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# How I learned to stop worrying and use the legal argument

## A critique of Giorgio Agamben's conception of law

Leila Brännström\*

Giorgio Agamben's *Homo Sacer. Sovereign Power and Bare Life* (1998 [1995]), and *State of Exception* (2005 [2003]) are, among other things, efforts to explore the deep structures shaping contemporary tendencies in the development of law and politics.<sup>1</sup> Agamben offers us the diagnosis that we live in a 'permanent state of exception' – a situation in which law cannot be distinguished from lawlessness. He also suggests a prescription; we ought to look beyond law and reach for a realm of human activity 'uncontaminated' by law. He warns us that if we do not overcome law, we risk the 'juridico-political' system transforming itself into 'a killing machine', thus causing an 'unprecedented biopolitical catastrophe' (Agamben 1998, 188; Agamben 2005, 86).

In this article, I will argue against both Agamben's diagnosis and his prescription. One of the troubles with his line of reasoning, the one that I will focus on, is its deadlocked and overly formalistic understanding of how law operates and of how it might be used and transformed.<sup>2</sup> Surely Agamben insightfully points out certain dangerous trajectories in contemporary law and politics, but I believe that the rigid way in which he analyses law and politics forecloses the most promising ways of responding to and acting upon the problems that he outlines.

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<sup>1</sup> The two books are part of a three volume work which also includes *Remnants of Auschwitz. The Witness and the Archive* (1999 [1998]). This third book could be characterized as a case-study applying some of the thesis presented in *Homo Sacer. Sovereign Power and Bare Life*, to the case of Auschwitz. According to Agamben another volume is to be expected in this series of work. See Raulff 2004.

<sup>2</sup> The formalism of Agamben's analysis of 'politics' and 'power' has been pointed out and criticized by for example Connolly 2005 and Lemke 2005. My critique of the rigidity of Agamben's analysis of law derives, roughly speaking, from the same points of departure as Connolly's and Lemke's.

There is a more general rationale for scrutinizing Agamben's analysis of law and of the state of exception and the implications of his analysis. Agamben's understanding of law as a mechanism that puts limitations to our political potential and imagination and his conviction that law cannot be used for emancipatory purposes, is shared by many engaged in the field of critical legal and social studies who assume that exposing the repressive character of law and legal practices is the only possible way of conducting critical studies of law. Such an assumption is problematic as it overlooks the possibility to raise legal arguments and to engage in legal practices for pursuing emancipatory politics, a possibility that in many cases would be both forceful and productive. Sometimes, as in Agamben's case, these assumptions are built on a perception of law as a machine whose workings, effects and possibilities are given beforehand – once and for all. The objectification of law, in turn, induces fear and aversion which often leads to political, social and legal analyses that suffer, like Agamben's analysis does, from an overemphasis on, and an overestimation of, the legally authorized power of the state which nourishes the persisting, but misleading, idea that the major threats to our freedom and to a better future are to be found in repressive state-practices.

Since Agamben argues that Guantánamo Bay Naval Base (hereinafter 'Guantánamo') – where men and boys who were captured in Afghanistan and elsewhere have been imprisoned since January 2002 – is the locus par excellence of the new state of exception, I will take his characterization of the situation of the detainees at the Naval Base – abandoned by law and dwelling in a state of exception – as the point of departure for fleshing out what Agamben means when he talks about law and the permanent state of exception. The choice of Guantánamo as the starting, and the focal, point is also motivated by the fact that the raising of legal arguments, which is dismissed by Agamben as a constructive form of political action, seems to be one of the best ways of opposing the state of affairs at Guantánamo.

While many have described Guantánamo as a place where law is absent, 'a legal black hole' (Steyn 2004), 'a lawless enclave' (Hafetz 2006), 'a prison beyond the law' (Margulies 2004), et cetera, it has also been accurately pointed out that the situation at the the naval base has been created and sustained through legal regulations and measures.<sup>3</sup> In the following, I will first sketch the coinciding lawlessness and legal

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<sup>3</sup> Fleur Johns for example argues that 'the plight of the Guantánamo detainees is less an outcome of law's suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps are above all works of legal representation and classification. They are spaces were law and liberal proceduralism speak and operate *in excess*' (Johns 2005, 614).

rule that govern the life of the detainees at the Naval Base, which make Agamben's portrayal of Guantánamo as a place where law and lawlessness are simultaneously present and indistinguishable from one another, seem plausible. Next, however, I will argue that when looked at closer Agamben's characterization of the state of law at Guantánamo turns out to be based on an ahistorical and reductive understanding of law which leads to fatalistic conclusions about the fate of law at Guantánamo and elsewhere. After that I will discuss the possibilities of contesting the situation of the detainees at Guantánamo, and of engaging in political struggles in general by way of asserting legal rights and using legal arguments and strategies.

## **1. The presence of law and the absence of legal protection at Guantánamo**

The initial decision of the United States executive to transport detainees halfway across the world to Guantánamo – where the US exercises complete and exclusive control even though Cuba retains formal sovereignty<sup>4</sup> – was based on the calculation that the US executive could operate beyond the jurisdiction and reach of US domestic courts.<sup>5</sup> Since then, the executive has also maintained that the

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<sup>4</sup> “The Guantánamo Naval Station is a forty-five square-mile area on the southeastern coast of Cuba. It has been in the possession of the United States ever since the Spanish-American War of 1898, when Spanish dominion over the island was brought to an end. As a purely formal matter, the United States has possession of the territory by virtue of a 1903 lease (later modified in 1934). The lease reserves “ultimate sovereignty” in Cuba, but also provides that “so long as the United States of America shall not abandon the said naval station of Guantánamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has”. The Guantánamo arrangement is a lease without a term, and given the allocation of power between the two nations, there is no doubt that the Naval Station is property within the exclusive control of the United States. Each year the United States tenders the rent, approximately \$4,000. For the last 40 years the Castro government has refused to accept it. The Naval Station is separated from the rest of Cuba by an extensive fencing system. It has its own stores, including a McDonald's and a Baskin-Robbins. With the exception of a handful of elderly Cuban employees, holdovers from another era, who enter the base for work, there is no exchange between the base and the rest of the island.” (Fiss 2006, 246.) For a more detailed history of Guantánamo, see Kaplan 2005.

<sup>5</sup> Such intention can for example be read out from a memorandum examining whether a federal district court would have jurisdiction to judge a petition filed on behalf of a non-citizen at Guantánamo. *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba*. Memorandum to the Department of Defense from Patrick F. Philbin & John C. Yoo, Office

Third Geneva Convention governing the treatment of prisoners of war does not apply to ‘terrorists operating outside internationally accepted norms’, which it has taken to mean that it would be legally unrestrained in its treatment of the detainees.<sup>6</sup> At the same time the US executive has assured that ‘as a matter of policy’, the detainees would be treated humanely and ‘to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva’.<sup>7</sup> The executive has classified the detainees as ‘unlawful combatants’<sup>8</sup> (sometimes ‘unlawful enemy combatants’), to signal that US civilian courts have no jurisdiction over them and that they do not qualify as prisoners of war under Article 4 of the Third Geneva Convention, and consequently are not entitled to the rights and privileges accorded to a prisoner of war.<sup>9</sup>

The opening of the detention camp was nevertheless preceded by vigorous debates between the US Departments of Defense and Justice and the State Department over the prosecution of the ‘war on terror’. Arguments were legally framed and legal precedents and interpretations were invoked to support rival positions. From the onset, the US executive either offered legal basis for its actions regarding the detainees at Guantánamo or gave explanations as to why laws were not applicable to them.<sup>10</sup>

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of Legal Counsel, U.S. Department of Justice, 28 December 2001, especially 4–6. Available at <<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf>> [visited 24 January 2008]. Cf. Margulies 2006, 44–52.

<sup>6</sup> In fact if the third Geneva Convention would not apply in the case of the detainees, other legal protections under international humanitarian law would (See Dörmann 2003).

<sup>7</sup> *Humane Treatment of al Qaeda and Taliban Detainees*. Memorandum to the Vice President et al from President George W. Bush. 7 February 2002. Available at <[www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf)> (visited 20 October 2007). See also Murphy 2004, article by Seelye in *New York Times* on 28 January 2002, article by Knowlton in *International Herald Tribune* on 28 January 2002.

<sup>8</sup> For the background of the term in international and US domestic law see Kanstroom 2003 and Dörmann 2003.

<sup>9</sup> *Humane Treatment of al Qaeda and Taliban Detainees*, see note 7. *Enemy Combatants*. Memorandum to Members of the ASIL-CFR Roundtable from William J. Haynes II, General Counsel of the Department of Defense. 12 December 2002. Available at <[www.cfr.org/publication.html?id=5312](http://www.cfr.org/publication.html?id=5312)> (visited 27 January 2008). See also Murphy 2004.

<sup>10</sup> Murphy 2004. See also article by Jehl & Lewis in *New York Times* on 21 May 2004. For an example see: *Application of Treaties and Laws to Al Qaeda and Taliban Detainees*. Memorandum to William J. Haynes II, general counsel, U.S. Department of Defense, from Robert Delahunty & John Yoo, Office of Legal Counsel, U.S. Department of Justice. 9 January 2002. Available at <<http://antiwar.com/news/?articleid=2637>> (visited 20 October 2007).

The legal basis supporting the detention of ‘enemy combatants’ at Guantánamo is a military order, issued by President Bush on November 13, 2001 in his capacity as the Commander in Chief.<sup>11</sup> The Bush administration chose to call those who it detained under the Military Order ‘enemy combatants’, a category divided into two sub-categories: lawful and unlawful combatants.<sup>12</sup> The military order itself was legally anchored in Congress’s *Authorization for the Use of Military Force* issued one month earlier on September 18, 2001, authorizing the President to use all necessary and appropriate force against nations, organizations, and persons associated with the September 11th terrorist attacks.<sup>13</sup>

The military order allows non-citizens of the US who are suspected of involvement in acts of international terrorism or of aiming to cause ‘injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy’ to be detained and when tried, ‘tried for violations of the laws of war and other applicable laws by military tribunals’. The order authorizes the Secretary of Defence to set up military commissions to carry out the trials for war crimes violations of the detained individuals. The length of time for which a detention can continue before the detainee is tried by a military commission is not specified in the order. In 2003 and 2004, the US Department of Defense released several orders and instructions specifying the applicable rules and procedures of such military tribunals.<sup>14</sup> Alongside the military commissions an additional reviewing procedure, the *Administrative Review Procedure*, was established in May 2004 to ‘assess annually the need to continue to detain each enemy combatant during the course of the current and ongoing hostilities’.<sup>15</sup>

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2007).

<sup>11</sup> *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. Military order given by President George W. Bush on 13 November 2001. Available at <[www.state.gov/coalition/cr/prs/6077.htm](http://www.state.gov/coalition/cr/prs/6077.htm)>.

<sup>12</sup> Memorandum from William Haynes II, 12 December 2002. See note 10.

<sup>13</sup> The joint resolution of the congress to authorize use of military force is available at <<http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>> (visited 20 October 2007).

<sup>14</sup> *Military Commission Instructions* by U.S. Department of Defense (2003 & 2004). Available at <[www.globalsecurity.org/security/library/policy/dod/mil-commission-instructions2003.htm](http://www.globalsecurity.org/security/library/policy/dod/mil-commission-instructions2003.htm)> (visited 7 September 2007). Some revised or superseded instructions are available at <[www.defenselink.mil/news/rescinded.html](http://www.defenselink.mil/news/rescinded.html)> (visited 7 September 2007).

<sup>15</sup> *Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantánamo Bay Naval Base, Cuba*. An order by U.S. Department of Defense given on 11 May 2004. Available at <[www.defenselink.mil/news/May2004/d20040518gt](http://www.defenselink.mil/news/May2004/d20040518gt)>

A dual attitude towards the existing legal frameworks is noticeable in the military order. While suspects can be detained and tried ‘for violation of the laws of war and other applicable laws’, which acknowledges the validity of these laws, the order at the same time declares that it is not practicable to apply ‘the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts’ in the military commissions, and that the suspects are not privileged to ‘seek any remedy or maintain any proceeding’ in any US domestic court or any court of any other nation, or any international tribunal.<sup>16</sup> Such a dual stance towards law could also be seen in the simultaneous assurance of the Bush administration that the prisoners would be treated in a manner ‘consistent with’ the Geneva Conventions, which among other things prohibit the use of torture, and its authorization of the use of ‘enhanced interrogation techniques’ at Guantánamo.<sup>17</sup>

On July 7, 2004, after the June 28th ruling of the US Supreme Court in *Rasul v. Bush*,<sup>18</sup> which affirmed the jurisdiction of the federal courts over Guantánamo and the right of Guantánamo detainees to invoke *habeas corpus* review to challenge the legality of their detention, the US Department of Defense produced a new set of regulations, the most noticeable of which was the order of US Deputy Secretary of Defense, Paul Wolfowitz, establishing a third body, Combatant Status Review Tribunal (CSRT), to review the information related to a detainee to determine

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moreview.pdf> (visited 23 January 2008).

<sup>16</sup> ‘With respect to any individual subject to this order – (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal’. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, section 7 b. See note 11.

<sup>17</sup> A summary of the Bush administrations policy on torture can be found in Gregory 2006, 415–418.

<sup>18</sup> The case involved a number of Australian and Kuwaiti detainees held at Guantánamo Bay. In *Hamdi et al. v. Rumsfeld* which was issued on the same day, involving a US citizen imprisoned in relation to ‘the war on terrorism’ but not held at Guantánamo, the court ruled that ‘illegal enemy combatants’ who are U.S. citizens must have a meaningful ability to challenge their detention before an impartial judge. For detailed analysis of the two rulings and another related ruling that was also issued on the same day (*Rumsfeld v. Padilla*.) see Fiss 2006 and Dworkin 2004.

whether he has been ‘properly detained as an enemy combatant’.<sup>19</sup> In the order ‘enemy combatant’ is defined as ‘an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces’.<sup>20</sup> The order provides that the tribunal is not to be bound by ‘the rules of evidence such as would apply in a court of law’.<sup>21</sup>

The executive and legislative branches also responded to the Supreme Court ruling of June 28th through the *Detainee Treatment Act of 2005* (DTA), which limited the remedy available to detainees who sought to challenge their ‘combat status’ as determined by the Bush administration, to the CSRT and the Administrative Review Boards.<sup>22</sup> The act explicitly restricted the jurisdiction of the US court system to hear petitions for *habeas corpus* and other actions filed by detainees at Guantánamo. The Court of Appeals for the District of Columbia Circuit was given ‘exclusive jurisdiction’ to review the validity of the final decision of the CSRT and of the military commissions.<sup>23</sup> Within days after the DTA had passed, the federal

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<sup>19</sup> For overview of the three established procedures, see *Guantanamo Detainee Processes*. U.S. Department of Defense, 2 October 2007. Available at <[www.defenselink.mil/news/Sep2005/d20050908process.pdf](http://www.defenselink.mil/news/Sep2005/d20050908process.pdf)> (visited 23 January 2008).

<sup>20</sup> A detailed analysis of the Combatant Status Review Board Letters by Seton Hall Law School concluded that 55% of the detainees had not committed any hostile acts against the US or its allies. Only 8 % were characterized as enemy combatants (Denbeaux & Denbeaux 2006).

<sup>21</sup> *Order establishing combatant status review tribunals*. Memorandum to the Secretary of the Navy from the Deputy Secretary of Defense, 7 July 2004. Available at <[www.defenselink.mil/news/Jul2004/d20040707review.pdf](http://www.defenselink.mil/news/Jul2004/d20040707review.pdf)> (visited 25 January 2008).

<sup>22</sup> The act is available at <<http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&>> (visited 25 January 2008). The act also prohibits ‘cruel, inhuman, or degrading treatment’ of American captives.

<sup>23</sup> The act limits the detainees’ access to courts by stating that ‘no court, justice or judge shall have jurisdiction to hear or consider’ applications for *habeas corpus* or ‘any action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay’. The only possibility to access a court is to go to the D.C. Circuit Court of Appeals *after* the CSRT or the military commissions have reached their final decision. The D.C. Circuit Court of Appeals has the discretion to refuse to hear the detainees application except in cases where a military commission has sentenced a detainee to death or to a term of imprisonment of 10 years or more. The act also provided that for the ‘purposes of this section, the term “United States”, when sued in a geographic sense [...] does not include the United States Naval Station, Guantánamo Bay, Cuba’.

government relied on the act to seek dismissals of some 160 pending lower-court cases involving detainees at Guantánamo.<sup>24</sup>

The government also asked the US Supreme Court to dismiss the pending case of *Hamdan v. Rumsfeld*, challenging the legality of subjecting the detainees at Guantánamo to military commissions. The Supreme Court delivered its decision on the case on June 29, 2006. The court rejected the executive's argument that after the DTA, the court lacked jurisdiction to hear *habeas corpus* petitions that were pending at the time of the enactment. The court also held that the system of military commissions 'lacks power to proceed because its structure and procedures violate both the UCMJ<sup>25</sup> and the Geneva Conventions'.

The Supreme Court's decision provided the impetus for the *Military Commissions Act of 2006* (MCA), which made the court-stripping prohibitions of the DTA retroactive and extended it to be applicable to non-citizens in US custody anywhere in the world.<sup>26</sup> The new military commissions established through the MCA differ from the old ones. The new rules provide that defendants cannot be convicted based on evidence they cannot see or rebut, and that the defendants can appeal all convictions to a civilian appellate court.<sup>27</sup> In April 2007, the Supreme Court declined to hear two cases, *Boumediene v. Bush* and *Al Odah v. United States*, in which Guantánamo detainees challenge the MCA, but on June 29 it reversed its decision, releasing an order that expressed its intent to hear the challenge.<sup>28</sup> The two cases have been consolidated and the Supreme Court have heard oral arguments on the case on December 5, 2007.<sup>29</sup> At the core of the two cases is the question of whether it is constitutionally legal for the US legislator to block detainees from

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<sup>24</sup> See article by Resnik in *Slate.com* on 1 February 2006.

<sup>25</sup> Uniform Code of Military Justice is the foundation of military law in the US.

<sup>26</sup> MCA is available at <[www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf](http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf)> (visited 8 September 2007).

<sup>27</sup> As mentioned in footnote 23, under the DTA defendants could only appeal convictions that resulted in a sentence of death or more than 10 years imprisonment. For the work of the new Military Tribunals see the official site of the commission <[www.defenselink.mil/news/commissions.html](http://www.defenselink.mil/news/commissions.html)> (visited 8 September 2007).

<sup>28</sup> See article by Barnes in *Washington Post* on 30 June 2007.

<sup>29</sup> See article by Greenhouse in *International Herald Tribune* on 6 December 2007.

attempting to contest their detentions in non-military courts.<sup>30</sup> The Court is expected to issue a ruling on the case in June 2008.<sup>31</sup>

In the meantime, the Bush administration has expressed a desire to close the ‘facility’ at Guantánamo Bay. According to the current US Secretary of Defense, Robert M. Gates, the ‘biggest challenge is finding a statutory basis for holding prisoners who should never be released and who may or may not be able to be put on trial’ because, for example, evidence against them involves sensitive intelligence sources.<sup>32</sup> Pentagon officials have said they plan to try as many as eighty of the remaining Guantánamo prisoners – 277 detainees left in January 2008 – on war crime charges.<sup>33</sup> To do this, the U.S. military is building a mobile courtroom complex on an unused runway at the naval base (with plans to complete it by March 2008) to conduct as many as three terrorism trials at a time.<sup>34</sup>

## 2. Guantánamo – a space where law and lawlessness are indistinguishable?

What is new about President Bush’s order [issued on November 13, 2001, authorizing ‘indefinite detention’] is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of the POWs as defined by the Geneva Convention, they do not even have the status of persons charged with a crime according to American laws. Neither prisoners nor accused, but simply ‘detainees’, they are the object of a pure *de facto* rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight. (Agamben 2005, 3–4.)

I spoke rather of the prisoners in Guantánamo, and their situation is legally-speaking actually comparable with those in the Nazi camps. The detainees of

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<sup>30</sup> See article by Barnes in *Washington Post* on 6 December 2007 and article by Greenhouse in *Washington Post* on 3 December 2007.

<sup>31</sup> ‘US Supreme Court takes up Guantanamo rights case’. Reported by AFP on December 5, 2007.

<sup>32</sup> See article by Barnes in *Washington Post* on 30 June 2007. Also see article by Burns in *Washington Post* on 14 January 2008.

<sup>33</sup> See article by Sutton in *Reuters.com* on 5 September 2007, and article by Burns in *Washington Post* on 14 January 2008.

<sup>34</sup> See article by Sutton in *Reuters.com* on 5 September 2007.

Guantanamo do not have the status of Prisoners of War, they have absolutely no legal status. They are subject now only to raw power; they have no legal existence. In the Nazi camps, the Jews had to be first fully 'denationalised' and stripped of all the citizenship rights remaining after Nuremberg, after which they were also erased as legal subjects. (Agamben in Raulff 2004.)

Agamben's statement that the detainee at Guantánamo is 'entirely removed from law' and turned into a 'legally unnamable and unclassifiable being' is difficult to understand when it is clear, just from the brief enumeration above, that the detainees have, from the outset, been subject to an extensive work of legal classification, regulation, judgment and argumentation. One way of making sense of Agamben's statement is by distinguishing between legality and the veneer of legality; the camp at Guantánamo is a paralegal universe presenting itself as the real thing but lacking its true substance. Most other commentators, among them Steyn (2004), Hafetz (2006), and Margulies (2004), who have suggested that law is absent at Guantánamo, thereby mean that the legal framework and procedures in place do not offer the detainees any real protection against the power of the US executive, and because of that they contradict or fail to live up to a basic requirement of justice inherent in the notion of law or to the values embodied in the US Constitution, in the legal orders of liberal democracies or in international law. For these commentators the absence of law means severance from the normal legal order and lack of protection against infinite detention and brutal treatment.

There are many indications that Agamben joins this line of reasoning. He too points out that even if the US authorities present themselves as a legal power, they exercise power without complying with the law or being restrained by the law. And he has been read this way by, for instance, Judith Butler: '[f]or Agamben, the state reveals its extra-legal status when it designates a state of exception to the rule of law and thereby withdraws the law selectively from its application. The result is a production of a paralegal universe that goes by the name of law' (Butler 2004, 61).

However, at the same time Agamben is at pains to make a more far-reaching point: the operations of the US authorities are still happening within the domain of law – the existence of law is even a precondition for these operations. As mentioned before, he characterizes the situation of the detainees as a 'state of exception'. By this he is referring to a condition which he describes as a situation in which the force of law is intact – legal rules and orders are issued and the exercise of state power is effective – but law is not intact in the sense that it does not normatively limit the exercise of state power in any way (Agamben 2005, 39–40). He also describes the state of exception as a state of affairs in which the law that limits

power and offers legal protection is recognized as valid, but its application is suspended (Agamben 2005, 1, 4 and 23).

Evidently, the state of exception implies for Agamben the exercise of unbound state power. He argues that some form of legal order is the condition of possibility of organized state power and therefore even the extra-legal actions of state authorities in the state of exception rely, paradoxically, on the existence of a legal order. His point is that the unfettered sovereign power that unleashes when state power operates without legal restraints, is not only an inherent attribute of law, but even constitutive of law. He claims that the state of exception establishes a hidden but fundamental relationship between law and the absence of law (Agamben 2005, 51 and 60). He is careful to point out that the regime in a state of exception is not 'a special kind of law (like the law of war)' but a condition which is intrinsically related to the normal legal order. The state of exception is 'law's threshold or limit concept' where law and lawlessness are indistinguishable (Agamben 2005, 4; cf. Agamben 2005, 23, 29).

If law and lawlessness are indistinguishable in the state of exception, as Agamben argues, it is not meaningful to look at the regime at Guantánamo from a legal point of view and judge it as a series of legislative acts bringing new law into being or as a set of actions executing or transgressing law. Acts performed during the state of exception are mere facts, Agamben claims, and whether or not these acts are constitutive of new law or executive or transgressive of existing law can only be determined after the expiration of the state of exception. 'As long as the state of exception lasts all acts will be absolutely undecidable and will be 'situated in an absolute non-place with respect to the law' (Agamben 2005, 50–51).

In addition, Agamben argues that the state of exception has undergone a qualitative change as a matter of historical fact and has become 'permanent' in our time.<sup>35</sup> Whereas up until a certain point in history, the state of exception was clearly delimited in time and space, this is not the case any more. Until that point in history, the state of exception and the normal condition were temporally and locally distinct, but today the distinction has collapsed and normal conditions to which normal law could apply are no longer found anywhere (Agamben 2005, 86–87).

In this permanent state of exception, Agamben argues, what traffics under the sign of law is completely disconnected from 'the normative aspect of law', but

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<sup>35</sup> '[...] the state of exception or state of emergency has become a paradigm of government today. Originally understood as something extraordinary, an exception, which should have validity only for a limited period of time, but a historical transformation has made it the normal form of governance.' (Agamben in Raulff 2004.)

operates with the 'force of law' (Agamben 2005, 59, 87). The task before us, however, Agamben declares, is not to try to isolate the state of exception temporally and spatially 'in order to reaffirm the primacy of the norm and of rights that are themselves ultimately grounded in it'. From the permanent state of exception there is no way back to the state of law; the task before us is to overcome law. (Agamben 2005, 87–88).

If the state of exception has become permanent in our time and is no longer limited in time and space, then the situation of the detainees at Guantánamo is, with respect to law, no different from anybody else's. In Agamben's mind the regime at Guantánamo represents a special, deviant case in history, but today this regime has become illustrative and representative of the 'dominant paradigm of government in contemporary politics' (Agamben 2005, 2; see also Agamben 2005, 6–7, 14). As a matter of fact, the detainees are exposed to far more violence than most of us, but their position before the law is the same as everybody else's; they are abandoned by it, just like the rest of us.

At this point, there are a number of pressing questions. What is the nature of the mechanism which traffics in Agamben's work under the label of 'law'? What does Agamben mean when he says that law necessarily harbours legally unrestrained power? In what sense is the state of exception constitutive of law? How should we understand his statement that the state of exception is everywhere and not limited to places such as Guantánamo and other (often secret) locations where a superior power dispenses with legal restrictions? In what sense is an ordinary person like myself, in an ordinary city like my hometown, on an ordinary day like today, abandoned by law? When and why did the state of exception become permanent? In what sense did law have a normative aspect previous to some historical turning point which it does not have any more? And why is it not possible to return to a state of law?

The questions asked above cannot be fully and conclusively answered on the basis of Agamben's writings. Nowhere, for instance, does Agamben clearly elaborate what he means by 'law'. Further confusion is added to the matter as he in his discussions of law brings up examples from antiquity up until today, seemingly operating on an assumption that law has maintained its identity throughout history. Despite this, in the following an attempt will be made to reconstruct his arguments to the extent possible in order to address the questions raised above. First the historical emergence and the characteristics of the permanent state of exception are outlined and examined, and after that Agamben's notions of law and the state of exception are delved into.

### 3. The rise of the permanent state of exception

In stray remarks Agamben mentions a number of tendencies, particularly noticeable after WWI, indicating the emergence of a permanent state of exception: the expansion of executive power, the blurring of the line between the different branches of government, the extension of the military authority's wartime powers to the civil sphere, the conflation of politico-military and economic crises, the use of 'necessity' as a ground to justify official action, the generalization of the paradigm of security as a normal technique of government, and the recoil of colonial modes of government back to the centre of world order (Agamben 2005, 5–17; Agamben 1995, 37–38). The driving force, identified by Agamben, behind these trends, goes much further back in time. It is with the appearance of 'biopolitics' on the centre stage of politics at the threshold of modernity that the development towards the permanent state of exception is set off (see Agamben 1995, 119–125, 166–180).

Bio-power, according to Agamben, is the power to draw the line between 'bare life' which is the existence of a living being per se, something akin to biological life, and 'forms of life' which is existence as a political, ethical, legal or other distinctly human ways of being.<sup>36</sup> He does not consider bare life a natural concept but a legal/political one. Life is nowhere 'naturally' to be seen without a form of life attached to it, bare life is an artificial product that appears as original and pre-social. Agamben claims that the distinction between bare life and forms of life has been fundamental in the political tradition of the West since Greek antiquity; a tradition which is centred on sovereignty. Sovereignty, in turn, is for Agamben characterized by the authority to extinguish life. The isolation of bare life from forms of life only makes sense from the point of view of a sovereign power, because the authorized

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<sup>36</sup> Although Agamben frequently refers to Foucault when speaking of law, sovereignty, and biopolitics, his concepts are in several significant ways different from Foucault's. In Foucault's words sovereignty is the power to 'take life or let live' whereas bio-power is the power to 'make life and let die'. Foucault presents bio-power as a productive, generative power that shapes life in contrast with sovereign power which he presents as a mode of exercising power which is predominantly repressive and culminates in inflicting death. Foucault speaks of bio-power as a form of power which disciplines individual bodies as well as populations. He uses the concept of bio-power broadly and includes hygiene, housing conditions, demography, social welfare, insurance systems, etc. Biopolitics, as the exercise of bio-power, is by Foucault analytically distinguished from sovereignty. Agamben, on the contrary, insists on their unity. (Cf. for instance Raulff 2004.)

power to kill amounts to power over life as such, i.e. bare life. Agamben contends that since the production of bare lives, that is the conceptual isolation of life as such, is a precondition for making the life and death of a human being subject to a sovereign decision, the constitution of sovereignty requires the production of a biopolitical body – a body composed of bare lives. Hence ‘western politics is a biopolitics from the very beginning’ (Agamben 1998, 181).

The line dividing bare life and forms of life is, in Agamben’s theoretical frame, harboured in certain principles expressing the logic of sovereignty in a politico-legal community, for instance the right of a sovereign to demand sacrifice of life in times of war or the right to mete out capital punishment. The line, however, also divides people. The coming into being of a politico-legal community entails, according to Agamben, the drawing of a borderline which excludes certain people who for some reason cannot be integrated into the politico-legal order. The excluded outcast is deprived from the protection of the law and reduced to bare life. He is *homo sacer* – the personification of the bare life.<sup>37</sup> Unlike the accused or the criminal, who can claim certain legal rights and guarantees, *homines sacri* have no recourse to law since they are disqualified from the very capacity of being human, and as a logical consequence, of legal subjectivity. Law abandons *homo sacer* and anyone can kill him without committing homicide; ‘he is in every instant exposed to the unconditional threat of death’ (Agamben 1998, 183).

For Agamben bare life and the sovereign power to extinguish it are both exceptions to the normal politico-legal order. The sovereign is ‘above’ the law and bare life is ‘below’ the law. They are excluded from the legal order but Agamben underscores that they belong to the order through their very exclusion. They both dwell in an ‘exceptional’ space outside normal order – in a state of exception – and yet, at the same time, they are constitutive of the politico-legal orders founded on sovereignty. The decision about inclusion in the politico-legal community – a decision not only about life and death but also about who is recognized as a human being at all – is, according to Agamben, the foundational act of western politics. Agamben argues that these decisions cannot be made within the normal legal order

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<sup>37</sup> Agamben presents *homo sacer* as a figure of archaic Roman law; a person who could be killed without punishment (because s/he was outside the politico-legal order) but who could not be sacrificed (because s/he was outside divine law his/her death was of no value to gods). This double exclusion turned *homo sacer* into something like a living dead. Agamben’s reading of *homo sacer* has been criticized in Fitzpatrick 2001. In this context it is not important whether or not Agamben’s reading is accurate; it is his use of ‘bare life’ which is of interest here; not the possible parallels between Roman law and contemporary legal orders.

because the possibility of applying legal rules is conditioned upon the existence of a normal situation which is created, and sustained, exactly through banning the elements that do not fit in. Outside normal legal order, in the state of exception, where law and fact are indistinguishable, the sovereign operating above the law structures the normal life relations to which law can be applied.

The law has a regulative character and is a 'rule' not because it commands and proscribes, but because it must first of all create the sphere of its own reference in real life and *make that reference regular*. (Agamben 1998, 26.)

According to Agamben the production of bare lives used to occupy a marginal, although constitutive, place in western politics. Only exceptionally did the political mechanism of rules and exceptions come into play. With the emergence of modern biopolitics, this changed. Although Agamben, as mentioned before, maintains that biopolitics is as old as Western politics as such, he argues that it is with the advent of modernity that biopolitics and bare life comes to take the centre stage of politics. With the emergence of modern biopolitics:

we can observe a displacement and gradual expansion beyond the limits of the decision on bare life, in the state of exception, in which sovereignty consisted. If there is a line in every modern state marking the point at which the decision on life becomes a decision on death, and biopolitics can turn into thanatopolitics, this line no longer appears today as a stable border dividing two clearly distinct zones. This line is now in motion and gradually moving into areas other than that of political life, areas in which the sovereign is entering into an ever more intimate symbiosis not only with the jurist but also with the doctor, the scientist, the expert and the priest. (Agamben 1998, 122.)

Agamben's argument seems to be that the modern methods of government aiming at managing the population and at economic growth substantially increase the number of decisions sanctioned by the state which address bare life or affect it, which multiplies the number of situations where bare life is produced and/or excluded from the politico-legal community. Sovereign decisions on life and death, Agamben argues, are no longer clear-cut decisions to deprive life, but decisions on a wide range of issues concerning a zone where life and death are indistinguishable. The line that severs bare life from politically and legally qualified life today is mobile, or as Agamben would say, 'indistinct'.

Miniature sovereigns like the judge, the doctor, the bureaucrat, the policeman and the military commander make biopolitical decisions controlling the life of the

legal and, yet more intensely, non-legal subjects on an everyday basis without any of them being anchored in legal rules in more than a ceremonial sense. In the modern era, the sovereign decision on bare life can for instance be a politico-administrative decision on whether or not to improve the system of roads in order to reduce the number of people killed in traffic (cf. Agamben 1998, 114), but it can also be a decision raising the hazards of entering the Eurozone, sometimes causing the death of those trying to enter, in order to prevent refugees and emigrants from enjoying the benefits of being included in European politico-legal systems. Agamben contends that the boundary that was once drawn to turn certain individuals or groups of individuals into outlaws, can now be found inside every biological body resulting in a situation where ‘all citizens can be said, in a specific but extremely real sense, to be *homines sacri*’ (Agamben 1998, 111; cf. Agamben 1998, 140). This is taken by Agamben to mean that the state of exception has become permanent, more or less, everywhere.

Agamben contends that the logic and spirit of modern bio-politics is most manifestly at display, in a concentrated form, in what he calls ‘the camp’ and describes as the ‘hidden paradigm of the political space of modernity’ (Agamben 1998, 123). Agamben intends ‘the camp’ to have the theoretical function like the one ‘the Panopticon’ had in Foucault’s work on disciplinary power. It is a model purporting to ‘explain a larger historical context’ (Raulff 2004) and to expose the ‘underlying structure in order to better conceive the present political constellation’ (Lemke 2005, 5). Agamben claims that ‘the camp’ does not only subsume the refugee camps, the zones where illegal immigrants are parked by national authorities, the Gaza strip, the Nazi concentration camps and the detainment camp at Guantánamo, but every space where bare life is systematically produced. Since the production of bare life, which in Agamben’s scheme is also the moment of the exercise of sovereignty, takes place everywhere and at every moment in modern society, the camp represents a state of exception that is not limited in time; the space ‘that is opened when the state of exception becomes the rule’ (Agamben 1998, 168–69, italics in original). The camp is the location of a permanent state of exception where rule and exception, as well as law and fact, are indistinguishable from one another.

Agamben argues that since human and social rights, as well as democratic participatory rights, make biological life the source and bearer of these rights, i.e. these rights are enjoyed in the very capacity of being alive, they intensify the production of bare lives, the hold of biopolitics over life and the exercise of sovereignty. The claiming of rights is therefore double-sided:

the spaces, the liberties, and the rights won by individuals in their conflicts with the central power always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state-order, thus offering a new and more dreadful foundation from which they wanted to liberate themselves. (Agamben 1998, 121.)

According to this line of reasoning the one who claims rights becomes a *homo sacer*, just like the one who is deprived of all rights. This surprising conclusion is a result of the fact that Agamben's line of reasoning relies on a number of unsatisfactory substitutions and generalizations. Throughout his work it remains unclear why it is justified that bare life denotes both the life of the outcast and the object of political, social and legal measures that target the biological life of man. As Thomas Lemke relevantly remarks: 'even if all subjects are *homines sacri*, they are so in very different ways' (Lemke 2005, 7). Agamben confines himself to saying that everyone can be reduced to the status of bare life without clarifying the mechanisms of differentiation that distinguish between different values of life. The result is that the comatose pending between life and death, the embryonic stem cells in anticipation of life, the death row convicts, the detainees at Guantánamo, the people killed on the motorways, and the rest of us are all *homines sacri* more or less in the same way.

The justification for putting this seemingly heterogeneous crowd in the same class is beside the claim that they can all be reduced to bare life – for instance in the calculation of acceptable levels of traffic deaths or 'collateral damage' – also that they stand in an equal position in relation to law – they are 'included by exclusion'. The latter begs the question of how someone is 'included by inclusion' in law. The question points towards another problematic, and vague, generalization in Agamben's reasoning: the state of exception. In what meaningful sense, beside some structural similarities, can the state of exception encompass all the situations and contexts where decisions that touch on the biological life of man are made and all the cases in which normal legal rules cannot be applied? Why can the ordering of social life only take place in the state of exception? And what does Agamben mean when he says that application of legal rules presupposes regularity in social life?

Agamben's thesis that the state of exception has become the rule is woefully under-specified. Since the 'derailment' of Agamben's argument seems to be, to a large extent, caused by his concept of the state of exception and the representation of law and its limits that inform that concept, I will leave aside the questions concerning the nature of bare life, and the possible objections to Agamben's understanding of power, politics and biopolitics, and delve into his conception of law and his depiction of the relation between law and the state of exception.

## 5. Agamben's understanding of law

[The state of exception appears as] an ambiguous and uncertain zone in which *de facto* proceedings, which are in themselves extra- or antijudicial, pass over into law, and juridical norms blur with mere fact – that is, a threshold where fact and law seem to become undecidable. The essential point, in any case, is that a threshold of undecidability is produced at which *factum* and *ius* fade into each other. (Agamben 2005, 29.)

On the one hand, the juridical void at issue in the state of exception seems absolutely unthinkable for the law; on the other, this unthinkable thing nevertheless has a decisive strategic relevance for the juridical order and must not be allowed to slip away at any cost. (Agamben 2005, 51.)

The state of exception is, according to Agamben, paradoxically both inside and outside the normal legal order. It is located within the legal order but only as 'a space devoid of law, a zone of anomie in which all legal determinations [...] are deactivated.'<sup>38</sup> At the heart of his notion of the state of exception is the idea that it is in a meaningful sense a 'legal' condition of *de facto* rule removed from legal restraints and juridical oversight in which such distinctions as fact and law and rule and exception are meaningless. Agamben borrows the notion of a state of exception from the German legal theorist, Carl Schmitt, who defined it as a situation in which all the legal norms are suspended but in which the state remains capable of making legally enforceable decisions (Schmitt 1996 [1922], 13–21). Schmitt developed the concept of the state of exception in a number of works polemicizing against an approach to law we can call legalism, supposedly in fashion in the interwar Germany, according to which the legal order is exhausted by positive legal norms which lend themselves to more or less automatic application. Schmitt attacked the

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<sup>38</sup> Agamben 2005, 50. Agamben identifies two main schools of thought on the legal status of the state of exception. The first understands it to be an 'integral part of positive law because the necessity that grounds it is an autonomous source of law'. The second views it as 'essentially extrajudicial', something prior to or other than law. For the second group a constitutional endorsement of the state of exception is a pragmatic recognition of the limited constitutional domain. It is in contrast to these two views that Agamben suggests that the 'state of exception is neither internal nor external to the juridical order'; it is rather 'a zone of indifference, where inside and outside do not exclude each other but rather blur with one another' (Agamben 2005, 23).

legalist line of reasoning armed with two weapons: the singularity and unpredictability of events and the actuality of organized state power. He believed that these circumstances produce their most devastating attack on the legalist way of thinking when considered in combination.

By the early 1920s it was already old news, among others than legalists, that the uniqueness of real life occurrences necessitates mediation every time a general legal rule or principle is to be applied to a concrete case. Schmitt did not deny that in the standard cases more or less standard interpretations are available which make legal decisions seem mechanic in nature. In fact he exaggerated the degree of consensus in 'normal' decision-making by anchoring it in the uniform way of life in a nation guaranteeing homogeneous interpretations of legal norms. However, he argued that when a radically unanticipated situation is at hand and a lack of consensus threatens the political unity of the nation, there is no agreement on what the legal approach might entail. In these situations the only real guidance the legal order can offer, according to Schmitt, is to single out who or what instance is invested with the authority to make a sovereign decision to suspend the law in its entirety and to reestablish national unity unimpeded by legal restrictions. It is clear in Schmitt's work on the state of exception that he wished to establish the idea that the state executive has a legal possibility to act without legal restrictions.

When Agamben's understanding of law is scrutinized, it proves to be an unfortunate combination of the legalistic conception of law as a set of lifeless rules that are more or less applicable without mediation, and a radicalization and generalization of the Schmittian idea that legal rules cannot produce real effects and are only effective to the extent that they reflect a regularity already present in the life of a society. In Agamben's account of law, legal rules relate to 'reality' only through 'operators' which bring back inside what law has banned from its domain – violence, sovereign power, and life itself. In addition to the state of exception every legal decision is also such an operator, because every concrete application of law entails a moment in which an exception is assumed or rejected, and in that moment, Agamben argues, the legal rule is *de facto* suspended. Every time law touches upon the real, non-legal outside – in the moment of the constitution or application of a legal norm – the operators reach out, so to speak juridify the outside, and annex life and reality to state power. On this account, law is an empty,

inanimate and parasitic structure with a colonizing penchant, absorbing and capturing the non-legal outside by anchoring it to state power.<sup>39</sup>

Agamben underlines that the state of exception, and with it all legal decisions, are in a sense fictional. The fiction performs the function of attaching sovereign power to law, even in situations where the two are radically separated, thus legitimating a power that in reality is unbound.<sup>40</sup> As long as social life maintained regularity and legal regulation was restricted to certain, less ‘private’, areas of life, the ‘fraud’ of law remained masked. However, today when legal regulations embrace all aspects of life with their singularity and unpredictability, not even the optical illusion of the rule-bound implementation of law can be sustained and the ‘true’ face of law is exposed at all moments. Agamben’s line of reasoning bears resemblance to the old critique of the welfare state social policy programs, suggesting that such programs pose a threat to the rule of law because the extraordinary large and diverse terrain they target inevitably results in general and vague legal rules whose concrete meaning becomes clear only upon application. He is, however, not worried about the decline of the (illusion of) rule of law. His primary concern is to argue that the idea and ideal of law must be overcome. As the intensity of power-relations holding their sway over life increases Agamben underscores that only a radical break with the established political rationality can save us from the permanent state of exception ‘in which the sphere of creatures and the juridical order are caught up in a single catastrophe’ (Agamben 2005, 57).

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<sup>39</sup> Cf. ‘Law seeks to annex anomie itself’ (Agamben 2005, 39); ‘State power attempts to annex anomie through the state of exception’ (Agamben 2005, 59); ‘Law seems able to subsist only by capturing anomie, just as language can subsist only by grasping the nonlinguistic. In both cases, the conflict seems to concern an empty space: on the one hand, anomie, juridical *vacuum*, and on the other, pure being, devoid of any determination or real predicate. For law, this empty space is the state of exception as its constitutive dimension’ (Agamben 2005, 60).

<sup>40</sup> Agamben 2005, 39–40, 51, 59, 73. A few times Agamben mentions the ‘normative’ dimension of law which is no longer present in the permanent state of exception, which gives the impression that at some point law could normatively limit sovereign power. An example is the following: ‘[i]ndeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law’ (Agamben 2005, 87). This could be read as an indication that Agamben acknowledges that if those exercising power see themselves as bound by law, law can set limits to power. However, this theme is not elaborated anywhere in Agamben’s work.

## 6. How Agamben creates a terrifying object called law

In Agamben's writings law is represented as a uniplanar surface, even if a sophistication is present as the surface is twisted to the form of a Möbius strip (cf. Agamben 1998, 15, 37). Despite the twist, law is still represented as a homogeneous entity with a single border. The twist in the surface represents that, in Agamben's wording, 'law is outside itself' (Agamben 1998, 15). A state of affairs he claims instantiates itself in paradoxes like the im/possibility of legal creation *ex nihilo* and the im/possibility of the legal regulation of legally banned situations – for example legal codification of self-defense or the right of resistance against unlawful law. The paradoxical structure of law is, in turn, claimed to explain how life, violence, and sovereignty are simultaneously inside and outside the legal order. The paradoxes that Agamben enumerates are however engendered in the first place by his understanding of law as a mystic, monolithic, unilaterally productive, and ahistorical entity. As Agamben's reasoning suppresses temporality and depopulates the legal field, paradoxes arise as a result of treating law as an object rather than a practice that is performed.

Behind the fear of law that Agamben shows when he says that an 'unprecedented biopolitical catastrophe' is awaiting us if we do not break with the current politico-legal rationality, is a representation of law as an object – as a machine – standing outside history and affecting the course of events. Foucault has argued that if the state is abstracted and hypostatized – as a cold-blooded monster or the instrument of class repression – it appears to be the driving force behind all sorts of effects, which leads to the overvaluation of the 'state-problem' and causes inflationary effects such as statophobia. He reminds us that the state is nothing more than a flexible bundle of juxtaposed practices (Foucault 2006, 112–115). Similarly, law is not all too powerful or all too powerless; it is a protean combination of law-producing and reproducing practices and does not have an existence outside of that. Agamben's way of treating law as a point of departure rather than as the result of complicated social processes and as the origin of historical power relations rather than their effects is somewhat ironic since the crux of his argument seems to be that law does not have an independent life. His point, after all, is that the hold that law has over life can be broken and what is ultimately at stake in the state of exception, in legal production and decision-making and in biopolitical matters, is extrajudicial (cf. Agamben 2005, 11, 87–88).

Agamben's black and white image of law has its counterpart in his notion of bio-power as the controlling of the (increasingly blurred) borderline between life and death. Bio-power is here reduced to a question of either/or, eradicating all differentiation in the administration and management of life. It is all the more problematic as the control of the borderline is construed as a legal matter which is particularly troubling as law is equated to repression and the state is the sole legal agent mentioned.

The transposition of law and repression obscure the fact that some legal norms, rather than immediately directing and appraising behavior, distribute competences or legal powers which allow legal subjects to introduce changes in legal status through contract or other arrangements. Think for instance of the biopolitical effects of patenting human genome or the markets for surrogacy motherhood or for human organs. Neither is bio-power necessarily exercised by the state or even through legal action. As Lemke appropriately points out, it is 'more and more the scientific consultants, economic interest groups, and civil societal mediators that define the beginning, the end and the value of life, in consensus conferences, expert commissions, and ethical counsels' (Lemke 2005, 11).

Since Agamben seems to equate power and repression it comes as no surprise that he cannot see that bio-power can be exercised in ways radically different from those of the Nazi-regime. It is not wholly accidental that the biopolitical decisions of market actors scenting investment opportunities and those of us who quit smoking because we are acting in a biopolitically responsible way, go unnoticed in Agamben's story. Agamben overestimates here, as elsewhere, the role of law in a story where the (narrow and distorted) legal point of view tends to substitute reality.<sup>41</sup>

## **7. To act or not to act politically through law: the case of Guantánamo**

To show law in its non-relation to life and life in its non-relation to law means to open a space between them for human action, which once claimed itself the name of 'politics'. Politics has suffered a lasting eclipse because it has been contaminated by law, seeing itself, at best, as constituent power (that is, violence that makes law),

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<sup>41</sup> Another example of such overestimation of the legal point of view in Agamben's work would be the overstatement of the differences between incarcerated aliens and incarcerated citizens.

when it is not reduced to merely the power to negotiate with the law. The only truly political action, however, is that which severs the nexus between violence and law. (Agamben 2005, 88.)

Agamben's characterization of the situation at Guantánamo is marked by his objectification and overestimation of law. His presentation of law as a monolithic object makes it difficult to see that the reduction of the detainees to *infrahumans* is to a large extent a work of making distinctions through law. The prisoners at Guantánamo have been treated as objects of law rather than legal subjects by the US executive, legislative and, to a lesser extent, by the Supreme Court who has been willing to leave the detainees to military justice or other kinds of 'alternative justice'.<sup>42</sup> The different attempts to do 'alternative justice' show clearly that what is at stake regarding legal protection might not necessarily be a matter of inclusion or exclusion but a matter of different, and more or less pleasant, ways of being included. The 'alternative' legal designs outlined by the different branches of US government are reminiscent of colonial legal practices and maybe it is only within that context that the dehumanizing treatments of people at Guantánamo can be understood.<sup>43</sup>

We can see Agamben's overestimation of law in his analysis of the interactions between detainee and detainer as a matter determined by the (lack of) law. It is as if the brutality and racism at work at Guantánamo could be explained by the absence of legal protection. An example that William Connolly brought up to illustrate his argument that sovereignty is the end product of political acts at the micro level, is illuminating also in this context.<sup>44</sup> Connolly argues that the 'ethos infusing sovereignty' in the American society in the 19th century was primarily agricultural and protestant Christian. He points out this ethos, illustrated as a play of forces between the multitude of people, the traditions infused in the people and the state authorities, as the main reason for why American Indians were excluded from the new settler society. Even though a Supreme Court decision had ratified the autonomy of the Cherokee people in the southeast, the sovereign ethos of Christian

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<sup>42</sup> On this issue see for instance Fiss 2006, and Kaplan 2005. Kaplan fears that the Supreme Court's decisions over Guantánamo could lead to a 'shadowy legal system coextensive with the changing needs of empire' (Kaplan 2005, 84). For a more positive interpretation of the possibilities of judicial intervention see Humphreys 2006.

<sup>43</sup> Gregory 2006 and Kaplan 2005 are two attempts to shed light on the situation of the detainees by taking colonial legal practices as the point of departure.

<sup>44</sup> He borrows this example from Alexis de Tocqueville. See Connolly 2005, 141–144.

superiority personified by settler vigilant groups and the refusal of President Jackson to enforce the decision of the Supreme Court overturned the authority of the Court and American Indians were pushed outside of legal protection. Connolly argues, however, that if there had been a strong and successful political movement drawing on another aspect of the Christian faith to change the ethos in which Presidents made their decisions and the settlers acted, events could have taken another direction. Similarly it is the forces that animate law and state sovereignty, rather than the structure of law and sovereignty, which explain the brutality demonstrated at Guantánamo. As these forces are not all pervasive and unchallengeable, it is possible to change the situation of the detainees through political action.

Agamben presents the situation of the detainees at Guantánamo as the result of the onward march of history, turning it into something of an ontological necessity rather than the outcome of specific political actions and decisions that can be reversed. These actions and decisions are grounded in a certain political mind-set that can be rebutted. In Agamben's theory on the state of exception, however, political actors and struggles are conspicuous by their absence. His frame of description and line of reasoning depoliticizes, in Jacques Rancière's words, 'matters of power and repression [...] setting them in a sphere of exceptionality that is no longer political, in an anthropological sphere of sacrality situated beyond the reach of political dissensus.'<sup>45</sup>

As the quote introducing this section indicates, Agamben posits law as the opposite of political action in the true sense and in so doing forecloses the possibility of political contestation through legal arguments and actions. One available form of political action with regard to the situation of the detainees is, however, to remind of, and make tangible, the humanity of the prisoners. Asserting the legal subjectivity of the detainees is one way of doing this. The possibility of performing this political action is open to all of us since the question of who is a legal subject and what that subjectivity should entail is not 'owned' by superior powers as Agamben seems to suggest. As Rancière argues 'the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not' (Rancière 2004, 302), which reminds us that if rights were authoritatively defined by supreme powers, nobody would ever need their rights.

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<sup>45</sup> Rancière, 2004, 299. Dissensus is one of the key concepts of Rancière's political thinking. In his words a 'dissensus is not a conflict of interests, opinions, or values; it is a division put in the "common sense": a dispute about what is given, about the frame within which we see something as given' (Rancière 2004, 303).

The gap between the letter of the law and its actualization, or between law and fact, which Agamben takes to be signs of the fraud of law, might not be there to be closed – the gap sustains the possibility of interpretation. The reach and meaning of legal rules and rights, and of law itself, is never ultimately given, but developed through meaning-inducing legal, political and moral performative acts. Absolute identity between law and factual circumstances will never come about and neither is it desirable because law is a living practice whose performance involves engagement in political and ethical struggles about its formulation, interpretation and application.

The position of the Bush administration which acknowledges that both domestic and international law place limits on the exercise of power while maintaining that these limits are not applicable to the detainees at Guantánamo, expresses the kind of simultaneous validity and non-application of legal rules providing protection that Agamben points out as characteristic of a state of exception. The attitude of the Bush administration towards law – a ‘tactic’ to be used instrumentally and strategically – is however, despite Agamben, not the final authoritative interpretation of law regarding the situation of the detainees at Guantánamo. The Bush administration does not own the meaning of law; accepting their legal position as the final word, as Agamben does, is to represent them as more or less omnipotent, thereby intensifying the sense of despondence, and the attendant political paralysis, that is already widespread among those wishing for a change.

Legal arguments and legal action are admittedly not useful, or even desirable, means of political action in all situations, and there is no doubt that the story of how law curbs power is not the whole story, but the step that Agamben takes, in more or less wiping out the differences between law and lawlessness and between rights and domination, does away with much of the grammar of the field of justice. As it remains extremely vague what his suggestion that we should ‘reach beyond law’ might entail in practice, Agamben leaves us less well equipped in our pursuit of justice.

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