possible. The sovereign is impelled by the 'law of nature', which forbids an individual to do anything that impacts negatively upon his life or health, not only to ensure the safety of the people, but also allow the subjects as much liberty as is compatible with security, not as much liberty as the sovereign allows them to have.[58] Therefore implicit within Hobbes' work is the distinction between times of normality and times of emergency. Hobbes' work could be characterised as a harbinger of the exception, and Hobbes seen as the writer who brought the exception into political thought most vividly. However within his work is the possibility of a separation of normality and emergency, a separation that calls into question the authoritarian reading of Hobbes so often ascribed to him.

In times of normality the sovereign does not need to use any of the vast discretionary power available to him, and liberties for the individual are wider

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[54] ibid paras 124-6.
[55] ibid para 134.
[56] ibid paras 144, 151.
[57] ibid para 151.
[58] Tom Sorrell, 'Schmitt, Hobbes and the Politics of Emergency' (2003) 26 Filozofski Vestnik 223.

than in times of emergency. This is supported by Hobbes' defining liberty in a negative sense. The liberty of the subject is determined by the silence of the laws. If the laws do not cover a specific area, each individual is free to act according to his own discretion.[59] The individual has freedom to act in the way they please so long as there is not a law that prohibits that action. Such a view appears more libertarian rather than authoritarian. A subject of the Leviathan is left to live their life, and their freedom is only interfered with if they in turn transgress a law or rule. In times of normality, there will not be a need for this freedom to be curtailed through the sovereign's discretionary power. This leaves the subject a zone of freedom within which to act.

On closer inspection a deeper problem is revealed. The norm and the exception are meant to be kept separate, yet all the checks and balances that exist upon the Leviathan are informal. A lot of trust is placed in the sovereign's self-constraint in not abusing the 'spirit' of the social contract, as there are no legal checks to their power. There is the risk that the norm and exception will become indistinguishable over time. The sovereign's use of power is not constrained and no distinction is made between times of normality and times of emergency. Despite the libertarian reading of Hobbes offered, *Leviathan* illustrates the conceptual difficulty of clearly delimiting normality from emergency. It is this problem in Hobbes that was explicitly expanded upon by Carl Schmitt.

Locke's Theory of the Prerogative

Locke maintained that the Rule of Law was an insufficient tool on its own to be able to regulate society. The Rule of Law has to be supplemented with an extra-legal discretionary prerogative power exercisable by the executive:

> …the good of the society requires that several things should be left to the discretion of him that has the executive power. For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of nature a right to make use of it for the good of the society.[60]

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[59] Hobbes (n 10) ch 21, 152.
[60] Locke (n 41) para 159.

Locke defines prerogative power as "nothing but the power of doing public good without a rule".[61] There are two key factors in this definition. First, prerogative is a power for the public good and is limited by that good. Secondly, prerogative is not bound by any laws passed by the legislature; it is a power that is above and beyond the law, permitting the executive to act both in the absence of law and to act against the law.[62]

Such a prerogative power is necessary to Locke to deal with situations where a rigid application of the laws may lead to harm. Locke clearly envisions a separation of times of normality and times of emergency. The prerogative power should be viewed as an exceptional power. It allows the executive to "act according to discretion, for the public good, without the prescription of the law, and sometimes even against it".[63] Governmental power is necessarily limited by the purpose it was instituted for, the public good. The 'public good' may mean acting for the benefit or protection of lives, liberties or property. The breadth of this discretion is even more evident when the executive's functions are noted: it can dismiss and assemble the legislature, and can call elections. This responsibility is placed in the executive in a form of fiduciary trust to be used for the public good.

To Locke, the question of what is a legitimate prerogative power and what is an illegitimate use of prerogative power by the executive is simple. If the executive is using its discretionary power for the public good, it is a legitimate use of the prerogative.[64] The best rulers have always increased the scope of the prerogative, because they have always acted in the public good. The prerogative is:

> Nothing but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good.[65]

If the scope of the prerogative is increased by one individual, what is to stop the next individual who wields executive power from using the power for his own ends? Who is to judge whether or not the executive or legislative breaches their

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[61] ibid para 166. Locke also defines prerogative in paras 158, 160, 164 and 210.
[62] For the influences behind Locke's formulation of his prerogative, see Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 119.
[63] Locke (n 41) para 160.
[64] ibid para 161.
[65] ibid para 164.

trust? For Locke, the answer is clear: "The People shall be Judge".[66] Because the people constitute the latent sovereign power in civil society they have the final say and can theoretically remove the executive. Once again the emphasis is on informal controls to executive power.

Here the distinction between normality and exception is blurred once more due to the use of the prerogative power for 'public good'. Such a power does not only have to be used in times of emergency, but can also be used in times of normality. In this way, Locke does not allow for 'emergency' powers, but rather a wide discretionary power that is available at all times.

What is important to note about Hobbes and Locke's work is that they both accept and make the received distinction between norm and exception in granting a wide discretionary power to deal with emergencies. The norms both theorists speak of are civil society for Locke and the system of *salus populi* under the Leviathan. Both theorists distinguish these 'normal' periods of time from 'exceptional' situations. These are where the executive needs to use their power of prerogative, or where the Leviathan needs to take drastic measures to secure the safety of the people. Although this distinction is made, it is by no means clearly defined. There remains an ambiguity regarding the distinction between normality and exception or emergency. This ambiguity is reflected in the second group of scholarship that Agamben has identified in relation to emergency powers.

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[66] ibid para 240.

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The Exception Internal to Law

This approach to emergency powers inscribes emergency powers within the constitutions and laws of a State. The law formally defines when and how an emergency can be declared, and what can be done by whom to rectify the situation. In emergencies some rights and constitutional provisions may have to be suspended, but emergencies and emergency powers will be legally limited to try and prevent the State or Executive from having unchecked power.

The Roman Dictatorship

Roman law had within it a system of emergency rule that was built into a constitutional framework. The Roman system of dictatorship epitomises the belief that a constitutional state can alter its pattern of government temporarily in order to preserve it permanently.[67] The Roman dictatorship is the most well known system of emergency powers from the ancient world, and Niccolò Machiavelli wrote that the Roman dictatorship "deserves to be considered and ranked among those to which the greatness of Rome's vast empire was due".[68]

The Roman Republic's legal order

The Roman constitution had a complex system of checks and balances which applied to the exercise of executive authority, the purpose of which was to maintain the system of rights which every Roman citizen enjoyed. Rome had three main centres of power: the Senate, the magistrates and the people. Rome also had three kinds of power. The first was *auctoritas*, which was authority in matters requiring judgment. *Auctoritas* was a juridical power that enabled its holder to authorise an act. The second was *potestas*, which equates to a form of coercive force and power. The third is *imperium*, which is the supreme administrative or coercive power.[69]

The Roman Senate's power was *auctoritas*, and the Senate was responsible for the public purse and advising the Roman Magistrates.[70] The

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[67] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Transaction Publishers 2002) 15.
[68] Niccolò Machiavelli, *The Discourses* (Leslie J Walker tr, Penguin Books 2003) 195.
[69] Nomi Claire Lazar, 'Making Emergencies Safe for Democracy: The Roman Dictatorship and the Rule of Law in the Study of Crisis Government' (2006) 13 Constellations 506, 510.
[70] ibid.

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Senate held no real power of its own. The Magistrates were the elected officials of Rome, and it was the Magistrates who appointed the Senate. The Magistrates carried out the day to day running of the State, acting as an Executive, and would normally follow the *auctoritas* of the Senate. The Senate was as much a legislative body as it was an executive body, but it was very large and often divided. Magistrates wielded two types of power, *potestas* and *imperium*.[71]

Potestas, the coercive force of Magistrates, was used by them to conduct their duties. These were limited by task, law and the potential of a veto from a fellow Magistrate or a Tribune, another elected official of the plebs. *Potestas* in this way could be used to prevent the exercise of the *potestas* of another official. *Imperium* was the supreme magisterial power that could be held. The executive officials were those who bore the *imperium*. It gave a Magistrate power over the bodies of the people. All magistrates save the Dictator were elected by the citizens of Rome.[72]

The *imperium* gave its holders the right to conduct military operations outside the city and to kill those who opposed those operations without granting them due process – these included the consuls, proconsuls and praetors. The highest executive authority was carried out by two consuls who had vast power: they could command the army and exercise jurisdiction in all matters.[73] Each consul was elected for a single term of one year and each held a veto over the other's decisions. This complex system of government was cumbersome and unwieldy, which was inadequate during times of emergency.[74]

The Dictatorship

The origin of the Dictatorship is not entirely clear but the first dictator is generally accepted to be T Larcius Flaccus soon after the Roman Monarchy was replaced by the Roman Republic in 509 BC.[75] The Dictatorship, the only non-elected magistrate of the Republic, was created due to the continual wars that threatened the early Republic and was designed to be limited both temporally and in purpose. An appointment to the position of Dictator was the highest honour which the

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[71] ibid 511.
[72] ibid.
[73] Herbert F Jolowicz, *Historical Introduction to the Study of Roman Law* (Barry Nicholas ed, 3rd edn, Greenwood Press 1972) 45.
[74] Lazar, 'Making Emergencies Safe for Democracy' (n 69) 511.
[75] Rossiter (n 67) 21.

Republic could confer upon an individual, so the individual chosen was usually a well-known public figure, and, after 320 BC, Dictators were usually men who had held consular office.[76]

In cases of emergency, if the Senate was convinced that the Republic was in grave danger, it was able to propose that either consul appoint a Dictator for a period of time lasting up to six months.[77] Although there were no legal checks on the consul's power of selection, at the height of the Senate's power in the Old Republic it usually ensured that its favourite candidate for the Dictatorship was selected, so there were political checks on the consul's power of selection.[78] Once appointed, the Dictator became the highest magistrate of the republic with *imperium*, superior even to the consuls.

The Purpose and Powers of the Dictator

There were two main varieties of dictatorships in the Roman Republic. The *dictatura rei gerundae causa*, the dictatorship for getting things done, was appointed to save the state from being totally defeated in war. The *dictatura seditionis sedandae et rei gerundae causa*, the dictatorship for suppressing civil insurrection, was appointed to deal with internal strife.[79]

Fifty of the ninety-four recorded dictatorships in the office's three hundred year history were *rei gerundae causa*, and only four were instituted to put down civil insurrection, *seditionis sedandae*.[80] Late in the history of the Dictatorship, individuals were appointed to the role to fulfil important non-military tasks such as conducting religious ceremonies, holding elections or other ceremonial tasks in the absence of a magistrate who would usually act.[81] The *dictatura rei gerundae causa* is perhaps the most well-known form of the Dictatorship. It was the most widely used and was instituted when the future of the Republic was at stake. This dictatorship is discussed here.

When a Dictator was appointed, he had an *imperium* conferred upon him which was not subject to the limitations that the magistrates were placed under

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[76] ibid.
[77] ibid 19, citing Claudius, *Oratio Lugdunensis* I 28. The consuls could also propose that a Dictator be appointed but this needed Senate approval.
[78] ibid 20.
[79] Lazar, 'Making Emergencies Safe for Democracy' (n 69) 511.
[80] ibid 512.
[81] ibid.

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when exercising *imperium*. The Dictatorship, like all other Roman institutions, existed within a web of formal and informal constraints.[82] The Dictator was subject to a few important checks and balances but the limited number indicates just how much power he legally possessed. It is wrong, though, to think of the Dictator as having absolute power as this ignores the informal constraints that influenced his decision-making.[83]

The most important limit to the Dictator's power was that a Dictator *rei gerundae causa* was appointed to deal with external threats to the Republic, granted a specific task to fulfil and could only be appointed for a non-renewable term of six months. Therefore only one Dictator could be appointed in any one year.[84] If he had completed this task before his six-month term had expired, he was to step down and his orders were no longer to have any legal effect. Once the Dictator had stepped down the original legal order would be restored. This system was chosen because it was only possible to conduct military campaigns in the time of the Early Republic during the summer months. This time limitation did not preclude an individual from being appointed Dictator again.[85]

This encouraged Dictators to behave well as the Dictatorship was rarely the last public post for any individual. Many ran for the position of consul afterwards. Public life in Republican Rome was much more transparent and open than contemporary politics. If a Dictator wished to hold further public office he would not wish to make controversial or unpopular decisions which may affect the very citizens who would control his reappointment to public life.[86]

The Dictator's role was a defensive one. He could not embark on an aggressive war which was solely the right of the people and the Senate to declare. The Dictator was entirely dependent upon the Senate in financial matters. Although the Dictator was not accountable for how they spent the money under their control, the Senate's approval was needed for money to be withdrawn from the public treasury. Finally, the Dictator was given no jurisdiction to judge on

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[82] ibid 511.

[83] ibid.

[84] The six month term of the dictatorship was viewed as a factor which helped the dictatorship to be a successful legal regime – see Machiavelli (n 68) 194.

[85] An individual by the name of Furius Camillus served as dictator five times, in 396, 390, 386, 368 and 367 BC – Lazar, 'Making Emergencies Safe for Democracy' (n 69) 512.

[86] ibid 517.

civil matters and was not formally allowed to change the basic framework of the State.[87]

However there are records of at least seven Dictators who passed legislation, even altering the structure of government when the proposed change had popular support or appeased the populous.[88] Lazar argues that this indicates public support could act as an informal means of allowing a Dictator to engage in some circumscribed activities and prevent him from acting in others.[89] This is an important point to consider, showing that measures that were justified with recourse to public safety and security could be passed with full public support.

Despite the constraints the Dictator still had a large amount of power at his disposal. This included the power to compel citizens to go to war and to punish them corporally or capitally on the battlefield. This was the case until the inception of the *provocatio ad populum*, a right that stated only the citizens of Rome could sentence an individual to death. The decisions of the Dictator were not subject to appeal. He had full discretion in raising an army and using force and was not retrospectively accountable. Nor could he be punished for the decisions made within the scope of the Dictatorial powers.[90]

Conclusions on the Dictatorship

The Dictatorship's influence upon the development of emergency powers should not be understated. Contemporary theorists still turn to the Dictatorship for guidance and inspiration when writing about the problems that emergency powers give rise to. It is through the writings of Niccolò Machiavelli and Jean-Jacques Rousseau that the ideas of the Dictatorship were transmitted to modernity.

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[87] Rossiter (n 67) 24-5.

[88] Lazar, 'Making Emergencies Safe for Democracy' (n 69) 513-4. Lazar notes the example of M Aemilius Mamercinus, appointed Dictator *rei gerundae causa* in 434 BC, who passed a popular law once he had power to limit the duration of the Censorship from five years to eighteen months (the *Lex Aemilia de censura minuenda*).

[89] ibid 513.

[90] Rossiter (n 67) 19, 25. The dictator's power was an incredibly broad, discretionary *imperium*. Others who bore the *imperium* – the consuls and the praetor, for example – had similar powers to conduct military operations and to kill persons without due process. However, these powers were limited to actions carried out outside the city walls. Each official was accompanied by bodyguards who carried with them the symbol of the *imperium*, which was a bundle of rods, called fasces, which would include an axe. Inside the city walls, the axe was removed and the right to due process, the *provocatio ad populum*, was applied to all decisions taken. The dictator, in contrast, possessed this *imperium* both outside and inside the city – the axe was not removed from the fasces when he was inside of the city walls.

Machiavelli set out his political views in *The Discourses*, which discussed the Roman system of Dictatorship approvingly as the safest form of emergency governance, providing it lasted for no longer than a year.[91] Machiavelli supported the idea of a Dictatorship as a model of accommodation, providing legal checks and balances against an unfettered use of power. Machiavelli viewed the alternative as "extraordinary measures", somewhat similar to Lockean prerogative, which could set a bad precedent for the future and enable all manner of laws to be set aside.[92]

Relying on an individual to use a power for good is no substitute for properly limited law, even if the law is to grant a dictatorship. Also, the Dictator would be appointed for the sole purpose of dealing with such matters as had led to the appointment, so he could not do anything to diminish the constitutional position of the government. Machiavelli's Dictatorship continued the influence of Rome in that it was designed to be limited and limitable.

Rousseau also championed the ideas of the Roman system of emergency rule in *The Social Contract*.[93] Rousseau accepted that circumstances may well arise which the laws do not provide for, or prove inflexible in dealing with them. He did not favour the existence of a general prerogative power that would only be exercised when necessary.

Rousseau argues in favour of a system of temporary emergency rule which should not complement existing powers, but instead replace the regular laws which are suspended "when the salvation of the fatherland is at stake".[94] In these rare cases when the state is in danger a special act is passed, entrusting the public safety to "the worthiest person", a dictator. Rousseau argued that on most occasions it would only be necessary to increase the power of the government, but on the rare occasion that this was not enough, all the laws could be suspended and the sovereign authority be passed from the government to a dictator who would have fixed term limits.[95]

Both Machiavelli and Rousseau perceived the Roman Dictatorship to allow limited emergency powers. In fact, because of the perceived limitations

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[91] Machiavelli (n 68) 190-9.
[92] ibid 195.
[93] Jean-Jacques Rousseau, *The Social Contract and other later political writings* (Victor Gourevitch ed, CUP 1997).
[94] ibid 138.
[95] ibid 140.

some commentators view it as having an inherently conservative purpose. Ferejohn and Pasquino argue that it is similar to modern constitutional emergency powers in that they are both conservative in nature, employed in emergency situations and both aim to restore the ordinary constitution as soon as possible.[96] This view can be contrasted to Nomi Lazar who states that the Dictator's power was both broader and narrower than is commonly ascribed by commentators such as Ferejohn and Pasquino, due to the series of informal constraints that applied.

Lazar, using the Dictatorship as an example, makes the point that in liberal democracies emergency powers do not have to be represented by a conceptually troubling switch from the Rule of Law to arbitrary rule. While formal power constraints contained within a constitution or ordinary laws are weakened, she argues that there is no reason why informal constraints cannot constrain arbitrary power, at least in part. These informal means of constraining power may supplement or supersede the Rule of Law during emergencies.[97] Whilst Lazar attempts to argue that power can be constrained through political, not legal checks, her analysis raises an even more interesting point.

Lazar argues that the informal constraints in Republican Rome operated at all times, not just in periods of emergency. Along with the admission that there was no clear shift from the Rule of Law to arbitrary rule, this demonstrates the indistinct and ambiguous separation of norm and exception. The exceptional Dictatorship was constrained not by formal measures, but rather by measures from within the 'normal' legal order. The separation of norm and exception could not be maintained. Dictators legislated when they had no power to do so and acted *ultra vires* when they could rely on public support. It is this ambiguity of separation that means the exception must be reconsidered in its relation to the normal order and also in its implications for law and political life. With this in mind, this chapter turns to the work of Carl Schmitt.

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[96] Ferejohn and Pasquino (n 6) 212.
[97] Lazar, 'Making Emergencies Safe for Democracy' (n 69) 514-6.

Schmitt's Theory of the State of Exception

Carl Schmitt is credited by Agamben with being the individual who undertook the most rigorous attempt to construct a theory of the state of exception.[98] Schmitt was a German legal theorist who was prominent in Weimar Germany in the 1920's and 1930's, and an active supporter of the Nazi party. Because of this he has been the focal point of many heated debates between his detractors and his supporters.[99]

Schmitt rejected the traditional norm-dichotomy distinction that characterised approaches to emergency powers. Additionally, Schmitt dedicated a substantial amount of attention to the topic of emergencies and emergency powers. That area had, until this point, been neglected in studies of law and politics.[100] Schmitt's theory of the exception was inspired by his own experiences of living in Weimar Germany. The theory of the exception was his response to the political instability of inter-war Germany.

The state of exception for Schmitt is more than an exceptional political situation or emergency. The exception was a constitutional idea. Schmitt's state of exception refers to a constitutional authorisation that suspends or abrogates normal constitutional procedures. What is important about Schmitt's exception is that it is brought into being by a decision from the sovereign. It is the sovereign who decides when an emergency exists. Schmitt makes the link between sovereignty and the state of exception, *Ausnahmezustand* in the original German, explicit.

Carl Schmitt's Ausnahmezustand

In the first line of *Political Theology* Schmitt declares: "Sovereign is he who decides on the exception".[101] This statement has been viewed as one of the most infamous in political theory.[102] Schmitt's position in *Political Theology*, published

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[98] *SE* 32.

[99] See William Scheuerman, 'Carl Schmitt and the Nazis' (1991) 23 German Politics and Society 71; George Schwab, 'Carl Schmitt Hysteria in the US: The Case of Bill Scheuerman' (1992) 91 Telos 99.

[100] Oren Gross, 'The Normless Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy' (2000) 21 Cardozo L Rev 1825, 1825-30.

[101] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005) 5.

[102] John P McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' (1997) 10 Canadian J L Jurisprudence 163.

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in 1922, can be contrasted with his writings a year earlier in *Die Diktatur*.[103] As *Die Diktatur* is not yet available in English, I have here relied upon the work of John P McCormick in applying the insights of Schmitt from this volume. In *Die Diktatur* Schmitt favoured the classical model of the Roman dictatorship as providing the standard for any emergency measures taken to preserve a constitutional order in a crisis.

In *Political Theology*, Schmitt argues that the exceptional situation requires an all–powerful sovereign who will save the state from the crisis.[104] Schmitt's change in theoretical direction has been attributed by McCormick to several possible influences, including the work of Max Weber and the potential threat Schmitt foresaw to Germany from Revolutionary Soviet Russia.[105]

Die Diktatur and *Political Theology* were both written in the context of the Weimar Republic's extensive use of Article 48 of the Weimar Constitution.[106] Article 48 explicitly provided the Weimar constitution with recourse to using emergency powers. The President could invoke Article 48 when, in his opinion, public safety and order were seriously disturbed or endangered. The Article allowed for all measures necessary for the restoration of public safety and order to be taken, including the use of the armed forces for that purpose. Article 48 could even be used to suspend fundamental rights guaranteed by the Weimar constitution. Between 1919 and 1932 Article 48 was invoked over 250 times for varying reasons and to deal with varying crises.[107]

In theory the use of Article 48 was subject to many caveats and limitations but in practical terms "none of these limitations proved a meaningful obstacle to the exercise of unfettered dictatorial powers".[108] The vigilance of the Reichstag, the legislative body, was the main way to curtail abuses. However the Weimar Republic was beset by political and electoral turmoil and the Reichstag was not able to provide a check against emergency Presidential powers. There was also no

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[103] This work is only available in German. Due to this, only secondary analyses of this work have been drawn upon in the writing of this chapter. See Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Duncker & Humblot 1989).

[104] Schmitt, *Political Theology* (n 101) 63.

[105] McCormick (n 102) 170-1, 173.

[106] Rossiter (n 67) 31-2. See also Linsay Rogers, Sanford Schwarz, Nicholas S Kaltchas, 'German Political Institutions – Article 48' (1932) 47 Political Science Q 576, 577-8.

[107] ibid 33. Rossiter also provides a fairly detailed history of the use of Article 48 in the Weimar Republic – ibid 33-60.

[108] Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 83-4.

real judicial oversight of Article 48 and its exercise, with courts unwilling to pass judgment against the Executive. Rossiter argues that this was one reason why Article 48 did not stop the widespread use of dictatorial powers. The Weimar Republic's electorate was beset by confusion and revolt, the legislature was impotent and the Constitution was a document without roots in the history and conscience of the people.[109] In short, there were no effective constraints on the exercise of power by the President. Over thirteen years this lack of constraints contributed to the system of emergency powers turning from a temporary emergency measure to a permanent state of emergency.

In *Die Diktatur*, Schmitt gives a detailed account of the Roman dictatorship. McCormick reads Schmitt as seeing the dictator as knowing no concept of right or wrong, only the concept of expediency. His sole task is to bring about the restoration of the previously standing legal order. Dictatorship therefore:

> Suspends that by which it is justified, the state of law, and imposes instead the rule of procedure interested exclusively in bringing about a concrete success … [a return to] the state of law.[110]

Schmitt distinguishes between two types of dictatorship: 'commissarial dictatorship' and 'sovereign dictatorship'. In a commissarial dictatorship the Dictator could do whatever was necessary to address a crisis which had not been foreseen by the law. The Dictator's power to act was granted to him by another institution, the constitution itself, and he was charged with returning the state back to the rule of law. Sovereign dictatorship by contrast is a modern phenomenon. The sovereign dictator is not confined by any existing laws and is free to destroy the old order and create a new legal order if he so wishes.[111] It is the sovereign dictatorship that Schmitt develops in *Political Theology*.

Schmitt's Sovereign Dictatorship

Schmitt's sovereign dictatorship is linked directly to the exception. Although Schmitt wrote extensively on the state of exception, he did not define it, instead

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[109] Rossiter (n 67) 70-1. For a broader discussion of the various checks and balances that the Weimar Constitution placed on the exercise of Article 48, see ibid 64-73.

[110] McCormick (n 102) 165.

[111] ibid 170.

claiming that it was impossible to define the exception by its very nature. The exception:

> [W]hich is not codified in the existing legal order, can at best be characterised as a case of extreme peril, a danger to the existence of the state, or the like.[112]

The exception cannot be explained by the law as threats and perils to the State could encompass a very broad scope of factual situations. What is therefore important to Schmitt is to establish the fact that the exception could potentiality occur at any point.[113] As the exception cannot be defined, its existence must none the less be established, and it is this fact that means the exception is inseparable from the question of sovereignty:

> It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty.[114]

Sovereignty does not follow from the law or the legal order but precedes it, and the sovereign's authority derives from his power to declare a state of exception and to act in a way to tackle the crisis, even if such actions are contrary to positive laws.

Schmitt contends that the exception is the purest expression and reflection of the political. This view means that in Schmitt's world the legal and the political are not coterminous with one another. The political, in the form of the sovereign decision, precedes and bounds the legal. The implications of Schmitt's connection between the political, sovereignty and the exception are widespread. For Schmitt the main distinction that the sovereign can make in the political order is that of 'friend' and 'enemy'.[115] Because every aspect of human behaviour can rise to the level of the political the exception permeates all aspects of human existence. Deciding upon the exception becomes the most important decision for political existence.[116] As such Schmitt argues it is impossible to draw up a set of concrete, normative standards or rules that can cover all possible future occurrences.

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[112] Schmitt, *Political Theology* (n 101) 6.

[113] Carl Schmitt, *The Concept of the Political* (George Schwab tr, University of Chicago Press 1996) 35.

[114] ibid; Schmitt, *Political Theology* (n 101) 5.

[115] Schmitt, *The Concept of the Political* (n 113) 26.

[116] ibid 37-8. Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 163; see also George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (2nd edn, MIT Press 1986) 125.

In fact, the mere existence of the exception indicated to Schmitt the shortcomings of traditional liberalism and its contention that the law can cover all exigencies. He criticised liberalism on two main grounds that the rhetoric of liberalism kept hidden.[117] First he criticised liberalism's inbuilt failure to account for the possibility of the exception by maintaining that legal norms are applicable at all times. Such a position denotes a very narrow view of 'liberalism', assuming as it does that the law can be viewed as a formal process of rule application with little or no room for interpretative disagreements. This critique of Schmitt can be reinforced by noting Schmitt's main target of criticism – the jurisprudence of Hans Kelsen and Kelsen's 'Identity Thesis'.[118]

Kelsen contended that the state is totally constituted by law. When an individual or political body acts outside the law, their actions will have no authority because they cannot be attributed to the state.[119] Kelsen's thesis, therefore, has removed the 'personal'. There is no room for the individual of the sovereign; instead, the objectively valid norm of the law applies at all times. Schmitt notes:

> The objectivity that he [Kelsen] claimed for himself amounted to no more than avoiding everything personalistic and tracing the legal order back to the impersonal validity of an impersonal norm.
> The multifarious theories of the concept of sovereignty … agree that all personal elements must be eliminated from the concept of the state.[120]

Schmitt's position is that one cannot eliminate the personal from the legal. It is all very well basing the legal system on objective norms, but the need to decide on the exceptional situation emphasises the need for political decision-makers to decide how to deal with the exception on a case-by-case basis. Such a critique has echoes of those critiques levelled at the Business as Usual model of emergency powers.

Schmitt maintains that the executive or those who exercise sovereign power are best placed to make the decision regarding the existence of the

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[117] Gross, 'The Normless Exceptionless Exception' (n 100) 1848; John P McCormick, *Carl Schmitt's Critique of Liberalism – Against Politics as Technology* (CUP 1997) 124-9, 148-52.

[118] For further discussion on Schmitt's criticisms of Kelsen, see David Dyzenhaus, ''Now the Machine Runs Itself': Carl Schmitt on Hobbes and Kelsen' (1994) 16 Cardozo L Rev 1, 10.

[119] Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechslehre or Pure Theory of Law* (Stanley L Paulson and Bonnie Litschewski-Paulson trs, Clarendon Press 1992) 97-106.

[120] Schmitt, *Political Theology* (n 101) 29.

exception.[121] Schmitt's position was influenced by the impotency of Weimar politics to deal with emergencies effectively. The Reichstag proved far inferior in dealing with exceptional situations than the figure of the President acting alone.

Schmitt's second critique of liberalism is that even if it were to acknowledge the existence of the exception, it is structurally prevented from doing anything about it, and from effectively separating the normal case from the exceptional. Schmitt appears to be arguing that a determinate point exists beyond which the law cannot preserve the safety of the State through its own normal legal processes. Precisely in order to preserve the State, the law needs to be suspended by the exception. However, to characterise this as liberal, as Schmitt does, is unsatisfactory. What Schmitt calls liberal appears to be the self-containment of the law within set rules, as evidenced in the work of Kelsen. There is little nuance within Schmitt's characterisation of liberalism, which leads to the criticism that liberalism can answer the charges brought against it.

The traditional view of emergency powers views normality and exception as occupying alternative, mutually exclusive time-frames. However, in liberal democracies emergencies can become entrenched and prolonged. The State of Israel, which declares itself to be a liberal democratic state, has existed under a state of emergency since its creation in May 1948.[122] The exception thus contains the potential to be normalised. Measures that when introduced may have been considered exceptional could with time be regarded as normal and routine, especially if further emergency powers are passed. In the words of Oren Gross, as the concept of 'normality' is reinterpreted, "the previously unthinkable may transform into the thinkable".[123] However, Schmitt's all too unsatisfactory reading of liberalism aside, he brought to the surface the notion of the exception as both a tool of power and as central to the legal order's operation.

The implications of Schmitt's exception

These two criticisms of liberalism lead Schmitt to favour the sovereign dictatorship as the proper means for dealing with the exception. This sovereign

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[121] Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 163.
[122] ibid 228-30.
[123] ibid 228.

will not be constrained, limited or guided in their actions through any reference to *a priori* rules – they must have the last word on all matters:

> There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. All law is "situational law". The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.[124]

There are two main conclusions that can be drawn from this position. First, in emergency situations the sovereign is legally uncontrolled and has complete discretion in deciding which factual circumstances amount to a state of exception. Second, it is possible to find out who the sovereign is because he will be the individual who has the power to decide on whether there is a state of exception. So paradoxically, the state of exception, which can amount to a total suspension of law, is actually brought into being through a legal decision, made by the sovereign. Law seemingly is used against itself, to suspend its own operation.[125] The state, through the position of the sovereign, is not constrained or bound by any of the laws the state of exception has suspended.

The state of exception shows that the difference between democracies and a totalitarian exercise of power is a very fine one. This potential of the state of exception to lead to totalitarian excess is illustrated by a critique of Schmitt's sovereign dictatorship. The sovereign dictatorship allows the sovereign unlimited power to change and transform the legal order as he sees fit, even to the extent of fully suspending it.[126] This means that not only does the sovereign have an unlimited discretion in deciding *when* an exception exists; he also has an unlimited discretion in deciding what responses are necessary in order to deal with the exception. The traditional norm-exception dichotomy is therefore reversed: the exception becomes the pre-eminent system of government and the rule:

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[124] Schmitt, *Political Theology* (n 101) 13.

[125] David Dyzenhaus, 'Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 Cardozo L Rev 2005, 2006.

[126] Schmitt, *Political Theology* (n 101) 12.

> The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception.[127]

The sovereign has the power of deciding when the exception exists. Conversely, he also has the power to decide whether or not the normal situation exists. The sovereign is the only individual capable of distinguishing the exception from the norm.[128] As sovereignty is indivisible from the powers that are attached to it, it is impossible to state that only some of the sovereign's powers are available to him at any given time. All of his powers may be used at his discretion.[129] The sovereign therefore has unlimited powers.[130]

Oren Gross has criticised Schmitt on this point, declaring that Schmitt's theory of the exception leads to an exception which is both normless and exceptionless. No outside laws or constraints can be applied to it, and once the powers are given to the sovereign, they are both unlimited and can never be removed from him. This leads to a permanent exception.[131] It is clear that Gross views Schmitt as a threat to democratic politics and liberal legalism.

Such a position could be reinforced by Schmitt considering himself as an intellectual descendant of Thomas Hobbes, and a twentieth century Hobbesian. David Dyzenhaus points to Schmitt's commentary on *Leviathan* which ended with the message: "You shall no longer teach in vain, Thomas Hobbes!"[132] However, his system of sovereign dictatorship can be seen as even more Hobbesian than Hobbes' own *Leviathan*. Hobbes guaranteed the citizen that if the Leviathan could not keep them safe as is his obligation under the social contract - the principle of *salus populi* - then the individual was free to preserve his own life in any way he thought necessary. Schmitt's work lacks this exception of self-preservation contained in *Leviathan*. Also, the Leviathan is under a duty to grant to the citizens

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[127] ibid 15.
[128] ibid 13.
[129] ibid 8; Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 165-6; Gross, 'The Normless Exceptionless Exception' (n 100) 1844-5.
[130] Schmitt, *Political Theology* (n 101) 12.
[131] For Gross' critique see Gross and Ní Aoláin, *Law in Times of Crisis* (n 5) 162-70; Gross, 'The Normless Exceptionless Exception' (n 100) 1830-53.
[132] Dyzenhaus (n 118) 2; Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols* (Verlag 1982) 132.

as much liberty as is compatible with security, which is in direct contrast to Schmitt's sovereign, who is under no such constraints.[133]

The Exception as Key to Political Life

Despite criticisms made by authors such as Gross, another view of Schmitt's work and the exception is possible. This sets the stage for the introduction of Agamben's philosophy. Sergei Prozorov has critically reconstructed Schmitt's conception of sovereignty, arguing that it has for too long been unfairly conflated with Schmitt's association with the Nazi regime.[134] Prozorov argues that Schmitt's sovereignty can be viewed as a critique of 'Immanentism'.

Immanentism aims to recast the social order as a closed universal self-propelling system without an outside. It denies that there can be any human action 'outside' of the order, as it denies that such an 'outside' exists. It is a fiction because such a view presupposes an all-encompassing social order that is always already encapsulating acts that have not yet happened – the order is given omnipotent and omniscient powers as it is able to subsume any act within itself.[135] Schmitt's sovereign decision upon the exception is seen by Prozorov as a reminder of the transcendence of the political, rupturing the ideal that the social order has no outside.[136] This is why Schmitt's sovereign decision had to "emanate from nothingness".[137]

Prozorov sees Schmitt's sovereignty as a borderline concept. In Prozorov's terms it is the irreducible excess of any order that is nonetheless indispensible for the order's emergence. The sovereign decision forms the basis of the political order and at the same time is the basis for the current order to be transcended. Prozorov casts Schmitt in a very different light. Instead of defending tyrannical absolutist rule, Schmitt is seen as a political radical whose exception ruptures the legal order enabling it to be recast anew. Schmitt's aim is not to promote an unending dictatorship, as Gross interprets him. Rather he challenges the idea of law as being able to provide answers for all circumstances.[138] This does not just

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[133] See Hobbes (n 10) ch 30.
[134] Sergei Prozorov, *Foucault, Freedom and Sovereignty* (Ashgate Publishing 2007) ch 4.
[135] ibid 83.
[136] ibid 82-4.
[137] Schmitt, *Political Theology* (n 101) 32.
[138] Prozorov (n 134) 86-7.

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start to question whether emergency powers are necessary, but it also questions whether law itself helps or hinders political agonism.

The exception can be seen not just as part of an ongoing debate over the legitimacy of a State's actions in an emergency. The exception is a fundamental question for political existence, and should not be held in a dialectical relation with a conception of normality, but rather considered in and of itself. It is this element of Schmitt that Agamben builds upon, using Schmitt as a foil for his own writings on the exception and its importance to modernity.

Conclusion

This chapter has explored a legal fiction that pervades thinking on the exception. The doctrine of exceptionalism accepts that the norm and exception can be logically, factually and temporally separated. The law seems to accept the necessity of this separation. Both the extra-juridical exception and the exception internal to law assume that a clear distinction can be drawn between normal and exceptional times. The success of these models of emergency powers depends upon their ability to make that very distinction. For normality to truly be normality it has to be the ordinary state of affairs. Only if this is the case can an emergency be recognised. This analysis led this chapter to consider the work of Carl Schmitt, who also attacks this legal fiction.

Only with Carl Schmitt do we see the inability for norm and exception to be separable, and Schmitt demonstrates that it is the exception, not the norm, that is by far the most important component in the dialectic. This explanation of Schmitt's position provides the groundwork for exploring the characteristics and implications of the exception in Agamben's thought. Agamben uses Schmitt's own writings as a basis for his connecting the exception and sovereignty.

The purpose of this exploration has been to show that Agamben's exception does not conform to the historical views on emergency powers, and as such should be seen as the first step towards an analysis of Agamben's radical politics. This move is important in my mind to counter the views of Agamben as a scholar of emergency powers, and to show that his vision of a community has consequences that are much more wide-ranging than a focus upon exceptionalism.

As such, this chapter has aimed to provide an entry point for Agamben's claim that the exception is not only the most important concept to the law and the legal order, but provides the basis for an ontological analysis that aims to challenge the bedrock of Western political and legal thought.

Chapter 2: Foucauldian and Agambenian Biopolitics

This chapter turns its focus to Agamben's approach to the exception and law. As stated, the exception will be used as a tool with which to introduce Agamben's wider political and philosophical project. The reason for this is that Agamben's radical politics and philosophy is comprised of investigations on a breadth of topics and engagements with numerous other philosophers. This chapter advances a number of arguments that helps to set Agamben's exception within this wider philosophical schema, and also directly addresses another area of contention that exists in the literature surrounding Agamben, namely his engagement with the thought of Michel Foucault. This move again helps trace a path towards the full implications of Agamben's thought, as well as helping to study whether his philosophical moves lead to any negative implications for his ethical politics.

The first contention of this chapter relates to the repositioning of Agamben's thought that was discussed as a specific aim of this thesis. Agamben's thought is undoubtedly influenced by Michel Foucault's concepts of biopower and biopolitics. Through a detailed analysis of Agamben's writings, it is argued that Agamben's re-reading and re-interpretation of Foucault's hypothesis of biopower and biopolitics involves a mischaracterisation of Foucault's work on Agamben's part. This conclusion underpins the analytic approach adopted throughout this thesis. A connection is made between Agamben's mischaracterisation and the expulsion thesis. The expulsion thesis states that Foucault excluded the law from his formulations of power. This chapter alleges that Agamben promulgates a version of this explusion thesis. This position, it is argued, is necessary for Agamben's philosophical project, as it allows Agamben to generate critical distance between his work and Foucault's own writings on law.

The second argument builds upon this contention that Agamben has mischaracterised Foucault. Despite this contention this thesis contends that Agamben should not be viewed as either a Foucauldian or post-Foucauldian philosopher, nor should Agamben's work be seen as a 'development' of Foucault's own analyses. The reason for this is that Agamben's philosophy is characterised here as a philosophy of immanence, which denies any transcendent authority for law or power. This immanent grounding of his thought is argued to be crucial for Agamben's attempt to construct an ethical messianic politics and

legal order. Agamben argues that law, like man, has always-already been conceived of as a division between transcendent and immanent realms. Agamben argues that this division based upon a separation provides a fundamentally negative basis for the law. It is this negative basis that provides the basis for Agamben's ethical move. This thesis contends that it is this analysis that places Agamben in direct conflict with Foucault. Foucault's writings are drawn upon to argue that Foucault's own philosophical project can be contended to be transcendent in nature, rather than immanent.

This of course does not offer judgments upon Foucault's own political aims. Rather, what is attempted here is to counter much existing literature that casts Agamben as Foucauldian in nature. This, it is argued, does not do justice to the ethical politics Agamben posits. It would be more accurate to view Agamben as complimenting his wider philosophical project with a re-imagination of Foucault's ideas. This position is controversial in part because of Agamben's own admission that Foucault is the philosopher to whom he is the closest. This chapter contends that 'closeness' should be understood and interpreted in terms of the Foucauldian methods of genealogy, archaeology, the paradigm and the apparatus that Agamben develops and radicalises within his own philosophical project. This closeness should not be interpreted as Agamben being a 'successor' to Foucault philosophically, as the divergent philosophical bases for each thinker does not imply this. This position can be supported evidentially by Agamben's work explicitly distancing itself from Foucault in relation to Foucault's conception of the transcendent. The overall aim of this analysis is to present Agamben as an original political thinker who should not be reduced into Foucauldian coordinates. If this happens, the ethical and political insights of Agamben's thought may well be lost.

This point is developed in the third argument forwarded by this chapter. A parallel is drawn between Agamben's conception of law and post-structuralist readings of Foucault's account of law, in particular those of Ben Golder and Peter Fitzpatrick. These post-structuralist readings can be read in a manner that provides a view of the legal order that comes very close to Agamben's. This does potentially leave Agamben open to a post-structuralist criticism that his work is not as nuanced or historically accurate as Foucault's. As Agamben does not see his own work as post-structuralist in nature, such a closeness is highly significant

for Agamben's attempt to distance himself from Foucault's philosophy. However, following this chapter's earlier arguments, it is contended that Agamben's immanent philosophical aims provides a counter to this claim. It is this focus upon immanence that provides a basis for his move to positing an ethical existence, as well as countering the claim that Agamben is Foucauldian.

Agamben's Philosophy

Interest in Giorgio Agamben's philosophy has grown exponentially in the last decade. This interest can be traced to a number of sources. As was eloquently argued by Leland de la Durantaye, Agamben's numerous private relationships with disparate thinkers such as Martin Heidegger, Guy Debord, Jean-Luc Nancy, Pier Paolo Pasolini and Italo Calvino have attracted interest, as have his public acts such as his resignation from a Professorship at New York Univerisity in 2004 in protest at the US Homeland Security Act 2004.[1]

Additionally, Agamben's fame has been affected by external events. The terrorist attacks of September 11th 2001 on the United States, the wars in Afghanistan and Iraq and the camps of Guantanamo Bay and Abu Ghraib all led to Agamben's discussions of the state of exception appearing remarkably prescient. It would not be too inaccurate to argue that due to these external factors, the majority of secondary scholarship on Agamben has focused upon the *Homo Sacer* project.[2]

A continuing theme throughout the myriad of books and works of Agamben is the concept of *the human* and how life itself has been continuously defined and redefined by power.[3] This question of *life* is central to Agamben's wider philosophy, as well as his *Homo Sacer* series of books and his engagements with Foucault. It is from this position that Agamben's engagements with Foucault should be viewed.

What sets Agamben apart from the writers on emergency powers considered in the previous chapter is his focus. Agamben's writings upon law and the exception focus less upon classical themes of sovereignty and right that traditionally preoccupied legal and political philosophy. Instead, Agamben's focus

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[1] Leland de la Durantaye, *Giorgio Agamben: A Critical Introduction* (Stanford UP 2009) 8. In 2004 he turned down a visiting professorship at New York University as a protest against new security measures introduced for foreign nationals entering the country. See Giorgio Agamben, 'Bodies Without Words: Against the Biopolitical Tattoo' (2004) 5 German L J 168. This editorial was originally printed in German in the *Süddeutsche Zeitung* on the 10th January 2004.

[2] See, in particular, Andrew Norris (ed), *Politics, Metaphysics and Death: Essays on Giorgio Agamben's* Homo Sacer (Duke UP 2005); Matthew Calarco and Steven DeCaroli (eds), *Giorgio Agamben: Sovereignty & Life* (Stanford UP 2007); Alison Ross, 'Introduction' (2008) 107 South Atlantic Q 1.

[3] Katia Genel, 'The Question of Biopower: Foucault and Agamben' (2006) 18 Rethinking Marxism 43, 44.

is upon how power and law shapes and constitutes the subject in a number of different ways.[4]

In his book *Giorgio Agamben: Power, Law and the Uses of Criticism*, Thanos Zartaloudis outlines the main aim of Agamben's works as an attempt to escape from the juridification of life, the attempt to fuse law and life.[5] Zartaloudis traces a continual struggle in Agamben's work to avoid problem-solving apparatus, structures that seek to identify a single answer to a particular problem.[6] One such problem-solving apparatus identified by Zartaloudis is the imposition of a theoretical structure to law and politics in the form of a 'Law of law'. This presupposes a fictional transcendent structure of law itself. This serves to conceal the fact that law does not have any point of transcendental support to guarantee either its authority or its authenticity. Zartaloudis reads Agamben as seeing the only support that law has in this regard is its very human construction.[7]

Therefore, as Zartaloudis reads Agamben, any attempt by theory to posit a surplus value, such as a 'Law of law', either in the form of a paramount order or origin, is nothing less than a dogmatic formation of the spectacularisation of power and of sovereign law.[8] In other words, the very attempt to ground a transcendent law in an 'origin', or to claim a transcendent legal order, is yet another attempt to juridify life itself. Agamben's work could be seen as an assault on this juridification, and on attempts by theorists to invoke a transcendent origin or source of law's power and authority. Zartaloudis explains that Agamben aims to expose the remainders of those problem-solving recommendations that defy the attempt to posit a trans-historic essence or substance to law.[9] These remainders are the paradoxes that arise after a mythological foundation for law has been advanced. As such, Agamben's interrogation of these remainders calls into question a number of established legal traditions and principles.

The denial of a transcendent realm of authority for law and power is fundamentally important for Agamben's philosophy. It is from this position that Agamben can claim that there is no substance, essence or absolute sacred body in

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[4] For an overview of similar approaches, see Costas Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism* (Routledge 2007) ch 5.

[5] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge 2010) 4.

[6] ibid.

[7] ibid.

[8] ibid.

[9] ibid 4-5.

the plane of law's foundation.[10] Zartaloudis sees Agamben's position as showing how government and administration act as apparatus who constantly attempt to silence the fact that there is no transcendent authority for law.[11]

Most importantly, this process can be seen to relate to Agamben's immanent philosophy. Agamben attempts to think beyond any transcendent relation, focusing on the very immanent existence of life. As such, following Zartaloudis, Agamben attempts to ground the law and other social institutions immanently, without any transcendent referent. In order to introduce Agamben's immanent thought, it is necessary to fully explore Agamben's critique of transcendent schema. This will help explain the drawbacks and *aporias* that this thesis traces in Agamben's work.

A starting point for exploring Agamben's critique of transcendent apparatus is his engagement with Foucault's hypothesis of biopower. This allows for Agamben's divergence from Foucault and his radicalisation of Foucault's method to be properly sited. It also allows for Agamben's conception of the exception to be understood in relation to his wider philosophical aims.

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[10] ibid 7.
[11] ibid.

Agambenian and Foucauldian Biopolitics

The major engagement with the work of Foucault by Agamben begins at the very start of his book *Homo Sacer: Sovereign Power and Bare Life*. Here, Agamben states that he aims at nothing less than to "correct, or at least complete" Michel Foucault's hypothesis of biopower.[12] Foucault postulated this hypothesis in a series of lectures at the Collège de France in 1975 and 1976, published as *Society Must Be Defended*,[13] and in the first volume of *The History of Sexuality*, published in 1976.[14]

Foucauldian Biopower

Foucault's hypothesis of biopower was an analytic of power that focused not on sovereign power as the central source of power within the social body but instead upon disciplinary and normalising mechanisms designed to transform and influence human life. It is here, when life itself enters political calculations, that politics becomes 'biopolitics'.

Foucault traced this event to the eighteenth century, when he argued that life itself became the focus of power. This, Foucault maintained, was the social body's "threshold of modernity".[15] In *The History of Sexuality*, Foucault referred to Aristotle's definition of man when he summarised the process by which life was included within the mechanisms of State power:

> For millennia, man remains 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.[16]

Such a move away from the classical view of sovereign power was necessary due to the negative form ascribed to sovereignty. Sovereignty was being used against the populace to repress or prohibit,[17] which was ineffective for the task of biopower, that of regulating life itself.[18]

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[12] *HS* 8.

[13] Michel Foucault, *Society Must Be Defended, Lectures at the Collège de France, 1975-76* (David Macey tr, Penguin Books 2003).

[14] Michel Foucault, *The History of Sexuality, Volume One: An Introduction* (Robert Hurley tr, Penguin Books 1978).

[15] ibid 143.

[16] ibid.

[17] Genel (n 3) 48.

[18] Foucault, *Society Must Be Defended* (n 13) 249-50.

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For Foucault biopower was a direct combination of power and life, a juncture which when explored requires the redefinition of both terms.[19] Foucauldian biopower has garnered a great deal of academic support. Michael Hardt and Antonio Negri argue that in the last thirty years the process of biopower and biopolitical regulation has increased, so much so that today every aspect of social relations is subjected to the operations of this power.[20] Biopower thus focuses on the protection of life. This can be contrasted to the classical view of sovereignty as a 'negative' mechanism of power used as a means of repression or prohibition used against the populace. Classical views of sovereignty focused upon the sovereign's 'right of the sword', the right the sovereign has to kill or let live.[21] This classical sovereign power is incompatible with biopower's attempts to regulate life.[22]

Biopower and biopolitics complemented Foucault's earlier works on the microphysics of power in *Discipline and Punish*. Disciplinary power and biopower function at two different levels. Disciplinary power functions on the individual, focusing upon the individual's body and its behaviour, by defining behaviour as normal or deviant. Disciplinary power thus complimented and dominated the juridical exercise of power by marking the boundaries of acceptable thought and practice and policed the social body through the exclusion of the abnormal and the alien.[23]

Biopower does not take law as its model or code.[24] Biopower superimposes itself over the classical sovereign Right of the sword, but also over disciplinary power. Biopower addresses itself to populations as a whole, separate from any notions of society, dealing with man as a species rather than an individual. 'Population' is not to be understood as being composed of groups of individuals. Instead, a population is a multiplicity of individuals who are and fundamentally and essentially only exist biologically bound to the materiality within which they live.[25] Biopolitical measures direct themselves towards

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[19] Genel (n 3) 44.

[20] Michael Hardt and Antonio Negri, *Empire* (Harvard UP 2000) 12.

[21] Genel (n 3) 48.

[22] Foucault, *Society Must Be Defended* (n 13) 243-4.

[23] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Penguin Books 1977).

[24] Foucault, *The History of Sexuality* (n 14) 88-90.

[25] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-78* (Graham Burchell tr, Palgrave Macmillan 2007) 37.

populations and large groups of people, dividing the masses into scientific groupings that can be subject to political intervention.[26] Biopower does so through qualifying, measuring and appraising in order to create hierarchies and fields of apparatuses that function to regulate the different biological processes that affect populations. This better protects the population as a whole against phenomena that sap at its strength.[27]

Biopower operates with knowledge and law, exercising itself on both the body and the processes of life. These technologies of biopower are not internal to legality or sovereignty, but are separate from the sovereign and juridical realm. Despite this, they still maintain a relation to the sovereign and the juridical. As such power, law and sovereignty can operate separately from one another but also alongside one another. Both forms of power may be applied in the same circumstances to the same event. The exercise of one necessarily affects the other. Life, more than law, becomes the issue of political struggles.[28]

Agambenian Biopower

At the start of *Homo Sacer* Agamben attempts to develop a critique of Foucauldian biopower and to formulate his own theory of biopolitics. Agamben contends that Foucault's death prevented him from developing his nascent concept of biopolitics.[29] Such a position is a mischaracterisation at best. Biopower occupied a transitory moment in the thought of Foucault and was not a central part of Foucault's analyses of power. The reason that biopower gained so little attention from Foucault was that biopower was not a refined enough category of power. This was why governmentality and apparatuses of security began to enter into his work.[30]

Foucault's studies of biopower took him towards his later analyses of the subject and subjectivity – in works written after *The History of Sexuality* and *Society Must Be Defended*, although published before the latter book, Foucault

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[26] Foucault, *Society Must Be Defended* (n 13) 242-3.
[27] ibid 243-4.
[28] Douzinas (n 4) 111-4.
[29] *HS* 6.
[30] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge 2009) 32, 49; Michel Foucault, 'Technologies of the Self' in Michel Foucault, *Essential Works of Foucault 1954-1984, Vol. 1: Ethics, Subjectivity and Truth* (Robert Hurley tr, Paul Rabinow ed, Penguin Books 1997) 223-51.

argued that the subject, not power, was the overriding theme of his work.[31] Despite this underdeveloped nature of biopower in Foucault's work Agamben gives the concept a central place in his wider philosophical treatise.

In addition to this mischaracterisation of the prominence of biopower in Foucault's work, Agamben goes on to summarise a persistent feature of Foucault's writings as including a:

> [D]ecisive abandonment of the traditional approach to the problem of power, which is based on juridico-institutional models (the definition of sovereignty, the theory of the State), in favour of an unprejudiced analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life.[32]

Whilst Foucault did move away from traditional views of sovereignty, it is unclear what Agamben means when he refers to a "decisive abandonment". This wording appears to indicate that Agamben views Foucault as having expunged all conception of the juridical and the law from his work, in favour of focusing upon normalising techniques of power.

Such a position seems to be reinforced by Agamben's summation of the Foucauldian project which identifies two main strands of inquiry. The first is the study of political techniques with which the State assumes and integrates the care of natural life of individuals into its very centre, which can be seen in biopower and biopolitics. The second is the examination of the technologies of the self by which processes of subjectivisation bring the individual to bind himself to his own identity and consciousness and, at the same time, to an external power. This can be seen clearly in disciplinary power.

It is here that Agamben tries to generate critical distance between his own project and that of Foucault's. Agamben argues that Foucault's inquiries result in an *aporia* which Foucault was not able to explain. Agamben contends that if Foucault was correct and the modern State has "integrated techniques of subjective individualisation with procedures of objective totalisation to an unprecedented stage",[33] the point at which these two powers converge remains unclear. It is clear here that Agamben's reading of Foucault moves away from

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[31] Michel Foucault, 'The Subject and Power' in Hubert L Dreyfus and Paul Rabinow, *Michel Foucault: beyond structuralism and hermeneutics* (Harvester Press 1982) 208; Paul Rabinow (ed), *The Foucault Reader: An Introduction to Foucault's Thought* (Penguin Books 1991) 7-11.
[32] *HS* 6.
[33] ibid.

Foucault's work on power/knowledge, which indicates the complementarity of the juridical and disciplinary realms of power. For Agamben, Foucault's contestation of the juridical model of power (including sovereignty) comes at the price of his failure to identify in the body of power the 'zone of indistinction' where the techniques of individualisation and totalising procedures come together.[34]

This invocation of a zone of indistinction can be put in better context by citing Agamben's own explanation of his methodology:

> When you take a classical distinction of the political-philosophical tradition such as public/private, then I find it much less interesting to insist on the distinction and to bemoan the diminution of one of the terms, than to question the interweaving. I want to understand how the system operates. And the system is always double; it works by means of opposition. Not only as public/private, but also the house and the city, the exception and the rule, to reign and to govern, etc. but in order to understand what is really at stake here, we must learn to see these oppositions not as "di-chotomies" but as "di-polarities", not substantial, but tensional. I mean that we need a logic of the field, as in physics, where it is impossible to draw a line clearly and separate to different substances. The polarity is present and acts at each point of the field. Then you may suddenly have zones of indecideability or indifference.[35]

A zone of indistinction is thus a point at which two terms or points in an opposition interweave and intersect with one another, becoming completely indistinct. The zone therefore allows for a questioning of not just the opposition itself, but additionally the very basis for the system's operation. It is through a zone of indistinction that 'what is really at stake' can be viewed – namely how the human being is constructed by power. Agamben uses the zone of indistinction as a philosophical tool to expose this construction.

In relation to the work of Foucault, the opposition of the techniques of subjective individualisation and the procedures of objective totalisation are used by Agamben to try and find a zone of indistinction which will unconceal the operation of the analytic of power in Western politics. The "hidden point of intersection" between these two analyses of power, the juridico-institutional and the biopolitical is not an intersection at all. Agamben argues that the two forms of power cannot be separated.[36] Instead, the two forms of power are bound together

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[34] ibid 6-7.
[35] Ulrich Raulff and Giorgio Agamben, 'An Interview with Giorgio Agamben' (2004) 5 German L J 609, 612.
[36] *HS* 7.

through sovereign power. Agamben's biopower does not liberate individuals from the theoretical privilege of sovereignty but instead radically intensifies his work with sovereignty, a sovereignty that acts through the law to create and sustain political life.[37]

The Expulsion Thesis

Agamben's conception of biopolitics is one in which sovereign power and the law play a central role. To make his move from Foucault clear, Agamben characterises Foucault as having moved away from juridical notions of power, juridical notions which Agamben reintroduces into biopower. In doing so Agamben ends up endorsing a particular view of Foucault's work, the expulsion thesis, which views Foucault as having abandoned the law within his work.

The expulsion thesis was first proposed by Alan Hunt and Gary Wickham, and maintained that for Foucault, law was irrelevant.[38] It should be noted that Hunt and Wickham are by no means the only scholars who shared this view of Foucault's interpretation of law.[39] It is also important to note that the expulsion thesis is based upon select readings of Foucault which do seem to indicate that the philosopher did exclude law from his writings on power.

The expulsion thesis viewed Foucault's formulations of power as incompatible with traditional views of sovereignty and law. Ben Golder and Peter Fitzpatrick summarise the expulsion thesis succinctly in stating that it views Foucault's characterisation of law as essentially negative, historically tied to monarchical sovereignty and overtaken by more productive technologies of power.[40] Law and sovereignty are viewed as having been superseded by other forms of power such as discipline, governmentality and biopower.

By focusing upon Foucault's writings on biopower at the expense of his other works Agamben reads into Foucault an abandonment of law and juridical categories. This aligns Agamben with the expulsion thesis of Hunt and Wickham. As such, Agamben reads Foucault selectively and to his advantage. Such

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[37] de la Durantaye (n 1) 210.

[38] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press 1994).

[39] For example, Duncan Kennedy and Nicos Poulantzas have supported versions of the expulsion thesis. See Nicos Poulantzas, *State, Power, Socialism* (Patrick Camiller tr, Verso 2000) 149; Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 Legal Studies Forum 327, 353-5.

[40] Golder and Fitzpatrick (n 30) 14.

criticisms of Agamben are by no means unusual, and have been made previously by Peter Fitzpatrick about Agamben's *Homo Sacer* project.[41]

Such a characterisation of Foucault is troubling, not least because it belies the myriad of views that counter the expulsion thesis. In their book *Foucault's Law* Golder and Fitzpatrick identify three approaches to Foucault and law that have been made, which they then place in opposition to the expulsion thesis. First is the view that law and discipline and disciplinary power are not opposed but are in fact interrelated. Law is interdependent with discipline, and the democratic characterisation of law masks the control of the populace through disciplinary measures.[42] Law in modernity does not recede, but becomes more involved in disciplinary control. Therefore the two interacted, overlapped and articulated one another, as well as being in a state of tension and confrontation.[43] Such a position still gives law a peripheral role in the social body, with it dependent upon disciplinary control and still reliant upon disciplinary power for its operation.

The second approach focuses upon Foucault's examination of governmentality. Hunt and Wickham here note that Foucault returns to the question of law.[44] Governmentality refers to attempts by political theorists from the eighteenth century onwards to develop an 'art of government'. This focuses not on maintaining sovereign power but instead on the care and maximisation of the potential of the population itself.[45] This in turn maximises governmentality's own potential.[46] This form of power has marked similarities to biopower, but there exist differences of emphasis and detail. First, governmentality places a greater emphasis upon governmental strategies that function by inducing subjects to govern themselves. Second, governmentality provides a more precise historical example of the broad notion of biopolitical management of life.[47]

Governmentality operates alongside disciplinary power.[48] This has led to scholars rehabilitating law in Foucault's work, arguing that law has become part

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[41] See Peter Fitzpatrick 'Bare Sovereignty: *Homo Sacer* and the Insistence of Law' in Norris (n 2) 51.

[42] See Nikolas Rose and Mariana Valverde, 'Governed by Law?' (1998) 7 Social and Legal Studies 541; Anthony Beck, 'Foucault and Law: The Collapse of Law's Empire' (1996) 16 OJLS 489.

[43] Golder and Fitzpatrick (n 30) 29.

[44] ibid 55.

[45] Foucault, *Security, Territory, Population* (n 25) 74, 89.

[46] Golder and Fitzpatrick (n 30) 32.

[47] ibid.

[48] Foucault, *Security, Territory, Population* (n 25) 107-8.

of the wider dispersal of government sites throughout the social body.[49] Rose and Valverde have argued that Foucault implied the interrelation of legal, disciplinary and governmental strategies. The law would form a central part of the management of social problems by government.[50] However in this view law is refigured as one component of an overriding governmental-administrative apparatus. Law thus is read as being *subsumed* by governmentality, rather than existing as distinct yet complementary to governmentality. This position has not yet effectively countered the expulsion thesis.[51]

Thirdly there is the semantic argument that Foucault's usage of the terms 'juridical' and 'legal' are not synonymous. Although a semantic argument, Golder and Fitzpatrick note that it aims to advance a broad conceptual thesis about the nature of modern law and its relation to normalising practices.[52] Although Foucault argued that biopower inhabits the space that the juridical retreats from, François Ewald argues that this does not mean that law is in decline.[53] Instead, biopolitical technologies are coterminous with a proliferation of legality. Ewald argues that:

> The formation of a normalising society in no way diminished the power of law or caused judicial institutions to disappear. In fact, normalisation tends to be accompanied by an astonishing proliferation of legislation ... The norm, then, is opposed not to law itself but to what Foucault would call 'the juridical': the institution of law as the expression of a sovereign's power. ... In the age of bio-power, the *juridical*, which characterized monarchical law, can readily be opposed to the *normative*, which comes to the fore most typically in constitutions, legal codes, and 'the constant and clamorous activity of the legislature'.[54]

Ewald argues that Foucault's target was not the legal but the juridical, the institution of law as an expression of sovereign power. Ewald thus argues that there are two ways of understanding the operation of law: the juridical and the normative.[55] This re-reading of Foucault argues that the law thus continues to exist as a normative device, following Foucault's argument in *The History of*

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[49] Golder and Fitzpatrick (n 30) 33.
[50] Rose and Valverde (n 42) 542-3.
[51] Golder and Fitzpatrick (n 30) 34.
[52] ibid 35.
[53] François Ewald, 'Norms, Discipline and the Law' in Robert Post (ed), *Law and the Order of Culture* (Marjorie Beale tr, University of California Press 1991) 138-61.
[54] ibid 138.
[55] ibid.

Sexuality that in the biopolitical age "law operates more and more as a norm".[56] The juridical is an inappropriate means of representing and understanding law in modernity, and that the law actually becomes disciplinary and biopolitical.[57]

However, Golder and Fitzpatrick argue that such a reading is inadequate in respect of the position of law in Foucault's work. Ewald, in arguing that Foucault's view of law should be viewed as the passage from the juridical to the legal, states that this move is the passage "from the Law to the norm".[58] However, this move only assimilates the law to the norm.[59] Such a move ignores Foucault's work which aims to establish a difference between these different techniques of power.

Agamben's summarisation of the Foucauldian project is a position that does not have the nuance of the above three examples. Agamben's analysis of Foucault supposes a dejuridicised biopower which is used as a tool to construct his own form of biopower. This form of biopower aims to radically move away from Foucault's work. This leads on to the second main argument of this chapter, namely that Agamben should not be seen as either a Foucauldian or a post-Foucauldian philosopher.

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[56] Foucault, *The History of Sexuality* (n 14) 144.
[57] Golder and Fitzpatrick (n 30) 36.
[58] François Ewald, 'A Concept of Social Law' in Gunther Tuebner (ed) *Dilemmas of Law in the Welfare State* (Iain Fraser tr, Walter de Gruyter 1988) 71.
[59] Golder and Fitzpatrick (n 30) 38.

Agamben, Foucault and Law

Agamben approaches Foucault's writings on biopower not only from the expulsion thesis, but also from the work of Aristotle. Agamben builds upon the Aristotelian definition of man, and returns directly to the Greek text of the *Politics* where Aristotle defines the proper end of man as 'life according to the good'. Agamben argues that for the Greeks there was no one word that described 'life'. Such a conclusion is by no means unusual linguistically. Many languages have multiple words that describe the same thing. Leland de la Durantaye notes that the Inuit have four words that designate 'snow'.[60] Yet 'life' carries much more fundamental connotations than 'snow'. By declaring that the Greeks had no one word to describe this seemingly self-evident condition Agamben sets about challenging the basis of modern political existence.[61]

Agamben re-reads Aristotle's *Politics*, and in doing so distinguishes between *zoē*, which denoted the basic fact of living common to all living beings, be they animals, men or gods, and *bios*, which was the form or way of living proper to an individual or group:

> This [life according to the good] is certainly the chief end, both of individuals and of states. And mankind meet together and maintain the political community also for the sake of mere life [*kata to zēn auto monon*] (in which there is possibly some noble element [*kata ton bion*] so long as the evils of existence do not greatly overbalance the good). And we all see that men cling to life [*zoē*] even at the cost of enduring great misfortune, seeming to find in life a natural sweetness and happiness.[62]

Bios is seen by Aristotle as the proper end of man, how man exists as a political animal. Every *bios* is equally built upon *zoē*, natural life. It is this distinction that Agamben argues first brought life into the political sphere, and makes Aristotle into the father of biopolitics. Thus biopolitics is not, as Foucault would have it, an invention of modernity. Rather, it is as old as modernity itself.[63]

Bios strikes Agamben as an interesting concept as it is effectively an empty signifier. Political life does not have meaning in and of itself, as it always needs to be held in relation to natural life, *zoē*, in order to give substance to its

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[60] de la Durantaye (n 1) 210.

[61] ibid.

[62] Aristotle, *Politics*, in Aristotle, *The Complete Works of Aristotle, Volume Two* (Jonathan Barnes ed, Princeton UP 1984) 1278b, 23-31; *HS* 1.

[63] Although this is confused by Agamben referring to biopower and biopolitics as a modern phenomenon in another work – *O* 15.

content. It is Agamben's contention that today *bios* is found in the political existence given meaning by the great Conventions and declarations of rights started in the 1800's.[64] Despite rights and duties being inscribed on to *bios*, *bios* only gains meaning through being held in relation to what it is not, namely *zoē*. The "decisive event of modernity" in Agamben's eyes is the entry of *zoē* into the *polis*, the political sphere, the very act that allows *bios* to ground itself against a politicised *zoē*.

This politicised *zoē* is termed 'bare life', a life that is without the rights and duties of *bios* but a life that is still trapped within the political realm and therefore vulnerable to the operations of power that may act against it. Almost paradoxically, the most important figure to Western politics is not the rights-imbued individual characterised by *bios*, but instead bare life. Without bare life *bios* cannot ground itself. It is bare life that maintains political existence, yet at the same time is anathema to the very system it maintains, the very system that denies that bare life can exist. Is this position defensible however? Agamben grants primacy to a specific reading of the *Politics*, and by reading Foucault's biopower as beginning with Aristotle Agamben risks positing an extremely arbitrary basis for his reinterpretation of biopower not based upon empirical evidence.[65]

To counter this, it is necessary to view Agamben not as following in Foucault's philosophical footsteps, but as distancing his own work from Foucault's. He does this through tracing a transcendent strand of thought within Foucault, which Agamben maintains provides an ineffable foundation for Foucault's thought.

A non-Foucauldian philosopher?

To claim that Agamben should not be considered as a Foucauldian or post-Foucauldian philosopher is controversial. It is controversial not least because Agamben himself has stated that "I see my work as closer to no one than to Foucault".[66] Whilst Agamben's works are close to Foucault, especially in method, Agamben's philosophical project is markedly different from Foucault's. However

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[64] *HS* 181.

[65] See Andrew Norris, 'The Exemplary Exception: Philosophical and Political Decisions in Giorgio Agamben's *Homo Sacer*' in Norris (n 2) 262.

[66] de la Durantaye (n 1) 209.

it is first necessary to consider the charge that Agamben's work is a development of Foucault's.

Agamben's attempt to 'correct' Foucauldian biopower has led many scholars to consider Agamben, not unreasonably, to be the heir to Foucault's philosophical project. Katia Genel, as part of a detailed analysis of Agamben's correction of Foucauldian biopower, asks:

> Can Agamben legitimately reinterpret Foucault's thought starting from what is an admittedly essential but nonetheless transitory and brief moment of his thought, the hypothesis of biopower?[67]

Questioning whether Agamben has undertaken a legitimate reinterpretation implies a view that Agamben has directly developed Foucault. However, Agamben, whilst being heavily influenced by Foucault, has not accepted the limits and parameters of Foucault's own research in outlining his own philosophical project.

Nor is Genel alone in these conclusions. Mika Ojakangas, in his article 'Impossible Dialogue on Biopower: Agamben and Foucault' argues that Agamben's move to ally biopower and biopolitics with sovereignty and sovereign power misses a key thrust of Foucault's analysis. Ojakangas argues that:

> The original problem of Agamben's analysis is that he sees bio-power as power based upon bare life, defined in turn solely by its capacity to be killed. Foucault's bio-power has nothing to do with that kind of bare life.[68]

Ojakangas gives Agamben a generous reading, but again reads Agamben as if he was a direct descendent of Foucault philosophically. In particular, Ojakangas accepts Foucault's contention that biopower is a thoroughly modern phenomenon.[69] This is important for Ojakangas's argument as the positions given to biopower by both Foucault and Agamben are radically different. From this position Ojakangas can question Agamben's fidelity both to Foucault's conception of biopower, as well as the accuracy of Agamben's corrections given Foucault's other writings on power and sovereignty.[70]

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[67] Genel (n 3) 45.
[68] Mika Ojakangas, 'Impossible Dialogue on Biopower: Agamben and Foucault' (2005) 2 Foucault Studies 5, 11.
[69] ibid 26.
[70] ibid 13-5.

To add fuel to this comparative fire, Agamben uses the Foucauldian methodologies of paradigms and archaeology in order to support his argument that biopower can be traced back to the time of Aristotle. The most famous paradigm invoked by Agamben is that of *homo sacer*, the sacred man. *Homo sacer* is used by Agamben as a paradigm to represent the necessity of bare life for all political existence and its continual actualisation within the political order. This allows Agamben to understand the historical structure of biopower and its operation with and through the law and sovereignty. The paradigm is described by Agamben as a "historically singular phenomenon" comparable to Foucault's use of the Panopticon in his work.[71] However, Agamben's use of paradigms differs from Foucault in a very important way.

The force behind Foucault's genealogies and archaeologies consist in the fact that the examples Foucault uses within his work are primarily historical. Foucault's paradigm of Jeremy Bentham's Panopticon stands as an emblematic figure for a new age of power and governmental control.[72] Despite the Panopticon never being built to its original design, a number of prisons influenced by Bentham's concept were built.[73] Foucault's work thus has a historical relevance, so much so that Foucault has been characterised by some as primarily a historian rather than a philosopher.[74] Most importantly, Foucault should not be viewed as a paradigmatic philosopher like Agamben. To reduce Foucault to a paradigmatic philosopher, as Agamben appears to imply, minimises the historical relevance that his ideas had.

Contrary to Foucault, Agamben's uses of paradigms do not carry the same historical weight. The "historically singular phenomenon" of Agamben's paradigm is drawn from history, but Agamben compares his paradigms to examples, a similarity he explained in a passage from *The Coming Community*:

> In any context where it exerts its force, the example is characterised by the fact that it holds for all cases of the same type, and, at the same time, it is included among these. It is one singularity among others, which, however, stands for each of them and serves them all. On one hand, every

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[71] Raulff and Agamben (n 35) 610.
[72] de la Durantaye (n 1) 215.
[73] ibid 216.
[74] See Gary Gutting, 'Foucault and the History of Madness' in Gary Gutting (ed), *The Cambridge Companion to Foucault* (2nd edn, CUP 2003) 49–73. For a contrary view, see Michel Foucault, 'What Is Enlightenment?' in Paul Rabinow (ed), *The Foucault Reader: An Introduction to Foucault's Thought* (Penguin Books 1991) 32–50.

example is treated in effect as a real particular case; but on the other, it remains understood that it cannot serve its particularity. Neither particular nor universal, the example is a singular object that presents itself as such, that *shows* its singularity. Hence the pregnancy of the Greek term, for example: *para-deigma*, that which is shown alongside … Hence the proper place of the example is always beside itself, in the empty space in which its undefinable and unforgettable life unfolds.[75]

Thus the use of paradigms for Agamben is akin to a historical example. The paradigm is neither inside nor outside the group or set of phenomena that it identifies. Rather, a paradigm is the real particular case that is set apart from what it is meant to exemplify.[76] The paradigm is vital to Agamben's immanent aim as his paradigm remains a 'singular object', without reference to any transcendent referent. However such a move from the historically grounded paradigms of Foucault to paradigmatic examples is problematic, ostensibly because Agamben always leaves himself open to criticisms of historical inaccuracy.

Perhaps more concerning to his project's defensibility, Agamben appears to be placing himself in a self-referential methodological cycle. His use of paradigms as examples and insistence that those examples stand outside of the phenomena they identify mean that his work does lack detailed empirical analysis. However, such a criticism could be countered by Agamben through the assertion that he is a philosopher, not a historian, and that it would be a mistake to understand his work as being a historical treatise. If this is the case, then the lack of historical accuracy is not a criticism that can affect the veracity of Agamben's contentions. This is surely a nonsensical position as Agamben goes on to argue that his use of paradigms forms a 'philosophical archaeology' that seeks to trace a phenomenon to its point of emergence.

This construction of a philosophical archaeology is also Foucauldian in influence. Just as Foucault's genealogical tradition eschewed searching for origins, so Agamben's archaeology also avoids questing for origins.[77] This lack of focus on origins is intentional. A focus upon origins implies a 'before', presupposing an original condition that existed and split into the various phenomena being studied. For example, a pure 'life' that split into *bios* and *zoē*. This idea of a 'before' can lead to a yearning to rediscover a golden age that needs

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[75] *CC* 9-10.

[76] de la Durantaye (n 1) 218-9.

[77] *PA* 214.

to be returned to. For Agamben, such a yearning is misplaced, and does not hold the answers for our current malaise. Therefore, his archaeology studiously avoids questions of origins and any notion of a 'before'. Agamben defines his archaeology as follows:

> We could provisionally call 'archaeology' the practice which, within any historical investigation, has to do, not with the origin, but with the question of the point from which the phenomenon takes its source, and must therefore confront itself anew with the sources and with the tradition. Also the archaeology cannot take up the challenge of the tradition without deconstructing the paradigms, techniques and practices by means of which it regulates the forms of transmission, conditions the access to the sources, and determines, in ultimate analysis, the status of the knowing subject. The point of emergence is here, thus, both objective and subjective and situates itself at the threshold of undecidability between object and subject. No fact emerges without giving rise, at once, to the emerging of the knowing subject itself: the operation on the origin is, at the same time, an operation on the subject.[78]

Philosophical archaeology searches for the point of emergence of the phenomenon, the source of its existence. Through the use of paradigmatic examples such as *homo sacer* Agamben aims to use his archaeology to determine how and where bare life emerged. Thus Agamben attempts to trace an archaeology of *homo sacer*, and biopolitics, from antiquity to modernity.

The use of paradigms therefore cannot be separated from Agamben's philosophical archaeology, and forms a key constituent element to his philosophical investigations. This includes Agamben's wider ontological project. To question Agamben's use of paradigms and archaeology is also implicitly to question Agamben's ontology. Agamben's archaeology can be characterised as an ontological examination of a phenomenon that aims to enable "the thing itself" in question to be grasped and understood.[79]

Such a methodological move by Agamben has led to many criticising him for distorting Foucault's own methodologies and ignoring the historical force that those methods have. This has opened Agamben up to be viewed, and criticised, as a Foucauldian philosopher. Peter Fitzpatrick has written critically that Agamben has read Foucault selectively and to his advantage.[80] Fitzpatrick focuses on Agamben's archaeology of *homo sacer* and argues that Agamben only cites texts

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[78] ibid 217.
[79] ibid 220.
[80] Fitzpatrick (n 41) 51.

that support his position, and does not place the figure of *homo sacer* into any sort of historical context.[81]

Agamben's paradigm of *homo sacer* does not have the same historical grounding as Foucault's Panopticon. Agamben argues that in Roman law *homo sacer* is a life that may be killed but not sacrificed, outside both human law and divine law.[82] As such Agamben claims that *homo sacer* could be killed with impunity by anyone but could not be sacrificed in a religious ceremony.[83] However Fitzpatrick coherently argues that a quotation of Ambrosius Theodosius Macrobius shows that *homo sacer* is punished according to the *ius divinium*, and instead of being completely excluded from the law, he is actually defined by and contained within the law.[84] *Homo sacer* could be killed without need for a religious sacrifice precisely because he had *already* been sacrificed through the legal decision that made the individual sacred. His life is bare because he is already "of the gods" and there is nothing left for him in this world except to be killed. Fitzpatrick therefore heavily criticises Agamben's claim that *homo sacer* survived Roman law through to modernity.[85]

Nor is Fitzpatrick a lone critic. Andrew Norris has accused Agamben of positing an extremely arbitrary basis for his reinterpretation of biopower by tracing its origin to Aristotle, one that is not based on empirical evidence.[86] Despite Agamben equating his method with that of Foucault's, it should be more properly understood as a radicalisation of Foucault's methodology. Perhaps due to this radicalisation of Foucault's method Agamben's use of paradigms has been very widely criticised by philosophers and historians.

Ernesto Laclau has attacked Agamben for purveying a "distorted history" as well as a view of the present that reflects "political nihilism".[87] Laclau does not simply oppose the principle of the paradigmatic method however, but seems to

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[81] ibid 51-2, 55-6.

[82] *HS* 71.

[83] ibid 8.

[84] Fitzpatrick (n 41) 52. *HS* 82, citing Ambrosius Theodosius Macrobius, *Saturnalia*, 3.7.3-8: "It does not seem out of place to consider the status of those men whom the law declares to be sacred to certain divinities, for I am not unaware that it appears strange to some people that while it is forbidden to violate any sacred thing whatsoever, it is permitted to kill the sacred man". See also W Warde Fowler, 'The Original Meaning of the Word Sacer', (1911) 1 The Journal of Roman Studies 57, 58; Harold Bennett, 'Sacer Esto' (1930) 61 Transactions and Proceedings of the American Philological Associations 5.

[85] Fitzpatrick (n 41) 49, 67-8.

[86] Norris (n 65) 262.

[87] Ernesto Laclau, 'Bare Life or Social Indeterminacy?' in Calarco and DeCaroli (n 2) 19-22.

misread Agamben's work as deterministic, with *homo sacer* not being able to be countered by any means. Rather, as Leland de la Durantaye observes, Agamben's paradigms are examples, albeit extreme, that explore the emancipatory possibilities that exist in modernity. To dismiss Agamben as deterministic, as Laclau does, misses the key thrust of Agamben's method.[88]

Leland de la Durantaye sees the strengths of the *Homo Sacer* project as inseparable from its weaknesses in its radicalisation of Foucault's method.[89] It is Agamben's insistence that paradigms can be both concrete historical instances as well as representing broader philosophical concepts that appears to form the biggest objection to his thought.[90] It should be realised that Agamben's use of paradigms is complex, central to his thought and radicalised from that of Foucault's. Any criticism of Agamben must therefore be careful not to misunderstand Agamben's aims and not implicitly call into question Foucault's own conclusions and methodology.

This radicalisation of Foucault's methodology must be read in conjunction with Agamben's denial of a transcendent realm. Agamben's ontological aim is to challenge the definition of life itself, and to strive against conceptions of law and life that posit a transcendent substance or essence. This is the illustrative difference between Foucault and Agamben, and marks a fracture between their philosophical projects.

The Mythologeme of Transcendence

It is Agamben's claim that philosophy, and in particular transcendent philosophy, is the subject of an originary negative scission between transcendent and immanent spheres. Zartaloudis reads Agamben as tracing this originary negativity back to the second century, and in particular early Christianity. This is a position most clearly enunciated in *Il Regno e la Gloria*. This volume of Agamben's is not yet translated into English. As such, the following analysis is drawn from Thanos Zartaloudis's work which has conducted detailed analysis of the Italian original. All the work in this chapter and thesis relating to *Il Regno e la Gloria* is drawn from Zartaloudis's analysis and the secondary literature rather than the primary

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[88] de la Durantaye (n 1) 221.
[89] ibid 226.
[90] ibid 220.

source. The footnotes that refer to *Il Regno e la Gloria* also draw upon and follow Zartaloudis's footnoting.

An immediate point of ambiguity arises at this early stage. If Agamben alleges that an originary negativity can be traced back to early Christianity, does this square with his maintaining that bare life can be traced back to the time of Aristotle? This point is not dwelt upon by Agamben, nor is it developed in his work. This does leave Agamben open to similar criticisms as those directed against him by Laclau, Norris and Fitzpatrick. It is unclear as to how Agamben's focus on Aristotle is, or can be, linked to early Christianity.

This point aside, Zartaloudis contends that Agamben outlines two theses in *Il Regno e la Gloria*. First, modernity has two political paradigms derived from and bequeathed to it from Christian theology. The first paradigm is political theology, which provides for the theory of sovereignty and the foundations of law. This paradigm founds the transcendence of power in the unity of God. The second paradigm is that of the Divine economy or *oikonomia*, which provides the model for the governance and economic administration of human beings and things. *Oikonomia* is an immanent, economic, domestic and non-political administrative order of governance.[91] From the first paradigm is derived Western political philosophy and theories of sovereignty; from the second derives modern biopolitics and the modern managerial economy.

The second thesis Agamben posits is that these two paradigms are both separate from each other, antinomian to each other yet functionally related. Through the presupposed relation of the two paradigms, Agamben argues it is possible to show the general problem of power at an ontological level. This is the fracture between being and *praxis*. For Agamben, only through understanding the centrality of *oikonomia* can the bipolar structure of philosophy, politics and law derived from Christian theology can be properly appreciated.[92]

The paradigm of political theology serves to transmit and to safeguard a definition of law that is fractured between a transcendent Law and an immanent law. Conceiving of law as a bipolarity presupposes a 'Law of law'. This is a mysterious centre of law that ought to, and does remain ungraspable, universal, transcendent and ineffable. Zartaloudis sees Agamben's argument as opposing

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[91] Zartaloudis (n 5) 5.
[92] ibid.

such bipolar, transcendent schema. A problem arises as foundational *mythologemes* of law and power define law negatively. There exists a separation between a transcendent and an immanent order. Law is thus defined through being held in relation to a transcendent sphere that it cannot reach and has no part of. There is thus a realm of participation for law and an unparticipated realm that the immanent law cannot reach.[93]

Zartaloudis's approach is telling here. The traditional approach of political theology which is mirrored in the work of Carl Schmitt focuses on the absolute, perpetual sovereignty of law and power from which all secondary laws and powers proliferate.[94] However, there is a paradox that political theology cannot explain. If sovereign power is absolute, in the sense that it needs nothing other than its own being sovereign to justify itself, then why does it require secondary causes, intermediaries and administrators to act?[95] Zartaloudis, echoing Agamben, argues that the only appropriate answer is that there is neither an essence nor a substance in the plane of the foundation of law.[96] Zartaloudis continues:

> This is tantamount to saying that the sovereign throne has always been conceived as an empty throne and doctrinal and administrative apparatuses attempt to do nothing else than to silence this fact.[97]

Thus it is the paradigm of *oikonomic* management and governance that posits and produces the absolute transcendent foundation of power and law. Thus Zartaloudis reads Agamben as contending that there has always been a misplaced emphasis upon sovereignty. It is *oikonomia* that is the key to modernity and the production and sustaining of bare life, *homo sacer*.

In legal discourse, there remains the question of the relation between the law that immanently exists in the common law, statute and constitution and the spirit of the law or the Law of law.[98] Zartaloudis reads Agamben as seeing that what is at stake is an attempt to posit a *mythologeme*, namely a bipolar juridical body torn between transcendence and immanence, and at the same time to posit a

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[93] ibid 6.

[94] ibid; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005).

[95] Zartaloudis (n 5) 6.

[96] ibid 7.

[97] ibid.

[98] See *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31, 49-50 (Lord Hope); *Vowles v Evans* [2002] EWHC 2612 [27], [42] (QBD); Harold Hongju Koh, 'The Spirit of the Laws' (2002) 43 Harvard Intl L J 23, 23.

limit between the transcendent and immanent realms. Such a limit implies a relation between the two that exceeds every relation. It is this limit that incessantly captures and regulates life itself. In other words, recourse to the transcendent does nothing other than create bare life. As such, Zartaloudis reads Agamben's wider aim as to think of law outside of every relation, and without resort to foundational *mythologemes*.

More than this, these *mythologemes* are negative in character. Zartaloudis describes Agamben's argument as stating that every metaphysical or politico-theological essence and origin is negative as they assume a scission between essence and existence. Every origin presumes two realms: one existent, immanent realm and another, essential, transcendent realm that remains ineffable. The immanent realm is defined negatively by being held in relation to a transcendent realm. The immanent sphere therefore needs the transcendent sphere in order to ground itself and constitute itself. It is Agamben's contention according to Zartaloudis that the relation of *oikonomia* to sovereignty repeats this scission between existence and essence. This is traced to early Christian theology.

The Theological Fracture of Being and Praxis

In *The Signature of All Things*, Agamben outlines his theory of signatures.[99] Again showing his Foucauldian influence, Agamben begins his investigation with Foucault's account of the signature in *The Order of Things*.[100] The signature is not a concept or a sign. A sign or concept refers to a specific interpretation or a determinate sphere. As Zartaloudis describes, this allows for a movement away from a current signification and construction of a new signification of a concept.[101] Rather, a signature dislocates concepts and signs, and does not aim to resignify concepts. A signature moves concepts and signs to another sphere, without any semantic redefinition being involved.[102] This movement to another sphere is not a movement between spheres of actual and potential interpretation. Rather, the movement to another sphere can unconceal a previously hidden

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[99] See Sophie Fuggle, 'Excavating Government: Giorgio Agamben's Archaeological Dig' (2009) 7 Foucault Studies 81, 85-7.

[100] Michel Foucault, *The Order of Things: Archaeology of the Human Sciences* (Routledge 1988) 29.

[101] *RG* 16; Zartaloudis (n 5) 97-8.

[102] *SA* 46.

connection between two seemingly unconnected spheres. For example, Agamben argues that the notion of sovereignty is a signature, which in its displacement from the domain of the sacred to that of the profane identifies a relationship existing between the two spheres.[103]

One of the key examples used to explain the theory of signatures is *secularisation*. Secularisation in modernity is a signature that paradoxically returns the secular world to theology. Through secularisation, the theological leaves its mark on the political whilst avoiding a direct correlation between political and theological identities.[104] *Oikonomia*, as Zartaloudis reads Agamben, is a thoroughly theological paradigm, and has formed the basis for modern secular democracies. The consequences of this reading of Agamben's analysis of *oikonomia* is not a calling for a revised understanding of how Western societies govern but demands a radical re-thinking of how we conceive of the theological principles underpinning secular modes of government.[105]

Oikonomia *and the Trinity*

In Greek, *oikonomia* signified the administration of the home (*oikos*) and, more generally, management.[106] Aristotle referred to *oikonomia* as *techne oikonomike*, or economic art, the art of running the household.[107] Zartaloudis provides evidence that Xenophon and Plato both considered *oikonomia* to be a non-political paradigm, an administrative, practical activity tied up with the management of the home.[108] It is this administrative, managerial meaning of the term that Agamben argues survives through to early Christian thought.

Zartaloudis reads Agamben as tracing the paradigms of sovereignty and *oikonomia* to the debates amongst the Early Church Fathers surrounding the question of how to reconcile the doctrine of the Trinity with one, omniscient, omnipotent God. Christianity inherited from Judaism the doctrine of one God, the Father and Creator as the central pillar to its faith.[109] Early Church Fathers were in agreement with the idea that one God brought all things into existence from non-

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[103] Fuggle (n 99) 86.
[104] *RG* 20-1.
[105] ibid 52.
[106] *WA* 8.
[107] Aristotle, *Politics* (n 62) 1253b, 1259a-b.
[108] Zartaloudis (n 5) 57-9.
[109] J N D Kelly, *Early Christian Doctrines* (5th edn, Adam & Charles Black 1977) 87.

existence. The problem facing theology was how to integrate this Judaic belief in one God with the specifically Christian revelation. At the simplest level, this revelation involved God making Himself known in the Person of Jesus, the Messiah, raising Him from the dead and offering salvation to men through Him, and the pouring out of His Holy Spirit upon the Church. This conception of a plurality of divine persons was deeply imprinted upon the early apostolic faith.[110] Zartaloudis notes Agamben stating that the plurality of divine persons, and their unity in one God, was a mystery even to Paul, who referred to the *oikonomia* of the mystery of the Trinity.[111]

In enquiring into the relation between God the Father and God the Son, the Early Church Fathers distinguished between *theologia*, theology, and *oikonomia*, economy. *Theologia* referred to the mystery of God's innermost Being within the Trinity and *oikonomia* referred to all the works by which God reveals himself and communicates his life. This included the act of giving his only Son to the world to die and redeem all sins. This can be seen in the thought of second century theologian Irenaeus, who approached the question of the Trinity from two directions. Irenaeus envisioned God both as He exists in His intrinsic being, and also as He manifests Himself in the 'economy', *oikonomia*, the ordered process of His self-disclosure. Thus God is ineffably 'one', yet He makes Himself known through the revelation of his Son and Holy Spirit.[112]

What is key to Agamben, for Zartaloudis, is a strategic reversal of the use of *oikonomia*. Whereas the Apostle Paul referred to an economy of mystery, theologians such as Hippolytus speak of a mystery of economy, with *oikonomia* referring to the relation between Father and Son.[113] Zartaloudis argues that Hippolytus in his *Contra Noetum* attempts to conciliate the unity of God with the Trinity. Hippolytus argues that this very conciliation is mysterious as such.[114] Thus the doctrine of the Trinity can posit a Triune of Divine figures; God, Christ and the Holy Spirit. The Godhead is revealed in the Divine *oikonomia*, with each Person being a manifestation of a single indivisible power. The mystery of the Divine *oikonomia*, and the *mythologeme* of transcendence, arises from the

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[110] ibid 88.
[111] *RG* 36, 38; Colossians 1: 24-6 (Revised Standard Version).
[112] Kelly (n 109) 104-5.
[113] *RG* 49-50.
[114] Zartaloudis (n 5) 62; *RG* 53-4.

conception of the substance of God as absolute, ineffable, and unknowable to human beings, due to His very nature. The Divine *oikonomia* is the mystery of God's will, a mystery which from the ages has been hidden in God, who created all things.[115] This mystery existed because it was not unveiled to human beings in any past ages, it was hidden in God. Men could see the creation, but they could not understand the purpose of the creation.

The purpose of the creation was revealed through Christ in God's *oikonomia*, the arrangement of the eternal plan of God's household administration.[116] Thus God was not revealed in his being, but only in his concrete *praxis* through Christ. Already there is an absolutely mysterious transcendent realm posited that can only be understood through an immanent, *oikonomic* power, embodied in Christ. God cannot be understood, except through a revelation in Christ, who is also God.[117] As Tertullian posited, and Zartaloudis restates, the three Persons of the Trinity are one in quality, substance and power, but different in sequence, aspect and manifestation.[118] Therefore although the Trinity posits a Triune of Divine figures Christ, as represented in the Divine *oikonomia*, is God, not subordinate to God. This is the mystery of *oikonomia*.

Zartaloudis explains that against the Arian conception of Christ as being generated by the Father, the Church Council of Constance in Nicaea, famous for formulating the Nicene Creed, concluded that the origination of Christ does not pertain to God's being but to the mystery that founds Christ in God without *archē*. In this way, God's *praxis*, the revelation of the divine *oikonomia* through Christ, is not grounded in the substance of God. If it were, then Christ would be subordinate to God, which cannot be the case.[119] Christ, the Son, is *an-archos*, without origin. Thus divine *oikonomia*, divine action, is *anarchical* in a way similar to God. Most importantly, there remains a functional relation between the sovereign transcendent God and the *oikonomic* Christ. Christ is a necessary figure for without Him the revelation would not occur; likewise without God there would not have been Christ. From the very start of Christology sovereignty and *oikonomia* retain a close yet mysterious relationship.

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[115] Ephesians 1:9; 3:9.
[116] Ephesians 1:9-10; 3:9-11; I Timothy 1:3-4.
[117] Ephesians 1:7; 1:10; 3:11; I Timothy 3:15.
[118] Quoted in Zartaloudis (n 5) 62.
[119] ibid 70; *RG* 74.

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The secular implications of oikonomia

Theologians attempted to coincide within one God the notion of the Trinity, and did so, as can be seen in Irenaeus's attempt, by distinguishing the being or *ousia* of God from his *praxis* or *oikonomia*. This distinction between being and *praxis* was recognised and defended by both Tertullian and Hippolytus. Both aimed to refute Gnostic dualism, and both used *oikonomia* to refer at first to God's secret purpose or divine plan, then to the goal of the divine purpose.

Zartaloudis develops this line of reasoning and the implications of *oikonomia*. In its original meaning, *oikonomia* referred to distribution, organisation and the arrangement of a number of factors in a regular order. It was extended to connote the distinction of Son and Spirit from the one Father as disclosed in the working out of God's redemptive plan.[120] However, through this attempt to reconcile the Godhead within one God the theologians introduced an originary fracture in God's substance between his being and his *praxis*. What is divided in the Trinity is not God's being but the *oikonomic praxis* or power of God.[121]

According to this paradigm of *oikonomia*, the divine *praxis* of creation is not founded on the being of God but is distinguished and realised in a separate Person, the Son in *logos*. He is unfounded and anarchic and attempts to conciliate the unity between transcendence and immanence. Zartaloudis sees Agamben as arguing that Western political history has always operated according to this *oikonomic* paradigm through a bipolar machine, rather than through a sovereign transcendentalism as has been the obsession of political theology.[122] The Trinitarian *oikonomia* bequeathed to Western politics a transcendent sovereignty that cannot act without an immanent, *oikonomic* managerial government, which in turn derives all its power from the sovereign. Governmental action is anarchic and not derived from sovereignty, in the same way that Christ does not derive from God, but is God. Government does not derive from sovereignty, but *is* sovereignty. Government upholds the transcendent *mythologeme* of sovereignty through its immanent *praxis*.

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[120] ibid 110-1; *RG* 49-50.
[121] Zartaloudis (n 5) 65.
[122] ibid 71-2; *RG* 81.

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Therefore, Zartaloudis concludes, Agamben can claim that action, *praxis*, in the form of *oikonomia* and politics, has no foundation in a transcendent plane.[123] This fracture between being and acting provides for a rich inheritance in Western thought. This is evident in every attempt to conceive of a reciprocal determination of being and acting in philosophical, ethical, and political principles that provide the rules according to which an individual is to act and the authority according to which this is made possible as its justification.[124]

The transcendent in Foucault

Agamben attempts to read into Foucault's archaeology this originary scission between transcendent and immanent realms. Agamben argues that Foucault's archaeology presented itself as the research of a dimension both paradigmatic and transcendental, a 'historical *a priori*' that aims to discover on what basis knowledge and theory become possible.[125] This dimension Foucault identifies is the *episteme*:

> [A]n epistemological field, in which our knowledge, envisaged irrespective of all criteria that relate to its rational value or objective forms, grounds its positivity, and by so doing manifests a history which is less the history of its ever-growing perfection than that of its condition of possibility.[126]

Agamben traces the Foucauldian archaeology and historical *a priori* to *The Archaeology of Knowledge*.[127] Agamben's characterisation of Foucault's project as transcendent is the mechanism by which Agamben seeks to differentiate his wider project from his use of Foucauldian methodologies.

Agamben argues that the historical *a priori* is itself a historical practice. Foucault attempts to discover within what space of order knowledge was constituted, how ideas could appear, sciences be established, experience reflected in philosophies and rationalities be formed.[128] Foucauldian archaeology aims for the history of the sciences when they are analysed at the level of discursive

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[123] *WA* 10.
[124] Zartaloudis (n 5) 65-6.
[125] de la Durantaye (n 1) 219.
[126] Foucault, *The Order of Things* (n 100) 13.
[127] Michel Foucault, *The Archaeology of Knowledge* (A M Sheridan Smith tr, Routledge 2002)
[128] Foucault, *The Order of Things* (n 100) 13.

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regularities, seized at a particular level.[129] This level is the level of their simple existence, the brute fact of their presenting themselves in particular way at a particular time.[130]

After arguing that Foucault's *a priori* was historical, Agamben begins his questioning of Foucault's philosophy. Agamben's questioning of Foucault's archaeology starts with the question: how can an *a priori* exist historically?[131] Agamben argues that Foucault did not question himself on the particular temporal structure that the historical *a priori* implies.[132] This paradox for Agamben focuses upon the fact that the historical *a priori* exists and is inscribed within a certain history. Agamben re-presents this history subsequent to the *a priori*. This leads Agamben to conclude that archaeology must always discover its object, rather than the other way around.[133]

Agamben therefore sees Foucault's *a priori* exists as a transcendent constituent element that can only be defined through its constituted history *and* defines that history. In other words, the *a priori* itself remains ineffable and ungraspable. In order to distance his use of archaeology from Foucault, Agamben traces an ineffable transcendent realm within Foucault's work. Agamben sees this as a fracture between immanent and transcendent realms. This can only be countered by positing a phenomenon that itself remains ineffable and constitutes both realms through a paradoxical formulation.

From this it can be argued that Agamben views Foucault's historical *a priori* as evidence of Foucault's transcendent thought. Whilst not shared by all Foucauldian scholars such a view has its supporters, most notably Beatrice Han-Pile.[134] Han-Pile has focused upon what she views as Foucault's 'transcendent' philosophy. Whilst this is by no means the only reading that can be given to Foucault, it is useful here to illustrate the move Agamben makes with the Foucauldian method. Han-Pile focuses upon Foucault's continuing interest in the historical *a priori*. Foucault continually attempts to understand the conditions that at any time, discourses have to obey to be true. These conditions must be defined

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[129] *PA* 220.
[130] ibid.
[131] ibid.
[132] ibid.
[133] ibid.
[134] Beatrice Han-Pile, *Michel Foucault's Critical Project: Between the Transcendental and the Historical* (Stanford UP 2002) 3.

at a specific level, distinct from that of the empiricities that they govern, and that they are binding for the period concerned. Both his interest in non-empirical conditions and his criticism of the traditional understanding of the transcendental are clearly articulated:

> [the rules of the historical *a priori*] are not constraints whose origin is to be found in the thoughts of men, or in the play of their representations; but nor are they determinations which, formed at the level of institutions, or social or economic relations, transcribe themselves by force on the surface of discourses.[135]

Additionally, Agamben characterises the historical *a priori* is an apparatus, and argues that the apparatus, or *dispositif*, is an essential technical term in Foucault's work. Agamben claims apparatuses take the place of universals in Foucault's work.[136] In using the apparatus, Agamben argues that Foucault takes a position with regard to the relation between individuals as living beings and what Agamben terms the 'historical element', the historical *a priori*.[137] The apparatus thus stands for Agamben as the way in which this scission between transcendent and immanent realms are concealed. Such a view of the apparatus as a 'universal' could be supported by Foucault himself. In an interview from 1977, Foucault defined the *dispositif* as follows:

> What I'm trying to pick out with this term is, firstly, a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions—in short, the said as much as the unsaid. Secondly, what I am trying to identify in this apparatus is precisely the nature of the connection that can exist between these heterogeneous elements. Thirdly, I understand by the term ''apparatus'' [dispositif] a sort of—shall we say—formation which has as its major function at a given historical moment that of responding to an urgent need.[138]

For Agamben the apparatus thus stands as a way to conceal the fact that the transcendent plane of authority is a *mythologeme*. Agamben's charge is that Foucault not only had a transcendent project but also masked the ineffability of this transcendence. This is a direct consequence of his ontological project.

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[135] Foucault, *Archaeology of Knowledge* (n 127) 73-4.
[136] *WA* 7-9.
[137] ibid 6.
[138] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Colin Gordon tr, Pantheon 1980) 194-5.

Following Zartaloudis, Agamben's wider aim is to think of law outside of every relation, and without resort to foundational *mythologemes*. These *mythologemes* are negative. Every metaphysical or politico-theological essence or origin is negative as it assumes a scission between essence and existence. The whole of Agamben's critique of Foucault is based upon this premise. This should in turn be understood as a consequence of Agamben's radicalisation of Foucault's methods, as de la Durantaye explained.[139]

It is this scission between essence and existence that Agamben attempts to think beyond. This is why Agamben characterises his archaeology as a point of emergence, a point of pure immanence. Agamben's archaeology aims not to discover the past, but to make the future possible. Archaeology does not focus on origins, but on making the point of emergence of a phenomenon clear and understandable. This is how Agamben's archaeology fulfils its operation.[140] The breadth of this philosophical task Agamben sets himself can be illustrated by Agamben's radicalisation of Foucault's apparatus.

The Apparatus

Agamben abandons the context of Foucauldian philology and situates apparatuses in a new context.[141] Agamben proposes a "general and massive partitioning of beings" into two large groups or classes. On the one hand there will be living beings. On the other there will be apparatuses, in which living beings are incessantly captured.[142] This 'capturing' relates to the trapping of living beings within the originary fracture between a transcendent *mythologeme* and an immanent realm. Living beings are captured within this paradoxical situation where they gain their grounding through reference to an ineffable, ungraspable transcendent realm. This transcendent realm in turn cannot be defined in and of itself, but only in relation to the immanent realm which it in turn defines. As can be imagined from this situation, Agamben goes even further than Foucault in defining the apparatus:

> Further expanding the already large class of Foucauldian apparatuses, I shall call an apparatus literally anything that has in some way the capacity

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[139] de la Durantaye (n 1) 220.
[140] *PA* 227.
[141] *WA* 13.
[142] ibid.

to capture, orient, determine, intercept, model, control, or secure the gestures, behaviours, opinions, or discourses of living beings. Not only, therefore, prisons, mad houses, the panopticon, schools, confession, factories, disciplines, juridical measures, and so forth (whose connection with power is in a certain sense evident), but also the pen, writing, literature, philosophy, agriculture, cigarettes, navigation, computers, cellular telephones and – why not – language itself, which is perhaps the most ancient of apparatuses – one in which thousands and thousands of years ago a primate inadvertently let himself be captured, probably without realizing the consequences that he was about to face.[143]

Between the two classes of apparatuses and living beings exists a third: subjects, which result from the relation between living beings and apparatuses.[144] The subject is the result of the capturing of living beings within apparatuses. To relate this to Agamben's work in *Homo Sacer*, political life and bare life, and the relation they have with each other results from the capturing of life itself within the apparatus of politics, the fusing of politics and life, and the state of exception. Agamben's archaeology aims to strip away all apparatuses to grasp the living being itself.

Agamben's analysis of the apparatus can be summarised into three arguments. First, the apparatus is a heterogeneous set that includes virtually anything, linguistic and non-linguistic, under the same heading: discourses, institutions, buildings, laws, police measures, philosophical propositions, and so on. The apparatus itself is the network established between these elements. For instance, Agamben argues that *oikonomia* itself was an apparatus, a *dispositif*, by which the Trinity was introduced in God. This can be supported by reference to the fact that the Latin translation of *oikonomia* is *dispositsia*, from which *dispositif* is etymologically descended.[145] Second, the apparatus always has a concrete strategic function and is always located in a power relation. The apparatus functions to conceal the scission between immanent and transcendent realms. Third, it appears at the intersection of power relations and relations of knowledge.[146]

These three arguments belie Foucault's influence over Agamben. They reinforce Agamben's statement that Foucault is the philosopher who influenced

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[143] ibid 14.
[144] ibid 14-5.
[145] ibid 11; Kelly (n 109) 113.
[146] *WA* 11.

him the most. However, it can be seen that Agamben's re-positioning of Foucault's work and method as transcendent is vital to Agamben's own ontological schema. Not only is it important to underscore Agamben's focus upon immanent philosophy, it also allows Agamben to try and develop critical distance between his own thought and that of Foucault. Whatever Agamben's philosophical deficiencies, it would be wrong to characterise his work as either Foucauldian or post-Foucauldian in nature. The implications of Agamben's radicalisation of Foucault's method can be seen in the following section which analyses the apparatus of the state of exception, which Agamben claims creates the subject of bare life.

Agamben, Law and Bare Life

Agamben builds upon the *zoē/bios* opposition at the start of *Homo Sacer* to develop his formulations of how law and biopower interact. While Foucault joined together both disciplinary power and biopower at the micro and macro levels respectively, with disciplinary power affecting the individual and biopower operating at the level of populations,[147] Agamben replaces this distinction. Here, Agamben's biopower operates through sovereignty directed upon the individual. Power acts in both creating and maintaining *bios*, political life, by directly acting upon *zoē* and granting natural life the political rights that transform it into *bios*.[148]

Agambenian biopower subsumes disciplinary power. Unlike Foucault, who saw both forms of power as attempting to cover all of life, Agamben's biopower can be described as totalising in its operation. This biopolitics, far from complimenting the disciplines, or existing in a tensional relation with normative operations of power, is today causing disciplinary institutions to retreat in their influence over life.[149]

At the same time this biopower is aligned with and acts through the law. Agamben's understanding of biopower aims to transform all *zoē* into *bios*, attempting to regulate, order and increase power's hold over every human action. Life is aligned with and lived through the law. Political life, *bios*, becomes a legal subject, as the juridical order constructs legal subjects that can be acted upon by power. There are no longer separate spheres of power, only a juridical biopower. Thus Agamben argues that biopower aims to dominate every aspect of being a human: there can be no human actions that are outside of biopolitical regulation and control.

It is instructive here to compare this structure to Sergei Prozorov's description of 'immanentism'.[150] Immanentism denies that there can be any human action 'outside' of a self-enclosed social order, as it denies that such an 'outside' exists. It is important to distinguish Prozorov's *immanentism* from Agamben's focus on *immanence*. Prozorov was writing in the context of Foucault's critique of a closed social order. In contrast, Agamben's aim is to *deactivate* the biopolitical order but to do so through a politics of pure

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[147] Foucault, *History of Sexuality* (n 14) 139.
[148] For a critique of Agamben's reimagining of Foucault, see Ojakangas (n 68).
[149] *HS* 3.
[150] Sergei Prozorov, *Foucault, Freedom and Sovereignty* (Ashgate Publishing 2007) 83; *SE* 31.

immanence, by focusing on a political and legal existence that is not dependent upon any transcendent relations.

Prozorov's analogy needs to be modified slightly here as Agamben deals primarily with a *juridical* order, rather than a *social* order as Foucault does. A juridical order for Agamben presupposes a distinction between legality and illegality – this is the case as Agamben argues that biopower acts through the law.[151] Agamben's distinction made between legality and illegality may not necessarily correlate with Foucault's writings. This is because Foucault did not just focus upon legality and delinquency (or abnormality) in *Discipline and Punish*, but also focused upon broader concepts of normality and abnormality.[152] The nuance and breadth of Foucault's writings are not reflected in Agamben's formulation of biopower. For Agamben, human actions are constrained solely through denoting them as legal or illegal, not through the multiplicity of measures of power/knowledge that Foucault theorised. Despite this difference, Prozorov's construction of immanentism is a useful analogy to the structure of Agamben's biopower.

Agamben's totalising biopower can be argued to be analogous in structure to immanentism. The fiction of immanentism is maintained in Agamben's biopower through the aim of biopower to transform all *zoē* into *bios*, political life. However, Agamben argues that the figure of bare life challenges this fiction of immanentism. Bare life functions as a paradigmatic figure that allows Agamben to unconceal the key and decisive role of sovereignty within the political and legal order. Bare life challenges the notion that all natural life can be transformed into *bios*, political life.

Agamben ties the creation of bare life directly to sovereignty by focusing upon and modifying Carl Schmitt's concept of the sovereign decision. For Schmitt sovereignty rested on one concrete political fact, namely which individual or body could declare a state of exception. The decision, rather than any pre-ordained power, decided who was sovereign. Bare life is therefore linked to the transcendent, ineffable sphere of sovereignty that orders the immanent realm.

Adopting and modifying Schmitt's definition of sovereignty, Agamben contends that the sovereign and sovereign power can be identified through the

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[151] See *SE* 87.
[152] See Foucault, *Discipline and Punish* (n 23) generally.

creation of bare life; the individual or body that creates bare life will be by definition imbibed with sovereign power. This sovereign decision is tied directly to the operation of law. In *State of Exception* Agamben posits bare life not only being created through a sovereign decision, but also through the operation of the law, and specifically through the state of exception which exists as a zone of indistinction between law and anomie, law's beyond.[153]

The State of Exception

What sets apart Agamben from the other writers on emergencies that were considered in the previous chapter is Agamben's consideration of the exception. The state of exception is not a true exception as understood by the theorists of emergency powers, as Agamben denies that the exception can be temporally or spatially separated from the norm. Instead the exception is a zone of indistinction where law and fact completely coincide.

In his work on the exception Agamben distinguishes between the juridical order, *il diritto*, and the law, *la legge*. The juridical order maintains the fiction of immanentism; the abstract notion of 'law' presupposes that it applies to all of reality, to all of life itself. Whilst the law (*la legge*) of a State does not imply that all laws cohere with one another,[154] the juridical order maintains that there are no lacunae, in the sense that the juridical order covers all lacunae and all situations that arise. The fiction of immanentism is maintained even when the law seems to conflict and contradict itself internally.

Agamben's exception therefore does not exist as separate from or as dichotomous to the law. Although Agamben appropriates Schmitt's notion of the sovereign decision, he argues that attempts to relate the exception into the juridical order result in paradoxes and *aporias* which cannot be explained. If the exception is contained within the juridical order as part of positive law, such as the process of derogation, then the paradoxical situation arises where the exception that suspends the juridical order is contained within the very object – the juridical order – that it is suspending.[155] Likewise, if the exception is a purely political *de facto* extra-juridical situation, then the juridical order must contain a

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[153] *SE* 23.

[154] ibid 27.

[155] ibid 23. See also Stephen Humphreys, 'Legalising Lawlessness: On Giorgio Agamben's State of Exception' (2006) 17 European J Intl L 677, 678-9.

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lacuna precisely where the decisive situation concerning its existence in the face of grave threats exists. To conclude this is to support a fiction that the juridical order does not legislate for exceptions, which is patently not the case.[156]

Agamben has argued that in the twentieth century, with increasing recourse to emergency governance in Western democracies, the exception can no longer be distinguished from the norm, and today we live in a permanent state of exception.[157] This is quite a curious claim, taking into account his works on the primacy of the figure of bare life and his emphasis upon the paradigmatic method that traces bare life to Aristotle. It appears that Agamben embarks upon a genealogical diversion explaining how the exception developed throughout the twentieth century. With his statement in *Homo Sacer* that the exception is the originary form of the law,[158] it may be questionable at the very least to state that the exception has become the norm only during the twentieth century.

Despite this point, Agamben's development of the concept of the exception deserves further attention. The exception is neither inherent to law, nor other to law. The problem of defining the exception cannot be resolved through a simple opposition of inside/outside. The exception should be understood as a zone of indistinction where inside and outside blur with one another.

Agamben explains the importance of the exception for the law through the analogy of language and linguistics. Agamben argues that the law and language are interconnected. The *aporias* to be found in language are equally to be found in law. Appropriating and following Saussure's distinction, Agamben argues that linguistic elements exist in *langue*, in language, without any real meaning. These linguistic elements only gain meaning through their use in actual speech, *parole*. Equally, speech, concrete linguistic activity, only gains meaning if a language is presupposed.[159] The relationship between speech and language is not based upon any logical operation. The only way in which a generic proposition endowed with a merely virtual reference, such as a 'tree', passes to a concrete reference that corresponds to a segment of reality is through a practical activity, presupposing what is meant when the linguistic element 'tree' is used.

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[156] *SE* 23.
[157] ibid.
[158] *HS* 26.
[159] *SE* 36-7.

As it is for language, so it is for law. The application of a norm is in no way contained within the norm and cannot be derived from the norm. There is no internal logical nexus that allows the norm to be derived from its application.[160] The nexus that holds the norm in relation to its application is found in the exception, which exists as a zone of indistinction where the norm and application reveal their separation. In other words, in the exception the norm is applied even though its application has been suspended. In order to apply a norm, it is ultimately necessary to produce an exception, to suspend its application.

Such a position does assume a certain view of law. Assuming Saussure's structuralism leads the application of the norm to occur determinatively. Here Agamben assumes a determinate, logical judgment that occurs within legal reasoning. This approach can be seen most clearly in Agamben's example of necessity. Necessity for Agamben shows the being-in-force of the law even though it is suspended. In a case of necessity, legal norms still remain in force, yet the norm is not applied to a concrete factual situation. In effect, the law is suspended but still remains in force.[161] Equally, factual situations that are justified through necessity can gain legal status, in that they do not constitute transgressions of the law.

However the decisive act to which necessity applies evades all definition, in that it is neither fact nor law. If the act is considered legal and not factual, then why, asks Agamben, does that act need to be approved *ex post facto* by a judicial or legislative decision?[162] Yet if the decisive act is considered as factual rather than legal, then another problem arises, namely that the legal effects of the action begin not from the moment that it is converted from law to fact at the moment of decision after the event, but from the very moment of its taking place. The law's retroactive ratification of such necessary acts, delimiting them as lawful, can be seen as a fiction, concealing the very status of the act of necessity.[163]

Far from being a matter of law or a matter of fact, the act of necessity is a zone of indistinction that is subsumed into the law and considered *legal* in character, despite the fact that the actual necessary act defies all logical

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[160] ibid 40.
[161] ibid 26-7.
[162] See, for example, *Re A (Children) (Conjoined Twins: Surgical Separation)* (2000) 4 All ER 961 (CA).
[163] *SE* 26-31.

subsumption into either fact or law. Again, this position appears to give primacy to a view of reasoning with law as logical and determinate. There is a lack of nuance in this position, with Agamben equating the law to a formalistic, logical application of rules to facts. For instance, when Agamben speaks of acts that contradict legal norms gaining legal force, he ignores the position of interpretation within legal reasoning. Agamben reads into legal norms a determinate meaning.

For Agamben, every act of legal reasoning thus becomes an instance of the exception, trying to contain within the law that act which is neither law nor fact. In doing so it legitimises the act of bare power which has occurred in the 'necessary' act. The law becomes completely indistinct and is exercised solely through a concrete *praxis* in the exception, a zone of indistinction. This situation is problematic. Although this position appears to allow for a hermeneutic exercise of reasoning in the exception, in the sense of a concrete *praxis*, once again the decision-maker is constrained by a formalistic view of the law.

Agamben concludes that the exception is the opening of a fictitious lacuna in the juridical order. It is fictitious as the lacuna is not real and there is no gap in the law that the judge has to fill. In this sense there is no lack of law within the exception. The law exists in the sense of the norm, and the judge therefore does not have to make law. However, the lacuna is fictitious as it suspends the legal order that is in force, "safeguarding the existence of the norm and its applicability to the normal situation".[164] There is no gap in the legal order in the sense of a lack of law. Rather the legal order is suspended within the exception. Almost contrarily, through suspending the norm the exception guarantees the norm's pre-eminence for future cases. By delimiting when the norm does not apply in the exception this reinforces the norm's applicability in the 'normal' situation. Only by demarcating when the norm does not apply is it possible to constitute and give the norm its content.

This leads to the exception having some curious characteristics. In the zone of indistinction all legal determinations are deactivated,[165] but this does not mean that there is no law in the exception. The exception is full of legality, and, perhaps even more curiously, this means that potentially any action taken in the

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[164] ibid 31.
[165] ibid 23, 50.

exception can gain legal force.[166] The exception is not part of the law, or the juridical order. To presuppose this would be to reduce the exception to a function of law, and misses the key point about the actions that occur in the state of exception, namely their radical dis-location to the juridical order and the potential for any act to gain legal status.

The legal norm is suspended but still in force, through the means of the creation of the fictional lacuna in the legal order. As stated, the legal norm still retains its pre-eminence for the normal situation. However, in suspending the norm the norm's 'force-of-law' is also separated from its application. By 'force-of-law' Agamben refers to the constitutive essence of the law, the element that literally gives laws, decrees and other measures their 'force'.[167] In other words, the 'force-of-law' makes a law 'legal', and gives it legal force. So, legal norms that remain in force yet are not applied are separated from their 'force'. The 'force-of-law' therefore acts as an almost floating quality.[168] For Agamben, the conclusion to this scenario is striking.

Acts that do not have legal force can acquire this floating force-of-law that has been separated from the norm that is not being applied. If an act that does not gain legal force gains this force-of-law, then it will be by definition *legal*. Such acts are characterised by Agamben as having the force-of-law (without law). More than this, the norm that has had its force-of-law separated is still being in force, but not being applied. Thus a legal norm, through not being applied, can lead to acts that are not legal becoming legal. The force-of-law (without law) can be claimed by both the State and non-State groups not just to justify their actions, but to give them the force-of-law, to make their actions *legal*.[169]

The exception is tied by Agamben directly to both the operation of the sovereign decision to create bare life and the exercise of law. Drawing upon his analysis of the relationship of the norm to its application, Agamben argues that it is through the exception that the bare life that the political order requires to operate is created.[170] Because bare life is created through the exception, it is created through a zone of indistinction that is neither fact nor law. In this way,

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[166] ibid 59; *HS* 52.
[167] *SE* 38.
[168] ibid.
[169] ibid.
[170] ibid 40.

drawing upon Agamben's analysis, it is possible to conclude that the creation of bare life in the exception can gain the force-of-law (without law). This allows an action that may contradict legal norms to suspend those norms and at the same time be declared as legal.[171] In this way the law can remain in force yet not be applied to bare life.

Agamben's original contribution here is important. The operation of sovereign power and the sovereign decision that is imbued with the power to give acts the force-of-law is antecedent to any discourse about the norm and its application. In this way, the sovereign decision and the possibilities of acts gaining legal force precede any such act occurring. Agamben thus traces an ingrained and ongoing potentiality within the legal order for the exception to operate with sovereign power. Such an analysis challenges the efficacy of all legal rights in protecting the individual against the power controlled by the State.

Agamben, Benjamin and the Exception

To help support these arguments Agamben draws upon the work of Walter Benjamin, and specifically his *Critique of Violence*, '*Zur Kritik der Gewalt*' in the original German.[172] *Gewalt* signifies legitimised force or judicial power and also carries the meanings of authority, dominion, might and control.[173] In this text, Benjamin made explicit the connection between law and violence (*Gewalt*). For Benjamin, law and violence are intertwined and cannot be separated. Violence is the foundation of law, although today the law seems not to recognise its violent past. Benjamin argued that modern law has developed out of the violent revolutions and wars of the past and it preserves itself through violence by stopping challenges to the law and legitimising its own actions.

Benjamin posited two forms of violence to illustrate the connection violence has to law. 'Law-making violence' is violence used against the existing laws and conditions with the effect of constituting new laws. 'Law-preserving violence' maintains the authority and laws of the current system. Despite the

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[171] ibid 87.

[172] Walter Benjamin, 'Critique of Violence', in Walter Benjamin, *Selected Writings, volume 1, 1913-1926* (Marcus Bullock and Michael W Jennings eds, Harvard UP 2004) 236-52. The German word *Gewalt* in the title has been imperfectly translated into the English word 'violence' as this is the closest translation.

[173] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 Cardozo L Rev 919, 973-80; Michèle Lowrie, 'Vergil and Founding Violence' (2005) 27 Cardozo L Rev 945, 949.

differences between the two types of violence, Saul Newman argues that they both lead to a perpetuation of the law and power as neither type of violence affects the law's position. Law-making and law-preserving violence are used everyday by the law in order to perpetuate itself.[174] Every legal act can be classified as using law-making violence or law-preserving violence.

Agamben argues that the exception extends the legal violence Benjamin explored beyond its own boundaries by making it possible for extra-legal actions to acquire legal status, to gain force-of-law.[175] The exception as a zone of indistinction deactivates the law that is contained within it. In doing so it produces a violence that has "shed every relation to law",[176] making it appropriable by anyone, potentially allowing any action to acquire legal force through this legal violence that has shed its relation to law:

> It is as if the suspension of law freed a force … that both the ruling power and its adversaries, the constituted power as well as the constituent power, seek to appropriate.[177]

The paradox Agamben identifies is that suspending law only increases its violent activity. The exception produces law-making violence through the law's suspension.

Building upon this paradox, which Agamben states is representative of the force-of-law (without law), Agamben argues that the biopolitical law is caught within a dialectic akin to Benjamin's dialectic of violence. Any legal attempt to subsume or contain the exception within the law does not work. The exception by its very definition is a zone of indistinction where legal terms are deactivated, and as such it escapes the very law that sought to contain it. Therefore the sovereign decision creating bare life will always-already be legal, allowing Agamben to predict that:

> The normative aspect of law can … be obliterated and contradicted with impunity by a governmental violence that – whilst ignoring international law externally and producing a state of exception internally – nevertheless claims to be applying the law.[178]

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[174] Saul Newman, 'Terror, Sovereignty and Law: On the Politics of Violence' (2004) 5 German L J 569, 572.

[175] For a critique of Agamben's reading of Benjamin, claiming that Agamben should not have read Benjamin through Schmitt as he did in *State of Exception*, see Adam Kotsko, 'On Agamben's Use of Benjamin's "Critique of Violence"' (2008) 145 Telos 119.

[176] *HS* 52; *SE* 59.

[177] *SE* 51.

[178] ibid 87.

Despite Agamben's attempt to create distance between his and Foucault's conception of law, Ben Golder and Peter Fitzpatrick have provided a post-structuralist conception of law that is remarkably similar to Agamben's.

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Foucault, Post-Structuralism and Law

In *Foucault's Law*, Ben Golder and Peter Fitzpatrick reinterpret Foucault's writings on law and develop a Foucauldian approach to law that is markedly similar to Agamben's own direction. Their approach does not have the theoretical drawback of existing within a violent dialectic where power subsumes political resistance within itself. This post-structuralist account of law does not get subsumed by relations of power, although it is susceptible to domination by power.[179]

It is Golder and Fitzpatrick's argument that Foucault did not do away with either sovereignty or law in modernity but on the contrary, the two persisted in an integral relation.[180] In fact, it is disciplinary power that is dependent upon the law, a law which acts as a constituent power in relation to the disciplines.[181] It is through the law acting as a restraint to disciplinary power that the law actually constitutes disciplinary power, rather than being subsumed under disciplinary power as the expulsion thesis argues. By acting in a supervisory jurisdiction over the abuses and excesses of the disciplines, law implicitly confirms the claim at the heart of disciplinary power to adjudicate on questions of normality and social cohesion.[182] Through the law confining its jurisdiction to the periphery of the disciplines the core of disciplinary power is reinforced. At the same time the disciplines remain constituently reliant upon law to curb their abuses.[183] In this way, the law masks the disciplinary domination through offering the veil of legality. Law and the disciplines exist within a relation where they are dependent on one another.

This reading of Foucault eschews Agamben's reductivist reading that prioritises biopower and biopolitics over and above the disciplines. Instead of the law and biopower intertwining in the decision on life itself, Foucault envisioned that the law and the disciplines interacted. In contrast to the expulsion thesis, it is the law that is the most important factor in the operations of power, not the other way around. Golder and Fitzpatrick's argument does not just involve a reconstruction of Foucault's thought on law. The authors put forward a post-

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[179] Golder and Fitzpatrick (n 30) 53-6.
[180] ibid 58-9; Foucault, *Discipline and Punish* (n 23) 223.
[181] Golder and Fitzpatrick (n 30) 64-5.
[182] ibid 64.
[183] ibid 65-7.

structuralist reading of Foucault's law which has markedly similar features to the biopolitical law constructed by Agamben. Golder and Fitzpatrick argue that Foucault's law is both determinate and illimitable. The law contains a determinate element which has a definite content as well as an illimitable element that is always-already extending itself to encompass and respond to what is outside the law's definite content. The law is constantly in excess of its determinate self.[184]

More than this, Golder and Fitzpatrick claim that Foucault saw power as responsive and formed by resistance. Power always acts after resistance.[185] As it is for power, so it is for law. Law has a definitive content but also must be formed and re-formed by resistance, a constant resistance that is other to the law but to which the law responds and accommodates.[186] This post-structuralist law already anticipates its own beyond and resistances to it, responding to and continually creating modes of political resistance to dominant power relations. In this sense, it is a political law, one open to futurity, yet always determinate. Law needs its determinacy and equally needs its responsiveness. Law cannot be a settled determinate fact as it would not be able to respond to new events and possibilities. Likewise, law cannot remain purely responsive as to do so would be to reduce it to a vacuity.[187]

The reason why Golder and Fitzpatrick's account is important here is due to its parallels with Agamben's writings on the exception. Agamben claims that the exception is a zone of indistinction that can make legal those acts that do not have legal force. This accords with Golder and Fitzpatrick's argument that the law contains an illimitable element that is always-already extending itself to encompass what is outside the law's definite content. The exception is certainly constantly in excess of its determinate self. This in turn increases the juridical order's grip over life. However, Foucault's law contains an illimitable element that is self-resistant. For Foucault, the law does not simply remain in excess of its determinate self. Rather, the law constantly disrupts its own determinate order through becoming receptive of resistances that constantly challenge its position.

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[184] ibid 71.
[185] ibid 75; Foucault, *History of Sexuality* (n 14) 93, 95.
[186] Golder and Fitzpatrick (n 30) 77-82; see also Michel Foucault, 'Maurice Blanchot: The Thought from Outside' in Michel Foucault and Maurice Blanchot, *Foucault/Blanchot* (Brian Massumi tr, Zone Books 1987) 9-58.
[187] Peter Fitzpatrick and Richard Joyce, 'The Normality of the Exception in Democracy's Empire' (2007) 34 Journal of Law and Society 65.

In other words, Foucault's law allows for the possibility of political resistance and political change in a way that Agamben's view of law does not.

Agamben's position is open to a double criticism. First, Agamben has invoked a version of the expulsion thesis in an attempt to generate critical distance between his work and that of Foucault's. Second, Agamben's attempt to distance himself from Foucault is countered by the post-structuralist critique that Agamben's work is still very close to Foucault. As such Agamben's attempt to trace a transcendent and ineffable ground in Foucault's work can be called into question. In addition, a post-structuralist critique can also challenge Agamben's work as offering little in the way of definite political direction for action.

Whilst the first criticism has weight, the second presupposes that Agamben's philosophy reflects a post-Foucauldian approach to law and power. This is not the case. Whilst Agamben's approach to his own work may rely upon Foucault's methodologies, Agamben sees Foucault's formula for political resistance to be futile due to the transcendent theme that is alleged to run through his thought.

Foucault, Agamben and Resistance

For a post-structuralist, Foucault's law can be constructed as the site of resistance, with the law reacting to resistance and therefore always opening up to political possibilities. Foucault closely connects power and resistance. Resistance must be internal to the code of power that exists because power is not a system of domination with an inside or an outside.[188] Resistance thus becomes the driving force behind the law and the operations of power.

Foucault's resistance to biopower is grounded in the very power relation that biopower seizes upon. That is to say, resistance needs to be grounded in *zoē* in order to be effective. Foucauldian resistance is grounded in life because Foucault argued that life has not been totally integrated into the techniques that govern it but constantly resists their domination.[189] In turn, power would react to such resistance with techniques of normalisation of its own. After all, delinquency, discussed in detail in *Discipline and Punish*, itself is a kind of

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[188] Joseph Rouse, 'Power/Knowledge' in Gary Gutting (ed) *The Cambridge Companion to Foucault* (2nd edn, CUP 2003) 111.
[189] Foucault, *History of Sexuality* (n 14) 144.

resistance. What is important is that Foucault's biopower consists of a constellation of various technologies, all of which have life itself as their object. As such, the "'right' to life, to one's body, to health, to happiness, to the satisfaction of needs" were the political response, grounded in life itself, to the procedures of biopower that proliferated throughout the social body.[190] *Life* must always and constantly provide the opposition to the operations of biopower. Life should resist the processes of subjugation that are in operation in the technologies of biopower, precisely because biopolitics relies upon life and man as a living being to support its investments of power. Foucault sees the potential for resisting the domination of biopolitics within the body, and specifically in a different economy of bodies and pleasures that would be able to break free of the control of power.[191]

Agamben's consideration of Benjamin's dialectic of violence leads him to conclude that *true* resistance cannot be grounded in the current biopolitical power. Any attempt to ground a transcendent resistance within the current system of power, even one grounded in 'life', does not yet challenge the primacy of bare life to the political order. It will not prevent bare life from being created. It is this that leads Agamben to dismiss Foucault's own way forward as ultimately futile. Agamben claims that the very body that Foucault wishes to use as a base for a different politics is always-already a biopolitical body and therefore always-already bare life, as it remains trapped within the juridical order that constitutes and creates bare life through the zone of indistinction of the state of exception. This demonstrates a rather narrow view of Foucauldian resistance to power. By seemingly concluding that Foucauldian resistance is based around the body, Agamben too quickly dismisses the Foucauldian project. For Foucault, resistance is prior to power and is thus found in every aspect of power relations, not narrowly within the body alone.

Agamben's comments do not mean that Agamben feels that Foucault has somehow failed in a transcendent project. Rather, Agamben denies that any transcendent philosophy can challenge the actuality of the biopolitical order. Agamben can dismiss Foucault's point of resistance because Foucault's attempt to theorise a new body escaping the powers of the State does not fit with Agamben's

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[190] ibid 145; Genel (n 3) 58.
[191] Catherine Mills, *The philosophy of Agamben* (Acumen Publishing 2008) 78.

wider project. This project can be summarised as an attempt to take up Walter Benjamin's suggestion that the origin of the dogma of the sacredness of life should be investigated.[192] As Zartaloudis explains, for Agamben the 'sacredness of life' is traced to an urge to posit a transcendent support for life. What Agamben identifies in Foucault's formulation of resistance (and, as importantly, post-structuralist conceptions of law) is an attempt to posit a transcendent basis for both the law and life. Zartaloudis sees Agamben as arguing that such an approach simply results in irresolvable enigmas that can only ever repeat themselves endlessly.[193] Agamben's emphasis upon an immanent philosophical approach (inevitably) leads to a radical redefinition of sovereignty. It is to this claim that the next chapter turns.

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[192] *HS* 66; de la Durantaye (n 1) 352-4.
[193] Zartaloudis (n 5) 50.

Conclusion

This chapter has put forward a series of arguments that support this thesis's contention that the potential of Agamben's work has not been realised in much of the literature. This chapter has contended that Agamben's exception is part of a wider philosophical project that has led many to conclude, not without reason it has to be said, that Agamben is in some way a Foucauldian or post-Foucauldian philosopher.

Agamben should not be considered a Foucauldian or post-Foucauldian philosopher. Agamben denies transcendent support for life, law and philosophy. Agamben radicalised Foucault's methodology in order to support his own political and ethical messianism. To conflate the two philosophers' projects would be to undermine Agamben's messianic project, which is based upon this move away from Foucault.

However, there have been problems traced with Agamben's approach to Foucault through the use of the analytic method this thesis adopts. Firstly, Agamben's characterisation of Foucault appears to support the expulsion thesis. Golder and Fitzpatrick's work has shown that this is by no means a clear position, and the law had a much more prominent position in Foucault's work than Agamben allows. This does question the coherency of Agamben's critique of Foucault. As Agamben's messianic project is separate from Foucault, it may have been better for Agamben to admit of the closeness of his work to Foucault and to emphasise that his messianic project is based upon a philosophy of immanence. This of course does not necessarily call into question the desirability of Agamben's politics but it does illustrate the difficulty many have had separating Agamben from Foucault.

Secondly, Agamben's attempt to argue that Foucault was a transcendent philosopher is again a position that has far from universal support, although, as Beatrice Han-Pile has shown, it is defensible. This position has been adopted by this chapter. A position on Foucault's work has not been adopted, the focus here being placed upon Agamben's thought. However, this position has been adopted to defend the position that Agamben is not Foucauldian, and to defend the interpretation of Agamben this thesis adopts. Likewise, post-structuralist approaches to Foucault and law provide a similar account of law's operation to

Agamben, but Agamben's claim of an immanent base for power and sovereignty offers a compelling counter to this objection.

It is this immanent thought that also calls into question traditional formulations of sovereignty. It is to this analysis that this thesis now turns. It is through analysing how Agamben's immanent thought critiques sovereignty that Agamben's re-thinking of the figure of the living being comes into view, which ultimately sets the stage for his messianic ethical politics.

Chapter 3: Agambenian Sovereignty

The previous chapter looked at Agamben's radicalisation of Foucault's hypothesis of biopower and his wider methodology. In particular, it has been argued that Agamben's work is structured by an immanent philosophy which places him as separate from Foucault. So far, this thesis has attempted to counter the interpretations of Agamben that have characterised him as a scholar of emergency powers and as a Foucauldian philosopher.

This chapter focuses upon Agamben's immanent philosophy, and connects this to Agamben's conception of sovereignty. It is through a turn to sovereignty that the connections Agamben makes between sovereignty, the exception and the living being can be revealed. This chapter offers an analysis of Agamben's political critique based upon this messainism which opens up the ground for his exposition of the figure of whatever-being.

Turning to sovereignty, Agamben argues the proper political paradigm of the West should not be sovereignty, but government, or *oikonomia*. It is *oikonomia* that structures sovereignty, not sovereignty that structures *oikonomic* government. Agamben alleges that *oikonomic* governmental apparatuses operate to conceal the fact that there is no transcendent realm of law or politics. Transcendent visions of sovereignty are therefore a fiction sustained by *oikonomia*, government. This analysis lends support for Agamben's immanent philosophical project, as it is this part of Agamben's thought that is argued to provide the greatest implications for future research in fields of law and politics. It is also through Agamben's writings on *oikonomia* that his ontology can be approached.

This move allows for the strengths and weaknesses of Agamben's immanent ontology to be unconcealed, and their consequences for the legal order to be developed in the following chapters. This reinforces the themes that underpin this thesis. The previous chapters have aimed to move Agamben's thought away from exceptionalism and Foucault towards the radical politics he espouses. The analytic approach this thesis undertakes then allows Agamben's radical politics to be interrogated as to their ethical coherence and desirability. To this end, this chapter makes three arguments.

Firstly, this chapter returns to the relation between Agamben and Foucault. Through this relation this chapter explores the different roles that Agamben and Foucault ascribe to sovereignty and governmentality. This allows this thesis to develop an analysis that illustrates the radical nature and the potential for Agamben's use of *oikonomia*. Whereas Foucault's sovereignty was separate from biopower, Agamben places sovereign power at the heart of biopower. Again, with reference to the previous chapter's arguments, it is argued that despite Agamben following Foucault into the realm of governmentality, Agamben's denial of the possibility of a transcendent politics sets him apart from Foucault's own philosophy. As in his development of Foucauldian biopower, Agamben again takes a radical reinterpretation of Foucault's work, but one that could have huge implications for the way law is thought about and approached, especially in relation to how law operates in practice. It is argued that Foucault's writings on governmentality have recourse to a transcendent schema of constituent power, a schema which Agamben argues legitimates and causes the creation of bare life and the operation of the exception. Agamben's attempt to re-think sovereignty and its basis is necessary for his own critique of Western politics, but it also does forcefully challenge much current thinking upon what sovereignty is and where it derives its force from. Specifically, this chapter focuses upon the ongoing debate surrounding constituent and constituted power. Agamben sees this debate as nothing less than concealing the *oikonomic* basis for sovereignty. This has the potential to re-order the very idea of sovereign power and its relation to government.

Secondly, this chapter turns to the writings of Hans Lindahl. The reason for this move relates back to the analytic method that underpins this thesis's approach. Lindahl has written heavily on constituent and constituted power. Of interest here is Lindahl's conception of 'a-legality', which he conceives of as the primordial experience of political plurality that challenges the distinction between legality and illegality, a distinction maintained by legal boundaries. As such Lindahl's a-legality can appear at first to be similar to Agamben's exception. This analysis defends Agamben's exception, and its *oikonomic* basis, as not being able to be reduced to the dialectic of constituent and constituted power. Two main differences are traced between Agamben and Lindahl, which points to the radical nature of Agamben's writings on *oikonomia*. Firstly, a-legality can be viewed as a

transcendent phenomenon, which does not resolve the paradox of constituent and constituted power but masks it instead. Secondly, Lindahl's manifestation of political plurality ends up defining life through the law, and in doing so will lead to the figure of bare life re-appearing. Nevertheless, it is argued that Lindahl's approach and theorisation of a-legality can actually help bolster Agamben's argument that *oikonomic* government is the proper political paradigm of the West.

Finally, this chapter makes a connection between Agamben's attempt to rethink the paradigm of sovereignty and his ontology. As such, this chapter aims to complete an arc that began in the first chapter. Agamben's work is now placed in the realm of ontology. This is supported through texts where Agamben turns to Aristotle's definition of potentiality, arguing that Aristotle's definition of potentiality matches sovereign power's definition. This move leads to ontology through potentiality and questioning the potentiality of the human being. It is this connection that leads this study to the basis of Agamben's immanent philosophy and his ontology. This is based upon a critique of Martin Heidegger. It is through this critique that Agamben's ethical move is introduced. However, Agamben's critique does raise questions that challenge the philosophical coherence of Agamben's works.

Sovereignty and Governmentality: Agamben *contra* Foucault

The previous chapter introduced Agamben's immanent philosophical project through Zartaloudis's readings, and introduced *oikonomia*. It is instructive to recount the main contentions underpinning Agamben's account in this reading. Central to Agamben's project are two theses. The first is the claim that modernity has two political paradigms bequeathed to it from Christian theology. The first paradigm is political theology, providing for the theory of sovereignty. This paradigm founds the transcendence of power in the unity of God. The second paradigm is that of *oikonomia*, Divine economy, providing the model for governance and economic administration of human beings, and the modern managerial economy. The second thesis is that these two paradigms are separate from each other yet functionally related. Through the relation of the two paradigms it is possible to show the implications to law and sovereignty of the fracture that exists between being and *praxis*.

Analysis of Zartaloudis's reading of Agamben has argued that it is *oikonomic* management and governance that both posits and produces the absolute transcendent foundation of power and law. There has therefore always been a misplaced emphasis upon sovereignty. It is *oikonomia* that is the most important paradigm of the two. The attempt to posit a *mythologeme* is at stake in this relation between transcendent and immanent realms. The theoretical structure of transcendence posits not just a transcendent realm and an immanent realm, but also a limit between the two realms. It is within the limit zone, the relation between the two realms, that subjects are both formed and desubjectivised.[1] It is in this limit where *homo sacer* is created.

If this construction of Agamben's argument is accepted, then Western political history has always operated according to the *oikonomic* paradigm rather than through a sovereign transcendentalism.[2] This view of Agamben's thought would therefore stretch well beyond informing the ongoing debate on emergency powers, impacting upon the very political structures that form Western democractic governance.

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[1] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge 2010) 12-3.
[2] ibid 71-2; *RG* 81.

Oikonomia means that a transcendent sovereignty cannot act without an immanent, *oikonomic* managerial government which derives all its power from the sovereign. Governmental action is *anarchic* in that it does not derive from sovereignty, but *is* sovereignty. Government upholds the transcendent *mythologeme* of sovereignty through its immanent *praxis*. Therefore action, *praxis*, in the form of *oikonomia* and politics, has no foundation in a transcendent plane.[3] It is to a consideration of Agamben's writings on government and sovereignty that this chapter now turns.

Having recapitulated Zartaloudis's reading of Agamben's thesis of the theological basis of *oikonomic* government, it is possible to place Agamben's treatment of Foucault's project in its proper place. Agamben places his work on *oikonomia* explicitly within the legacy of Foucault's project on the genealogy of government. Agamben engages with Foucault's series of lectures delivered in 1977 and 1978 at the Collège de France which were later published as *Security, Territory, Population*.[4]

There is an immediate similarity that shows between the two philosophers. Agamben agrees with Foucault that the proper paradigm for the modern State is governmentality rather than sovereignty. Yet the different emphases Agamben and Foucault place upon sovereignty is marked. For Agamben, sovereignty is much more central to his overall philosophical schema than it was for Foucault.

Foucault's writings focus upon a deconstruction of classical concepts of sovereignty. The concept occupies an important, if fundamentally different role in his analyses than it had for classical theorists of sovereignty and law. Foucault's writings on governmentality shift the emphasis from sovereignty to the art of government. In comparison, Agamben's use of sovereignty is much more critical and central to his overall philosophical schema, being closely related to the paradigm of *oikonomia*.

Unlike *Homo Sacer*, where an explicit disagreement between Foucault and Agamben can be postulated in relation to biopower and sovereignty, Agamben's work in *Il Regno e la Gloria* appears at first to be much more a development than a radicalisation of Foucault's work. Keeping Agamben's overall project in mind

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[3] *WA* 10.

[4] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-78* (Graham Burchell tr, Palgrave Macmillan 2007).

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and its aversion to transcendent schema, it is argued that even where there appears to be agreement, Agamben's work provides a stunning re-imagination of sovereignty, governmentality and law.

What ends up distancing Agamben from Foucault is Agamben's aversion to transcendent relations and his contention that Foucault uses such transcendent relations within his thought. With this in mind, the two philosophers' conceptions of sovereignty and governmentality can be contrasted.

Foucauldian Governmentality

In *Security, Territory, Population* Foucault focused upon the genesis of the notion of population and the mechanisms for ensuring its regulation. Foucault's technologies of the self, made clear in his analyses of disciplinary power,[5] interact with the technologies of political power, outlined in his theory of biopower.[6] Together they form the field of practices Foucault termed 'governmentality'.

One of the key features of Foucault's work is his separation of disciplinary power, biopower and his analyses of governmentality from conceptions of sovereignty that were tied directly to monarchical characterisations of law.[7] Foucault could argue that disciplinary power applied to codes of normalisation in the human sciences, not legal sovereignty.[8] Despite this, Foucault did not abandon sovereignty or sovereign power – there is no sovereign expulsion thesis. Biopower, disciplinary power and sovereign power exercise themselves over different areas of the population for different reasons in different ways.[9] Foucault studies power on the basis of the relationship between the individual and the State itself, asking how relations of subjugation can manufacture subjects.

Foucault traces the origins of governmentality to the Christian pastorate.[10] This pastoral power aimed for the salvation of the flock, looking after the community as a whole as well as each individual during their life.[11] Whilst

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[5] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Penguin Books 1977).

[6] Michel Foucault, *The History of Sexuality, Volume One: An Introduction* (Robert Hurley tr, Penguin Books 1978); Michel Foucault, *Society Must Be Defended, Lectures at the Collège de France, 1975-76* (David Macey tr, Penguin Books 2003).

[7] Foucault, *Society Must Be Defended* (n 6) 35.

[8] ibid 38.

[9] Foucault, *The History of Sexuality* (n 6) 88-90.

[10] Michel Foucault, 'The Subject and Power' (1982) 8 Critical Inquiry 777, 782.

[11] ibid 783.

Foucault argued that the ecclesiastical institutionalisation of this pastoral power ceased by the eighteenth century, this technique at the same point in time became the political model for modern government.[12] Agamben's paradigm of *oikonomia* follows Foucault's pastoral power in the sense that it is capable of referring to both the individual and the totality, but the important difference arises in that Foucault perceives of governmentality as being a thoroughly modern phenomenon.

Foucault argues that come the eighteenth century, government was caught in a 'blocked' situation between two frameworks. The first was an excessively large, rigid framework of classical sovereignty. The second was the model of the family, based in the *oikos*, which was too narrow and weak for the plurality of ends government was pursuing. By the sixteenth and seventeenth century Foucault notes this shift in the primacy of classical sovereignty through the development of an 'art of government', linked to the emergence of a *raison d'État*.[13] The sovereign no longer had to know just the laws, but also the elements that constitute a State and preserve its survival. This reason of State acts on the consciousness of 'people' and the public sphere becomes a key managerial apparatus for the State and its art of government.[14]

Foucault contends that the art of government was freed from the blocked situation it found itself in through a number of general processes. Most important of which was the emergence of the problem of population.[15] The population is akin to the Christian pastorate. A body of individuals treated both as one and as a whole. Population unblocked the art of government as it eliminated the model of the family.[16] Population became the final end of government. The end of government becomes to improve the condition of the population.[17] Government does so through acting directly on the population itself. Population is therefore both the end and instrument of government. It is this that gives birth to the art of government.

Foucault traces the centrality of population to the emergence of a new science of 'political economy', made possible when the population emerged as a

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[12] ibid 784.
[13] Foucault, *Security, Territory, Population* (n 4) 256.
[14] ibid 275.
[15] ibid 140.
[16] ibid 141.
[17] ibid 142-3.

new subject. The new regime was characterised by a multiple network of relationships between the population, territory and wealth. The new art of political science moves away from sovereignty to a regime dominated by techniques of government.[18] This enabled the problem of government to be thought of outside of the juridical framework of sovereignty, although it remains interdependent with sovereignty.

This does not mean that sovereign power fails to persist into modernity. Foucault described how sovereignty could combine with other forms of power, most notably biopower. This was illustrated through the example of Nazi Germany, where biopower and sovereign power combined to murderous effect.[19] Biopower could only exercise the sovereign right to kill when it was justified by racism, used as a means to decide which populations must live and which populations must die.[20] Populations like the Jews could be killed not as political adversaries but as biological threats in order to maintain the biological health of the other population. This was by no means the only example. Foucault's sovereignty survives to interact not only with disciplinary power, but also it survives to interact with the economic domain and the society of normalisation.[21] Foucault's governmentality envisions a triangle of sovereignty, discipline and governmental management which has the population as its main target and apparatuses of security as its essential mechanism.[22]

Power relations therefore exist at all levels of the social body and interact with one another across these levels. Power relations do not act directly upon individuals as classical views of sovereignty would posit. Rather, power relations act upon actions themselves, either existing actions of those individuals or upon actions that may arise in the future.[23] The aim of governmentality is therefore 'conduct of conduct'. As Zartaloudis explains, government acts or conducts the conduct of autonomous and free subjects.[24] Government regulates the conduct of conduct through implying its functional or vicarious relation to a transcendental source of power, which, however, does not act or govern.

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[18] ibid 144.

[19] Foucault, *Society Must Be Defended* (n 6) 260.

[20] ibid 254-5.

[21] For an in depth analysis of how sovereignty is dealt with through Michel Foucault's various works, see Panu Minkkinen, *Sovereignty, Knowledge, Law* (Routledge 2009) 95-112.

[22] Foucault, *Security, Territory, Population* (n 4) 145.

[23] Foucault, 'The Subject and Power' (n 10) 789.

[24] Zartaloudis (n 1) 107-9.

Panu Minkkinen argues that Foucault showed how the identification of weaknesses in the classical theory of sovereignty led to sovereignty taking on a guise that allowed it to perform its classical functions whilst also overcoming clashes resulting from the incompatibilities between disciplinary, normalising and juridical rationalities.[25] In a similar manner to Golder and Fitzpatrick's conception of law within Foucault,[26] sovereignty functions as a legitimating device. It does so as an ideological veil juridifying governmental practices. It also minimises interference with government through, as Minkkinen demonstrates, redefining juridical subjectivity through new 'fuzzy' rights, such as the right to be a productive member of society, at the expense of traditional political rights.[27] Foucault's governmentality indicates that what is at stake is not the mere execution of the sovereign's command or rule, but the creation of an autonomous space (an economy) that both administers and executes 'sovereign power'. This forms a space for the self-government of the social order and its subjects.

Thus Foucault did not deny the theory of sovereignty in favour of the analysis of power relations in the social body. Sovereignty can be classically seen as violence which does directly apply itself on to individuals' bodies.[28] Contrarily power "incites, induces, seduces, makes easier or more difficult … constrains or forbids absolutely";[29] always acting upon an individual through their actions or their capability to act. Foucault showed the crisis of sovereignty in its shift from the power of the monarch to the rationality of governmentality. However this crisis does not challenge sovereignty as a condition of the possibility of an order.[30]

Agambenian oikonomic *sovereignty*

Foucault identified the birth of modern governmentality in the eighteenth century. One of the strengths of Foucault's genealogy of governmentality in *Security, Territory, Population* is its scope and detail. Foucault's methodology is detailed, tracing the development and metastasis of the Christian pastoral power into modern political economy. Agamben's claims in *Il Regno e la Gloria* suggest that

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[25] Minkkinen (n 21) 112.
[26] See ch 2.
[27] Minkkinen (n 21) 111.
[28] Foucault, *Discipline and Punish* (n 5) 3-5.
[29] Foucault, 'The Subject and Power' (n 10) 789.
[30] Sergei Prozorov, *Foucault, Freedom and Sovereignty* (Ashgate Publishing 2007) 82.

Foucault's own genealogy is incorrect, focusing too heavily upon overtly political texts and neglecting the theological origins of modern governance.

In his book *Giorgio Agamben: Power, Law and the Uses of Criticism* Thanos Zartaloudis builds upon Agamben's commentary on *oikonomia* in *Il Regno e la Gloria* and outlines a genealogy of the paradigm, showing *oikonomia*'s influence throughout the medieval period through to modernity. Whilst Agamben's commentary on early Christian sources has support theologically, there is always the allegation facing Agamben that he proceeds too quickly from formulating a paradigm to concluding it operates in modernity. Zartaloudis's great achievement is to provide supporting evidence that can bolster and supplement Agamben's own analysis.

The King's Two Bodies

Zartaloudis traces Agamben's genealogy of the fissure between being and *praxis* through medieval thought. Of particular interest to this genealogy is the development of the *oikonomic* fracture between sovereignty and government to the doctrine of the King's Two Bodies. This doctrine is linked explicitly to the Divine Right of Kings to rule.[31] Zartaloudis references Ernst Kantorowicz's study of the doctrine of the King's Two Bodies in making this connection.[32]

Kantorowicz traced the existence of a bipartite body within the King, with a transcendent sovereign body existing alongside a natural body in the same individual.[33] In the 'two bodies' of the monarch there exists a division between two laws and two powers – an immanent (ordinary) law and immanent power and a transcendent (absolute) Law and transcendent Power. This division between absolute and ordinary powers placed one power – Law, as the source of another power – law.[34]

Zartaloudis's achievement is in showing the genealogy of this absolute power as it is transferred from the King to the King in Parliament with the

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[31] It was the Divine Right of Kings to Rule that John Locke countered in his First Treatise of Government, aiming to refute the views of Sir Robert Filmer. See John Locke, *Two Treatises of Government* (Peter Laslett ed, CUP 1988).

[32] Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton UP 1957).

[33] ibid 8-9; Zartaloudis (n 1) 17-9.

[34] Zartaloudis (n 1) 33-49.

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Glorious Revolution of 1688.[35] The King's two bodies can be seen as a pre-cursor to the present day doctrine of Parliamentary Sovereignty. Inverting Carl Schmitt's observation that all key concepts of modern state theory are nothing other than secularised theological concepts, Zartaloudis notes Agamben argues that it is in fact the opposite – secularisation shows that theology remains ever present in the immanent world.[36]

It can therefore be surmised that Dicey's famous pronouncements on the absolute power of Parliament have their origins in Trinitarian theology.[37] Parliament, like the King, contains within itself power spilt into two realms. The first is an immanent, ordinary power of governance, used to carry out its day-to-day administration and running of the nation. This power is derived from a second power. This is an absolute sovereign Power, which allows Parliament to act. The paradox exists as the doctrine of Parliamentary Sovereignty relies upon an immanent, *oikonomic* power of administration in order to operate.

Providential oikonomic *Order*

Of fundamental importance to this chapter's argument is the notion of order and its direct correlation with the Trinitarian *oikonomia*. Zartaloudis argues that the notion of order in the thought of Thomas Aquinas and medieval scholars reproduced this fracture between being and *praxis* internally through a division between a transcendent order and an immanent order.[38] Aquinas conceived of a divine government of the world as a hierarchical Providential order, as a chain connecting the Heavenly bodies to ordinary beings. Zartaloudis sees providence, for Agamben, as the name of the *oikonomia* which is presented as the government of the world.[39]

Such a genealogical leap is not without supporting evidence. G L Prestige, in examining the writings of the Patristic writers on God and providence, equated God's providential ordering of the world with *oikonomia*.[40] For Karl Barth, the

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[35] ibid 48-9.

[36] ibid; *RG* 15.

[37] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan Publishing 1959).

[38] Zartaloudis (n 1) 73.

[39] ibid 73-4; *RG* 127-8, 147-56.

[40] George Leonard Prestige, *God in Patristic Thought* (SPCK Publishing 1959). See also Benjamin Wirt Farley, *The Providence of God* (Baker Book House 1988) 16; Zacharias Ursinus,

doctrine of Providence is part of the doctrine of Creation, but Providence is specifically the maintenance of creation, which occurs *oikonomically* through Christ. Without God's continuing Providential activity, creation would revert back to chaos.[41] Like the Early Church Fathers, there is a clear distinction between a transcendent sovereign realm and an immanent, *oikonomic* governance of the world.

The dominant current of Christian theistic thought relating to Providence posited two forms of Providence. This was to avoid falling into deistic thought and aimed to reconcile the freedom of man with the special Providence of God. General Providence is the widespread care and supervision which God exercises over His universe; such Providence embraces good and evil alike.[42] God exercises Special Providence over and on behalf of the good, those whose wills are in harmony with the divine will. So, unlike the transcendent General Providence, the immanent Special Providence descends to particulars, the details of existence and is always active.[43]

Zartaloudis's study of *Il Regno e la Gloria* leads him to state that Agamben concludes, with some merit, that Providence is the name of the *oikonomia* in which it is presented as the government of the world.[44] This view means that it is only in this way that the governmental machine in question can be understood in its economico-theological terms. Government is therefore only possible if General Providence (Zartaloudis notes that Agamben terms this kingdom, sovereignty) and Special Providence, government, are correlated in a bipolar machine. This machine would be akin to the position of God and Christ in the Trinity.[45]

Following this lead, Zartaloudis observes that for Agamben providence articulates *oikonomic* power upon two distinct planes. The type of understanding here is one of bipolarity between a transcendent plane and an immanent plane.

Commentary of Dr Zacharias Ursinus on the Heidelberg Catechism (G E Willard tr, 4th edn, Elm Street Printing Co 1888) 151.
[41] Karl Barth, *Church Dogmatics: The Doctrine of Creation, Volume 3* (G W Bromily and R J Ehrlich trs, T&T Clark 1960) 34; see also Robin Klay and John Lumm, 'The Relationship of God's Providence to Market Economics and Economic Theory' (2003) 6 Journal of Markets & Morality 541, 543-4.
[42] Psalms 104: 14, 104: 21-9, Job 12:23.
[43] Psalms 37:23; Matthew 6:33; Zartaloudis (n 1) 75-7.
[44] Zartaloudis (n 1) 74; *RG* 127-8.
[45] ibid 75; *RG* 131-3.

General Providence relates to the transcendent plane, which founds, legitimates and makes possible the second, immanent plane of Special Providence (what Agamben terms 'Fate') as its condition of possibility.[46] The immanent plane of Fate realises concretely the causes and effects of the general decisions of the divine will. It is by extension this relation that Agamben would see as deactivated through a philosophy of immanence. In this immanent form of government, decisions would no longer be made with reference to a transcendent realm. Immanent forms of government and decision-making can therefore be opposed to providential forms of administration and government.

Providential Government

The Providential governmental machine is a unitary apparatus that articulates its power on two related planes, namely a transcendent plane and an immanent plane. In this providential machine, transcendence always remains in relation to immanence. Most importantly for Agamben, this relational form of immanence is false, as it is always defined and understood negatively through being held up to the reflection of a transcendent order. Agamben's immanent philosophy focuses upon a true immanence. This form of immanence is immanent only to itself.

In the Providential machine, the transcendent realm of sovereignty founds, legitimates and renders possible the immanent realm of governance. The realm of governance realises concretely in the chain of causes and effects the general decisions of the sovereign power.[47] The doctrine of the King's Two Bodies is therefore re-incarnated in a new form.

The key paradigm of governmental *praxis* lies in its collateral effects, what Zartaloudis translates Agamben terming "collateral damage".[48] Collateral effects form part of the effective management and administration of the inhabitants of a State, and are fundamental to democratic modes of government.[49] Government, through effecting the decisions of the sovereign power, impacts upon the everyday lives of individuals. However this impact is not direct. Rather, government's impact upon individuals is a collateral effect to its realisation of the sovereign power's decisions. Modernity has seen the separation of powers doctrine become

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[46] ibid 76-80; *RG* 139, 142.
[47] *RG* 157.
[48] ibid 187.
[49] ibid.

pre-eminent. Following Zartaloudis's analysis, Agamben sees this doctrine as confirming that the doctrines of *oikonomia* and providential government form categories of law and politics. Government acts collaterally, all the time positing a transcendent primary act or Providence with which to justify its actions.

Understanding government in terms of collateral damage has been compared by Fuggle to Foucault's notion of security. For Foucault, where disciplinary power involved techniques of normalisation, security operates according to a principle of circulation. Security focuses on the notion of population, and is concerned with growth, production and the increase of its mechanisms, a centrifugal force operating within and beyond the social body.[50] The population is what is at stake in the management and control of various events, and is the final objective of security's operation.[51] Security appears to operate as a transcendent force in the social body, which structures and conditions the immanent mechanisms that function in relation to its existence. It is linked to the emergence of capitalism, providing the possibility for economic growth by simultaneously encouraging and restricting circulation of goods, opening up borders and delineating new boundaries.[52]

Fuggle argues that both security and collateral damage offer an opportunity to provide the means of explaining the presence of death within a biopolitical society without reverting to discourses of racism.[53] In Foucault, according to Fuggle, security acts as a transcendent referent by which government will always-already be able to justify its actions. Fuggle here equates Foucault and Agamben. Indeed the notions of security and collateral damage are similar. Security could serve as the transcendent source of *oikonomic* administration. Governments could act by reference to security as their authority. Such actions would then impact upon individuals collaterally. Such an analysis does offer logical weight.

Agamben's challenge to Foucault's conception of government can now be offered. Foucault's focus upon government as a modern phenomenon is misplaced and ignores the specifically theological roots of *oikonomic* management. In the

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[50] Foucault, *Security, Territory, Population* (n 4) 44-5.
[51] ibid 37.
[52] Sophie Fuggle, 'Excavating Government: Giorgio Agamben's Archaeological Dig' (2009) 7 Foucault Studies 81, 86.
[53] ibid 87.

second volume of *The History of Sexuality*, Foucault identifies *oikos* as requiring an "art of government" compatible to that found in political spheres.[54] Whereas Foucault identifies an art of government operating within three different domains: the political; the military; and the economic, Zartaloudis notes that Agamben emphasises a bipolar order where politics and economy oppose each other yet remain related to one another.[55] Modern government is founded on this bipolar machine. Sovereign power and *oikonomia* are always present to a greater or lesser degree, and power is necessarily separate from its execution. Just as God governs in the world yet remains other to it, the relationship between sovereignty and governmentality is always vicarious. It is therefore impossible to access ultimate power since it is always deferred from one realm to the other. This is why Zartaloudis can allege that the notion of an art of government forms a mythological foundation for sovereignty and law.[56] Foucault notes:

> For the art of government not to have split into two branches of an art of governing economically and an art of governing juridically, in short, to preserve the unity and generality of the art of governing over the whole sphere of sovereignty, and to keep the specificity and autonomy of the art of governing with respect to economic science, to answer these … questions, the art of governing must be given a reference, a domain or field of reference, a new reality on which it will be exercised, and I think this new field of reference is civil society.[57]

For Agamben, civil society stands as a transcendent concept of governmentality. Civil society is what holds the juridical and economic technologies of governmentality in relation to one another.[58] Following on from Zartaloudis's analysis of Agamben, a critique of civil society can be offered. Zartaloudis argues that the notion of a civil society, or a People, for Agamben masks a fracture between a people as a political power (an artificial, qualified body of the people) and people as a non-political power (a bare or natural body of the people).[59]

However, this position reads Foucault's thought very narrowly. Foucault's exposition of the historicity of governmentality could be argued to be a necessary precondition for Foucault's conception of resistance. Agamben appears to assume

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[54] Michel Foucault, *The History of Sexuality, Volume 2: The Use of Pleasure* (Robert Hurley tr, Penguin Books 1992) 154.
[55] Zartaloudis (n 1) 120; *RG* 17.
[56] Zartaloudis (n 1) 120.
[57] Foucault, *Security, Territory, Population* (n 4) 295.
[58] ibid 296.
[59] Zartaloudis (n 1) 109.

that Foucault's governmentality entrenches the foundational negativity of *oikonomia*, rather than providing the ground for its challenge.

Constituent Power and Sovereignty

This critique of civil society ties in with Agamben's attempt to distance his conception of sovereignty from that of Foucault's. In the essay 'What is a People?' in *Means Without Ends*, Agamben writes that:

> Any interpretation of the political meaning of the term *people* ought to start from the peculiar fact that in modern European languages this term always indicates also the poor, the underprivileged, and the excluded. The same term names the constitutive political subject as well as the class that is excluded – *de facto* if not *de jure* – from politics … In the American Constitution one thus reads without any sort of distinction: 'We the people of the United States…'; but when Lincoln in the Gettysburg Address invokes a 'government of the people, by the people, for the people', the repetition implicitly sets another people against the first. The extent to which such an ambiguity was essential during the French Revolution (that is, at the very moment in which people's sovereignty was claimed as a principle) is witnessed by the decisive role played in it by a sense of compassion for the people intended as the excluded class.[60]

This fracture in the notion of a people reflects an ambiguity in the concept of a People in Western politics – on the one hand the People refers to an integral body, and on the other people refers to a subset of the People, the body politic.[61]

This notion of a People is fundamental to the concept of government by popular sovereignty. Agamben builds upon this double meaning behind people in turning to the relationship between *constituent* and *constituted* power. The relationship between these two powers has been termed the paradox of constitutionalism.[62] Constituent power is that power that has the authority to make and found a constitution. Constituted power is that power found within the institutions that exist under the law and constitution formed by the constituting act. The paradox of constitutionalism arises as it is not clear whether the constituent power becomes exhausted within constituted power after the constituting act, or whether constituent power exceeds the original act, remaining a check or source of authority on constituted power.

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[60] *MWE* 29-31.
[61] ibid 31.
[62] See Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: constituent power and constitutional form* (OUP 2007).

A People or Civil Society in the form of popular sovereignty and constituent power stands as a mythological foundation for governmental apparatuses. In answering the paradox of constitutionalism Agamben disagrees explicitly with Antonio Negri. Negri claims that constituent power is separated from sovereignty. Constituent power is a creative force which is not exhausted in what it creates.[63] Negri's constituent power remains as a revolutionary force that can be appropriated by the populous against tyrannical or oppressive governance. Agamben here does not see constituent power as somehow being surplus to sovereign power. Constituent power is directly equated with sovereign power.[64]

Constituent power is equated to sovereignty for Agamben as both stand as transcendent *mythologemes* which are constituted and maintained solely through *oikonomic* immanent governance. In the absence of such real transcendent support for authority, sovereign governmentality requires an intimate relationship between sovereignty and subjectivity, hence the notion of the People as the constituent source of sovereign power.[65] If constituent power as creative force is separate from sovereignty Negri has simply re-sited the paradox. As Zartaloudis notes, such a radically free constituent power only seems to be restrained by its illimitable freedom, which appears extremely close to being a new form of sovereignty-suffused power, rather than being in excess of sovereignty.[66] As Christodoulidis has argued, constituent power is:

> Always already implicated with constitutional form … because to be valid [constituent power] must be imputed to the constitution that establishes the conditions under which the popular will can be expressed *as* sovereign. Law and democracy are reconciled only via the suppression of a paradox that impacts on constitution-making as never, inevitably, fully democratic.[67]

Constituent power therefore forms through a relation with constituted power, and both presuppose a relation to an empty throne of transcendence.[68] This can also be seen through the writings of Carl Schmitt on sovereignty. Sergei Prozorov argues

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[63] Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (Maurizia Boscagli tr, University of Minnesota Press 1999) 21-2.
[64] *HS* 43-4.
[65] Zartaloudis (n 1) 144.
[66] ibid 124.
[67] Emilios Christoudoulidis, 'Against Substitution: The Constitutional Thinking of Dissensus' in Loughin and Walker (n 62) 189-208.
[68] Zartaloudis (n 1) 125.

that Schmitt's formulation of sovereignty has been unfairly conflated with his association with the Nazi regime.[69]

Prozorov argues that Schmitt's sovereignty and decision on the exception serves as a reminder of the transcendence of the political, rupturing the ideal that the social order has no outside.[70] This is why Schmitt's sovereign decision had to "emanate from nothingness".[71] Schmitt's sovereignty is therefore a borderline concept, and in Prozorov's terms it is the irreducible excess of any order that is nonetheless indispensible for the order's emergence. The sovereign decision forms the basis of the political order and is also the basis for the current order to be transcended. In this sense, sovereignty is directly equated with constituent power.

What is most interesting about Prozorov's analysis is the connection he makes between the works of Schmitt and Foucault. Prozorov claims that Foucault's conception of sovereignty can be compared to Schmitt's in that it also amounts to a transcendent constituent power. Although Prozorov admits that his argument is one which is controversial and many Foucauldian scholars would not share,[72] an argument can be made from Foucault's writings on governmentality to support this view.

As noted above, Foucault did concern himself with the historical shift in sovereignty from the transcendent monarch to that of government. This historical analysis of sovereignty can be seen as an analysis of the constituted order, of sovereign power that is exercised within the institutions of the State. Equally, Foucault did note that sovereignty did persist into modernity. In that way Foucauldian sovereignty can be seen as a form of constituent power, namely the condition of a possibility of an order, or the order's security. The condition of possibility transcends specific institutions yet does not get subsumed within the new orders it creates, in a way akin to Negri's free floating constituent power. Thus Prozorov finds a certain kinship between Foucault and Schmitt.

This novel interpretation can be supported through Foucault's aligning the notion of an art of government with Civil Society. This move places the People as

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[69] Prozorov (n 30) ch 4.
[70] ibid 82-4.
[71] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005) 32.
[72] Prozorov (n 30) 81.

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a transcendent foundation for governmentality. Furthermore, as has been argued with support from Zartaloudis's work, such a transcendent foundation will always-already lead to paradoxes (such as the dialectic between constituent and constituted power) that ultimately lead to a zone of pure undecidability in the form of the exception.[73] If the People or Civil Society is the constitutive source of sovereign power, then Agamben is surely correct to state that the notion of 'People' contains within itself a scission, not unlike the scission between bare life and *bios*, that defines the term negatively through holding itself in relation to an absolute, ineffable transcendent sphere.

Oikonomia *and the exception*

It is now possible, relying upon Zartaloudis's analysis of *Il Regno e la Gloria*, to connect *oikonomia* to the exception. Following Zartaloudis the paradox of constitutionalism, at the heart of democratic governance, can be said to have its roots in *oikonomia*.[74] The mystery of the Trinitarian *oikonomia* has a descendant in the mystery of the relation between constituent and constituted power. Agamben could therefore be said to place the exception as a zone of undecidability at the heart of this mysterious relation. It is the exception that opens a fictitious lacuna in the juridical order. We can now posit that this fictitious lacuna is the relation between transcendent and immanent realms. This relation that results in paradoxes can be maintained through the exception, a zone of undecidability.

It is in light of reading Zartaloudis on Agamben's *oikonomia* that Agamben's paradigmatic method reveals its inherent weakness. It is not clear how the state of exception operates in relation to *oikonomia* and *homo sacer*. It is through the state of exception that *homo sacer* is created. However, *oikonomia* is traced to an origin in early Christianity and *homo sacer* is traced to an origin in Aristotle. Agamben has not traced the origin of the state of exception. It is not clear whether the state of exception existed prior to *oikonomic* government or whether it was created with it.

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[73] Zartaloudis (n 1) 166.
[74] ibid 121-2; *RG* 277, 280.

As stated previously, Zartaloudis maintains that Agamben wishes to move beyond the transcendent/immanent relation.[75] Zartaloudis also posits that it is Agamben's argument that government has no ends, but instead derives from a transcendent law as part of a general *oikonomia*. Zartaloudis states that the paradigm of a 'Law of law' is therefore a Providential paradigm and also an *oikonomic* paradigm as well.[76] The *oikonomic* machine is it has be described here by Zartaloudis therefore leads to the founded power projecting its founding referent as a transcendental principle. This act of founding would not only presupposes the form of the founded power but also remains the source of its justification from a higher realm that must always remain sacred, concealed, absolute and omnipotent.[77]

This *oikonomic* structure would place sovereignty in a transcendent realm. The implication of this construction is that *oikonomic* government justifies their acts with reference to sovereignty. As *homo sacer* is created by a sovereign decision, the conclusion to be drawn from this is unquestionable. This means that it is *government* that founds the law, and creates *homo sacer* through the exception. Whether Sovereignty or the People are claimed as the originary foundation of power, Zartaloudis maintains that it is the act of their presupposition to what they allegedly found and justify, namely government or administration, which projects their imaginary transcendence and perfection.[78] When Agamben argues that the exception, by suspending the legal norm, frees the norm's 'force-of law', the constitutive essence of the law, he is referring to the fact that the exception justifies governmental actions through recourse to transcendent schema.[79] Therefore government has a *vicarious* character.

Through suspending the order in force the exception safeguards the existence of the 'norm', the transcendent legal principle, document or theory, and the norm's applicability to the concrete, immanent situation.[80] In this way the exception is foundational, and appears to be a problematic form of *oikonomic* government. By safeguarding a transcendent realm the exception aims to *oikonomically* manage life itself. Zartaloudis contends that the exception, a zone

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[75] ibid 185.
[76] ibid 83.
[77] ibid 185.
[78] ibid 123, 125.
[79] *SE* 23, 38, 50, 59; *HS* 52.
[80] *SE* 31.

of undecidability, thus exists at the heart of the dialectic between immanent and transcendent realms and conceals the fact that the world is unmasterable and *an-archic*, without origin outside of the immanent human realm.[81]

Zartaloudis's reading of Agamben's construction suggests that *oikonomic* government is not a despotic power, but rather is democratic government. The democratic separation of powers will always-already conceal the paradox of constitutionalism, which in turn masks its own theological origin in the mystery of the *oikonomia*. If Zartaloudis is correct in his reading, then within the *oikonomic* paradigm *every* power has a vicarious character, acting in the place of the *mythologeme* of sovereign transcendence. There can be no substance of power, only an *oikonomia* of power. This is why modern forms of government can never hold one person accountable or absolutely responsible. There exists a bipolar system formed between an image-suffused transcendence and a virtual, faceless, powerless form of immanent management or *oikonomia* that is none the less effective and inherently adaptive (*an-archic* neo-governmentality).[82] Sovereign decision-making has been replaced by an administrative apparatus that manages events; this is a governing *non-power* (in the sense of no accountability).

This means that the 'sovereign decision' will not in fact be a sovereign decision at all, but a managerial one. The sovereign decision is based upon the exception, a *mythologeme* of undecidability. The undecidability of decision does not mean that decisions do not take place. On the contrary, decisions between fact and law, exception and norm occur incessantly. It is this incessant decision making that constitutes the relation between transcendence and immanence and gives *oikonomic* government the justification to act. Sovereignty is in force without significance. The sovereign decision is every time an *oikonomic* decision.

At this point, there is an important historical ambiguity surrounding *oikonomia* and the state of exception that must be noted. If the state of exception arose with the work of Aristotle, then it pre-dates *oikonomia* and as such *homo sacer* is not created by government but sovereignty itself. If the state of exception arose at the same time as *oikonomia* then *homo sacer* could not have been created through the exception prior to Christianity. In short, the creation of *homo sacer*

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[81] Zartaloudis (n 1) 133, 176-7.

[82] ibid 52. See also Anton Schütz, 'Imperatives without *Imperator*' (2009) 20 Law and Critique 233.

must have been dependent upon two separate historical factors: one prior to Christianity; and one after the Christian *oikonomia*. This requires a detailed historical investigation and grounding that Agamben's paradigmatic method eschews.

If Zartaloudis's reading of Agamben is taken at face value, then it appears that the exception is coterminous with *oikonomia*. However, if this is the case, then ascribing the origin of *homo sacer* to Aristotle appears overly deterministic and lacking both in evidence and in internal consistency with Agamben's other works. However, the implications of this reading of *oikonomia* are very wide-ranging. Following Zartaloudis, Agamben claims that instead of the sovereign deciding on the exception and, more importantly, on the existence of bare life, this decision is in fact taken by government. Governmental and administrative decision-making that refers back to transcendent schema will always-already institute and create the conditions necessary for bare life, if not bare life itself. In particular, this would mean that judicial reasoning and the operation of law in a democratic State would form part of the governmental apparatus. Every referral to a higher law or power, a Law of law or transcendence by a court or in a legal judgment masks the *oikonomic* basis of power, as well as placing a veil over the empty throne of sovereignty. This allows for the creation of bare life to be undertaken by *anyone* under the guise of a governing non-power.

Before exploring the further connections Agamben makes between sovereignty and potentiality, which connects to his wider immanent ontological aims, this chapter turns to the work of Hans Lindahl, whose writings on constituted and constituent power present a challenge to Agamben's argument, and must be considered before moving on to further theorisation.

Lindahl's A-Legality

Hans Lindahl's writings on the paradox of constitutionalism appear to strongly challenge Agamben's theory of the exception. Lindahl's focus, in a manner similar to Agamben's, is upon legal boundaries. Lindahl's writings defend political agonism as central to the constitution of law. This provides a tonic to Agamben's almost fatalistic writings that appear to foreclose the possibility of political action to counter sovereign exceptionalism and providential governmentality.[83] What is of particular importance about Lindahl's argument is that he offers a strong defence of the centrality of legal boundaries even in a post-national world where the importance of the nation state and state-centred visions of sovereignty have apparently been diminishing since the Second World War. It is this aspect of Lindahl's approach that could supplement and ameliorate Agamben's own theorising, even if Lindahl's conclusions would not be acceptable to Agamben.

The Problem of Legal Boundaries

Lindahl starts his investigations with an appraisal of post-nationalism, namely the idea that law is becoming de-territorialised in relation to the nation state. Lindahl traces this line of thought to the emergence of regional and global legal orders such as the European Union (EU). The EU and its relationship to its constitutive Member States cannot be grasped solely in the terms of mutually exclusive territories.[84] The EU's Member States retain sovereignty over their own affairs, whilst at the same time relinquishing part of their sovereignty in order to participate within a European legal order. Global law has meant that the traditional law state unity has been challenged. Gunther Teubner has forcefully argued that global law should be thought of as a distinct form of law, as it is:

> [A] self-reproducing, worldwide legal discourse which closes its meaning boundaries by the use of the legal/illegal binary code and reproduces itself by processing a symbol of global (not national) validity.[85]

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[83] See Hans Lindahl, 'The Opening: Alegality and Political Agonism' in Andrew Schaap (ed), *Law and Agonistic Politics* (Ashgate Publishing 2009) 57-70.

[84] Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 MLR 30, 30.

[85] Gunther Teubner, 'Global Bukowina' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth Publishing 1997) 14.

Lindahl sees in Teubner's enquiries a further question raised by global law, namely whether de-territorialisation amounts to de-localisation. Lindahl argues that legal orders are closed, spatially bounded, and it is fundamentally important to explore how these orders relate to what is beyond their legal boundaries.[86] This cannot be done, argues Lindahl, through the binary opposition of legality/illegality, as human action does not fall tidily on either side of this divide.

Lindahl argues that these developments mean that political and legal theory needs to reconsider the relation between legal orders and their boundaries. Of relevance here is Lindahl's account of the *reflexivity* of the law. A reflexive law orders human behaviour by limiting it through demarcating actions as either legal or illegal. This law is made by legal officials who see themselves as part of the ongoing process of engaging in the ongoing process of articulating through lawmaking the interest of the broader collective of which they are part.[87] This lawmaking limits human behaviour by setting boundaries and determining who ought to do what, when and where. The 'who, what, when and where' relate to the subjective, material, temporal and spatial spheres of norms respectively.[88] Lindahl's argument is that *any* legal order, global or national, is bounded. Legal orders are distributions of 'ought-places', places where behaviour ought and ought not to take place, that lends spatial form to the common interest of the community.[89]

Lindahl thus defines legal orders as reflexive via the human actions that occur within them. This leads to boundaries being posited and formulated that respond to these actions. Reflexively constituted legal orders are not legal orders unless they can in some way draw the spatial, temporal, material and subjective boundaries that make it possible to qualify human behaviour as legal or illegal. This spatial boundedness occurs in global and national law, public and private law. In this way, defining legal orders in this way not only moves away from State-centric models of law, it also offers an account of law that is able to survive the attacks made against theories of sovereignty in the post-national age. Boundaries are the necessary condition of legal orders.

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[86] Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (n 84) 31.
[87] ibid 32, 34.
[88] ibid 31; Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski-Paulson and Stanley L Paulson trs, Clarendon Press 2002) 12-3.
[89] ibid 36.

Here, Lindahl offers an account of legal orders that can add to Agamben's own analysis of sovereignty and government, although it is one that distorts Lindahl's own project, as will be made clear. Through Lindahl's argument Agamben's own account of how law affects and creates subjects can be seen anew. The existence of the sovereign decision and the exception is thus not tied to State-centric legal orders but, following Lindahl, is tied to reflexively bounded legal spaces. In this way the exception maintains itself through the fragmentation of legal orders, as it remains tied to the idea of a legal 'space', rather than a legal State.

The A-Legal Act

However, it would be inaccurate to simply reduce Lindahl's account to a supplement of Agamben. Lindahl's concern in studying legal boundaries is to question the place of political pluralism in law and politics. Legal boundaries relate to unity in the sense that political reflexivity presupposes a collective 'we' that manifests itself in an interlocking web of *legal* behaviour. This is behaviour that does not transgress the boundaries that the collective set to form the legal order. The correlation between the unity of a legal space and the unity of a collective self is revealed in the illegal crossing of those boundaries. Such crossings are declared as breaching not only the legal space but also as transgressing the 'we'. The illegal act contravenes the collective's will which was demonstrated in their positing the boundaries in the first place.[90]

On the contrary, *plurality* can refer to the fact that legal orders can interfere with one another.[91] More fundamentally, plurality refers to the fact that human behaviour cannot be completely contained within the legality/illegality divide, but can call into question the ways in which legal orders draw the distinction between legality and illegality. It is this political manifestation of plurality that Lindahl terms *a-legality*.[92]

A-legal acts challenge the distinction between legality and illegality. They do so by imitating another way of distinguishing between legality and illegality.[93]

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[90] ibid 40-1.
[91] See Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 Intl J Const L 375.
[92] Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (n 84) 41.
[93] Lindahl, 'The Opening: Alegality and Political Agonism' (n 83) 60.

By revealing the spatial boundaries that bound a legal space and separate this space from an outside, a-legal acts show that the strange outside can appear as a place that ought to be included inside the bounded legal space of a collective we.[94] This destabilises not only conceptions of unitary legal spaces but also conceptions of unitary collective bodies. A-legality interrupts the attribution of collective boundaries to a collective self. In this way, Lindahl argues that a-legality causes familiar expectations about what legal boundaries are to give way to strangeness and the disruption of those expectations.[95] In turn, this means that a-legal behaviour reveals the tension between law in its actuality and the possibilities of law, an alternative way of ordering legal space.[96]

Much like the conception of the exception, a-legality cannot be reduced to being of the law. It exists as a limit concept between the duality of legality and illegality and constantly challenges the way these dual concepts interact with one another. However, in contradistinction to Agamben, Lindahl's thesis places political action at the heart of a-legal behaviour. In a manner akin to Foucault, for whom resistance was always prior to power, a-legality for Lindahl is always prior to the duality of legality and illegality. The act of setting the boundaries of legality and illegality will always be a-legal.[97] Legislation thus responds to the primordial questionability of legal boundaries, a questionability that continually asks whether a group of individuals are to become a unity and what defines them as a unity.[98]

A-legality is therefore transcendent. The political agonism of a-legality cannot be reduced to the legal unity of bounded legal spaces. Human behaviour will always be a-legal because it will always-already upset the anticipation of legality and illegality that are found in legal norms.[99] Authorities present legal orders as unities; this is how collective self-legislation can claim that legislation made by that collective is for that collective.[100] A-legal political pluralism that

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[94] Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (n 84) 42.
[95] ibid.
[96] ibid 43. See also Hans Lindahl, 'Border Crossings by Immigrants: Legality, Illegality, and Alegality' (2008) 14 Res Publica 117; Hans Lindahl, 'Give and take: Arendt and the *nomos* of political community' (2006) 32 Philosophy and Social Criticism 881.
[97] ibid 44-5.
[98] ibid. See also Peter Fitzpatrick, *Modernism and the Grounds of Law* (CUP 2001) 76.
[99] Lindahl, 'The Opening: Alegality and Political Agonism' (n 84) 63.
[100] ibid 64.

contests unitary legal orders can only be responded to in a limited way by the legal order if it is to maintain its unitary status.[101]

Lindahl's Political Agonism

Lindahl's account can therefore be seen as an attempt to place political action as central to any conception of law and legal orders. In so doing, his account of a-legality is in marked contrast to Agamben, whose theory of the exception argues that political action will be marked inside a violent dialectic. However, there are some notable theoretical drawbacks to Lindahl's a-legality. Primarily, the paradox of constitutionalism that Agamben traces back to the doctrine of *oikonomia* is not resolved through a-legality.

This paradox is re-sited as Lindahl identifies an irreducible hiatus. This hiatus exists between the questionability of legal boundaries and the responsiveness of lawmaking. Firstly, human behaviour demands legal qualification and precedes the law. The meaning of human behaviour can never fully be a legal construct. Secondly, the responsiveness of legislation is never simply subordinate to human behaviour, nor is it a fixed reaction to a pre-coded stimulus. Legislation remains responsive as it retroactively established whether and how behaviour is a-legal.[102] This reflexivity means that the constituent properties of a-legality are also dependent upon legislation, which confuses the matter further.

Lindahl argues that legislative acts establish whether an act is a-legal and what kinds of a-legality that a collective can deal with.[103] Likewise a-legality reveals possibilities that are, to a lesser or greater extent, possibilities as a legal collective's own possibilities. A-legality confronts a collective with possibilities that escape it to a lesser or greater extent, possibilities that are not its own.[104] Therefore a-legality is not reducible into legality or illegality, as legal boundaries would not be porous or permeable and amenable to transformation unless what a legal order has excluded is, in some normative sense included therein.[105] In fact, the paradox is almost made explicit when Lindahl states that every reflexively

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[101] ibid 67.
[102] Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (n 84) 46.
[103] ibid 47.
[104] ibid 49.
[105] ibid.

structured legal order hides a blind spot from which irrupts the reciprocity of constitutional dialogue between a-legality and legal responsiveness.[106]

Thus Lindahl is able to posit a solution to the paradox of constitutionalism only through arguing that human action and law relate to each other through a-legal behaviour. In this manner, a-legality as a transcendent principle acts in the stead of constituent power, always in excess of the constituted order yet remaining related to it. Lindahl has not resolved the paradox, but masked it through the doctrine of a-legality. Moreover, Lindahl's discourse on political plurality repeats the scission identified by Agamben in the notion of a People. A People as a collective self agree to make laws that govern their behaviour. At the same time there are people who act a-legally in order to disrupt the unity's boundaries. Both notions of a People are in operation within Lindahl's argument.

For Agamben, Lindahl's political agonism, by defining life through a legal dialectic, will always-already end up producing and maintaining the figure of bare life. This can be illustrated through following Lindahl's argument closely. He asks how it is possible, given that political plurality is irreducible to legal unity, that normative theory be based on the injunction that a legal order should be open to a-legality and respond to it accordingly.

Lindahl finds an answer in Hans-Georg Gadamer's interpretation of openness and closure in *Truth and Method*.[107] Gadamer argued that human experience is rooted in the negation of what we take for granted. Experience is always experience of negation.[108] For Lindahl this moment of negativity is *strangeness*, what resists integration into our familiar world, which corresponds to a-legality. A-legality resists inclusion in the legal order as either legal or illegal. Legal orders depend upon a-legality to reveal the closure of a legal order in the distinction between an actual law and a possible law.[109]

Lindahl thus views the *agon* as irreducible as legal boundaries are irreducible, although they are transformable. By positing the legality/illegality distinction, legislation not only includes what it excludes, but also excludes what it includes. The closure of legal orders is thus definitive, as legislation cannot

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[106] ibid.

[107] Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G Marshall trs, 2nd edn, Continuum Books 2006).

[108] ibid 361.

[109] Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (n 84) 69.

include without excluding. This leads Lindahl to posit, as the primordial form of openness, an opening that renders possible all forms of institutional openness and closure. This Opening conditions the possibility of political agonism because it is an abyss that precedes and makes possible all claims to and contestations of legal commonality.[110]

In so doing, Lindahl defines political plurality negatively, through an abyss which precedes *praxis* and therefore precedes a-legal behaviour. Equally, Lindahl's a-legality is presaged on a split in the notion of a People between a constituted People in a legal unity and people who act a-legally. The dialectic between a-legality and legality/illegality is a responsive one. Like Benjamin's *Critique of Violence*, all acts are reducible into a-legality or legality/illegality. More than this, the dialectic will always exclude individuals through setting boundaries. These excluded individuals will exist on the verge of this abyss, with nothing to constitute either their person or their a-legal actions other than the very fact that they are alive. We therefore come full circle and meet the figure of *homo sacer* once more. Agamben's work has not been successfully countered by a-legality. With this in mind, this chapter now turns to Agamben's own ontology, and specifically his writings linking sovereignty and potentiality.

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[110] ibid 70.

Agambenian Sovereignty and Potentiality

In explaining his connections between constituent power and sovereign power, Agamben turns to Aristotle, and specifically his conception of potentiality as drawn out in Book Theta of the *Metaphysics*.[111] The structure of potentiality, claims Agamben, directly corresponds to the structure of sovereignty. This is not potentiality as is commonly understood in the everyday use of the word.

Agamben turns back to Aristotle, and explains that for Aristotle there were two types of potentiality, only one of which interested him.[112] Aristotle identified a generic potentiality. This is meant when we say that a child has the potential to know, or that they can potentially become the head of State. According to Agamben the potentiality that interested Aristotle is an *existing* rather than a generic potentiality. An existing potentiality belongs to someone who has knowledge or ability. For example, the poet has the potential to write poems. This existing potentiality is contrasted to the generic potentiality of the child. For Aristotle the child is potential in that they must suffer an alteration ('a becoming other' as Agamben puts it) through learning. Whoever already possesses knowledge, like the poet, does not need to suffer an alteration. They are already potential thanks to a 'having' on the basis of which they can also *not* bring their knowledge into actuality.[113] It is this existing potentiality that interests Agamben and forms the basis for his analysis of potentiality.

For Agamben potentiality is not only a principle by which something is acted upon. If something has the potential-to-be it must have the potential-not-to-be at the same time. Potentiality is not simply the potentiality to do this or that thing but the potential to not-do, the potential not to pass into actuality.[114] The existence of potentiality is primarily the existence of non-Being. This is the presence of an absence, or what Agamben terms a faculty.[115] Thus, the originary relation of potentiality is its maintaining itself to its own privation, its own non-Being.[116] To be potential is to be in relation to one's own incapacity, to be

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[111] Aristotle, *Metaphysics* in Aristotle, *The Complete Works of Aristotle, Volume Two* (Jonathan Barnes ed, Princeton UP 1984) 1046a, 30-5.
[112] Giorgio Agamben, 'On Potentiality' in *PT* 179.
[113] ibid.
[114] ibid 180.
[115] ibid 179.
[116] ibid 182.

capable of im-potentiality.[117] Agamben interprets this to mean that a thing is potential when, at the moment of its realisation, there is nothing left that is im-potential, nothing able not-to-be.[118] Potentiality thus fulfils itself by letting itself be - by taking away its own potentiality not to be.[119] It is this interpretation that exactly matches sovereign power for Agamben:

> An act is sovereign when it realises itself by simply taking away its own potentiality not to be, giving itself to itself.[120]

Expounding upon the definition of potentiality as the existence of non-Being there is certainly a parallel within the *oikonomic* conception of sovereign transcendence. Transcendent paradigms reveal their own non-Being as constitutive of themselves, remaining in the originary bipolar relation between potentiality and im-potentiality: potentiality and actuality. They have not yet fulfilled their own potential by letting themselves be. Potentiality, letting being be, occurs in a purely immanent sphere. An immanent philosophy for Agamben is not reflexively beholden to transcendence.

The Ontology of Potentiality

Most importantly, Agamben attempts to connect this discussion of potentiality to ontology. In *Potentialities*, he states that every human power is im-potentiality and every human potentiality is always-already held in relation to its own privation.[121] This is both the origin of human power, good and bad, and the root of human freedom:

> Other living beings are capable only of their specific potentiality; they can only do this or that. But human beings are the animals who are capable of their own impotentiality. The greatness of human potentiality is measured by the abyss of human impotentiality.[122]

It is in this formulation that Agamben sees human freedom. Freedom is properly understood neither as the power to do an act, nor the power to refuse to do an act. To be free is to be capable of one's own im-potentiality, to be free for both good

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[117] ibid.
[118] *HS* 45.
[119] ibid 45-6.
[120] ibid 46.
[121] Giorgio Agamben, 'On Potentiality' in *PT* 182.
[122] ibid.

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and evil in a purely immanent sphere of *praxis*, free from any transcendent relations.[123]

Human potentiality therefore defines Being. Potentiality is what separates human being from other beings. This potentiality to be human is fulfilled by letting itself, the potentiality to be human, be. Agamben here shows the influence of Martin Heidegger. In particular Agamben shows the influence of Heidegger's pronouncements in *Being and Time* that potentiality should have primacy over actuality, as well Heidegger's declaration that *Dasein* is defined through potentiality, its own possibility of existence.[124] For both Agamben and Heidegger, to think of the Being that all beings share is to think of the potentiality of Being.[125] Such a potentiality moves away from defining the human being from any outside referent. The human being already has the potentiality to be within, ready to be fulfilled and pass over into actuality.[126] The importance of potentiality for the human being is shown further in *Homo Sacer*, where Agamben makes a statement whose brevity belies a complex, multilayered conception of human existence:

> Potentiality (in its double appearance as potentiality to and as potentiality not to) is that through which Being founds itself *sovereignly*, which is to say, without anything preceding or determining it … other than its own ability not to be.[127]

In one sentence, sovereignty, potentiality and human existence all gain a new immanent grounding on which to base themselves.

The Sovereign Being

Primarily, Agamben's work on sovereignty suffers from a potential contradiction, or at least confusion. Agamben refers to a sovereignty which is equated to constituent power and a sovereignty which is equated to potentiality which is realised by taking away its own potentiality not-to-be. Agamben's works indicate that he is discussing one form of sovereignty that is held in different relations to

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[123] ibid 182-3.
[124] *BT* 62-3.
[125] Leland de la Durantaye, *Giorgio Agamben:A Critical Introduction* (Stanford UP 2009) 25.
[126] Giorgio Agamben, 'On Potentiality' in *PT* 183-4.
[127] *HS* 46.

different concepts.[128] However, Agamben in reality refers to two separate sovereignties in his work.

Agamben equates sovereign power with constituent power, as he does in *Homo Sacer*, which implicitly includes the sovereign power exercised in the decision to create bare life.[129] As such, the sovereign decision will always be constituent power. This sovereign power, as argued earlier, will be an *oikonomic* sovereignty, upheld and constituted by governmental *praxis*. However, Agamben goes on in the same passage to state that:

> Only an entirely new conjunction of possibility and reality … will make it possible to cut the knot that binds sovereignty to constituting power.[130]

It is clear from this statement that Agamben's rethinking of potentiality is an ontological attempt to free life from law and the sovereign decision, and to think life on a fully constituted immanent plane, outside of any relation with bare life.

However the logical conclusion of the sovereign decision being rendered inoperative is that constituent power will also be rendered inoperative. Agamben is clear in mentioning that his politics to-come do not do away with constituent power, but rather frees it from its current bind with sovereign power.[131] If this is the case, however, can sovereign power be equated to constituent power if it is to be rendered inoperative? Or rather, should the equation of sovereignty with constituent power be considered as an equation of sovereign power with a *constituted* power that Agamben wishes to move beyond? Despite so confidently asserting the *oikonomic* basis of the paradox of constitutionalism, it is unclear whether Agamben's own ontology has fallen into the same trap that he accuses others of perpetrating.

If Agamben is simply talking about one form of sovereignty then sovereign power relates to both constituent power and potentiality. The problem with this view is that it means that potentiality relates to constituent power, the same constituent power that is caught up in the *oikonomic* sovereign decision. The logical conclusion of Agamben equating both sovereign power and

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[128] For a critique of Agamben's conception of constituent power and potentiality coming from a different angle, that of political relevancy, see Rad Borislavov, 'Agamben, Ontology and Constituent Power' (2005) 13 Debatte 173.

[129] *HS* 43-4.

[130] ibid 44.

[131] ibid.

constituent power and vesting it in Being is that the sovereign creation of bare life is not only conducted by the State or State organs, but can be undertaken by anyone. This appears to accord with Zartaloudis's reading of Agamben's analysis in *Il Regno e la Gloria*, but unfortunately is only hinted at by Agamben in his other works. The majority of his focus remains on state operations of sovereignty.[132]

This formulation of sovereignty may seem analogous to Judith Butler's concept of petty sovereignty, the idea that sovereignty under certain situations can be appropriated by non-state actors to use for their own ends. However, this would be a misunderstanding of Agamben's position. Butler's petty sovereignty still presupposes a definite centre or source for sovereign power which then delegates that sovereignty out to others.[133] Agamben's sovereignty is a transcendent schema. It operates through a governmental decision-making that presupposes a transcendent sovereignty. The two powers constitute and reinforce each other. Butler's argument still accepts a transcendent realm of sovereignty which makes the decisions as to who can hold and exercise sovereign power.

If it is correct to argue that Agamben posits one form of sovereignty in his texts, then it could be argued that life will not be able to escape the sovereign decision that creates bare life. Life, sovereign power and potentiality all constitute one other. Therefore they will always-already fall under each other's influence and life will always-already be affected by sovereignty and *oikonomic* sovereign decision-making. This is surely not what Agamben intended.

Rather, the sovereignty of constituent power and the sovereignty of potentiality could be considered as separate sovereignties. Agamben does state that "sovereignty is always double".[134] This statement made in *Homo Sacer* could refer to the bipolar dialectic of sovereignty and government expounded upon in *Il Regno e la Gloria*. It is argued here as being better understood as forming two conceptions of sovereignty. One is caught up in the immanent/transcendent dialectic of *oikonomic* government, and one is pure potentiality, pure immanence. This second type of sovereign power thus has no centre or source, nor is it dispersed throughout the social body, acting upon life itself in a multitude of

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[132] ibid 133.

[133] Judith Butler, *Precarious Lives: The Power of Mourning and Violence* (Verso 2004) 61-2.

[134] *HS* 47.

ways. Sovereignty is potentiality, and appropriately it holds the potential for an immanent existence that is beyond biopolitics and bare life. Therefore only Being that grounds itself sovereignly in relation to its own potentiality not to be is capable of forming the politics to-come that renders the figure of bare life in operative.

Whilst this is one possible reading of Agamben, matters are further confused when Agamben seeks to think a "constitution of potentiality" entirely freed from sovereignty and indeed any relation to Being, which is in fact the thinking of ontology beyond *any* form of relation.[135] This is a puzzling section of writing, seeming as it does to contradict his works both on potentiality and undermining Agamben's aim to ground Being ontologically in potentiality. This grounding, being linked to sovereignty, is the very relationality that Agamben is trying to move away from. Agamben sets up an ontological task that appears beyond even his thinking.

Nevertheless, Agamben's conception of potentiality as sovereignty moves sovereign power far beyond traditional conceptions of sovereignty as a single source for law, power and self-knowledge, the autocephalous state as Minkkinen phrases it.[136] Sovereignty instead becomes the key to defining Being itself, radically dislocated from traditional hierarchies and structures of law and political governance.

With this in mind, Agamben's contention that the sovereign and bare life exist in a dichotomous topographical relationship can be looked at again. It states that the sovereign is excluded from the political order by means of his inclusion within it, and bare life is included within the order only by means of its exclusion from it. It is clear that Agamben sees bare life as an actualised figure. To make matters even more complex, Agamben offers yet another definition of the relation between Being and the sovereign:

> Being, as potentiality, suspends itself, maintaining itself in a relationship of ban (or abandonment) with itself to realise itself as absolute actuality (which thus presupposes nothing other than its own potentiality). At the limit, pure potentiality and pure actuality are indistinguishable, and the sovereign is precisely this zone of indistinction.[137]

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[135] Ibid.
[136] Minkkinen (n 21) 11-58.
[137] *HS* 47.

What this passage suggests is that what distinguishes Being from bare life and in turn the sovereign is sovereignty's potentiality. If sovereignty is that potentiality that Being uses to found itself then bare life is Being which does not possess this sovereignty, that potentiality and potentiality not-to-be Agamben declared was intrinsic to the human being.[138] In this way, bare life is not simply deprived of just legal rights but the im-potentiality that allows human beings to be capable of greatness as well. Such a position destabilises all concepts of political identity, as bare life is not concerned with political identity but with the potentiality of Being itself.

Ontological Objections

This chapter has explored Agamben's move from managerial governance to ontology. Of primary focus is the Heideggerian critique of Agamben. Whilst Agamben refers back to Being, for Heidegger Agamben's analysis could be considered ontic, rather than ontological in nature. Heidegger's concepts of freedom and Being are connected, as Heidegger defines freedom as the possibility in the disclosure of Being.[139] For Heidegger Being can never be defined or captured, as Being always withdraws, remaining partially concealed. Any attempt to seek out the essence of Being is already a distortion of Being, as Being is always more than can be made of it.[140] In this sense, Agamben's form of immanent life must tread a careful line in seeking to posit a sphere of purely immanent *praxis*, a 'politics of pure means', without reducing life to any form of essentialism. Following on from Heidegger, parallels can also be drawn between Agamben's Being of pure immanence and Foucault's own ontological freedom.

Finally, one of the biggest objections to Agamben's thought comes from the French philosopher Jacques Derrida. Derrida's philosophy of Deconstruction, and particularly his 'undecidability' can be contrasted to Agamben's exception, which forms the basis of political relations Agamben aims to render inoperative through his ontology. Agamben's work comes very close to undecidability, a term that does not fit comfortably into either of the two poles of a binary opposition, which appears to match Agamben's formulation of the exception. With Agamben

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[138] Giorgio Agamben, 'On Potentiality' in *PT* 182-3.

[139] *OET* 126; Neve Gordon, 'On Visibility and Power: An Arendtian Corrective of Foucault' (2002) 25 Human Studies 125, 135-6.

[140] *BT* 60.

being constantly critical of Derrida's Deconstruction throughout his various works, it is necessary to show that Agamben's work does not argue for abstracted versions of ethics and justice, which is the very thing Deconstruction aims to reveal. It is to these objections that the following chapter turns.

Conclusion

This chapter has forwarded three arguments. Firstly, returning to Foucault's relation to Agamben, this chapter has argued that Agamben's denial of a transcendent realm means that the paradox of constitutionalism between constituted and constituent power must be reconsidered and placed in its proper *oikonomic* and theological origins. Agamben reads Foucault's writings as having recourse to transcendent schema which for Agamben will only legitimate the operation of the exception. This serves to reinforce Agamben's distancing of his thought from Foucault's, as well as providing evidence to justidfy the necessity for an immanent politics and ethics.

Secondly, the objections of Hans Lindahl and his theory of a-legality have been critiqued. The purpose of this has been to defend Agamben's analysis of *oikonomia* and sovereignty in the face of an account of sovereignty that does not rely upon the radical critique Agamben offers. Lindahl's account has been challenged, and it has been argued that despite a-legality seemingly equating to Agamben's exception, Lindahl masks the paradox of constitutionalism, succeeding only in re-siting it. More importantly, Lindahl aims to make a-legality central to an account of political agonism, yet in doing so he sets up a situation which will only lead to bare life being created and maintained. In other words, Agamben's account of *oikonomia* challenges even the staunchest defender of the paradox of constitutionalism, which suggests that Agamben's critique of sovereignty has the potential to change the way this problem is thought about in both the law and politics. This conclusion stands irrespective of the overall coherence of Agamben's thought.

Finally, this chapter has explored the link between Agamben's account of sovereignty and the link he makes between sovereignty and ontology. It is argued that this opens new areas of investigation into Agamben's thought, in particular with relation to how Agamben conceives of an immanent life that is able to deactivate and render the exception inoperative. It has drawn together the various strands of Agamben's thought. The past three chapters, using the exception as a foil, have shown how Agamben's thought should not be placed in a coordinate of either emergency powers or of Foucault's thought. Rather, the exception is part of

a critique of Western politics that aims to open the way for a new ontology and a messianic ethics and politics. It is to this ontology that this thesis now turns.

Chapter 4: Agambenian Ontology

This chapter turns to Agamben's ontology, which relates to his consideration of potentiality as a sphere of pure immanence. This is fundamentally important for the argument of this thesis. Without fully considering the ontological basis for Agamben's thought, it will not be possible to draw conclusions regarding Agamben's immanent politics. From this it would not be possible to relate these conclusions back to the themes underpinning this work, namely ethics, community and law. Agamben's immanent politics has the potential to challenge how these themes are thought about, so it is vitally important to approach the coherence of Agamben's thought from the direction of ontology. Such an investigation also unconceals certain *aporias* within Agamben's thought that threaten to undermine the ethical politics he forwards. The consequences of these *aporias* are fully expounded upon in the final three chapters of this thesis, but they do point to certain areas where Agamben's ethics and ontology need reconsidering.

Agamben's arguments and philosophical schema are contentious. This chapter maintains that Agamben's immanent philosophy can be traced to Agamben's attempt to differentiate his thought from his philosophical mentor, Martin Heidegger. To do so, this chapter discusses Agamben's disagreement with Jacques Derrida. Then this chapter focuses upon Agamben's wider ontological project and the conflict that occurs between Agamben and Heidegger's thought. The reasons behind this again relate to ensuring that the potential of Agamben's thought is not misplaced by positioning him in a coordinate that does not do his thought justice.

This chapter makes three arguments. The first may seem out of place given the path traced up to this point. However, it is fundamentally important if Agamben's ontology is to be properly understood as denying transcendent support for any social structure or the human being itself. This argument relates to the objection that can be raised to Agamben's thought by the thought of Derrida. Derrida's 'undecidable' is here contrasted to Agamben's exception. This is done as there is force in the suggestion that Derrida's emphasis upon the undecidability of the law conflates with Agamben's work. As Agamben's exception is paradigmatic of the negative definition of life and law through transcendent

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schema, Derrida's challenge has the potential to undermine Agamben's wider project.

An attempt here is made to respond to Derrida and Deconstruction. It is argued that Deconstruction attempts to overcome metaphysics through positing an abstracted conception of a de-juridicised law. This construction remains reliant upon defining law and justice through an ungraspable transcendent sphere. In this way, Derrida's work does not effectively challenge Agamben's critique of empty foundationalism. This is important to state to pre-empt any suggestions that Agamben's thought comes close to Deconstruction. This allows for Agamben's critique of Heidegger to be introduced.

The second argument builds upon Agamben's critique of Derrida, turning to Agamben's ontology. Agamben's immanent ontology is both explicitly and implicitly focused upon language. Agamben argues that life is defined negatively through reference to an illimitable transcendent substance or essence. Agamben ultimately traces this negativity to Aristotle's definition of man as 'the living animal that speaks'. The human being is defined on the ground of the faculty for speech. Agamben argues that this is an ineffable and negative foundation. Agamben attempts to demonstrate this through an analysis of the oath as a performative utterance that is paradigmatic of language and law. This underpins Agamben's analysis of both sovereignty and potentiality which was outlined in the previous chapter.

The third and final argument forwarded by this chapter reads Agamben's works through those of Martin Heidegger. Agamben traces the basis of his ontological project to the works of Heidegger. Agamben traces the originary negativity of the human being to Heidegger's *Dasein*. This reading of Heidegger made by Agamben is argued to underpin his analyses of law and politics, as it underpins his attempt to found a non-relational definition for the human being. It is from Agamben's critique of Heidegger that Agamben can found an ethical philosophy based on the immanent existence of whatever-being.

Despite Agamben's attempt to move beyond the negativity he views in Heidegger's thought, it is argued that Agamben's philosophy is fundamentally flawed. Agamben's reading of Heidegger is very selective, and does not account for the breadth and scope of Heidegger's writings. What is more, Agamben's construction of the human being beyond negativity relies upon an incorrect

reading of Heidegger's construction of *Dasein*. This has consequences for Agamben's immanent thought, as Agamben's treatment of Heideggerian hermeneutics is very uncharitable. This has consequences for the transposing of Agamben's immanent project to the sphere of legal reasoning, which will be fully explored in the final chapter.

This analytic approach to Agamben's reading of Heidegger suggests that Agamben has not effectively established that Heidegger's work transmits a negativity. Agamben's focus on Heidegger is explained as Agamben's attempt to generate critical distance away from a thinker who is admittedly the main influence over Agamben's philosophy.

Importantly, this chapter does not purport to place Derrida within a Heideggerian coordinate. Agamben's critiques of Derrida and Foucault help trace a path to Agamben's engagement with Heidegger. Agamben's work on the exception, and his critiques of Foucault and Derrida, ultimately rest upon his attempt to break free of Heidegger's influence. This chapter maintains that Agamben's attempt to break from Heidegger raises *aporias* within Agamben's work that have not been satisfactorily addressed. The following chapters attempt to find ways with which to address these and other *aporias* in Agamben's thought to help construct a defensible political project that remains sympathetic to Agamben's aims.

Ontology and Language

Until now, this thesis has attempted to move Agamben's thought away from emergency powers to the domain of ontology. This journey has taken in the works of Michel Foucault on biopower and governmentality, Carl Schmitt's exceptionalism and Christian theology. This thesis has traced Agamben's ontology to the realms of sovereignty and potentiality, both of which are tied to the human being. This ontology underwrites Agamben's wider immanent philosophical project. Agamben attempts to deactivate the immanent-transcendent relation that, in his view, underpins Western metaphysics.

However, the path traced so far does not paint a full picture of Agamben's thought. As this thesis aims to correctly place Agamben's thought, it would misunderstand Agamben not to discuss the central question that links together all his thought. This question focuses on an interrogation of language, and specifically what it means to define man, as Aristotle does, as "the animal that has speech" (*zoōn logon echon*).[1]

Agamben's critique of empty transcendentalism, linked in the previous chapter to the question of sovereignty and government, aims to think of life, politics and law without a negative relation to some essential foundation. This way of thinking ultimately relates to the fact that language exists. It is Agamben's contention that Aristotle's definition of man as 'the animal that speaks' has bequeathed a negative definition of man to Western philosophy. This negativity has been transmitted to modernity, most recently in the works of Martin Heidegger.

It may therefore appear odd that this chapter begins with a meditation on Derrida before exploring Heidegger's thought. This may also surprise as Derrida's thought has not yet been considered by this thesis. Agamben's interrogation of language and negativity allows the reader to appreciate the ontological underpinning of Agamben's works and how they all interlink, overlap and reinforce each other.

Derrida is considered as his thought focused heavily upon language, speech and writing. As such, Derrida covers much of the same ground as Agamben. In particular, Derrida's work on the indeterminacy of meaning within

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[1] Aristotle, *Politics* in Aristotle, *The Complete Works of Aristotle, Volume Two* (Jonathan Barnes ed, Princeton UP 1984) 1253a, 9.

texts comes very close to Agamben's work on the exception. For these reasons, dwelling upon the interaction between Agamben and Derrida allows Agamben's work on language to be introduced and then properly connected to his works on potentiality and the human being.

Deconstruction and the Exception

Deconstruction is a philosophical school begun by the French philosopher Jacques Derrida. Today it has a place as one of the most important theoretical approaches to law and justice in the academe. Derrida's writings on law and justice, like Agamben's, provide a strong challenge to views that consider law as a coherent, non-violent system of norms and rules. Deconstruction buttresses the idea that legal rules and legal doctrines will ultimately lead to conflict, contradiction and indeterminacy.[2]

Despite this provocative stance, any attempt at defining Deconstruction is hazardous at best. This is due to disagreement over whether Deconstruction is a method, a technique or a process based upon a particular ontological vision.[3] Michael Rosenfeld has attempted to postulate several key theses that Deconstruction has forwarded. First, Deconstruction claims that writing precedes speech instead of operating as a mere supplement to speech.[4] Second, Deconstruction stresses that every text refers to other texts.[5] Third, Deconstruction emphasises that discontinuities between the logic and rhetoric of texts create inevitable disparities between what the author of a text means to say and what the text is nonetheless constrained to mean.[6]

From this, a preliminary explanation can be offered. Deconstruction is an approach to reading a text that challenges the presupposition of conventional forms of interpretation. These conventional forms of interpretation view a text as having a coherent, patterned structure with a centre within which the text's meaning inheres. The object of this interpretation is to identify this centre so that the text's meaning may be derived from it. There is therefore an *aporia* that exists in every text surrounding its interpretation and its meaning. Deconstruction thus is markedly similar to Agamben. Deconstruction also aims to expose the fundamental mythological structural approach of linguistic theory. Like Agamben, for Deconstruction there is no essential centre of interpretation or power.

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[2] Michael Rosenfeld, 'Temptations of the New Legal Formalism' (1990) 11 Cardozo L Rev 1211, 1212.

[3] ibid; Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96 Harvard L Rev 561.

[4] Rosenfeld (n 2) 1212.

[5] ibid.

[6] ibid.

Rather, a text is radically indeterminate in the sense that its meaning defies the possibility of ever being securely constrained. This is because a text has no coherent structure to act as a constraint. As a disordered source of meaning, a text is thought of as a freeplay of its often contradictory, and thus incoherent, constitutive elements. A Deconstructive interpretation of texts is not an attempt to decipher its meaning. Deconstruction constantly seeks out possible meanings which a text can bear, juxtaposing these alternative meanings against one another to expose the incoherence and indeterminacy of every text.

The best example of how Deconstruction challenges Agamben's work and hypotheses is through the 'undecidable'. In *Of Grammatology* Derrida discusses the term 'supplement' that is found in the work of Jean-Jacques Rousseau:

> The concept of the supplement … harbours within it two significations whose cohabitation is as strange as it is necessary. The supplement adds to itself, it is a surplus, a plenitude enriching another plenitude, the *fullest measure* of presence. It cumulates and accumulates presence. It is thus that art, *technè*, image, representation, convention, etc., come as supplements to nature and are rich with this entire cumulating function. This kind of supplementarity determines in a certain way all the conceptual oppositions within which Rousseau inscribes the notion of Nature to the extent that it *should* be self-sufficient.
>
> But the supplement supplements. It adds only to replace. It intervenes or insinuates. *In-the-place-of*; if it fills, it is as if one fills a void. If it represents and makes an image, it is by the anterior default of a presence. Compensatory and vicarious, the supplement is an adjunct, a subaltern instance which *takes-(the)-place*. As substitute, it is not simply added to the possibility of a presence, it produces no relief, its place is assigned in the structure by the mark of an emptiness. Somewhere, something can be filled up *of itself*, can accomplish itself, only be allowing itself to be filled through sign and proxy.[7]

Derrida argues that the supplement in Rousseau's work is undecidable. The undecidable is a term that does not fit comfortably within either of the two poles of a binary opposition. Already there is a striking similarity between the undecidable and Agamben's formulation of the exception. The exception exists as a limit concept. Like the undecidable, the exception cannot be reduced into a pole of a binary opposition. In a sense, the exception as a zone of indistinction could even be re-classified as a zone of undecidability. Derrida was careful to

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[7] Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, John Hopkins UP 1997) 144-5.

distinguish undecidability from radical indeterminacy, as the undecidable did not

mean that *any* meaning could be imparted:

> Undecidability is always a determinate oscillation between possibilities
> (for example, of meaning, but also of facts). These possibilities are
> themselves highly determined in strictly defined situations (for example
> discursive-syntactical or rhetorical – but also political, ethical, etc.) … I
> say 'undecidability' rather than 'indeterminacy' because I am interested
> in relations of force, in differences of force, in everything that allows,
> precisely, determinations in given situations to be stabilised through a
> decision of writing.[8]

Every decision for Derrida necessarily involves an experience of the undecidable.

There is no decision that is not structured by the experience of the undecidable.[9]

Derrida traces four distinct themes of the undecidable.

The first is the irreducibility of any text to a given theme, set of themes or

thesis. Although texts do convey thematic meanings, every text is always more or

less than those meanings. Texts therefore always have a remainder. No text can be

construed as fully present to itself, and is never wholly what it is without

departing from itself. This remainder is very evocative of the exception. Just as

the norm cannot be fully reconciled with its application in the legal decision, so

the irreducibility of any text to a given meaning gives rise to the remainder of the

undecidable. Derrida's undecidable almost pre-empts Agamben's argument that

bare life will always be the remainder produced by the exception. This

irreducibility of the undecidable is expounded upon by Derrida in *Glas*:

> The rare force of the text is that you cannot catch it saying (and therefore
> limit it to saying): *this is that*, or, what amounts to the same thing, this is
> in a relationship of apophatic or apocalyptic unveiling, or has a
> determinable semiotic or rhetorical relationship with that, this is the
> subject, or is not the subject, this is the same, this is the other, that this is
> the text, and not that one, this corpus rather than that. There is still
> something else, something still other, always at issue. A rare force. At the
> limit, equal to zero. What might be called the potency of the text.[10]

Secondly, the essential irreducibility of a text to a given theme has a corollary in

the irreducibility of any text to pre-emptive truth.[11] If truth is understood as either

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[8] Jacques Derrida, 'Afterword: Toward an Ethic of Discussion' in Jacques Derrida, *Limited Inc.* (Gerald Graff ed, Northwestern UP 1988) 148.
[9] ibid 116.
[10] Jacques Derrida, *Glas* (John P Leavey and Richard Rand trs, University of Nebraska Press 1986) 198-9.
[11] Leslie Hill, *The Cambridge Introduction to Jacques Derrida* (CUP 2007) 110.

correspondence between discourse and object or the self-presentation of the text, then truth cannot command writing or control it in advance. If writing is at all possible it means that the value of what was true was not only infinitely complex, multiple and shifting but was also never given as a dogma in advance. The undecidable is a response to the requirement that all conceptual distinctions need to be reassessed critically if they are to be affirmed. Again, in a similar way, the undecidable is mirroring the exception in calling into question foundational norms of modernity.

Thirdly, Derrida argued that indecision was a necessary condition for all decision-making. In a critique of formalist decision-making, Derrida argued that if decisions could be resolved by recourse to external authority there would be no decision, rather there would be the mechanical application of a moral code or doctrine.[12] For a decision to be possible and necessary there must be the undecidable: the hesitation between determined choices without which there would be nothing to decide. Even when there is a decision, the undecidable never disappears. The undecidable continues to haunt each and every decision. Each decision is therefore never entirely final. Even though a decision may belong to the past it lingers on, as though it were still in the future. The undecidable thus ensures decisions have to be confronted time and again. The undecidable is therefore the cornerstone of ethical decision-making, asking the decision-maker each time a decision is made to justify his choice. Here the undecidable shares with Agamben's exception a critique of formalistic decision-making.

Leading on from this, the fourth characteristic Derrida enunciates is that the undecidable is inseparable from risk. It is closely intertwined to questions of responsibility, and poses the question of how it can be possible to be responsible in the face of that which is unforeseen and therefore irreducible to established knowledge or belief.

The undecidable therefore appears to agree with Agamben's contention that action cannot be grounded in an external authority or essence. As well as this, the undecidable accords with Agamben's argument that the exception is an *aporia* at the centre of every decision caused by the impossibility of reconciling norm and application. Derrida's undecidable also places ethics at the heart of every

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[12] ibid 112.

decision. This ethical centrality of decision-making appears absent within Agamben's work at first viewing. However, Agamben's ontology places ethics at the heart of his work. In fact, Agamben's critique of Derrida is marked by a view that Derrida does not go far enough in his investigations.

Agamben has dedicated essays to Derrida, as well as being fulsome in his praise for Derrida's interrogation of language and linguistics.[13] Despite this, Agamben has constantly tried to distinguish himself from Derrida and Deconstruction. Thomas Carl Wall has produced a concise Agamben-esque critique of Deconstruction, which provides the basis for a closer interrogation of the differences between the two philosophers' works:

> There is always a gap between the words on the page and our understanding of them. The application of understanding to the words produces a reading, more strongly, a judgment. Deconstructionists call this "violence" and the work of Deconstruction is to produce "undecideables" which thwart any judgment, any reading. Deconstruction has the effect of neutralizing understanding, or, it has the effect of suspending the task of understanding. Thus inadvertently, Deconstruction has produced 'text' as a kind of *lexica sacer*. On the one hand the written work can be read by anybody at all, in any way at all, infinite "violence" can be done to it; on the other hand it remains completely unreadable, merely refers to itself, the words merely say the words themselves; thus the words are august, consecrated to the Other, untouchable by us. In short, in Deconstruction, what is called 'text' is the bare life of the written, the bare life of whatever was to be communicated.[14]

Agamben, Derrida, Law

Derrida's undecidable appears to provide a much more satisfactory explanation of legal decision-making than Agamben's exception. Derrida allows both for ethical decision-making as well as for the possibility of the decision-maker actually making a decision. These are facets that have not been dwelt upon in detail by Agamben. In short, the undecidable does not appear as deterministic as the exception does.

In constructing a response to the charge that Agamben's philosophy is 'Deconstruction-light' (as it may appear to be) it is first important to note that

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[13] Giorgio Agamben, 'Pardes' in *PT* 205, 208-9.

[14] Thomas Carl Wall, 'Waiting for Agamben: Bare Life, Politics, and the Idea of Community' (paper presented at The Unthinkable – Thinking Beyond the Limits of Culture, Institute of Ethnology, Academia Sinica, Taiwan, December 13-14 2008) http://www.ioe.sinica.edu.tw/chinese/seminar/081213/qwall2_Thomas%20Carl%20Wall.pdf accessed 1 February 2011.

both Agamben and Derrida share the aim to challenge foundational *mythologemes* in Western metaphysics, including in the sphere of law. Derrida posited the impossibility of overcoming the infinite undecidability that exists on the limit of metaphysics in every decision. However, there is a risk that such an undecidability simply becomes another transmission of the limit myth. The limit myth is the self-referential circle between the foundation and the originated, between being and *praxis*, God and Christ.[15] This can be illustrated through a discussion of Derrida's conception of law and justice.

Derrida's most famous essay on Deconstruction, law and justice is 'Force of Law: The "Mystical Foundation of Authority"'.[16] In formulating the title, Derrida indirectly followed the writings of Montaigne who wrote that the laws are respected not because they are just, but because they are the law. In this manner, Montaigne argued that the foundations of law were inherently mysterious.[17] Derrida's point of reference in exploring the mystical foundations of the law is Walter Benjamin's *Critique of Violence*,[18] a text relied upon heavily by Agamben in *State of Exception*.[19] In relying upon Benjamin Derrida aimed to formulate a Deconstructionist theory of justice.[20] Derrida concluded that the law and justice are the "most proper place" for Deconstruction and a Deconstructive theory of law if such a place existed.[21] Derrida argued that his analysis provided the:

> [B]asis for a modern critical philosophy, indeed for a critique of juridical ideology, a desedimentation of the superstructures of law that both hide and reflect the economic and political interests of the dominant forces of society.[22]

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[15] Thanos Zartaloudis, 'Without Negative Origins and Absolute Ends: A Jurisprudence of the Singular' (2002) 13 Law and Critique 197, 200.

[16] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 Cardozo L Rev 919.

[17] Michel de Montaigne, *The Complete Essays* (A M Screech tr, Penguin Books 1993) Essay III, Essay XIII.

[18] Walter Benjamin, 'Critique of Violence' in Walter Benjamin, *Selected Writings, volume 1, 1913-1926* (Marcus Bullock and Michael W Jennings eds, Harvard UP 2004) 236.

[19] *SE* 51.

[20] For discussion of elements of this kind of theory see Drucilla Cornell, 'The Violence as the Masquerade: Law Dressed Up As Justice' (1990) 11 Cardozo L Rev 1047; Dominick LaCapra, 'Justice and the Force of Law' (1990) 11 Cardozo L Rev 1065; Samuel Weber, 'In the Name of the Law' (1990) 11 Cardozo L Rev 1515; Drucilla Cornell, 'From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation' (1990) 11 Cardozo L Rev 1687.

[21] Derrida, 'Force of Law' (n 16) 929.

[22] ibid 941.

The title of Derrida's essay refers to the fact that the law is necessarily applied with force, hence the term 'force of law'. This is the same force of law that Agamben appropriates and develops in relation to the exception. Derrida's conception of force, in a manner repeated by Agamben, is very broad. For Derrida, force includes physical, symbolic and also hermeneutic approaches.[23] The similarities to Agamben continue throughout Derrida's essay, most noticeably when he states that:

> Since the origin of authority, the foundation or ground, the position of the law cannot by definition rest on anything but themselves, they are themselves a violence without ground.[24]

This force has a peculiar property – there is no just and unjust before the foundational act (a foundational act that Agamben has shown has an *oikonomic* basis). The legitimation of the order is retrospectively created by this order itself.[25] The force creates law and thus its own legitimation. In this manner Derrida comes close to Agamben's position (or perhaps, Agamben later comes close to Derrida's position) in denying that there exists a solid foundation for the law and that the law justifies its existence through a self-referential process. The founding moment of law is neither legal nor illegal, but rather it exceeds the oppositions of founded and unfounded. The origins of the law therefore will still contain the mystical remnant that provides the basis for authority.[26]

It is this mystical element that Derrida argues that law is essentially deconstructible. In turn it is this deconstructible structure of law that insures the possibility of Deconstruction. In such a manner, "Deconstruction is justice".[27] So Derrida is in agreement with Agamben regarding the law's sacral origin, but the difference between the two philosophers is again found on the plane of transcendence, which is transmuted in Derrida via justice:

> Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists. Deconstruction is justice.[28]

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[23] ibid 927.
[24] ibid 943.
[25] ibid 991.
[26] ibid 943.
[27] ibid 945.
[28] ibid.

Deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on).[29] In so taking place, Deconstruction exposes the violence, the force, the *Gewalt* that masquerades itself within the law with reference to sacral, originary *mythologemes*.

Derrida posits an uncrossable divide between law and justice. For Drucilla Cornell, Deconstruction exposes and protects the divide in the very deconstruction of the identification of law as justice.[30] This position allows the reader to understand the full significance of Derrida's saying that Deconstruction is justice.[31] Deconstruction has practical consequences for the law in that by challenging and exposing a legal system's self-legitimation of authority as myth, through the use of the undecidable as challenging the essential grounding of legal texts, the law loses one justification for its actions.[32] Cornell quotes Derrida to support this argument. This quote from Derrida is incredibly important, placing Derrida's work very close to Agamben's insistence that transcendent/immanent dialectics only serve as reinforcing foundational *mythologemes*:

> Here we "touch" without touching this extraordinary paradox: the inaccessible transcendence of the law before which and prior to which "man" stands fast only appears infinitely transcendent and thus theological to the extent that, so near him, it depends only on him, on the performative act by which he institutes it: the law is transcendent, violent and non-violent, because it depends only on who is before it – and so prior to it – on who produces it, founds it, authorises it in an absolute performative whose presence always escapes him. The law is transcendent and theological, and so always to come, always promised, because it is immanent, finite and so already past.
>
> Only the yet-to-come (*avenir*) will produce intelligibility or interpretability of this law.[33]

The law never catches up with its projected justification, which continually provides it with the justification necessary to act. It is this paradox that Deconstruction and Derrida identify and try and assault. In many ways, Agamben's work would not have been possible without Derrida's formulation of Deconstruction.

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[29] ibid.
[30] Cornell, 'The Violence as the Masquerade' (n 20) 1049.
[31] Derrida, 'Force of Law' (n 16) 945.
[32] Cornell, 'The Violence as the Masquerade' (n 20) 1049.
[33] Derrida, 'Force of Law' (n 16) 993.

However, it is Derrida's conception of justice that is of interest here. As Zartaloudis noted, despite Derrida's identification of the empty source of power and law, Derrida may have repeated this self-same limit myth. For example, Derrida argues that whilst the law is calculable and formed by general rules,[34] justice is infinite and incalculable.[35] As such, a decisive property of justice is that it cannot be captured in general rules. General rules are unjust precisely on account of their generality. Justice must therefore be uniquely singular and any theoretical representation of justice has to fail. This is because justice amounts to a unilateral relation with a person (as uniquely singular), and the obligation to respect and appreciate their uniqueness and their otherness.

In this sense, the Other as a unique individual will always remain elusive as the Other will always-already escape the grasp of any representation made to capture it. This has to be the case, as any representation will always-already be a generalisation.[36] The particular in its otherness escapes not only any theoretical construction but also any rule of justice. General rules cannot do justice to the real world of particular entities. This reflects Derrida's objection to representational philosophy in that concepts and theoretical constructions do violence to things. Respect for the Other is the means of escaping this violence, especially as regards human beings.[37] This focus upon the absolute particularity of the other person is also an important facet of Agamben's thought, reflecting the closeness in the work of the two philosophers. While Agamben shares Derrida's focus on the absolute singular, his critique of Derrida is driven by the argument that Derrida did not go far enough in his work and follow through with the full implications of his philosophy.

Has Derrida managed to escape the nihilism of a foundation of nothingness? The answer to this question hinges upon the position of justice in Derrida's thought. It is argued here that Derridean justice functions as just such a foundational void. It is clear from Derrida's writings that justice cannot be reduced to any general rule, and always escapes any chance to contain it to anything other than a unique singularity that is held in relation to the individual Other. If this is the case, then each individual is always-already held in a relation

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[34] ibid 961.
[35] ibid 971.
[36] Jacques Derrida, *Writing and Difference* (Alan Bass tr, Routledge 1978) 164.
[37] ibid 203.

with justice, a justice which always-already escapes definition. This gains all the more significance when Derrida states that he does not want to discard law in the name of justice.[38] Justice therefore remains the *avenir* of the law. Justice irritates and disrupts the law and challenges any conception of law that denies and does not include the singularities of particulars.[39]

This structure of the relation between justice and law is fundamentally negative. Justice functions as a Law of law and an Ethics of ethics. Law in its pure form as self-founding is experienced through presupposing the founding of law in a Law of law (justice) that forms the law's condition of possibility. Justice for Derrida is the non-juridical formula of transcendence. Justice is constantly compromised by its very legal form and the fact that it cannot be found other than through the law.[40] This presupposition of a Law of law is silenced and denied as an act. Justice maintains that it deals with the unique singular and exposes the mythical foundations of law, but instead simply transposes another mythical foundation in its stead, a self-referential sphere that refers to nothing but itself. It is Agamben's argument that justice does focus on the unique singular, without any need for foundations.

It is Derrida's irreducible call for justice that provides both the main political basis for Deconstruction and also the basis for Agamben's critique, namely that Derrida still has recourse to the negative foundations he identifies through Benjamin in 'Force of Law'. Justice is always to come for Derrida, a fact that underlines the very practical and political nature of Deconstruction.[41] Despite this, the question still begs itself as to what Agamben offers beyond Derrida.

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[38] Derrida, 'Force of Law' (n 16) 993.
[39] ibid 1027.
[40] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge 2010) 279.
[41] Jacques Derrida, *The Post Card* (Alan Bass tr, University of Chicago Press 1980).

Language and Performativity

A vital point to make here is that Agamben critiques Derrida not because of his method, but because he does not go far enough in his conclusions. It is in the sphere of language that Agamben's ontology can be properly expounded upon. This also makes clear Agamben's critique of Derrida.

Following Zartaloudis's reading of *Il Regno e la Gloria*, it has been contended that foundational *mythologemes* are structured through a series of comparable forms, such as the Law of law. These *mythologemes* have a self-referential character that shows their structures up as pseudo-bipolarities, or bipolarities resting upon a negative foundation. This was shown in Chapter Two with the example of the Trinity.[42] What is concealed by such self-referential *mythologemes* of power and law is the fact that such presuppositions, even those of Justice or Law, are absolutely ineffable. Zartaloudis explains the key motive for Agamben is how to think and be without a negative relation to some essential foundation, even one that is made of nothing.[43]

Derrida's genius was in critiquing through Deconstruction these foundational *mythologemes* and exposing them *as mythologemes*. However as Zartaloudis notes Derridean justice still functions as a negative. Justice always needs to be presupposed as ineffable, a nothingness that still needs to be captured, concealed and then related to negativity.[44] To state that nothingness is the foundation of power does not mean that nothing existent is the ground of power. Rather nothingness can be re-written as no-*thingness* to give the proper meaning of the phrase. No-thingness negates *thingness*. Agamben's thought focuses upon the immanent existence of beings. 'Thingness' connotes an existence not defined by reference to a negativity but instead defined by its very existence as such. Therefore no-*thingness* presupposes an ineffable foundation made of nothing. It is this very thingness, the experience of things, which for Zartaloudis forms the key part of Agamben's ontology.[45]

For Agamben this very negativity is ultimately related to an attempt to define the very fact that language exists. Zartaloudis argues that such mythological schema that serve as foundations for law and power are nothing

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[42] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 185.
[43] ibid 187.
[44] ibid.
[45] ibid.

other than responses to the fact that language's existence is posed as a mystery in itself.[46] For Agamben law and power are intertwined with the fact that language exists. This close connection between the negative presupposition of foundations and language was explored by both Agamben and Derrida in the sphere of performativity.

Performativity

Conventional linguistic theories denote a relationship between things (such as an object) and another thing (a word). Words thus have a denotative character. Linguistic performativity presupposes the suspension of the normal denotative character of language. The linguistic act itself accomplishes an action. Most famously, the performative power of language was expounded by John L Austin.[47]

Austin argued that the performative utterance should be judged upon whether it succeeded or failed to produce an action, rather than whether it was true or false.[48] Both Agamben and Derrida criticise Austin's explanation of performatives. For Derrida, Austin's admission that performatives sometimes fail to produce a desired action (due to the fact that they are dependent upon contextual conventions) is due to the structure of performatives in general. Failure is part of the condition of possibility of all performative acts. They are always marked by the possibility of failure, of failing to produce the desired result.[49] Derrida identifies that what is incompatible with the pure enactment of performatives is the condition of possibility of performatives. The possibility of failure is included within the performative act at the same time as it is excluded through the performative's success. Such a structure is reminiscent of the exception.

Agamben's writings on performativity focus upon the structure of the oath as a paradigm, and ultimately allow a way into viewing Agamben's wider ontological thought.[50] This analysis of Agamben's writings on the oath is

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[46] ibid.

[47] John L Austin, *How To Do Things With Words* (Clarendon Press 1975).

[48] ibid 5.

[49] ibid 8-9; Jacques Derrida, *Margins of Philosophy* (Alan Bass tr, University of Chicago Press 1982) 325.

[50] For a detailed discussion of Agamben's analysis of the oath as paradigmatic of speech acts, see Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 191-202.

dependent upon Thanos Zartaloudis's analysis of *The Sacrament of Language: The Archaeology of the Oath*, which is untranslated at the time of writing.

With reference to Austin, Zartaloudis contends that an oath suspends the realm of linguistic denotation where words refer to concrete objects. The oath presupposes and renders stable the essential relation between words and things. It does so through instituting a virtual state where the oath enunciates nothing but the self-referential effectiveness and truth of the enunciation itself. In other words, what the oath says *is*.[51]

What is important about the oath for Agamben, in Zartaloudis's reading, is its relevance for both language and the human being, defined by Aristotle as "the animal that speaks".[52] By suspending the normal realm of denotation the oath guarantees the assurance of the enunciation's veracity and its realisation, in a manner akin to the exception and the norm. The veracity and realisation of enunciations can only occur through a self-referential paradox that underpins the relation in language between words and things.[53] That another self-referential *mythologeme* underpins human language means not only that language is defined negatively but also that the human being as the animal that speaks has a negative foundation.[54] For Zartaloudis, authority needs to conceal this lack of a human essence through the apparatus of the oath in order for the truth and effectiveness of language to be guaranteed and instituted in an economy of order.[55]

In support of this claim Zartaloudis notes that Agamben refers to an ancient text by Philo of Alexandria, who speaks of the oath in its constitutive relation to the language of God. For Philo, the very words of God are oaths. The oath is the *Logos* of God and as such we can know nothing of God but his oaths.[56] If what God says happens, then the oath is the *Logos* of God whose language realises things immediately.[57] Agamben's presupposition here, in Zartaloudis's opinion, is that human language takes place through the marking of a difference with the language of God. The oath as the language of God realises what it says and so is. The oath as speech act, much like the Trinity, institutes a division

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[51] ibid 197-9; *SL* 7.
[52] Aristotle, *Politics* in Aristotle (n 1) 1253a, 9.
[53] *SL* 7.
[54] ibid 5-6.
[55] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 196.
[56] ibid 198; *SL* 28-30.
[57] ibid.

between a transcendent realm of divine language and a sphere of mediacy that is human language.[58] The oath survives as a remnant of a negative transcendental presupposition in language where the *nexus* between word and object is that of a performative nature. To speak, in Zartaloudis's reading of Agamben, is to take an oath, and to continually reinforce the negative foundation of language that underpins the definition of the human.[59]

The mystical foundation of authority that Derrida interrogated in 'Force of Law' is the violent force of a word.[60] The proper mode of the law is always a performative imperative, a command in the form of an oath, an invocation in the name of the law.[61] Such a position is not too far from Derrida's observation that performatives can be found as part of the law's foundations. Performatives represent social phenomena of the most fundamental character, for example, "a state as guarantor of a right".[62] For Derrida, language and social force are two sides of the same coin, as normative hierarchies and chains of legitimation end in the fact of force.[63] Zartaloudis quotes Agamben:

> What takes place is the performative experience of a language that has the force to realise what it says.[64]

The law guarantees its order upon an oath which grounds both life and law negatively through the filling of the lack of an essence at the heart of the human being with a presupposed excess of signification such as Derridean justice, constituent power and the Trinitarian God.[65] As Zartaloudis and Schütz maintain, this is no mere theoretical exercise. Today, terms such as humanity and human rights, progress and democracy are evoked as oaths, self-referential performative imperatives.[66]

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[58] ibid 199-200; *SL* 69-70.

[59] ibid 201; *SL* 72-3.

[60] See Derrida, 'Force of Law' (n 16).

[61] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 202.

[62] Derrida, 'Force of Law' (n 16) 943.

[63] "Even if the success of performatives that found law or right (for example, and this is more than an example, a state as guarantor of a right) presupposes earlier conditions and conventions (for example in the national or international arena), the same "mystical" limit will reappear at the supposed origin of the said conditions, rules or conventions, and at the origin of their dominant interpretation." - ibid 943. The 'mystical limit' is explained thus: "[H]ere the discourse comes up against its limit: in itself, in its performative power itself. It is what I here propose to call the mystical. Here a silence is walled up in the violent structure of the founding act." – ibid 941-3.

[64] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 202; *SL* 86.

[65] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 202.

[66] ibid 202-3; Anton Schütz, 'Imperatives without *imperator*' (2009) 20 Law and Critique 233.

Therefore in order to understand Agamben's ontological move in relation to both law and life, it is necessary to realise that all Agamben's works interrogate the definition of the human being as the animal that speaks. The fundamental negativity of the human being in relation to language is traced by Agamben to the works of his philosophical mentor, Martin Heidegger. Heidegger's thought permeates the whole of Agamben's work. Because of this, Agamben has constantly striven to identify a negativity within Heidegger and to overcome that negativity within Heidegger's work. It is to this attempt that this chapter now turns.

The Negativity of Man, the Negativity of Language

What does it mean to define a human being as the animal that has speech? For Agamben such a definition places a negative foundation for language. The human being is always-already defined negatively. This in turn leads to the capture and suspension of this nothingness (*zoē*) which leads to the figure of bare life continually reappearing. As Zartaloudis explains, for Agamben language's taking place is thought of on the basis of a negative definition of being.[67]

What this thesis has offered so far is a series of historical and philosophical readings made by Agamben to support his argument that there exists a structure of negativity that underpins Western metaphysics. That Agamben's works cohere and share a common thread throughout is not a position that is immediately obvious. As Alice Lagaay has stated:

> In attempting to describe Giorgio Agamben's philosophy I find myself confronted with a peculiar challenge, which seems to have something to do with the very experience of reading. Whilst reading Agamben's texts, much of what he writes seems to me to make immediate sense. It feels familiar and clear, yet my attempts to reconstruct his argument soon falter. This incapacity to reflect, to speak or write about Agamben's work is perhaps not, however, just one particular reader's affliction, for it also happens to be one of the recurrent themes of the texts themselves. The difficulty of re-telling his work, which may perhaps be interpreted as a kind of reaction block, corresponds precisely with what Agamben aims to highlight. It is what is interesting to him and in his work.[68]

It is precisely this reaction block that this thesis has attempted to remove. Agamben's ontology is premised upon tracing the originary negativity of the human being to Heidegger's construction of *Dasein*. Agamben has been accused by scholars of incorrectly interpreting Heidegger and paying scant attention to his whole opus of works.[69] However Agamben's critique of Heidegger should be understood as underpinning all of Agamben's works on law and politics, and his aim to found a non-relational definition of the human being.

Agamben aims to generate critical distance between his work and Heidegger's. This is in order for Agamben to fashion a philosophy that overcomes the negativity he presumes exists in Heidegger's work. This attempt ultimately

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[67] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 208.
[68] Alice Lagaay and Juliane Schiffers, 'Passivity at Work. A Conversation on an Element in the Philosophy of Giorgio Agamben' (2009) 20 Law and Critique 325, 325-6.
[69] Tracy Colony, 'Before the abyss: Agamben on Heidegger and the living' (2007) 40 Continental Philosophy Review 1.

calls into question the philosophical coherence of Agamben's project, resting as it does upon this attempted distancing from Heidegger.

The Negative Human

Agamben's major inquiry into the negative foundation of language is found in *Language and Death: The Place of Negativity*.[70] It is in this volume that Agamben makes his attempt to distance himself from Heidegger's construction of *Dasein* and begin his own investigation into the construction of the human being. It is clear, if Zartaloudis's analysis of *Il Regno e la Gloria* is correct, that Agamben views this distancing as necessary for his pursuit of exposing the negative partitioning that foundational *mythologemes* protect and project.[71] Agamben does not see Heidegger as the originator of this negative partitioning. However, Agamben does explicitly trace this negative partitioning to Heidegger's thought.[72]

This should be seen as an overtly strategic move by Agamben. The term strategic is used quite deliberately. What is covered in this thesis cannot be a full and detailed analysis of the conflicts between Agamben and Heidegger. Rather, what is argued here is precisely that Agamben's use of Heidegger is strategically necessary for the overall coherence of his philosophical project. Agamben seems determined to differentiate his thought from Heidegger's. It appears as though Agamben aims to construct a philosophy distinct from Heidegger and so avoid the charge that his work is Heideggerian in nature.

There is another reason why Heidegger's thought is focused upon by Agamben. Agamben's aim is to overcome the perceived originary negativity in Western metaphysics and posit a new politics.[73] Agamben is no doubt aware of Heidegger's influence. The works of Emmanuel Levinas, Jacques Lacan, Maurice Blanchot, Foucault and Derrida, as well as other twentieth century continental philosophy, would not have been possible without Heidegger. By attempting to assault Heidegger's work, Agamben aims to call into question not just Heidegger's philosophy, but also the influence of Heidegger's thought. If an originary negativity is traced to Heidegger, then Agamben could be justified in claiming that such a negativity is transmitted through the works of Levinas,

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[70] See *LD* generally.
[71] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 239.
[72] *LD* 1-5.
[73] *MWE* 114-7.

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Lacan, Blanchot, Derrida and Foucault. That this is the implication to Agamben's thought should not be underplayed.

The starting point of Agamben's critique of Heidegger is centred on his thinking the fact that language exists as such, beyond any relation.[74] It is such thinking that for Agamben can render inoperative the negativity he traces to the definition of the human being. For Agamben, the relation to negativity that defines the human being from the time of Aristotle has been a particular understanding of transcendence that relates to a negative ground. Such a structure was termed by Heidegger as the *ontotheological* problem:

> If we recollect the history of Western-European thinking once more, then we will encounter the following: the question of Being, as the question of the being of beings, is double in form. On the one hand, it asks: what is a being in general as a being? In the history of philosophy, reflections which fall within the domain of this question acquire the title ontology. The question 'What is a being?' (or 'What is that which is?') simultaneously asks: which being is the highest (or supreme being) and in what sense is it the highest being? This is the question of God and of the divine. We call the domain of this question theology. This duality in the question of the Being of beings can be united under the title ontotheology.[75]

Ontotheology denotes the originary scission that presupposes an ineffable transcendent realm that must remain ungraspable. It is Heidegger's triumph to be perhaps the first philosopher to identify and grapple with this form of transcendence. Agamben's philosophy is also driven by the *ontotheological* question. As stated, Agamben's target is Heidegger's construction of *Dasein*. Before dwelling upon *Dasein*, it is first necessary to investigate the *Seinfrage*, the question of Being.

The Question of Being

It is Heidegger's claim to have re-awakened the question of Being that was lying dormant all through the Western philosophical tradition from the time of the pre-Socratics. What then is the question of Being? In the *Introduction to Metaphysics* Heidegger posed the question explicitly: "why are there beings at all instead of

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[74] *LD* 25-6; Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 221.
[75] Martin Heidegger, 'Kant's Thesis about Being' (1973) 4 Southwestern Journal of Philosophy 7, 10-1.

nothing?"[76] This question is returned to throughout Heidegger's thought. In the opening pages of *Being and Time*, Heidegger stated:

> *What is asked about* is Being – that which determines entities as entities, that on the basis of which entities are already understood … Being lies in the fact that something is, and in its Being as it is; in Reality; in presence-at-hand; in subsistence; in validity; in Dasein; in the 'there-is'.[77]

Beings *are*. The question of Being interrogates beings as to their ground.[78] It is vital here to distinguish between the terms *ontological* and *ontic*.

Whereas *ontology* and *ontological* thought is concerned with Being, *ontic* thought is concerned with the ways entities are and facts about those entities. Therefore *ontic* thought is not concerned with Being. The difference between Being and entities (beings), the ontological and the ontic, is the 'ontological difference'.[79] In this chapter, this Heideggerian use of ontic is adopted.

In re-awakening this question of Being, Heidegger aims to transcend the metaphysical tradition. Heidegger traces this tradition to the inauguration of the idea of truth, which had become synonymous with correctness (*Richtigkeit*), correspondence between ideas and beings.[80] Heidegger traces a more ancient (which is not merely a historical claim) notion of truth as 'unconcealment', or *alētheia*, which connotes disclosedness, clearing or revealing.[81] By thinking back to the pre-Socratic understanding of truth as unconcealment Heidegger aimed to reveal the moment when the question of Being was forgotten and buried. The metaphysical tradition that Heidegger wished to transcend can be seen as the inspiration for Agamben's own challenge to foundational *mythologemes*:

> Metaphysics thinks beings as beings in the manner of a representational thinking that gives grounds … What characterises metaphysical thinking, which seeks our the ground of beings, is the fact that metaphysical thinking, starting from what is present, represents it in its presence and thus exhibits it as grounded by its ground.[82]

Agamben's starting point can be seen as Heidegger's tracing of the craving of metaphysics to represent the positive essence of things. Agamben's aim to think

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[76] *IM* 1.
[77] *BT* 25-6.
[78] *IM* 29-30.
[79] *BPP* 17.
[80] *OET* 116-23.
[81] Oren Ben-Dor, *Thinking About Law: In Silence With Heidegger* (Hart Publishing 2007) 44.
[82] *EPTT* 432.

the thing itself, away from any essentialist thought, can be traced to this point of emergence.

For Heidegger the Being of beings, that which must be thought about, cannot be reduced to a mere object-for-thought in the world. Being is positive in that it is given in any being by uncovering the being's (the entity's) thingness.[83] However Being should not be understood as positing an essence, a determinate substance that ensures we know whether something is. In a paradoxical sense, Heidegger maintains that Being *is* nothing. This should be thought of in the sense that Being is no-thing, and cannot be reduced to any-thing. There is no one thing or essence that constitutes Being. Heidegger writes of the Nothing:

> In spite of this, the *ontological meaning of the notness* (*Nichtheit*) of this existential negativity is still obscure. But this holds also for the *ontological essence of the 'not' in general*. Ontology and logic, to be sure, have exacted a great deal from the 'not', and have thus made its possibilities visible in a piecemeal fashion; but the 'not' itself has not been unveiled ontologically. Ontology came across the 'not' and made use of it. But it is so obvious that every 'not' signifies something negative in the sense of a lack? In its positivity exhausted by the fact that it constitutes 'passing over' something? Why does all dialectic take refuge in negation, though it cannot provide dialectical grounds for this sort of thing *itself*, or even just establish it *as a problem*? Has anyone ever made a problem of the *ontological source* of notness, or, *prior to that*, even sought the mere *conditions* on the basis of which the problem of the 'not' and its notness and the possibility of that notness can be raised?[84]

Most importantly, the Nothing should not be thought of as something to be overcome. The Nothing remains vital to a questioning of Being. It would not be right to speak of a metaphysics that accords primacy to beings over Nothing.[85] How then is Being to be understood?

Heidegger's Dasein

In his lecture course entitled 'What is Called Thinking?' Heidegger was concerned with thinking in general, and stated that:

> *Most thought provoking is that we are still not thinking* – not even yet, although the state of the world is becoming constantly more thought-provoking.[86]

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[83] *BPP* 10; Ben-Dor (n 81) 46.
[84] *BT* 331-2.
[85] *IM* 31.
[86] *WCT* 4.

The question 'What is called thinking?' relates to anything that is to be thought about. Reflecting on 'aboutness' opens a new horizon for reflecting upon the way entities are, or their Being.[87] Heidegger makes it explicit that in order for the question of Being to be grasped, it is necessary to make an entity, the inquirer, transparent in its own Being.[88] This being's mode of Being is the very asking of the question of Being, and it is this (human) being that Heidegger terms *Dasein*, which is literally 'Being-there'.[89]

For Heidegger that essence of Being can only be grasped in a moment of being-in-the-world, by *Dasein*.[90] This is so because a human being has the capability to question its being (thereness) in relation to Being, the ontological structure of its existence.[91] Such a moment is authentic, a moment where thinking successfully resists the craving for metaphysics.[92] Thus for Heidegger, the essence of things is intimately connected to the essence of *Dasein*.[93] For Heidegger, *essence* is bestowed by the thinking-Being of a being. Essence means that which enables. Essence is that which lets beings be, the unfolding potentiality of the thingness of things, but which is no-thing in particular.[94]

The Being of *Dasein* is "in each case mine", and as such each *Dasein* is designated by the personal pronoun.[95] However, *Dasein* should not be thought of as simple 'human life', in the sense of Agamben's formulation of *zoē*. Instead, *Dasein* is intimately connected to Being, but is also never fully identified with the Being of beings or with beings.[96] *Dasein* encounters Being in a moment of insight, a moment of clearing, although *Dasein* always-already falls back into its being among other beings. Heidegger explains the relationship between Being, life and *Dasein* as follows:

> Life is a particular kind of being; but essentially it is accessible only in *Dasein*. The ontology of life is achieved only by way of a privative interpretation; it determines what must be the case if there can be

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[87] Ben-Dor (n 81) 42.

[88] *BT* 27.

[89] ibid.

[90] Ben-Dor (n 81) 49.

[91] Zartaloudis, 'A Jurisprudence of the Singular' (n 15) 203.

[92] Ben-Dor (n 81) 46.

[93] ibid 121.

[94] *LH* 220; Ben-Dor (n 81) 121.

[95] *BT* 67.

[96] ibid 51.

anything like mere-aliveness (*Nur-nich-leben*), life is not a mere being-present-at-hand, nor is it *Dasein*. In turn, *Dasein* is never to be defined ontologically by regarding it as (ontologically indefinite) life plus something else.[97]

A part of the metaphysical dominance that has forgotten the question of Being is identified by Heidegger as Aristotle's definition of man as the animal that has speech.[98] This stood for the universal essence of man. Heidegger saw this definition as thinking of man in a particular way. Specifically, Heidegger saw Aristotle's definition as thinking of man according to a certain interpretation of animality and of life.

It is in this sense that Heidegger questions the necessity of humanism and humanistic thinking, which he ties to metaphysics. Humanism views the essence of man as obvious, and as such it misses:

> The simple essential fact that man essentially occurs only in his essence, where he is claimed by Being.[99]

In such a manner, Heidegger himself can be seen as attempting to unconceal a formulation of human life (although he would not accept the humanistic connotations of such a phrase) that would do away with foundational *mythologemes*.[100] Humanism embodies such a *mythologeme*, namely defining man as an animal with an ungraspable, ineffable essence. For Heidegger, metaphysics thinks of man "on the basis of *animalitas* but does not think in the direction of his *humanitas*".[101] The *logos* of phenomenology is *phonē*, or voice – man is not a rational animal as Aristotle would have it but a being without a natural voice or *phonē* and this is *Dasein*. As Agamben states, "Being *Da*, man is in the place of language without having a voice".[102]

It is through *Dasein* that Heidegger aims to challenge this humanism. Humanism, by attempting to frame out a characteristic of humans, falls short of the uniqueness of human beings, and does not set human beings high enough, in their position as respondents to Being.[103] *Dasein* does not exist – rather, it 'ek-

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[97] ibid 75.
[98] See Aristotle, *Politics* (n 1) 1253a, 9.
[99] *LH* 227.
[100] Zartaloudis, 'A Jurisprudence of the Singular' (n 15) 203-4.
[101] *LH* 227.
[102] *LD* 55.
[103] *LH* 234-5.

sists'.[104] *Dasein* is only in-the-world when it is leaping outside of self-interpreting as a being. Being-in-the-world is a moment of nearness to Being for *Dasein*, which is only as ek-sistent.[105] To ek-sist cannot be reduced to a representational quality that is found in humanism. Ek-sistence refers precisely to "standing in the clearing of Being".[106] Ek-sistence moves away from any notion of a living being.

There is no representation by which the Being of human beings can be captured in a relationship to Being.[107] The Being of human beings, the mode of being given to humans, is related to the question of Being, to the fact that Being is in question for the way that humans are as *Dasein*. Whenever *Dasein* is, it is a Fact. The factuality of such a Fact is *Dasein*'s 'facticity'.[108] This means that *Dasein* has Being-in-the-world in a way that it can understand both itself and the Being of the entities that it encounters in the world.[109] *Dasein*'s ek-sistence is structured temporally, with *Dasein* always-already self-interpreting what it has been.[110] In the human's relation to *Dasein* the human is not considered for its own sake, but instead for the sake of Being. As such *Dasein* should not be thought of as equivalent to human life or the human being. It is with reference to Heidegger's challenge to humanism that Agamben's critique of Heidegger's construction of *Dasein* can be introduced.

Agamben's Critique of Humanism

The starting point for outlining Agamben's critique of Heidegger is *The Open*. It is in this volume that Agamben offers a rethinking of the relation between humanity and animality. This rests upon an attempt to think of man as a rational animal or an animal that speaks.

Like Heidegger, Agamben takes aim at humanism. Agamben, starting from Aristotle's definition of man, takes aim at the "anthropological machine" of humanism.[111] This may appear a curious starting point for outlining Agamben's critique of *Dasein*, given that Agamben dedicated a book, *Language and Death*,

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[104] ibid 228.
[105] Ben-Dor (n 81) 51.
[106] *LH* 228.
[107] Ben-Dor (n 81) 55.
[108] *BT* 82.
[109] ibid.
[110] *BPP* 276.
[111] *O* 33-8.

to Heidegger's construction of *Dasein*. However, by looking at Agamben's assault on humanism, Agamben's misreading of Heidegger's *Dasein* becomes clear.

For Agamben, humanism elaborates the human both *in* relation to the animal and *as* this very relation. Humanism therefore always thinks of man as existing relationally:

> In our culture, man has always been thought of as the articulation and conjunction of a body and a soul, of a living thing and a *logos*, of a natural (or animal) element and a supernatural or social or divine element.[112]

That the anthropological machine of humanism must be unworked is presented by Agamben as a critical rereading of Heidegger's reflections on humanism. Agamben argues that the humanist machine must be rendered inoperative. This would suspend the relation that holds the human in relation to the animal:

> To render inoperative the machine that governs our conception of man will therefore mean no longer to seek new – more effective or more authentic – articulations, but rather to show the central emptiness, the hiatus that – within man – separates man and animal: the suspension of the suspension, Shabbat of both animal and man.[113]

What this suspension promises is the end of elaborating humanity through a relation with animality. After humanism, Agamben's human is marked by the emptiness of the caesura between the human and the animal.[114] By rendering humanism inoperative, the human and the animal are "let be".[115]

Agamben's exposition of the human/animal relation can be contrasted to Heidegger's questioning of humanism. Heidegger's questioning turns on the relation between the human and *Dasein*. For Heidegger, humanism renders the human-animal relation into the focal preoccupation of life.[116] It is this humanism that Heidegger's thought rails against. As Ziarek explains:

> The very orientation of the human in terms of the animal constitutes a mark of the metaphysical, and thus humanist, revealing of the "human" way of being.[117]

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[112] ibid 16.
[113] ibid 92.
[114] Krzysztof Ziarek, 'After Humanism: Agamben and Heidegger' (2008) 107 South Atlantic Q 187, 188.
[115] *O* 91.
[116] Ziarek (n 114) 194.
[117] ibid.

It is claimed that Agamben's attempt to render humanism inoperative still remains marked by a trace of humanism. This means that Agamben's account is marked by the same humanism that Heidegger critiqued.

Even though Agamben attempts to deactivate the relation between humanity and animality, Agamben leaves a vestige of this relation intact. This vestige is the presumption that there is a central role for 'human animality' in understanding the human as such.[118]

This can be made clearer in the following way. Agamben's aim is to posit a non-relational existence that provides a definition of life not based upon a negativity. However, this form-of-life, in order to be thought, needs to render the human/animal relation of humanism inoperative. In this way, Agamben's non-relational existence is structured by the inoperative humanistic relation of human/animal. The human/animal relation that colours humanism also underpins Agamben's attempt to define the human without a negative ground. This humanistic relation remains in a non-working state, but structures the immanent life Agamben founds. Agamben therefore bases a non-relational existence upon a negative referent. This calls into question Agamben's critique of Heidegger's *Dasein*, as his own attempt to move beyond negative foundations appears grounded in a negative foundation.

Agamben's Critique of Dasein*'s Negativity*

To complicate matters, Agamben attempts to incorporate Heidegger's construction of *Dasein* into his conceptualisation of immanent life. Agamben's human emerges from the animal after the suspension of the relation between the two. Agamben sees *Dasein* as emerging from this suspended relation as the "becoming-*Dasein* of living man".[119]

Agamben reads *Dasein* as becoming the genesis of the human being out of animality, emerging from its captivation in animality. However, *Dasein*, after emerging from one kind of captivation, then gets captivated by Being.[120] As Ziarek points out, Agamben sees *Dasein* as:

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[118] ibid 189.
[119] *O* 68.
[120] ibid 70.

> An animal that has awakened from being taken with its environment and, as a result, begins to try and master the animality from which it has awakened and of which it no longer has a "direct" experience.[121]

It is this reading of *Dasein* as humanity awakened from animal captivation that Agamben characterises as life. Agamben speaks of "a new and more blessed life",[122] as well as referring to humans and animals as "living beings".[123] There is therefore a connection drawn between saved human life and *Dasein*. This misreads one of Heidegger's key points about *Dasein*, namely that it is not human life.

Dasein is an opening on to Being, an opening that allows Being to unfold *in* and *as* the *Da*, the there. The *Da* of *Da-sein*, the there, marks the originary human relation to Being. The *Da* opens up in relation to the human. The human is displaced as the there of Being, as *Da-sein*.

Agamben's equating saved life with *Dasein* mischaracterises Heidegger's formulation of *Dasein* and the role it plays with relation to humans and Being. Again, Agamben risks repeating the same humanist construction of the human that Heidegger (and Agamben's own works) cautions against. More than this, by repeating this metaphysical thinking, Agamben's own ontology may not be ontological.

For *Dasein* thinking ontologically always involves contemplating the ontic, a necessary gateway to the ontological, which is always embedded within the ontic. An ontic view of beings is implied in a philosophy where a subject tries to account for beings as well as seeing itself as an 'I', a subject amongst others. The ontic is most accessible to the subject. This is because the subject is a being amongst beings. Heidegger's construction of *Dasein*, through ek-sisting, always is split between the ontic and the ontological.[124] This tendency is essential to *Dasein* itself, and is termed by Heidegger the pre-ontological understanding of being.[125]

By equating *Dasein* with the human being, Agamben's thought remains ontic. Agamben's *Dasein* is no longer spilt between the ontic and the ontological.

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[121] Ziarek (n 114) 196.
[122] *O* 87.
[123] ibid 92.
[124] *BPP* 304; Ben-Dor (n 81) 60-1.
[125] *BPP* 281.

This split between the ontic and the ontological is the *Da* and its relation to Being that humans experience in the clearing of Being, the *Da*.

Perhaps most curious of all Agamben argues that after the human-animal relation is suspended the human being remains "outside of being".[126] This clearly shows Agamben's move from Heidegger. The phrase outside of being can be explained in the following way. The suspension of the human-animal relation is termed by Agamben as a zone of "nonknowledge", beyond both Being and the Nothing.[127] This human life goes beyond the ontological difference.[128] Agamben's equates *Dasein* with the human being. This means that Agamben sees *Dasein* as part of the human-animal relation that characterises humanism. As a result in order for Agamben to render humanism inoperative he must also take aim at the very construction of *Dasein*. This leads Agamben to challenge the ontological difference and the very questions of Being and the Nothing. That Agamben has misinterpreted Heidegger's *Dasein* questions the conclusions he makes in regard to the negativity he sees in Heidegger's thought.

The Place of Negativity within Heidegger's Thought

Agamben starts his critique of Heidegger with the ontic-ontological difference of *Dasein*. As argued, Agamben's thought sees this difference as part of a humanistic conception of life. Agamben sees the ontological difference as both a "relation that unites" and a "relation that separates".[129] In Agamben's linguistic research he argues that a corollary to the ontic-ontological difference can be found in the Indo-European root **se*.[130] Agamben maintains that **se* embodies the ontological difference because it is reflexive, indicating a relationship with itself, implying a reference to another pronoun or name.

This move can be viewed as the result of Agamben's equivalence of *Dasein* with the human being. The notion of the ontological difference as embodying a reflexive relationship with a name (a person) only makes sense if *Dasein* is viewed as a human being, rather than as an opening to Being that humans experience in relation to the *Da*. Agamben then posits that when

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[126] *O* 91-2.
[127] ibid 91.
[128] ibid 92.
[129] Giorgio Agamben, '**Se*: Hegel's Absolute and Heidegger's *Ereignis*' in *PT* 116-7.
[130] ibid 116.

Heidegger thinks the Being of being, he is thinking of nothing else but the relation-difference between the nominative (the subject) and the genitive (the possessive), where the genitive indicates a belonging, a being-proper.[131] This further entrenches *Dasein* within metaphysical thought as a subject.

The question of Being is thus subtly effaced within Agamben's thought, with a focus instead on thinking the 'thing itself' of the human, life itself.[132] This focus still retains a vestige of humanism. Alysia Garrison explains that it is in an absolute return to one's self that Agamben sees a saving power. This saving power reveals that existence is pure potentiality to be lived.[133]

It is this focus upon pure potentiality of existence that marks Agamben's ontology and his striving to escape from the negativity transmitted through foundational *mythologemes*. Given Agamben's misinterpretation of Heidegger it is no surprise that Agamben traces this originary negativity to Heidegger. For Agamben, Heidegger's thought embodies the negative foundations of being, negative foundations that Heidegger unsuccessfully attempted to escape from:

> A fulfilled foundation of humanity in itself necessarily implies the definitive elimination of the sacrificial mythologeme along with the ideas of nature and culture that are grounded in it … *Se*, the proper of man, is not something unsayable, something *sacer* that must remain unsaid in all human speech and *praxis*. Nor is it, according to the *pathos* of contemporary nihilism, a Nothing whose nullity grounds the arbitrariness and violence of social activity. Rather, *Se – ēthos –* is the social *praxis* itself that, in the end, becomes transparent to itself.[134]

There are two important points to be garnered from this passage. Firstly, to fulfil humanity is to think the human beyond any relation. Agamben appears to read *any* relation as embodying a negative foundation, akin to humanism. This includes the ontological difference, as Agamben views this as a relation involving the human. Second, it is again demonstrated how methodologically important Agamben's meditations on language and the human are. As Agamben clearly states, if the negative *mythologeme* that defines humanity can be eliminated, then by extension both nature and culture, including the law, would be eliminated too. All social

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[131] ibid 118, 122, 128-33.
[132] See Giorgio Agamben, 'The Thing Itself' in *PT* 32.
[133] Alysia E Garrison, 'Agamben's Grammar of the Secret under the Sign of the Law' (2009) 20 Law and Critique 281.
[134] Giorgio Agamben, 'K' in Justin Clemens, Nicholas Heron and Alex Murray (eds), *The Work of Giorgio Agamben – Law, Literature, Life* (Edinburgh UP 2008) 137.

phenomena and institutions appear grounded within the negative mythologeme of the human. As such if Agamben's construction of fulfilled life is called into question, then by extension so is his thinking on law. It is for this reason that Agamben's reading of Heidegger is important as it demonstrates a potential shortfall in Agamben's construction of ontology.

The Da*, Death and the Human*

Agamben argues that Heidegger's ontological difference originates by *Dasein*'s being thrown into a pre-existing world or tradition. Heidegger structure *Dasein* not as prior to Being but by 'throwness' in Being.[135] *Dasein* is thrown into the there, the *Da*, as Being-in-the-world.[136] Being-thrown reveals itself as being thrown in the direction of death, namely the direction of possibility of *Dasein*. In a sense, death should be thought of as *Dasein*'s indefinite possibility, an impossible possibility, as *Dasein* cannot experience its own death except through an anticipation.[137]

Death is the key issue in Heidegger's thought for Agamben. *Dasein* can experience the death of others,[138] but *Dasein*'s own death can only be experienced as an own-most, non-relational, impending possibility.[139] The proper understanding of being-thrown implies a fundamental disposition that is anxiety, caused by *Dasein*'s throwness. Agamben explains:

> Anxiety that necessarily refers to anguish in the face of death, is in truth the principle auto-affection, the *Stimmung* in which the Self is constituted by the very act that it is 'claimed', 'called' as an individual for its own-most being-able, absolute and unsurpassable. As a principle of individuation, of absolutisation, death is charged with a capital revelatory function: it opens *Dasein* to itself as that which exists as being-thrown for an in relation to its end. Being-there is only *there* in order to exist as thrown into possibility, or inasmuch as it strikes out in that direction, anticipates it or goes ahead of it, and by so doing delivers it as such, making possibility possible. Death is not an expiration date with which *Dasein* will surely be faced one day or another, a possibility that hangs over its head and that will ultimately come true: it is not *possible* except as being itself essentially possibilising, that is to say, as that instance always to come that allows *Dasein* to set out, going ahead, defining, or,

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[135] *BT* 321.
[136] ibid 174.
[137] ibid 304-11.
[138] ibid 281-5.
[139] ibid 294.

better, in defining thereby the ontological possibility of its entire being-able-to-be.[140]

It is Agamben's claim that this throwness means that *Dasein* is linked to an experience of negativity, in relation to *Dasein*'s own-most impending possibility of death.

As Zartaloudis explains, Agamben sees anxiety as a state of mind that signifies the anxiety of desubjectivisation inherent in *Dasein*'s throwness.[141] To speak of desubjectivisation again reminds that Agamben sees *Dasein* as a subject, as human being. *Dasein* is conveyed to the world before its own *Da*, its there. At the same time *Dasein* reveals the *Da* as a non-place, a nowhere. This relates to the nowhere of death. Agamben argues *Dasein* is structured by death, which is an (the) absolute negativity. Agamben writes:

> If *Da* faces *Dasein* like an 'inexorable enigma'… that is because in revealing *Dasein* as always-already thrown, it (*Dasein*'s mood) unveils that fact that *Dasein* is not brought into its *da* of its own accord.[142]

Zartaloudis explains that in order for *Dasein* to be, it is called by its mortality that says nothing. In order to form itself as a totality, *Dasein* constructs another death. This is a concept of death that is experienced by others but not by *Dasein* itself.[143] Thus, Agamben argues that *Dasein* realises its existence through the deaths of others.

Agamben's critique of Heidegger is based upon an extension of Heidegger's inquiry into the Nothing.[144] Agamben sees a source of originary negativity in *Dasein* as the constant threat of its own outstripping in its being-towards-death. As Zartaloudis states, Agamben argues that this is reflected in the very ordering of *Dasein* itself.[145] This is so because between the relation of Being to beings stands the *alētheic* there-ness of *Dasein*.

Agamben views Heidegger's construction of *Dasein* as his attempt to overcome the paradox of the relation between Being and beings.[146] Agamben

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[140] *LD* 86.
[141] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 228.
[142] *LD* 56.
[143] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 228-9.
[144] See *BT* generally.
[145] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 229.
[146] Zartaloudis, 'A Jurisprudence of the Singular' (n 15) 205.

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reads *Dasein* as negative, arguing that it should not be understood as 'Being-there', but rather 'Being-*the*-there':

> At the point where the possibility of being *Da*, of being at home in one's own place is actualised, through the expression of death, in the most authentic word, the *Da* is finally revealed as the source from which a radical and threatening negativity emerges. There is something in the little word *Da* that nullifies and introduces negation into that entity – the human – which has to be its *Da*.[147]

Dasein (as Being-the-there) is thrown to its there (*Da*) to realise that it is threatened by a radical negativity (its death). The *Da* here is characterised as the no-place of death, an ineffable foundation that Agamben can then use to allege that Heidegger's construction of *Dasein* is based upon a negativity. In Zartaloudis's terms, *Da-sein* for Agamben becomes the placeholder of nothingness.[148]

Again, Agamben bends Heidegger's arm in order to posit a negativity within the structure of *Dasein*. To view death as a radical negativity is to misunderstand the position of death in Heidegger's construction of *Dasein*. For Heidegger, death is not seen as a negativity, but can be seen as integral to *Dasein*'s own potentiality:

> Being-towards-death is the anticipatory of a potentiality-for-Being of that entity whose kind of Being is anticipation itself.[149]

Anticipating death, rather than entrenching a negativity, is the possibility of understanding one's own-most potentiality-for-Being. It is death that makes possible authentic existence for *Dasein*. Authentic existence is something of *Dasein*'s own.[150] Thus the anticipation of death is necessary for *Dasein* to grasp its own potentiality, its own possibility. More importantly, *Dasein*'s own-most possibility is non-relational.[151] When *Dasein* becomes free for its own death, *Dasein* becomes open to the possibility of being itself. This Heidegger terms "freedom towards death".[152] Agamben effaces this freedom towards death.

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[147] *LD* 5.
[148] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 230.
[149] *BT* 307.
[150] ibid 68.
[151] ibid 308.
[152] ibid 311.

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Agamben and The They

The consequences to Agamben's equivalence of death with negativity can be seen in Heidegger's relation of the They to death. *Dasein* as everyday Being-with-one-another, existing with Others, is subjected to Others.[153] *Dasein* is dominated by Others in average-everydayness. In average everydayness *Dasein* lives inauthentically, without comporting itself towards its own-most possibility.[154] It is the Being of everydayness that is the 'they'. In everydayness, *Dasein* does not seek its own possibilities, but rather is subsumed into the activities of the They. The Self of everyday *Dasein* is they-Self. This they-Self can be distinguished from authentic Self in that as they-Self *Dasein* has been dispersed in the they and must find itself, and give itself up to its own potentiality.[155]

In relation to death, the They avoids viewing death as something that is *Dasein*'s own-most possibility. The they does not see death as something actual. Everyday-Being-towards-death is 'falling', constantly fleeing in the face of its own death.[156] By doing so, *Dasein* is not capable of facing up to its own possibilities. If *Dasein* cannot face up to its finite possibility of existence, then *Dasein* remains as a they-Self, and cannot project itself upon its ownmost potentiality-for-Being.[157] With this in mind, Agamben's construction of the human being can be further questioned.

For Agamben to exclude an analysis of death from *Dasein* on the basis of its supposed negativity is surprising. Agamben's writings on biopower have a central focus on death and *thanatopolitics*.[158] In addition, when Agamben wrote of the prisoners in the Nazi concentration camps as the limit to human life (in the figure of the *Muselmann*), he did not hesitate to refer to them as the "walking dead" of the camps.[159] Despite Agamben appropriating and developing Heidegger's authenticity throughout his philosophy,[160] Agamben seeks to articulate authentic existence separately from any conception of death. This ultimately may lead to Agamben's thought remaining trapped within an ontic horizon of the They.

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[153] ibid 164.
[154] ibid 167.
[155] ibid.
[156] ibid 298.
[157] ibid 322.
[158] Mitchell Dean, 'Four Theses on the Powers of Life and Death' (2004) 5 Contretemps 16.
[159] *RA* 45.
[160] Robert Eaglestone, 'Agamben and Authenticity' (2009) 20 Law and Critique 271.

Shifters and Transcendence

After positing a negativity within Heidegger, Agamben then turns to linguistics, specifically the fact that each *Dasein* is designated by the personal pronoun. This move is Agamben's attempt to think of an immanent form of existence that is not grounded upon negativity.

Agamben turns his attention to the *Da* of *Da-sein*. This *Da* for Agamben is a demonstrative pronoun, or a 'shifter', an indication of an utterance.[161] Zartaloudis describes such demonstrative pronouns as being presented in linguistics as empty signs that become full as soon as the speaker assumes them in an instance of discourse.[162] "I", "it" and "they" gain their meaning through discourse, through use in language. Therefore, shifters entail no meaning outside of a reference to the very instance of discourse:

> [Pronouns] permit the reference to the very event of language, the only
> context in which something can only be signified.[163]

Zartaloudis is right to argue that it is the demonstrative pronoun that shows what is always-already indicated in *Logos* or speech without being named in philosophy, namely Being.[164] As Zartaloudis states, for Agamben *Dasein* means 'to be' or 'witness' the taking place of language.[165]

It is this interpretation of *Dasein* that leads to Agamben attempting to re-think the very foundation of transcendence itself. Agamben eschews any kind of transcendental relation, that is, a transcendence realm that exists in relation to an immanent realm, akin to the Trinity. However, for Agamben 'true' transcendence does not need to be held in any relation:

> The transcendence of the being and of the world … is the transcendence
> of the event of language with respect to that which, in this event, is said
> and signified.[166]

Transcendence only exists as the pure taking place of language as such. *Dasein* is in language and is already in its transcendence. *Dasein*'s transcendence *has* a

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[161] *LD* 25.
[162] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 231.
[163] *LD* 24-5.
[164] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 231.
[165] ibid.
[166] *LD* 26.

linguistic structure, which is its shifting through the shifters. Agamben's tracing of a transcendence to the taking place of language is dependent upon his readings of a negativity in *Dasein*.

Agamben reads Aristotle's definition of man as presupposing a particular understanding of human speech. This views human speech as eroding or shifting an underlying animal voice or an animal state that must be overcome in order for man to be a rational animal. This does appear to equate Heidegger with Aristotle. This is perhaps not surprising. Aristotle's definition of man as a rational animal does seem to be grounded in the humanistic thought that Agamben wants to find in Heidegger.

Zartaloudis reads Agamben as claiming that grammatical shifters are one such presupposition as they articulate a passage between signification of a concept and that concept's indication.[167] In this journey towards rationality, an animal or natural voice is displaced by another Voice.[168] This Voice becomes the presupposed place of negativity of the human being in language.[169] A negativity exists as the human Voice is built upon a lack, an animal voice that does not have the capacity for language.

Agamben ties this argument back to his reflections on *Dasein*. Agamben maintains that because Dasein is always-already thrown it cannot be its own *Da*, the pure event of language.[170] Heidegger identifies the instance of discourse through the voice that speaks them. Language is in *Dasein*'s *Da*, which is essentially without a voice.[171] As Zartaloudis describes, Agamben sees Heidegger as siting a voice as a nothing in the *Da* which presupposes the Voice of *Dasein* that signifies openness to Being.[172] Thus Agamben can claim that the articulation of the human voice within language is a pure negativity.

This reading of Heidegger is crucial for Agamben's immanent thought. However it does appear as though Agamben is reading *Dasein* as human being. This view of *Dasein* as human could be supported with Agamben's claim that every shifter is structured as a Voice, with language conceived as both being and

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[167] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 233.
[168] *LD* 35.
[169] ibid 35, 44-5.
[170] ibid 55-6.
[171] ibid 56.
[172] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 233-5.

not-being the voice of man.[173] The *Da* is viewed as trapped in this limbo in relation to the human *Dasein*.[174] The split between signification and demonstration only becomes possible if it is marked by the presupposition of a Voice, which both discloses the place of language as both a no-longer animal voice or sound and as also a not-yet meaningful discourse.[175]

Agamben sees man as 'no-longer' animal because he alone experiences language. Such a position is drawn from Heidegger, who saw the capacity to speak as distinguishing the human as human.[176] However Agamben argues that man always-already fails to grasp meaningful discourse because he cannot reach the *Da*, the pure experience of language.

As a result linguistics, philosophy and the very definition of man rests upon a double negativity. The unspeakable of language (in the shifter) is guarded by its being spoken. In other words the limit of language falls within language. The human means of *having* language rests upon a mystical foundation, an originary shifter as Voice that allows humans:

> To experience the taking place of language and to ground, with it, the dimension of being in its difference with respect to the entity.[177]

Agamben is striving to transcend (in the sense of thinking beyond all relations) a negativity that he sees as founded in the very structure of Western linguistics. He finds the answer in a pure experience of language. This pure experience underpins Agamben's thought and provides the basis to think the 'thing itself' of all social phenomena, including the law.

The Pure Experience of Language

The pure experience of language, beyond any shifter or relation Agamben sees as akin to Plato's conceiving of 'the thing-itself'. For a foundation to be a proper foundation, it must presuppose nothing but itself – what Heidegger termed the

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[173] *LD* 59-60.
[174] ibid 62.
[175] ibid 33.
[176] *WTL* 397.
[177] *LD* 84-5.

"Absolute".[178] The thing-itself is that by which each being is knowable and truly is.[179] Agamben states that:

> The thing itself is not a thing; it is the very sayability, the very openness at issue in language, which, in language, we always presuppose and forget, perhaps because it is at bottom its own oblivion and abandonment.[180]

Agamben argues that thought must show the limit of the experience of language, and he conceives the limit of the human understanding of language as the vision of language itself, its Idea, which is that which unites human beings together.[181] Thus Agamben can claim that:

> The moat between voice and language (like that between language and discourse, potency and act) can open the space of ethics and the 'polis' precisely because there is no *arthros*, no articulation between *phonē* and *logos*. The voice has never been written in to language (and the *gramma* as Derrida fortuitously demonstrated) is but the very form of the presupposing of self and of potency. The space between voice and *logos* is an empty space, a limit in the Kantian sense. Only because man finds himself cast into language without the vehicle of a voice, and only because the *experimentum linguae* lures him, grammarless, into that void and that '*aphonia*', do an *ēthos* and a community of any kind become possible.[182]

This experience of language where language itself shows its limit where it is experienced is termed by Agamben 'infancy'. Infancy is the experience of the pure fact that language exists, which is a transcendent experience.[183] Zartaloudis understands transcendence as the pure potentiality of pure existence, an unfinished communicability, a continuous participation in an excess.[184] This excess occurs in every discourse and is nothing other than the pure fact that language exists, ungraspable through presuppositions.

It is Agamben's focus upon the pure experience of language that could cause problems to his thought. This focus upon a pure experience, beyond any relation, seems to place the human being beyond any relation with language. The human being can only experience language through a vision of language's

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[178] Martin Heidegger, *Hegel's Phenomenology of Spirit (Studies in Phenomenology and Existential Philosophy)* (Indiana UP 1994) 32.
[179] Giorgio Agamben, 'The Thing Itself' in *PT* 32.
[180] ibid 35.
[181] Giorgio Agamben, 'The Idea of Language' in *PT* 44-5.
[182] *IH* 8-9.
[183] ibid.
[184] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 250.

existence. That each human being is transcendent in Agamben's thought is clear, as pure potentiality is experienced through man being thrown in language. Language itself is presupposed only by a no-thingness, a Nothing of a void. It is hard to see how Agamben's critique of the nihilism inherent in the structuring in *Dasein* is not equally applicable to the human who experiences the very fact of language as a Nothing, a void.

Zartaloudis argues that everything depends upon how this void is experienced. Whereas Heidegger says that Being is Nothing, Agamben conceives of the Nothing as neither Being nor related to being but as the void between language and discourse.[185] Agamben posits that his no-thingness of a void cannot be presupposed. It simply is. Agamben reads the Nothing in Heidegger as a presupposed void in relation to the ordering of *Dasein* and its Being-towards-death. Language simply exists, an empty dimension of pure existence that can be experienced by the human being only through an experience in and with language.[186] In this sense, the human being has no relation to language other than a pure experience of language's existence. That this construction is problematic can be seen with reference to Heidegger's meditations on language and hermeneutics.

Language and Hermeneutics

It is argued here that Agamben's move to the pure experience of language is based upon his reading of negativity within *Dasein*. In support of his construction of pure potentiality, Agamben argues that the negativity of *Dasein* in the early Heidegger was recognised by the later Heidegger, who attempted to conceive of an event of pure experience, historicity itself, as *Ereignis*. This point is supported by Zartaloudis's analysis of *Means Without Ends*.[187] This interpretation is troubling, not least because to view Heidegger's work as fitting in to early and late periods ignores Heidegger's whole *ēthos* against chronology.[188]

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[185] ibid 255.

[186] *IH* 6.

[187] *MWE* 111; Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 261.

[188] Ben-Dor (n 76) 34. Agamben's own work has been split into early and later periods, each with different focuses. See Paul A Passavant, 'The Contradictory State of Giorgio Agamben' (2007) 35 Political Theory 147.

Heidegger wished to think language 'as' language, away from any theorisation or philosophy of language.[189] Language itself says something when it speaks.[190] To talk is to listen to the language we speak. We are only capable of speech because we have heard already listened to language and heard language speaking.[191] The source of the Saying of language is Being. Language's call is the call from Being.[192] As David Cooper has argued with reference to Heidegger that the way in which beings are illuminated for us is essentially linguistic.[193] Words designating beings are inseparable from the Saying which is Being.[194] The understanding of beings consists of a receptive listening to the Saying of language, to Being. For Heidegger, language preserves the between where language speaks the 'inexpressible', the pure fact that there is language.[195] Language is always on its way, calling to the fact that Being is the unfolding of language in temporality.

Most importantly, the essence of man consists in language. *Dasein*'s access to the world is structured by language. *Ereignis* for Heidegger signifies an event that appropriates the inexpressible of language that *Dasein* alone is near to.[196] *Dasein* therefore exists relationally with language. *Dasein*'s being held by language is defined by how *Dasein* belongs to *Ereignis*. Language is appropriated by and pervaded by Being.[197] Thus *Dasein* is appropriated by Being through the experience of language, by being held in relation to language.

Agamben's view of *Ereignis* as pure experience akin to infancy effaces the relational role *Dasein* must play. Because Agamben traced a negativity to the construction of *Dasein*, *Dasein* cannot exist in a relation to language. Another consequence of Agamben's attempt to render inoperative this perceived originary negativity relates to the position of hermeneutics within *Dasein*.

The temporal structure of *Dasein*'s being-in-the-world is a hermeneutic cycle. *Dasein* is at the heart of Heidegger's phenomenological investigations into

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[189] Martin Heidegger, 'Language' in Martin Heidegger, *Poetry, Language, Thought* (A Hofstadter tr, Harper Collins 1971) 187, 188.
[190] *WTL* 411.
[191] ibid.
[192] *LH* 223.
[193] David Cooper, *Heidegger* (Claridge 1996) 84, 86.
[194] Guy Bennett-Hunter, 'Heidegger on Philosophy and Language' (2007) 35 Philosophical Writings 5, 8.
[195] Ben-Dor (n 76) 68-9.
[196] *WTL* 424-5; Ben-Dor (n 76) 67-8.
[197] *LH* 236-7.

ontology.[198] The meaning of such phenomenological investigation lies in interpretation, which Heidegger terms hermeneutics.[199] It is the phenomenology of *Dasein* that works out *Dasein*'s historicity hermeneutically. As such *Dasein* is hermeneutic, as the meaning of Being is made known to *Dasein*'s understanding of Being.[200]

Understanding and interpretation are closely connected. Interpretation is the development of the understanding. As understanding, *Dasein* projects its Being upon possibilities. In interpretation, understanding becomes itself.[201] When something-within-the-world is encountered, *Dasein*'s interpretation of that something is disclosed through *Dasein*'s understanding of the world.[202] Every interpretation is grounded in *Dasein*'s involvement in the world. Additionally, any interpretation that is to contribute understanding must already have understood what is to be interpreted.[203] This is the hermeneutic circle.

Dasein is always in the hermeneutic circle. It is through *Dasein* that interpretation occurs, based upon *Dasein*'s understanding of Being-in-the-world. As such *Dasein* is already transcendence within its own existence, separate from any foundational referent.[204] What is important to Heidegger is to come to the hermeneutic circle in the right way.[205] To do this it must be understood as the structure of the understanding of the world that *Dasein* has in advance of any interpretation.

Agamben sees *Dasein*'s negativity as extending to the hermeneutic circle. For Agamben, the hermeneutic circle is actually a paradigmatic circle.[206] It is not possible to come to the circle in the right way:

> Heidegger suggested that it was a matter of never allowing the pre-understanding to be presented by "fancies" or "popular conceptions", but instead "working [it] out in terms of the things themselves". This can only mean ... that the inquirer must be able to recognise in phenomena the signature of a pre-understanding that depends on their own existential structure.[207]

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[198] *BT* 61.
[199] ibid 62.
[200] ibid.
[201] ibid 188.
[202] ibid 190-1.
[203] ibid 194.
[204] *BPP* 298-9; Ben-Dor (n 76) 60.
[205] *BT* 185.
[206] *SA* 27.
[207] ibid.

The pre-understanding is equated by Agamben to *Dasein*'s understanding of the world. As *Dasein*'s own existential structure embodies a negativity, so must the hermeneutic circle.[208] Only by denying the very circularity between understanding and interpretation can Agamben move beyond the negativity of *Dasein*. By viewing the understanding of the world as elusive, Agamben is able to argue that the hermeneutic circle is *aporetic*.

In so doing, the circle is completed through paradigmatic cases, of singularities that stand beside phenomena.[209] It is this attempt to move beyond hermeneutics itself that causes Agamben's thought the greatest practical problem. Attempting to complete interpretation by positing singular paradigmatic examples appears like an ad hoc phenomenology. This closes rather than opens questioning, providing Agamben with an answer to any and every challenge to his work. If a difficulty is posed with Agamben's thought, the paradigmatic circle provides an answer not with an understanding that relates to *Dasein*'s existential construction, but rather with a single case. As the paradigm stands as a historically singular phenomenon, this appears to place Agamben's thought beyond all phenomenological questioning. The implications to this for Agamben are grave, and leave him open to a hermeneutic challenge that is explored in the final chapter of this thesis.

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[208] See *LD* 54-62.
[209] *SA* 27-8.

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Law's Potentiality

What does Agamben's ontology mean for law? Agamben's charge is that a law that is self-referential will always have a negative foundation. Such a law that thinks of itself as subject to itself, in the form of a 'Law of law', will always-already exhaust potentiality into a predetermined actuality.[210] Potentiality is central to the law and the law's operation, and is found referred to either directly or indirectly in cases, statutes and the global sphere.[211] If all foundations attempt to capture and regulate that which they presuppose as lying outside their realm, then all foundations arise in the domain of potentiality.[212]

In making this move Agamben refers back to his observation that potentiality not-to-be is not destroyed in the passage from potentiality to actuality but fulfilled. In order to preserve the distinction between potentiality and actuality this potentiality-not-to-be must always be maintained. In potentiality being actualised (*zoē* being actualised into *bios*) there always-already remains the potentiality-not-to-be – bare life. As Agamben maintains, potentiality is pure existence, pure experience, both the potential to-be and the potential not-to-be at the same time. It consumes the remainder that exists always beyond itself when potentiality actualises and passes into pure immanence or im-potentiality. It is this im-potentiality, which Agamben ties to the pure experience of language's existence as such, allows the human being to exist without negative presuppositions.[213] Pure potentiality posits a different *ēthos*, a different way of being that is no longer presupposed but exposed.[214] This plane of pure potentiality is a plane of pure immanence, contingent potentiality, an *ēthos* that lacks predicates or appearances.

This is a life that gives itself to itself through the pure experience of language, living in its own immanence without need of relational existence. This Agamben terms 'form-of-life'. Form-of-life is life lived in its own potentiality of "being thus",[215] meaning that the biopolitical law that is integral to *bios* is overcome and deactivated. This does not mean that the law is abandoned, nor

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[210] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 246; Jean-Luc Nancy, *The Sense of the World* (University of Minnesota Press 1997) 29.
[211] ibid 266.
[212] ibid 265.
[213] *HS* 45; *MWE* 114-5.
[214] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 274-5.
[215] *CC* 93.

does it imply a return to an original pre-biopolitical state of nature.[216] To deactivate the law is not to return it to an original form but to free it from biopolitics meaning that a new usage can be found for it.

In this sense Agamben attempts to continue Heidegger's move away from metaphysical thinking. For Agamben humanity always has the possibility of redemption beyond biopolitics, even when the biopolitical, encapsulated through negative metaphysical thought, seems to encapsulate every aspect of being human. It is in this absolute return to one's self that Agamben sees a saving power, revealing that existence is pure potentiality to be lived.

More than this, Agamben argues that to challenge the fundamental negativity of the human being is also to challenge the negative foundations Agamben sees in social phenomena, including the law. Thus Agamben conceives of a politics of pure means. This is political existence beyond relational politics. This is so because Agamben has to avoid grounding his resistance as a negativity which would leads to a conception of Being that is subsumed back into the negative biopolitical order, which is the criticism Agamben makes of Derrida.

However, this chapter has traced a particular issue that poses a challenge to Agamben's thought. This relates to Agamben's tracing of a negativity to Heidegger. Agamben uses this as a springboard by which to conceive of a life that is not defined by a negative relation. This is a life that is not held in relation to a ground that is ineffable and ungraspable.

It has been argued that this move is based upon a misreading of *Dasein* in Heidegger. Agamben's position transmits a signature of humanism and metaphysics throughout Agamben's work. This leads to a charge that Agamben's ontology is actually ontic in nature in the Heideggerian sense. Agamben's misreading of *Dasein* leads him not just to see a negativity in the construction of *Dasein*, but also to see a negativity in the hermeneutic circle as well.

The spectre of a negative *Dasein* haunts Agamben's work, leading him to 'complete' the hermeneutic circle as well as potentiality itself. Potentiality cannot be seen in light of Heidegger's formulation of potentiality. Heidegger sees potentiality as being constituted by *Dasein*'s Being-toward-death. Instead, talk becomes of a pure potentiality. Whilst ostensibly rendering the perceived

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[216] *SE* 88.

negativity inoperative, such a potentiality can be questioned as having transmitted the metaphysical thought that Agamben attempts to escape from. Such an analysis also calls into question Agamben's construction of a law of pure potentiality.

Agamben's attempt to conceive of pure experience suggests that a law or power with no recourse to transcendental foundations is a law exposed. Legal subjects are alone in the pure potentiality of their own communicability. This is what Zartaloudis terms their difficult freedom.[217] Agamben's law can be rendered accountable and comparable to other possibilities without any outside referent. That this may render legal judgment difficult or impossible for Zartaloudis is a condition of legal judgment that has been largely forgotten.

What needs to be remembered is that by equating the hermeneutic circle with *Dasein*'s negativity, Agamben's thought calls into question the very notion of legal judgment. This is evident as Agamben does challenge the juridification of thought, where thought itself becomes judgment and a legal understanding of responsibility.[218] As Agamben has maintained:

> The juridicising of all human relations in their entirety, the confusion between what we may believe, hope, and love, and what we are supposed to do and not supposed to do, what we are supposed to know and not know, not only signal the crisis of religion, but also, and above all, the crisis of the law.[219]

That Agamben's own interpretation of Heidegger calls into question his construction of law is vital here. Agamben sets up a project built upon a very contentious reading of Heidegger. Such a reading forces him to develop a thought that is beyond all relations. As such, Agamben's law is thought of not as what it is or is not, but what it can be. Philosophy and law are left to think the things themselves, beings as the pure forms of singularities, or "whatever-being".[220] Whatever-being is the plane of pure existence, pure potentiality, being such as it is. Law is to be thought of in the sphere of pure potentiality that deals with the singularity of whatever-being. It is with this figure of whatever-being that this thesis moves forward, and onto questions of applying Agamben's thinking to the sphere of legal reasoning.

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[217] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 40) 246.
[218] Alex Murray and Thanos Zartaloudis, 'The Power of Thought' (2009) 20 Law and Critique 207, 208.
[219] *TTR* 135.
[220] *CC* 1.

Conclusion

This chapter has attempted to place Agamben's thought into its proper ontological location, ending the path that was begun in the first chapter. It can therefore be seen that Agamben's exception should be seen as part of an ontological project that aims to critique Western philosophy and which forms the basis for his own immanent politics. This path has shifted Agamben's thought from the realm of sovereignty in the previous chapter to the sphere of language. Agamben's philosophy is a philosophy of *language* rather than a philosophy of power or the subject. This means that all of Agamben's works have the individual, the speaking being, at its centre. This trajectory opens the way for Agamben's ethics and conception of community, and their place in relation to the law to be questioned for their coherence and political desirability.

Agamben's challenge to negative foundations has led him to the works of Jacques Derrida and Martin Heidegger. This chapter has differentiated Agamben's exception from Deconstruction and Derrida's thought. In so doing an originary negativity has been traced to Derrida's transcendent, ineffable justice, which acts as a *mythologeme* for structuring the law. This aims to defend Agamben against challenges from Deconstruction, and traces the main objection to Agamben's ontology to Heidegger's thought.

Most importantly, it has been shown how Agamben's ontological construction of the human being relies upon a misreading of Heidegger's *Dasein*. This leads Agamben to radicalise Heidegger's thought, attempting to think the human beyond any relation. Agamben traces a negativity to the sphere of hermeneutics, the implications of which will be explored in the second half of this work with respect to legal reasoning. Agamben's reading of Heidegger opens up his work for a potential critique, namely that Agamben's formulation of a non-relational ontology is marked by the very metaphysics that he tries to render inoperative. Through investigating the exception, identified as the consequence of an originary negativity in the construction of the human being, this thesis has argued that the basis of Agamben's ontology rests upon a remnant of metaphysical thinking.

This suggests that Agamben's thought contains certain *aporias* that need addressing, which does call into question whether Agamben's political aims rest

on an uncertain foundation. It is to this task this thesis now turns, through applying Agamben's thought to the sphere of legal reasoning and the operation of the legal order.

Chapter 5: Agamben, Levinas and the Anxiety of Influence

The previous four chapters traced a path through Agamben's thought from emergency powers and the exception to the plane of ontology. Agamben's critique of negative origins underpins his work. The previous chapter focused upon Agamben's critique of Martin Heidegger. It was argued that Agamben's reading of Heidegger's construction of *Dasein* is unsympathetic and has profound effects for his own philosophical project. This is because Agamben's immanent philosophy and politics appears to contain an *aporia* relating to a remnant of metaphysics. However, these effects do not simply remain with Heidegger's thought. It is through applying Agamben's thought to the area of legal reasoning that the consequences of his critique of foundational negativity can be explored.

Primarily Agamben's own attempt to think the experience of pure potentiality beyond any negative relation causes problems. It is maintained that an important influence lies concealed within Agamben's philosophy that relates to Agamben's formulation of a pure potentiality. This influence is that of the work of Emmanuel Levinas. Agamben's construction of law is derivative of and influenced by Levinas. Only by reading Agamben through Levinas is it possible to formulate anything like a conception of legal reasoning that remains faithful and sympathetic to Agamben's wider project. This is crucial for Agamben's political project, as Agamben's ethics and immanent politics require amelioration through Levinas in order to remain coherent and defensible. This ultimately supports one of the main arguments of this thesis. Agamben's conception of ethics and community are not a desirable form of politics as they ultimately rest on deeply unethical foundations and need Levinas's support in creating a form of community that is ethically defensible.

With this in mind, this chapter makes three arguments. Firstly, Agamben's construction of the figure of 'whatever-being' is detailed. Agamben's project attempts to think of life and law beyond all relationality. This task is necessary due to the foundational negativity that is traced by Agamben to the ground of both law and the human being. As such, Agamben aims to think the thing itself of the human being, a pure form of singularity Agamben terms 'whatever-being'.[1] This figure of whatever-being is directly related to Agamben's wider 'messianic'

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[1] *CC* 1. The word 'being' is not capitalised in Agamben's translated works. The same construction is repeated here.

project. It is this messianism that Agamben sees as being able to deactivate the negativity at the heart of Western metaphysics. This central figure is explored and its characteristics and importance to this immanent politics explained.

The second argument focuses upon a conception of legal reasoning charitable to Agamben's thought. This form of legal reasoning is constructed through an extension of Agamben's thought. This relies upon the analytic methodology that underpins this thesis and its research. Agamben's arguments are developed and applied in a manner that aims to reflect Agamben's own political aims. This form of legal reasoning considers the singularity of whatever-being in every decision. Justice entails in every decision treating the individual as whatever-being. It is this decision making on the limit of the law that Agamben claims is ethical, in the sense that *ēthos* entails a way of being that is immanent whilst remaining in itself.

The third argument relates to Agamben's formulation of whatever-being. It is argued that Agamben's work owes an unspoken debt to Emmanuel Levinas that is neither admitted nor explored within his work. In fact, Agamben goes out of his way to distance himself from Levinas, especially in *Remnants of Auschwitz*. Despite this fact, Agamben's ontology strongly reflects a Levinasian inspired ethics. It is maintained that Agamben's ethic is also derivative of Levinas's thought. Agamben's own meditations upon ethics both rely upon and are not as detailed as Levinas's works. Only by ameliorating Agamben's works through Levinas's thought is it possible to reconcile the *aporias* that are apparent within Agamben. This conclusion has profound implications for the Agamben's radical politics, as it appears as though it is only possible to construct this political future without significant help from Levinas's thought.

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The figure of whatever-being

The previous chapter demonstrated Agamben's philosophical approach to rendering the foundational negativity of the human being inoperative. The implications of this should not be understated. Agamben traces the foundational negativities of all social structures to this negative definition of the human being. By attempting to think the human beyond all relationality, Agamben is also attempting, by extension, to think all social structures beyond all relationality. This is why the figure of whatever-being is vital to Agamben's philosophy.

The word 'whatever' should be understood in a particular way. The translation arises from the Italian word *qualunque*, a word that has many uses in Italian that are awkward in English. 'Whatever' should be thought of as that which is neither particular nor general, individual nor generic.[2] Whatever-being is 'being such-as-it-is', with all its properties. Whatever-being is a being freed from the dilemma of the universal and particular. It does not belong to a class or set. In fact, the notion of belonging is irrelevant for whatever-being.[3] This is because whatever-being (Agamben also uses the term 'being-such') "remains constantly hidden in the condition of belonging".[4] Whatever-being does not 'belong' to anything, but rather it is a singularity that is exposed as pure potentiality. Pure potentiality is seen by Agamben as the pure experience of language as such. Agamben sees an analogy to this existence in the form of love:

> Love is never directed toward this or that property of the loved one (being blond, being small, being tender, being lame), but neither does it neglect the properties in favour of an insipid generality (universal love): The lover wants the loved one *with all of its predicates*, its being such as it is.[5]

The key question for Agamben relates to what form of political existence can be conceived that would provide for whatever-being: "what could be the politics of whatever singularity?"[6]

This way of thinking is directly related to Agamben's attempt to challenge the very need of law to ground itself with reference to an ineffable foundation, be it the People, Right, Integrity or a transcendent Law of law. Agamben's attempt to

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[2] ibid 107.
[3] ibid 9.
[4] ibid 2.
[5] ibid.
[6] ibid 85.

think of a law without a foundational negativity is tied up with his attempt to think the human being without a foundational negativity. This in turn is linked to an attempt to conceive of a politics of whatever-being, a politics that tries to think beyond all relation. The result of these tasks is that both the law and whatever-being coincide in Agamben's conception of justice.

Agamben's Messianic Law

Agamben's thought is messianic in nature. Agamben's own project of thinking this absolute singular of whatever-being depends upon his own messianic vision. Agamben's critique of law and foundational *mythologemes* is driven by a messianic attempt to think of the law without reference to a negative ground. Agamben's thought should not be seen as destructive. Messianism does not come to destroy the law but instead to fulfil the law.[7]

The messianic underpinnings of Agamben's thought have received attention, but nowhere near as much as his writings on sovereignty and *homo sacer*.[8] Such a messianic outlook for Zartaloudis is distinctly modest. It is modest in the sense that messianism does not seek a revolution, or a profound change in the way we think about law and life. Messianism seeks to picture the world after the biopolitical law has been deactivated. It is clear from a passage that Agamben cites from Ernst Bloch that the messianic kingdom is very similar to the current world, and requires only a slight shift in thinking:

> The Hassidim tell a story about the world to come that says everything there will be just as it is here. Just as our room is now, so it will be in the world to come; where our baby sleeps now, there too it will sleep in the other world. And the clothes we wear in this world, those too we will wear there. Everything will be as it is now, just a little different.[9]

This messianism is modest as it does not allow for the law to capture the outside of the law. As Agamben has argued in relation to biopower and biopolitics, any attempt by the law to regulate its outside, or to go beyond itself becomes an apparatus for the control of that which is outside the law. In the messianic

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[7] Giorgio Agamben, 'The Messiah and the Sovereign' in *PT* 163.
[8] For exceptions, see Jessica Whyte, ''I Would Prefer Not To': Giorgio Agamben, Bartleby and the Potentiality of Law' (2009) 20 Law and Critique 309; Catherine Mills 'Playing with law: Agamben and Derrida on postjuridical justice' (2007) 107 South Atlantic Q 15.
[9] *CC* 43.

kingdom, everything remains the same. The slight difference is found in the law and life having no recourse to foundational *mythologemes*.

It is the law's messianic fulfilment that leads to justice. Zartaloudis's description of justice is helpful here. He describes justice as referring to the experience of encountering the limit of the law.[10] This point is especially important when looking at the insights that can be gleaned from Agamben's thought in relation to legal reasoning. For Agamben justice is central to legal reasoning itself. This is due to the fact that legal reasoning occurs on the limits of the juridical order.

The question that should be raised each time in relation to whatever-being and a messianic law is that of potentiality. As Zartaloudis argues, potentiality returns law, and the human being, to its possibilities.[11] The question of potentiality connects the operation of a messianic law back to Agamben's ontology. Agamben's ontological aim has been to render inoperative the foundational negativity that underpins the definition of the human as the animal that speaks. Whatever-being is a being of pure potentiality. Such a being does not have a negative ground. In a similar move, Agamben's messianic law is a law of pure potentiality. Both whatever-being and the messianic law are thought of in terms of pure possibility and what they can be, rather than what they are.

The question of potentiality of both whatever-being and the messianic law is linked by Agamben to both justice and the profane. Such a move connects the figure of whatever-being explicitly to justice, which is experienced through the messianic law. Before this connection is explained, it is important to explain how the profane connects to both messianism and potentiality.

Agamben traces a particular use of the term profanation to ancient Rome. The profane can be placed in opposition to the sacred. Whereas to be sacred was to be in the thrall of the gods, to profane an object or custom was to return it to the free use of men.[12] What is profaned back to free use is free from all sacred names and foundational *mythologemes*. To profane life and to profane the law is to open up life and law to their own potentiality and possibilities. The act of profanation opens up the law and makes it available to a new use, returning to

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[10] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge 2010) 278.

[11] ibid 280-1.

[12] *P* 73.

common use the spaces that power had seized.[13] Such a new use can be brought about by the curious example of play.[14] As Agamben states:

> One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good.[15]

To play with law is to profane law. To play with life is to profane life. Such a move renders the sacred hold over both inoperative. Agamben believes that the sacred maintains a hold over life and law. This can be seen in his analyses of *homo sacer* and *oikonomia* respectively.

Thus the figure of whatever-being renders *homo sacer* inoperative by being defined not through a negative ground, but rather through its own potentiality-to-be. Whatever-being is messianically freed unto a new use. Likewise the messianic law has no self-referential foundation, and is not thought of through the logic of presupposition. The free use of law has no ends. The messianic law becomes pure means. Following Zartaloudis, it can be maintained that these pure means are just.[16] The profane law is therefore messianic. For Agamben, it is only through such a profane, messianic law that justice can be experienced.

This experience of justice, of law as pure potentiality, can only be experienced by whatever-being. The experience of the law as pure potentiality is experienced through the spectre of legal reasoning and decision-making. Because such reasoning occurs at the limits of the juridical order, such reasoning has the opportunity to effect justice, in the sense of turning to pure potentiality, pure existence. In turn, the messianic law refers to the very taking place of beings just as they are.[17]

It is precisely here, where the law considers the singularity of whatever-being, that justice is experienced as pure potentiality. The law's potentiality is found in its ability to think whatever-being *as* whatever-being, just as it is. This is surely what Agamben conceives of when he speaks of "a politics no longer

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[13] ibid 77.
[14] ibid 75.
[15] *SE* 64.
[16] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 10) 282.
[17] ibid 285.

founded on the *exceptio* of bare life".[18] As Zartaloudis argues, such a law of pure potentiality must think the singularity of whatever-being.[19] Whatever-being *is* a singularity. In order to affirm its *ēthos*, its way of being, it should be considered as a singularity, neither its mere particular properties nor the mere totality of its properties.[20] Zartaloudis goes on:

> To show the pure potentiality of law necessitates the contemporary presence of its potentiality in the integral actuality of posited law, which returns law to the domain of pure potentiality, to its common use(s).[21]

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[18] *HS* 11.
[19] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 10) 285.
[20] ibid 286.
[21] ibid 288.

A Messianic Legal Reasoning

A form of legal reasoning that accords with Agamben's thought can be linked to Agamben's figure of whatever-being and the messianic law. The messianic law is a law of pure potentiality. Whatever-being is a figure of pure potentiality, being such-as-it-is. The law's potentiality is deeply connected to whatever-being's potentiality. The pure potentiality of the law can only be experienced by whatever-being in the decision. Thus the correct question to ask in every case, in every decision, is not what the law is, but what the law can be.

For Agamben, reasoning with the law and whatever-being occurs at the limits of the juridical order. It is precisely here, at these limits, that the messianic law can reach a decision that reflects the unique singularity of whatever-being. In order to outline precisely how Agamben sees reasoning occurring at the limits of the juridical order, this chapter turns to the work of Jean-Luc Nancy.[22]

The Limit of Legal Reasoning

Agamben shares Nancy's naming as myth the different types of transcendentalism that both precedes actuality and overcomes actuality with reference to its mythic origins.[23] It may then strike the reader as curious as to why Nancy is cited here and no attention is paid to Derrida. After all, Derrida's undecidable has been argued to be very similar in construction to Agamben's exception.

The reason why Nancy's work is used here to construct a form of reasoning sympathetic to Agamben's thought is because Nancy has explicitly developed work in relation to judgment and jurisdiction. This thesis has not investigated whether Derrida's work could be used to support this project, or whether Agamben's critique of Derrida also applies to Nancy. These questions can be seen as a fruitful area for future research. Rather, Nancy's writings on judgment are used as those writings in particular inform and complement Agamben's messianic project.

Nancy has argued that the law, *jus*, and its jurisdiction is the very "right to say right".[24] Nancy's argument maintains that it was a certain Latinate

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[22] Jean-Luc Nancy, '*Lapsus Judicii*' in Jean-Luc Nancy, *A Finite Thinking* (Simon Sparks ed, Stanford UP 2003) 152-71.

[23] Thanos Zartaloudis, 'Without Negative Origins and Absolute Ends: A Jurisprudence of the Singular' (2002) 13 Law and Critique 197, 198.

[24] Nancy, '*Lapsus Judicii*' (n 22) 154.

understanding of law that lead to the juridicisation of philosophy.[25] This he sums up by stating that today there is "no *jus* without *ratio*"; there can be no law without reason.[26] In a manner similar to Agamben, Nancy attacks empty foundationalism. Agamben's comments in *Il Regno e la Gloria* echo Nancy's argument that the law must be justified with recourse to an external or foundational source with which it will always-already be held in relation to. This relational character of law is, for Nancy, tied up with the question of the legal judgment.

Referring to the Latin term *jurisdiction*, literally *juris-diction*, the very saying of law, Nancy argues that the law must always affirm its own boundaries and foundations. This can only be done through a *diction*, a saying, *logos*.[27] Thus jurisprudence and the law establish their own viable perimeters and protocols through the saying of the legal judgment.[28] The saying is the very judgment that facilitates the *ratio* of *jus*.[29] As Agamben has stated:

> The law can speak of everything, on the condition that it remains silent on the fact that it does so.[30]

As Anton Schütz notes, the law institutes a perfect, lawful silence.[31] The silence is perfect as the very saying of the judgment can be argued to impose a line beyond which law subtracts itself from further exposure. This is a line beyond which further argument has no sway because it has arrived too late.[32]

The legal order institutes a continual decision-making routine, but it is the structure of this routine that is so interesting. Once the Latinisation of the *logos* takes place and it is transformed into the *diction* of *jus*, the very pleading of particular cases legitimates the *jus* of judgment. In other words, the law requires constant judgment in order to set its own limits, which in turn are set as

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[25] ibid 152. Nancy's argument surrounding this juridicisation of philosophy is one that this thesis does not have the room to expand upon, as it is ancillary to the use of Nancy's work in relation to legal reasoning.

[26] ibid 154.

[27] ibid.

[28] Benjamin C Hutchens, 'Philosophy as juris-fiction: Jean-Luc Nancy and the "Philosophy of Right"' (2005) 9 Journal of Cultural Research 119, 123-4.

[29] ibid 124.

[30] Giorgio Agamben, 'Philosophy and Linguistics' in *PT* 62-76.

[31] Anton Schütz, 'Thinking the Law With and Against Luhmann, Legendre, Agamben' (2000) 11 Law and Critique 107, 119-20.

[32] ibid 120.

foundations that justify each judgment.[33] Nancy's argument therefore allows Agamben to posit the place of legal reasoning at the limits of the law, and complements Agamben's attempt to eschew foundations. This attempt to challenge foundations can be explicitly linked to the creation of *homo sacer*, the question of which coloured Agamben's engagements with Foucault.

Legal Reasoning and Oikonomic *Government*

What the messianic law proposed by Agamben aims to do is to remove the foundations on which legal judgments are grounded. That this removal is necessary can be illustrated with reference to Agamben's writings on *oikonomic* government.

Reasoning that involves a relation to a foundation is characterised by the providential governmental machine, which was described through Zartaloudis's analysis of *Il Regno e la Gloria*. This machine articulates its power on a transcendent plane that remains in relation to an immanent plane. These two planes remain in relational existence. This means that a transcendent sovereignty founds and legitimates and renders possible the immanent realm of governance. For instance, a transcendent foundation would render possible and legitimate a concrete decision in an instant case. In turn, concrete cases and the reasoning used within each case realise the decisions of the sovereign power.[34]

As Zartaloudis's reading of Agamben showed, the key paradigm of governmental *praxis* lies in its collateral effects, collateral damage. Collateral effects form part of the *oikonomic* administration of democratic government.[35] It is these collateral effects that can be argued to be the effects of court decisions and legal reasoning. The courts form part of *oikonomic* governance and administration that has recourse to transcendent acts to justify their actions. It is the notion of collateral damage that is most interesting here. Collateral damage suggests that there is no underlying reason or pattern to the bipolar governmental order's creation of bare life.

For Agamben, there is no overarching schema that can determine whether an individual relational judicial decision will lead to *homo sacer* becoming

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[33] Hutchens (n 28) 124-5.
[34] *RG* 157.
[35] ibid 187.

actualised. The only thing that appears certain is that *homo sacer* will be actualised. It appears as though this is a weakness in Agamben's analysis, and one which his entire conception of reasoning rests upon. Without this conclusion, there would be no need to formulate a form of reasoning that eschews foundations. It appears as though Agamben is positing a hypothesis on which a form of immanent reasoning must stand. This form of reasoning focuses on the singularity of whatever-being, which Agamben sees as being the focus of the ethical and just decision.

The Singular of the Decision

The law decides a case ethically upon the basis of whatever-being's singularity, its way of being. Such a law is no longer constrained by tradition or legal foundations, but every time asks how the law can give effect to justice, allowing whatever-being to be. To be just is to let whatever-being be, in its pure potentiality *as* itself. As Zataloudis helpfully describes:

> To show the pure potentiality of law necessitates the contemporary presence of its potentiality in the integral actuality of posited law, which returns law to the domain of pure potentiality, to its common use(s).[36]

What guides this new use is whatever-being. Every time the law is faced with whatever-being the law is opened to its truly human origin and is faced with a decision that can no longer rely on a transcendent relational sphere. As Agamben stated, every human power is im-potentiality and every human potentiality is always-already held in relation to its own privation.[37] This is both the origin of human power, good and bad, and the root of human freedom:

> Other living beings are capable only of their specific potentiality; they can only do this or that. But human beings are the animals who are capable of their own impotentiality. The greatness of human potentiality is measured by the abyss of human impotentiality.[38]

To free law from foundationalism is thus to open up a difficult freedom. The law has the potential for a new use but this new use can be used for greatness or to create an abyss. Zartaloudis helpfully illustrates the consequences of this modest, messianic law:

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[36] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 10) 288.
[37] Giorgio Agamben, 'On Potentiality' in *PT* 182.
[38] ibid.

> This means that legislative practice will continue to fail, at times, to provide good laws and that juridical justice (judgment) will also be, contingently or intentionally, unsuccessfully *observed*, and that, for once whatever power, impotence and failure there is will be ours alone.[39]

The absolute singularity of whatever-being therefore becomes the most important figure for the law. Agamben's messianic law looks forward towards the singularity of whatever-being in its coming before the law in the instant case. It is whatever-being that is the subject of law's judgment and rules, and it is through its social *praxis* that the law exists immanently.[40]

The Contradiction of Non-Relationality

Nevertheless, the question arises as to how this law is to be assessed. How can this messianic, immanent law be judged? How is it possible to know whether this law is a law of pure potentiality? If the law operates through the figure of whatever-being, then the messianic law's operation could be judged and assessed through its impact upon whatever-being. This could be a way in which the messianic law is assessed as to whether it has acted ethically and justly. The question to be asked would be whether the law has acted ethically in relation to whatever-being's way of being.

Such a position immediately exposes a problem. Agamben's thought opposes all relationality, arguing that it ultimately rests upon a negative ground. However, in order to assess and judge the messianic law Agamben proposes, relationality has to enter the picture. A relation would need to be posited between the singularity of whatever-being and the decision itself, which in turn presupposes a decision-maker or adjudicator. This would enable a judgment to be made as to whether the decision was just, in the sense of letting whatever-being be. Lorenzo Chiesa helps to identify the difficulty of thinking a non-relational politics and thought by pointing out this contradiction.[41] Non-relational politics needs relationality in order to make judgments possible.

Chiesa makes a suggestion that casts a new light on Agamben's construction of whatever-being. Chiesa argues that a formulation of a *positive*

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[39] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 10) 282.
[40] ibid 306.
[41] Lorenzo Chiesa, 'Giorgio Agamben's Franciscan Ontology' (2009) 5 Cosmos and History: The Journal of Natural and Social Philosophy 105, 107-8.

form of *homo sacer* arises from Agamben's writings.[42] This stands in marked contrast to Agamben's thought, for whom whatever-being is supposed to render inoperative the *oikonomic* machine that creates *homo sacer*. Even so, Chiesa argues that Agamben's form-of-life, whatever-being, is but a positive version of *homo sacer*.[43]

Whereas *homo sacer* stands for a life that is dominated by its relation to sovereignty, whatever-being stands as a completed, messianic life that can stand aside from all relationality. However, the implications of Chiesa's argument for Agamben's thought are clear. Whatever-being remains haunted by the spectre of *homo sacer*. Whatever-being needs the figure of *homo sacer* in order to justify its own existence – without *homo sacer* being created, there would be no need for whatever-being. Chiesa's argument suggests that despite Agamben's intentions, it is not possible for whatever-being to exist non-relationally.

This can be supported by connecting Chiesa's contention to Agamben's attempt to render humanist thought inoperative, discussed in the previous chapter. Agamben's immanent life, whatever-being, is still structured by the human/animal relation Agamben sees as defining the human negatively. Therefore Agamben's attempt to render negativity inoperative still involves an ineffable ground, be it called *homo sacer* or the human/animal relation.

Agamben's own statements from *The Coming Community* also support the view that whatever-being exists relationally. In this text, Agamben attempts to think of a community of whatever-beings beyond relation. Agamben starts by defining whatever-being as:

> [A] being whose community is mediated not by any condition of belonging ... nor by the simple absence of belonging ... but by belonging itself.[44]

Therefore a community of whatever-beings cannot be based upon a sharing of properties, which could form the basis for a relational existence. As such, whatever-beings cannot form a politics of social movements.[45] It is this identity politics that Agamben views as an apparatus of control. However, Agamben is clear that neither is the coming community marked by an *absence* of shared

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[42] ibid 108.
[43] *HS* 55.
[44] *CC* 85.
[45] ibid 86.

properties. If it was it would be a "negative community".[46] The coming community must be a community of singularities who share nothing more than their singularity, their being-such.

That Agamben posits the idea of a community existing beyond all relation is due to his anti-statist tendencies. For Agamben the State has to have a form of belonging that affirms an identity. Any such identity brings the individual under the control of the State apparatus. Whatever-being stands for a figure who challenges the hegemony of state and sovereign power over life. A community of singularities that do not posit an identity is the ultimate challenge to the State:

> The possibility of the *whatever* itself being taken up without an identity is a threat the state cannot come to terms with.[47]

However, this coming community does not resolve the contradiction of relationality. If the coming community were beyond all relation, then by definition it would not be possible to relate the profane, messianic law to whatever-being. What is more, by positing a community of singularities beyond all relation Agamben is begging the question of how singular whatever-beings relate to each other. This point is left disappointingly unanswered.

This contradiction is exacerbated by Agamben's sketching of the profane law. Agamben speaks of the profane law "constructing the link between *zoē* and *bios*".[48] This appears to admit of an implicit relation between the law and whatever-being. As well as this, Agamben maintains that the profane law:

> [Has] to put the very form of relation in question, and to ask if the political fact is not perhaps unthinkable beyond relation and, thus, no longer in the form of a connection.[49]

Such a statement does seem to show that it is not possible to think of existence and a community beyond all relation.

This thesis does not simply propose that Agamben's work conceals a relationality. What is proposed is that Agamben's work on life and law presupposes a relationality. This relationality pays a large debt to the works of Emmanuel Levinas. What is curious about Agamben's work is that he does not

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[46] ibid.
[47] ibid.
[48] *HS* 11.
[49] ibid 29.

admit to this debt, and goes so far as to deny that Levinas's work has influenced him at all. It is to this anxiety of influence that this chapter now turns.

Agamben, Levinas and the Anxiety of Influence

The connection between the works of Agamben and Levinas may not be clear at first viewing. The only mentions of Levinas that are made in Agamben are sparse, and amount to an attempt to distance Agamben's work from Levinas's own texts. What this thesis postulates is that Agamben's thought belies a Levinasian kernel at its heart. Agamben's attempt to distance his thought from Levinas masks not only Levinas's influence but also illustrates shortcomings in Agamben's own work that can only be understood by placing Agamben's ethics solely as Levinasian in character.

The main interaction with Levinas's work by Agamben can be found in *Remnants of Auschwitz*. In this text mention of Levinas is restricted. It exists as a critique of Levinas's ethics. The specific charge levelled by Agamben towards Levinas is that his ethics retain a juridical form. Agamben sees the juridical order as indicative of the operation of the exception. This in turn leads Agamben to view Levinas's ethics as "in force without significance".[50] The use of language is quite deliberate – Agamben views Levinas's ethics as sharing many of the characteristics of the exception. This implies that Agamben views Levinasian ethics as creating and entrenching bare life, akin to the operation of the exception. This move appears strange, not least because Agamben equates the law with responsibility and ethics with non-responsibility:

> Ethics is the sphere that recognises neither guilt nor responsibility. ... To assume guilt and responsibility ... is to leave the territory of ethics and enter that of law.[51]

Such a move is strange as it conflicts with Agamben's construction of whatever-being. Agamben's messianic law decides a case ethically upon the basis of whatever-being's singularity, its way of being. It is somewhat inconceivable to think of a decision-maker, a judge or a lawyer, being tasked with deciding a case according to the very *ēthos* of whatever-being and doing so *without* responsibility for the decision. If anything, such a decision is a paradigmatic example of an assumption of responsibility – to make the genuinely ethical decision is a huge

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[50] *HS* 51.
[51] *RA* 24.

responsibility. Yet Agamben dismisses this – any assumption of responsibility can never be ethical.[52]

An Ethics of Non-Responsibility?

As well as inconsistencies within his own thought, there are a number of lacunae that indicate Agamben's account of ethics is lacking. Agamben's emphasis upon an ethics of 'non-responsibility' is sparse on detail. One of the most important details lacking relates to Agamben's insistence on thinking the thing itself beyond any relationality. There is no mention in his works on how a non-relational, non-responsible ethics can operate. This is doubly important as Agamben is not calling for law's abolition but rather its completion.

In fact, in Agamben's writings on ethics it is unclear as to whether he thinks law can exist in the coming community:

> The concept of responsibility is also irremediably contaminated by law. Anyone who has tried to make use of it outside the juridical sphere knows this. And yet ethics, politics, and religion have been able to define themselves only by seizing terrain from juridical responsibility – not in order to assume another kind of responsibility, but to articulate zones of non-responsibility. This does not, of course, mean impunity. Rather, it signifies – at least for ethics – a confrontation with a responsibility that is infinitely greater than we could ever assume.[53]

This view is not an aberrant one. It is repeated by Agamben. He also views the question of legal judgment as incompatible with an ethical decision. In *Remnants of Auschwitz* Agamben delivers the following lengthy passage on legal judgment that is quoted in its entirety:

> In 1983, the publisher Einaudi asked [Primo] Levi to translate Kafka's *The Trial*. Infinite interpretations of *The Trial* have been offered; some underline the novel's prophetic political character (modern bureaucracy as absolute evil) or its theological dimension (the court as the unknown God) or its biographical meaning (condemnation as the illness from which Kafka believed himself to suffer). It has been rarely noted that this book, in which law appears solely in the form of trial, contains a profound insight into the nature of law, which, contrary to common belief, is not so much rule as it is judgment and, therefore, trial. But if the essence of the law - of every law - is the trial, if all right (and morality that is contaminated by it) is only tribunal right, then execution and transgression, innocence and guilt, obedience and disobedience all become indistinct and lose their importance. "The court wants nothing

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[52] ibid 21.
[53] ibid 20-1.

from you. It welcomes you when you come; it releases you when you go."
The ultimate end of the juridical regulation is to produce judgment; but
judgment aims neither to punish not to extol, nether to establish justice
nor to prove the truth. Judgment is in itself the end and this, it has been
said, constitutes its mystery, the mystery of the trial.[54]

These passages point to fundamental contradictions at the heart of Agamben's
ethical project.

On the one hand, Agamben rejects the law and juridical constructions as
harbouring a form of responsibility that is equated to the transmission of self-
referential origins. By extension, this includes the exception. Agamben sees
judgment as "self-referential",[55] akin to Nancy's saying of right. Agamben even
goes so far as to include Levinas in this construction, arguing that Levinas
presupposes a juridical structure in his stating that the ethical relation presupposes
ontology.[56]

However, at the same time, Agamben's formulation of a non-relational,
non-responsible ethics is itself admitted to amount to "a responsibility that is
infinitely greater" than could ever be assumed.[57] In other words, non-
responsibility is infinitely responsible. It is difficult to see how this move
differentiates Agamben from Levinas in any way except semantically.

Additionally, another contradiction arises relating to Catherine Mills'
observation that Agamben avoids the question of relationality in ethics.[58] This
avoidance can be viewed as concealing an *aporia* that exists within his thought.
As argued by Lorenzo Chiesa, Agamben's construction of whatever-being
presupposes a relationality. The implications for thinking about law with
Agamben are grave.

In order to reach an ethical decision in a case, there must be a decision-
maker. However, Agamben argues that every legal judgment cannot be ethical.
This does not accord with Agamben's description of the messianic kingdom:
"Everything will be as it is now, just a little different".[59] Such a position does not
mention the lack of a legal order. Rather, it implicitly suggests the existence of

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[54] ibid 18-9.
[55] ibid 19.
[56] ibid 22.
[57] ibid 21.
[58] ibid 111; Catherine Mills, *The philosophy of Agamben* (Acumen Publishing 2008) 103-4.
[59] *CC* 43.

law and legal orders. This in turn suggests that Agamben's messianic law presupposes a relationality that is needed to make the ethical decision. This unspoken relationality is also present in other areas of Agamben's thought.

Agamben's philosophy and its focus upon language and grammatical shifters as examples of the very existence of language also belie the very relationality that Agamben denies exists within his thought.[60] The entry into language through the use of personal pronouns does not only designate the position of the individual in relation to language (something Agamben argues is fundamentally negative) but also designates the position of the individual in relation to others.[61] Enunciative pronouns only gain meaning in the presence of and by the existence of other persons.

As Mills concludes, this leads to two possible options for Agamben's ethics. The first is that Agamben has neglected the position of relationality in his construction of ethical non-responsibility. If this is the case Agamben's work needs correcting or completing, an ironic twist given Agamben's views on Foucault. The second is that Agamben's conceptual framework precludes relationality completely. If this is the case, it is difficult to see, as Mills acknowledges, quite how Agamben can talk of ethics, if it is accepted that relationality is fundamental to ethics.[62]

It is maintained here that Agamben's work falls into the first possibility. Agamben's work needs 'correcting'. Agamben precludes mention of relationality due to an unspoken philosophical debt to Levinas. This position is not immediately clear from Agamben's writings. In *Nudities* Agamben appears to admit of the centrality of relationality to humanity:

> The desire to be recognised by others is inseparable from being human. Indeed, such recognition is so essential that, according to Hegel, everyone is ready to put his or her own life in jeopardy in order to obtain it. This is not merely a question of satisfaction or self-love; rather, it is only through recognition by others that man can constitute himself as a person.[63]

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[60] *RA* 104.
[61] ibid.
[62] Mills (n 58) 105.
[63] *N* 46.

However, in the same section, Agamben speaks of a "new figure of the human" that is "beyond personal identity".[64] This appears to place the new figure of the human beyond the relationality that Agamben accords to being a 'person'.

Such preclusion has serious implications for Agamben's work, and any attempt to transpose Agamben's work into the sphere of legal reasoning. The very structure of the legal order and legal decision-making implies a relation between the decision-maker and those to whom the decision is addressed or affects. If a fatal defect is to be avoided in Agamben's work, it is necessary to ameliorate his writings. To do this, this thesis turns to the work of Levinas, which, it is maintained, forms the proper basis for understanding Agamben's ethical writings.

Agamben and the Influence of Levinas

The affinity between Agamben and Levinas should not be seen as a matter of a suppressed recollection, or of an influence that dare not speak its name. Instead, the relation between the two men is characterised here as an 'anxiety of influence'. Agamben has attempted to maintain a critical distance from Levinas in order to avoid his work being classified as somehow derivatively Levinasian. Yet this is exactly what Agamben's ethics are.

The anxiety of influence was first proposed by Harold Bloom in relation to poetry and poets.[65] Bloom's argued that the influence of one poet upon another is inevitable and undeniable. Bloom uses poetic 'strength' as a synonym for the poet's finding of a distinctive voice in their work. It is this voice, this distinctiveness, that Bloom contends is a deliberate misreading and rewritings of the poet's predecessors.[66] A poem is not an overcoming of anxiety of a previous poet's influence, it is that anxiety.[67] For Bloom, every poem is a "misinterpretation of a parent poem",[68] as "to imagine is to misinterpret".[69] In every poetic experience there is thus a silence anxious influence that remains. For Agamben, this is found in Levinas's ethics. Agamben's distinctive voice does not overcome Levinas, but is an anxious repetition of Levinasian ethics.

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[64] ibid 54.
[65] Harold Bloom, 'The Anxiety of Influence' in Raman Selden (ed), *The Theory of Criticism: from Plato to the Present* (Longman 1988) 415-7. See also Harold Bloom, *The anxiety of influence: a theory of poetry* (2nd edn, OUP 1997).
[66] ibid 416.
[67] ibid 417.
[68] ibid.
[69] ibid 416.

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Ethical experience for Levinas has its foundations in an irreducible relation between oneself and other people, which he terms the Other. It is the Other that haunts the figure of whatever-being, yet Agamben's own ethical works are far less developed and philosophically defensible that Levinas's. For Levinas, metaphysics, the relation between the Self and the Other, precedes ontology.[70] Metaphysics is presaged upon a movement between what is familiar to us and towards the alien, the other.[71]

The absolutely other for Levinas is the Other, a Stranger who disturbs and disrupts every notion of ipseity, the same.[72] The irreducible strangeness of the Other presents an ethical demand that cannot be ignored or avoided and must be faced. The reason for this unavoidable ethical demand is Levinas's contention that ethics is first philosophy. In this sense, ethics precedes ontology. The relation between the Self and the Other is the primary question presented by concrete human existence. For Levinas a sense of subjectivity is felt only when facing an infinite and asymmetrical debt to the Other, the absolute alterity of difference. It is the Other, and our relationship to the Other, that defines us. In this way, it is the Other that precedes the Self, and in that way, also precedes ontological reflections upon Being.

This "radical heterogeneity" of the other and its effect upon the individual is only possible with respect to a term that serves as entry into the relation –for Levinas a term can only remain at the point of departure as 'I'.[73] Levinas views the I as "the being whose existing consists in identifying itself, in recovering its identity throughout all that happens to it".[74] The I is the primordial work of identification but exists in relation with the Other.

Immediately this could raise an Agambenian objection relating to Levinas presupposing an ineffable transcendent realm within his work. Such an objection has been argued to be central to Agamben's philosophy and writings on law throughout this thesis. Before Levinas's work is summarily dismissed, the question needs to be raised as to whether Levinas has posited a negative presuppositional dialectic prior to ontology. Levinas strives to argue that this

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[70] *TI* 43.
[71] ibid 33.
[72] ibid 39.
[73] ibid 36.
[74] ibid.

metaphysical relation is in no way negative, even if it is transcendent in the sense that the relation constitutes the Self. As Levinas states, transcendence is fundamentally important to his ethics:

> If transcendence has meaning, it can only signify the fact that the *event of being* ... passes over to what is other than being. ... Transcendence is passing over to being's *other, otherwise than being*. Not *to be otherwise*, but *otherwise than being*. And not to not-be; passing over is not here equivalent to dying.[75]

This transcendence is integral to the Self-Other relation. To illustrate this, it is important to dwell upon Levinas's construction of the I. The Other is irreducible to the I, and to be I is to have identity as one's content. More than this, the I's construction points to a similarity within Agamben's construction of whatever-being.

In *The Coming Community*, Agamben defines whatever-being as "being such that it always matters".[76] Whatever-being is being such that it is, defined by being a pure transcendent in its taking-place as such on an immanent plane, without recourse to presuppositional foundations.[77] Likewise the I is irreducible to the Other, a formulation shared by whatever-being that exists as a pure singularity. By definition, whatever-being must be irreducible to keep its singular nature. When Levinas states that the I's existing consists in its identifying of itself, he gives us an antecedent of whatever-being's happy form-of-life. For Levinas in order for subjects to recognise themselves as individuals, it is necessary for them to achieve solitude, in the sense of separating themselves from that which they are not.[78] Such an isolation leads the subject to enjoy themselves, being absolutely for themselves.[79] Such an attitude is self-regarding, self-sufficient and cocooned from the world, as enjoyment is characterised as interiority.[80]

Turning to Agamben's formulation of a happy life, we are told that whatever-being "wants to appropriate belonging itself".[81] Whatever-being can

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[75] *OB* 3.
[76] *CC* 1.
[77] ibid 15.
[78] *TI* 117.
[79] ibid 134.
[80] ibid 118.
[81] *CC* 87.

have neither identity nor a bond of belonging.[82] In this sense, whatever-being appears completely cocooned within their own being, their own immanent plane. Agamben's move places whatever-being beyond any transcendent relation.

However, perhaps curiously, he does speak of the "being in common" of whatever-beings.[83] This is curious because of Agamben's aversion to taking responsibility for others.[84] Agamben's happy life that focuses upon the figure of whatever-being appears to lack any notion of how the coming community will interact and relate to one another. This being in common appears to be the very relationality that Agamben attempts to escape from. If Agamben accords to Levinas's description of the I's enjoyment based upon interiority, upon being such-as-it-is upon an immanent plane, then Agamben cannot explain how there could be being in common.

This interpretation cannot explain how Agamben's messianism can state that it would only amount to "the tiny displacement that every thing must accomplish in the messianic world".[85] Even though this difference is small, it is, for Agamben, "in every way, a decisive one".[86] Such a description of the messianic world appears to suggest that there is very little change made by Agamben's focus upon the thing itself.

If this is the case, then we are still faced with a world in which individuals dwell and live together in communities and interact with one another.

This position leads to two possibilities within Agamben's work. The first is that Agamben's coming community is made up of self-interested whatever-beings that do not engage in relational acts with one another. Such a position appears deeply *un*ethical, and so cannot be what Agamben intends. The second position is one where the coming community involves relationality between whatever-beings. Given Agamben's comments, especially in relation to the importance of bearing witness to the testimony of events,[87] it can be argued that relationality must be a part of Agamben's thought.

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[82] ibid 86.
[83] ibid 87.
[84] *RA* 24.
[85] *CC* 56.
[86] *TTR* 69.
[87] *RA* 161.

This being the case, there is immediately a lacuna within Agamben's work focusing around whatever-being's interaction and relation with others. As Levinas states:

> The idea of transcendence is self-contradictory. The subject that transcends is swept away in its transcendence it does not transcend itself.[88]

In order for whatever-being to avoid being swept away in the transcendence of its own immanence, the question needs to be asked as to how whatever-being exists in relation to others in the coming community. The answer is found within the work of Levinas. Agamben's work cannot make philosophical sense without viewing it as adopting the Levinasian ethic of the Other.

The Other

In order to understand the relationality implicit within Agamben's thought, it is necessary to outline how Levinas conceives of the relation between the Self and the Other. This can be used to complement and complete Agamben's own analyses.

Levinas sees the I's enjoyment as isolated.[89] However, Levinas sees this isolation as unsustainable. The separation of the I through enjoyment becomes a consciousness of objects around the I.[90] Such appropriation of surrounding objects aids the I's enjoyment and the awareness of objects leads to language as objects are thematised. So far, Levinas's account is similar to Agamben's – the big difference comes when Levinas argues that awareness of objects by the I leads to awareness of the Other.[91] Initially the I attempts to thematise other people as means to his enjoyment. Through this, the relation between the I and the Other is always-already cast in language.[92]

Such a philosophical standpoint already appears more convincing then Agamben's. As opposed to Agamben, Levinas accounts for the fact that individuals do not exist in isolation (a point first made by Heidegger), and also places ethics within this relational existence. As Thomas Carl Wall has eloquently

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[88] *TI* 274.
[89] ibid 120.
[90] ibid 139.
[91] ibid 148.
[92] ibid 69.

described, Levinas's ethics attempt to articulate a responsibility that realises in the extreme an abandonment of the certainties of the self.[93] More importantly, Levinas attempts to create a sovereign ethics, an ethics that constitutes the subject.[94] Such a position is in stark contrast to Agamben's writings upon sovereignty. For Agamben:

> An act is sovereign when it realises itself by simply taking away its own potentiality not to be, giving itself to itself.[95]

This construction of sovereignty is linked to potentiality, with Agamben arguing that it is whatever-being itself that has sovereign power over its own constitution:

> Potentiality (in its double appearance as potentiality to and as potentiality not to) is that through which Being founds itself *sovereignly*, which is to say, without anything preceding or determining it ... other than its own ability not to be.[96]

In Agamben's formulation, it appears that whatever-being grounds itself, and has sovereign power over its own potential. This position seems to efface the very fact that whatever-beings exist in common with one another, which is what Agamben maintains in *The Coming Community*.[97]

In other words, Agamben's focus in *Homo Sacer* upon the sovereign potential of whatever-being to found itself suggests that whatever-being neither needs nor relies upon others. As shown above, Levinas views this isolation as ultimately unsustainable. Implicitly Agamben appears to agree, as his construction of the messianic law presupposes relationality. If this messianic law was not relational, the law could not make a decision regarding the unique whatever-being.

How then can the existence of whatever-beings in common be accounted for in Agamben's thought? It appears as though Agamben has set himself into a paradox. By removing all self-referential foundations and relationality from whatever-being, he cannot account for how beings-in-common would relate to one another, if indeed they could.

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[93] Thomas Carl Wall, *Radical Passivity: Levinas, Blanchot and Agamben* (SUNY Press 1999) 31.
[94] ibid; *OB* 50, 136-40.
[95] *HS* 46.
[96] ibid.
[97] *CC* 85-7.

Contrary to this, Levinas offers an account that can answer the *aporias* raised by Agamben's construction of ethics. For Levinas, "the oneself cannot form itself; it is already formed with an absolute passivity".[98] The subject cannot ground itself by itself. Levinas places the formation of the I in the relation between the Self and the Other. Thomas Carl Wall describes Levinas's Self/Other relation as constituting all other relations, as well as remaining essentially ethically ambiguous.[99]

This ambiguity arises from the fact that the Self/Other relation is older than the Self and the world. In this sense the Other exists immemorially before any sense of self. Any relation between the I and an other will always-already betray this anterior relation that orders the Self to respond to the Other. The I must always respond, as the Other is both infinite and antecedent to any I. In this sense, Carl Wall maintains that there are no Levinasian ethics as they are founded upon an abyss. The relation with the Other is without a purpose, a *telos*. The Other does not drive the I into any particular outcome. Nor does the relation to the Other have any meaning apart from constituting the I, the Self. Levinas terms this relation the 'infinite'. This can be compared favourably to Agamben's formulation of pure means:

> Infinity is characteristic of a transcendent being as transcendent; the infinite is the absolutely other. The transcendent is the sole *ideatum* of which there can be only an idea in us; it is infinitely removed from its idea, that is exterior, because it is infinite ... To think the infinite, the transcendent, the Stranger, is hence not to think an object.[100]

What passes for ethics is no ethics as such, and what passes for the Self/Other relation is no relation as such either. The relation to the Other will always escape the I. In this sense, the Self's relation to the Other cannot help but be betrayed. Carl Wall explains:

> This anteriority [of the Other to the Self] will be, for Levinas, a dissymmetry and a goodness without measure that (de)structures the self *as* a relation with a never-present Other … any relation that the *I* establishes with *an* other subject will only betray the pure anteriority that … *orders* me to the Other.[101]

[98] *OB* 104.
[99] Carl Wall (n 93) 32.
[100] *TI* 49.
[101] Carl Wall (n 93) 32.

The relation to the Other always escapes the I. At the same time, the Other will always escape others as well in the same manner. The other person is without relation in the same manner as the I. The other person obligates the I as the other person is also without relation, as is the I. What binds the I to the other person is precisely the shared nonrelation to the Other. The Other constitutes the Self but is ungraspable by the Self. It is beyond the Self's powers of identification. As Carl Wall argues, the Other is therefore that from which I cannot distinguish myself.[102] The anonymity of the Other means that no-thing defines the I. Precisely because no-thing obligates the I, the I cannot be distanced from obligation – the I *is* obligation. Ethics becomes the very event of the self.

Such a nuanced account is suggestive, showing the influence that Levinas has had over Agamben. The sovereign foundation of being for Agamben has a mirror in Levinas's meditation on the I and Other. However Agamben's own thought appears at once derivative of Levinas and less well developed. This is so as for Levinas this founding of the Self always has an ethical calling.

Any attempt to appropriate Otherness as interior to the Self is at odds with the reality of interpersonal exchanges.[103] Attempts to thematise the Other will always conflict with the Other's "strangeness", her "very freedom".[104] It is this aspect of the Other, the fact that the Other is ungraspable, that demands that the I recognise the Other. Ethics is the very event of the Self that is defined through relations to others. It is an ethical imperative that demands the I recognises the Other as exteriority, acknowledging her rights as a Stranger.[105] The relation with the other person is a betrayal of the relation with the Other but is a reflection of the antecedent demand for acknowledgement of the Other.

Thus Levinas's construction of subjectivity takes into account the relationality that exists in encounters with others, something Agamben does not do. This is especially important when the act of legal reasoning is considered: the lawyers and judge in each case not only interact with each other when constructing arguments and reasoning for the case; there is also interaction with the individuals who are affected by the case.

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[102] ibid 37.
[103] *TI* 73.
[104] ibid.
[105] ibid 77.

Agamben's thought does not account for this necessary relationality with respect to the law and decision-making. In order to do so, Agamben's thought needs to be completed through transposing Levinas's meditations on the Other. If this is done, Agamben's messianic law and figure of whatever-being can be understood as relational, making explicit their presupposed relationality. This in turn would call into question Agamben's pronouncements that the law and legal judgment cannot be ethical. The price Agamben pays for solving the *aporias* in his work is to rescind his claim for a non-relational ethics. In order to understand this argument, it is necessary to outline not just how the Other can haunt decision-making, but also to outline the similarities between Agamben's construction of ethics and its antecedent in the work of Levinas.

The Relation with the Other as Ethical

Levinas locates the revelation of the Other in the "face-to-face" encounter.[106] It is the face of the other person that causes an "epiphany".[107] This is a primordial demand for the other person's recognition through the infinity of the face.[108] The face is infinite as it hints to the I of the Other, of the fact that the other person is truly Other to the I, ungraspable. Such a connection reminds the I that its freedom is inhibited, and that in order to affirm its own subjectivity, the I is compelled to acknowledge that affirming its own subjectivity necessarily involves assuming responsibilities. These responsibilities are ethical. What is more, the encounter itself is ethical and no-one can release the I from these responsibilities which the I must encounter alone.[109] Faced with the other the I is made aware of the other person as an unpredictable, irreducible entity.

It is contended that Agamben's account does not only not do justice to Levinas's thought due to the minimal and dismissive tone in which he is mentioned, but also that Agamben does not do justice to the spectre of the legal decision. For Levinas, ethics is prior to subjectivity, prior to choice:

> I cannot posit myself as a subject without distinguishing myself from that
> which I am not. I must thematise the world around me. However, it is not
> possible to conceptualise the world without reaching out to the Other. In

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[106] ibid 202.
[107] ibid 194.
[108] ibid 199.
[109] ibid 205.

affirming myself as subjectivity in the face of the Other, I posit myself as responsible.[110]

Levinas salvages subjectivity by overcoming subjectivity. The language of ethics designates a singular relation with and response to the other person as other. Not only that, but ethics cannot be avoided precisely through this relation with the other. It is through this ethical relation that subjectivity is constructed.[111]

Levinas's ethics are passive and non-voluntary.[112] Agamben follows this view of the ethical encounter as wholly singular. Each individual makes the ethical relation with the other anew.[113] In this way, the I's existence unfolds ethically. This similarity can be seen with Agamben's description of whatever-being's *ēthos*. This view of the ethical encounter can be connected to both the legal judgment and to justice. Agamben contends that only by recognising the singularity of whatever-being can the legal decision reach a just decision and an ethical decision. That this view was reflected by Levinas prior to Agamben can be seen in Levinas's construction of ethics:

> The most passive, unassumable, passivity, the subjectivity or the very subjection of the subject, is due to my being obsessed with responsibility for the oppressed who is other than myself.[114]

Levinas's ethics provide not just the basis for Agamben's thought. Levinas's writings also provide an explanation for a community and political existence that is more philosophically coherent than Agamben's own writings. This has implications for an attempt to apply Agamben's thought into the sphere of legal reasoning.

If to do justice to the singularity of whatever-being, that being's uniqueness must be grasped in any decision, then this can only be done by ensuring a relation between the judge or decision-maker and whatever-being. It would then be this relation that is itself ethical. This relation would constitute not only an ethical decision but also constitute the subjectivity of the decision-maker as Self. By effacing the influence and implications of Levinas, Agamben neither

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[110] ibid 215.
[111] ibid 245.
[112] *OB* 15.
[113] *TI* 245.
[114] *OB* 55.

does Levinas justice, nor can he fully explain how the deactivated messianic law is to function.

Agamben's thought can therefore be critiqued by a reading of Levinas. Specifically, if Agamben is correct and whatever-being founds itself sovereignly by letting its own being-be, then how does this formation of subjectivity inform the Self when faced by another person? Any relationship to another person in the coming community cannot merely be characterised by letting their whatever-being be. Such a move contradicts Agamben's assertion that letting whatever-being be is ethical.

If this is the case, then Agamben appears to equate ethics with indifference towards other people. Such indifference is precisely the source of criticism towards biopower that Agamben's readings of Foucault lead him to make. It is precisely such indifference towards life that characterises the figure of bare life. For Agamben the law treats the figure of *homo sacer* with indifference, never admitting of its existence and yet at the same time creating it through legal proliferation. Is this formulation not indifferent? If this indifference characterises the biopolitical law, then how can the same indifference be ethical? It stands to reason that on this point, Agamben's analyses are sorely lacking.

The Legal Judgment

The question of the legal judgment troubles the coming community. With this spectre, Agamben's thought is also haunted by Levinas. The relationship to the other person cannot be characterised by letting being be, especially if the focus is upon an ethical decision. For Levinas, the relationship to the other person must involve a face-to-face ethical encounter that is ethical. This encounter is ethical as it does not simply involve being-with the other person, as Agamben would have it, but as speaking to the other and being for the other. To make a case based upon the singularity of whatever-being, as Agamben's thought suggests, is not to let being be, but to face the other person as Other.[115]

If the judge in the concrete case simply lets whatever-being be, then a non-relational approach would presumably preclude any taking into account of the

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[115] Emmanuel Levinas, 'Is Ontology Fundamental?' in Emmanuel Levinas, *Basic Philosophical Writings* (Adriaan Theodoor Peperzak, Simon Critchley, Robert Bernasconi eds, Indiana UP 1996) 7, 9.

other person's face. If this is the case, and Agamben eschews relationality, the interaction with the other person for Agamben appears to avoid encountering the other person at all. This avoidance of an encounter would surely amount to an ignoring of whatever-being, rather than an understanding of whatever-being, taking place in every legal decision. To then call this move ethical appears perverse.

In fact a non-relational ethics applied to the sphere of legal reasoning appear to lead to a sovereign Schmittian decision in every case. The Schmittian decision is made by the decision-maker without recourse to others or who they are. It is purely sovereign and itself self-referential, being made by a Self, a decision-maker, who justifies both its own existence and that of whatever-being.

Instead, if the decision is made with recourse to the face of the Other, then each case becomes a part of an ethical discourse that forms part of the particularity of the face-to-face relation. To state that the legal judgment, in order to be ethical, needs to take account of whatever-being's singularity necessarily means that the ethical decision is based upon a relation. This relation exists between the decision-maker (the judge) and whatever-being (the individual before the court). Through interactions with the Other in every concrete case the decision-maker can still decide on the basis of the singularity of whatever-being. Levinas maintains that each face-to-face situation increases the I's understanding of the fact that each situation is different and cannot be reduced to the Same.[116]

To be ethical, therefore, Agamben's conception of legal reasoning needs to allow the otherness of the Other, the other person's very way of being or *ēthos*, remain as a surplus to any attempt by biopower to totalise its influence over life. This can only be done by realising the fact that Agamben's work is both derivative of Levinas's thought and needs Levinas's thought to answer the *aporias* present in his work.

Even Agamben's attempt to let whatever-being be can itself be seen in Levinas. The Self is an absolute dependency upon the Other, and this absolute dependency is an inexhaustible potential. The very encounter with the other person contains a potentiality that Agamben speaks of at length in his works. Yet Agamben's subject can only sovereignly ground itself by letting go and being

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[116] *TI* 283.

determined by the Other.[117] Only in this way can Agamben still hold on to the main thrust of his ontology, in particular his writings on potentiality, whilst reconciling it with an ethical philosophy and an ethical politics of messianism. The anxiety of influence is strong in Agamben's work, and is only exacerbated by Agamben's attempt to rigorously distance himself from Levinas.

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[117] ibid 128.

Conclusion

Agamben's critique of Heidegger led him to think of the figure of whatever-being. Whatever-being aims to deactivate the originary negativity at the heart of Western metaphysics. As the last chapter indicated, Agamben's reading of this negativity in Heidegger led to Agamben attempting to overcome the hermeneutic circle.

This chapter has traced a different strand of thought, namely the construction of whatever-being. It has been argued that Agamben's construction of whatever-being suffers from a contradiction. Whatever-being stands as the form of a non-relational existence. However, this non-relational existence stands in opposition to Agamben's formulation of a non-relational, messianic law. For Agamben, justice is experienced through the messianic law treating whatever-being as an absolute singularity. However, this presupposes a relation between the decision-maker and whatever-being. This has led to the recognition of an *aporia* in Agamben's thought that needs addressing.

This contradiction has ultimately been traced to an anxiety of influence in Agamben's work in relation to the thought of Emmanuel Levinas. Agamben's construction of whatever-being and messianism has been argued to both rely upon and be derivative to Levinas's own thinking. That this is important is illustrated by the fact that Agamben denies any influence from Levinas in his works.

It has been argued that the contradiction within Agamben's construction of whatever-being and his messianic law can only be resolved if Agamben's work is read through Levinas's thought. By doing this, whatever-being and the messianic law need to be seen as relational, despite Agamben's attempts to think them outside of all relations. Only in this way can a form of legal reasoning faithful to Agamben's wider project be posited, and the aims of immanent politics and ethics be fulfilled. It is to the implications of this form of reasoning that the following chapter turns.

Chapter 6: Agambenian Legal Reasoning

The previous chapter argued that *aporias* present in Agamben's thought can only be understood with regard to the thought of Emmanuel Levinas. It was contended that Agamben's construction of ethics and justice both is in debt and remains derivative to the thought of Levinas.

The final two chapters of this thesis build upon this insight, and attempt to transpose Agamben's writings on law and the human being into a field that has not been touched upon explicitly in the literature – legal reasoning. Using an analytic method, this chapter develops the implications of Agamben's thought and extend Agamben's arguments in formulating a form of legal reasoning that remains sympathetic to his writings and political aims. This analysis helps to support the arguments made in this thesis so far. Levinas's influence on Agamben is underlined through this move. As well as this, Agamben's uncharitable reading of Heidegger and Heideggerian hermeneutics leads to an *aporia* within Agamben's thought. This *aporia* relates to his attempt to challenge the hermeneutic circle though his paradigmatic method. This can be more clearly seen through the implications of applying Agamben's thought to legal reasoning.

This extension of Agamben's arguments into the sphere of judicial and legal reasoning is explored through a consideration of how the doctrine of precedent as traditionally understood can be seen in light of Agamben's writings on law, ethics and justice. This analysis is conducted with reference to Agamben's construction of the exception. Agamben's observation that it is only through the exception that a norm and its application can be reconciled provides the basis for tracing a forceful challenge to strict formalistic forms of legal reasoning and a doctrine of precedent that gains its authority from a self-referential foundation. In building this analysis, this chapter puts forwards four arguments.

The first argument focuses upon the implications of Agamben's critique of foundational *mythologemes*, which can be seen as the main strength of his work. It is contended that if Agamben's thought is to be applied to the sphere of legal reasoning his critique of empty foundationalism necessitates a re-thinking of the doctrine of precedent. This is necessary as precedent is founded within the self-referential *mythologeme* of time immemorial. What is argued here is that conventional explanations of the necessity of precedent are based upon abstracted

views of the legal order. If precedent is to retain its relevance for an ethical legal order its necessity needs a greater justification than abstractions. An anti-foundational justification for precedent is offered here, based upon the writings of Edmund Burke. This justification casts precedent as part of the cultural fabric of the world by which beings found themselves. As such, this form of precedent can complement Agamben's messianic project, placing the singular whatever-being in a lived relationship with the legal order.

The second argument builds upon this anti-foundational precedent. Building upon Burke's defence of tradition, it is argued that the repetition of a past decision in precedent does not need to be viewed as restrictive or incompatible with a forward-looking legal order. This is supported with writings on repetition by Agamben and Søren Kierkegaard. Both Agamben and Kierkegaard view repetition as producing difference, rather than recollecting the same. This argument is important, as it aims to show that Agamben's criticism of negative foundations does not preclude the doctrine of precedent existing in the world of messianic politics.

The third argument maintains that Agamben's quest for the ethical decision can reconcile both the ethical demands of an absolutely singular whatever-being and the ethical demands of the doctrine of precedent. For a decision to be ethical Agamben argues that it must affirm whatever-being's way of being. It is contended that precedent should be viewed as forming the world into which whatever-being is thrown. Whatever-being forms its own way-of-being whilst in this world. As such, precedent can be said to contribute in a small way to forming and constituting whatever-being's way-of-being. In making this argument this chapter connects Burke's writings on tradition to Agamben's and Kierkegaard's writings on repetition. However, most importantly, such an analysis cannot be supported without recourse to Levinas's writings on ethics. Thus Agamben's political project is defensible, but at the cost of admitting of the Levinasian influence that is at the heart of his ethical thought.

The fourth argument builds upon this Agambenian form of precedent. By extending and developing Agamben's arguments, it is argued that the implications of this form of precedent can raise objections relating to the originality of Agamben's work. Specifically, this anti-foundational precedent and focus upon the singularity of whatever-being remains close to some existing approaches to

legal reasoning that focus upon particularism rather than universalism. This calls into question the necessity of Agamben's political project. If a form of reasoning similar to Agamben's already exists, the messianic deactivation may not be necessary. What is contended here is that the forms of particularistic reasoning discussed here are responsive to the position of the individual in the trial and judicial decision, which is argued to be implicit within the form of Agambenian legal reasoning constructed by this thesis.

Finally, applying Agamben's work to precedent opens up more questions in relation to hermeneutics and how Agamben can reconcile his work with hermeneutics. This point is explored in the final chapter of this thesis, with reference to Agamben's exception and its operation.

An Agambenian Precedent

A pressing problem for any conception of legal reasoning formed from Agamben's thought is the doctrine of precedent. Agamben's messianic law must every time raise the question of potentiality. As Zartaloudis described, justice is experienced as pure potentiality and as the law's consideration of whatever-being's singularity in each case.[1] Agamben's messianic law and conception of justice presupposes a relationality between whatever-being and the decision-maker or adjudicator in court.

For Agamben, the ethical decision would be one that accounts for the singularity of whatever-being. However, the doctrine of precedent, *stare decisis*, appears to challenge such a way of reasoning. Precedent appears to lead law to look backwards, to past and previous decisions of courts within the judicial hierarchy. Traditional accounts of precedent are therefore focused upon past decisions and how they can influence today's cases.[2] In the traditional formulation, only the *ratio decidendi* of the decision is binding precedent. All other aspects of the judgment are, strictly speaking, *obiter dicta*, persuasive remarks that do not bind future courts. The *ratio* of a case is also distinguishable from the case's holding. The holding is the legal rule that determines the outcome of the case.[3] The *ratio* is the rationale for the court's decision, and is what binds lower courts within the judicial hierarchy.[4]

Such a view can produce a preoccupation with the statements of past decision-makers. However, precedent can also be forward-looking. This view of precedent sees today's cases as precedent for future decision-makers.[5] Whichever view is taken, *stare decisis* is viewed as fundamentally important to the operation of the legal order. Lord Hailsham reflects a view predominant in the legal profession in stating that precedent's importance relates to the fact that "in legal

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[1] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge 2010) 288.

[2] Frederick Schauer, 'Precedent' (1987) 39 Stanford L Rev 571, 572.

[3] Glanville Williams and A T L Smith, *Learning the Law* (14th edn, Sweet & Maxwell 1978) 62-88.

[4] On a classic yet contested view on what the *ratio* actually is, see Arthur L Goodhart, 'Determining the Ratio Decidendi of a Case' (1930) 40 Yale L Rev 161. For the disagreement over this view, see Arthur L Goodhart, 'The Ratio Decidendi of a Case' (1959) 22 MLR 117; J L Montrose, 'Ratio Decidendi and the House of Lords' (1957) 20 MLR 124; J L Montrose, 'The Ratio Decidendi of a Case' (1957) 20 MLR 587; A W B Simpson, 'The Ratio Decidendi of a Case' (1957) 20 MLR 413; Julius Stone, 'The Ratio Decidendi of the Ratio Decidendi' (1959) 22 MLR 597.

[5] Schauer (n 2) 572-3.

matters, some degree of certainty is at least as valuable a part of justice as perfection".[6] In 1966, the House of Lords practice statement summarised this view, thinking of precedent as:

> An indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.[7]

Whether precedent is viewed as backward-looking towards past cases, or forward-looking towards influencing future cases, or both, precedent can be seen as constraining decision-making. It does so by imposing a judicial obligation upon future decision-makers to take account of past cases. This obligation has potential consequences for any Agambenian form of precedent, as will be considered.

As there is no mention of legal reasoning within Agamben's work the doctrine of precedent receives no comment, critical or otherwise. Such a position has raised difficulties for Agamben's scholarship, both methodologically and theoretically. As Peter Goodrich has argued, the study of legal texts and legal meanings is a discipline of hermeneutics.[8] Goodrich argues that the law is:

> An exemplary object for hermeneutic study: it is in the strongest of senses a tradition and community concerned with handing down specialised knowledge and meanings which will be authoritatively interpreted and applied to the judgment of particular cases.[9]

This tradition is transmitted through the doctrine of precedent. An argument from precedent asserts that something should be done in a certain way now because it was done that way in the past.[10] This argument opens up a sphere of hermeneutic investigation and inquiry. That Agamben attempts to move beyond hermeneutics presents a theoretical challenge to his work. The implications of this challenge can be more clearly seen after a form of precedent supportive of Agamben's thought is outlined.

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[6] *Broome v Cassell & Co Limited* [1972] AC 1027, 1054 (HL).
[7] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (HL).
[8] Peter Goodrich, 'Legal Hermeneutics: An Essay on Precedent and Interpretation' (1985) 7 Liverpool L Rev 99, 119.
[9] ibid.
[10] Anthony Kronman, 'Precedent and Tradition' (1990) 99 Yale L J 1029, 1032.

Guantanamo and Precedent

A clearer challenge to Agamben's works arises methodologically. By ignoring the doctrine of precedent and its effects Agamben's commentary on the law and legal measures is coloured by a misunderstanding that calls into question Agamben's conclusions. An example of this can be found in *State of Exception*, where Agamben refers to the Presidential Order issued on the 13th November 2001 in relation to foreign terrorist suspects:

> The immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension emerges clearly in the "military order" issued by the president of the United States on November 13, 2001, which authorised the "indefinite detention" and trial by "military commissions"… of noncitizens suspected of involvement in terrorist activities ... What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnameable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of POW's as defined by the Geneva Convention, they do not even have the status of people charged with a crime according to American laws.[11]

Such a statement is indicative of Agamben's paradigmatic method, but it does raise an issue in relation to Agamben's treatment of precedent. Specifically, in classifying noncitizens as legally unnameable and unclassifiable being, Agamben betrays a lack of knowledge, or at least focus, on precedent and its operation. This conclusion can be drawn as Agamben appears to remain ignorant of the history of the 2001 Executive Order, which was justified with reference to past judicial precedent.

There has been a huge amount of litigation surrounding both the status of Guantanamo Bay and the indefinite detention of illegal enemy combatants there after the invasion of Afghanistan in 2001.[12] However, this litigation was not the first concerning detentions at Guantanamo. Guantanamo was used to house and

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[11] *SE* 3. See also US White House, Presidential Order, 'Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism', (13 November 2001) www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

[12] For the legal status of Guantanamo, see Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16 Eur J Intl L 613, 616; see also Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations (United States-Cuba) (23 February 1903) TS No. 80; Executive Order 8749 of 1 May 1941, 6 Fed Reg 2252 (3 May 1941).

detain illegal immigrants throughout the 1990's.[13] By 1994, 23,000 Cubans and 16,000 Haitians were being detained in Guantanamo.[14]

This refugee crisis led to litigation over the status of those detained at Guantanamo. The Eleventh Circuit Court of Appeals held that the Haitian detainees at Guantanamo had no constitutional rights whatsoever as the base was outside of the United States.[15] A similar conclusion was reached when the Cuban detainees claimed that they could exercise constitutional rights in court.[16] These series of decisions were relied upon by the administration of George W Bush to deny that the suspected terrorist detainees at Guantanamo had rights under the U.S. Constitution. The Naval Base was specifically selected to avoid such legal entanglements.[17] An analogy was drawn between decisions that dealt with asylum seekers and the situation of the detainees in order to create a binding judicial precedent that supported the Bush Administration's position.[18]

Agamben is at the very least mistaken by characterising the detainees at Guantanamo as legally unnameable and unclassifiable. The Executive Order was in no way new, nor was the being created by it in any way novel. Rather, it was based upon and justified by legal precedent. Agamben's failure to account for this leaves his works and conclusions upon to the criticism that he does not do justice to the influence that precedent has over the legal order. Notwithstanding this,

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[13] Harold Hongju Koh, 'America's Offshore Refugee Camps' (1995) 29 U Richmond L Rev 139, 140. For a comprehensive history of Guantanamo and its relations to both Cuba and the United States see Joseph C Sweeney, 'Guantanamo and U.S. Law' (2007) 30 Fordham Intl L J 673.

[14] Koh (n 13) 155.

[15] *Haitian Refugee Ctr., Inc. v Baker,* 953 F.2d 1498 (1992) (11th Circuit Court of Appeals). Such a position, denying the extraterritoriality of constitutional rights is not an exceptional occurrence - see *United States v Verdugo-Urquidez*, 494 U.S. 259 (1990) (Supreme Court of the United States). See also Gerald L Neuman, 'Anomalous Zones' (1996) 48 Stanford L Rev 1197, 1197-1201.

[16] See *Cuban American Bar Association, Inc. v Christopher*, 43 F.3d 1412, 1424-27 (1995) (11th Circuit Court of Appeals). Two Cubans airlifted to the United States in 1980 had been in detention awaiting deportation to Cuba for years as the Cuban government refused them entry. The Supreme Court held in 2005 that their indefinite detention would be intolerable and granted the men habeas corpus, although under a strict monitoring regime – see *Clark v Martinez*, 543 U.S. 371 (2005) (Supreme Court of the United States).

[17] Michael Johnson, '*Boumediene v Bush*: Flashpoint in the Ongoing Struggle to Determine the Rights of Guantanamo Detainees' (2008) 60 Maine L Rev 236; Patrick F Philbin, Deputy Assistant Attorney-General and John C Yoo, Deputy Assistant Attorney-General, 'Memorandum to William J Haynes II, General Counsel, Department of Defense, Re: Possible Habeus Jurisdiction over Aliens Held in Guantanamo Bay, Cuba' (28 December 2001) in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (CUP 2005) 29.

[18] The claim by analogy was ultimately unsuccessful. See *Rasul v Bush*, 542 U.S. 466 (2004) (Supreme Court of the United States); *Hamdi v Rumsfeld*, 542 U.S. 426 (2004); *Rumsfeld v Padilla*, 542 U.S. 426 (2004) (Supreme Court of the United States); *Hamdan v Rumsfeld*, 126 S. Ct. 2749 (2006) (Supreme Court of the United States); *Boumediene v Bush*, 553 U.S. 723 (2008) (Supreme Court of the United States).

Agamben's critique of empty foundationalism does provide the basis for a rethinking of *stare decisis* to accord with Agamben's form of legal reasoning.

The self-referentiality of time immemorial

Agamben's critique of empty foundations can be levelled towards the operation of precedent within the common law. This is necessary in order to provide the critical distance to develop a messianic form of precedent. The common law and the doctrine of precedent have their origins in 'time immemorial', time before legal memory. This is no sophistic statement. The Statute of Westminster I 1275 arbitrarily fixed the commencement of legal time and legal memory at 6th July 1189, the date of accession of Richard I to the throne.[19] Such a date is after the traditionally ascribed beginnings of the development of the common law by Henry II in 1154.[20] This was reinforced by the Prescription Act 1832, which redefined legal memory as no more than forty years.[21]

In order to construct this Agambenian critique of precedent, it is necessary to trace the authority of the common law to a self-referential foundation. This can be done by turning to the importance of tradition to both precedent and the common law. This argument is supported with reference to the work of Anthony Kronman. Kronman argues that it would be wrong to reject as absurd the claim that the past obliges us to act in certain ways because it is the past.[22] This is wrong as it closes off a deeper understanding of the human meaning of the past.

Kronman illustrates this by analysing the work of Frederick Schauer, who he sees as paradigmatic of a way of thinking about precedent that remains closed off to this deeper understanding. Schauer argues that the claims of precedent should be recognised for three reasons. The first is an argument of fairness, maintaining that like cases should be treated alike.[23] The second is an argument from predictability. Schauer argues that following precedent enhances the predictability of the law and therefore makes it easier to plan their lives.[24] Schauer views predictability as a question of balancing expected gain against expected

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[19] Statute of Westminster, The First 1275 c 5 3 Edw 1.
[20] Charles Wild & Stuart Weinstein, *Smith & Keenan's English Law* (16th edn, Pearson 2010) 5.
[21] Prescription Act 1832 c 71, s 5.
[22] Kronman (n 10) 1037.
[23] Schauer (n 2) 595.
[24] ibid 598.

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loss.[25] The third reason is what Schauer calls "the argument from strengthened decision-making".[26]

Schauer argues that precedent conserves the time and energy of decision-makers by allowing them to avoid recollecting questions they have already considered. Precedent also works to decrease the variability in decisions that arises from different judges ruling on different cases.[27] At its base, Kronman argues that Schauer's position rests upon two claims. The first is utilitarian, claiming that respect for precedent increases the sum of social welfare by enhancing the law's predictability. The second line of reasoning, focusing upon treating like cases alike, is deontological.

Kronman's claim is that neither the deontological nor the utilitarian arguments take seriously the claim that the past deserves to be repeated simply because it is the past.[28] Kronman maintains that both utilitarianism and deontology are intelligible only if we remove ourselves, by a process of abstraction, from our real temporal situation and examine the law from a timeless point of view.[29] This is because the standard of judgment used by both cases is exclusive. The only argument that has justificatory force from a utilitarian point of view is one that appeals to social welfare, and the only argument that has justificatory force from a deontological point of view is an argument appealing to individual rights. The temporal distinctions that define our experience of life all disappear and cease to have any inherent meaning or authority of their own.[30] Both the deontological and utilitarian defences of precedent are indirect, as precedent serves a purpose outside of time.

In attempting to think seriously about the question of precedent and tradition, Kronman turns to the work of Edmund Burke. Burke is a defender of tradition. Kronman uses a suggestive passage of Burke to take a step towards understanding the inherent authority of the past. Kronman quotes a passage of Burke's *Reflections* where Burke is commenting upon the shamelessness of democracies. When commenting upon the fact that, in his opinion, political power must be exercised in trust, Burke states:

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[25] ibid.
[26] ibid 599.
[27] ibid 600.
[28] Kronman (n 10) 1039.
[29] ibid 1039-43.
[30] ibid 1039.

> [O]ne of the first and most leading principles on which the commonwealth and its laws are consecrated, is lest the temporary possessors and life-renters in it, mindful of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on their inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them, a ruin instead of an habitation – and teaching these successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers. By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.[31]

What Kronman argues is that Burke's use of flies is quite deliberate. What is inhuman about the fly is its disconnectedness to the future and the past.[32] Yet human beings are born into a cultural world. It is this world of culture that is the human being's own.[33] This world of culture can be accumulated or destroyed, added to or removed from. This can be done only by human beings. Kronman argues that if human beings distinctiveness is tied to a participation in the world of culture, then respect for the work of past generations is founded upon something deeper than utilitarianism or deontology.[34]

Kronman argues that the past should be respected because the world of culture human beings inherit from it makes us who we are. The past is not something to be chosen. Rather, it is a custodial attitude and respect towards the past that establishes humanity.[35] The world of culture is inherited from those who went before, and in conserving this world humanity expresses its indebtedness to the past. Humanity is bound within limits to respect the past for its own sake. All these debts are connected. As humanity satisfies its obligations to the past it in turn puts the future in debt to the present. Humanity therefore depends upon the future for the preservation of the world of culture created today.[36]

Kronman explains that Burke's chain and continuity of generations is a chain and continuity of interwoven obligations. Burke sees succeeding

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[31] Edmund Burke, *Reflections on the Revolution in France* (Thomas Mahoney ed, OUP 1993) 108.
[32] Kronman (n 10) 1049.
[33] ibid 1065.
[34] ibid 1066.
[35] ibid.
[36] ibid 1067.

generations as party to a contract. By phrasing it in this way, Burke aims to remind humanity that it has obligations towards the past. It is only through meeting this obligation can humanity can compel its successors to conserve the cultural world it has created and added to.[37]

When applied to the doctrine of *stare decisis*, Kronman's analysis can be fully appreciated. Precedent is part of the cultural fabric of the world. It is this cultural fabric that helps makes human beings human. As such, paying respect to precedent is part of meeting obligations to the past, and in turn setting obligations for successors. That the common law traces its origins to time immemorial can therefore not be seen as sophistry. It can be seen as a call to tradition, in the sense of the cultural history of humanity.

This presents a particular challenge to Agamben. If the origins of precedent are challenged as self-referential, Agamben must be careful not to leave himself open to the critique that he has not taken into account the importance of history to human beings. To phrase it another way, if Agamben does away with the tradition of precedent, then he may be accused of ignoring the cultural background and basis for law. Agamben's task is therefore to challenge the self-referential basis of precedent without destroying all connection with the past.

In Agamben's terms, tradition in the Burkean sense can be separated from the origin of the common law in time immemorial. This origin acts as a self-referential foundation not just for the common law as a whole, but also for individual laws and cases within the legal order. Thus the doctrine of precedent gains its authority from ensuring this continuity with the past. In this sense *stare decisis* is derivative from the common law's self-referential basis.

Examples of such self-referentiality can be found throughout the common law in both the judgments of cases and in statutes. In each case, the common law's foundations, and the jurisdiction of the law maker, be they judge or legislator, are reinforced through reference to this time immemorial, the self-referential foundation:

> [T]he fact is that the common lawyers, holding that law was custom, came to believe that the common law, and with it the constitution, had always been exactly what they were now, that they were immemorial.[38]

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[37] ibid.
[38] J G A Pocock, *The Ancient Constitution and the Feudal Law* (2nd edn, CUP 1987) 36.

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Such reference to these self-referential origins can be seen in relation to testamentary capacity,[39] sentencing in fraud trials,[40] as a justification for proscribing as criminal unprovoked violence,[41] and for granting a right to market stall holders to trade.[42] Likewise reference to the basis of the common law in time immemorial has been used to justify the courts' refusal to exclude their jurisdiction in judicial review cases,[43] and to justify the common law crime of contempt.[44] Lord Nicholls in the House of Lords summarised this reliance of the common law upon precedent and tradition in a 2005 case:

> Changes in the common law made by judges are usually described as 'development' of the common law. This is a helpful description, not a misleading euphemism. Judges do not have a free hand to change the common law. Judicial development of the common law comprises the reasoned application of established common law principles, of greater or less generality … "The judge … is still not wholly free. He is not to innovate at pleasure … He is to draw his inspiration from consecrated principles … He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system".[45]

Using Nancy as a foil, it could be argued that the origins of the common law, transmitted through *stare decisis*, serve to reinforce the law's authority through its juris-diction. The common law's authority is drawn from its self-referential origins in time immemorial, and this authority is affirmed as a boundary and foundation through a *diction*, a saying of law.[46] Through the saying of the legal judgment, the legal order establishes its own viable perimeters.[47]

It could therefore be stated that the legal order gains and reinforces its authority through reference to past cases that in turn refer to further past cases. The ineffable foundations of the common law are thus repeated and transmitted

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[39] *In re Perrins, deceased*; *Perrins v Holland and others* [2010] EWCA Civ 840 [13] (Sir Andrew Morritt C).

[40] *R v Anthony Peter Kelly* [2010] EWCA Crim 1033; *R v Stevens* [1993] 14 Cr App R (S) 372 (CA); *R v Callen* [1992] 12 Cr App R (S) 60 (CA).

[41] *R v Majewski* [1977] AC 443, 476 (Lord Simon of Glaisdale) (HL).

[42] London Local Authorities Act 2007 c 2, Sch 3 para 1; London Local Authorities Act 1990 c 7, s 41.

[43] Christopher Forsyth, 'The legitimacy of judicial review' [2003] PL 286, 304.

[44] Michael Chesterman, 'Contempt: in the common law, but not the civil law' (1997) 46 ICLQ 521, 558.

[45] *National Westminster Bank plc v Spectrum Plus Limited and others and others* [2005] UKHL 41 [33] (Lord Nicholls, quoting Justice Cardozo).

[46] Jean-Luc Nancy, '*Lapsus Judicii*' in Jean-Luc Nancy, *A Finite Thinking* (Simon Sparks ed, Stanford UP 2003) 152-71, 154.

[47] Benjamin C Hutchens, 'Philosophy as juris-fiction: Jean-Luc Nancy and the "Philosophy of Right"' (2005) 9 Journal of Cultural Research 119, 123-4.

oikonomically through an immanent form of decision-making. Each repetition affirms the self-referential origin of the law. It is to the connection between repetition and precedent that this chapter now turns.

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Precedent and Repetition

In law and legal thought, precedent is intimately linked with repetition. The notion of *stare decisis* is tied into the observation that like cases must be decided alike. The repetition of past decisions has been integral to the development of the English common law. As lawyers and courts construct arguments to distinguish cases from precedent, the doctrine of precedent still acts as a foundation to these arguments, constraining the ability of lawyers and courts to argue over what the law should be.

Andreas Philippopoulos-Mihalopoulos has argued that the legal order's operation is determined by the repetition of legal norms through the doctrine of precedent. Repetition becomes coterminous with precedent.[48] Philippopoulos-Mihalopoulos's aim is to conceive of another form of repetition that can lead to justice. Whilst his aims and method differ from the direction of this chapter and thesis, Philippopoulos-Mihalopoulos's analysis is worth paying attention to, and he aims to reconceive of repetition as expressing difference rather than sameness.

Philippopoulos-Mihalopoulos supports this contention with reference to the works of Gilles Deleuze and Søren Kierkegaard. It is Kierkegaard that is of interest here, as it is argued that Kierkegaard's conceiving of repetition has both parallels with Agamben's own account and makes it possible to conceptualise an Agambenian account of precedent that accords with his works on law, language and power. This thesis has argued that Agamben's works remain derivative to the thought of Emmanuel Levinas. However, no such connections are either made or implied between the thought of Levinas and those of Kierkegaard and Deleuze. Such a project, if it exists, is beyond the scope of this work. What this chapter focuses upon is how Kierkegaard's thought can inform Agamben's work on repetition and law.

What concerns Agamben is to break away from the self-referential foundations of the common law. A starting point for a consideration of an Agambenian form of precedent is a text on repetition that Agamben wrote, which

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[48] Andreas Philippopoulos-Mihalopoulos, 'Repetition: Deleuze and Kierkegaard on Law, Justice and Art' in Oren Ben-Dor (ed), *Law and Art: Ethics, Aesthetics, Justice* (Routledge 2011) (forthcoming). I am grateful to the author for allowing me to see both an early and final draft of this essay, and the content has greatly informed my readings of Agamben and this argument relating to precedent and repetition.

focused on the films of Guy Debord.[49] Despite the subject matter being that of film, Agamben's comments can here be useful in constructing a form of precedent that can do justice to his analyses in the *Homo Sacer* series of books. Agamben's view of repetition accords with his other views on a politics of pure means:

> Repetition is not the return of the identical; it is not the same as such that returns. The force and the grace of repetition, the novelty it brings us, is the return as the possibility of what was. Repetition restores the possibility of what was, renders it possible anew; it's almost a paradox … To repeat something is to make it possible anew.[50]

Repetition here does not bring similitude, but rather novelty. It is important here to make a distinction between both Kierkegaard's and Agamben's positions and that of Gilles Deleuze.

In Deleuze's work *Difference and Repetition*, Deleuze stated that law is a discipline where repetition remains impossible.[51] This is because Deleuze traces the pure subjects of law as being particulars who are unable to be subsumed under law's generality.[52] At first glance, there are immediate echoes here between Deleuze's particulars and Agamben's whatever-being. This is because both are unable to be subsumed under general laws, existing as they both do on a plane of pure immanence. Additionally, Philippopoulos-Mihalopoulos accords Deleuze, along with Kierkegaard, the status of "the main sources of the modern theory of repetition".[53]

Deleuze sees law's generalities as being repeatable as "repetitions of the same".[54] Nevertheless, Deleuze also refers to "a more profound repetition".[55] For Deleuze this is profound as:

> To repeat is to behave in a certain manner, but in relation to something unique or singular which has no equal or equivalent.[56]

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[49] Giorgio Agamben, 'Difference and repetition: on Guy Debord's film' in Tanya Leighton (ed), *Art and the Moving Image: A Critical Reader* (Tate Publishing 2008) 328-33.

[50] ibid 328.

[51] Gilles Deleuze, *Difference and Repetition* (Paul Patton tr, Columbia UP 1994) 2.

[52] ibid.

[53] Philippopoulos-Mihalopoulos (n 48) 2. Philippopoulos-Mihalopoulos admits that Kierkegaard and Deleuze are not the only sources of writing on repetition. Aristotle and Nietzsche both wrote on repetition, but Kierkegaard is focused upon here as his writings allow for an expansion upon an immanent conception of law and justice. As Agamben can be placed firmly in this immanent tradition, Kierkegaard's writings are important for this thesis's argument.

[54] ibid 20.

[55] ibid.

[56] ibid 1.

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There are therefore two accounts of repetition within Deleuze's work: as Philippopoulos-Mihalopoulos states "one impure ... the other the right thing".[57] Reality is split into two levels, with pure repetition acting as a transcendental, a pure repetition that grounds and acts as a referent for the general repetition of law. For this reason, Philippopoulos-Mihalopoulos is correct in stating that Deleuze's account is not faithful to immanence. This is because Deleuze still has recourse to a referential origin that grounds his form of precedent and law. For Agamben, pure immanence only has reference to the thing itself.

Philippopoulos-Mihalopoulos's argument focuses on a conception of law that is characterised by viewing the law as a "hypnotic mundanity of repetitive norm application and the superimposition of norms to facts".[58] It is from this mundanity that Philippopoulos-Mihalopoulos sees justice arising from. It is important to state that Philippopoulos-Mihalopoulos's account of law does not do justice to the complexity of legal practice. Such a view is decidedly mechanical in tone, with reference to norm application and superimposition of norms to facts. Philippopoulos-Mihalopoulos's account does not account for any real judicial discretion in the decision. Despite the poverty and brevity of this conceptualisation, it does not detract from Philippopoulos-Mihalopoulos's central argument. Whilst Philippopoulos-Mihalopoulos's focus on legal reasoning may be lacking, his insistence on the centrality of repetition to the law's operation is not.

Philippopoulos-Mihalopoulos relates this repetition to the philosophical writings he considers. It is fundamentally important to ask exactly what is meant by repetition. For Philippopoulos-Mihalopoulos in relation to law, it is clear that repetition refers to precedent and the operation of judicial application of laws to concrete cases. Such a definition is narrow and very formalistic. It must be asked if there is another sort of repetition at play.

It is contended that there are not two sorts of repetition that need consideration here, but rather *recollection* and *repetition*. Recollection is seen as the repetition of the law that operates in a formal, narrow sense. When repetition is used it refers to a form of repetition used by Kierkegaard and Agamben. This repetition is immanent in nature. It is contended that Agamben and Kierkegaard share certain affinities in their conception of repetition.

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[57] Philippopoulos-Mihalopoulos (n 48) 8.
[58] ibid.

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Kierkegaard, Agamben and Repetition

In *Repetition*, Kierkegaard makes the point that repetition is not recollection. What has been recollected has been, whereas genuine repetition is recollected forward.[59] In this way it can be stated that a precedent founded upon a *mythologeme* does not repeat but merely recollects past cases and analogous facts. Such a recollection is mundane and would not reflect the true difference that repetition can bring. As Kierkegaard states in *Repetition*:

> That which has been repeated has been, otherwise it could not be repeated; but precisely this, that it has been, makes repetition something new.[60]

For Kierkegaard, repetition produces difference.[61] Kierkegaard's *Repetitions* provides the tale of a narrator who moves back to Berlin to re-live the life he had there when younger. As Philippopoulos-Mihalopoulos explains, the narrator, Constantine Constantius, discovered that everything was the same on his return. However, Kierkegaard makes it clear that what Constantius experienced was not repetition but mere recollection.[62] For Kierkegaard, "the only repetition was the impossibility of a repetition".[63]

Repetition, as Kierkegaard maintains, is actuality, life itself that is lived in the moment itself. For Kierkegaard, the one that lives is the one that gives himself to the repetition of life.[64] Life is a succession of repetitions, but such repetitions create something new. Such a position raises the possibility that the very act of repetition opens up to a new sphere of living, a sphere that for Kierkegaard must be embraced. Repetition, in Philippopoulos-Mihalopoulos's reading of Kierkegaard, is transcendent, but a transcendence that is folded in the immanence of living.[65] Such a forward conceived repetition is itself repeated by Agamben when he speaks of memory and repetition. For Agamben:

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[59] Søren Kierkegaard, 'Repetition: A Venture in Experimenting Psychology' in Søren Kierkegaard, *Fear and Trembling/Repetition* (Howard V Hong and Edna H Hong trs, Princeton UP 1983) 131.
[60] ibid 149.
[61] This point is also strongly emphasised by Philippopoulos-Mihalopoulos.
[62] Philippopoulos-Mihalopoulos (n 48) 4.
[63] Kierkegaard (n 59) 170.
[64] ibid 132, 133.
[65] Philippopoulos-Mihalopoulos (n 48) 4.

Here lies the proximity of repetition and memory. Memory cannot give us back what was, as such: that would be hell. Instead, memory restores possibility to the past.[66]

Both writers here conceive of a form of repetition that is forward looking. This repetition is without reference to an origin in the past, and focuses on the effect of that repetition for the future.

Furthermore, Kierkegaard's formulation of repetition as transcendence-as-immanence is strongly reminiscent of Agamben's own thoughts relating to an immanent law. For Agamben, the plane of transcendence extends no further than the plane of immanence.[67] This can be connected to Agamben's argument that the pure existence of language needs to be thought of anew.[68] In order to posit a life that does not rest on presuppositions or self-referential foundations, it is necessary to consider the fact of language's existence:

Only the experience of the pure existence of language allows thought to consider the pure existence of the world.[69]

As Zartaloudis explains, pure linguistic existence presumes that existence is not a property or quality of a being, but being's taking place as-such, its pure potentiality, whatever-being.[70] This points towards a different *ēthos* or way of being of life. By removing the presupposition of time immemorial, reinforced by the doctrine and practice of *stare decisis*, Agamben's law aims to be truly open to its possibilities of being.

Nevertheless, the position Agamben holds is very close to that espoused by Kierkegaard, who is part of the philosophical tradition that Agamben is attempting to challenge. This fact in itself could give rise to the objection that Agamben's thought is not in fact original or groundbreaking, but in fact is itself a repetition of earlier works. If this is conceded, then both Kierkegaard and Agamben could argue that this would not make Agamben unoriginal, due to the nature of repetition. It does challenge Agamben's claim that his work overcomes the Western metaphysical tradition. It is necessary to draw these strands of

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[66] Agamben, 'Difference and repetition: on Guy Debord's film' (n 49) 328.
[67] Giorgio Agamben, 'Absolute Immanence' in *PT* 226-8.
[68] Giorgio Agamben, 'Philosophy and Linguistics' in *PT* 71.
[69] ibid 68.
[70] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 1) 249.

thought together into a formulation of precedent that can accord with Agamben's philosophical position.

Agamben and Precedent

To consider the law existing on a plane of pure immanence, taking into account the singularity of whatever-being in every decision does not mean the end for *stare decisis*. Rather, an Agambenian precedent would be based upon repetition as difference. This precedent would have to accommodate Agamben's argument that it is where law considers the singularity of whatever-being that justice is experienced as pure potentiality.

What this means for precedent can be approached from viewing the obligation that Agamben appears to place the judge and decision-maker under. The judge in Agamben's terms is charged with instituting "a politics no longer founded on the *exceptio* of bare life".[71] Agamben places an ethical demand upon the judge, the decision maker. The only way that a decision will be just is if the decision is made with regard to whatever-being, asking not what the law is but rather how the law can affirm that being's singularity. As Zartaloudis correctly states, a decision that bases its ruling upon a mere property of whatever-being, or even the mere totality of its properties, will be neither ethical nor just.[72] This ethical moment is what drives Agamben's critique of law.

This emphasis upon the ethical moment, and the insistence upon a pure potentiality appears at odds with *stare decisis* and its insistence upon the past and past decisions. This position is complicated further by Agamben's messianism, as messianism focuses not on a radical change, but a slight yet decisive change in the way the world is viewed. This, in contrast, suggests a continuation of precedent in the messianic law.

A way of reconciling a focus on whatever-being with the doctrine of precedent is suggested here through the works of Levinas and Edmund Burke. This reconcilement is necessary in order to support the optimistic view that characterises Agamben's thought.[73] As part of this move, it is contended that both the doctrine of precedent and the singularity of whatever-being place an ethical obligation upon the decision-maker. What is more, these two ethical obligations are connected. The first, relating to whatever-being, can be explored through the work of Levinas.

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[71] *HS* 11.

[72] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 1) 286.

[73] Vacarme and Jason Smith (tr), "'I am sure that you are more pessimistic than I am...": An Interview with Giorgio Agamben' (2004) 16 Rethinking Marxism 115, 123–4.

In a passage towards the end of *Otherwise than Being*, Levinas develops his observation that the I has an ethical responsibility to the other. Levinas notes that this responsibility for the other becomes a problem when a third party arrives.[74] This presents a problem as the third party is other to both the neighbour, the other, and the I. The third party is another neighbour to the I, and he is also a neighbour to the other.[75] Levinas argues that the other stands in a relationship to the third party that the I cannot answer. The other and the third party put distance between the I and the other and the third party, the properly Other.[76]

The implication of this is that one individual cannot be absolutely and uniquely responsible for more than one other. Matthew Stone develops this point. Stone argues that the I must compare and prioritise the appeal of others upon a plane of objectivity, and also recognise that the I is also the subject of judgment of others.[77] Stone posits that this is why Levinas states that the "intelligibility of a system" is required to mediate and make intelligible the relations with multiple others.[78] This system is necessary as multiple others cannot be encountered purely ethically, as if they were the only other that exists.[79] A method for making sense of multiple relations with others is needed in order to place the ethical relation within any kind of community, and explain how multiple ethical relations relate to one another and exist in common.

Levinas's thought on this point can inform Agamben's meditations on community. Agamben conceives of multiple others within a community. It is clear that Agamben does not see a community as a unified, enclosed, defined body. Agamben conceives of a community, in a manner similar to Nancy, of a "community without community".[80] Agamben's community of "belonging without identity" is not tied to a transcendent essence of a community.[81] Rather, it posits multiple whatever-beings living-in-common.

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[74] *OB* 157.
[75] ibid.
[76] ibid.
[77] Matthew Stone, 'Levinas and Political Subjectivity in an Age of Global Biopower' (2010) 6 Law, Culture and the Humanities 105, 109.
[78] *OB* 157.
[79] Stone (n 77) 109; *OB* 157-8.
[80] Jean-Luc Nancy, *The Inoperative Community* (Peter Connon tr, University of Minnesota Press 1991) 71.
[81] *CC* 83.

Agamben's community cannot be represented because it works against the very idea of representation, the idea that a body is collectivised and foundational modes of representing that community are produced. This position means that any institutions that exist within an Agambenian legal order cannot rely upon any notion of community in order to act and justify both their acting and their decisions. As Levett has stated in a manner reminiscent of debates surrounding constituent and constituted power:

> A community can only imagine the fictive harmony of its members with its collective representation by repressing the contingency of its own institution.[82]

However this does not mean that Agamben does away with legal institutions. Levinas's insights are key here.

Legal institutions still exist as systems of intelligibility that serve to make sense of multiple relations with others.[83] However, these legal institutions can no longer 'say right' with reference to an essence of community or any other transcendent plane.[84] The law for Agamben needs institutions, just as it needs judgment, but such institutions should not have their power grounded in a mythic foundation.

Therefore the messianic law must think the singularity of whatever-being within a community of whatever-beings, each of whom maintain an ethical obligation of responsibility over one another. Precedent has a part to play in this law. For Agamben, the experience of justice asks not what the law is, but what the law can be. This does not mean that the judge as decision-maker is no longer dependent upon the recollection of past cases in order to justify the decision that is made. To view legal reasoning this way would caricature what judges do in order to make room for Agamben's thought.

Precedent places an ethical obligation on the decision-maker in a different way, relating to the prioritisation and comparison of the appeal of multiple whatever-beings. This second form of obligation on the decision-maker, and its connection to whatever-being, could be seen in light of Edmund Burke's defence of tradition. Tradition here is no self-referential concept, but refers to the cultural

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[82] Nicholas Levett, 'Taking Exception to Community (between Jean-Luc Nancy and Carl Schmitt)' (2005) 9 Journal for Cultural Research 421, 432.
[83] See *OB* 157.
[84] See Nancy, '*Lapsus Judicii*' (n 46) 154.

history and fabric of the world. Precedent places an obligation on a decision-maker to do justice to the cultural fabric of the world. The cultural fabric of the world is important and worthy of respect. It is into this world that whatever-being is thrown.[85] It is from within this world that the unique singularity of whatever-being is forged.

Whatever-being, such-as-it-is, gives itself to itself from within a world that always-already exists. The cultural fabric of this world is continuously changing and responding to the actions and influences of individuals. Following Kierkegaard, the repetition of events and precedents continuously open up new spheres of living. It is within these spheres of living that whatever-being gives itself to itself.

Precedent is part of this cultural fabric of the world. As such precedent forms part of the background in which whatever-being constitutes itself. This world is also shaped by other whatever-beings, as it is these others who help maintain and create the world's cultural fabric. The community of whatever-beings belongs to this world. As an extension of this, the cultural world, including precedent, forms the background in which multiple whatever-beings experience ethical relationships with one another.

The demand placed on the decision-maker by precedent is an ethical one. Precedent demands respect as part of the cultural fabric of the world that helps shape whatever-being. Without this respect, a key part of the world in which whatever-being is thrown is lost. At the same time, the unique singularity of whatever-being places an ethical obligation upon the decision-maker, demanding that it be treated as a singularity.

The decision-maker is therefore faced with an ethical challenge between two obligations. However, it should here be remembered that for Agamben, the only way that a decision will be just is if the decision is made with regard to whatever-being. This asks not what the law is but rather how the law can affirm that being's singularity. This does not mean that every decision needs to be different. To uphold a past precedent is not to uphold an identical judgment. As mentioned before, Agamben does not see repetition as the return of the identical. Rather, to uphold a past precedent is to create something anew.

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[85] *BT* 236.

Repetition restores the possibility of what was and renders it possible again anew.[86] To repeat a precedent is not to do an injustice to whatever-being. It is to reinforce and make possible the cultural fabric of the world that whatever-being can use to affirm its own singularity. The position of each court is difficult as they would no longer have recourse to recollecting self-referential foundations in precedent. Instead, precedent obliges decision-makers to recognise that as part of the cultural fabric of the world, it has helped shape whatever-being's way of being.

Every decision will therefore serve to show the experience of the limit of the law. This in turn serves to show, in Zartaloudis's language, the law's ownmost possibilities.[87] The fulfilled messianic law for Agamben is the state of law after the removal of the negative partitioning of Law and law.[88] The law's possibilities are its own as it no longer has recourse to self-referential justifications. What guides the court and the decision-maker is the figure of whatever-being. Every decision must affirm whatever-being's way of being. If a decision does this, then it will be ethical.

This form of precedent outlined is properly profane. It is profane as it is opened to new uses with every case that is decided by the law. This precedent returns to common use the potentiality that power had seized and precluded.[89] This potentiality can be used by whatever-being to found its own freedom.[90] As Agamben states:

> The freed behaviour still reproduces and mimics the forms of the activity from which it has been emancipated, but, in emptying them of their sense and of any obligatory relationship to an end, it opens them and makes them available for a new use ... The activity that results from this becomes a pure means, that is, a praxis that, while firmly maintaining its nature as a means, is emancipated from its relationship to an end; it ... can now show itself as such, as a means without an end.[91]

This form of precedent both lets whatever-being be, as well as being able to place whatever-being within a community of other whatever-beings.

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[86] Agamben, 'Difference and repetition: on Guy Debord's film' (n 49) 328.
[87] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 1) 280.
[88] ibid 281.
[89] *P* 77.
[90] Giorgio Agamben, 'On Potentiality' in *PT* 182.
[91] *P* 85-86.

It should be noted that this construction would not be possible without Levinas. Indeed, the above argument again goes to show Levinas's influence over Agamben. It is also important to note that Agamben's emphasis upon the absolute singularity of whatever-being does not appear to break with the philosophical tradition. Rather, it remains very close to extant approaches to ethical and legal reasoning, especially when the Agambenian form of precedent is considered alongside the figure of whatever-being. This similarity does call into question the necessity for Agamben's messianism. It is to these approaches and their implications that this chapter now turns.

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The Absolute Particular

What is problematic for Agamben's attempt to think the absolute singularity or the thing itself of whatever-being is that there are already theories of legal reasoning that attempt this. These existing approaches have the advantage of not having the philosophical drawbacks and *aporias* that this study has maintained are present in Agamben's thought. What this move aims to question is the claim from Agamben that the law and social structures are founded upon a negativity. If a form of reasoning that accords with Agamben's thought remains contains similarities with forms of thought that contain negative foundations, then a question can be legitimately asked about whether Agamben's messianism does render this negativity inoperative. This critique is developed in the final chapter of this thesis through a study of the implications of the hermeneutic nature of Agambenian legal reasoning.

Before these approaches are discussed and their similarities to Agamben's thought outlined, it is necessary to dwell upon the distinction between reasoning with the particular and reasoning with universals.

Universal Reasoning

A good description of reasoning with universals is given by Neil MacCormick. Scholars have praised MacCormick's work for providing an invaluable tool for judges that helps their decision-making.[92] MacCormick here is used as a foil to introduce theories of particularistic reasoning, and to illustrate the particularistic critique of reasoning with universals.

MacCormick's theory of legal reasoning concentrates on 'justification', and he argues that legal reasoning is about justification, giving good justifying reasons for decisions.[93] Legal reasoning is presented as the application of rules to facts. MacCormick's claim is that the justification of a legal decision is deductive in form. This form of deductive reasoning is presented as a syllogism that features legal rules as major premises and statements of fact as minor premises.[94]

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[92] See Torben Spaak, 'Guidance and Constraint: The Action-Guiding Capacity of Neil MacCormick's Theory of Legal Reasoning' (2007) 26 Law and Philosophy 343.

[93] Neil MacCormick, *Legal Reasoning and Legal Theory* (2nd edn, Clarendon Press 1994) 17. MacCormick links legal reasoning more widely to practical reason – see ibid 265, 272.

[94] See also Joseph Raz, 'Authority, Law and Morality' in Joseph Raz, *Ethics in the Public Domain* (Clarendon Press 1994) 210, 214-5.

MacCormick distinguishes three types of interpretative problems that cannot be solved by simple deductive reasoning. First, MacCormick identifies a problem relating to the ambiguity of meaning of one or more expressions in a legal norm. MacCormick classes this the problem of interpretation.[95] Secondly, MacCormick argues that not all legal problems involve interpretation of an existing legal norm, as some involve facts that are not covered by existing laws. This is termed the problem of relevancy.[96] Third, there is the problem of correctly classifying the facts of the case, as different rules may apply to different classifications. This is termed the problem of classification.[97]

In order to counteract these problems, and in order to guide the judge in reasoning, MacCormick places "universalisability" as central to legal reasoning.[98] In order for a judge to give an adequate decision in a case, the way a case is decided must be the way that every such case in the future is decided.[99] For MacCormick a universal rule is one that can be applied in any other like case. To state that rule x applies in situation α, and to state that x is universalisable means that x is true not just in situation α but also in every other case which is the same as α.[100]

For MacCormick in order for a case to be decided a universal rule needs to be formulated under which the facts of the case are to be subsumed. This will give a conclusion in the present case. As any ruling can be universalised, the judge will often be faced with more than one universal rule that could be followed in each case.

The individual judge's decision therefore has consequentialist elements, as there are always consequences to a decision that embraces universal elements. What is evaluated by the judge in a decision is not the individual decision but the consequences of the ruling about the points at issue.[101] MacCormick thus characterises his theory as a type of ideal rule utilitarianism,[102] with the judge

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[95] MacCormick, *Legal Reasoning and Legal Theory* (n 93) 65-8.
[96] ibid 68-72.
[97] ibid 93-7.
[98] ibid 75-6.
[99] Neil MacCormick, 'Particulars and Universals' in Zenon Bańkowski and James Maclean (eds), *The Universal and the Particular in Legal Reasoning* (Ashgate Publishing 2007) 3, 5.
[100] ibid 12.
[101] Neil MacCormick, 'The Artificial Reason and Judgement of Law' (1979) 2 Rechtstheorie Beiheft 105, 116.
[102] MacCormick, *Legal Reasoning and Legal Theory* (n 93) 104.

being concerned with the normative status of those consequences should they occur.[103] MacCormick recommends that the judge apply the relevant norm in accordance with its most obvious literal meaning, unless there is available a somewhat less obvious literal meaning and good coherence or consequence arguments support the less literal meaning.[104] The judge thus weighs the implications to law of each universal being adopted, and makes the decision accordingly.

While MacCormick admits that the court's ruling ought to be tested and justified in terms of the court's evaluation of its consequences (and that evaluation will always-already be a subjective process), a decision must be consistent with pre-existing laws. If a case is to be treated differently to previous cases this must be justified.[105] Judges should therefore decide cases only in accordance with rulings that are coherent with and supported by the existing body of law. Valid rules of law are justified or explained by reference to principles, which are norms of generality formed universal values.[106]

MacCormick's work may seem irrelevant in constructing an argument that claims Agamben's thought is similar to extant forms of particularistic reasoning. However, these forms of particularistic reasoning cannot be understood without explaining their critique of universalism. What this critique demonstrates is not that particularistic reasoning is preferable to universal reasoning. Rather, it demonstrates that Agamben's move to particularism is not as radical a break from the philosophical tradition as is made out.

Particularistic Reasoning

Contrary to theories of universal judgment, of which MacCormick's is a paradigmatic example, there exist theories of legal reasoning that argue that reasons for judicial decisions are particular in nature. These theories can be seen on a spectrum. They range from theories that maintain reasons for judicial decisions have facets of universal and particularistic reasoning, to theories that maintain that judicial reason is, or should be, based upon the particular characteristics of each case.

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[103] ibid 254.
[104] ibid 206.
[105] MacCormick, 'Particulars and Universals' (n 99) 17.
[106] Neil MacCormick, 'Argumentation and Interpretation in Law' (1993) 6 Ratio Juris 16, 28.

John Bell is a proponent of the former. Bell argues that particularism and universalism are held in relation to one another within an institutional setting.[107] Cases are heard within an institutional context with surrounding rules of procedure and adjudication that lend themselves to the creation of universal principles.[108] Whilst a decision may claim to be universalisable, it remains an ambition that is mediated through the particular. Thus the institutional setting requires a dialogue between established positions and a new set of facts, and it is these facts that are manifested in the specificity of individual facts. Bell argues that this is how legal rules are established and built.[109]

Scholars such as Bell have espoused a particularism that is always-already held in relation to a universal, or even a particular rule. This form of particularism presupposes a rule that it is subsumed by. This rule can either be universal (torture is absolutely prohibited under any circumstances) or particular (a decision will be unreasonable if no reasonable decision maker would have taken it).[110] As such, it still relies upon universalism, and does not yet come close to Agamben's form of reasoning with the singularity of whatever-being.

However, other writers have eschewed this formulation for forms of particularistic reasoning based upon the characteristics of each case. A starting place can be seen with Emilios Christodoulidis's argument that decisions are not grounded in universals, merely expressed by them.[111] In a manner akin to Agamben, Christodoulidis argues that universalisation, by missing the particular, will lead to injustices in the context of particular applications.[112] This is because Christodoulidis sees universalisation as providing justification *ex post facto*.[113]

A connection could even be drawn here between such *ex post facto* justification and Nancy's saying of right.[114] The legal order could be said to justify its own authority through universalising the judgment. This justifies the

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[107] John Bell, 'The Institutional Constraints on Particularism' in Bańkowski and Maclean (n 99) 39, 48-9.
[108] ibid 44-5.
[109] ibid 49.
[110] For examples of particular rules, in relation to the standard of 'unreasonableness' in judicial review, see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[111] Emilios Christodoulidis, 'Eliding the particular: a comment on Neil MacCormick's 'Particulars and Universals' in Bańkowski and Maclean (n 97) 95, 95.
[112] ibid 102.
[113] Christodoulidis, 'Eliding the particular: a comment on Neil MacCormick's 'Particulars and Universals' (n 111) 95.
[114] See Nancy, '*Lapsus Judicii*' (n 46) 154.

legal order's authority not just to act in the decided case, but it every future similar case as well. Universalisation could therefore be argued to be acting as a mask and sacralisation of law's negative foundations.

However Christodoulidis argues that the absolute particular of the singular individual cannot be recognised in any legal judgment. Christodoulidis sees law as an institution, and he reads the institutional achievement of law as entrenching certain generalisations in order to describe events so that social interaction and contestation can be accommodated in a system.[115] This allows for legal expectations to be created, but only at the price of introducing abstractions. These abstractions allow for legal expectations to be held and decided normatively by an impartial third party, the judge.[116] Thus Christodoulidis argues that a focus upon particularity would undo law as an institutional achievement.[117] The absolute particular can be invoked but it cannot be addressed in legal judgment.[118] Justice in the context of the law is seen by Christodoulidis as an attentiveness to the context of the application of norms, universals, and judgment. This in turn demands an attentiveness to the particularity of each application.[119] In other words, justice for Christodoulidis is an attentiveness to the particulars of each application of the legal norm, but such judgments cannot be reconciled with the absolute particular. An example of such a particular unable to be decided in a legal judgment is given by Christodoulidis as mercy, which has to be decided as an ethical, rather than a legal question.[120]

The main point of difference between Christodoulidis and Agamben is Christodoulidis's contention that it is not possible for the legal order to recognise the absolute particular. Agamben's messianic order would contend that the law, to be ethical, must recognise the absolute particular. If the absolute particular remains impossible to grasp by the legal judgment Agamben would surely claim that the legal order is being ordered by a negativity – namely the absolute

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[115] Emilios A Christodoulidis, 'The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular' (1999) 18 Law and Philosophy 215, 234-5.
[116] ibid 235.
[117] ibid 237.
[118] ibid.
[119] Christodoulidis, 'Eliding the particular: a comment on Neil MacCormick's 'Particulars and Universals' (n 111) 104.
[120] Christodoulidis, 'The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular' (n 115) 240-1.

particular that remains ungraspable by that legal decision yet acts as a call to justice.

Despite this difference, there are elements of Christodoulidis's work that are similar to the form of Agambenian legal reasoning this thesis has constructed. In particular, Christodoulidis's contention that justice demands an attentiveness to the particularity of each application does have a parallel to the messianic form of legal reasoning that sees justice as the law affirming whatever-being's singularity, which involves the weighing of twin obligations of the upholding of precedent or a legal rule and doing justice to the singular whatever-being before the court. To paraphrase Christodoulidis, it could be argued that the messianic decision-maker must be attentive to the particularity of each application of a legal norm or precedent to ensure that the decision affirms the singularity of whatever-being. This is not to suggest that Christodoulidis is influence by Agamben. Rather, it is further evidence to show that Agamben's thought does not break from the philosophical tradition he critiques.

Other academics have focused upon the judge, the decision-maker in each case, and analysed what would make an decision ethical. Zenon Bańkowski has attempted to focus upon the ethical life of the judge.[121] Bańkowski's focus is on a particular confronting a particular: a particular judge ruling on a particular case.[122] Bańkowski makes an important point. He argues that if a judge attempts to universalise a particular case they will lose that case's particularity. The individual singularity will become subsumed under a general rule and the judge ceases to conduct an ethical judgment.[123]

Agamben's form of precedent and legal reasoning can also be seen to mirror Bańkowski's argument. For Bańkowski the judge has to have responsibility to the individual before the court. By focusing upon subsuming the individual case to a universal or general rule the ethical relation cannot be realised, as the judge is not recognising the call of the singular other before the court.[124] However, it is important to note that the similarity between Bańkowski and Agamben can only be made once Agamben's thought is ameliorated with

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[121] Zenon Bańkowski, 'In the Judgment Space: The Judge and the Anxiety of the Encounter' in Bańkowski and Maclean (n 99) 23-38.
[122] ibid 25.
[123] ibid 26-7.
[124] Bańkowski, 'In the Judgment Space: The Judge and the Anxiety of the Encounter' (n 121) 26-7.

Levinas's writings on relationality. Without Levinas's writings on ethics, Agamben's judge would not be responsibility for the individual before the court.

This is not to state that Bańkowski's ethical approach is necessarily influenced by Levinas in any manner. Rather, what is suggested is that Bańkowski's ethicised judge is similar to the ethicised decision-maker constructed in relation to Agamben using Levinasian ethics and relationality. This further calls into question the originality of Agamben's messianic move.

Bańkowski is not alone in constructing an ethicised lawmaker. A similar argument has been made by Michael Detmold. Detmold argues that decision making is based upon a "radical particularity".[125] Detmold sees each individual as radically particular. Agamben would surely agree with this, given his construction of whatever-being. Detmold argues that the very existence of the radically particular individual, in the sense that we are all different, demands that a rule's application must be justified each and every time with reference to the individual it is being applied to.[126]

The space for judgment in each case has been characterised by Detmold as a "particularity void".[127] This is the space between a rule and its application where a judge is existentially alone and has to make a decision.[128] This particularity void is of importance to Bańkowski's argument. Bańkowski references Simone Weil, and her concept of 'attention', which he argues is needed for judging in the judgment space:

> Attention consists of suspending our thought, leaving it detached, empty, and ready to be penetrated by the object; it means holding our minds within reach of this thought.[129]

The object here is the radically particular individual. It is in Detmold's particularity void that the particular individual's call can be responded to and an ethical dimension introduced into the act of decision making in the legal case. Bańkowski is surely correct to outline the dangers of the judge subsuming cases under universal rules like a "robojudge".[130] Bańkowski aims to site this ethical

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[125] Michael Detmold, 'The End of Morality: Radical and Descriptive Particularity' in Bańkowski and Maclean (n 99) 81, 83-6.
[126] ibid 86.
[127] Michael Detmold, 'Law as Practical Reason' (1989) 48 Cambridge L J 436, 457.
[128] ibid.
[129] Simone Weil, *Waiting for God* (Harper Row 1951) 111.
[130] Bańkowski, 'In the Judgment Space: The Judge and the Anxiety of the Encounter' (n 121) 34.

decision within an institutional order that is governed by norms. This still relies upon universals to structure the judge's reasoning.[131]

Likewise Detmold relies upon universals, even though he observes that law is particular, not universal.[132] There is no theory of particularity for Detmold. The common law can judge the individual based upon the Kantian notion that each individual is an end in themselves.[133] However Detmold cautions that despite the common law dealing with the particular history of each individual the particular person may "slip beneath every description".[134] Although the individual provides the basis for a legal judgment, that legal judgment is still dependent upon a rule that is generally applicable, what Detmold terms "descriptive particularity".[135]

Both Bańkowski and Detmold place a focus on the particular of the individual at the centre of their legal reasoning. This view can be seen as according with Agamben's contention that ethics is reachable only through a focus upon the unique individual. Bańkowski and Detmold also share a focus upon the institutional nature of law. This again reflects Agamben's thought. As this chapter has argued, an Agambenian legal reasoning would be based upon both the call of whatever-being as well as the ethical obligation posed by precedent. Precedent presupposes legal institutions. This point is important, as Agamben's messianic law must accommodate such institutions. As Zartaloudis describes, a messianic legal order:

> would not eliminate the need for positing laws, nor for norms and judgment but, for once, the law will be understood as not always-already returning to its own presupposed … unity of transcendence and immanence.[136]

Law as an institution must continue to exist in the messianic world. However, Bańkowski and Detmold are not isolated examples of writers whose conception of legal reasoning retains a similarity to Agamben's. Costas Douzinas and Ronnie

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[131] ibid.

[132] Detmold, 'The End of Morality: Radical and Descriptive Particularity' (n 125) 92.

[133] It is here that Detmold explicitly disagrees with Nigel Simmonds. See Nigel Simmonds, 'Judgment and Mercy' (1993) 12 OJLS 52, 66.

[134] Detmold, 'The End of Morality: Radical and Descriptive Particularity' (n 125) 91.

[135] ibid 82-4.

[136] Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (n 1) 281.

Warrington, in attempting to theorise the introduction of justice into legal decision-making and law, describe:

> A judge [that] is always involved and implicated, called upon to respond to the ethical relationship when he judges.[137]

Equally Marinos Diamantides in the context of medical law conceives of a justice whose agents:

> Substitute themselves for-the-other, in pure emotion which they cannot withhold, and so to 'put themselves in the other's place'.[138]

Drucilla Cornell has gone further than Bańkowski in one respect. Cornell has identified the notion of an ethical judgment in recorded cases, most famously the Supreme Court decision of *Roe v Wade*.[139] Thus Cornell does not just posit what a judge should do. Rather, Cornell has attempted to find examples of such ethical responsibility in existing case law.

What this analysis suggests is that the approach of messianic legal reasoning to focus upon the singular individual before the court is shared by other thinkers who focus upon particularistic reasoning. This argument further casts doubt over Agamben's originality and the implications for his critique. Rather than breaking from the philosophical tradition, Agamben can be seen as part of the tradition he tries to transcend.

Precedent and Hermeneutics

It is through this critique of Agamben that another important issue is raised: the question of hermeneutics. Both the Agambenian form of reasoning and the theories of particularism outlined in this chapter construct their analyses upon two key premises.

The first premise relates to the legal judgment itself. All the forms of reasoning outlined presuppose an encounter between the decision-maker and the individuals within the court case. For Agamben, the ethical decision treats the whatever-beings before the court as unique singularities. As has been argued, this

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[137] Costas Douzinas and Ronnie Warrington, *Justice Miscarried: Ethics and Aesthetics in Law* (Harvester Wheatsheaf 1994) 184.

[138] Marinos Diamantides, *The Ethics of Suffering: Modern Law, Philosophy and Medicine* (Ashgate 2000) 167.

[139] Drucilla Cornell, *The Philosophy of the Limit* (Routledge 1992) 147-54; *Roe v Wade*, 410 U.S. 113 (1973) (Supreme Court of the United States).

form of reasoning can be reconciled with a continuation of the doctrine of precedent. Precedent should be treated as part of the world into which whatever-beings are thrown and find their own way of being. As such, precedent can be upheld by the court in an ethical decision.

This leads on to the second premise. Agamben's messianic law, as explained by Zartaloudis, does not affect the existence of norms or judgment. Therefore, there will still be a need for a concrete legal judgment in order to reach an ethical decision. The ethical decision in Agamben's work is not a mechanical occurrence. This view is reflected in those other writers who focused upon particularistic reasoning. Agamben's messianic law presupposes a legal judgment in a legal order comprising of legal norms and whatever-beings. This in turn means that the decision-maker, in order to reach the ethical decision, will have to reconstruct and interpret legal norms and precedent in order to do justice to whatever-being. This appears to place the legal decision squarely within the field of hermeneutics.

That this position can be reached is problematic for Agamben. Agamben's critique of the legal order and legal reasoning is based upon the exception and its operation. Agamben's exception is left open to a hermeneutic challenge that it cannot easily answer. Agamben does not afford a sympathetic reading to the school of hermeneutics. This can be traced to his attempt to render the hermeneutic circle in Heidegger inoperative. This challenge questions whether Agamben can resolve his work with the hermeneutic school, and whether Agamben has done justice to the practice of law.

Conclusion

This chapter has set out to explicitly develop and extend the implications and framework of Agamben's thought into an area that has not been covered by his writings, namely legal reasoning. In so doing, this chapter has attempted to construct a form of legal reasoning that remains broadly in line with Agamben's stated political and philosophical aims. Importantly, this chapter has also sought to tease out the contradictions and inconsistencies within the implications of Agamben's thought and ameliorate them.

One such inconsistency has been the doctrine of precedent, which Agamben's writings have not touched upon and demonstrated a level of ignorance towards. In order to make it possible for Agamben's messianic politics to be reconciled with the doctrine of precedent, Agamben's thought has to be ameliorated through the application of Levinasian ethics. That the doctrine of precedent should be retained in a messianic legal order is also something that this chapter has argued. Through a hermeneutic analysis of Agamben's messianism, it is contended that a messianic legal order cannot do away with *stare decisis*, as Agamben argues that messianism involves a small shift in thinking, and to remove precedent would involve a major legal revolution.

In addition it has been argued that an extension of Agamben's thought shows that a messianic form of legal reasoning not only cannot do away with precedent but must rely upon precedent in its operations. Precedent has been re-cast as part of the fabric of the world within which whatever-beings dwell. This chapter has argued precedent should be seen as part of the background to their coming community. If precedent were ignored completely, then the law would also be ignoring part of the unique singularity of whatever-being, which has been shaped by that self-same legal order.

However, it should be reinforced that it has not been possible to counter this *aporia* within Agamben's thought and make these political moves without a reliance upon Levinas's writings on relationality. This is seen to correct perceived deficiencies in Agamben's political thought, which is notoriously deficient in respect of how whatever-beings relate to one another. In turn this analysis has lent further credence to the claim that Agamben has laboured under a Levinasian

influence. This makes Agamben's brief dismissal of Levinas all the more surprising and puzzling.

Perhaps the most important facet to arise out of this extension of Agamben's thought into the field of legal reasoning has been the conclusion that a form of reasoning that accords with Agamben's thought appears to be hermeneutic in nature. This, it is argued ultimately leads back to the door of Martin Heidegger, and to the uncharitable interpretation given to Heidegger's hermeneutics by Agamben. It is this to a hermeneutic critique of Agamben that the final chapter of this thesis turns, arguing that this critique stems directly from Agamben's treatment of Heidegger.

Chapter 7: Agamben and Hermeneutics

The final chapter of this thesis returns to the question of hermeneutics that was developed in the fourth chapter. This chapter's focus upon hermeneutics is quite deliberate and precise. A comprehensive study and application of hermeneutics to Agamben's thought is not attempted. Rather, aspects of hermeneutics are used as a lens with which to view Agamben's thought. This allows for connections to be drawn between relationality and Agamben's immanent project, which has been discussed and extended in the previous two chapters.

The previous chapter constructed a messianic form of legal reasoning that remained charitable to Agamben's thought. This thesis, through extrapolating Agamben's thought, has argued that the *aporia* of relationality in Agamben's works can only be resolved through the application of Levinasian ethics. What is more, Agamben's works demonstrate an anxiety of influence from Levinas, denying all influence from Levinas yet at the same time anxiously trying to distance his thought and own ethics from Levinas. This is ultimately unsuccessful, as the figure of whatever-being and the messianic legal order presupposes a relationality that it requires to reach an ethical decision. Therefore, in order to reconstruct Agamben's ethics into a form of political belonging that remains charitable to Agamben's aims these *aporias* need addressing.

This chapter relates the arguments made in relation to Agambenian legal reasoning back to arguments made in relation to Agamben's philosophy. Specifically, this chapter focuses Agamben's relation to the school of hermeneutics. The reasons for this relate to the fact that hermeneutics are central to any form of legal reasoning where the decision-maker must interpret laws and norms in order to do justice to whatever-being. As such, hermeneutics join together the extrapolation of Agamben's thought into the sphere of legal reasoning and the investigations and analysis of Agamben's ontology. This chapter contends that Agamben has caricatured hermeneutics in his works. The position accorded to hermeneutics within the messianic legal order is traced back to Agamben's attempt to break free of Heidegger's thought.

It is through viewing Agamben's critique of legal decision-making that the connection between hermeneutics, Heidegger and Agamben can be seen. Agamben's messianic thought rests upon a view of the extant legal order as

embodying a foundational negativity. Agamben has maintained that this foundational negativity is transmitted through the exception. It is contended that if Agamben's conception of the exception can be challenged, then this undermines his argument of the necessity of positing a messianic legal order.

Agamben's critique of foundational negativity is driven by his aim to formulate a non-relational political and legal order. Agamben traces this negativity to Heidegger's hermeneutic circle. This leads to Agamben seeing the hermeneutic circle as transmitting this negative foundation. However, Heidegger's hermeneutic circle is closely connected to his writings on relationality. This connection leads to Agamben attempting to eschew relationality in his messianic thought. Again a connection can be made with the previous chapters, whose discussion of relationality and Levinas have critiqued Agamben's messianic thought. This chapter again adopts an analytic approach to tease out the implications of Agamben's treatment of hermeneutics, as well as offering conclusions relating to his political and ethical aims and whether they are realisable.

This view of hermeneutics is argued to colour Agamben's own critique of law and reasoning with law. Agamben's construction of the exception does not do justice to either the role of hermeneutics within the legal order or the complexities of legal practice. Agamben's exception is integral to Agamben's project. It is the exception that is supposed to show the necessity of messianism.

It is through viewing the exception and its operation that this chapter can connect the research undertaken on Agamben's philosophy and Agambenian legal reasoning.

This chapter makes three arguments. The first argument maintains that this construction of Agamben's exception foresees the judge having recourse to a Schmittian decision leading to the creation a *homo sacer* and the transmission of law's ineffable foundation. Agamben's exception, if interpreted broadly, potentially claims that any interpretative decision that relies upon hermeneutics could create *homo sacer*. The only way for Agamben to counter this potential is through a focus on the singularity of whatever-being. However, in viewing the figure of *homo sacer*, parallels can be drawn between whatever-being and *homo sacer*. It is contended that *homo sacer* constitutes the figure of whatever-being. As such, this does call into question Agamben's aim to posit an ethical existence. It

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does so as Agamben's thought, as it stands, appears to follow the same negativity that he critiqued so heavily.

The second argument builds upon the messianic form of legal reasoning constructed in the previous chapter. It is contended that this messianic form of legal reasoning is *hyper-hermeneutic*. This neologism is coined deliberately. Agamben is immersed within the hermeneutic tradition. However Agamben sees the possibility of deactivating the hermeneutic circle through his paradigmatic method. Agamben's paradigmatic method and its consequences are developed by this chapter. The consequences of this method lead to the conclusion that this focus on the paradigm and a messianic legal order allows Agamben to wrest the hermeneutic tradition away from self-referential foundations towards the singularity of whatever-being. In this manner Agamben attempts to break free of the tradition he critiques. However this hyper-hermeneutic method appears to give rise to a deterministic and distinctly unethical approach to reasoning with the law, and it is suggested that this cannot be reconciled with the ethical aims that underpin Agamben's philosophy.

The third argument maintains that this hyper-hermeneutic move can ultimately be traced back to Agamben's treatment of Heidegger. Agamben's critique of the hermeneutic circle is argued to be based upon a misreading of Heidegger and of the role relationality plays within hermeneutics. As such, in order to challenge the *aporias* that have been traced in Agamben's political thought, it is suggested that Agamben's thought has to admit of a relationality in order to give rise to an ethical form of reasoning and politics. The consequence of Agamben's defence of a messianic law helps to reveal another critique of Agamben's effacing of relationality, this time grounded in Heideggerian hermeneutics. Ultimately, the only way to ensure Agamben's politics do not remain deeply unethical is to reconcile them with relationality, which involves a reconsideration of Agamben's treatment of Levinas and Heidegger.

The Exception and Hermeneutics

Throughout this thesis, reference has been made to the exception and its place within Agamben's thought. One of the main aims of this study has been to think of the exception as far more than a constitutional response to an emergency. The exception is linked directly to the foundational negativity that Agamben traces to the very definition of life itself. Through an interrogation of Agamben's form of messianic law it has been maintained that Agamben's thought, far from being non-relational, actually relies upon a presupposition of relationality. This has been supported with reference to the thought of Emmanuel Levinas.

What is contended in this chapter is that in applying Agamben's thought to the sphere of legal reasoning further connections can be made to Agamben's philosophy, specifically his treatment of Martin Heidegger. Agamben's philosophical misreading of Heidegger underwrites his messianism. It is through the exception that the research on legal reasoning can be related back to the research undertaken on philosophy.

It is the exception that connects the legal decision to the creation of *homo sacer*. It is also the exception that lends credence to the notion that a messianic law is needed to deactivate the negative relation the legal order is trapped within. Finally it is through the exception that Agamben's lack of emphasis upon hermeneutics within his critique of foundationalism can be related back to his attempt to found an immanent ontology.

The Exception and Legal Reasoning

Agamben contends that it is not possible to logically reconcile a universal, or norm, with a particular, or the application of a norm. This contention forms a basis for Agamben's critique of the legal order. As Agamben states:

> In the case of the juridical norm, reference to the concrete case entails a "trial" that always involves a plurality of subjects and ultimately culminates in the pronunciation of a sentence, that is, an enunciation whose operative reference to reality is guaranteed by the institutional powers.[1]

It is through the exception that two connections can be made obvious. First, Agamben's argument also reflects an affinity with the work of Nancy, covered in

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[1] *SE* 39-40.

previous chapters. The saying of right in respect of ineffable foundations is seen in this passage on the trial. The saying of right reconciles a norm to the concrete case.[2] Secondly this is fundamentally a practical activity. This makes clear that the exception itself is a hermeneutic exercise. Agamben goes on with reference to the work of Hans-Georg Gadamer:

> As Gadamer has shown, not only is every linguistic interpretation always really an application requiring an effective operation ... but it is also perfectly obvious ... that, in the case of law, the application of a norm is in no way contained within the norm and cannot be derived from it.[3]

Agamben here is referring to Gadamer's insights into to the role hermeneutics plays in the judge's decision. By looking at Gadamer's thought, it is possible to see how Agamben equates the exception with hermeneutics. Gadamer states that legal hermeneutics give us:

> The model for the relationship between past and present ... The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision.[4]

Agamben here follows Gadamer in stating that the judge, in applying the norm to the concrete case, carries out a practical task.

This involves an interpretation of the law, the legal norm at issue. The judge is aiming to seek a valid meaning for the norm's application. This cannot be done solely through logic for Gadamer, but rather through discovering and recognising a valid meaning for that norm.[5] Therefore Gadamer's hermeneutics does not involve a logical application of a norm to a set of substantive facts. The idea of a purely logical operation of legal reasoning is untenable; it is not possible to make every judgment a mere act of subsumption.[6]

The judge as decision-maker has to meditate upon the legal significance of the decision. This meditation always-already involves interpretation. Gadamer explains the importance of interpretation thus:

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[2] This can also be connected to chapter 4 where Agamben interrogates the structure of the oath. For Agamben, what is oath says, is. In a similar way, the legal judgment can be seen as a juridical oath, pronouncing upon the relation of norm to reality.

[3] *SE* 40.

[4] Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G Marshall trs, 2nd edn, Continuum Books 2006) 324.

[5] ibid.

[6] ibid 326.

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> The work of interpretation is to concretize the law in each specific case -
> i.e., it is a work of application. The creative supplementing of the law that
> is involved is a task reserved to the judge, but he is subject to the law in
> the same way as is every other member of the community. It is part of the
> idea of a rule of law that the judge's judgment does not proceed an
> arbitrary and unpredictable decision, but from the just weighing up of the
> whole.[7]

In order to make sense legally, the judge must interpret the application of the
norm with respect to the weighing up of the legal tradition. Gadamer sees the
judge like an interpreter. Like an interpreter, the judge must immerse themselves
in the text and tradition before them. The legal tradition is already given to the
judge, and it is from the decision-maker's being rooted within this given tradition
that the decision-maker's interpretation must arise.[8] Gadamer traces this tradition
to the doctrine of precedent:

> Thus it is an essential condition of the possibility of legal hermeneutics
> that the law is binding on all members of the community in the same
> way.[9]

This brief overview of Gadamer's contentions relating to legal hermeneutics may
seem unrelated to Agamben's works on violence and *homo sacer*.

Despite this there are statements of Agamben's that suggest that Agamben
sees the exception as tied to hermeneutics:

> Between the norm and it application there is no internal nexus that allows
> one to be derived immediately from the other ... the impossible task of
> welding norm and reality together, and thereby constituting the normal
> sphere, is carried out in the form of the exception, that is to say, by
> presupposing their nexus.[10]

The exception holds the norm and its application together. It appears as though the
very acts of the judge or decision-maker that Gadamer described are, for
Agamben, no more than instances of the exception.

This has implications for both Agamben's messianism and his critique of
the legal order. The emphasis that Agamben has placed upon a messianic law and
singularity of whatever-being is made clear when Agamben explains that the

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[7] ibid 325-6.
[8] ibid 325.
[9] ibid.
[10] *SE* 40.

exception is needed for every decision that attempts to reconcile a norm and its application:

> The state of exception is the opening of a space in which application and norm reveal their separation and a pure force-of-law (without law) realises ... a norm whose application has been suspended ... In every case, the state of exception marks a threshold at which logic and praxis blur with each other and a pure violence without *logos* claims to realise an enunciation without any real reference.[11]

By placing the exception at the heart of every judicial decision Agamben reinforces the need for a messianic legal order. The exception transmits the negative foundations of law through a saying of right. However, this also has a far greater consequence in relation to the ability of sovereign power to create bare life.

Bare Life, Interpretation and Hermeneutics

Agamben maintains that the originary negativity of the law and language leads to the creation of bare life, human waste, *homo sacer*. Agamben traces the point of emergence of bare life to Aristotle's distinction between *bios* and *zoē*.[12] It is through tracing a genealogy and archaeology of *homo sacer* that Agamben can argue that *homo sacer* persists into modernity.[13]

Agamben's arguments relating to *homo sacer* are based upon a reading and an understanding of historical sources that remains grounded in hermeneutics. This has involved interpreting and reinterpreting past texts to unconceal their influence on the present. This position views the past as being in continuity with the present.

It is clear that Agamben sees his work as immersed within the hermeneutic tradition. In *What is an Apparatus?* Agamben noted, with respect to reading the works of Foucault, that:

> Whenever we interpret and develop the text of an author in this way, there comes a moment when we are aware of our inability to proceed any further without contravening the most elementary rules of hermeneutics.[14]

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[11] ibid.

[12] *HS* 1.

[13] ibid 71; Peter Fitzpatrick 'Bare Sovereignty: *Homo Sacer* and the Insistence of Law' in Andrew Norris (ed), *Politics, Metphysics and Death: Essays on Giorgio Agamben's* Homo Sacer (Duke UP 2005) 49, 67-8.

[14] *WA* 13.

However, despite being immersed within the hermeneutic tradition, Agamben's writings on the exception and *homo sacer* radicalise the position of hermeneutics within the legal order. Agamben sees hermeneutics as leading to a completely indeterminate law. This can be explained with reference to the exception's characteristics.

The exception operates as a radically destabilising force that introduces indeterminacy into the law. This indeterminacy is introduced into every potential meaning of a legal norm. It is worth recounting Agamben's most controversial claim regarding the exception. For Agamben, the exception means that:

> The normative aspect of law can … be obliterated and contradicted with impunity by a governmental violence that – whilst ignoring international law externally and producing a state of exception internally – nevertheless claims to be applying the law.[15]

If the exception is a necessary part of every legal decision as Agamben states, then every legal decision made by the judge would be indeterminate. This conclusion can be reached as potentially any legal action taken in the exception can gain legal force.[16] The force-of-law (without law) allows any act to gain legal force, as it is appropriable by anyone for any reason.[17] Thus, the exception could render all legal norms indeterminate. Any interpretation of a legal norm could be rendered legal, and any interpretation of a legal norm can lead to the creation of bare life.[18]

An immediate problem arises with this argument relating to the role of adjudication within such a legal order. Although the creation of bare life remains based upon a sovereign decision, this contention can be cast in new light with reference to Agamben's writings on *oikonomia*. As has been seen, Zartaloudis has read Agamben as arguing in *Il Regno e la Gloria* that it was *oikonomia* that structures sovereignty, not sovereignty that structures *oikonomic* government. Government apparatuses therefore make decisions and justify them with recourse to an ineffable, ungraspable sovereign realm that in turn provides government with the authority to act.

In particular, this reading of Agamben's argument infers that judicial reasoning and the operation of law in a democratic State would form part of the

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[15] *SE* 87.
[16] ibid 23, 50.
[17] ibid 38.
[18] ibid 51.

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oikonomic governmental apparatus that creates bare life.[19] If Agamben's arguments are accepted at face value, then there are huge implications for any questioning of judicial adjudication, namely how judges reason in making decisions.

Agamben's construction of the exception appears to grant judges the potential of an unlimited discretion in interpreting the law, as the exception could legalise any such interpretation. This would have to include those ways of interpreting legal norms that lead to murderous results.

Agamben's approach encompasses the danger of reducing hermeneutics into the operation of the exception. Agamben does not account for, or even attempt to account for the various factors and influences that bear upon judicial decision-making. Instead, the exception operates in every decision.[20] What is more, if Agamben's arguments are accepted, it is the exception that leads to the creation of bare life, *homo sacer*.

It is perhaps useful at this point to return to an argument forwarded against Agamben that was detailed in the second chapter of this thesis. This argument charges Agamben's thought as deterministic. The implications of the exception appear to lend credence to this charge made against Agamben.

Bare Life and Determinism

A charge of determinism may have some weight against Agamben. This thesis has defended Agamben against a charge of determinism so it may strike the reader as strange that such a charge is now being given weight. It is useful at this point to summarise the charge of determinism that has been made against Agamben and defended in this thesis.

Ernesto Laclau raised the charge of determinism against Agamben in relation to Agamben's paradigmatic method. Laclau accused Agamben of presenting a view of modernity that represents "political nihilism".[21] Laclau's arguments were countered with the observation that Laclau reads Agamben's construction of *homo sacer* as not being able to be countered by any means. This

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[19] *RG* 157, 187.
[20] *SE* 40.
[21] Ernesto Laclau, 'Bare Life or Social Indeterminacy?' in Matthew Calarco and Steven DeCaroli (eds), *Giorgio Agamben: Sovereignty & Life* (Stanford UP 2007) 19-22.

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was argued not to be the case. Agamben's paradigms stand as examples of the emancipatory possibilities that can be grasped today.

Leland de la Durantaye was correct to state that Agamben's entire philosophy should not be dismissed as deterministic.[22] This thesis still supports this view. Agamben's thought as a whole is not deterministic. Agamben's thought does not presuppose a negativity that can never be deactivated. It can be argued that Agamben's messianic thought stands as an attempt to provide a new political and philosophical basis for human existence. Agamben messianic figure of whatever-being aims precisely to render the negativity that underpins political and social structures inoperative.

However, this does not mean that Agamben does not come close to determinism in aspects of his thought. In particular, this charge of determinism is argued to have weight in respect of the creation of *homo sacer*. Agamben's treatment of the legal order's operation fails to do justice to the order's complexities. By presenting a simplified account of the operation of the legal order, Agamben's works fails to account for exactly how *homo sacer* is created. Because of this, Agamben's work appears to suggest that *homo sacer* is created deterministically, or at the very least arbitrarily.

Agamben does not explain how bare life is realised. Nor does he explain by what criteria bare life is created. Agamben does not explain how the individuals within a legal order act to bring about the existence of *homo sacer*. It appears that any decision that attempts to reconcile a norm with its application could create *homo sacer*.[23]

As a result, *homo sacer*'s actualisation could be seen as being deterministic as well as indeterminate. What is meant by this is the following. The exception's occurrence appears determinate, as any and every as of interpretative reasoning must involve the exception. By extension, as the exception gives rise to *homo sacer* it must follow that any and every act of interpretative reasoning can potentially give rise to *homo sacer*'s occurrence.

However the realisation of *homo sacer* is indeterminate. There are no criteria given by Agamben to show when the figure of *homo sacer* is created. In

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[22] Leland de la Durantaye, *Giorgio Agamben: A Critical Introduction* (Stanford UP 2009) 220-1.
[23] *SE* 26-7.

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this sense then there is no way of telling when *homo sacer* will be actualised. What appears to determine *homo sacer*'s actualisation is completely arbitrary.

Homo sacer is at the same time a determinate outcome of the negativity that underpins the definition of the human being, as well as being indeterminately created. *Homo sacer* could therefore be said to be a spectre that haunts every legal decision. Agamben's writings do not contend that *homo sacer*, bare life, is actualised in every single legal decision. However, Agamben does indicate that *homo sacer* is actualisable.[24] In one sense, *homo sacer* must be actualisable in order to remain consistent with Agamben's use of paradigms as historically singular examples.[25] This lack of detail on the creation of *homo sacer* leads to an *aporia* that Agamben himself appears to admit of:

> It is on the basis of these uncertain and nameless terrains, these difficult zones of indistinction, that the ways and the forms of a new politics must be thought.[26]

The very basis of the messianic politics to come seems to be based upon an uncertain terrain. This uncertain terrain relates to the figure of *homo sacer*. As we have seen, this uncertainty arises as it is not clear when or how *homo sacer* is created. The only certain matter with Agamben's thought is that *homo sacer* is created. It is in this way that *homo sacer* can be said to embody a form of determinism and arbitrariness. Agamben admits that the examples he provides of *homo sacer* can appear arbitrary.[27] It does appear as though Agamben, having shown the negativity that grounds the human being, feels as though it is not necessary to explain how *homo sacer* is created. As Agamben argued with respect to Foucault's conception of resistance:

> The "body" is always already a biopolitical body and bare life, and nothing in it or the economy of its pleasure seems to allow us to find solid ground on which to oppose the demands of sovereign power.[28]

A connection can be made to a weakness of Agamben's radicalisation of Foucault's paradigmatic method.[29] As de la Durantaye argued, it is Agamben's insistence that paradigms can be both concrete historical instances as well as

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[24] *HS* 123-5, 127-35, 183-8; *MWE* 43-4, 140-1.
[25] ibid 186-7.
[26] ibid 187.
[27] ibid 186.
[28] ibid 187.
[29] de la Durantaye (n 22) 226.

representing broadly philosophical concepts that appears to form the biggest objection to his thought.[30] It is Agamben's use of the figure of *homo sacer* as a concrete historical figure as well as representing the foundational negativity of human existence that has led to a lack of an explanation of how *homo sacer* is created by the legal decision. Such an *aporia* needs to be explained in order for the charge of determinism to be answered.

Agamben's argument ultimately rests upon his paradigmatic contentions relating to the existence of bare life and the fundamentally negative grounding of the human being. If these arguments are not accepted, then by extension the contention that legal reasoning will lead to the creation of the exception must be doubted.

Due to this *aporia* within Agamben's construction of the exception, his thought is currently left open to the criticism that he has it both ways. Agamben both maintains that bare life haunts every decision yet is not always produced in every decision. Such a position appears insulated against criticism as there is an answer to every challenge. If a legal decision creates bare life, Agamben can use this as evidence of the originary negativity at the heart of the law. Likewise, if a legal decision does not lead to the creation of bare life, then this too does not defeat Agamben's thesis.

This *aporia* at the heart of the creation of *homo sacer* has two important consequences. Firstly, it opens Agamben up to a critique that his conception of legal reasoning is a caricature of hermeneutics. Agamben's work and thought can be read as implying that a decision-maker can decide a case in any way that they see fit. The exception, present in every interpretative instance, allows the decision to gain the force-of-law and therefore become legal. More than this, the decision-maker appears to be able to arbitrarily create *homo sacer* through the exception. There appears to be no constraints upon the interpretative potential of the decision-maker. This form of reasoning does not just caricature hermeneutics. It also has a distinctly Schmittian undertone. Agamben's thought seems to infer that judges exercise a fundamentally Schmittian form of decision-making. Judges are free to act in a way that is contrary to both past decisions, legal traditions and

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[30] ibid 220.

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precedent. Paraphrasing Schmitt, the judge is sovereign as he decides the case with the exception.

It is this caricatured position that leads on to the second main consequence for Agamben's thought. The potential determinism that underpins the creation of *homo sacer* can be seen to be necessary for Agamben's messianic thought. Agamben's move to the figure of whatever-being and a non-relational politics is premised upon the existence of *homo sacer*. Therefore, it can be said that Agamben's messianic move is grounded upon a deterministic creation of *homo sacer*. It is to the relation between *homo sacer* and whatever-being that this chapter now turns.

Homo Sacer *and whatever-being*

Whatever-being is the form-of-life that exists within the messianic legal order. Agamben has insisted upon the messianic legal order being similar to the current biopolitical legal order.[31] This position may appear almost nonsensical given the critique of Agamben's determinism outlined in this chapter. However, it is contended that this critique of determinism within the creation of *homo sacer* reveals a relation that exists between whatever-being and *homo sacer*.

Agamben sees the potential for an ethical decision based upon whatever-being's singular way of being. This can be reconciled with Agamben's contention that the messianic legal order remains similar to the biopolitical legal order. In fact, it must remain similar given Agamben's statements implying a relation between *homo sacer* and whatever-being.

These statements can be found throughout Agamben's works. Agamben has termed whatever-being a form-of-life, "in which it is never possible to isolate something like naked life".[32] This position suggests a deep connection between bare life and the form-of-life of whatever-being. Bare life is not overcome by Agamben's messianic move, but appears to become that very immanent form-of-life:

> [W]e give the name form-of-life to this being this is only its own bare existence and to this life that, being its own form, remains inseparable from it.[33]

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[31] *CC* 43.
[32] *MWE* 9.
[33] *HS* 188. See also *RA* 163-4.

This connection between whatever-being and *homo sacer* is complicated by Agamben's emphasis upon a non-relational thought. This thesis has contended that a problem with Agamben's non-relational ethics relates to the decision-maker. This problem continues in the messianic legal order.

If a decision-maker makes a truly non-relational decision then their decision will always-already be a Schmittian decision. This is because a truly non-relational decision would not take into account whatever-being's singularity. To do so would be to admit of a relation between the decision-maker and whatever-being. Agamben's non-relational thought precludes this position from being adopted. Instead, in a non-relational legal order the decision-maker again appears left with their own discretion as to how the case should be decided.

The previous chapter contended that in order to resolve this *aporia* the messianic decision would have to involve a relation between whatever-being and the decision-maker. The previous chapter also constructed a form of legal reasoning that remained charitable to Agamben's thought. Such a form of reasoning could accommodate a doctrine of precedent. This is the case as the doctrine of precedent forms the background of the world into which whatever-beings are thrown, and in which they constitute their existence. Therefore, the messianic legal order contains the doctrine of precedent, as well as laws and legal norms, just as the biopolitical legal order does. Furthermore, both legal orders contain a relation between the decision-maker and the individual before the court.

Such an approach poses a further problem that relates to the adjudication of cases within the messianic legal order. The figure of whatever-being renders *homo sacer* inoperative. However, as Zartaloudis has noted, the messianic legal order, in presupposing legal norms, also countenances situations where bad decisions and judgments are made by a decision-maker.[34] This possibility opens up another line of inquiry – if a decision-maker does not decide a case according to the singularity of whatever-being, is *homo sacer* created? In other words, does *homo sacer* remain in a continual relation with whatever-being, remaining the condition of its possibility should legal judgment fail? It is posited here that this is the implication of Agamben's thought.

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[34] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge 2010) 282.

However, whatever-being needs *homo sacer* in order to provide the reasons for its existence; *homo sacer* constitutes whatever-being's existence. Agamben's messianism may aim to deactivate *homo sacer*, but this does not mean that *homo sacer* will not be actualised within such an order. Even after the messianic completion of law *homo sacer* appears to remain in a deactivated relation with whatever-being. Such a situation provides further support for the contention of Lorenzo Chiesa that whatever-being is a positive form of *homo sacer*.[35] *Homo sacer* remains the condition of possibility of legal judgment.

Whatever-being remains inseparable from its own existence. The ethical decision would have to respect whatever-being's way of being. This position infers that should the decision-maker decide the case on grounds other than the singularity of whatever-being, then the decision-maker raises the spectre of bare life being created. *Homo sacer* seemingly reminds decision-makers what can arise if a decision is not made ethically, according to whatever-being's way of being.

That this conclusion can be reached can be supported by reference to Agamben's exception. Following on from Agamben's definition of the exception in *State of Exception*, it appears that any reliance upon universals necessarily introduces the exception into law.[36] Likewise, any interpretative attempt to reconcile a norm to its application leads to the exception.[37] A norm here does not necessarily need to equate to a universal or universalisable value. It is possible to reason with legal norms that are particularistic in nature.[38] Agamben's exception appears to apply to any legal norm. It should not be restricted to universal forms of reasoning. From the breadth of Agamben's arguments it appears that there are no exceptions to the scope of the application. All hermeneutic reasoning, whether conducted with universal norms or particularistic norms, can lead to *homo sacer*. Therefore such reasoning, if adopted by the decision-maker in the messianic legal order, could lead to *homo sacer* being created.

This further intimates that the exception could remain as a condition of possibility in even a messianic legal order. As such, any exercise of reasoning that does not think the absolute singularity of whatever-being may cause the

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[35] Lorenzo Chiesa, 'Giorgio Agamben's Franciscan Ontology' (2009) 5 Cosmos and History: The Journal of Natural and Social Philosophy 105, 107-8.
[36] *SE* 40.
[37] ibid.
[38] See Maria Redondo, 'Legal Reasons: Between Universalism and Particularism' (2005) 2 Journal of Moral Philosophy 47.

actualisation of *homo sacer*. Reliance upon universal values or rules or even to interpret norms appears to create the possibility of *homo sacer*'s actualisation. Agamben's account indicates the following argument. In applying a general rule to the particulars of the case the singularity of the individual appears reduced to a particular. Universal or general principles serve as justifications for this reduction of the singularity to a particular. This produces a remainder that is manifested in the form of bare life. Even if *homo sacer* has been deactivated, it still constitutes the existence of whatever-being, and still haunts the messianic world to come.

This in turn raises an *aporia* which focuses upon exactly how whatever-being can render the figure of *homo sacer* inoperative if *homo sacer* remains in a deactivated relation with whatever-being. The key to positing a response to this *aporia* is to focus on the notion of a deactivated relation. The messianic legal order renders the foundation negativity underpinning the human being and social structures inoperative. This would include the figure of *homo sacer*. However it is not contradictory to say that *homo sacer*, and the exception, remain as possibilities of the messianic law.

To illustrate this, it is necessary to turn back to Agamben's writings on repetition. As stated, Agamben sees repetition as bringing novelty:

> Repetition is not the return of the identical; it is not the same as such that returns. The force and the grace of repetition, the novelty it brings us, is the return as the possibility of what was. Repetition restores the possibility of what was, renders it possible anew; it's almost a paradox … To repeat something is to make it possible anew.[39]

Agamben contrasts repetition with memory, which he views as proximate with repetition:

> Here lies the proximity of repetition and memory. Memory cannot give us back what was, as such: that would be hell. Instead, memory restores possibility to the past.[40]

Repetition produces difference.[41] This focuses upon the effect of repetition for the future. At the same time, memory restores possibility to what has been, to the past.

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[39] Giorgio Agamben, 'Difference and repetition: on Guy Debord's film' in Tanya Leighton (ed), *Art and the Moving Image: A Critical Reader* (Tate Publishing 2008) 328-33, 328.
[40] ibid.

This can be applied to Agamben's messianic legal order and its treatment of whatever-being, precedent and legal norms. Agamben's messianism focuses upon the politics to come. This implies that after the messianic move the biopolitical order, and *homo sacer*, will be left in the past. As such, it can be argued that *homo sacer* will form part of the messianic legal order's memory. Following Agamben, the memory of *homo sacer* would restore possibility to the past.

It could be contended that the memory of *homo sacer* would affect each and every decision-maker in the messianic legal order. The memory of *homo sacer* could lead the decision-maker to restore possibility to what has past – namely precedent and previous decisions. This possibility would be the possibility of a legal order that does not actualise bare life, *homo sacer*, and focuses upon the individual of whatever-being. The repetition of past precedents would therefore be directed to the future, and to the singularity of whatever-being. In short, the memory of *homo sacer* acts as an imperative force on the decision-maker that guides them towards a form of reasoning that focuses upon the singularity of whatever-being. *Homo sacer* can therefore still haunt the messianic world, but does so as a means of securing an ethical judgment. *Homo sacer* reminds decision-makers what was and what could be again – the hell of giving the legal order back what was.[42]

Whatever-being and *homo sacer* can thus be said to exist within this deactivated relation. This relation endures into the messianic world. It has been argued that such an endurance of *homo sacer* does not necessarily undermine the figure of whatever-being. However it is important to note that Agamben's messianic form-of-life is still premised upon the actualisation of *homo sacer*.

It is this actualisation that has been argued to be based upon a caricature of the hermeneutic tradition. This caricature, which can be traced to the construction of the exception, is both vital to his critique of the legal order and for his positing of a messianic thought. It is Agamben's view of hermeneutics that this chapter describes as *hyper-hermeneutic*.

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[41] See Søren Kierkegaard, 'Repetition: A Venture in Experimenting Psychology' in Søren Kierkegaard, *Fear and Trembling/Repetition* (Howard V Hong and Edna H Hong trs, Princeton UP 1983) 131.

[42] Giorgio Agamben, 'Difference and repetition: on Guy Debord's film' (n 39) 328.

The *Hyper-Hermeneutic* Exception

This chapter contends that Agamben's philosophy can be properly understood as *hyper-hermeneutic*. This phrase is a neologism, and its use is both deliberate and very specific. It refers to both the grounding of Agamben's thought as well as Agamben's messianic move with the exception and whatever-being.

From Agamben's own statements and work, it is clear that he remains immersed within the hermeneutic tradition.[43] However, Agamben's focus upon the exception and messianism aims to ensure that his thought does not remain within the tradition.

It is surely no coincidence that Agamben's radicalisation of Foucault's concept of the apparatus included Agamben arguing that "language itself" was "the most ancient of apparatuses".[44] Agamben conceives of the apparatus as a mechanism by which human life was ordered and structured by power, a power that Agamben has argued has a negative foundation.

By including language as an apparatus, Agamben appears to see language as a device by which human life can be structured and ordered in relation to a negative foundation. This thesis has already shown how Agamben sees human life as defined negatively in relation to a capacity for language. It may be surmised that Agamben's view of hermeneutics and interpretation is coloured by this view of language as an apparatus that must be deactivated messianically. Agamben thus appears to make it clear that remaining within the hermeneutic tradition is not an option for his messianic thought.

What this chapter contends is that Agamben's attempt to no longer remain within the hermeneutic tradition can be traced to his treatment and consideration of Heidegger's hermeneutic circle. It is from this position that the *aporias* within Agamben's thought when it is applied to legal reasoning can be understood. Agamben, through his reading of Heidegger, sees the hermeneutic circle as a negative apparatus. However, Agamben's work is immersed in hermeneutics. This leads to a philosophical double-bind and an *aporia* that Agamben's thought may not be able to reconcile.

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[43] *WA* 13.
[44] ibid 14.

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Hermeneutics and Hyper-Hermeneutics

Agamben's exception should be understood as hyper-hermeneutic. Agamben's exception presupposes interpretation as central to the exercise of legal reasoning within the biopolitical order.[45] In fact, Agamben's description of legal reasoning as a practical activity is reflected not just in Gadamer's writings. Other writers versed in the hermeneutic tradition would agree with Agamben's statement.

Perhaps one of the clearest examples is that of Jürgen Habermas. Habermas eloquently explains the circular relationship that exists between a norm and its application:

> A norm always "takes in" a complex lifeworld situation only in a selective manner, in view of the criteria of relevance prescribed by the norm itself. At the same time, the single case constituted by the norm never exhausts the vague semantic contents of a general norm but rather selectively instantiates them.[46]

By referring to Agamben's hyper-hermeneutics this chapter intends to convey Agamben's immersion within the hermeneutic tradition. This also conveys Agamben's response to Heidegger's hermeneutic circle. Agamben's paradigmatic method is the response to the perceived *aporias* of hermeneutics. This paradigmatic method aims to render inoperative the *aporia* Agamben traces to hermeneutics.[47]

Agamben's paradigmatic method is referred to as hyper-hermeneutic here as well due to its aim of deactivating the hermeneutic circle. The term 'hyper' connotes Agamben's attempt to escape the circle. In order to do so, Agamben has to use non-hermeneutic means, namely the paradigm.

This hyper-hermeneutic nature of Agamben's thought is a potential weakness for Agamben's philosophy. It is the potential arbitrariness and reductivist nature of Agamben's method that leaves Agamben open to a challenge from within the hermeneutic tradition. This challenge can call into question Agamben's conclusions regarding judicial reasoning that he reaches using the exception.

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[45] *SE* 23, 50.

[46] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 2009) 199.

[47] *SA* 27.

The reductivist tendency in Agamben can be explored through the writings of Ronald Dworkin and Jürgen Habermas. Habermas and Dworkin are writers who are grounded within the hermeneutic tradition. They are chosen here not because they stand as representing the entire hermeneutic tradition but because they have offered hermeneutic explanations of legal reasoning that challenge Agamben's arguments, illustrating Agamben's unsympathetic interpretation of hermeneutics.

Dworkin's Constructive Interpretation

To cite Dworkin here in relation to hermeneutics is controversial. It is controversial because Dworkin's work involves a constructivist turn to hermeneutics. However, even this constructivist turn illustrates a critique of Agamben that has weight. Dworkin explains:

> Interpretation of … social practices is concerned with purpose … Constructive interpretation is a matter of imposing purpose on an object or practice in order to make the best possible example of the form or genre to which it is taken to belong.[48]

Dworkin's work imposes a purpose upon the law and legal practice. Dworkin, like Agamben, can be criticised as imposing a *purpose* upon judicial decision-making from outside. Agamben can be argued to impose the exception upon the exercise of judicial reasoning. Likewise, Dworkin can be criticised as imposing a purpose upon judicial reasoning. This purpose would be the best possible example of the law and legal reasoning.

Whilst this objection does have weight, it overlooks an important difference between the two thinkers. Unlike Agamben, Dworkin meditates extensively upon how judges actually come to decisions. Even if Dworkin admits that he is outlining the best possible example of legal practice within his work, the judge is central to this description. Therefore even if Dworkin's constructivism is objected to, Dworkin's description of judicial reasoning offers a counter to Agamben's approach that takes into account the various constraints and principles judges reason with.

Dworkin's work can offer an alternative to Agamben's explanation of how judges reach a decision. Agamben's exception appears to leave the judge with the

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[48] Ronald Dworkin, *Law's Empire* (Hart Publishing 2006) 52.

possibility of being absolutely unconstrained, either by legal norms, rules of procedure or the doctrine of precedent. Such a view of legal reasoning was critiqued by Dworkin in *Law's Empire.*

Dworkin criticised the view that described law as being a system of the application of rules. Dworkin argued that if this view is correct, then rules have an 'all or nothing' quality. When the rules run out there will be nothing left for the judge to appeal to. This leaves the judge with an unrestricted discretion as to how they decide the case.[49] Such a position does not accord with what actually occurs when judges reason. There exist constraints that operate on each judge when they reach a decision.

This centrality of the decision-maker is an element missing within Agamben's work. Dworkin offers an explanation of legal reasoning and decision-making that counters the apparent indeterminacy of the exception. Rather than decision-making leading to the creation of bare life, for Dworkin decision-making reflects the best possible example of the legal order. Dworkin argues that law is an interpretative practice, which he terms integrity.[50] Dworkin argues that judicial discretion is an exercise of judgment that requires discretion in the sense of interpretation:

> Law as integrity … is both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive; law as integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself.[51]

Judicial discretion is interpretative as the meaning of every law is an exercise in interpretation. Dworkin's work here is grounded within the hermeneutic tradition. Legal interpretation is a process of interpretation because it is historically situated. There exists a pre-understanding between the norm and its application that establishes a relation between the two and enables further relations to be made in the future. Dworkin joins the pre-understanding of the judge to a shared tradition.

Where there is no established rule by which a judge can adjudicate, the judge turns to a scheme of abstract and concrete principles,[52] derived from a

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[49] ibid 130-44.
[50] ibid 13.
[51] ibid 226.
[52] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 81-3.

community's moral tradition.[53] To illustrate further, this means that Dworkin does posit a judge existing relationally, drawing upon a shared moral tradition.

For Dworkin, this pre-understanding follows from a constructive interpretation of the institutional history of the legal system. These principles justify the decision, and have to reflect the institutional history of the legal order.[54] For Dworkin, what law is, and therefore what is legal, follows from a constructive interpretation of the institutional history of the legal system.[55] This necessarily involves the actors within a legal system engaging in a hermeneutic exercise, interpreting texts in line with their institutional history.

The indeterminacy Agamben accords to interpretation of legal norms can be negated through reference to historically situated principles. This means that the meaning of every norm-application will vary according to the particular situation.[56] Every decision is the weaving together of a description of the circumstances and a concretisation of general norms. As such interpretation for Dworkin is tied up with justification. The practice of law is understood by justifying what the practice is about.

As has been argued, Agamben's exception maintains that any interpretative exercise of reasoning that is not justified by recourse to the singularity of whatever-being must reflect the basic operation of this exception. Agamben's argument seems to claim that hermeneutics both rationalises and ends up justifying the exception. In contrast to this, Dworkin's hermeneutic approach enables judges to draw upon tradition and principles in order to make a decision.

It is possible to read Dworkin through the conception of tradition espoused in the previous chapter. Tradition can be read in terms of the cultural history and fabric of the world. Following Edmund Burke, it can be posited that human beings are born into this world of tradition, history and culture.[57] This Burkean tradition can be used in conjunction with Dworkin to offer a reading of judicial reasoning that can take into account the singularity of the individual before the court.

To justify a singular decision, the decision-maker will base the decision upon the relevant normative reasons that apply to the situation. The applicability

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[53] ibid 90-94.

[54] ibid 116-26; Dworkin, *Law's Empire* (n 48) 254-8.

[55] Dworkin, *Law's Empire* (n 48) 101-4.

[56] Ronald Dworkin, *A Matter of Principle* (OUP 1985) 147-50.

[57] Edmund Burke, *Reflections on the Revolution in France* (Thomas Mahoney ed, OUP 1993) 108.

of norms depends upon the unique singularity of the circumstances of the case. Rather than being effaced by decision-making, the singularity of the individual is considered by the decision-maker in determining whether a norm should apply. To help the decision-maker reach this decision, they can draw upon principles of tradition and precedent. Legal history, tradition and precedent can be read as parts of the cultural fabric of the world that form part of the background into which individuals constitute their selves.

Dworkin's constructive interpretation of law could be read as respecting the singularity of the individual. Therefore law's purpose becomes not the best possible practice of law, but encompasses the very ethical decision that drives Agamben's thought. The advantage of this reading of Dworkin is that the *aporias* and weaknesses of the exception are mitigated.

In this reading the exception, if indeed it exists, could be seen as nothing more than the sphere of judgment within which a judge must reconcile a norm to its application. This would occur with reference to the historical basis of the practice of law, as well as the circumstances of the case, which includes the singularity of the individual.

Dworkin can both mitigate the indeterminacy of the exception and offer a more convincing explanation of judicial decision-making by drawing upon the hermeneutic tradition. Disagreements between judges are described not as caused by differences between unlimited discretions, but are for Dworkin arguments over the point and purpose of the law.[58] Dworkin's law is therefore based upon political pluralism and principle, with justifications for every decision able to be found within the practice's history.

Dworkin's account has not escaped criticism,[59] specifically Dworkin's idealisation of the legal order. This can be seen in the fact that the ideal judge that Dworkin tasks with finding law's integrity is named Hercules.[60] This thesis does not have the scope to focus upon all of the potential criticisms that Dworkin's constructivism gives rise to.

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[58] Dworkin, *Law's Empire* (n 48) 348-9.
[59] See, for example, Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000) 246-8; Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing 2005) 137-8.
[60] Dworkin, *Taking Rights Seriously* (n 52) 119-21.

However, one such aspect will be focused upon, which relates to the idea of a wider legal community. This aspect is chosen due to Agamben's messianic legal order being an order that still contains institutions and norms. The work of Habermas is instructive here. Habermas's approach to legal reasoning is again grounded within the hermeneutic tradition, and offers another counter to Agamben's own construction of legal reasoning.

Habermas's Discourse Theory

Habermas focuses upon Dworkin's presupposition of an exceptionally qualified judge who can reconstruct the best possible interpretation of the legal order.[61] Habermas questions Dworkin's "monological" theory.[62] The judge is meant to act alone as the citizens' representative in securing law's integrity. However, Dworkin conceives of law as a means of social integration, and contends that reciprocal recognition amongst individuals through communicative action can only be generalised to the community at large through law.[63]

This mutual recognition amongst natural persons must be transmitted to the realm of law, where relationships between abstracted legal persons exist. Habermas finds a mechanism for this in the practice of argumentation, which demands that each participant in the legal process adopts the perspective of everyone else in that process.[64] Habermas finds that an idealised vision of law is not found in the perfect judge Hercules, but in a wider legal community shared by all citizens.[65]

In order for the shared community's legal order not to be too complex, legal paradigms are introduced. However these paradigms are not paradigms in an Agambenian sense. Rather, they operate within a hermeneutic understanding of legal practice. This paradigmatic pre-understanding of law limits indeterminacy and guarantees a measure of legal certainty if it is shared by all citizens. This is especially the case in reference to legal procedure.[66] The judge, in deciding each case, then has to follow professionally recognised standards that guarantee an

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[61] Habermas (n 46) 222.
[62] ibid.
[63] Dworkin, *Law's Empire* (n 48) 216.
[64] Habermas (n 46) 223.
[65] ibid.
[66] ibid 223-4.

impartial judgment and constrain individual discretion.[67] For example, these rules could relate to the admissibility of evidence or the right to be represented by a lawyer in court.

This legal discourse is informed by pragmatic, ethical and moral factors.[68] The rules of procedure can and do change, and are often changed through legislation. The rules of procedure can be reflected upon by those participants within the process, and developed and curtailed as seen fit. For Habermas those rules secure a space for legal discourse. This 'space', governed by rules, aims to achieve justice in the individual case and promote consistency in the application and development of the law.[69] The legal judgment is therefore the outcome of the process of argumentation that places discourse between individuals at the heart of the legal order. Disputes regarding mutual recognition can be dealt with in a way that is accepted as impartial by the community at large.[70]

Habermas's arguments cannot be developed fully. They may appear detached from Agamben's thought, but they do inform Agamben's work in an important way. Agamben's exception does indirectly focus upon the role of the decision-maker, but Agamben fails to account for the rules of procedure that exist within a legal order. Also, Agamben does not mention how an individual is supposed to act on those rules. All we are left to turn back to is the exception, and its premise that every decision involving a norm and its application needs the exception to come to the decision.

Habermas's hermeneutic approach emphasises that these decisions made in a procedural order are not detached from the individual. There is no Schmittian-type decision as results from the exception. Habermas argues that the individual helps to constitute the decision by contributing to and informing the decision-making process.

To Agamben, the individual appears powerless to avoid being cast out of legal protections by the judicial decision. There appears to be nothing an individual can do to affect a judge appropriating the force-of-law (without law) and thus legalising a set of actions. This situation appears deterministic. Whatever the individual does, the judge's discretion under the exception is unconstrained.

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[67] ibid 224.
[68] ibid 230.
[69] ibid 236.
[70] ibid 234-5.

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Habermas counters this determinism. His focus is still upon the hermeneutic pre-understanding of the law, but importantly he argues that the rules of procedure and legal argumentation are there for the benefit of the citizen. Agamben appears to ignore the possibility of a discourse occurring within the legal order, or at the very least minimises its importance. Habermas points out that legal discourse and argumentation is a source of legal agonism. The just decision that accounts for the singularity of the individual cannot be made without that individual's participation within the process.

As well as this, the judge's hermeneutic task is structured by the rules and procedures of the legal order. This ensures that the judge does not have unlimited discretion. Again, this is something Agamben has not accounted for. The citizens involved in each case will have had their existence shaped by the processes, procedures and decisions of the legal order. Every individual will be shaped by extant laws in the way they live their lives. Thus, it could be contended that Habermas offers a process with which an individual within the community may identify, and by which a decision can be made that reflects that individual's unique situation. The singular decision would take into account the individual's circumstances as well as those precedents and procedures of the legal order that have also shaped that individual's way of being. There may be no need for Agamben's messianic moves.

Hermeneutics and Heidegger

These readings of Habermas and Dworkin serve to illustrate the deficiencies within Agamben's critique of legal reasoning. The use of Habermas and Dworkin should not be read as an attempt to show the best way to approach a description of legal reasoning. Instead, these writers serve to show that Agamben's conception of the legal order needs developing if he is to offer a compelling reason for his messianic move. At present, Agamben's critique can be dismissed as a caricature.

Habermas and Dworkin should be seen as examples of the possibility of hermeneutic forms of reasoning to challenge Agamben's construction of the exception. The term example is used here in a specifically Agambenian sense:

> The example is characterised by the fact that it holds for all cases of the same type, and, at the same time, it is included among these. It is one

singularity amongst others, which, however, stands for each and serves them all.[71]

What Habermas and Dworkin illustrate is the caricature of hermeneutics that is present in Agamben's thought. This caricature does not do justice to the hermeneutic tradition. Agamben's hyper-hermeneutic method appears deterministic. The decision-maker can decide the case in any way and the exception will allow for any actions to be given the force-of-law.

The full implications of Agamben's treatment of hermeneutics have not been studied. In addition, Agamben's potential interactions with other hermeneutic philosophers have not been focused upon. What is suggested here is that Agamben's thought will remain susceptible to a hermeneutic challenge. It is also postulated that this susceptibility is related to Agamben's rejection of Heideggerian hermeneutics. It is Agamben's treatment of Heidegger that ultimately leads to the *aporias* in Agamben's thought.

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[71] *CC* 9-10.

Heidegger, Hermeneutics and Relationality

Agamben's hyper-hermeneutic approach, and its *aporias*, is argued to ultimately relate to his attempt to distance his thought from that of Heidegger. It is maintained that hermeneutic approaches to law carry weight against Agamben due to Agamben's treatment of Heidegger. In addition, the uncertainties surrounding Agamben's figure of whatever-being and its relationality are traced to Heidegger's hermeneutic circle.

Agamben sees Heidegger's hermeneutics as *aporetic*. In his attempt to break away from the hermeneutic circle Agamben leaves *aporias* in his own work that are open to criticism by thinkers who base their works within the hermeneutic tradition. The *aporia* in Agamben's thought relating to whatever-being and its relation to *homo sacer* and other whatever-beings relates to Agamben's approach to Heideggerian hermeneutics.

The Hermeneutic and Paradigmatic Circles

For Agamben, the hermeneutic circle only acquires its true meaning from within his paradigmatic methodology. In order to appreciate the implications of this move it is necessary to turn back to Heidegger and question the exact importance of the hermeneutic circle within his philosophy.

The temporal structure of *Dasein*'s being-in-the-world is hermeneutic. *Dasein* interprets the world through its own understanding of the world. Understanding is an *existentiale*, a fundamental character of *Dasein*'s Being.[72] Understanding for Heidegger is tied up with *Dasein*'s own potentiality for being. In other words, understanding guides *Dasein* to know what it is capable of.[73] *Dasein* understands itself through projection, by being thrown before its own possibilities.[74] The projecting of *Dasein*'s understanding has its own possibility of developing itself, which Heidegger terms interpretation.[75]

It is through interpretation that understanding becomes itself, which allows *Dasein* to realise what its possibilities are. Interpretation allows *Dasein* to work out its own possibilities that are projected through understanding.[76] To understand

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[72] *BT* 182.
[73] ibid 184.
[74] ibid 185.
[75] ibid 188.
[76] ibid 189.

is to give the structure of something 'as' something to a phenomenon. The 'as' of this construction relates to the purpose of the something in question, which involves interpreting the phenomenon and making an assertion that characterises it.[77] The interpretation that leads to a thematic assertion about something *as* something is itself grounded in fore-having, fore-sight and fore-conception. These are known as the 'fore-structures' of interpretation. The interpretation is grounded on things *Dasein* has in advance, sees in advance and grasps in advance respectively.[78]

Thus in order to approach the hermeneutic circle in the right way, the hermeneutic circle must be understood as the structure of *Dasein*'s understanding of the world that *Dasein* has in advance of any interpretation. Heidegger writes of the hermeneutic circle:

> It is not to be reduced to the level of a vicious circle, or even of a circle which is merely tolerated. In the circle is hidden a positive possibility of the most primordial kind of knowing. To be sure, we genuinely take hold of this possibility only when, in our interpretation, we have understood that our first, last, and constant task is never to allow fore-having, fore-sight, and fore-conception to be presented to us by fancies and popular conceptions, but rather to make the scientific theme secure by working out these fore-structures in terms of the things themselves.[79]

It is vital to focus upon the fore-structures that make up the world into which *Dasein* is thrown. The reason for this is that the circle is the expression of the existential fore-structure of *Dasein* itself.[80] By approaching the circle in the right way *Dasein*'s own possibilities for Being can be understood as being structured by the world into which *Dasein* is thrown. *Dasein* has a circular structure. Heidegger warns against resting any interpretation on popular conceptions without first questioning those conceptions themselves.[81]

It is this process of understanding fore-structures that forms the basis for Agamben's critique of the hermeneutic circle. Agamben does acknowledge Heidegger's explanation as an attempt to reconcile the difficulties of hermeneutics:

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[77] ibid.
[78] ibid 190-1.
[79] ibid 195.
[80] ibid.
[81] ibid.

Grounding this hermeneutical circle in *Being and Time* on pre-understanding as *Dasein*'s anticipatory existential structure, Martin Heidegger helped the human sciences out of this difficulty [caused by the hermeneutical circle] and indeed guaranteed the "more original" character of their knowledge.[82]

However Agamben challenges the very idea that *Dasein* can come to the circle in the right way. Specifically, Agamben challenges the idea that these fore-structures can be worked out:

[Heidegger's] guarantee was less reassuring than it at first appeared. If the activity of the interpreter is always already anticipated by a pre-understanding that is elusive, what does it mean "to come into [the circle] in the right way?"[83]

Agamben sees the pre-understanding of these fore-structures as elusive. As such, the hermeneutic circle appears defined by an ineffable foundation that can never be grasped.

Thus Agamben appears to connect the foundational negativity he argues is implicit within the construction of *Dasein* to the hermeneutic circle. The circle transmits this negativity that cannot be escaped from.

It is this view of the circle that colours Agamben's view of hermeneutics. Much like the structure of the exception, Agamben sees that any interpretative response to the hermeneutic circle is futile, as it is not possible to avoid its clutches. It is perhaps understandable that Agamben reaches this conclusion, given his attempt to challenge foundational *mythologemes*. Agamben concludes:

This can only mean – and the circle then seems to become even more "vicious" – that the inquirer must be able to recognise in phenomena the signature of a pre-understanding that depends on their own existential structure.[84]

An important and vital ambiguity arises in this statement. What does Agamben mean by "their"? It is unclear as to whether "their" refers to the existential structure of *Dasein* or the existential structure of the phenomena that form the fore-structures in question.

It is contended here that "their" refers to the existential structure of the phenomena in question. This implies that any pre-understanding of those fore-

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[82] *SA* 27.
[83] ibid.
[84] ibid.

structures is impossible. The interpreter can never come to the circle in the right way as the interpreter will not have the pre-understanding of the world required to do so. This explains why Agamben feels it is necessary to move from hermeneutics to paradigms:

> The aporia is resolved if we understand that the hermeneutic circle is actually a paradigmatic circle. There is no duality between "single phenomenon" and "the whole" ... the whole only results from the paradigmatic exposition of individual cases. And there is no circularity, as in Heidegger, between a "before" and an "after", between pre-understanding and interpretation. In the paradigm, intelligibility does not precede the phenomenon; it stands, so to speak, beside it (*para*).[85]

Agamben thus maintains that the 'things themselves' cannot be reached through the hermeneutic circle, or even through a pre-understanding. Rather, the paradigmatic circle allows for the phenomenon's intelligibility to be understood through the paradigm itself. A singular paradigm can therefore allow for an understanding of a constellation of phenomena of which the paradigm stands as an example:

> The paradigmatic gesture moves not from the particular to the whole and from the whole to the particular but from the singular to the singular. The phenomenon, exposed in the medium of its knowability, shows the whole of which it is the paradigm. With regard to phenomena, this is not a presupposition (a "hypothesis"): as a "non-presupposed principle", it stands neither in the past nor in the present but in their exemplary constellation.[86]

It is this paradigmatic method that stands as being able to do the work of the hermeneutic circle. However, it does so not through any pre-understanding of the world, but rather it makes a phenomenon intelligible through the paradigm. It is this move that leads to the characterisation of Agamben's paradigmatic method as hyper-hermeneutic.

Therefore for Agamben, there appears no need to undertake a detailed hermeneutic understanding of the world, or of the fore-structures of understanding. The paradigm does not need a fore, but rather will make those phenomena intelligible through its own operation. The radicalisation of Foucault's paradigmatic method that so perplexed scholars who approached Agamben as a

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[85] ibid.

[86] ibid 27-8.

Foucauldian thinker can actually be traced to this movement away from Heidegger.

Agamben's construction of the paradigmatic circle is problematic for two reasons. Firstly, Agamben's critique of Heidegger is open to the argument that Agamben has misinterpreted Heidegger's intentions. Secondly, it is problematic for Agamben as his own figure of whatever-being can be argued to be constructed hermeneutically.

The Misinterpretation of the Hermeneutic Circle

Agamben's misunderstanding of the hermeneutic circle can be traced to his argument that the circle is vicious. Agamben argues that it is not possible to come to the circle in the right way as no interpreter will have the necessary pre-understanding of the world to do so. However, it is precisely here that Agamben misunderstands Heidegger's explanation of the hermeneutic circle.

Heidegger explained that the interpretation of the fore-structures is dependent upon *Dasein*:

> In interpreting, we do not, so to speak, throw a 'signification' over some naked thing which is present-at-hand, we do not stick a value on it; but when something within-the-world is encountered as such, the thing in question already has an involvement which is disclosed in our understanding of the world, and this involvement is one which gets laid out by the interpretation.[87]

The interpreter must always be guided by the things themselves. The constant process of new projections by *Dasein* constitutes the movement of understanding and interpreting. This is why the hermeneutic circle relates to the fore-structure of *Dasein*.[88] Understanding realises its full potential only when the fore-meanings that it begins with are not arbitrary.

By arguing that the fore-structures in the world cannot be understood because such an understanding is elusive, Agamben appears to miss the point that the very pre-understanding of those fore-structures is not dependent upon the interpreter alone. When Heidegger states that interpretation of the fore-structures is dependent upon *Dasein*, he does not mean that interpretation is dependent upon one singular *Dasein*.

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[87] *BT* 190-1.
[88] ibid 195.

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The things of pre-understanding are encountered from out of the world in which they are ready-to-hand for Others.[89] *Dasein*'s understanding does not occur in a vacuum, but is situated in relation to other *Dasein*.[90] Thus *Dasein* will approach understanding and interpretation through fore-structures that are structured by *Dasein*'s experience in relation to other *Dasein* and the world.

It is this point that is crucial for Agamben's thought. The hermeneutic circle is intimately tied up with relationality. Others are already with *Dasein* in Being-in-the-world. The state of *Dasein* by which every mode of *Dasein*'s Being gets determined is dependent upon *Dasein*'s existence with Others in the world.[91]

The *aporia* of relationality in Agamben's thought can be traced to Heidegger's hermeneutic circle. It is the hermeneutic circle and pre-understanding that are dependent upon relationality. Agamben maintains that the things themselves cannot be reached either through the hermeneutic circle or through pre-understanding of phenomena. The implications of this argument suggest that Agamben sees the things themselves as not dependent upon the individual's relation with others.

It is this move that has the potential to explain the *aporias* present in Agamben's construction of whatever-being. Agamben reads the hermeneutic circle as trapping the interpreter within an ineffable negative structure that cannot be overcome. This negative structure is seemingly read by Agamben as including relations with other *Dasein*. In other words, Agamben differs from Heidegger quite crucially in one key respect – relation appears not to be constitutive for one's own *Dasein* for Agamben. It is for Heidegger.[92]

Dasein must work out appropriate projections, anticipatory in nature, which are confirmed by the things themselves. The understanding of that fore-structure helps *Dasein* to see its own possibilities that are available for it. Thus *Dasein* is not trapped in a vicious circle. The circle instead relates to *Dasein*'s ownmost possibilities. It is these ownmost possibilities that are always-already affected by the acts and interpretations of other *Dasein*.

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[89] ibid 154.
[90] ibid 149-68.
[91] ibid 152-3.
[92] ibid 162.

Agamben effaces the fact that the hermeneutic circle is intertwined with potentiality for Being. On the contrary, Agamben appears to have missed the thrust behind Heidegger's warning:

> But if we see this circle as a vicious one and look out for ways of avoiding it, even if we just 'sense' it as an inevitable imperfection, then the act of understanding has been misunderstood from the ground up.[93]

By seeing the circle as vicious and attempting to render it inoperative through the paradigm, Agamben misunderstands the act of understanding, and the importance of relationality for constituting *Dasein*. As Heidegger argues:

> Dasein 'is' essentially for the sake of Others ... Even if the particular factical Dasein does *not* turn to Others, and supposes that it has no need of them or manages to get along without them, it *is* in the way of Being-with. In Being-with, as the existential "for-the-sake-of" Others, these have already been disclosed in their Dasein. With their Being-with, their disclosedness has been constituted beforehand; accordingly, this disclosedness also goes up to makes up significance – that is to say, worldhood.[94]

Each interpreter will approach the act of understanding from a unique position due to their own position in relation to the world and other individuals. They will each have their own fore-structures that they base their acts of interpretation on.

This can be preliminarily connected to legal reasoning. The hermeneutic circle and a pre-understanding could be argued to be vital to the intelligibility of the legal decision. The legal decision will involve understanding and interpretation. The factual issues of the case will only become intelligible against an understanding of the fore-structure of the decision-making process itself. This fore-structure relates to a pre-understanding of the practice of law. This in turn relates to questions of history and tradition. As Gerald Postema maintained:

> To learn a social practice is to become acquainted through participation with a new common world; it is to enter and take up a place in a world already constituted.[95]

History and tradition, as the previous chapter has argued, can be connected to the doctrine of precedent. As such, the decision-maker will have to have regard to

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[93] *BT* 194.

[94] ibid 160.

[95] Gerald J Postema, '"Protestant" Interpretation and Social Practices' (1987) 6 Law & Philosophy 283, 313.

precedent. It is precedent that helps constitute the pre-understanding of the case to be decided.

This is but a brief outline of how the hermeneutic circle can inform decision-making. However, another connection may be made. The emphasis upon understanding fore-structures can be connected to both Habermas and Dworkin. Habermas's work maintains that the fore-structures that need to be understood in order for the decision-maker to make a decision relate to rules of procedure and adjudication. For Dworkin, the fore-structure of the legal decision relates to the scheme of principles that judges draw upon to reconstruct the best possible conception of legal practice.

Having regard to Agamben's eschewing of pre-understanding it may be no surprise that both these writers offer explanations of legal reasoning that counter the *aporias* present in Agamben's thought. What is contended here is that these *aporias* relate back to this paradigmatic move by Agamben.

The Hermeneutic Circle and whatever-being

Agamben's interpretation of Heidegger and the shift to paradigms has huge consequences for an understanding of the figure of whatever-being. Agamben's form-of-life, whatever-being, is an example of a life lived in pure immanence, which gives itself to itself. Whatever-being stands as a thing itself, free from any foundational relation.

This seemingly includes a relation with others. For Heidegger, *Dasein*'s understanding of other *Dasein* occurs hermeneutically:

> The possibility of understanding the stranger correctly presupposes such a hermeneutic as its positive existential condition.[96]

As relationality involves hermeneutic understanding, Agamben's figure of whatever-being is posited as non-relational. Agamben contends that the thing itself of whatever-being can be understood, but this understanding cannot be based on a presupposition of hermeneutics. Whatever-beings must be understood paradigmatically. This eschewing of relationality by Agamben has been discussed previously within this thesis, but it is in relation to hermeneutics that another *aporia* arises.

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[96] *BT* 163.

This argument can be seen throughout Agamben's thought. Agamben uses a number of different paradigms to represent whatever-being, the figure of this form-of-life. These paradigmatic figures are varied. They include the nude body,[97] an adult pornographic actress who remains expressionless in her films,[98] Herman Melville's 'Bartleby',[99] and the protesters in Tiananmen Square.[100]

The paradigm for Agamben is akin to an example. It stands neither clearly inside nor clearly outside of the group or set of phenomena that it identifies. A paradigm is the real particular case that is set apart from what it is meant to exemplify.[101] Thus all these figures stand as real particular cases, paradigmatic examples for whatever-being. Following Agamben's construction of the paradigmatic circle, each paradigmatic example shows the whole of which it is the paradigm. Therefore these figures are not to be understood as examples that form the precursor to a detailed study of whatever-being's existence. Following Agamben's start, they are the evidence for whatever-being's existence.

It is this paradigmatic gesture that also stands as evidence for the hyper-hermeneutic nature of the messianic figure of whatever-being. Again the paradigm takes away the need for a hermeneutic investigation of these phenomena and their meanings.

As a corollary to this, it stands to reason that whatever-beings understanding of other whatever-beings would have to be paradigmatic as well. This can be seen as a necessary consequence of Agamben's tracing a negativity to the relational hermeneutic circle. Agamben's messianism has to rearticulate the singularity of whatever-being away from the hermeneutic circle into the domain of pure potentiality.[102]

This messianic thought has its aim as completing, rather than destroying the current political and legal order.[103] This domain can only be rendered intelligible through Agamben's paradigmatic method. This move reflects

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[97] *N* 91-103.

[98] *P* 90-1.

[99] Giorgio Agamben, 'Bartleby, Or On Contingency' in *PT* 243-71.

[100] *CC* 85-7.

[101] Ulrich Raulff and Giorgio Agamben, 'An Interview with Giorgio Agamben' (2004) 5 German LJ 609, 618; de la Durantaye (n 22) 218-9.

[102] Paolo Bartoloni, 'The Stanza of the Self: on Agamben's Potentiality' (2004) 5 Contretemps 8, 11-2.

[103] Giorgio Agamben, 'The Messiah and the Sovereign' in *PT* 163.

Agamben's contention that there is no duality between the whole and the single phenomenon. As Paolo Bartoloni explains:

> Singularity is thus freed from the false dilemma that obliges knowledge to choose between the ineffability of the individual and the intelligibility of the universal.[104]

However it is with reference to this 'false dilemma' that an inherent contradiction arises within Agamben's thought.

The supposedly paradigmatic figure of whatever-being is itself still reliant upon a hermeneutic interpretation and application in order to be understood. Although it is justified paradigmatically, whatever-being is still beholden to hermeneutics.

Agamben's thought treats hermeneutics as both crucial to whatever-being and also as underpinning the operation of the exception. This embodies the negativity Agamben attempts to escape from. Whatever-being's hermeneutic construction can be supported by Agamben's own writings.

Agamben ties the singularity of whatever-being to Plato's erotic *anamnesis*, which moves the individual towards their own taking-place, the now.[105] Whatever-being's singularity refers directly to the individual's taking-place, their concrete existence within the world. It is this concrete existence in the world that implies a hermeneutic influence.

In order to understand whatever-being's taking place, and its concrete existence in the world, it is necessary to understand the world in which whatever-being exists. This in turn suggests that the taking-place of whatever-being is related to the world in which it exists.

Moreover, this relation would be affected and conditioned by whatever-being's interpretation and pre-understanding of the world. Whatever-being's concrete existence is dependent upon its own understanding and interpretation of the phenomena in the world it interacts with. Therefore it can be argued that whatever-being's way of being would be influenced by the context of its existence in relation to the world. Following Heidegger, this world must also be understood as being shared with others, and being affected by those others' actions. Thus it could be argued that hermeneutics and relationality would be constituent of

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[104] Bartoloni (n 102) 11.
[105] *CC* 2.

whatever-being's way of being. This is at the very least a problem that Agamben's thought has not yet explained.

If whatever-being's existence was to be understood paradigmatically as Agamben insists, then an *aporia* arises relating to the ethical judgment. It is contended that it is not possible to both define whatever-being paradigmatically and have a decision take into account the unique singular way-of-being each whatever-being has. Agamben's paradigms are singular examples. However they are singular examples that are set apart from what they identify.

Therefore, if whatever-being is defined through a paradigm, then that whatever-being is defined not by its own way-of-being. It is being defined with reference to *another* whatever-being, whose existence is meant to stand as a paradigm for this whatever-being's existence. It is contended that in order to reconcile this *aporia*, whatever-being's existence must be understood as properly hermeneutic. It is this necessity of hermeneutics that underpins the hyper-hermeneutic nature of Agamben's messianism.

The Ethical Judgment and Hermeneutics

If whatever-being is understood in this hermeneutic context the singularity of whatever-being may both be grasped and reflected in the messianic legal judgment. However if hermeneutics are presupposed in relation to whatever-being, then following Heidegger, it is unclear as to how whatever-being can continue to exist non-relationally.

Hermeneutics, interpretation and relationality appear central to Agamben's thought. It may even be possible for Agamben's thought to be considered as hermeneutic. A preliminary argument could be posited. This would focus upon Agamben's challenging of foundational *mythologemes*. Agamben's paradigmatic method could be reconciled with hermeneutics by arguing that Agamben's paradigmatic method is an attempt to wrest the hermeneutic tradition away from self-referential foundations. Agamben traces such foundations to Heidegger's hermeneutic circle, which explains Agamben's focus on Heidegger's thought.

In order to render the circle inoperative, Agamben has to shift hermeneutics towards the singularity of whatever-being. In this manner, hermeneutics operate as a means without end, and focus solely on the singularity of whatever-being. This in turn relates back to Agamben's conception of justice.

Justice is central to legal reasoning and for Agamben refers to the experience of encountering the limit of the law.[106] This reflects the hermeneutic attitude underpinning Agamben's works. To speak of encountering the limit of the law is to presuppose a situation that does not involve the logical application of norms. This is always-already a hermeneutic task. Every interpretative instance is thus focused towards doing justice to the singularity of the individual.

Agamben's qualification of this, which by his arguments amounts to an ethical event, is that those tasked with making decisions and constructing arguments in the legal order should base their interpretations upon whatever-being's singular way of being. A decision-maker needs to interpret laws and norms in order to ensure a decision respects whatever-being's way of being. Hermeneutics therefore appears needed to give effect to the ethical decision.

This can be reinforced with reference to the concept of repetition and how it operates in a messianic legal order. Repetition is not the return of the identical, but the creation of something new. To repeat a past decision is not to do injustice to the singularity of whatever-being, but reinforces the cultural fabric of the world that whatever-being uses to affirm its own way of being. This movement will always-already be hermeneutical. Texts in the form of past decisions and statues will be interpreted by the decision-maker with the aim of affirming whatever-being's singularity. This will involve a hermeneutical exercise, with the decision-maker trying to find a meaning within the texts that accord with whatever-being's way of being. As such, repetition illustrates that this messianic form of legal reasoning will be hyper-hermeneutic.

Agamben's messianism offers the possibility of a deactivation of the negativity at the heart of the legal order. The law is fulfilled by a messianic event. Whatever-being is the form-of-life that is at the centre of this messianic legal order. Hermeneutics is both the source of negativity of the biopolitical legal order and needed to fulfil the operation of the messianic law. What this leads to is Agamben's hyper-hermeneutic paradigmatic gesture, and an attempt to formulate a non-relational philosophy.[107] This hyper-hermeneutic move both retains hermeneutics within the messianic world, as well as rendering the supposedly negative hermeneutic circle inoperative. This move is necessary to ensure that

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[106] Zartaloudis (n 34) 280.
[107] *SA* 27.

Agamben's work does not succumb to the *aporias* of non-relationality that challenge it.

Ultimately, underpinning Agamben's methodology is his attempt to philosophically distance his work from the thought of Heidegger. The final word on the character of Agamben's hyper-hermeneutic move should be left to Heidegger. Agamben's methodology can be described as an *assertion* in the Heideggerian sense. For Heidegger an assertion is "a pointing-out which gives something a definite character and which communicates".[108]

An assertion is derivative to interpretation. It is derivative as if an entity becomes the object of an assertion:

> Something *ready-to-hand with which* we have to do or perform something, turns into something *'about which'* the assertion that points it out is made.[109]

Hermeneutics and its relationality is the subject of such an assertion by Agamben. For Agamben, it appears that legal reasoning is not a hermeneutic exercise. Hermeneutics is asserted to transmit a negativity through the exception. Agamben points out this facet of hermeneutics in order to justify his conclusions and messianic move.

It is because of this treatment of hermeneutics that an Agambenian conception of legal reasoning appears both reductivist and deterministic. It is also due to this move by Agamben that *aporias* of relationality enter his thought. The consequences of Agamben's misinterpretation of Heidegger have been grave. These *aporias* of relationality have been illustrated with reference to the works of Heidegger and Levinas. It is yet to be seen how the relationality implicit in Agamben, and explicit in Levinas and Heidegger relate to one another.

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[108] *BT* 199.
[109] ibid 200.

Conclusion

This chapter has built upon the analyses of Agamben and legal reasoning by returning to the thought of Martin Heidegger. Heidegger was discussed earlier in this thesis in relation to Agamben's ontology and writings on the human being. In this chapter, the focus has been upon Agamben's form of legal reasoning and the exception, and their relation to Agamben's philosophy.

Agamben's treatment of hermeneutics is almost a caricature. This has been argued to relate to Agamben's treatment of Heidegger's hermeneutic circle. Agamben appears to see Heidegger's hermeneutic circle as reflecting the originary negativity of *Dasein*. Because Heidegger's hermeneutic circle presupposes relationality, Agamben's thought moves away from both relationality and hermeneutics. This ultimately undermines his political and ethical aims. This analysis reinforces the importance of this thesis's approach and analytic method, as it has unconcealed unforeseen consequences of Agamben's political thought that would lead to oppression and injustice.

This non-relational move forms the philosophical basis for whatever-being, but as has been seen in the previous chapters, whatever-being contains *aporias* relating to relationality that can ultimately be traced to Agamben's critique of Heidegger.

Agamben's exception and method have also been characterised as hyper-hermeneutic. One of the consequences of Agamben's critique of hermeneutics is an unsympathetic treatment of hermeneutics in legal reasoning. This is seen in the operation of the exception, which appears to give judges an unlimited discretion in acting. Agamben's exception borders upon a reductivist and deterministic account of law, where any decision could potentially give rise to bare life. As such, Agamben's reasoning and the exception is left open to a potential critique drawn from within the hermeneutic tradition. This makes it all the more important that Agamben's work is ameliorated through Levinasian ethics and Heideggerian hermeneutics.

A connection can also be seen between the operation of the exception and the operation of the messianic legal order. A consequence of Agamben's treatment of hermeneutics is that the figure of *homo sacer* appears to be a condition of possibility of both the biopolitical and messianic laws. This further

questions whether whatever-being is non-relational, and again does challenge the possibility of Agamben constructing a form of political community that is ethically desirable. Ultimately, what this thesis has shown is that Agamben's radical politics requires Levinas's thought in order to forward an ethical politics that can be an alternative to the negativity of *homo sacer*.

As a whole, this thesis has attempted to reconstruct Agamben's thought and philosophy and transpose it to the spheres of law and legal reasoning. In so doing, it has been argued that Agamben's work is positioned between the hermeneutics of Heidegger and the ethics of the Other of Levinas. Agamben's thought is open to critiques grounded in Heideggerian hermeneutics and Levinasian ethics. Such critiques call into question the overall originality of Agamben's thought. This thesis has not been able to develop the relations between Agamben, Heidegger and Levinas to fully explore the preliminary arguments that have been formed here. Such a task is for a future project. Thus in expressing the need for such a future project is where this project ends.

Conclusion

The title of 'conclusion' is used hesitantly. This thesis does not aim to be a 'conclusive' account of Agamben's work, as a 'conclusion' assumes a closure or an end. For this thesis, it is quite the opposite.

This thesis began its life with a definite goal in sight. This research originally began with a questioning of the reactions by liberal democratic states to the threat of international terrorism. As further research led the direction of this project away from a doctrinal approach on emergency powers, Agamben's works and thought began to resonate more loudly. More focus was then paid to Agamben's philosophy. The problems that first ensured that this project was embarked upon – questions of law, morality, ethics and philosophy – were moved from the sphere of anti-terrorism legislation towards a more evident philosophical grounding.

Despite this philosophical turn, this research was still carried out with an end in sight. For much of this thesis's development, the aim of this work was to show the worth of Agamben's thought for research in law and legal reasoning. This thesis began by approaching Agamben's work as an original and exciting contribution to the literature. Agamben's work was seen as having enormous potential for providing a novel approach to the questions of law, legal subjectivity and legal reasoning.

With time and further research, this presumption began to be questioned. Further philosophical investigation into Agamben's thought, its implications and its influences did not reinforce the view of Agamben's originality. Rather, with further research Agamben's worth to legal thought began to be called into question.

In truth, this questioning of Agamben's worth was a disappointing experience. This thesis set out to defend Agamben's originality. It aimed to construct a form of thought that would reflect the insights, as well as the depth and breadth of Agamben's work. To question not just Agamben's thought, but this own thesis's original arguments, therefore did disappoint. However, this disappointment did lead to important realisations regarding Agamben's work, and why Agamben is so popular. It also helped to crystallise the contribution that this thesis would make to the literature.

Agamben's Potential

Agamben's thought promises a remedy to the ills of modernity. Such a promise can be attractive to those who wish to rail against the injustices and inequities of the world in which we live, but are unsatisfied with current political and philosophical approaches to these problems. Agamben appears to offer a way of thinking that is a new start, upon which a new philosophical approach can be grounded. Agamben appeals as his thought offers the possibility of a law and a political life that is grounded in an ethical existence, and which has justice at the forefront of every decision. It was this promise that led to this research striving to show how Agamben's diagnoses of nihilism in Western thought were demonstrable, and how Agamben's new politics was achievable.

However, as this thesis's research progressed, questions emerged relating to Agamben's thought that were not easily answerable. These questions related to the construction as well as the implications of his thought.

In reading the works of Michel Foucault, it became clear that Agamben's paradigmatic method was both a strength and a weakness. It was a strength as it allowed for connections to be made between disparate and apparently unconnected areas of thought. However, it was also a weakness in the sense that Agamben's method underpins his entire project. If an objection is raised to Agamben's paradigmatic method, then this in turn affects his wider philosophical arguments.

As well as this, it also became clear that Agamben's ontological basis for his project rested upon a re-interpretation of the works of Martin Heidegger. These issues necessitated a change in the focus of the arguments being made, and a deeper engagement with Heidegger's thought.

This thesis then aimed to continue to defend Agamben's work as original and important, but intended to do so whilst recognising that there were limitations to Agamben's way of thinking. However, it soon became clear that even this position was too optimistic. It was through the application of Agamben's thought to the realm of legal reasoning that it became clear that Heidegger could not be denied. It became more and more difficult to defend Agamben's work without recognising the overtly Heideggerian underpinnings to it.

It was this move to consider Agamben's interpretation of Heidegger that directly lead to this thesis's final direction. Agamben's tracing of a nihilism within Heideggerian thought appeared arbitrary and based upon a misreading of Heidegger's work. The implications of this misreading for Agamben's work should not be underestimated. This critique could not be easily reconciled with being able to demonstrate the occurrence of Agamben's diagnoses of nihilism, or a prognosis of an original way of thinking. A deeper interrogation of Agamben in light of Heidegger has not led to the reinforcement of basis of Agamben's philosophical thought, but a questioning of its validity.

This interrogation began after a large amount of research had already been conducted. As such, assumptions and arguments relating to Agamben that had previously been formulated had to be considered anew. It was in reconsidering my previous readings of Agamben in light of reading Heidegger that a link became clear between Agamben and Levinas.

The development of these connections and arguments has been an ongoing process. In particular, the two strands of research relating to law and legal reasoning have reinforced and informed each other's arguments and contentions. They have also led to many areas of thought being opened up in relation to Agamben's works. As such, the conclusions and arguments that this thesis has formulated, nascent though they are, should be viewed as the preliminary outlines of a wider, more detailed study into Agamben's work. Despite this cautious approach it is possible to outline the implications and areas for development that this future work will focus upon.

The Implications of Agamben's Thought

Despite this thesis's contention that Agamben's philosophy as a whole does not offer the radically original break that he hopes for, there are elements of Agamben's thought that are profoundly original. Of most interest are Agamben's writings on early Christianity and the role that *oikonomic* government plays in constituting sovereign power. If there is one area of Agamben's thought that has the potential to greatly influence current scholarship it would be this.

Even more than Foucault, Agamben's writings on sovereignty and *oikonomia* would, if accepted, greatly change the basis of much legal justification. The notions of sovereign immunity, the separation of powers, the debate between

constituent and constituted power, all would be significantly undermined. It is intriguing to speculate what those effects could be. Agamben is arguing against the notion of secularism being non-theological. Sovereignty becomes an obviously theological concept, and a fiction at that. Could national and international legal orders function if this *oikonomic* base of power was uncovered? What would the consequences be for the concept of the nation-state if sovereignty was unmasked as a fiction? More space and time is needed to respond to these questions.

Such a move appears to cast the recent history of Western Europe, from the Treaty of Westphalia through the Enlightenment as nothing less than a recasting and masking of the original Christian doctrine of the Trinity. This in turn could challenge any basis of secular democracy and also the whole idea of religious pluralism in modern Europe. Agamben's *oikonomia* appears to recast Europe as a Christian continent. Europe is seen as Christian not in belief but in its very structure of government. It is these writings on *oikonomia* that have great potential for future research, in particular research that focuses upon the relation between sovereignty and the nation-state in light of Agamben's thought.

The Contribution to Knowledge: Foucault, Levinas, Heidegger

If one lesson can be drawn from this research it would be that a quest for original thought is neither easy nor straightforward. We are all constituted and shaped by the thought that has preceded us. Agamben is no exception to this.

This thesis's content has been built around upon three main arguments. Firstly, Agamben's philosophy is re-sited, and is argued to form an overall ontological project that interrogates the meaning of the human being. This has aimed to move Agamben away from being considered a philosopher of the exception and emergency powers, although it is clear that Agamben's work can inform and contribute to these areas of scholarship. As such, this thesis maintains that Agamben's philosophy should be understood as a philosophy of *immanence*, which challenges any recourse to transcendent schema. The implications of this construction should not be understated. Agamben's work aims a broadside at any conceptions of philosophy, politics and law that rely upon universal values or norms.

This re-siting opens up many more avenues for research than have been undertaken here. Although this thesis has engaged with the works of Michel Foucault, Agamben's immanent ontology could give rise to renewed focus upon the interactions between the two philosophers, particularly in relation to the role of government and its Christian influences.

Ultimately the debate between the two men is settled not by their arguments, but by their readers. Foucault appeals to those seeking a way of resisting power and its operations. Foucault offers a politics that is receptive to the actions of subjects. Agamben's formulations of power will appear nihilistic to those individuals, emphasising as it does the totalising nature of biopower and the futility of Foucauldian forms of resistance.

Contrarily, Agamben appeals to those people who wish for a new, radical politics and a break with the political past. Foucault's emphasis on resistance that erupts from within the social order may appear to not go far enough in countering power's operations for those readers. Agamben's messianism may then offer the new approach to ethics and justice that many people feel is necessary.

This thesis has also not had the space to fully engage with the differences between the works of Agamben and Derrida. This disagreement has been hinted at, and an engagement with such a disagreement could form the basis for an entirely new study. Agamben's treatment of Deconstruction is vital for his work on language. However, Agamben's critique of transcendent foundations may well affect Deconstruction, and would require Deconstruction to offer a counter-critique of Agamben's works. In addition, Derrida's potential to inform and ameliorate Agamben's way of thinking has not yet been touched upon. What has been attempted in this thesis is to illustrate that this disagreement exists between Agamben and Derrida. It is not yet certain that this is irreconcilable.

The second argument relates to the work of Martin Heidegger. This thesis has aimed to demonstrate that Agamben's thought rests upon a very selective and uncharitable reading of Heidegger. In particular, Agamben does not do justice to Heidegger's construction of *Dasein*. Agamben's criticisms of Heidegger are so marked due to Agamben's wish to break free of Heidegger's influence and philosophy.

The result of this is that Agamben has only been able to generate distance between himself and Heidegger by focusing upon Heidegger's construction of

Dasein. By arguing that Heidegger's construction of *Dasein* transmits an originary negativity Agamben locates within the human being, Agamben is able to construct his own philosophy. However, this interpretation of Heidegger's construction of *Dasein* has been argued to distort Heidegger's own thought. Agamben's treatment of Heidegger's hermeneutic circle and how *Dasein*'s existence is hermeneutic is verging upon the deterministic. By doing this Agamben's construction of whatever-being remains very close to Heidegger's *Dasein*.

This thesis has only outlined this conflict between Agamben and Heidegger in relation to *Dasein* and hermeneutics. Despite this, a further area of questioning is opened up in relation to Heidegger's works. Heidegger's shadow appears to loom large over Agamben in relation to whatever-being, but it is not clear how far Heidegger's influence permeates into Agamben's wider works. It is one thing to admit an influence from a thinker, but another to attempt to overcome that thinker's thought and fail to do so. Does the entirety of Agamben's thought stand in Heidegger's shadow? This work is suggestive that this is the case.

This in turn suggests that any use of Agamben's thought in scholarship today must also take into account Heidegger's works and their impact on Agamben's thinking. In particular, it is not yet clear how far Heidegger's writings on *Dasein*'s being-with Others influence and potentially even overlap with Agamben's thought.

The third argument does develop the question of Agamben's immanent thought and its relationality in respect of the sphere of legal reasoning. This application has not only made clear the hermeneutical challenge to Agamben's thought, but also revealed the fact that Agamben's work is situated within the coordinates of the thought of both Heidegger and Levinas. Levinas's thought has been argued to be implicit within Agamben's work. This is a connection not explicitly focused upon, and is one of the main contributions that this thesis makes to the literature. The reliance upon Levinas undermines Agamben's claim for original philosophical thought. Instead, Agamben's thought remains derivative to Levinas's ethics and consideration of relationality.

This thesis has approached legal reasoning as a foil which helps reveal these hidden *aporias* and influences that exist in Agamben's thought. This work does not purport to undertake an in-depth study of legal reasoning. For example,

the ongoing debate between legal positivism and natural law has not been considered. This was not meant to infer that such issues have no relevance.

Future Directions for Thinking with Agamben

The research undertaken indicates that the main area of this thesis that could be developed relates to the interactions between Agamben and legal reasoning. This is because it is through the spectre of legal reasoning that the Heideggerian and Levinasian grounding of Agamben's thought has been made clear. Agamben's work shows the difficulty of formulating a non-relational philosophy. It also opens up a realm of questioning into precisely whether all forms of ethics require relationality and if so, precisely what that relationality involves.

In particular, certain trains of future research can be suggested. This thesis has not undertaken a detailed empirical analysis of the exception and its operation. Nor has this thesis undertaken an exposition of Agamben's relation to the main strands of legal reasoning. Both of these areas could be subjects of future research. The sphere of legal reasoning has revealed the 'anxiety of influence' that Agamben's work contains from the philosophy of Levinas. It is an open question as to how far Levinas's influence permeates legal theory and theoretical approaches to legal reasoning. In addition, perhaps the most important area that this thesis does not cover is the potential conflict between Heidegger and Levinas.

Levinas's work is not questioned in light of Heideggerian hermeneutics and Heidegger's thought is not interrogated for its ethical stance. Agamben's thought, despite its derivative nature, could be crucial in analysing this potential conflict. Agamben's work is therefore in a precarious position. His work is situated between Levinas's ethic of the Other and Heidegger's hermeneutic cycle of Being. This thesis has not developed a detailed philosophical analysis of how Agamben's work interplays between Heidegger and Levinas.

This move appears to be the obvious next stage in developing these arguments. If there is a potential conflict between Heidegger and Levinas this would have grave implications for the sphere of judicial decision-making. This potential conflict also points to an important, if unintentional, conclusion that can be drawn from Agamben's work.

Agamben could represent modern philosophy's debt to Levinas and Heidegger. Agamben's thought outlines in detail a malaise that has enveloped

modernity. The critiques of Agamben expounded upon in this thesis suggest that a solution to this malaise will not be found from a thought that attempts to break with a historical negativity. Rather, it is to the works and influence of Heidegger and Levinas that such a way forward may be found.

This thesis has attempted to draw connections between Agamben, Heidegger and Levinas that may not at first viewing have been obvious. This thesis's aim has been to conceptualise Agamben as a philosopher of ontology. This conceptualisation has brought him into conflict with both Levinas and Heidegger.

Agamben's thought goes simultaneously too far and not far enough. He goes too far in diagnosing the need for a break with the past and a coming politics. However, he does not go far enough as he does not do justice to the philosophical tradition that he intends to break from. In turning back to the works of Levinas and Heidegger, we may find answers to the *aporias* Agamben identifies. The coming community therefore may not need to be messianic. Rather, the coming community may be present at hand, but not yet grasped.

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