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'STATE OF EXCEPTION' OR 'THRESHOLD OF INDISCERNIBILITY'?
A STUDY ON THE BEGINNINGS OF GIORGIO AGAMBEN'S *HOMO SACER* PROJECT

VALERIA BONACCI
Departments of History of Philosophy
University Paris-Sorbonne (Paris IV)
valeriabonacci@gmail.com

ABSTRACT
The aim of this article is that of bringing the inextricably ontological and political enjeu of Agamben's work into light, through the investigation of the beginning of the *Homo Sacer* series and of the shift that such a beginning produces within the author's philosophical project. More precisely, through a comparison of the first two texts of the series, *Homo Sacer. Sovereign Power and Bare Life, Homo Sacer I* (1998) [1995], and *State of Exception, Homo Sacer II, 1* (2005) [2003], we will show how, in many respects, the philosophical question raised by Agamben in the first volume proves to be problematic, although it finds its most precise formulation in the period of time which spans from the first volume to the second. Our hypothesis is that the punctual recovery of the main inquiries of *Homo Sacer* I within *State of Exception* and, in particular, the recovery of the strategic interpretation of the debate between Carl Schmitt and Walter Benjamin, coincides with a crucial in-depth analysis that allows Agamben to introduce the paradigms of *inoperativity* and use in the specific meaning that these terms have in the subsequent developments of the series, i.e., as key notions through which Agamben elaborates his philosophical rethinking of the nexus between ontology and politics.

KEYWORDS
Agamben, Benjamin, inoperativity, use, indiscernibility, state of exception, Homo Sacer

The aim of this article is that of bringing the inextricably ontological and political *enjeu* of Agamben's work into light, through the investigation of the beginning of the *Homo Sacer* series and of the shift that such a beginning produces within the author's philosophical project. More precisely, through a comparison of the first two texts of the series, *Homo Sacer. Sovereign Power and Bare Life, Homo Sacer* I (1998) [1995], and *State of Exception*, *Homo Sacer* II, 1 (2005) [2003], we will show how, in many respects, the philosophical question raised by Agamben in the first volume proves to be problematic, although it finds its most precise formu-

lation in the period of time which spans from the first volume to the second. Our hypothesis is that the punctual recovery of the main inquiries of *Homo Sacer I* within *State of Exception* and, in particular, the recovery of the strategic interpretation of the debate between Carl Schmitt and Walter Benjamin, coincides with a crucial in-depth analysis that allows Agamben to introduce the paradigms of *inoperativity* and *use* in the specific meaning that these terms have in the subsequent developments of the series, i.e., as key notions through which Agamben elaborates his philosophical rethinking of the nexus between ontology and politics. Undoubtedly, *Homo Sacer I* represents one of the most important philosophical essays of the twentieth century. Since its publication, the text has had an as widespread as controversial reception. If we think about the messianic tone of Agamben's antecedent books, such as *The Coming Community* or *Means Without Ends*, *Homo Sacer I* constitutes a *détour* in the philosopher's path, not so much in the sense of a halt, but rather in the sense of a shift towards a further level of complexity. And the key to such a shift is the reflection on *indiscernibility* (indiscernibilità) which configures itself as the real philosophical protagonist of *Homo Sacer I*. The topos of *indiscernibility* emerges as a recovery and further development of the critique made by Benjamin against the apparatus of the 'state of exception', and specifically against its key theorisation by Carl Schmitt. According to *Homo Sacer I*, the 'state of exception' unveils the arcane functioning of the apparatuses of Western powers, and constitutes the key to the comprehension both of the totalitarian drift of contemporary democracies and of the *impasse* that politics and thought manifest in dealing with it. The apparatus of emergence coincides with a state in which the law is in force by means of its very suspension, illegal provisions take on a juridical appearance, therefore the state of exception becomes impossible to comprehend – nor be revoked – through recourse to the binary categories upon which our political tradition is based (not only licit/illicit, private/public, but also: inside/outside, identity/difference). Agamben goes back to Benjamin's strategy, which consists in showing how the apparatus of the exception presupposes at its core a *threshold of indiscernibility* between its polarities – *nomos* and *anomie*, sovereignty and life, to use Agamben's terms – a threshold which invalidates any attempt to inscribe it in a juridical context, thus marking a point of no return with respect to any traditional political form. Although this philosophical strategy is evident in the book, we will show how *Homo Sacer I* does not get to coherently distinguish the apparatus of the *exceptio* from the *topos* of indiscernibility – to use Benjamin's words in the eighth thesis *On the Concept of History* (Benjamin 1991; Benjamin 2006): the merely virtual *Ausnhamezustand* from the "real state of exception" – and we will identify in this lack of distinction the cause of the criticisms that have been made as to an indirect apology for the Schmittian doctrine.

In this study, we will try to demonstrate how at the basis of this *impasse* lies an undeveloped conception of man's praxis as a *threshold of indiscernibility*, or as an *unsubstantial medium*, between the polarities of the power apparatuses, which, although it is present in a crucial passage of *Homo Sacer I*, it is not, however, fully developed there. We will also show how, in the next volume of *Homo Sacer, State of Exception*, this problematic issue takes Agamben back to the debate between Schmitt and Benjamin, and induces him to center this debate around the figure of the praxis as a 'pure medium' as formulated by Benjamin in *Critique of Violence*. Through this new interpretation, Agamben comes to indicate man's praxis as a threshold which is situated at the centre of the apparatus of the exception, and which allows its functioning – i.e. the separation and simultaneous articulation of *nomos* and anomy, law and life – a threshold which, nevertheless, the apparatus tries to hide and dissimulate in its operation, because it reveals its polarities as indiscernible. In the conclusion, we will show how, in *State of Exception*, the development of the Benjaminian conception of acting as a 'pure medium' leads Agamben to confront the *impasse* of *Homo Sacer I*, by indicating man's praxis as an 'inoperative use', i.e. as a threshold in which potentiality and act, law and life, become indistinguishable, and we will consider how this conception constitutes the basis for the reformulation of the nexus between ontology and politics that Agamben will develop more thoroughly in the last section of the *Homo Sacer* series[1].

[1] It may be appropriate to note at this point a brief methodological premise concerning the manner of a 'genealogical' approach to Agamben's work. In 2013, I had the fortune of being invited by Agamben himself to transcribe and edit, with the help of two other Italian researchers, his philosophical diaries, an incredibly imposing work, considering that they consist of almost thirty notebooks of 120 pages each, dating from 1968 to today, and which are characterized, for the most part, by a labyrinth of "citations without quotation marks" that need to be collocated and translated. At the time, the publication had been entrusted to a publishing house which then gave up on the project, and which is now been reconsidered by another publishing house. For more than a year, I worked on the notebooks from the 2010s, that were also coeval to the texts that I was focusing my research on at the time. What immediately caught my attention was how, right from the beginning of that very decade, a different number of notations and reflections were already hinting at what Agamben would have thematised ten years later in essays like *The Highest Poverty* and *The Use of Bodies*, and on which he was probably already working for a while. In this sense, to attribute the introduction of a concept to a specific text of Agamben's might seem reductive. However, I believe that in philosophical works it is impossible to separate the analysis of a concept from the process through which such a concept reaches its formulation, since the peculiar trait of any genuine philosophical notion is, to use Feuerbach's definition which Agamben often recalls, its capacity to be developed (*Entwicklungsfähigkeit*) within an itinerary in which it never reaches a final definition and never ceases to transform itself. This is valid also for those key notions like the state of exception and the topos of indiscernibility, whose conception still continues to develop throughout the years.

1.

"The tradition of the oppressed teaches us that the 'state of exception' in which we live is the rule. We must arrive at a concept of history which corresponds to this fact. Then we will have the production of the real state of exception before us as a task; and this will improve our position in the struggle against Fascism" (quoted and translated in Agamben 2017b: 48; Italian original edition Agamben 2019: 60[2]). Walter Benjamin's eighth thesis *On the Concept of History*, with its annotations on the indiscernibility of law and life in the contemporary 'state of exception', constitutes the starting point of *Homo Sacer I*, in that it represents the lens through which Agamben reads Michel Foucault's inquiry into biopolitics. And it is in the way of a cross-reading of these two authors that the research entailed in the first volume of the series takes shape:

> Only a reflection that, taking up Foucault's and Benjamin's suggestion, thematically interrogates the link between bare life and politics, a link that secretly governs the modern ideologies seemingly most distant from one another, will be able to bring the political out of its concealment and, at the same time, return thought to its practical calling (Agamben 2017b: 7-8; Agamben 2019: 20).

The research hypothesis, formulated in the first few pages of the book, is that the mutual reference between 'sovereign power' and 'bare life' constitutes something like the unthought assumption of Western tradition, an assumption which makes all the theories that try to play one term against the other complicit. 'Bare life' is the translation of the Benjaminian syntagm '*bloßes Leben*', and it functions as a key term in *Homo Sacer I* in reference to Foucault's inquiries into the process through which, within modernity, the biologic life of the individuals becomes the stake of politics, which then turns into biopolitics. "For millennia", we read in *The Will To Knowledge*, "man remained what he was for Aristotle: a living animal with the additional capacity for political existence; modern man is an animal whose politics calls his existence as a living being into question" (Foucault 1976: 172)[3]. However, according to Agamben, it is not sufficient to think this progress of the Western tradition as a discontinuity, or as an overturning, like a "threshold of biological modernity"[4], to use Foucault's words, which separates antiquity from modernity. Through a Benjaminian lens, what appears to be decisive to Agamben is the fact that in the Western tradition law and life emerge as at once divided and articulated, as the two poles of an 'apparatus', in which both intertwine to the point that they become undecidable. Foucault himself, in particular in his late 1970's lectures, shows how, with the "resulting increase in importance of the nation's

[2] The very last sentence is not quoted by Agamben, see W. Benjamin 1991: 697; W. Benjamin 2006: 392.

[3] Quoted in Agamben 2017b: 6; Agamben 2019: 18.

[4] See Agamben 2017b: 6; Agamben 2019: 18.

health and biological life as a problem of sovereign power" this latter gets into a process of emptying, or of rarefaction, to the point that the figure of sovereignty gradually changes into a "government of men", into a mere "administration of the bodies" (Agamben 2017b: 6; Agamben 2019: 18).

While Foucault does not confront himself with the measure of the 'state of emergency', which characterises the birth of the twentieth century totalitarian regimes to then become a governmental paradigm in contemporary democracies, according to *Homo Sacer I* it is this apparatus, which forms the core of Benjamin's reflection, that allows us to think the process described in Foucault's lectures. The text shows how the 'state of exception' – the *Ausnhamezustand* of Carl Schmitt's theory – coincides with a *suspension* of the juridical order, within which the law *remains* in force; and argues how, through such a suspension of the law, the political dimension of the individuals comes to coincide with their biological existence, with their 'bare life'. Therefore, the state of exception appears to be a threshold concept, which is neither ascribable to the sphere of the *nomos*, nor to the sphere of the *physis*, in which law and life reveal themselves as undistinguishable. Starting from this concise reconstruction of the central argument of the text, we can already formulate the question which will direct our inquiry: does the indiscernibility of law and life describe the functioning of the state of exception, or is it a threshold contained within it, that hints at its possible deactivation? A question which, in terms of the first two volumes of *Homo Sacer* (whose arguments we will here try to reconstruct) can be provisionally formulated in the following manner: how can we possibly comprehend the Benjaminian admonishment to the production of the 'real state of exception (*wirchlick Ausnhamezustand*)', as opposed to the merely 'virtual' one theorised by Schmitt? As hinted above, our hypothesis is that, despite Agamben's attempt to play the Benjaminian 'real state of exception' against the Schmittian 'virtual one', in *Homo Sacer I* the topos of indiscernibility is used to describe the position of both authors without an evident philosophical strategy, and that such an ambiguity invalidates the book's central argument.

2.

In *Homo Sacer I* the research on contemporary biopolitics leads, in the first place, to the development of another Foucaultian assumption, that is to investigate – to use Foucault's words – the "shadow that the present casts onto the past"[5]. If, in the state of exception, the norm is in force as suspended, and the bare life of

[5] Agamben often mentions Foucault's definition of his own archaeological inquire as a "shadow cast onto the past by the present" although never reporting the source of this quotation. The definition is probably derived from Foucault 1969: 234, and then loosely reformulated. I would like to thank Andrea Cavalletti for helping me to find this passage.

the citizens becomes the place of politics, how should we retrospectively think about the nexus between law and life in the Western tradition?

Through a well-known and provoking reading of Aristotle's *Politics*, *Homo Sacer I* shows how in classical Greece 'life' is split into two distinct poles: *zoé*, the natural life, and *bios*, the politically qualified life, which nevertheless define themselves through their very contrast. When Aristotle indicated: "The end of the perfect community [...] he did so precisely by opposing the simple fact of living (*to zēn*) to politically qualified life" (Agamben 2017b: 6; Agamben 2019: 18), and in such a way as to also reveal how, only through such an *exclusion* of life, can the boundaries of the *bios* be defined. The *separation*, the contrast, between *bios* and *zoé*, attests itself as an *implication*, hidden but still constitutive, of the natural life into the polis. In as far as the sphere of the *bios* defines itself by way of the exclusion of the *zoé*, the separation of natural life proves to be something like an internal limit which prevents the *bios* from realizing itself, and which underpins the different polarization of the terms during modern times, when bare life emerges as the constitutive dimension of contemporary politics[6]. If, in the *polis*, the boundaries of the *bios* are defined through the exclusion of the *zoé*, in the state of emergency it is the *suspension* of the law which discloses the domain of bare life as the sphere of politics. The bare life, as Agamben concludes, "remains included in politics in the form of the exception, that is, as something that is included solely through an exclusion" (Agamben 2017b: 12; Agamben 2019: 25). *Homo Sacer I* defines the exception (the Latin term *exceptio* literally means the 'capture of the outside') as the nexus of the inclusive exclusion between life and law in our tradition, a tradition within which the two poles reveal themselves as always being at once divided and articulated. The coming into light of this relationship allows Agamben to highlight how the crucial role of the natural life in modernity does not mark a discontinuity with respect to the ancient times. The "shadow which the inquiry into the present casts onto the past" is situated beyond the biopolitical boundaries traced by Foucault, and it reveals "the production of a biopolitical body" as "the original activity of sovereign power" in the Western tradition (Agamben 2017b: 9; Agamben 2019: 21).

The relevance of Schmitt's thought for *Homo Sacer I*s researches can be better appreciated in the light of these inquiries. As it is known, in *Political Theology* the rank of the sovereign derives from his capacity to "decide on the exception", that is, to suspend the juridical order, in so far as such a suspension does not call into question the validity of the law, but rather defines the domain upon which it finds its very application, by delimiting the sphere of life: "Here the decision is not

[6] In his essay *Agamben and the Question of Political Ontology*, M. Abbott defines 'bare life' as the "unthought ground of the metaphysics underpinning our political system, a presupposition that, after the failed attempt to exclude it in the classical world, has returned to haunt us in modernity". See Abbott 2014: 20.

the expression of the will of a subject hierarchically superior to all others, but rather represents the inscription within the body of the *nomos* of the exteriority that animates it and gives it meaning. The sovereign decides not the licit and illicit but the originary inclusion of the living in the sphere of law or, in the words of Schmitt, 'the normal structuring of life relations' which the law needs" (Agamben 2017b: 25; Agamben 2019: 37). While the theories of the state of exception generally try to frame it within the fact/law opposition, thus indicating it, on the one hand, a juridical provision, or, on the other hand, simply a concrete exception, the relevance of the Schmittian doctrine cannot but reside, for Agamben, in its way of presenting the state of exception as a threshold concept that founds the very structure of the juridical reference, i.e. the relationship of the sphere of law to the sphere of fact: "The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule [...] To refer to something, a rule must both presuppose and yet still establish a relation with what is outside relation (the nonrelational). The relation of exception thus simply expresses the originary formal structure of the juridical relation" (Agamben 2017b: 19-20; Agamben 2019: 32-33). It is only through the suspension of order that the sovereign can trace a new boundary between anomy and *nomos*, separate, exclude life from the law, and, at the same time, include life into its domain, as the sphere upon which law places its application. Thus, the specific manner of the Schmittian theory is that of "inscrib[ing] anomie within the very body of the *nomos*" (Agamben 2005: 54, now in Agamben, 2017b: 213; Agamben, 2019: 220), so as to make the suspension of the order, the demarcation of the juridically empty sphere of life, the very foundation of law and its application. Therefore, if this is the complexity of the functioning of law, if that which is separated from the *nomos* – anomy, life – is already included in it through its exclusion, in what way is it possible to call into question such a relationship, to neutralise the device of the *exceptio*?

3.

Homo Sacer I's critique of contemporary philosophy can be better understood in light of this analysis of the Schmittian doctrine. *In Homo Sacer I*, Agamben discusses the attempt developed by the twentieth century French philosophy to deactivate the law apparatus through the figure of *difference*. If law's nature does not consist so much of a distinction between what is licit and what is illicit, but rather, and ultimately, in the presupposition of a nexus of an inclusive exclusion between law and life, it will not be sufficient to appeal to an 'otherness', to an 'other' in respect to the law, in order to deactivate it. *Homo Sacer I* mentions a passage from *Entretien infini*, in which Blanchot defines the process of the '*grand enfermement*' described by Foucault in the *Histoire de la folie,* as an attempt by power

to "confine the outside", to "interiorise what exceeds it", a process by virtue of which "the system designates itself as exterior to itself" (Blanchot 1969: 292)[7]. To Agamben, such a description of power appears to be ephemeral. As he writes, if "exteriority [...] is truly the innermost centre of the political system, and the political system lives off it in the same way that the rule, according to Schmitt, lives off the exception" (Agamben 2017b: 33; Agamben 2019: 45), then, any opposition between an inside and an outside of the system will fall within the mechanism of the *exceptio*.

However, the question which the apparatus of the exception poses to contemporary thought is, according to Agamben, even more radical. Agamben reconstructs the debate between Gershom Scholem and Benjamin around the status of the law in Kafka's *The Trial*. The situation described therein, whereby the "law is all the more pervasive for its total lack of content" (Agamben 2017b: 47; Agamben 2019: 59), is interpreted by Scholem as a "being in force without significance (*Geltung ohne Bedeutung*)" as proper to the law. According to Agamben, such an indication of the anomic foundation of the *nomos* connotes both the post-heideggerian reflection on the ontological structure as abandonment (the reference here is in particular to Jean-Luc Nancy) and deconstructionism, which reads the "entire text of tradition as being in force without significance" and conceives it as "absolutely impassable" (Agamben 2017b: 47; Agamben 2019: 60). However, Agamben states, these theories describe exactly the status of the law in the contemporary state of exception:

> The task that our time imposes on thinking cannot simply consist in recognizing the extreme and insuperable form of law as being in force without significance. Every thought that limits itself to this does nothing other than repeat the ontological structure that we have defined as the paradox of sovereignty (or sovereign ban) [...] A pure form of law is only the empty form of relation. Yet the empty form of relation is no longer a law but a zone of indistinguishability between law and life (Agamben 2017b: 51-52; Agamben 2019: 64).

Therefore, provided that the functioning of power consists in the inclusive-exclusion of law and life (in which the law is in force as suspended) how does the topos of indiscernibility allow us to pursue the deactivation of the power apparatus, and to formulate a "completely new politics – that is, a politics no longer founded on the *exceptio* of bare life"? (Agamben 2017b: 13; Agamben 2019: 25).

4.

The place in which *Homo Sacer I* deals with such a question is the reconstruction of the debate between Schmitt and Benjamin on the state of exception, in re-

[7] Quoted in Agamben 2017b: 19; Agamben 2019: 31.

spect to which the comparison between Scholem and Benjamin serves as an introduction. In response to the conception of *Geltung ohne Bedeutung*, intended as 'spectral figure of the law', that "Scholem, not at all suspecting that he shares this thesis with Schmitt, believes is still law", and "which is in force but is not applied or is applied without being in force" (Agamben 2017b: 220; Agamben 2019: 225), Benjamin objects that a law which is in force without signifying is not a law anymore as it becomes indiscernible from life. In the Kafkian village, Agamben glosses, "the existence and the very body of Joseph K. ultimately coincide with the Trial; they become the Trial" (Agamben 2017b: 47; Agamben 2019: 59). This indiscernibility of law and life is indicated as the key to the figure of the 'real state of exception' which Benjamin, in his eighth thesis *On the Concept of History*, opposes against Schmitt's 'state of exception' which is identified as a merely 'virtual' one.

Benjamin's thesis obviously refers to the Nazi Reich's state of exception, proclaimed in 1933 with Hitler's seizure of power. According to Schmitt's perspective, the suspension of Weimar's constitution should have led to the foundation of a new order, coinciding with a new subordination of life to law, of anomy to *nomos*. But in fact, as the state of exception was never revoked, it therefore became, as shown in the eighth thesis also, 'the rule'. To Benjamin's eyes, the suspension of the law brings into light a threshold of undecidability between *nomos* and anomy, law and life, which neutralises any attempt to newly separate and subordinate them in a juridical relationship, thus marking a point of no return in respect to all traditional political forms. But in what way does the indiscernibility between law and life, which characterises the 'real state of exception', distinguish itself from their inclusive exclusion, which identifies the merely virtual *Ausnhamezustand*? Agamben recapitulates the two different interpretations of the state of exception as follows:

> We have seen the sense in which law begins to coincide with life once it has become the pure form of law, law's mere being in force without significance. But insofar as law is maintained as pure form in a state of virtual exception, it lets bare life (K.'s life, or the life lived in the village at the foot of the castle) subsist before it. In a real state of exception, law that becomes indistinguishable from life is confronted by life that, in a symmetrical but inverse gesture, is entirely transformed into law [...] Only at this point do the two terms distinguished and kept united by the relation of ban (bare life and the form of law) abolish each other and enter into a new dimension (Agamben 2017b: 48, translation modified; Agamben 2019: 60-61).

Nonetheless, at this stage of the analysis, such a conclusive statement of the argumentation reveals itself as highly enigmatic, because it seems to provoke a shift in Agamben's discussion. If, in the previous pages, the indiscernibility of law and life characterised Benjamin's position, a position that unmasked the artifice of the state of exception in such a way as to reveal it as a pretence of deciding on an *undecidable* – in the later lines of this very same paragraph the indeterminacy of law

and life seems to characterise Schmitt's theory. Confronted with the jurist's position, 'the real state of exception' is described by Agamben as "a life entirely transformed into law" but also as a "mutual abolition" of the two terms. This ambiguity of the text allows us to render a problematic aspect of *Homo Sacer I* into light, and one which, in our view, lies at the basis of many criticisms that have been drawn around this key text and the ensuing misunderstandings. This problematic issue concerns the distinction of the apparatus of the exception – the inclusive-exclusion – from the topos of the threshold of indiscernibility. We can start by considering how the lexicon of indiscernibility (notably, indifference, undecidability, indistinction, etc. all terms that Agamben uses in a co-extensive manner) is used in *Homo Sacer I* both to describe Schmitt's doctrine and to indicate Benjamin's position. At times the indiscernibility is thought as the functioning of the state of exception, coinciding with the mechanism of the inclusive-exclusion of law and life, at other times as a threshold between them, which does not reduce itself to the exception, and which points at its possible neutralization. "The sovereign decision", as we saw, for instance, in the first part of the text, "traces and from time to time renews this threshold of indistinction between outside and inside, exclusion and inclusion, *nomos* and physis, in which life is originarily excepted in law" (Agamben 2017b: 26; Agamben 2019: 38), and, while examining the figures of the *exceptio* – sovereignty, bare life, the concentration camp, the Muselmann – Agamben describes them in terms of a "threshold of indifference between nature and culture, between violence and law" (Agamben 2017b: 33, translation modified; Agamben 2019: 45). In the light of these considerations, the topos of indiscernibility seems to coincide with the mechanism of the *exceptio* and, in so far as this is the place in which law and life acquire their meaning through their inclusive exclusion, its possible deactivation can only configure itself as a "mutual abolition of the terms", that is, as a perfectly empty destitution of the apparatus, at the risk of attesting it as a formal and metaphysical dimension. However, in other passages, the indiscernibility, in as much as it is an "unlocalizable zone of indistinction" between law and life, manifests an intrinsic ambiguity of the Schmittian apparatus which cannot be reduced to it and "that, in the last analysis, necessarily acts against it" (Agamben 2017b: 20; Agamben 2019: 32). And in such a direction point also Benjamin's considerations around the 'real' state of exception, considered as the coming into light of a threshold of indiscernibility between law and violence, which unmasks any attempt to go back to a separation or subordination of the terms in a juridical context.

Does the topos of indiscernibility therefore describe the ambiguity which characterises the relationship between law and life in the inclusive-exclusion[8], or does it

[8] In his 2014 essay entitled *Agamben and Indifference*, William Watkin states that the question of the relation between the apparatus of inclusive-exclusion and the figure of indifference has never been investigated in the Anglophone critical literature on Agamben: "A question that I believe no

stand for a threshold which gives us a glimpse of a possible neutralization of this apparatus?

5.

A step in the direction of the dissolution of this difficulty is taken in the section entitled *Threshold*, which connects the first and the second parts of the book, through a reading of Benjamin's essay *Critique of Violence* which Agamben defines as a "necessary and, even today, indispensable premise of every inquiry into sovereignty" (Agamben 2017b: 54; Agamben 2019: 67). Even if Agamben does not reach a conventional conclusion, this brief chapter forms the basis for the new interpretation of the debate between Schmitt and Benjamin which, as we shall also see, he develops in the subsequent volume of *Homo Sacer*: *State of Exception*. In his *Critique*, Benjamin shows how every position of a new law, inasmuch as it presupposes the position of a boundary between anomy and *nomos*, contains an intrinsic anomic, violent act, which the *nomos* tries to dissimulate, but which comes into light in its reference, ambiguous but nonetheless constitutive, to a *violence* which preserves the law,

> Hence the necessity of a third figure to break the circular dialectic of these two forms of violence [...] The definition of this third figure, which Benjamin calls 'divine violence', constitutes the central problem of every interpretation of the essay. Benjamin in fact offers no positive criterion for its identification and even denies the possibility of recognizing it in the concrete case. What is certain is only that it neither posits nor preserves law, but rather 'de-poses (*entsetzt*)' it (Agamben 2017b: 55; Agamben 2019: 67).

If the dialectical oscillation between life and law, violence and law, describes the functioning of the state of exception, the divine violence, as a 'third' term among them, will not be a substantial term that would act as a dialectical opposite to law. However, it will not even indicate the ambiguous oscillation between the two terms, in fact, the very same sovereign violence, as Agamben immediately recognises, is neither identifiable with the violence that poses the law, nor with that which preserves it, in as far as it constitutes itself through their inclusive exclusion:

one has yet raised" (Watkin 2014: 190). It is peculiar how, in his text, which still has the merit of putting the topos of indiscernibility in Agamben's work into sheer focus, Watkin describes the implication of such a conception as an (empty) suspension of all the oppositional categories of our tradition, in which "the very same indifference becomes indifferent" (Watkin 2014: 191, *passim*). If, as we have shown, these are Agamben's conclusions in some of the *Homo sacer I* remarks, especially in those passages where the apparatus of inclusive-exclusion and the topos of indiscernibility seem to coincide, then the implications of this notion can only be grasped in relation to the notion of a *threshold* which, as we shall also see, Agamben connotes as 'use'.

> The violence exercised in the state of exception clearly neither preserves nor simply posits law, but rather conserves it in suspending it and posits it in excepting itself from it. In this sense, sovereign violence, like divine violence, cannot be wholly reduced to either one of the two forms of violence whose dialectic the essay undertook to define (Agamben 2017b: 55; Agamben 2019: 68).

Therefore, the interpretation of Benjamin's essay deals with the crucial problem of *Homo Sacer I*, the distinction between the inclusive-exclusion of violence and law, which characterises 'sovereign violence', and the topos of indiscernibility, which connotes 'divine violence' as key to its possible deactivation. The paragraph continues as follows and it is worth quoting it in full:

> This does not mean that sovereign violence can be confused with divine violence [...] Sovereign violence opens a zone of indistinction between law and nature, outside and inside, violence and law. And yet the sovereign is precisely the one who maintains the possibility of deciding on the two to the very degree that he renders them indistinguishable from each other. As long as the state of exception is distinguished from the normal case, the dialectic between the violence that posits law and the violence that preserves it is not truly broken [...]. The violence that Benjamin defines as divine is instead situated in a zone in which it is no longer possible to distinguish between exception and rule. It stands in the same relation to sovereign violence as the state of actual exception, in the eighth thesis, does to the state of virtual exception. This is why (that is, insofar as divine violence is not one kind of violence among others but only the dissolution of the link between violence and law) Benjamin can say that divine violence neither posits nor conserves violence, but deposes it (Agamben 2017b: 55; Agamben 2019: 68).

The Schmittian sovereign, by suspending the constitution, reveals a 'zone of indistinction' between violence and law. Even though he installs himself in this threshold, where anomy and *nomos* are at once divided and articulated, he still has the pretence of dissimulating such an indistinction, i.e. the pretence of deciding upon it, by way of the separation of the two terms and of their subsequent subordination within the creation of a new law. Nevertheless, despite this attempt to dissimulate it through the device of inclusive-exclusion, it is only through the presupposition of a threshold of indiscernibility between violence and *nomos* that the law can *at once* distinguish and articulate the two terms. This means that no less essential to the functioning of the *nomos* – the separation of law and life into two distinct spheres, and their subsequent juridical subordination through the mechanism of *exceptio* – is the act of presupposing and dissimulating the threshold of indiscernibility of the two terms. If therefore, *positing* the law equates to installing oneself in a threshold of indistinction of law and life, but at the same time *hiding* such an indistinction, and dissimulating it through the device of the exception, *deposing* the law should equate to *exposing* this threshold of indistinction, to bringing it into light.

Benjamin's attempt to think divine violence, or pure violence, as a third term, as a medium which is irreducible to the dialectic oscillation between violence and

law, should therefore coincide with such an *exposition*. However, Benjamin's inquiry does not take this direction. Agamben argues how, in his *Critique*, "with a seemingly abrupt development", instead of defining the divine violence he "concentrates on the bearer of the link between violence and law, which he calls 'bare life (*Bloß Leben*)'" (Agamben 2017b: 55-56; Agamben 2019: 69). We can consider then how Agamben takes up Benjamin's strategy, by formulating the task of the deactivation of the law apparatus through the unfolding of the mystery of 'bare life', indicated in the paradigm of the '*homo sacer*'. However just like the *homo sacer* represents the "originary form of the inclusion of bare life in the juridical order" and thus "names something like the originary 'political' relation, which is to say, bare life insofar as it operates in an inclusive exclusion as the referent of the sovereign decision" (Agamben 2017b: 72; Agamben 2019: 84), in the same way all the figures through which the text tries to think the indiscernibility of anomy and *nomos*, law and life, are an expression of the dialectical oscillation of the two poles in the inclusive-exclusion – and therefore not an expression of a threshold between them, in which they reveal themselves as indiscernible, thus entering into a 'new dimension'. The '*homo sacer*', the 'muselmann', the 'concentration camp', are all figures through which sovereign power and bare life include each other while excluding themselves, without ever touching each other, but only in the menace of death. Thus, these figures result from the inclusive-exclusion apparatus, but do not allow us to think about a 'third term' in which the two poles would show themselves in a new configuration. In such a manner, the Benjaminian reference to this third term, to a medium that would exhibit the indiscernibility between violence and law by neutralizing their dialectical oscillation, is a theme that remains undeveloped in the text[9].

6.

If we read the subsequent volume of the *Homo Sacer* series, *State of Exception*, in the light of this issue we can consider how Agamben confronts precisely this question. We can notice how in this book, Agamben never defines the state of

[9] This issue is at the root of some of the critiques that have been raised against *Homo Sacer* and of the many misunderstandings of the book. Some earlier commentators, in particular in the Anglophone world, understand the apparatus of inclusive-exclusion as the logic which governs the entire Western tradition as by a hidden and unsurmountable necessity. Despite the problematic aspects that we are highlighting in *Homo Sacer I*, these critiques, exemplified by Catherine Mill's position in *The Philosophy of Agamben* (2008), simplify the philosophical issue opened by the book and, as we will show, become unable to capture the soteriological intent of Agamben's research, such as it developed in the subsequent volumes of *Homo Sacer* project. In the same direction as Mill's, we could place many of the essays contained in M. Calarco, S. DeCaroli (eds.), *Giorgio Agamben. Sovereignty and Life* (Calarco and DeCaroli 2007), and in A. Norris (ed.), *Politics, Metaphysics and Death: Essays on Giorgio Agamben's* Homo Sacer (Norris 2005).

exception, from Schmitt's doctrine point of view, as a zone of indiscernibility of law and life, but always as a 'dialectical oscillation' between the two poles, which describes the functioning of the apparatus of inclusive-exclusion. "Schmitt's theory of the state of exception", we read at the beginning of the chapter dedicated to the German jurist, "proceeds by establishing within the body of the law a series of caesurae and divisions whose ends do not quite meet, but which, by means of their articulation and opposition, allow the machine of law to function" (Agamben 2017b: 196; Agamben 2019: 203). In the light of the argument that we have reconstructed so far, the core sense of such an analysis emerges in the book's fourth chapter where Agamben returns to the debate between Schmitt and Benjamin on the state of exception. The analysis of the Schmittian doctrine of the state of exception that is developed in this chapter is much more detailed than the one we found in *Homo Sacer I*, and it culminates in a new interpretation of the debate between the two authors. According to a widespread view, the origin of such a debate coincides with Benjamin's reading of *Political Theology* (1922) to which he reacts by introducing the figure of the 'sovereign indecision' in *The Origin of German Tragic Drama* (1926; Benjamin 1974; Benjamin 1998). Although, Agamben shows how Schmitt's book from 1922 can already be considered as a response to Benjamin, and, more precisely, as a response to the essay that had come out one year earlier: the *Critique of Violence* (1921). This article was published by Benjamin in the *Archiv für Sozialwissenschafter und Sozialpolitik*, a journal of which Schmitt was a collaborator and which he had regularly cited in his works from 1915 onward. If "Benjamin's interest in Schmitt's theory of sovereignty has always been judged as scandalous", Agamben writes, implicitly answering some of the critiques raised against *Homo Sacer I* – "turning the scandal around we will try to read Schmitt's theory as a response to Benjamin's critique of violence" (Agamben 2017b: 212; Agamben 2019: 219).

This reconstruction of the debate between the two authors assumes a strong philosophical value in the text. As we have seen, the aim of Benjamin's essay is

> to ensure the possibility of a violence [...] that lies absolutely 'outside (*außerhalb*)' and 'beyond (*jenseits*)' the law and that, as such, could shatter the dialectic between law-making violence and law-preserving violence [...] Benjamin calls this other figure of violence 'pure' (*reine Gewalt*) or 'divine,' and, in the human sphere, 'revolutionary' [...] The proper characteristic of this violence is that it neither makes nor preserves law, but deposes it (*Entsetzung des Rechtes*) and thus inaugurates a new historical epoch (Agamben 2017b: 212; Agamben 2019: 219).

In the first part of his inquiry, Agamben shows how, in the essay that had come out the year prior to the publication of *Political Theology* with the title *The Dictatorship* (1921), Schmitt had thought the state of exception through the figure of the 'sovereign dictatorship', which suspends the constitution in force in order to create a new law. In this book, the dictatorship's relationship with the juridical or-

der coincided with the nexus between *constituting* and *constituted* power. This hendiadys, as Agamben notices, corresponded exactly to the one criticised by Benjamin in his essay *Critique of Violence*, and more precisely with the relationship between the 'law-positing violence' and the 'law-preserving violence'. The text paraphrases the Benjaminian argumentation: "Violence that is a means for making law" – i.e., in the specific terms of the argument we are reconstructing, the suspension of *nomos*, the *separation* between anomy and *nomos* as foundation of constituting power – "never deposes its own relation with law and thus instates law as power (*Macht*), which remains 'necessarily and intimately bound to it'" (Agamben 2017b: 220; Agamben 2019: 227). That is to say, it institutes constituted power as a power which must guarantee the application of law resorting to violence, i.e. through an *articulation* between anomy and *nomos*. The aim of Benjamin's essay is to show how the dialectical oscillation between 'law-positing violence' and 'law-preserving violence' presupposes at its core the *mutual reference* between violence and law as a nexus which is not reducible to one of the two poles, neither to their separation nor to their articulation, a nexus in which violence and law show themselves as at once divided and articulated, in such a way as to attest themselves as undecidable. As Agamben reminds us, Benjamin has a relational, not substantial, conception of purity, so that the criterion for the purity of violence lies in its relationship to the law: violence is pure in as much as it is not separable from, nor can it be subordinated to law – as in the Schmittian apparatus – but rather manifests itself as co-originary, or, more precisely, as indiscernible from law[10].

One year later, in *Political Theology*, Schmitt does not define anymore sovereignty through the hendiadys of constituted-constituting power, rather, he develops the figure of the decision upon the exception: according to the well-known definition: "The sovereign stands outside (*außerhalb*) of the normally valid juridical order, and yet belongs (*gehört*) to it, for it is he who is responsible for deciding whether the constitution can be suspended *in toto*" (Schmitt 1990: 13)[11]. Agamben argues how this shift in the jurist's theory, its elaboration of sovereignty as a *limit figure* of the law, which stands neither outside nor inside the law, is in the end an attempt to provide an answer to the Benjaminian critique of the oscillation between 'law-positing violence' and 'law-preserving violence'; and precisely an attempt to capture pure violence within the *nomos* as a threshold that exceeds both types of violence, both constituent and constituted power. As Agamben writes:

> It is in order to neutralize this new figure of a pure violence removed from the dialectic between constituent power and constituted power that Schmitt develops his theory of sovereignty. The sovereign violence in *Political Theology* responds to the pure violence of Benjamin's essay with the figure of a power that neither makes nor

[10] See Agamben 2017b: 218-210 and Agamben 2019: 225-226.

[11] I quote the translation of *State of Exception*, in Agamben 2017b: 195; Agamben 2019: 202.

> preserves law, but suspends it [...] That this place is neither external nor internal to the law – that sovereignty is, in this sense, a *Grenzbegriff* [limit concept] – is the necessary consequence of Schmitt's attempt to neutralize pure violence and ensure the relation between anomie and the juridical context (Agamben 2017b: 213; Agamben 2019: 220).

The Schmittian doctrine of the state of exception derives from an attempt to capture the dimension of pure violence as a medium, a threshold in which law and life are *at once* divided and articulated, an attempt to include it into the sphere of law by the way of its dissimulation. This dissimulation consists in the separation of law and violence into two distinct spheres by way of the suspension of the law and in their juridical subordination in the position of a new law. If it is only the pure violence, in which law and life are at once divided and articulated, that allows the functioning of the apparatus of inclusive exclusion, no less essential for such apparatus will be the dissimulation of the threshold of pure violence, in so far as this reveals the two terms as indiscernible.

Nonetheless, Benjamin shows how such an attempt to dissimulate, to 'capture' pure violence, is ephemeral: the suspension of the law of the state of exception does not lead to constitute a new order, but rather, as he will also argue in his thesis *On the Concept of History*, it 'becomes the rule', proves to be inseparable by the normal order. In this way, the state of exception reveals a presupposition of a threshold of indiscernibility between law and life at its very core, that undermines every possible juridical configuration of the two terms, thus marking a point of no return with respect to any traditional political form. In the *Critique of Violence* we can already find a conclusion akin to the position of the eighth thesis, in the discussion of the figure of the 'police', which Agamben, however, does comment on. According to Benjamin, the state of exception is essentially a 'police state' in which: "The separation of law-making and law-preserving violence is suspended" (Benjamin 1977: 189; Benjamin 2002: 240). He defines police as a "kind of spectral mixture" of the two types of violence: "It is law-making, because its characteristic function is not the promulgation of laws but the assertion of legal claims for any decree, and law-preserving, because it is at the disposal of these ends" (Benjamin 1977: 189; Benjamin 2002: 239-240). The police institution, as well as the "decision upon the exception", represents an attempt made by power to suspend the difference between law and life and to seize the threshold of pure violence – a threshold in which the two poles are at once divided and articulated (the only key that makes its functioning possible) but, at the same time, an attempt to hide it, to dissimulate this threshold through the inclusive exclusion of law and life, because it reveals them as indiscernible. In this sense, we can understand how in the *Trauerspielbuch*, by referring to the Schmittian definition of the sovereign as "the one who decides upon the state of exception", Benjamin surreptitiously alters the content of the definition by writing that the most important function of the sovereign

is, in reality, that of excluding the state of exception[12]. Indeed, through the suspension of the juridical order, the sovereign allows the 'real state of exception' to emerge, in so far as he reveals a threshold of indistinction between life and law, but, at the same time, he tries to 'exclude' it, to dissimulate it through the *exceptio* of law and life.

7.

But, in what way does Benjamin think pure violence, this threshold of indiscernibility of law and life in which their inclusive-exclusion appears to be neutralised? As we have considered, if the positing of law consists in a *dissimulation* of such a threshold, the deposition of law will come to coincide with its *exposition*. Agamben, then, paraphrases the *Critique*:

> While violence that is a means for making law never deposes its own relation with law and thus instates law as power (*Macht*), which remains 'necessarily and intimately bound to it', pure violence exposes and severs the nexus between law and violence and can thus appear in the end not as violence that governs or executes (*die schaltende*) but as violence that purely acts and manifests (*die waltende*) (Agamben 2017b: 220; Agamben 2019: 226).

The instrumental conception of violence, as a 'means' for the positing of law, consists, according to Benjamin, in the very attempt to hide, to dissimulate its 'medial' character. 'Pure means' will therefore be the violence which does not dissimulate itself in the aim – its aim being the positing or conservation of law – but rather the violence which exposes itself in its 'mediality', i.e., as a violence that is neither separated from law nor subordinated to it, in other words, as a violence indiscernible from law[13]. It is interesting to notice how in his essay Benjamin portrays such a manifestation of violence as essentially non-violent. If the conventional meaning of violence is tied to its dissimulation in the end of law, if violence and law historically gain their sense through their inclusive exclusion, then, in the exposition of the medial nature of violence, both violence and law change to a new dimension. Agamben expands this idea by going back to the debate between Scholem and Benjamin around Kafka's interpretation,

> Kafka's most proper gesture – the text argues - consists not (as Scholem believes) in having maintained a law that no longer has any meaning, but in having shown that

[12] See Agamben 2017b: 213-214; Agamben 2019: 221.

[13] "Here appears the topic", Agamben writes "which flashes up in the text only for an instant, but is nevertheless sufficient to illuminate the entire piece—of violence as 'pure medium,' that is, as the figure of a paradoxical 'mediality without ends' – a means that, though remaining such, is considered independently of the ends that it pursues [...] pure violence is that which does not stand in a relation of means toward an end, but holds itself in relation to its own mediality" (Agamben 2017b: 219; Agamben 2019: 226-227).

> it ceases to be law and blurs at all points with life. In the Kafka essay, the enigmatic image of a law that is studied but no longer practiced corresponds, as a sort of remnant, to the unmasking of mythico-juridical violence effected by pure violence [...]. The decisive point here is that the law—no longer practiced, but studied—is not justice, but only the gate that leads to it (Agamben 2017b: 220; Agamben 2019: 227-228).

The apparatus of inclusive exclusion, which is at the root of the application of law, consists, as we have shown, in the dissimulation of the medial character of violence, or of potentiality as we could also say in reference to other places of Agamben's work. Benjamin counterposes to juridical violence a "no longer practiced, but studied" law, that is, a law whose potentiality remains inseparable from its application and which, in as far as it exposes the indiscernibility of the two dimensions, does not unveil any idea of justice, but rather limits itself to exhibiting "the gate that leads to it"; i.e., it reveals justice as a threshold, as the purely medial nature of the relationship between violence and law, potentiality and act. The conclusion in the following passage has a crucial role in the *Homo Sacer* project, in as much as this coincides with the introduction of the notions of *inoperativity* (*inoperosità*) and of *use* (*uso*), intended in the medial meaning that they have in the subsequent volumes of the series:

> What opens a passage toward justice is not the erasure of law, but its deactivation and inoperativity [*inoperosità*] — that is, another use of the law. This is precisely what the force-of-law (which keeps the law working [*in opera*] beyond its formal suspension) seeks to prevent (Agamben 2017b: 221; Agamben 2019: 228).

Agamben can therefore affirm that the specific performance of the state of exception consists in an attempt to "prevent another use" of law, i.e. an "inoperative use" of law, in so far as he has come to show the apparatus of the suspension of law – the inclusive exclusion – as the 'capture' of an inner threshold of indiscernibility of law and life. *Homo Sacer I* did not manage to show such a threshold, at the risk of attesting the inclusive exclusion as a formal, insurmountable dimension, i.e., as a metaphysical device. *State of Exception* can now show how the dialectical oscillation of law and life derives from the capture of man's praxis as inoperative use, pure mediality – and from the attempt to dissimulate it, insofar as it reveals violence and law as indiscernible. In the passage quoted above we can thus identify the *arché* of the notion of use formulated in the subsequent volumes of *Homo Sacer* project and, with it, that of the very same archaeological method used by Agamben, even if the word archaeology has not appeared in the book yet. The attestation of 'use' as the threshold of indiscernibility which gets caught in the heart of the apparatuses of power, allows us to define the sense of *Homo Sacer*'s historical and philosophical inquiry, an inquiry which neither describes a metaphysical mechanism which cannot be bypassed, nor can it be resolved in the hypostatization of an originary praxis which precedes law:

> And just as the victory – the text argues - of one player in a sporting match is not something like an originary state of the game that must be restored, but only the stake of the game (which does not preexist it, but rather results from it), so pure violence (which is the name Benjamin gives to human action that neither makes nor preserves law) is not an originary figure of human action that at a certain point is captured and inscribed within the juridical order (just as there is not, for speaking man, a prelinguistic reality that at a certain point falls into language). It is, rather, only the stake in the conflict over the state of exception, what results from it and, in this way only, is supposed prior to the law (Agamben 2017b: 218; Agamben 2019: 225).

Throughout these considerations we can perceive the echo of another Benjaminian assumption contained in *The Origin of German Tragic Drama*, which describes the origin as that which does not precede the historical becoming, but arises from it. In so far as the archaeological inquiry takes us back to 'use' as to a threshold of indiscernibility that gets caught in the heart of the apparatuses of power, it attests 'use' as an unexpressed possibility, a latent potentiality, therefore an *arché* not in the sense of a past experience, but rather in the sense of a chance of change that occurs in the present:

> What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it. And use, which has been contaminated by law, must also be freed from its own value. This liberation is the task of study, or of play. And this studious play is the passage that allows us to arrive at that justice that one of Benjamin's posthumous fragments defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical (Agamben 2017b: 221; Agamben 2019: 228).

In contemporary politics, the law coincides with the state of exception which has "become the rule". In so far as this reveals at its core a threshold of indiscernibility of violence and law – man's praxis as pure medium, or use – it discloses the task of the "production of the real state of exception". This coincides with a dimension which is situated beyond the law, but not in the sense of a reference to an outside of the law, but rather in the sense of a 'liberation' of the use caught at its centre. Such a liberation consists in a medial praxis defined as a 'study' or 'game', in which every opposition between means and end, potentiality and act is neutralised, and the dimension of justice reveals itself as non-juridifiable. It is in this liberation that the profound sense of the archaeological method which Agamben will reformulate in the subsequent volumes of the project lies. To go back to the *arché* of a phenomenon, or of an apparatus, means to return to a latent threshold of indiscernibility at its core, and thus to disclose a new possible use of it[14].

[14] Agamben returns to the analysis of *State of Exception* in his more recent work titled *Karman*. Here, he identifies, in the Benjaminian formulation of the "mediality without end", a polemic against Kant's definition of the beautiful as "purposiveness without purpose (or end)": "But while purposiveness without purpose is, so to speak, passive, because it maintains the void form of the end without being able to exhibit any determinate goal, on the contrary, mediality without end is in

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some way active, because it shows itself as such in the very act in which it interrupts and suspends its relation to the end" (Agamben 2018: 82; Agamben 2017a: 134). According to Agamben, "[t]he pure means loses its enigmatic character if it is restored to the sphere of gesture from which it comes". "Just as, in the gesticulation of a mime, the movements that are usually directed to a certain goal are repeated and exhibited as such – that is, as means – without there being any more connection to their presumed end, and, in this way, they acquire a new unexpected efficacy, so too does the violence that was only a means for the creation or conservation of law become capable of deposing it to the extent in which it exposes and renders inoperative its relation to that purposiveness" (Agamben 2018: 82; Agamben:2017a: 134-135).

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