CHRONOTOPOLOGIES OF THE EXCEPTION
AGAMBEN AND DERRIDA BEFORE THE CAMPS

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Flash back. Germany, 1933.

"Der Reichstag brennt! Der Reichstag brennt! Hast du mich gehört? Der Reichstag brennt." On a quiet, brisk February night in 1933 a Berlin fire station received a panicked phone call. A fire had flared up in the building that hosted the German parliament. The Reichstag was burning. Squads were needed to put the fire out. Just six days before the date set for the parliamentary election, the Reichstag fire represented an invaluable opportunity for Germany's newly appointed chancellor [Mommsen 129–222; Tobias 10–16]. Following up on what he deemed a "sign from heaven," Chancellor Hitler denounced the event as the inaugurating act in the Communists' plot to seize power. Something exceptional needed to be done in order to protect Germany against the menace of Bolshevik terrorism. On February 28, the day after the arson, Reich President Paul von Hindenburg approved what is commonly known as the Reichstag Fire Decree. This decree suspended fundamental individual rights and handed full power to the chancellor. Having seized emergency powers and with the pretext of the red threat, Hitler closed down unfriendly newspapers, incarcerated thousands of political opponents, and persecuted the Communist Party. The substantial suppression of all oppositional forces allowed Hitler to assemble at the March 5 election the majority he needed to pass the Enabling Act: the executive acquired legislative powers and had now the prerogative to rule by decree with neither the approval of the Reichstag nor of the president. Instituting de facto an endless state of exception, Hitler had transformed Germany into a camp.

Following Giorgio Agamben's work, one can in fact visualize the *lager* as a distortion of the normal political time-space, arising from the suspension of the customary checks protecting the people within a constitutional regime. The camp is the space produced by the enforcement of an exception to the law, and those who end up in it are robbed of any legal protection insofar as they are sanctioned as threats to the stability of the political itself [*Means without End* 37]. This branding of certain social assemblages as guilty regardless of any proven criminal behavior uncovers the sacrificial logic at the heart of the camp: the lives of others are sacrificed to protect the lives of a self-authenticated collectivity. In this way the polity gets fractured in two. There is a "they, the people," stripped of fundamental rights and abandoned to face bare the sovereign's absolute power. And there is a "We, the People," who can enjoy its rights only because the rights of the others have been revoked.[1] Such a fundamental split in the body politic is however what,

I would like to thank Scott Stuart, who provided invaluable linguistic assistance in the preparation of this essay.

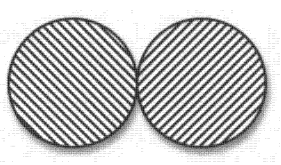
[1] *Legal theorist Geoffrey Stone reaches similar conclusions in* Perilous Times*: "as almost always happens, the individuals whose rights are sacrificed are not those who make the laws, but minorities, dissidents, and noncitizens. In those circumstances, 'we' are making a decision to sacrifice 'their' rights—not a very prudent way to balance the competing interests" [531]. Vik Kanwar's*

according to Agamben, intrinsically dooms a political space to its destruction. Once the line between authentic and inauthentic life is drawn, once the humanity which, as *bios*, lives fully, has been isolated from the humanity that merely exists as *zoē*, the frontier keeps moving forward, creating an ever more inclusive group of excluded that can be sacrificed. Eventually, the autoimmunitary thrust of the state of exception becomes clear: the life of some, and in the end the life of the One, is guaranteed only by the death of everyone else [Esposito 116].

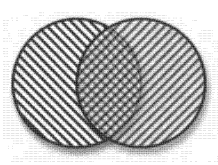
It is important to recall, once again, that Hitler's rise to power and the consequent reduction of Germany into one gateless *lager* was accomplished by following the dictates of the Weimar Constitution. The camps are not an accident that Hitler brought to his nation, but a paradoxical juridical space that finds its condition of possibility in Article 48 of the constitution. Article 48 in fact accorded plenary powers to the president in cases where security and public order were seriously disturbed in the Reich.[2] Beginning in 1930, President Hindenburg exploited the textual indeterminacy of this article to strategically strip the parliament of any functions and have the cabinet respond only to him. From that moment on, Germany ceased to be a parliamentary regime. The Reichstag, in other words, was destroyed well before the arson of 1933. Its eventual destruction and the rise of the camps were actually already inscribed, via Article 48, in the Weimar Republic's founding text. And the only thing Hitler accomplished with the authority to suspend the rule of law transferred from the president to the chancellery was to transform a presidential dictatorship into an executive dictatorship.

Flash forward. United States, ten years after 9/11.

Libraries are filled with books on the political and legal consequences of the terrorist attacks on the World Trade Center and the Pentagon, and the vast majority of the interventions archived on those library shelves refer to the constitutional downfall of the Weimar Republic as their obligatory precedent. Even if there were camps well before Hitler, what happened in Nazi Germany stands as an exemplary case for two sets of reasons: the memory of the Enabling Act imposes a reflection on the risks connected with the delegation of discretionary sovereignty to the executive, and it allows for the understanding of the juridical grounds that let camps emerge in modern democracies (as was the Weimar Republic). At stake in the formalization of the relationship between the normal political space and the state of exception, between rule of law and rule by law—between *polis* and *lager*, that is—is the re-evaluation of the arguments concerning the proximity of democracy and dictatorship. Obviously it is not a matter of negating the differences between a democracy governed by the rule of law and a dictatorship in which the law is a means to govern, but of discussing the existence of a threshold that would keep these two regimes clearly separated. In what follows, I will discuss three different topographies of the relationship between a state of exception and the rule of law.



Ackerman



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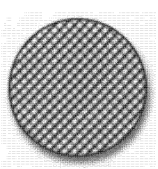
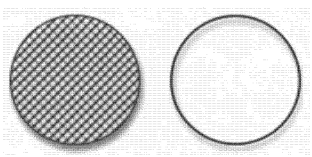


Derrida

review of State of Exception *discusses Agamben's interventions against the backdrop of U.S. constitutional theory, drawing especially from the works of Stone and David Cole.*

[2] *On the legal dispute regarding the constitutionality of Article 48—and the role that Carl Schmitt played in such a battle—see David Dyzenhaus, "Legal Theory in the Collapse of Weimar."*

I begin with Bruce Ackerman who in "The Emergency Constitution" tried to demarcate an unmistakable threshold between the normal functioning of a constitutional democracy and its exceptional suspension. After having separated these two realms, Ackerman concerns himself with determining the actor who should have the authority to switch from normality to exceptionality (and vice versa). From this perspective he argues for the necessity of a statutory reform that would unmistakably preserve the legislature authority over the exception threshold, and therefore prevent the executive from turning a transitional emergency regime into a permanent police state. However imperative or praiseworthy such an attempt may be, I argue that Ackerman's legalist framework fails to notice that the exception is not something that—sometimes and somewhere, in a local and transitory context—needs to be enforced in order to deal with national emergencies. Following Adrian Vermeule, my first critical intervention consists in showing that any defense of classic legalism overlooks the inevitable existence, within a system of rights, of legal black and grey holes that always allow for negotiations with the rule of law. Against Vermeule, I claim that these loopholes are not created by the judicial discretion inscribed in administrative law, but provoked by the naked formality of laws, i.e., by the very form of law. Inspired by Jacques Derrida's description of the textual structure of our relation to law and Agamben's identifying the state of exception as *the* paradigm of government, I argue that spectacular exceptions granted to the executive when emergencies transpire should not distract us from the micro-exceptions that are produced every time the meaning of a certain law is decided upon. In other words, the executive's reactions to national crises should not prevent us from acknowledging that, for certain segments of the population, freedom is normally, and strategically, negated. After highlighting the structural affinities between Derrida and Agamben's topologies of the exception, I will show why, according to Agamben, deconstruction's eternal and tactical negotiation with a law recognized to always be in force without any fixed meaning is insufficient. In order to improve our position in the struggle against an emergency that has always been the rule, the task before us is the creation of truly extra-juridical spaces that might function as real exceptions to sovereign power.



Agamben

Beyond the legal and political deadlock that so many authoritative voices produce, beyond the defense of liberal constitutionalism as well as beyond the normalization of emergency regimes, beyond Schmitt, beyond Derrida, new common political spaces are there to be explored. Beyond the exception, politics awaits.

1

Constitutional Fetishism

Shocked by the Bush administration's reaction to 9/11, Ackerman's ultimate goal is to elaborate a set of constitutional devices that would immunize the United States from

the risk of following the Weimar Republic's catastrophic example. His "The Emergency Constitution" is set in motion by the fear that episodic terrorist attacks will punctuate the future of American history, and that each and every strike will lead the ruling executive to adopt ever more repressive measures. In a climate of mounting paranoia against real or presumed terrorists, "even if the next half-century sees only four or five attacks on the scale of September 11, this destructive cycle will prove devastating to civil liberties by 2050" [1030]. Discarding the respectable but naïve idea that all civil liberties should be upheld no matter what emergency a country is facing, Ackerman cautiously concludes that *some* constitutional rights can be suspended for *some time*, yet the executive cannot be allowed to run wild. Even during the most perilous times, there must be unmistakable statutory norms framing the executive's access to plenary powers. What ultimately scares Ackerman is the kind of autoimmunitarian degeneration that Derrida in *Rogues* has localized at the heart of modern constitutionalism [36–40]. For Derrida, the threats to democracy do not only come from outside because, in the attempt to defend the security of its body politic, a constitutional democracy has the power to suspend the very liberties around which it was established, thus harming itself "to an extent greater than any 'terrorist' could hope to achieve" [Haddad, "Derrida and Democracy" 29]. In the case of the U.S. Constitution: Article 1, Section 9 authorizes the suspension of habeas corpus when, in cases of rebellion or invasion, the public safety may require it. And although the proclamation of such an emergency measure was the province of the Congress, the president "has accreted more power than the original understanding might be understood to permit" [Posner and Vermeule, "Accommodating Emergencies" 1n4]. It is exactly such presidential "invasiveness" that Ackerman is afraid of. But is not the Supreme Court's role to protect the people against it?

In order to make the case for the necessity of statutory reform, Ackerman argues that the judicial management of the exception is not a sufficient deterrent to the executive's possible abuse of power, because the judiciary has been far too deferent to the president during critical moments. Since the U.S. Constitution does not specify the cases in which a suspension of habeas corpus is indeed constitutional, it is usually up to "judicial imagination" to determine whether the recourses to emergency measures such as indefinite custody in detention camps is in line with the spirit—if not the letter—of the Constitution itself. So while in "normal times" legal sages ramp up the requirements to condone a suspension of the writ, they can easily switch to a more relaxed interpretation of constitutional dictates should the situation require it. The case *Korematsu v. United States* is the ultimate proof that an excessive confidence in justices' wisdom is hardly defendable. In times of perceived emergencies, even justices as libertarian as Hugo Black will dangerously tend to defend the executive's decisions. Furthermore, under the common law system, one risks ending up with legal precedents that normalize, so to speak, the emergency. Ackerman points to the fact that *Korematsu* has never been formally overruled. Therefore: "What will the Supreme Court say if Arab Americans are herded into concentrations camps? Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the 'war on terrorism'?" [1043]. As Justice Robert Jackson's dissenting view in *Korematsu* claimed, once a judicial opinion justifies an emergency resolution by finding it in conformity with the Constitution, one creates "a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need" [*Korematsu v. United States* 246]. Pair then the presidential "invasiveness" with the traditional deference accorded to the executive by the judiciary during emergencies, and the constitutional yet antidemocratic catastrophe to which the United States is exposed becomes clearer. The specter of an executive regime will be looming on the horizon as long as the suspension of the habeas corpus remains a presidential prerogative restrained only by judicial scrutiny. For these reasons, Ackerman deems it urgent to take pressure and responsibility away from the common law cycle and the judiciary by having the Congress

enforce a less extemporaneous approach to emergency situations. Rather than relying on judges to accommodate emergency measures by stretching existing laws or creating dangerous precedents, it should be up to the legislature to create a precise framing of emergencies and specify how critical moments will be handled. In this way, it will be clear that emergency decisions such as the suspension of the writ are not consistent with the ordinary Constitution, but instead permissible only within extraordinary instances that the Congress itself is responsible for declaring. An unmistakable threshold would separate normal times from emergency moments and therefore avoid any structural contamination between the rule of law and the state of exception. Beside serving as a means to reassure the population that the nation is prepared to face crises, new constitutional structures will avoid the possibility of a lethal alliance between the executive and a permissive, or even remissive, judiciary.[3]

The constitutional device on which Ackerman specifically relies to hold emergency regimes in check is the "supermajoritarian escalator." The executive will be allowed to assume full power for no longer than two weeks if the Congress is already in session, otherwise only for enough time for it to convene and consider the case. Without congressional approval, the state of emergency would automatically expire. With congressional approval, the state of emergency will be assigned a two or three month life span. In order to carry on, the state of emergency would need to pass through the Congress again—but this time the required majority would be sixty percent. An escalating cascade of supermajorities would be required for each renewal. Giving veto power to the representatives of ever-smaller minoritarian groups, the supermajoritarian escalator will be able to protect a democracy from the risk of an executive regime backed up by the judiciary. The fractures within the social body are for Ackerman the ultimate antidote against a fallacious separation of powers: modern pluralist societies are simply too fragmented to sustain an indefinite violation of civil rights.

Laurence Tribe and Patrick Gudridge have pointed out that in "The Emergency Constitution" those civil rights that can be temporally revoked remain as vague as the nature of the terrorist attacks that would justify their suspension [1803]. However, unlike Tribe and Gudridge, I do not believe such a vagueness to be an unintentional blind spot in Ackerman's constitutional reframing. It is, on the contrary, the very heart of his proposal. One must not forget that in Carl Schmitt's *Political Theology*—the obvious reference for any discussion regarding sovereignty in exceptional times—the sovereign does not only have the power to decide *in* the emergency; he is also and foremost the authority who decides *on* the emergency, being the only actor with the prerogative to determine what is and what is not an emergency. Against the unitarian thrust of Schmitt's political theology, Ackerman's supermajoritarian escalator tears sovereignty apart by depriving the executive, even in exceptional times, of the authority to decide whether or not the country is really facing an emergency. Instead of setting actual restraints on what the executive can do during emergencies, Ackerman makes "the threshold question of the existence of a state of emergency—a matter for legislative deliberation, not executive fiat" [Tribe and Gudridge 1811]. Disassembling, if you will, the body of the Schmittian sovereign, Ackerman accords the executive the privilege to decide what needs to be done within the state of exception. But it is the legislative branch that ultimately decides if the suspension of the rule of law is justified. While the executive is sovereign during the emergency, the Congress is the sovereign on the emergency, being awarded the authority to cross or not to cross the line that separates normal times from critical moments, the threshold that leads from the *polis* to the camps.

[3] *On this issue, see Tushnet, "Defending* Korematsu*?"; and Gross, "Chaos and Rules."*

Everything seems resolved. The supermajoritarian rule of the legislature over the emergency border will prevent any political exploitation of emergencies, because minority congressional groups will not authorize unnecessary measures. Of course, one can always claim that, especially under such conditions, the executive will be tempted to produce ever more Reichstag fires in order to better defend its claims to power. As both Agamben and Derrida have pointed out, a well-aimed politics of terrorism can easily be employed as a catalyst for governmental re-legitimation [Agamben, *Means without End* 6; Derrida, *Rogues* 40]. However, one does not have to embark on a conspiracy theory hypothesis to show the ineffectuality of Ackerman's solution. His constitutional reframing does not work because the happy ending between the executive and the legislature will always be upset by the specter of the judiciary. What if the executive continued to grant itself emergency powers independent of the required congressional approval? In the case of a conflict between the executive and the legislature, the judiciary, to which Ackerman initially denied any say in the emergency, is now required to step up to the plate. Notwithstanding his dismissal of the judge-centered approaches to the emergency, Ackerman in fact still attributes to the judiciary a crucial role during exceptional times. Not only are courts the ultimate arbiters in eventual (and probable) dramatic contrasts between the executive and the Congress, engaging in what Ackerman calls "macromanagement." Judges are also required to "microadjudicate" in cases raised by individuals who claim their fundamental rights have been violated. "The Emergency Constitution" was set in motion by the distrust of juridical management of emergencies. The need that motivated Ackerman's project from the outset was the development of a statutory framework that would take the responsibility of dealing with emergencies away from the judiciary. And yet it is not clear why and how his supermajoritarian escalator could resolve the issue. In case of long-lasting emergencies, Ackerman can do no better than re-awarding the untrustworthy courts the authority of overseeing the camps, and negotiating between the demands of the executive and those of individual suspects, between national security and private liberty.[4] In this way, Ackerman's statutory framework allows for judicial interventionism and for the subjective legal decisionism that, in the name of the rule of law, his emergency Constitution strived at all costs to avoid. Judicial arbitrariness, in other words, deconstructs the elaborate framework statute put forth by Ackerman and punctures the barrier he tried to erect between the normal political space and the state of exception. No singular threshold can be localized between the *polis* and the camp. The points of access to the exception of the law are in fact multiple and do not fall under the legislature's control. Such a realization creates a superimposition of the two spheres that Ackerman wanted to keep clearly distinguished and paves the way for a different, terribly more convincing and terribly less reassuring topology of the relation between democracy and dictatorship.

2

No Power to the People: Or, We Are All (Potentially) Homines Sacri

The most significant result Vermeule achieves in "Our Schmittian Administrative Law" is the demonstration that any attempt to exclude justices from emergency management is destined to fail. Although Vermeule does not extensively address "The Emergency Constitution," mentioning it only in a brief footnote, I will approach his essay as a skillful demolition of Ackerman's endeavor to keep the rule of law and the state of exception separated by repositioning the latter within congressional reach.

[4] *For a discussion of Ackerman's other inconsistencies, see Vermeule, "Self-Defeating Proposals" [648–49].*

Vermeule finds the cue for his redescription of U.S. administrative law in Schmitt's *Political Theology*. While in 1921 with *Dictatorship* Schmitt examined the differences between commissarial and sovereign dictatorships, his 1922 *Political Theology* sought to distinguish the category of decision from that of norm. As Schmitt notes, norm and decision are two autonomous yet irreconcilable categories that coexist within the juridical order, categories whose hierarchy is modified by situations: "Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception" [*Political Theology* 12]. The suspension of the norm in fact gives space to an action which does not have anything to do with the realm of legality because it is not a matter of applying a preexisting rule or standard. When the present is endangered, when the configuration of our lives is under threat, what is required is a totally autonomous and instantaneous decision on the best way to secure the persistence of the *polis*. In the sovereign decision it is not merely a matter of defending this or that rule, this or that standard. The sovereign exceptional decision is what transcends, what stands outside the political space as its very condition of existence. The exception can be then imagined as the transcendental of the *polis*.

Drawing from Schmitt, Vermeule demonstrates that it is not possible to eliminate the dialectic between norm and decision by imposing a law to the exception. The texture of administrative law does not only allow but actually requires what David Dyzenhaus has recognized as grey and black holes, substantially lawless zones which exempt the executive and government agencies from legal constraints. Black holes are spaces that administrative law secures from the possibility of judicial review altogether. Under the category of grey hole fall all the cases in which reverential lower courts dial down the intensity of review to the point that the scrutiny of government agencies is only a formalism. Since administrative law is organized around vague parameters such as the arbitrary and capricious standard, the substantial evidence test, and the good cause exception, federal courts of appeal "during perceived emergencies [can and do] adjust to increase deference to administrative agencies" [Vermeule, "Our Schmittian Administrative Law" 1097].

Vermeule notes that for classic liberal legalism, grey holes are far more problematic than black ones because they consist in a substantial violation of the law that is formally justified on the basis of a certain reading of laws themselves. A body that is caught in one is awarded some procedural rights by a deferent judiciary, but not enough to effectively confront the executive's decision [Dyzenhaus, "*Schmitt v. Dicey*" 2026]. To put it in Derridian terminology: the judiciary's deference toward the executive takes the form of a two-fold differential gesture. In order to prevent certain detainees from opposing the measures to which they are subjected, courts defer the moment in which they will be treated as normal persons, both by granting them a laughable amount of constitutional rights and by "ducking legal challenges with the help of the copious procedural mechanisms at their disposal—standing doctrine, denial of certiorari, delay, and so forth" [Posner and Vermeule, "Accommodating Emergencies" 2]. In black holes the executive's actions appear for what they are—exceptional decisions that take place outside of the customs determined by the rule of law. Grey holes, on the other hand, allow courts to pass administrative agencies' extraordinary decisions as norms—compromising de jure and de facto the distinction between norms and decisions, normality and exception, rule of law and rule by law. While Ackerman tried to disseminate sovereignty across the different branches in order to limit any dictatorial drift, Vermeule suggests that sovereign extra- or pseudo-legal decisions are exactly what emergencies require. The attempt to limit the executive is both impracticable—given the structure of our times—and infeasible—given the structure of administrative law: grey and black holes are inevitable since it is impossible to subject government agencies to solid legal standards. The very idea of "standard" implies in fact that it can rule only in ordinary cases, and that changing circumstances require a different application of the standard itself, an application that actually allows for

executive decisions to "proceed untrammeled by even the threat of legal regulation and judicial review" [Vermeule, "Our Schmittian Administrative Law" 1133]. Then, in case of emergencies there is "no real choice but to hand the reins to the executive and hope for the best" [Posner and Vermeule, "Crisis Governance" 1614].

But is it true that our only alternative is between hope in the executive and despair, between deference and destruction? The history of emergency powers in the twentieth century has taught us that hope and despair, deference and destruction are not dialectical terms, but instead often work in solidarity with each other. Hope in the redemptive power of executive actions leads to a more incurable despair, and deference to them leads to an unthinkable level of destruction. With great responsibility comes great power: a thanatopolitical *détournement* of President Roosevelt's famous line from his undelivered 1945 Jefferson Day Address would sound more or less like this. And it would oblige us to realize that by positioning ourselves in need of salvation, we expose our precarious lives to the eventuality of sacrifice. To put it differently: should not the history of emergency powers, along with Vermeule's inscription of exception within the texture of administrative law, generate a less hopeful, more worrisome attitude before a sovereign power? How is it possible to restrain a government agency from treating not only "them" as terrorists but "us" as well? What can prevent us from plunging into one of the infernal circles where *homines sacri* live? In the pages that follow, I will explore Derrida and Agamben's readings of Kafka's "Before the Law" in order to highlight the conceptual similarities in their understanding of the relation between the exception and the law, and the strategic differences in their confrontation with a camp discovered to be the foundation of the rule of law.

3

Kafka's Lesson, Schmitt's Specters: Deconstruction as Thanatopolitics

The parable is well known.

A man from the country travels a long and troublesome way to arrive before the law. Believing the law to be accessible to all and at all times, he asks its doorkeeper for admittance. But he cannot get in. He finds himself standing not in front of the law, but before an ugly thug of a doorkeeper—with a fur coat, a big, sharp nose, and a long, thin Tartar beard—who denies him admittance. Days and years pass, and the countryman is turned down numerous times. Even bribery is unsuccessful. The doorkeeper stands in his way. Eventually, the man from the country loses his patience, and along with it, his eyesight. He has little time left to live—or so it seems—and he wants to ask the doorkeeper a final question: "Everyone strives to reach the law, so how is it that for all these many years no one but myself has ever begged for admittance?" The doorkeeper whispers in his ear: "No one else could ever be admitted here, since this gate was made for you alone. I am now going to shut it" [Kafka, *Complete Stories* 4].

The parable is well known. Published during Kafka's life in 1916 as an independent short story, it also appears posthumously in *The Trial* as a tale told in a cathedral by the prison chaplain to K. The aim of the story in this case is to teach K.—who is facing trial for an unspecified crime—a lesson about the law and to dispel his delusions regarding the workings of the court. K., however, is not sure he has understood the moral of the parable, and he spends quite some time going over possible interpretations. At the end, K. is literally left in the dark, unable to find his way out as the prison chaplain leaves him with this assertion: "The court does not want anything from you. It receives you when you come and dismisses you when you go" [160]. So: what exactly is the lesson K. should have learned? And what exactly is the parable about? Is it about an event that happens not

to happen (as Derrida asserts), or about an event that happened to happen by seeming not to happen at all (as Agamben maintains)? By exploring the antithetical readings Derrida and Agamben give of Kafka's parabolic riddle, I will highlight their different positions before the law and the legal. This will also allow me to debunk the political meaning of Agamben's curse against Derrida in *Homo Sacer*: "Woe to you, who have not wanted to enter into the door of the Law but have not permitted it to be closed either" [54].

Based on a lecture on Kafka delivered in London in 1982, Derrida's reading of "Before the Law" was later reworked in a longer engagement with Jean-François Lyotard's theory of judgment. For this reason, it was published as an independent essay ("Before the Law") and as a section of "Préjugés: Devant la loi." In both cases Derrida's objective is to highlight the textual structure of the relation Kafka sets up between the countryman and the law, and consequently also between K. and the court. The mistake both the countryman and K. committed, the mistake that brought them to waste their lives away, consists in failing to realize that appearing before the law equates to standing before a text. The law of the law is textuality, therefore all attempts to approach the thing itself and to make it present, all the attempts "to enter into a relation with it, indeed, to enter it and become intrinsic to it," are destined to fail ["Before the Law" 191]. For this reason, the journey of the man from the country toward the law can never end. It is destined to go on forever since the law exposes itself to our sight only in the form of a withdrawal. It is there—sometimes we can glimpse its light through the gates and protective boundaries—but it is always beyond our reach. As with the Sirens from another of Kafka's stories, it is silent. And through its silence the law impels us to decipher its enigmatic *silhouette* by giving an account of it. The man from the country does not understand all of this. Rather than deciding the meaning of the law himself by negotiating with the doorkeeper and then going back to his village to do something with this acquired knowledge, he decides not to decide. He decides to wait, as if one day the doorkeeper would grant him admission to the law. He does not understand that, even if he had been able to sneak in, he would have run away horrified, having discovered the inside of the law to be a void. Only an interpretative reading decision could provide the legal doctrine with some consistency; it is a reading decision that would have then given the countryman access (in the form of a non-access) to the law. But reading itself, according to Derrida, is always marked by a certain degree of violence.

Being that the law as text is absolutely transcendent and inaccessible, its actualization depends on the performative gesture that invents the meaning of the law every time it is applied. This implies the impossibility of strictly distinguishing between founding and enforcing a law, between constituent and constituted power. Therefore, all that Derrida affirms regarding founding violence in the passage I am about to quote from "Force of Law," can also be applied to the decision to read the law: "the operation that amounts to founding, inaugurating, justifying law, to *making law*, would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no earlier and previously founding law, no preexisting foundation, could, by definition, guarantee or contradict or invalidate" [241]. The founding violence inaugurates the law, and in doing so, legitimizes its arbitrary gesture through a deferred effect. At the same time the founded law is a text: it is then destined to be refounded every time it is reread and reapplied. Consequently, it is impossible to exclude force from the law: enforceability is not an external eventuality which may or may not get attached to laws. Enforceability is structurally implicit in every law, insofar as the existence of our laws and their meanings is assured by the performative violence of an application. The legible illegibility of the law imposes, as a necessity, "a juridicosymbolic violence, a performative violence at the very heart of interpretative reading" ["Force of Law" 271]. The law must be read, and reading is always a matter of decision-making in the absence of criteria that would guarantee the soundness of the decision. It is then difficult to main-

tain Derrida's distinction between instances in which sentences are delivered thanks to calculated reference to existing rules and those in which judgment passes through the experience of the undecidable—the experience of the suspension of all guidelines. It is not possible to hold on to this distinction, which leads Derrida to distinguish between *justice* and *justesse*, for one can never simply apply a just rule without also inventing the rule and example in each case. Applying the law always coincides, willingly or unwillingly, with inventing it ["Force of Law" 245]. Therefore, one should not think of judicial arbitrariness as a contingent fact which could be eliminated by a clearer law-writing practice. Judicial interventionism is not caused by the presence of vague parameters and loopholes within the body of the law. Judicial arbitrariness and interventionism are implied by the textual structure of the law itself. Moreover, law's textuality deconstructs the possibility of simply complying with the law and destines every application of a norm to always being more than a mere application. It destines it to be a responsible decision. *Il faut juger*. One must judge and decide. Indeed, one always does precisely that because, as Derrida puts it, the law is the pure transcendent ["Préjugés" 94–95].

In the chapters "Form of Law" and "Force-of-~~Law~~" (from *Homo Sacer* and *State of Exception* respectively), Agamben suggests that conclusions similar to those Derrida arrives at, via Kafka, in "Force of Law" were also reached by Carl Schmitt in his efforts to construct a rigorous theory of the state of exception. Agamben's arguments are quite oblique and require some patient unpacking. I will start with *State of Exception* and then move back to the first installment of the *Homo Sacer* series.

Agamben begins the last section of "Force-of-~~Law~~" by noting that "application" is a very problematic category. Its correct understanding was, for a long time, sidetracked by Kant's theory of judgment, where application is treated as a case of determinant judgment: the general is given and one only needs to logically translate this generality into the particular case. By looking at the relation between the generality of *langue* and the particularity of specific *parole* acts in the realm of language, Agamben highlights the conceptual fallacy of conceiving the application of a general norm to a particular case as a mere logical operation. As in language, the virtuality of *langue* is actualized and comes to existence only in the specific utterances of a speaker or a community of speakers that assumes that linguistic abstraction in its own *parole*, the law only acquires its meaning thanks to the procedural machine of a trial. Here Agamben moves along the lines of Feuerbach's full-fledged critique of abstractions: *langue* and law are nothing more than abstract fetishes produced by the attempt to isolate from the concrete customs and usages of individuals a common transcendental ground which would make such practices intelligible as reoccurrences of a same general structure. Just as *langue* is presupposed in order to explain actual discourse, the law is presupposed to justify applications—while, in reality, *parole* and applications should be considered the conditions of possibility of *langue* and law. This casual inversion of condition and conditioned provokes in the realm of the linguistic the floating signifier (one of Derrida's crucial concepts) and, in the legal domain, the state of exception. In both instances, we are dealing with void forms—respectively of language and law—which, after having lost their historical grounding in the realm of human praxis where they originated, return to haunt exactly such a realm.[5] In other words: they return as texts which, as *écriture*, have force without having any specific significance.

[5] *All this resonates with Walter Benjamin's critique of the Weimar Republic for forgetting its origin in the 1919 revolution: see "Critique of Violence" 244. Moreover, I am not completely sure the discussion of the similarities between language and law proposed by Agamben in the first pages of "Form of Law" in* Homo Sacer *is coherent with the one in* State of Exception. *My working hypothesis, which I cannot elaborate in this context, is that Agamben in "Form of Law" is not*

As far as the state of exception is concerned, its spectral haunting constitutes the most radical attempt to invert and naturalize the relation between life and law. It works by producing an anomic zone in which legal customs are suspended in order to allow for an effective governmentalization of human lives. Producing exceptions is a way to produce normality by reaffirming the grip on life not of this or that specific norm, but of a political ordering in general. This happens not only in the extraordinary space of the camp, but also in the ordinary setting of the court. The crucial point here is that the tension between norms and decisions that Schmitt had detected at the foundation of any juridical order does not actually exist: just as the sovereign decides in the suspension of the rule of law, judges also decide in the state of exception. Arguing against Kant, Agamben concludes that the application of a law cannot be considered as a case of determinant judgment. It cannot be considered a matter of logical subsumption because, in the passage from the general to the concrete, there is a gap which no strictly logical operation can fill. The act of bringing the law into actuality through enforcement consists in the decision which assigns—each and every time it is applied—an actual and specific meaning to the law in question: "it is . . . perfectly obvious (and Schmitt had no difficulty theorizing this obviousness) that, in the case of the law, the application of a norm is in no way contained within the norm and cannot be derived from it" [*State of Exception* 40]. This also means that the only way to enforce a norm is to suspend the law itself, for the law cannot determine how it will be applied. Norms need to be enforced in order to constitute the realm of normality—the space where the fictional grip of the juridical order over life is naturalized. But this enforcement is an active performance since, as Wittgenstein also demonstrated when discussing the paradoxes of rule-following, a norm does not mandate, allow, or forbid one singular and determinate course of action.[6] There are multiple, divergent ways to comply with the same norm. Therefore, in order to apply a norm, "it is ultimately necessary to suspend its application, to produce an exception" [*State of Exception* 40]. In other words: to be enforced, the law must destroy itself in an autoimmunitary fashion.

To further highlight the resonance between Derrida's deconstruction of the law and Schmitt's theorization of the state of exception, one could reformulate Agamben's findings in this manner: there is no enforcement of a law that is not also an exceptional decision. There are no norms. There are only normative effects originating from always sovereign decisions. It is not a coincidence—but Derrida overlooks this—that the syntagma "force of law" from a technical point of view refers not to the law, but to the executive's power to issue decrees that count as law even if technically they are not. However, since there is no application which is not also an exception, one must conclude that all applications of a law are actually sovereign decrees whose force of law is a force of ~~law~~: applications are extralegal, exceptional decisions rendered lawful by their power to impose themselves as enforcements with force of law. But if this is the case, then the exception cannot be considered merely "as the dominant paradigm of government in contemporary politics" [*State of Exception* 2]. It is not simply that the ruling by emergency decrees that has characterized the twentieth century collapsed the once-sound distinction between legislative and executive powers. As Adam Thurschwell has summarized: there is surely a history of exception regimes, but "the sovereign exception is also . . . the purely logical structure of the rule of law in general" ["Specters of Nietzsche" 54]. It is for this reason that the camps must be assumed as the paradigmatic spaces of modernity: the *lager* is the

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presenting his own ideas on language and law, but merely repeating Derrida's in order to expose the ban structure implied by deconstruction and eventually move beyond it. For a precise account of Agamben's confrontation with Derrida's philosophy of language, see Kevin Attell, "An Esoteric Dossier: Agamben and Derrida Read Saussure."

[6] *For the discussion of the connection between the state of exception and rule-following, see Paolo Virno,* Multitude Between Innovation and Negation *74–75.*

truth of the political as we know it. The logical conclusion we are then forced to confront is the following: *polis* and camp coincide; we live in a permanent state of exception. Law is in fact always in force without having any fixed meaning since its enforcement is a matter of sovereign decision, not of mechanical deduction. The situation is bleakly depressing, Kafkaesque indeed: "life under a law that is in force without signifying resembles life in the state of exception, in which the most innocent gesture or the smallest forgetfulness can have most extreme consequences" [Agamben, *Homo Sacer* 52]. Ackerman had tried to erect an unmistakable barrier between the normal functioning of a political space and the state of exception. Vermeule demonstrated that such a threshold is not as solid as Ackerman wished it to be, for administrative law is replete with grey areas allowing for the evasion of the rule of law even without the legislature's attribution of plenary powers to the executive. Derrida and Agamben expose the complete superimposition of the rule of law and the state of exception: any application of a norm is a sovereign decision, since judicial interventionism is not provoked by the vagueness of certain standards but by the textual structure of any law whatsoever.

Going back to Benjamin's "Critique of Violence," Agamben in *Homo Sacer* dubs *das bloße Leben* [bare life] the form of life that lives under a law which has form and force but not a specific content: a bare life living under the constant threat of *die bloße Form des Gesetzes* [the bare form of the law] (as Kant, in his *Critique of Practical Reason*, defined the law). And even if we are all potentially bare lives because the state of exception is the rule, for law itself has always been naked [*bloße*], i.e., without content, there are specific social assemblages which, not having any decision power before the law, are actually abandoned to face without any protection governmental doorkeepers. For this reason Benjamin writes that *das bloße Leben* is the marked bearer of guilt [250]: naked life is inevitably guilty, for it has been stripped of the performative means to enforce a reading of the law which would prove its own innocence. Deconstruction deals with the "coextensivity of the political and the police" [Derrida, "Force of Law" 279] by proposing a sort of microphysique of sovereignty that took away the monopoly over decision from the hegemonic authorities, dispersed reading power over the law upon the entire social body, and allowed for anti-hegemonic applications. Reading and counter-reading. Decision and counter-decision. Enforcement and counter-enforcement. Violence and counter-violence. "This infinite passage through violence is what is called history," Derrida concluded vis-à-vis Levinas in his 1964 "Violence and Metaphysics" [162].[7]

However, according to Agamben, Derrida's acceptance of the unavoidability of the oscillatory movement organizing the political eludes the real problem: the fact that we, like Kafka's countryman and K., are delivered to the absolute power of a law which, not demanding anything specific, can potentially find us guilty of anything. The law is all the more pervasive insofar as it completely lacks content. Agamben and Derrida would agree on this. However, Agamben diverges from Derrida on the best strategy to resist a law found to be in force without significance. "It is precisely concerning the sense of this being in force (and of the state of exception that it inaugurates) that our position distinguishes itself from that of deconstruction" [*Homo Sacer* 54]. Instead of trying to prevent law's pure potentiality from being actualized, deconstruction obliges humanity to the infinite task of influencing the outcomes of law's *transitus de potentia ad actum*. Rather than liberating humanity from the blackmail of the law as text, Derrida accepts life in the

[7] *I refer to Samir Haddad's "A Genealogy of Violence" for a detailed discussion of Derrida's accounts of violence and its unavoidability. Haddad argues that the suggestion, from "Violence and Metaphysics," that one ought to negotiate with the inevitability of violence by choosing the lesser violence is a contradictory claim, and one that therefore disappears in Derrida's later essays. Curiously Haddad does not take into consideration* The Gift of Death, *where one witnesses the ultimate collapse of the distinction between ethical choices and sacrificial decisions.*

state of exception as our only possible future, for such a form-of-life has always been our past. We have always been *préjugés* because the law, in its unpresentability, forces us to appear and respond before it. But since the law does not have significance in itself, one cannot rely on statutory reforms for protection against law's interpellation (to use an Althusserian term). One can only be defended by the re-empowerment of bare lives, i.e., the strengthening of communities and lawyers who are working for alternative, "ethical" enforcements of the law. Those who appear barest before the law are the ones whom the judiciary should favor. What is wrong with all this? According to Agamben, Derrida continues to imagine the political realm in Schmittian terms, that is, accepting the imputability of life and relying on the fundamental category in the architectonics of Schmitt's thought: decision. It is ultimately for this reason that Agamben detects in deconstruction the risk both of reducing thought and politics to a negotiation with the doorkeepers who control access to the law, and of attributing to thought and politics a door keeping function. Derrida is playing sovereign, in other words. Don't we need new doorkeepers if we want to subvert the decisions of the current ones, if we want the significance of the law to be decided otherwise and with others' interests in mind? Derrida's decisions are of course very different from Schmitt's. They are taken within the horizon of a democracy to come, "for the sake of more rather than fewer, and weaker rather than stronger, segments of the population" [McCormick 1698]. This emancipatory thrust organizing deconstruction is totally absent from Schmitt. But this is not Agamben's point. Agamben does not suggest a political syntony between Schmitt and Derrida. He highlights the structural affinity between their frameworks and the crucial role that the category of decision plays in both systems.

Gayatri Chakravorty Spivak, in her response to John McCormick's "Schmittian Positions on Law and Politics?," explained why Derrida's decisions cannot be considered sovereign decision in Schmitt's sense. McCormick's essay did not actually imply a direct connection between Schmitt and Derrida. However, he went terribly close to it from Spivak's perspective: he underlined the similarity between Schmitt and the Critical Legal Studies (CLS) project. Given the "conjunction or conjuncture" established by Derrida in "Force of Law" between "his" deconstruction and the juridical one performed by CLS, it is not a surprise that Spivak addressed the issue of a presumed analogy between Schmitt's and Derrida's frameworks. Very schematically, Spivak's argument goes as follows:

In Schmitt, the foundation of the political rests in the possibility of drawing a line distinguishing the friend from the enemy. Derrida's deconstructive intervention from *The Politics of Friendship* shows how this original political distinction is never sound, for the eventuality of civil war—a war between friends—always haunts the stability of any political space whatsoever. Since the other cannot be accessed directly but through what Husserl would call "analogical appresentation," there is no certainty on who is really a friend. Again, as it happened when standing before the law, the impossibility of touching what stands before us obliges us to responsibility and decision—responsibility and decision which remain heterogeneous to cognition. Political decisionism must negotiate with the undecidable, Spivak argues [1725–28].[8] But this is exactly what the sovereign does, isn't it? Is he not the one who deals with the "perhaps" which makes any decision impossible, by deciding nonetheless? Beyond knowledge, beyond criteria, beyond the law—the sovereign decides. He decides *in* the state of exception, but also *on* the state of exception, meaning that his decision and his sovereignty do not depend on a concrete matter of fact, since rather the significance of reality itself is a matter of sovereign (reading) decision. Derrida in "Force of Law" had tried to pass off Benjamin as a leftist Heideggerian who exorcised the spectral undecidability of the represented law in the name of a presentifica-

[8] *See also Thurschwell, "Specters of Nietzsche" 60–65.*

tion of justice. Agamben, in *Homo Sacer* and *State of Exception*, in a rather obscure way, responds to Derrida's critique of Benjamin by showing that Derrida's recourse to the category of decision is actually a capitulation to the structure of the exception. Derrida as a leftist Schmittian. But can any form of decisionism (juridical, political, or ethical) avoid the justification of sacrifice? Can it avoid thanatopolitics?

In the case of *Caldwell v. Mississippi*, the Supreme Court overturned a death penalty sentence because the prosecutor had announced to the jury that it was not ultimately responsible for its decision because the sentence would be subjected to further review: judges with technical expertise would correct the jury's possible mistake. The Court reversed the death sentence committed by the jurors and held that displacing the jury's responsibility of handing down death to a fellow human being onto technical formalism violated the Constitution. According to Thurschwell, *Caldwell v. Mississippi* is an astonishing case because the Supreme Court deemed inadequate the formal law (represented by the technical appellate courts) vis-à-vis the individual and untechnical ethical responsibility towards the other (represented by the jurors). In other words: the Supreme Court pitted formal law against "a responsibility placed upon each of them [the jurors] singularly and alone, to confront the singularity of the defendant's life and weigh it against the heinousness of the crime, without the benefit of any normative guidance (in legal or any other form) whatsoever" [Thurschwell, "Cutting the Branches" 187–88].

Before getting to the discussion of *Caldwell v. Mississippi*, Thurschwell had glossed "with bemusement" over Agamben's claim that any assumption of responsibility towards the other in Levinassian terms (and, according to Thurschwell, also Derridian terms) is genuinely juridical and not ethical. However, in his reading of *Caldwell v. Mississippi*, Thurschwell cannot avoid evoking the proximity between Levinas and Schmitt, and therefore between the ethical "in Levinas's sense" [185] and the juridical, but also and foremost between Derrida and Schmitt. For Thurschwell, *Caldwell v. Mississippi* represents in fact an invitation to capital defense lawyers to call the juries to their ethical obligation toward the other, an obligation and a responsibility that cannot be assumed within the boundaries of the law's formalism. Beyond the law: ethics. Responsibility in the "Levinassian-Derridian sense" is a matter of decision. Yet deciding on the life and death of other citizens beyond the law (i.e., within the camp) is exactly what the sovereign does at all times. Thurschwell discussed *Caldwell v. Mississippi* with the intention of showing how sovereignty is exceeded by moments of ethical responsibility. But at the end of his analysis, he finds himself acknowledging that ethical responsibility is itself structurally indistinguishable from sovereign absolute power, the power of he who decides in the state of exception. In the final passages of "Cutting the Branches for Akiba," Thurschwell admits in fact that one can give a "more sinister and more Schmittian interpretation" to the "the language of 'responsibility' of *Caldwell*" [189]. That Schmittianism is the dark side of any ethics of responsibility is especially clear if one looks at *The Gift of Death*, where Derrida "interprets Abraham's sacrifice not as a hyperbolic exception but as something which all of us perform again and again, every day, in our most common ethical experience" [Žižek 22]. If ethical responsibility implies the extralegal decision on who deserves to live and who does not (as it does for Derrida according to Thurschwell), if it amounts to a sacrificial decision (as it indeed does for Derrida) then any ethics of responsibility boils down to sovereignty. And, as we know, the proper space for the sovereign is the camp. Deconstruction does not merely dwell within the state of exception. Its hope to strategically benefit from law's indetermination to implement a progressive, ethical program actually reinforces the trope of the sovereign, and with it, the trope of bare life. In order to move beyond the camps and the logic of exception, a different strategy and a different ethics are, according to Agamben, necessary.

4

Conclusion: For an Ethics of Sabotage

> *Until a completely new politics—that is, a politics no longer founded on the exceptio of bare life—is at hand, every theory and every praxis will remain imprisoned and immobile, and the "beautiful day" of life will be given citizenship only either through blood and death or in the perfect senselessness to which the society of the spectacle condemns it.* [Giorgio Agamben, *Homo Sacer* 11]

Let us pause and recapitulate.

According to Derrida, the countryman from Kafka's parable overlooked the fact that the meaning of the law is undecidable because it is a text. The countryman should have determined the law's meaning himself through a singular and non-delegable decision: he should have become a deciding authority and gained control over the passage of law from potential indetermination to concrete application. For deconstruction, what is decisive is not to come out of the state of exception, but to inhabit it in an ethically responsible way. For Agamben, however, Derrida's suggestion of dwelling in the camp differently is unacceptable for it still implies biopolitically deciding on other people's lives within the suspension of the law. What to do then? How to deal with the law's being in force without significance? Obviously it is not a matter of defending the significance of the law against Derrida's deconstructive approaches: the prestige of deconstruction, Agamben admits in *Homo Sacer*, is due to its having exposed the law's textual indetermination as an impassable condition [54]. However, for the reasons I enumerated above, Derrida's route—deciding the significance of the laws after having demonstrated their undecidability—is out of the question. Since one cannot take a stance with regard to the "without significance" of a juridical order, acting on its "being in force" appears then the only option. And this is exactly the strategy that the countryman followed according to Agamben. In Agamben's Benjamin-driven reading of Kafka, the countryman is not idle nor is the legend about an event that happens not to happen. As a matter of fact, an event does take place before the law. It is provoked by the countryman himself. Does not the guardian close the door of the law at the end? In *Homo Sacer* we read:

> *If it is true the door's very openness constituted, as we saw, the invisible power and specific "force" of the Law, then we can imagine that all the behavior of the man from the country is nothing other than a complicated and patient strategy to have the door closed in order to interrupt the Law's being in force. And in the end, the man succeeds in his endeavor, since he succeeds in having the door of the Law closed forever (it was, after all, open "only for him"), even if he may have risked his life in the process (the story does not say that he is actually dead but only that he is "close to the end").* [55][9]

The man from the country does not die. He pretends to pass away, as his final act in a long and complicated confrontation with the doorkeeper. The countryman never actually wanted to access the law; his plan was to defer the moment of the *dispositif*—i.e., the deciding part in a sentence [Agamben, "What Is an Apparatus?" 7]—until the doorkeeper

[9] *Agamben targets Derrida's interpretation of Kafka (and therefore Benjamin) also in "The Messiah and the Sovereign" 173–74 and in "K." In* State of Exception, *Agamben "sneakingly" authorizes his own reading of Benjamin (and therefore Kafka) via an essay by a scholar close to Derrida's "inner circle": Samuel Weber's "Taking Exception to Decision."*

would eventually cave in and definitively close the door of the law. The apparent defeat of the countryman is actually his victory, for it coincides with the liberation of life from the law's blackmail. Since the law has no significance, it should also have no force—no force and no authority over people's lives. The man from the country knew this well. While faking submission, he resisted the temptation to have his body co-implicated in the workings of a trial. After all, so many of Kafka's other characters had taught him that by crossing the law's gate, one becomes either victim or tormentor, sacrificial object or sacrificing subject, bare life or sovereign. In order to move beyond this desperate set of alternatives, it was urgent to dissociate oneself from the spaces dominated by the logic of the exception, the spaces where ethics and politics amount to sovereignly, even if responsibly, deciding on other people's lives. A true exception to the exception was imperative. The countryman did not want anything else. The only thing he sought was the transformation of his village into an exceptional place, a space where men and women would need to come to terms with each other without recourse to the death threat grounding any sovereign decision. By tricking the guardian into closing the door of the law, by rendering the law not only content-less but also force-less, the countryman brought forth one such exceptional space, liberating human praxis and politics from the spectral violence of any law whatsoever. He was eventually able to open up a common place for human interaction beyond the camp. And he did it, according to Agamben at least, not by enforcing decisions, but by deactivating the very capacity of sovereign power to decide and to enforce its *dispositifs*. His ethics is then an ethics of sabotage. It does not seek to impose a will and a direction on life, but to enable alternative modalities of being-together. It deposes rather than imposes, liberates instead of condemning. From Kafka's parable, Derrida drew an ethics of responsibility in which it was a matter of deciding "responsibly." In Agamben, on the other hand, the countryman's ethics is a matter of space and amounts to the creation of dwelling places in which living beings could experiment new possibilities of life in common.[10]

In 2001, Tiqqun—a transnational collective heavily influenced by Italian unorthodox Marxism (*autonomia*) and by the work of Italian theorists like Agamben, Negri, Virno, and De Martino—published an article called "Une métaphysique critique pourrait naître comme science des dispositifs . . ." in the second issue of its short-lived review. The first essay of the issue, "Introduction à la guerre civile," targeted Derrida, among others. Deconstruction is denounced here as a writing style compatible with the Empire insofar as its only effect is to depotentialize life, passing for mystical or proto-fascist any actual revolt program and erecting a *cordon sanitaire* around anything marked by some sort of revolutionary charge [26]. Tiqqun deals with French critical theory more in general in "Une métaphysique critique," which is presented as the founding document of The Society for the Advancement of Criminal Science, a nonprofit organization dedicated to the diffusion of knowledge useful to anti-imperial resistance. After describing French critique as a resentful denunciation of contemporary life that ends up sheltering what is so fiercely exposed from any concrete intervention, Tiqqun concludes: "A science of apparatuses, a critical metaphysics, is thus indeed necessary, but not to depict some appealing certainty behind which one could hide oneself, nor even to *add* to life the thought of itself. We do need to think about our lives, but in order to dramatically *intensify* them. . . . What do I care about a knowledge that does not increase my potentialities?" [134–35]. Perhaps here one can locate the lesson of Italian radical thought on critical theory. In order to be

[10] *Thurschwell also highlights that Agamben's "spatial ethics" is influenced by Heidegger's "Letter on 'Humanism,'" where ethics is defined as the adobe where mortals and gods meet. On the contrast between Agamben's Heideggerianism and Derrida's Levinassianism, see Catherine Mills, "Agamben's Messianic Politics" 50–57.*

relevant, critical theory will have to be a science of *dispositifs*. A general sabotage of sovereign apparatuses and a potentialization of truly exceptional living spaces. Isn't this what the desire for commonality and communism in the end amounts to?

WORKS CITED

Ackerman, Bruce. "The Emergency Constitution." *The Yale Law Journal* 113.5 (2004): 1029–91. Print.

Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford UP, 1998. Print.

———. "K." *Nudities*. Trans. Stefan Pedatella and David Kishik. Stanford: Stanford UP, 2010. 20–36. Print.

———. *Means without End: Notes on Politics*. Trans. Vincenzo Binetti and Cesare Casarino. Minneapolis: U of Minnesota P, 2000. Print.

———. "The Messiah and the Sovereign: The Problem of Law in Walter Benjamin." *Potentialities: Collected Essays in Philosophy*. By Agamben. Ed. and trans. Daniel Heller-Roazen. Stanford: Stanford UP, 1999. 160–75. Print.

———. *State of Exception*. Trans. Kevin Attell. Chicago: U of Chicago P, 2005. Print.

———. "What Is an Apparatus?" *"What Is an Apparatus?" and Other Essays*. Trans. David Kishik and Stefan Pedatella. Stanford: Stanford UP, 2009. 1–24. Print.

Attell, Kevin. "An Esoteric Dossier: Agamben and Derrida Read Saussure." *ELH* 76.4 (2009): 821–46. Print.

Benjamin, Walter. "Critique of Violence." *Selected Writings, Volume 1, 1913–1926*. Ed. Marcus Bullock and Michael W. Jennings. Trans. Edmund Jephcott. Cambridge: Harvard UP, 2004. 236–52. Print.

Derrida, Jacques. "Before the Law." *Acts of Literature*. By Derrida. Ed. Derek Attridge. New York: Routledge, 1992. 181–220. Print.

———. "Force of Law: The 'Mystical Foundation of Authority." *Acts of Religion*. By Derrida. Ed. Gil Anidjar. New York: Routledge, 2002. 230–98. Print.

———. *The Gift of Death*. Trans. David Wills. Chicago: U of Chicago P, 1995. Print.

———. "Préjugés: Devant la loi." *La faculté de juger*. By Derrida et al. Paris: Minuit, 1985. 87–139. Print.

———. *Rogues: Two Essays on Reason*. Trans. Pascale-Anne Brault and Michael Nass. Stanford: Stanford UP, 2005. Print.

———. "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas." *Writing and Difference*. By Derrida. Trans. Alan Bass. New York: Routledge, 2001. 97–192. Print.

Dyzenhaus, David. "Legal Theory in the Collapse of Weimar: Contemporary Lessons?" *The American Political Science Review* 91.1 (1997): 121–34. Print.

———. "*Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?" *Cardozo Law Review* 27.5 (2006): 2005–39. Print.

Esposito, Roberto. *Bíos: Biopolitics and Philosophy*. Trans. Timothy Campbell. Minneapolis: U of Minnesota P, 2008. Print.

Gross, Oren. "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *The Yale Law Journal* 112.5 (2003): 1011–134. Print.

Haddad, Samir. "Derrida and Democracy at Risk." *Contretemps* 4 (2004): 29–44. Web. 14 Mar. 2012.

———. "A Genealogy of Violence, from Light to the Autoimmune." *Diacritics* 38.1–2 (2008): 121–42. Print.

Kafka, Franz. "Before the Law." *Franz Kafka: The Complete Stories*. Trans. Nahum N. Glatzer. New York: Schocken, 1988. 3–4. Print.

———. *The Trial*. Trans. Mike Mitchell. Oxford: Oxford UP, 2009. Print.
Kanwar, Vik. Rev. of *State of Exception*, by Giorgio Agamben. *International Journal of Constitutional Law* 4.3 (2006): 567–75. Print.
Korematsu v. United States. 323 US 214. Supreme Court of the US. 1944. *Supreme Court Collection*. Legal Information Inst., Cornell U Law School, n.d. Web. 13 Mar. 2012.
McCormick, John P. "Schmittian Positions on Law and Politics?: CLS and Derrida." *Cardozo Law Review* 21.1 (2000): 1693–721. Print.
Mills, Catherine. "Agamben's Messianic Politics: Biopolitics, Abandonment and Happy Life." *Contretemps* 5 (2004): 42–62. Web. 14 Mar. 2012.
Mommsen, Hans. "The Reichstag Fire and Its Political Consequences." *Republic to Reich: The Making of the Nazi Revolution*. Ed. Hajo Holborn. Trans. Ralph Manheim. New York: Pantheon, 1972. 129–222. Print.
Posner, Eric A., and Adrian Vermeule. "Accommodating Emergencies." *U of Chicago Public Law Working Paper* 48 (2003). Sept. 2003. Web. 13 Mar. 2012.
———. "Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008." *The University of Chicago Law Review* 76.4 (2009): 1613–82. Print.
Schmitt, Carl. *Dictatorship*. 1921. Cambridge: Polity, 2010. Print.
———. *Political Theology: Four Chapters on the Concept of Sovereignty*. 1922. Trans. George Schwab. Cambridge: MIT P, 1985. Print.
Spivak, Gayatri Chakravorty. "Schmitt and Postructuralism: A Response." *Cardozo Law Review* 21.1 (2000): 1723–37. Print.
Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: Norton, 2004. Print.
Thurschwell, Adam. "Cutting the Branches for Akiba: Agamben's Critique of Derrida." *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's* Homo Sacer. Ed. Andrew Norris. Durham: Duke UP, 2005. 173–97. Print.
———. "Specters of Nietzsche: Potential Futures for the Concept of the Political in Agamben and Derrida." *Social Science Research Network*. 1 Sept. 2004. Web. 10 Mar. 2012.
Tiqqun. "Introduction à la guerre civile." *Tiqqun* 2 (2001): 2–37. Print.
———. "Une métaphysique critique pourrait naître comme science des dispositifs . . ." *Tiqqun* 2 (2001): 109–65. Print.
Tobias, Fritz. *The Reichstag Fire*. Trans. Arnold Pomerans. New York: Putnam, 1964. Print.
Tribe, Laurence H., and Patrick O. Gudridge. "The Anti-Emergency Constitution." *The Yale Law Journal* 113.8 (2004): 1801–70. Print.
Tushnet, Mark. "Defending *Korematsu*?: Reflections on Civil Liberties in Wartime." *Wisconsin Law Review* 23.2 (2003): 273–307. Print.
Vermeule, Adrian. "Our Schmittian Administrative Law." *Harvard Law Review* 122.4 (2009): 1096–149. Print.
———. "Self-Defeating Proposals: Ackerman on Emergency Powers." *Fordham Law Review* 75.2 (2006): 631–49. Print.
Virno, Paolo. *Multitude Between Innovation and Negation*. Trans. Isabella Bertoletti, James Cascaito, and Andrea Casson. Los Angeles: Semiotext(e), 2008. Print.
Weber, Samuel. "Taking Exception to Decision: Walter Benjamin and Carl Schmitt." *Diacritics* 22.3–4 (1992): 5–18. Print.
Žižek. Slavoj. "Carl Schmitt in the Age of Post-Politics." *The Challenge of Carl Schmitt*. Ed. Chantal Mouffe. London: Verso, 1999. 18–37. Print.