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Open: Man and Animal.

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London
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Printed in the United States of America
10 9 8 7 6 5 4

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Wherever possible, I have included references to published English translations of Agamben’s French, German, and Italian sources in the references list. However, in order to maintain consistency in terminology throughout the text, and to better reflect Agamben’s own translations of these sources, the published English versions have frequently been modified. Where an English edition is listed in the bibliography, the first page number in the text citation refers to the original, and the second to the English edition (e.g., (Benjamin 1942, 697/957)). Where no English edition is listed, the translation is mine.

I would like to give my deepest thanks to Courtney Bookes, David Copenshades, Samuel Gilbert, Siretta Simancini, and to Giorgio Agamben for their generous help in preparing this translation.
Quare igitur jurante in manu tuo reo?

[Why are you jurata about that which concerns you?]
The State of Exception as a Paradigm of Government

The essential contiguity between the state of exception and sovereignty was established by Carl Schmitt in his book Politischer Theodolit (1922). Although his famous definition of the sovereign as "he who decides on the state of exception" has been widely commented on and discussed, there is still no theory of the state of exception in public law, and jurists and theorists of public law seem to regard the problem more as a "quasi facti" than as a genuine juridical problem. Not only is such a theory deemed illegitimate by those authors who follow the ancient maxim according to which necessitas legem non habet (necessity has no law) affirm that the state of necessity, on which the exception is founded, cannot have a juridical form, but it is difficult even to arrive at a definition of the term given its position at the limit between politics and law. Indeed, according to a widely held opinion, the state of exception constitutes a "point of imbalance between public law and political fact" (Saint-Bonnet 2003, 28) that is situated—like civil war, insurrection and resistance—in an "ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political" (Fontana 1999, 168). The question of borders becomes all the more urgent if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds (De Martino 1973, 310), then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form. On the other hand, if the law employs the exception—that is the suspension of law itself—as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.

It is this no-man's-land between public law and political fact, and between the juridical order and life, that the present study seeks to
investigate. Only if the veil covering this ambiguous zone is lifted will we be able to understand the meaning of the stakes involved in the difference—or the supposed difference—between the political and the juridical, and between law and the living being. And perhaps only then will be possible to answer the question that never ceases to reverberate in the history of Western politics: what does it mean to act politically?

3.1. One of the elements that make the state of exception so difficult to define is certainly its close relationship to civil war, insurrection, and terrorism. Because civil war is the opposite of normal conditions, it lies in a zone of undecidability with respect to the state of exception, which is state power’s immediate response to the most extreme internal conflicts. Thus, over the course of the twentieth century, we have been able to witness a paradoxical phenomenon that has been effectively defined as a “legitimate war” (Schmitt 1957). Yet we take the case of the Nazi State. No sooner did Hitler take power (or, as we should perhaps more accurately say, no sooner was power given to him) than, on February 28, he proclaimed the decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties. The decree was not repealed, so that from a juridical standpoint the entire Third Reich can be considered a state of exception that lasted twelve years. In this sense, modern totalitarianism can be defined in the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system. Since then, the voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so-called democratic ones.

Faced with the antipodal progression of what has been called a “global civil war,” the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics. This transformation of a previoustand exceptional measure into a technique of government threatens radically to alter—in fact, has already palpably altered—the structure and meaning of the traditional distinction between constitutional forms. Indeed, from this perspective, the state of exception appears as a threshold of indeterminacy between democracy and absolutism.

3.2. The expression “global civil war” appears in the same year (1968) in both Hannah Arendt’s On Revolution and Carl Schmitt’s Theory of the Partisan State. However, we will see, the distinction between a “real state of exception” (stat de siege efficace) and a “fictional state of exception” (état de siege fictif) goes back to French public law theory and was already clearly articulated in Thibaud Fontaine’s book De l’état de siège (1818). Hence, the term is a neologism in Schmitt, which is at the origin of the Schmittian and Benjaminian opposition between a real and a fictional state of exception. Anglo-Saxon jurisprudence (and in the English political and legal science) prefers the term “敵ized emergency” (or “state of emergency”) to the term “global civil war.”

3.3. The immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension emerges clearly in the “military order” issued by the president of the United States on November 24, 2001, which authorized the “indefinite detention” and trial by “military commissions” (not to be confused with the military tribunals provided for by the law of war) of noncitizens suspected of involvement in terrorist activities.

The USA Patriot Act issued by the US Senate on October 26, 2001, already allowed the attorney general to “take into custody” any alien suspected of activities that endangered “the national security of the United States,” but within seven days the aliens had to be either released or charged with the violation of immigration laws or some other criminal offense. What is new about President Bush’s order 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 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 persons accused, but simply “detainees,” they are the object of a pure de facto rule.
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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. The only thing to which it could possibly be compared is the legal situation of the Jews in the Nazi Lager (camps), who, along with their citizenship, had lost every legal identity, but at least retained their identity as Jews. As Judith Butler has effectively shown, in the detainee at Guantanamo, base life reaches its maximum indeterminacy.

1.4 The uncertainty of the concept is exactly matched by terminological uncertainty. The present study will use the syntagmatic state of exception as the technical term for the consistent set of legal phenomena that it seeks to define. This term, which is common in German theory (Ausnahmezustand, but also Nördring, "state of necessity"), is foreign to Italian and French theory, which prefer to speak of emergency decree and state of siege (political or fictitious, stato di guerra, stato de siège fictif). In Anglo-Saxon theory, the terms martial law and emergency powers prevail.

If, as has been suggested, terminology is the proper poetic moment of thought, then terminological choices can never be neutral. In this sense, the choice of the term state of exception implies a position taken on both the nature of the phenomenon that we seek to investigate and the logic most suitable for understanding it. Though the notions of state of siege and martial law express a connection with the state of war that has been historically decisive and is present to this day, they nevertheless prove to be inadequate to define the proper structure of the phenomenon, and they must therefore be qualified as political or fictitious, terms that are themselves misleading in some ways. The state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept.

The history of the terms fictitious or political state of siege is instructive in this regard. It goes back to the French doctrine that—in reference to Napoleon's decree of December 24, 1810—provided for the possibility of a state of siege that the emperor could declare wherever or not a city was actually under attack or directly threatened by enemy forces, "whenever circumstances require giving more force and more power to the military police, without it being necessary to put the place in a state of siege" (Retouche 1810, 109). The institution of the state of siege has its origins in the French Constituent Assembly's decree of July 8, 1793, which distinguished among état de paix, in which military authority and civil authority each acts in its own sphere; état de guerre, in which civil authority must act in concert with military authority; and état de siège, in which "all the functions entrusted to the civil authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility" (ibid.). The decree referred only to military strongholds and ports, but with the law of 16 Fructidor Year 5, the Directory established municipalities in the interior with the strongholds and, with the law of 23 Fructidor of the same year, granted the right to put a city in a state of siege. The subsequent history of the state of siege is the history of its gradual metastasis from the wartime situation to which it was originally bound in order to be used as an extraordinary police measure to cope with internal sedition and disorder, then changing from a real, or military, state of siege to a fictitious, or political one. In any case, it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one.

The idea of suspension of the constitution was introduced for the first time in the constitution of 22 Prairial Year 8, Article 95 of which reads, "In the case of armed revolt or disturbances that would threaten the security of the State, the law can, in the places and for the time that it determines, suspend the rule of the constitution. In such cases, this suspension can be provisionally declared by a decree of the government if the legislative body is in recess, provided that this body be convened as soon as possible by an article of the same decree." The city or region in question was declared in this constitution, although the paradigm is, on the one hand (in the state of siege) the extension of the military authority's wartime powers into the civil sphere, and on the other a suspension of the constitution (or of those constitutional norms that protect individual liberties), in time the two models end up merging into a single juridical phenomenon that we call the state of exception.

The expression full powers (pouvoirs pleins), which is sometimes used to characterize the state of exception, refers to the expansion of the powers of the government, and in particular the assumption on the executive of the power to issue decrees having the force of law. It derives from the notion of plebiscite, which was elaborated in that true and proper laboratory of modern public legal
exceptional measure, but it also lends its own nature as the constitutive paradigm of the juridical order come to light.

Tingsten's analysis centers on an essential technical problem that profoundly marks the evolution of the modern parliamentary regimes, the delegations contained in the "full powers" laws mentioned above, and the resulting existence of the executive's powers into the legislative sphere through the issuance of decrees and measures. "By full powers laws we mean those laws by which an exceptionally broad regulatory power is granted to the executive, particularly the power to modify or abrogate by decree the laws in force" (Tingsten 1954, 57). Because laws of this nature, which should be issued to cope with exceptional circumstances of necessity or emergency, conflict with the fundamental hierarchy of law and regulation in democratic constitutions and delegate to the executive (governo) a legislative power that should rest exclusively with parliament, Tingsten seeks to examine the situation that arose in a series of countries (France, Switzerland, Belgium, the United States, England, Italy, Austria, and Germany) from the systematic expansion of executive (governments) powers during World War One, when a state of siege was declared or full powers laws issued in many of the warring states (and even in neutral ones, like Switzerland). The book goes no further than recording a large number of case histories nevertheless, in the conclusion the author seems to realize that although a temporary and controlled use of full powers is theoretically compatible with democratic constitutions, "a systematic and regular exercise of the institution necessarily leads to the 'liquidation' of democracy" (330). In fact, the gradual erosion of the legislative powers of parliament—which today is often limited to ratifying measures that the executive issues through decrees having the force of law—has since then become a common practice. From this perspective, World War One (and the years following it) appear as a laboratory for testing and testing the functional mechanisms and apparatuses of the state of exception as a paradigm of government, and more generally, by the state of exception that had accompanied and followed those wars. They are in some ways the heralds who announced what we today have clearly before our eyes—namely, that since "the state of exception ... has become the rule" (Benjamin 1940, 6197/29), it not only appears increasingly as a technique of governance rather than as an
theory of dictatorship, which is dismissed in a footnote as "a puri-
sen tract" (Friedrich 1949: 596, 664). Schmitt's distinction between
communist dictatorship and sovereign dictatorship reappears here as
an opposition between constitutional dictatorship, which seeks to in-
gurize the constitutional order, and unconstitutional dictatorship, which
leads to its overthrow. The impossibility of defining and overcoming the
fascists that determine the transition from the first to the second form of
dictatorship (which he presents as what happened, for example, in Ger-
many) is the fundamental aporia of Friedrich's book, as it is generally
of all theories of constitutional dictatorship. All such theories remain
prisoners in the vicious circle in which the emergency measures they
seek to justify as the name of defending the democratic constitution
are the same tools that lead to its ruin.

There are no ultimate institutional safeguards available for issu-
ing that emergency powers be used for the purpose of preserving the
Constitution. Only the people's own determination to see them so
used can make sure of that... All in all, the quasi-dictatorial provi-
sions of modern constitutional systems, by their martial role, state of
sirens, or constitutional emergency powers, fail to conform to any ex-
acting standard of effective limitations upon a temporary constitu-
tion of powers. Consequently, all these systems are liable to be trans-
formed into totalitarian schemes if conditions become favorable to
it (195).

In Rosiiter's book these aporias explode into open contradictions.
Unlike Tugendhat and Friedrich, Rosiiter explicitly seeks to justify con-
ditional dictatorship through a broad historical examination. His
hypothesis here is that because the democratic regime, with its com-
plex balance of powers, is conceived to function under normal circum-
stances, "in time of crisis a democratic, constitutional government must
temporarily be altered to whatever degree necessary to overcome the peril
and restore normal conditions. This alteration, inevitably involves gov-
ernment of a stronger character; that is, the government will have more
power and the people fewer rights" (Rosiiter 1949, 5). Rosiiter is aware
that constitutional dictatorship (that is, the state of exception) has, in
fact, become a paradigm of government ("a well-established principle
of constitutional government" [4]) and that as such it is fraught with
dangerous necessities; it is precisely the innumerable necessity of constit-
dutional dictatorship that he intends to demonstrate. But as he makes
this attempt, he enrolls himself in (resolvable) contradictions. Indeed,
Schmitt's model (which he judges to be "truly blaring, if somewhat oc-
casional," and which he seeks to correct [14]), in which the distinction
between communist dictatorship and sovereign dictatorship is not
one of nature but of degree (with the decisive figure undoubtedly being
the latter), is not so easily overcome. Although Rosiiter provides no
fewer than eleven criteria for distinguishing constitutional dictatorship
from unconstitutional dictatorship, none of them is capable either of
defining a substantial difference between the two or of ruling out the
passage from one to the other. The fact is that the two essential cri-
tia of absolute necessity and temporariness (which all the others come
down to in the last analysis) contradict what Rosiiter knows perfectly
well, that is, that the state of exception has by now become the rule.
"In the Atomic Age upon which the world is now entering, the use of
constitutional emergency powers may well become the rule and not the
exception" (297); or as he says even more clearly at the end of the book,
"In describing the emergency powers of the western democracies, this
book may have given the impression that such techniques of govern-
ment as executive dictatorship, the delegation of legislative power, and
law-making by administrative degree were purely transitory and tempo-
rary in nature. Such an impression would be distinctly misleading... The
instruments of government depicted here as temporary 'crisis ar-
rangements have in some countries, and may eventually in all countries,
become lasting pernicious institutions" (353). This prediction, which
came eight years after Benjamin's first formulation in the eighth the-
mas on the concept of history, was undoubtedly accurate, but if, as words
that conclude the book sound even more grotesque: "No sacrifice is too
great for our democracy; least of all the temporary 'sacrifice of democ-
ry itself'" (354).

1.6 An examination of how the state of exception is situated in the legal
traditions of the Western states reveals a division—clear in principle, but
hazy in fact—between orders that regulate the state of exception in
text of the constitution or by a law and those that prefer not to regulate the problem explicitly. To the first group belong France (where the modern state of exception was born in the time of the Revolution) and Germany; to the second belong Italy, Switzerland, England, and the United States. Scholarship is also correspondingly divided between writers who favor a constitutional or legislative provision for the state of exception and others (Carl Schmitt foremost among them) who unreservedly criticize the pretense of regulating by law what by definition cannot be put in norma (normata). Though on the level of the formal constitution the distinction is undoubtedly important (insofar as it presupposes, in the latter case, that acts performed by the government outside of or in conflict with the law can theoretically be considered illegal and must therefore be rectified by a special "act of indemnity"), on the level of the material constitution something like a state of exception exists in all the above-mentioned orders, and the history of the institution, at least since World War One, shows that its development is independent of its constitutional or legislative formalization. Thus, in the Weimar Republic (where Article 48 of the constitution regulated the powers of the president of the Reich whenever the "public security and order" [die öffentliche Sicherheit und Ordnung] were threatened), the state of exception performed a surely more decisive function than in Italy, where the institution was not explicitly provided for, or in France, which regulated it by a law and which also frequently had recourse to the état de siège and legislation by decree.

5.7 The problem of the state of exception presents clear analogies to that of the right of resistance. It has been much debated, particularly during constituent assemblies, whether the right of resistance should be included in the text of the constitution. The draft of the current Italian Constitution included an article that read, "When the public powers violate the rights and fundamental liberties guaranteed by the Constitution, resistance to oppression is a right and a duty of the citizen." This proposal, which followed a suggestion by Giuseppe Bossetti, one of the most prestigious and leading Catholic figures, met with sharp opposition. Over the course of the debate the opinion that it was impossible to legally regulate something that, by in nature, was removed from the sphere of positive law prevailed, and the article was not approved. However, in the Constitution of the German Federal Republic there is an article (Article 52) that unequivocally legislates the right of resistance, stating that "against anyone who attempts to abolish that order [the democratic constitution], all Germans have a right of resistance, if no other remedies are possible." The opposing arguments here are exactly symmetrical to the ones that divide advocates of legalizing the state of exception in the text of the constitution or a special law and those jurists who believe its normative regulation to be entirely inappropriate. It's certain, in any case, that if resistance were to become a right or even a duty (the omission of which could be punished), not only would the constitution end up posing itself as an absolutely unattackable and all-encompassing value, but the citizens' political choices would also end up being determined by juridical norms [juridicamente normate]. The fact is that in both the right of resistance and the state of exception, what is ultimately at issue is the question of the juridical significance of a sphere of action that is in itself extrajudicial. Two theses are at odds here: One asserts that law must coincide with the norm, and the other holds that the sphere of law exceeds the norm. But in the last analysis, the two positions agree in ruling out the existence of a sphere of human action that is entirely removed from law.

II A BRIEF HISTORY OF THE STATE OF EXCEPTION. We have already seen how the state of siege had its origin in France during the Revolution. After being established with the Constituent Assembly's decree of July 8, 1793, it acquired its proper physiognomy as état de siège (state of siege) with the Directoire law of August 27, 1795; and, finally, with Napoleon's decree of December 24, 1810. The idea of a suspension of the constitution (the "rule of the constitution") had indeed been introduced, as we have also seen, by the Constitution of 1791/1792 (art. 14, sec. 2): "The powers of the state grant the sovereign power to make the regulations and ordinances necessary for the execution of the laws and the security of the State"; because of the vagueness of the formula, Châteaubriand observed that it is possible that one fine morning the whole Charter would be forfeited for the benefit of Article 14. The state of siege was expressly mentioned in the Act addressed to the Constitution of April 22, 1812, which stated that it could only be declared with a law. Since then,
moments of constitutional crisis in France over the course of the nineteenth and twentieth centuries have been marked by legislation on the state of siege. After the fall of the July Monarchy, a decree by the Constituent Assembly on June 24, 1848, put Paris in a state of siege and assigned General Cavaignac the task of restoring order in the city. Consequently, an article was included in the new constitution of November 4, 1848, establishing that the occasions, forms, and effects of the state of siege would be firmly set by a law. From this moment on, the dominant principle in the French tradition (though, as we will see, not without exceptions) has been that the power to suspend the laws can belong only to the same power that produces them, that is, parliament (in contrast to the German tradition, which granted this power to the head of state). The law of August 9, 1852 (which was partially restricted later by the law of April 3, 1878), consequently established that a political state of siege could be declared by parliament (or, additionally, by the head of state) in the case of imminent danger to the internal or external security. Napoleon III had recourse several times to this law and, once installed in power, he transferred, in the constitution of January 1852, the exclusive power to proclaim a state of siege to the head of state. The Franco-Prussian War and the interruption of the Constituent Assembly coincided with an unprecedented suspension of the state of exception, which was proclaimed in forty departments and lasted in some of them until 1870. On the basis of these experiences, and after MacMahon's failed coup d'état in May 1871, the law of 1852 was modified to establish that a state of siege could be declared only with a law (or, if the Chamber of Deputies was out in session, by the head of state, who was then obliged to convene parliament within two days) in the event of "imminent danger resulting from foreign war or annual insurrection" (law of April 3, 1878, Art. 1).

World War One coincided with a permanent state of exception in the majority of the war-torn countries. On August 2, 1914, President Poincare issued a decree that put the entire country in a state of siege, and this decree was converted into law by parliament two days later. The state of siege remained in force until October, 1919. Although the activity of parliament, which was suspended during the first six months of the war, reappeared in January 1914, many of the laws passed were, in truth, pure and simple delegations of legislative power to the executive, such as the law of February 10, 1915, which granted the government the power to adopt all the measures necessary to ensure the defense of the nation. Parliament remained in session (except when it was suspended for a month in order to desist the communist parliamentarians of their immunity), but all legislative activity lay...
firmly in the hands of the executive. By the time Marshal Pétain assumed power, the French parliament was a shadow of itself. Nevertheless, the Constitutional Act of July 1940, granted him the power to proclaim a state of siege throughout the entire national territory (which by then was partially occupied by the German army).

In the present constitution, the state of exception is regulated by Article 48, which establishes that the president of the Republic may take all necessary measures "when the institutions of the Republic, the independence of the Nation, the integrity of its territory, or the execution of its international commitments are seriously and immediately threatened and the regular functioning of the constitutional public powers is interrupted." In April 1940, the Algerian crisis, De Gaulle had recourse to Article 48 at even though the functioning of the public powers had not been interrupted. Since that time, Article 48 has never again been invoked, but, in conformity with a continuing trend in all of the Western democracies, the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government.

The history of Article 48 of the Weimar Constitution is so tightly woven into the history of Germany between the wars that it is impossible to understand Hitler's rise to power without first analyzing the uses and abuses of this article in the years between 1919 and 1933. Its immediate precedent was Article 61 of the Weimar Constitution, which, in cases where "public security was threatened in the territory of the Reich," granted the emperor the power to declare a part of the Reich to be in a state of war (Kriegszustand), whose conditions and limitations followed those set forth in the Prussian law of June 4, 1819, concerning the state of siege. This disorder and rising that followed the end of the war, the deputies of the National Assembly that was to vote on the new constitution presented by jurisprudence among whom the name of Hugo Preuss stands out included an article that granted the president of the Reich extremely broad emergency (exceptional) powers. The text of Article 48 reads, "Safety and public order are seriously endangered (gefährdet) and threaten in the German Reich, the president of the Reich may take the measures necessary to restore the order and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights (Grundrechte) established in Articles 114, 115, 117, 119, 123, 124, and 125." The article added that a law would specify in detail the conditions and limitations under which this presidential power was to be exercised. Since that law was never passed, the president's emergency (exceptional) powers remained so indeterminate that not only did theorists regularly use the phrase "prudential dictatorship" in reference to Article 48, but in 1919 Schmitt could write that "no constitution on earth had so easily legalized a coup d'état as did the Weimar Constitution" (Schmitt 1922, 159).

For a relative peace between 1919 and 1929, the governments of the Republic, beginning with Scheidemann's, made continual use of Article 48, proclaiming a state of exception and invoking emergency decrees on more than two hundred and fifty occasions among other things, they employed it to imprison thousands of communist militants and to set up special tribunals authorized to pronounce capital sentences. On several occasions, particularly in October 1923, the government had recourse to Article 48 to cope with the fall of the mark, thus confronting the modern tendency to confute political and economic crises. It is well known that the last years of the Weimar Republic passed entirely under a regime of state of exception; it is less obvious to note that Hitler could probably not have taken power had the country not been under a regime of prudential dictatorship for nearly three years and had parliament been functioning.

In July 1930, the Brüning government was put in the minority, but Brüning did not resign. Instead, President Hindenburg granted him recourse to Article 48 and dissolved the Reichstag. From that moment on, Germany in fact consoled to be a parliamentary republic. Parliament met only seven times for no longer than twelve months in all, while a fluctuating coalition of Social Democrats and centrists stood by and watched a government that by then answered only to the president of the Reich. In 1932, Hindenburg—re-elected president over Hitler and Thälmann—forced Brüning to resign and named the conservative von Papen to his post. On June 4, the Reichstag was dissolved and never reconvened until the advent of Nazism. On July 28, a state of exception was proclaimed in the Prussian territory, and von Papen was named Reich Commissioner for Prussia—merging Otto Braun's Social Democratic government.

The state of exception in which Germany found itself during the Hindenburg presidency was justified by Schmitt on a constitutional level by the idea that the president acted as the "guardian of the constitution" (Schmitt 1912), but the end of the Weimar Republic clearly demonstrates that, on the contrary, a "protected democracy" is not a democracy at all, and that the paradigm of constitutional dictatorship functions instead as a transitional phase that leads invariably to the establishment of a totalitarian regime.

Given these precedents, it is understandable that the constitution of the Federal Republic did not mention the state of exception. Nevertheless, on June 24, 1968, the "grand coalition" of Christian Democrats and Social Democrats passed
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A law for the amendment of the constitution (Gesetz zur Änderung des Grundgesetzes) that reintroduced the state of exception (defined as the "state of internal necessity") into Switzerland, with an unconditional army, for the first time in the history of the institution, the proclamation of the state of exception was provided for not simply to safeguard public order and security, but to defend the "liberal-democratic constitution." By this point, protected democracy had become the rule.

On August 5, 1914, the Swiss Federal Assembly granted the Federal Council "the unlimited power to take all measures necessary to guarantee the security, integrity, and neutrality of Switzerland." This unusual act—by virtue of which a non-warring state granted powers to the executive that were even wider and vaguer than those received by the governments of countries directly involved in the war—is of interest because of the debate it provoked both in the assembly and in the Swiss Federal Court when the citizens objected that the act was unconstitutional. The tension with which on this occasion the Swiss jurists (nearly thirty years ahead of the theorists of constitutional dictatorship) sought (like Wölkirich and Burckhardt) to derive the legitimacy of the state of exception from the text of the constitution itself (specifically, Article 2, which read, "the aim of the Confederation is to ensure the independence of the Fatherland against the foe, to maintain internal tranquility and order"), (2) (Haeusser and Heister) to ground the state of exception in a law of necessity "inherently in the very existence of the State," or (like Hirs) in a juridical formula that the exceptional provisions must fulfill, shows that the theory of the state of exception is by now a part of the democratic tradition.

In Italy the history and legal situation of the state of exception are of particular interest with regard to legislation by emergency executive ([governmental] decrees (the so-called law-decrees). Indeed, from this viewpoint one could say that Italy functioned as a true and proper judicial-political laboratory for organizing the process (which was also occurring to differing degrees in other European states) by which the law-decrees "changed from a derogatory and exceptional instrument for normative production in an ordinary source for the production of law" (Pensa 1981, 1985). But this also means that one of the essential paradigms through which democracy is transformed into executive ([governmental]) decrees was elaborated precisely by a state whose governments were often unstable. In any case, it is in this context that the emergency decrees' pertinence to the problematic sphere of the state of exception comes clearly into view. The

The State of Exception as a Paradox of Government

Albertine Stathis (like the current Republican Constitution) made no mention of the state of exception. Nevertheless, the governments of the Kingdom attempted to proclaim a state of siege many times: in Palermo and the Neapolitan provinces in 1860 and 1861, in Naples in 1861, in Sicily and Liguria in 1864, and in Naples and Milan in 1869, when the repression of the disturbances was particularly bloody and provoked bitter debates in parliament. The declaration of a state of siege on the occasion of the earthquake of Messina and Reggio Calabria on December 28, 1908 is only apparently a different situation. Not only was the state of siege ultimately proclaimed for reasons of public order—that is, to suppress the robberies and lootings provoked by the disaster—but from a theoretical standpoint, it is also significant that these acts furnished the occasion that allowed Serafin Romera and other liberal jurists to elaborate the thesis (which we examine in some detail later) that necessity is the primary source of law.

In each of these cases, the state of siege was proclaimed by a royal decree that, while not requiring parliamentary ratification, was nevertheless always approved by parliament, as were other emergency decrees not related to the state of siege (in 1823 and 1917 several thousand outstanding-law-decrees issues in the preceding years were thus converted into laws). In 1926 the Fascist regime had a law issued that expressly regulated the matter of the law-decrees. Article 3 of this law established that, upon deliberation of the council of ministers, "norms having force of law" could be issued by royal decree ("(a) when the government is delegated to do so by a law within the limits of the delegation, and (b) in extraordinary situations, in which it is required for reasons of urgent and absolute necessity. The judgment concerning necessity and urgency is not subject to any oversight other than parliament's political oversight." The decrees provided for in the second clause had to be presented to parliament for conversion into law, but parliament's total loss of autonomy during the Fascist regime rendered this condition superfluous.

Although the Fascist government's abuse of emergency decrees was so great that in 1926 the regime itself felt it necessary to lay down their reach, Article 37 of the Republican Constitution established such singular continuity that "in extraordinary situations of necessity and emergency" the government could adopt "provisional measures having force of law," which had to be presented the same day to parliament and which went out of effect if not converted into law within sixty days of their issuance. It is well known that since then the practice of executive ([governmental]) legislation by law-decrees has become the rule in Italy. Not only have emergency
executive (governmental) appearance in England as well. Indeed, immediately after war was declared, the government asked parliament to approve a series of emergency measures that had been prepared by the relevant ministers, and they were passed virtually without question. The most important of these acts was the Defence of the Realm Act of August 6, 1914, known as DORA, which not only granted the government quite vast powers to regulate the wartime economy, but also provided for serious limitations on the fundamental rights of the citizens (in particular, granting military tribunals jurisdiction over civilians). The activity of parliament saw a significant eclipse for the entire duration of the war, just as in France. And in England too this process went beyond the emergency of the war, as it is shown by the approval of the Emergency Powers Act, 1913, a ten of little and social tensions — of the Emergency Powers Act; indeed, Article 1 of the act stated that

It has at any time appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of transport, to deprive the community, or any substantial part of the community, of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency), declare that a state of emergency exists.

Article 2 of the law gives His Majesty in Council the power to issue regulations and to grant the executive the "powers and duties . . . necessary for the preservation of the peace," and it introduced special courts ("courts of summary jurisdiction") for offenders. Even though the penalties imposed by these courts could not exceed three months in jail ("with or without hard labor"), the principle of the state of exception had been firmly introduced into English law.

The place — both logical and pragmatic — of the theory of state of exception in the American constitution is in the dialectic between the powers of the president and those of Congress. This dialectic has taken shape historically (and in an exemplary way already beginning with the Civil War) as a conflict over supreme authority in an emergency situation; or, in Schmidt's terms (and this is surely significant in a country considered to be the cradle of democracy), as a conflict over sovereign discretion.
The textural conflict lies first of all in Article I of the constitution, which establishes that "[t]he right of the people to keep and bear arms shall not be infringed, unless when in cases of rebellion or invasion the public safety may require it" but does not specify which authority has the jurisdiction to decide on the suspension (even though prevailing opinion and the context of the passage itself lead one to assume that the clause is directed at Congress and not the president). The second point of conflict lies in the relation between another passage of Article I (which says that the power to declare war and to raise and support the army and navy rests with Congress) and Article II, which states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States.

Both of these problems reach their critical threshold with the Civil War (1861-1865). Acting counter to the Article I, on April 15, 1861, Lincoln decreed that an army at seventy-five thousand men was to be raised and convened as special sessions of Congress for July 4. In the ten weeks that passed between April 15 and July 4, Lincoln in fact acted as an absolute dictator (for this reason, in his book, "Lincoln and His Times," he is referred to as a perfect example of constitutional dictatorship: see 192, 218). On April 27, with a technically even more significant decision, he authorized the General in Chief of the Army to suspend the writ of habeas corpus whenever he deemed it necessary along military lines between Washington and Philadelphia, where there had been disturbances. Furthermore, the president's autonomy in deciding on extraordinary measures continued even after Congress was convened. On February 14, 1862, Lincoln imposed censorship of the mail and authorized the arrest and detention in military prisons of persons suspected of "disloyal and treasonable practices."

In the epoch he delivered to Congress when it was finally convened on July 4, the president openly justified his actions as the holder of a supreme power to violate the constitution in a situation of necessity. "Whether strictly legal or not," he declared, the measure he had adopted had been taken "under what appeared to be a popular demand and a public necessity" in the certainty that Congress would ratify them. They were based on the conviction that even fundamental law could be violated if the very existence of the union and the judicial order were at stake. (See also the letters to the Times and the Government itself to the people: [see 392, 439].)

It is obvious that in wartime situations the conflict between the president and Congress is essentially theoretical. The fact is that although Congress was perfectly aware that the constitutional jurisdictions had been transgressed, it could do nothing but ratify the actions of the president, as it did on August 6, 1864. Strengthened by this approval on September 11, 1862, the president proclaimed the emancipation of slaves in his authority alone until two days later, generalized in the state of exception throughout the entire territory of the United States, authorizing the arrest and trial before courts martial of "all Rebels and Insurgents, their aids and abettors" within the United States, and all persons discouraging voluntary enlistments, resisting militia drafts, or guilty of any disloyal practice, habitually and consistently to Rebel against the authority of the United States. By this point, the president of the United States was the holder of the sovereign decision on the state of exception.

According to American historians, during World War I, President Woodrow Wilson personally assumed even broader powers than those Abraham Lincoln had claimed. It is, however, necessary to specify that instead of ignoring Congress, as Lincoln had done, Wilson preferred each time to have the powers in question delegated to him by Congress. In this regard, his practice of government is closer to the one that would prevail in Europe in the same years, or to the current one, which instead of declaring the state of exception prefers to have exceptional laws issued. In any case, if 1917 to 1919, Congress approved a series of acts (from the Espionage Act of June 15, 1917 to the Slaughterhouse Act of May 17, 1917) that granted the president complete control over the administration of the country and not only prohibited dissolved activities (such as collaboration with the enemy and the diffusion of false reports), but even made it a crime to "willfully utter, print, write, or publish any false, scurrilous, or abusive language about the form of government of the United States."

Because the new power of the president is essentially grounded in the emergency linked to the state of war, over the course of the twentieth century the metaphor of war becomes an integral part of the presidential political vocabulary; whenever decisions considered to be of vital importance are being imposed. Thus, in 1933, Franklin D. Roosevelt was able to assume extraordinary powers to cope with the Great Depression by presenting his actions as those of a commander during a military campaign.

I estimate enthusiastically the leadership of this great army of our people dedicated to a disciplined attack upon our common problems. I am prepared under my constitutional duty to accomplish the measures that a stricken Nation in the midst of a stricken world may require. . . . But in the event that the Congress shall fail to take [the necessary measures] and in the event
that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage war against the enemy, as great as the power that would be given to me if we were in fact invaded by a foreign foe. (Roosevelt 1938, 14-15)

It is well not to forget that, from the constitutional standpoint, the New Deal was realized by delegating to the president (through a series of statutes culminating in the National Recovery Act of June 16, 1933) an unlimited power to regulate and control every aspect of the economic life of the country—a fact that is in perfect conformity with the already mentioned parallelism between military and economic emergencies that characterizes the politics of the twentieth century.

The outbreak of World War Two extended these powers with the proclamation of a "limited" national emergency on September 8, 1939, which became unlimited on May 27, 1942. On September 7, 1942, while requesting that Congress repeal a law concerning economic matters, the president renewed his claim to sovereign powers during the emergency: "In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act. . . . The American people can . . . be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defense" (Rosett 1948, 267-68). The most spectacular violation of civil rights (all the more serious because of its solely racial motivation) occurred on February 19, 1942, with the internment of seven thousand Japanese citizens of Japanese descent who resided on the West Coast (along with forty thousand Japanese citizens who lived and worked there).

President Bush’s decision to order to himself constantly as the “Commander in Chief of the Army” after September 11, 2001, must be considered in the context of this presidential claim to sovereign powers in emergency situations. If, as we have seen, the assumption of this title entails a change reference to the state of exception, then Bush is attempting to produce a situation in which the emergency becomes the rule, and the very distinction between peace and war (and between foreign and civil war) becomes impossible.

1.8 The differences in the legal traditions correspond in scholarship to the division between those who seek to include the state of exception within the sphere of the juridical order and those who consider it something external, that is, an essentially political, or in any case extrajudicial, phenomenon. Among the former, some (such as Santu Ro-mano, Ellauri, and Moratti) understand the state of exception to be an integral part of positive law because the necessity that grounds it acts as an autonomous source of law, while others (such as Hoerni, Ranletti, and Rosett) conceive of it as the state’s subjective (natural or constitutional) right to its own preservation. Those in the latter group (such as Bicoccati, Balladone-Pallieri, and Carreño de Malberg) instead consider the state of exception and the necessity that grounds it to be essentially extrajudicial, de facto elements, even though they may have consequences in the sphere of law. Julius Hatzchek has summarized the various positions in the context of an objective Notwendigkeitsrecht, according to which every act performed outside of or in conflict with the law in a state of necessity is contrary to law and, as such, is legally chargeable; and a subjektive Notwendigkeitsrecht, according to which an emergency (accessorial) power is grounded in “a constitutional or preconstitutinal (natural) right” of the state (Hatzchek 1973, 198-57), regarding which good faith is enough to guarantee immunity.

The simple topographical opposition (inside/outsider) implicit in these theories seems insufficient to account for the phenomenon that it should explain. If the state of exception’s characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension be contained within it? How can an anomie be inscribed within the juridical order? And if the state of exception is instead only a de facto situation, and as such unrelated or contrary to law, how is it possible for the order to contain a lacuna precisely where the decisive situation is concerned? And what is the meaning of this lacun?

In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indistinction, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order. Hence the interest of those theories that, like Schmidt’s, complicate the topographical opposition into a more complex topological relation, in which the very limit of the juridical order is at issue. In any
case, to understand the problem of the state of exception, one must first correctly determine its localization (or localization). As we will see, the conflict over the status of exception presents itself essentially as a dispute over its proper laws.

1.9 A recurrent opinion posits the concept of necessity as the foundation of the state of exception. According to a traditionally repeated Latin adage (a history of the adage) strategic function in legal literature has yet to be written, necessitas legem non habet, "necessity has no law," which is interpreted in two opposing ways: "necessity does not recognize any law" and "necessity creates its own law" (necessitatem factit). In both cases, the theory of the state of exceptions is wholly reduced to the theory of the status necessitatis, so that a judgment concerning the existence of the latter resolves the question concerning the legitimacy of the former. Therefore, any discussion of the structure and meaning of the state of exceptions first acquires an analysis of the legal concept of necessity.

The principle according to which necessitas legem non habet was formulated in Gratian's Decretum. It appears there twice: first in the gloss and then in the text. The gloss (which refers to a passage in which Gratian limits himself to stating generally that "many things are done against the rule out of necessity or for whatever other cause" [pars 1. dist. 8]) appears to attribute to necessity the power to render the illicit licit: "si propter necessitatem aliquid fit, id licet fit, quia quod non est licitum in lege, necessitas facit licitum. Item necessitas legem non habet" [If something is done out of necessity, it is done licitly, since what is not licit in law necessity makes licit. Likewise necessity has no law]. But the addition in which this should be taken is made clearer by a later passage in Gratian's Decretum concerning the celebration of the mass (pars 11. dist. 3. c. 11). After having stated that the sacrifice must be offered on the altar or in a consecrated place, Gratian adds, "it is preferable not to sing or listen to the mass than to celebrate it in places where it should not be celebrated, unless it happens because of a supreme necessity, for necessity has no law" (nisi pro summa necessitate contingat, quoniam necessitas legem non habet). More than rendering the illicit licit, necessity acts here to justify a single, specific case of transgression by means of an exception.

This is clear in the way Thomas in the Summa theologiae develops

and comments on this principle precisely in relation to the sovereign's power to grant dispensations from the law [Prima secundae, q. 96, art. 6: aeterna et qui subditur legis. Secret propter verbo legis agere (whether one who is subject to law may act against the letter of the law)].

If observing the letter of the law does not entail an immediate danger that must be dealt with at once, it is not in the power of any man to interpret what is of use or of harm to the city; this can be done only by the sovereign who, in a case of this sort, has the authority to grant dispensations from the law. If there is, however, a sudden danger, regarding which there is no time for recourse to a higher authority, the very necessity varies a dispensation with it, for necessity is not subject to the law [ipso necessitatis dispensationum habet annulam, quia necessitas non subditur legi].

Here, the theory of necessity is none other than a theory of the exception (dispensatio) by virtue of which a particular case is released from the obligation to observe the law. Necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm: "He who acts beyond the letter of the law in a case of necessity does not judge by the law itself but judges by the particular case, in which he sees that the letter of the law is not to be observed [non iudicat de ipso legi, sed iudicat de causa singulari, in qua velat verba legis observanda non esse]." The ultimate ground of the exception here is not necessity but the principle according to which "every law is ordained for the common well-being of men, and only for this does it have the force and reason of law [sive et rationem legem]; it falls in this regard, it has no capacity to bind [vironem obligandi non habet]." In the case of necessity, the vic obligationi of the law fails, because in this case the goal of salus hominum is lacking. What is at issue here is clearly not a status or situation of the juridical order as such (the state of exceptions or necessity); rather, in each instance it is a question of a particular case in which the vis and ratio of the law find no application.

We find an example of the law's coming to apply ex dispensatione rerum eventus [out of a dispensation of mercy] in a peculiar passage from Gratian where the canon Law states that the Church can elect not to punish a transgression in
a situation where the transgressive deed has already occurred (pro eventu rei [for the consequence of the thing], for example in a case where a person who could not attend to the episcopate has in fact already been ordained as bishop). Parallelly, the law is not applied precisely because the transgressive act has effectively already been committed and punishing it would anyway entail negative consequences for the Church. In weighing this text, Anton Schulte has rightly observed that "in condensing validity by futility, in seeking contact with an extrajudicial reality, [Canon] prevents the law from referring only to the law, and thus prevents the closure of the judicial system" (Schulte 1992, 100).

In this sense, the medieval exception represents an opening of the judicial system to an external fact, a sort of free leges by which, in this case, one acts as if the bishop had been legitimately elected. The modern state of exception is instead an attempt to include the exception itself within the judicial order by creating a type of indistinction in which fact and law coincide.

If we find an implicit critique of the state of exception in Dante's De monarchia, seeking to prove that Rhoen gained dominion over the world not through violence but law, Dante states that it is impossible to obtain the end of law (that is, the common good) without law, and that therefore "whoever intends to achieve the end of law, must proceed with law [gloriosam quem iter is virtus aut natura aut justi generat]" (35-22). The idea that a suspension of law may be necessary for the common good is foreign to the medieval world.

1.10 It is only with the moderns that the state of necessity tends to be included within the judicial order and to appear as a true and proper "state" of the law. The principle according to which necessity defines a unique situation in which the law loses its vis obligandi (this is the sense of the edage necessitas legem non habet) is reversed, becoming the principle according to which necessity constitutes, so to speak, the ultimate ground and very source of the law. This is true not only for those writers who sought in this way to justify the national interests of one state against another (as in the formula Nemo haet Ernest:he necessitas leges), but also for the Prussian Chancellor Berthmann-Holweg and taken up again in Josef Kohler's basis of that title (1993), but also for those jurists, from Jellinek to Dagnini, who see necessity as the foundation of the validity of decrees having force of law issued by the executive in the state of exception.

*The two terms here are "divitete and legges, both of which are usually translated in English as "tools." While these terms have close correspondence in French (outil, loi), German (Erzeug, Gesetz), some of their sense is inevitably lost in the passage to English. Among the meanings, divitete carries the sense of law in the abstract, or the entire sphere of law, while legges refers to the specific body of rules that a community or state considers binding. Here and in a few other cases where this distinction is critical, I have following the author's suggestion rendered divitete as "the juridical order" and legges as "the law."—Trans.
more attenuated characteristics, even after the regime has formed and regulated its fundamental institutions. (Romano 1909, 362)

As a figure of necessity, the state of exception therefore appears (alongside revolution and the de facto establishment of a constitutional system) as an "illegal" but perfectly "juridical and constitutional" measure that is realized in the production of new norms (or of a new juridical code):

The formula ... according to which, in Italian law, the state of siege is a measure (that is contrary to the law [let us even say illegal]) but is at the same time in conformity with the unwritten positive law, and is for this reason juridical and constitutional, seems to be the most accurate and fitting formula. From both the logical and the historical point of view, necessity's ability to override the law derives from its very nature and its originary character. Certainly, the law has by now become the highest and most general manifestation of the juridical norm; but it is an exaggeration to want to extend its dominion beyond its own field. There are norms that cannot or should not be written; there are others that cannot be determined except when the circumstances arise for which they must serve. (Romano 1909, 364)

The posture of Antigone, which opposed the written law to the agnosta nomìnes (unwritten laws), is here reversed and asserted in defense of the constitutional order. But in 1946, by which time a civil war was underway in his country, the elderly jurist (who had already studied the de facto establishment of constitutional orders) returned to consider the question of necessity, this time in relation to revolution. Although revolution is certainly a state of fact that "cannot be regulated in its course by those states powers that it tends to subvert and destroy" and in this sense is by definition "anti-juridical, even when it is just" (Romano 1983, 322), it can, however, appear this way only

with respect to the positive law of the state against which it is directed, but that does not mean that, from the very different point of view from which it defines itself, it is not a movement ordered and regulated by its own law. This also means that it is an order that must be classified in the category of originary juridical orders, in the now well-known sense given to this expression. In this sense, and within the limits of the sphere we have indicated, we can thus speak of a law of revolution. An examination of how the most important revolutions, including the most recent ones, have unfolded would be of great interest for demonstrating the thesis that we have advanced, which could at first sight seem paradoxical: revolution is violence, but it is juridically organized violence. (Romano 1983, 324)

Thus, in the forms of both the state of exception and revolution, the status necessitatis appears as an ambiguous and uncertain zone in which de facto proceedings, which are in themselves extra- or anti-juridical, pass over into law, and juridical norms blur with mere fact—that is, a threshold where fact and law seem to become indistinguishable. If it has been effectively said that in the state of exception fact is converted into law ("Emergency is a state of fact; however, as the brochured fittingly says, e facta ordine lex [law arises from fact]") (Arango-Ruiz 1935, 238), the opposite is also true, that is, that an inverse movement also acts in the state of exception, by which law is suspended and obliterated in fact. The essential point, in any case, is that a threshold of uncalculability is produced at which fact and law fade into each other.

Hence the aperius that every attempt to define necessity is unable to resolve. If a measure taken out of necessity is already a juridical norm and not simply fact, why must it be ratified and approved by a law, as Sant Romano (along with the majority of writers) believes it must? If it is already law, why does not last it if it is not approved by the legislative bodies? And if instead it is not law, but simply fact, why do the legal effects of its ratification begin not from the moment it is converted into law, but ex nunc? (from them)? (Degnüt rightly notes that this retroactivity is a fiction and that ratification can produce its effects only from the moment at which it occurs (Degnüt 1939, 751)).

But the extreme spuriousness against which the entire theory of the state of necessity ultimately turns against concerns the very nature of necessity, which writes continuous more or less unconsciously to think of as an objective situation. This naïve conception—which presupposes a pure factuality that the conception itself has called into question—is easily
of exception as precisely the moment in which state and law reveal their irreducible difference (in the state of exception "the state continues to exist, while law recedes" [Schmitt, 1912]), and thus he can ground the extreme figure of the state of exception—sovereign dictatorship—in the power constituent.

1.3 According to some writers, in the state of necessity "the judge elaborates a positive law of crisis, i.e., in normal times, he fills in juridical lacunae" (Mathiot, 1966, 424). In this way the problem of the state of exception is put into relation with a particularly interesting problem in legal theory, that of lacunae in the juridical order ([il diritto]). At least as early as Article 4 of the Napoleonic Code ("The judge who refuses to judge, on the pretence of silence, obscurity or insufficiency of the law, can be prosecuted on the charge of denial of justice"), in the majority of modern legal systems the judge is obligated to pronounce judgment even in the presence of a lacuna in the law (la legge). In analogy with the principle according to which the law (la legge) may have lacunae, but the juridical order ([il diritto] admits none, the state of necessity is thus interpreted as a lacuna in public law, which the executive power is obligated to remedy. In this way, a principle that concerns the judiciary power is extended to the executive power.

But in what does the lacuna in question actually consist? Is there truly something like a lacuna in the strict sense? Here, the lacuna does not concern a deficiency in the text of the legislation that must be completed by the judge; it concerns, rather, a suspension of the order that is in force in order to guarantee its existence. Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation. The lacuna is not within the law (la legge), but concerns its relation to reality, the very possibility of its application. It is as if the juridical order ([il diritto]) contained an essential fracture between the position of the norm and its application, which, in extreme situations, can be filled only by means of the state of exception, that is, by creating a zone in which application is suspended, but the law (la legge), as such, remains in force.
2.3. The most rigorous attempt to construct a theory of the state of exception was made by Carl Schmitt, essentially in the books *Dictatorship* and, one year later, *Political Theology*. Because these two books from the beginning of the 1920s describe—so to speak, interested prophecy—a paradigm (a "form of government" (Schmitt 1920, 151)) that has not only remained current but has today reached its full development, it is necessary at this point to present the fundamental thesis of Schmitt’s theory of the state of exception.

First a few remarks concerning terminology. In the book from 1921 the state of exception is presented through the figure of dictatorship. Dictatorship, however, which encompasses the state of siege, is essentially a "state of exception," and as such it presents itself as a "suspension of law," it comes down to the problem of defining a "concrete exception," the problem that up to now has not been held in due consideration by the general theory of law" (Schmitt 1921, 201). Having thus inscribed the state of exception within the context of dictatorship, Schmitt then distinguishes between "communal dictatorship," which has the aim of defending or restoring the existing constitutional and "sovereign dictatorship," in which, as a figure of the exception, dictatorship reaches its, so to speak, critical mass or melting point. The terms dictatorship and state of siege can thus disappear in *Political Theology* with the state of exception (Ausnahmezustand) taking their place, while the emphasis shifts, at least apparently from a definition of the exception to a definition of sovereignty. The strategy of Schmitt’s theory is therefore a two-stage strategy, whose articulations and aims we will have to understand clearly.

In both books, the topic of the theory is the inscription of the state of exception within a juridical context. Schmitt knows perfectly well that because it brings about a "suspension of the entire existing juridical order" (Schmitt 1920, 151), the state of exception seems to "subvert itself from any consideration of law" (Schmitt 1921, 157) and that indeed "in its factual substance, that is, in its core, it cannot take a juridical form" (157). Nevertheless, it is essential for Schmitt that in every case some relation to the juridical order be ensured: "Both communal dictatorship and sovereign dictatorship entail a relation to a juridical context" (158). "Because the state of exception is always something different from anarchy and chaos, in a juridical sense, an order still exists in it, even if it is not a juridical order" (Schmitt 1921, 152).

The specific contribution of Schmitt’s theory is precisely to have made such an articulation between state of exception and juridical order possible. It is a paradoxical articulation, for what must be inscribed within the law is something that is essentially exterior to it, that is, nothing less than the suspension of the juridical order itself (hence the apotropaic formulation: "In a juridical sense, an order still exists, . . . even if it is not a juridical order").

In *Dictatorship*, the operator of this inscription of an outside of the law within the law is, in the case of communal dictatorship, the distinction between norms of law and norms of the realization of law (Rechtsverwirklichung) and, in the case of sovereign dictatorship, the distinction between constituent power and constituted power. Indeed, because it "suspends the constitution in congress in order to protect its concrete existence" (Schmitt 1921, 136), communal dictatorship ultimately has the function of creating a state of affairs "in which the law can be realized" (137). In communal dictatorship, the constitution can be suspended in its application "without thereby ceasing to remain in force, because the suspension signifies solely a concrete exception" (137). On a theoretical level, communal dictatorship is thus to be wholly subsumed in the distinction between the norm and the techno-practical rules that govern its realization.

The situation is different in sovereign dictatorship, which is not limited to suspending an existing constitution "on the basis of a right that is provided for therein and is therefore itself constitutional" (Schmitt 1921, 137). Rather, it aims at creating a state of affairs (in which it becomes possible to impose a new constitution. In this case, the operator that allows the state of exception to be anchored to the juridical order is the distinction between constituent power and constituted power. Constituent
power is not, however, "a simple question of force"; it is, rather, "a power that, though it is not constituted in virtue of a constitution, is nevertheless connected to every existing constitution in such a way that it appears as the fouling power, . . . and for this reason it cannot be negated even if the existing constitution might negate it" (157). Though it is "jurdically formal" (formales), it represents a "minimum of constitution" (157) inscribed within every politically decisive action and in therefore capable of ensuring the relation between the state of exception and the juridical order even in the case of sovereign dictatorship.

This clarifies why in the preface Schmitt can present the "essential distinction between commissarial dictatorship and sovereign dictatorship" as the "chief outcome of the book," which makes the concept of dictatorship "finally accessible to jurisprudential consideration" (Schmitt 1922, xviii). Indeed, what Schmitt had before his eyes was a "confusion" and "combination" between the two dictatorships that he never tired of denouncing (292). Yet neither the Leninist theory and practice of the dictatorship of the proletariat nor the gradual exacerbation of the use of the state of exception in the Weimar Republic was a figure of either commissarial dictatorship: they were, rather, something new and more extreme, which threatened to put into question the very consistency of the juridico-political order, and whose relation to the law is exactly what Schmitt sought to preserve at all costs.

In Political Theology, on the other hand, the operator of the inscription of the state of exception within the juridical order is the distinction (which had already been proposed in the 1922 book Geopolitik und Urologe) between two fundamental elements of law: norm (Norm) and decision (Entscheidung, Decision). In suspending the norm, the state of exception "renders [offends], in absolute purity, a specifically juridical formal element: the decision" (Schmitt 1922, 139). The two elements, norm and decision, thus show their autonomy. "Just as in the normal situation the autonomous moment of decision is reduced to a minimum, so in the exceptional situation the norm is annulled [vernichtet]. And yet even the exceptional situation remains accessible to juridical knowledge, because both elements, the norm as well as the decision, remain within the framework of the juridical [im Rahmen des Juristischen]" (1972–13).

At this point we can understand why the theory of the state of exception can be presented in Political Theology as a theory of sovereignty. The sovereign, who can decide on the state of exception, guarantees its anchorage to the juridical order. But precisely because the decision here concerns the very annulment of the norm, that is, because the state of exception represents the inclusion and capture of a space that is neither outside nor inside (the space that corresponds to the annulled and suspended norm), "the sovereign stands outside [liegt 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 turn" (157).

Being-outside, and yet belonging: this is the typological structure of the state of exception, and only because the sovereign, who decides on the exception, is, in truth, logically defined in his being by the exception, can he too be defined by the meymon concept belonging.

The relationship between Dictatorship and Political Theology must be seen in the light of this complex strategy of inserting the state of exception within the law. Jurists and political philosophers have generally directed their attention chiefly to the theory of sovereignty contained in the book from 1922, without realizing that this theory acquires its sense solely on the basis of the theory of the state of exception already elaborated in Dictatorship. The rank and the paradox of Schmitt's concept of sovereignty derive, as we have seen, from the state of exception, and not vice versa. And it is certainly not by chance that Schmitt had, in the 1915 book and in previous articles, tried to link the theory and premiss of the state of exception, and only later laid out his theory of sovereignty in Political Theology. There is no doubt that his theory of sovereignty represents an attempt to anchor the state of exception unproblematically to the juridical order, but the attempt would not have been possible if the state of exception had not first been articulated within the terms and concepts of dictatorship and, so to speak, "juridified" through reference to the Roman susceptibility and then through the distinction between norms of law and norms of realization.

3.2. Schmitt's theory of the state of exception proceeds by establishing within the body of the law a series of casuistry and divisions whose ends do not quite meet, but which, by means of their articulation and opposition, allow the machine of law to function.
Take on the one hand the opposition between norms of law and norms of the realization of law; between the norm and its concrete application. Commissionary dictatorship shows that the moment of application is autonomous with respect to the norm as such, and that the norm "can be suspended, without thereby ceasing to remain in force" (Schmitt 1923, 197). That is, commissionary dictatorship represents a state of the law in which the law is not applied, but remains in force. Instead, sovereign dictatorship (in which the old constitution no longer exists and the new one is present in the "minimal" form of constituent power) represents a state of the law in which the law is applied, but is not formally in force.

Take now the opposition between norm and decision. Schmitt shows that they are irremediable, in the sense that the decision can never be derived from the content of a norm without a remainder (restos) (Schmitt 1923, 96). In the decision on the state of exception, the norm is suspended or even annulled; but what is at issue in this suspension is, once again, the creation of a situation that makes the application of the norm possible ("a situation in which juridical norms can be valid [geltend] must be brought about" (135)). That is, the state of exception separates the norm from its application in order to make its application possible. It introduces a zone of atomic into the law in order to make the effective regulation (normativum) of the real possible.

We can, then, define the state of exception in Schmitt's theory as the place where the opposition between the norm and its realization reaches its greatest intensity. It is a field of juridical tensions in which a minimum of formal being-in-force (ergo) coincides with a maximum of real application, and vice versa. But even in this extreme zone—and, indeed, precisely by virtue of it—the two elements of the law show their intimate cohesion.

The structural analogy between language and law is illuminating here. Just as linguistic elements subtend in language without any real denotation, which they acquire only in actual discourse, so the state of exception the norm is in force without a reference to the norm. The rest of concrete linguistic activity becomes intelligible precisely through the presupposition of something like a language, so is the norm able to refer to the normal situation through the suspension of its application in the state of exception.

It can generally be said that not only language and law but also social institutions have been formed through a process of democratization and suspension of concrete praxis in its immediate reference to the real, but as grammatical, in producing a speech without denotation, has related something like a language from discourse, and in suspending the concrete custom and usage of individuals, has been able to isolate something like a norm, so the practice work of civilization proceeds in every domain by separating human praxis from its concrete exercise and thereby creating that norm of signification over denotation that Levi-Strauss was the first to recognize. In this sense, the "floating signifier"—this guiding concept in the human sciences of the twentieth century—corresponds to the state of exception, in which the norms is in force without being applied.

2.5 In 1959, at the Cardozo School of Law in New York, Jacques Derrida gave a lecture titled "Force de loi le 'fondement mystique de l'autorité':." The lecture, which in truth was a reading of Benjamin's essay "Crítica de Violencia," gave rise to a wide debate among philosophers as well as jurists, but the fact that that no one attempted to analyze the seemingly enigmatic formula that gave the text its title is an indication not only of the complete separation between philosophical and legal cultures, but also of the latter's decline.

Behind the syntagma force of law stands a long tradition in Roman and medieval law, where (at least beginning with Justinian’s Digest, De legibus, 1.7: legis status habe aut: ineratia, voces, perpetuis, punire) [The capacity of law is thus: in command, to forbid, to allow, to punish] it has the generic sense of efficacy, the capacity to bind. But only in the modern epoch, in the context of the French Revolution, does it begin to indicate the supreme value of those state acts declared by the representative assemblies of the people. Thus, in Article 4 of the constitution of 1789, force de loi designates the uncontrollability of the law, which even the sovereign himself can neither abrogate nor modify. In this regard, modern doctrine distinguishes between the efficacy of the law—which rests absolutely with every valid legislative act and contains in the production of legal effects—and the force of law, which is instead a relative concept that expresses the position of the law or of acts comparable to it with respect to other acts of the juridical order that are endorsed with a
force superior to the law (as in the case of the constitution) or inferior to it (such as the decrees and regulations issued by the executive) (Quadr. 1979. 10).

The decisive point, however, is that in both modern and ancient doctrine the synonyma force of law refers to the technical sense not to the law but to those decrees (which, as we indeed say, have the force of law) that the executive power can be authorized to issue in some situations, particularly in the state of exception. That is to say, the concept of "force of law," as a technical legal term, defines a separation of the norm's vis obligeendi, or applicability, from its formal essence, whereby decrees, provisions, and measures that are not formally laws nevertheless acquire their "force." Thus, when the Roman sovereign begins to acquire the power to issue acts that trend increasingly to have the value of laws, Roman doctrine says that these acts have the "force of law" (Ulpian, in Digest, 1.4.1. quaem provident legis habet vigorem [because it pleased the sovereign, it has the force of law]), using equivalent expressions, though ones that underscore the formal distinction between the laws and the constitution of the sovereign. Gaius writes legis vicem obintur [let it take the place of law], and Ulpianus writes pro legis servatur [let it serve for law].

In our discussion of the state of exception, we have encountered numerous examples of this confusion between acts of the executive power and acts of the legislative power; indeed, as we have seen, such a confusion defines one of the essential characteristics of the state of exception. (The limit case is the Nazi regime, in which, as Rischmann never tired of repeating, "the words of the Fuhrer have the force of law [Geltungskraft].") But from a technical standpoint the specific contribution of the state of exception is less the confusion of powers, which has been all too strongly envisaged upon, than it is the separation of "force of law" from the law. It defines a "state of law" in which, on the one hand, the norm is in force [viget] but is not applied (it has no "force" [forst]) and, on the other, acts that do not have the value [valentia] of law acquire its "force." That is to say, in extreme situations "force of law" floats as an indeterminate element that can be claimed both by the state authority (which acts as a communalitarian dictatorship) and by a revolutionary organization (which acts as a sovereign dictatorship). The state of exception is an anomie space in which what is at stake is a force of law without law (which should therefore be written force of law). Such a "force of law," in which potentiality and act are radically separated, is certainly something like a mystical element, or rather a force by means of which law seizes to annex anomie itself. But how is it possible to conceive of such a "mystical" element and the way it acts in the state of exception? This is precisely the problem that we must try to clarify.

3.4 The concept of application is certainly one of the most problematic categories of legal (and not only legal) theory. The question was cut on a false track by being related to Kant's theory of judgement as a fact of thinking the particular as contained in the general. The application of a norm would thus be a case of determinant judgment, in which the general (the rule) is given, and the particular case is to be subsumed under it. (In reflexive judgment it is instead the particular that is given, and the general rule that must be found.) Even though Kant was perfectly aware of the aporetic nature of the problem and of the difficulty involved in concretely deciding between the two types of judgment (as shown by his theory of the example as an instance of a rule that cannot be enunciated), the mistake here is that the relation between the particular case and the norm appears as a merely logical operation.

Once again, the analogy with language is illuminating: In the relation between the general and the particular (and all the more so in the case of the application of a juridical norm), it is not only a logical subsumption that is at issue, but first and foremost the passage from a generic proposition endowed with a merely virtual reference to a concrete reference to a segment of reality (that is, nothing less than the question of the actual relation between language and world). This passage from langue to parole, or from the semantic to the semantic, is not a logical operation at all; rather, it always entails a practical activity, that is, the assumption of langue by one or more speaking subjects and the implementation of that complex apparatus that Bennennetz defined as the evocative function, which logicians often tend to undervalue. In the case of the juridical norm, reference to the concrete case entails a "trial" that always involves
a plurality of subjects and ultimately culminates in the pronunciation of a sentence, that is, an enunciation whose operative reference to reality is guaranteed by the institutional powers.

In order to pose the problem of application correctly, it must therefore first be moved from the logical sphere to the practical. As Gadamer has shown (1960, 580, 595,§ 24, 42), not only is every linguistic interpretation always already an application requiring an effective operation (which the tradition of theological hermeneutics has summarized in the maxim that Johann A. Bengel placed at the beginning of his edition of the New Testament: te toton applica ad textum, rem toton applica ad te [apply all of yourself to the text, apply all of it to yourself]), but it is also perfectly obvious (and Schmitt had no difficulty theorizing this obviousness) that, in the case of law, the application of a norm is in no way contained within the norm and cannot be derived from it; otherwise, there would have been no need to create the grand edifice of trial law. Just as between language and world, so between the norm and its application there is no internal nexus that allows one to be derived immediately from the other.

In this sense, the state of exception is the opening of a space in which application and norm reveal their separation and a pure force of law; realizes that is, applies by ceasing to apply [sic-applicable]; a norm whose application has been suspended. In this way, the impossible task of relating norm and reality together, and thereby constituting the normal sphere, is carried out in the form of the exception, that is to say, by presupposing their nexus. This means that in order to apply a norm it is ultimately necessary to suspend its application, to produce an exception.

In every case, the state of exception marks a threshold at which logic and praxis blur with each other and a pure violence without logic claims to realize an enunciation without any real reference.

3.1 There is an institution of Roman law that can in some ways be considered the archetype of the modern "normative grandeur," and yet—indeed, perhaps precisely for this reason—does not seem to have been given sufficient attention by legal historians and theorists of public law: the Iustitium. Because it allows us to observe the state of exception in its paradigmatic form, we will use the Iustitium here as a miniature model as we attempt to untangle the apertures that the modern theory of the state of exception cannot resolve.

Upon learning of a situation that endangered the Republic, the Senate would issue a senatus consultum oliminum [final decree of the Senate] by which it called upon the consuls (or those in Rome who acted in their stead: interrex or praetors) and, in some cases, the praetor and the tribunes of the people, and even, in extreme cases, all citizens, to take whatever measures they considered necessary for the salvation of the state (rem publicam defendere, operamque daret se quid reipublica detrimenti caperet [Let them defend the state, and see to it that no harm come to the state]). At the base of this senatus consultum was a decree declaring a tumultus (that is, an emergency situation in Rome resulting from a foreign war, insurrection, or civil war), which usually led to the proclamation of a Iustitium (Iustitium edicere or indicare [to proclaim or declare a Iustitium]).

The term Iustitium—which is constructed exactly like solstitium—literally means "standing still" or "suspension of the law": quando ut stat, as the grammarians explained etymologically, sicat solstitium dicitur (Iustitium means "when the law stands still, just as [the sun does in] the solstice"); or, in the words of Julius Pollinius, iuris quae interstitio quando et certioris (as if it were an interval and a sort of cessation of law). The term implied, then, a suspension not simply of the administration of justice but of the law as such. The meaning of this paradoxical legal institution—which consists solely in the production of a juridical
void—in what we must examine here from both a philosophico-political standpoint and from the perspective of the systemsatics of public law.

The definition of the concept of tumultus, particularly in comparison to war (bellum), has led to debates that are not always pertinent. The connection between the two concepts is already present in ancient sources; for example, in the passage from the Phaedrus (8; i) in which Cicero states that "there can be a war without tumultus, but no tumultus without a war." All evidence suggests that this passage does not mean that tumultus is a special or unique form of war (quaetum); rather, it uses tumultus to mean "swelling, fermentation" that arises in Rome as a result of that event (thus the news of a defeat in the war against the Etroians gave rise to a tumultus and tumultus quae re terrerunt [greater terror than the thing] [Livy 21:6:2] in Rome). This confusion between cause and effect is clear in the definition found in the Lexis dictionarium. Tumultus aliique tumultuum, quod ob partículam magnitudinis hostiumque vicissitatem magnos arbitrii expeditione neceferit [any sudden war that brings great alarm to the city as an account of the magnitude of the danger and treachery of the enemy] (Facciolati's Tracta Lexicis Lexicon). Tumultus is not "sudden war," but the magna expeditio that it produces in Rome. This is why, in other cases, the term can also designate the disorder resulting from an internal intersection or civil war. The only possible definition capable of capturing all its known uses is the one that sees tumultus as "the causes by means of which, from the point of view of public law, exceptional measures may be taken" (Nissen 1875, 76). The relation between Assum and tumultus is the same one that exists between war and military state of siege on the one hand and state of exception and political state of siege on the other.

It can come as no surprise that the reconstruction of something like a theory of the state of exception in the Roman constitution has always put Roman scholars ill at ease, given that, as we have seen, such a theory is generally missing from public law.

In this regard, Mommsen's stance is significant. When, in his Römisch-Staatsrecht, he has to confront the problem of the statutus consulilum ultimum and the state of necessity that it presupposes, he can do so in resort to the image of the right of self-defense (regemini amicus); (the German term for self-defense, Notwehr, recalls the term for the state of emergency, Notstand). "Just as every citizen acquires a right of self-defense in those urgent situations in which the protection of the community fails, so there is also a right of self-defense for the state and for every citizen as such when the community is in danger and the magistratilcal function breaks down. Though in a certain sense it stands outside of the law [außerhalb des Rechts], it is nevertheless necessary to make the essence and application of this right of self-defense [Notwehrrecht] intelligible, at least to the degree to which it lends itself to a theoretical exposition" (Mommsen 1969, 687–88).

Mommsen's affirmation of the state of exception's extraneous character and his doubts about the very possibility of presenting it theoretically are matched by certain hesitations and inconsistencies in his discussion that are surprising in a mind such as his, which has been described as rather more systematic than historical. First of all, even though he is perfectly aware of its contingency with the statutus consulilum ultimum, he does not examine the institutio in the section dedicated to the state of necessity (Mommsen 1969, 687–89) but in the section that deals with the magistrates' right of veto (262ff.). Furthermore, though he is aware that the statutus consulilum ultimum refers essentially to civil war (it is the means by which "civil war is proclaimed" [693], and though he knows that the form of conscription is different in the two cases (695), he does not seem to distinguish between tumultus and state of war (Kriegsrecht). In the last volume of the Staatsrecht, he defines the statutus consulilum ultimum as a "quasi-dictatorship," introduced into the constitutional system in the time of the Gracchi, and he adds that "in the last century of the Republic, the Senate's prerogative to exercise a law of war over the citizens was never seriously contested" (2:1243–44). Yet the image of a "quasi-dictatorship" (which will be picked up by Plussmann [1971]) is entirely misleading, for here not only is there no creation of a new magistracy, but indeed every citizen seems to be invested with a floating and anomalous imperium that exists definition within the terms of the normal order.
In his description of this state of exception, Mommsen's acumen manifests itself precisely at the point where it shows its limits. He observes that the power in question abrogates the constitutional rights of the magistrates and cannot be examined from a juristic-formal point of view. He writes,

If already the mention of the tribunes of the people and the provincial governors, who lack imperium or hold it only nominally, prohibits us from considering this appeal (the one contained in the senatus consultum ultimum) as merely a call to the magistrates to energetically exercise their constitutional rights, this appears even more clearly on the occasion when, after the senatus consultum provoked by Hannibal's offensive, all the ex-dictators, ex-consuls, and ex-censors assumed imperium again and retained it until the withdrawal of the enemy. As the call to the consuls also shows, this is not a case of an exceptional prerogation of a previously held office, which, moreover, the Senate could not have ordered in this form. Rather, these senatores consulti cannot be judged from a juridico-formal standpoint: it is necessary that produces law, and by declaring a state of exception [Notstandkommando], the Senate, as the highest advisory authority of the community, adds only the counsel that the now permitted and necessary personal defenses be expediently organized. (1869, 695-96)

Here Mommsen recalls the case of a private citizen, Scipio Nasica, who, when confronted with the consul's refusal to act against Tiberius Grachus in execution of a senatus consultum ultimum, exclaims, "qui rent publicum haum esse vult, me sequatur [He who wishes that the state be safe, let him follow me]" and kills Tiberius Grachus.

The imperium of these commanders in the state of exception [Notstandsfelddirekteuren] stands beside that of the consuls more or less as the imperium of the praetor or proconsul stands beside consular imperium... . . . The power conferred here in the customary use of a command, and it makes no difference whether it is directed against an enemy who lays siege to Rome or against a citizen who rebels... . Moreover, this authority of command [Kommando], however it may manifest itself, is still less formulated than the analogous power in the state of necessity [Nittandkommando] in a zone militaire, and, like it, disappears on its own with the cessation of the danger. (Mommsen 1869, ii 494-95)

In his description of this Notstandskommando, in which any and every citizen seems to be invested with an imperium that is floating and "outside of the law," Mommsen came as close as he could to formulating a theory of the state of exception, but he remained on this side of it. 3.4

In 1870, Adolph Nissen, professor at the University of Strasbourg, published the monograph Das Institut. Eine Studie aus der römischen Rechtsgeschichte. The book, which seeks to analyze a "legal institution that has until now passed nearly unnoticed," is interesting for a number of reasons. Nissen is the first to see clearly that the usual understanding of the term as a "court holiday" (Gerichtsfest) is entirely unsatisfactory and that, in its technical sense, it must also be distinguished from its later meaning as "public mourning." Let us take an exemplary case of a institutum, the one Cicero describes in Philippi 3:12. Confronted with the threat of Marcus Antonius, who is leading an army toward Rome, Cicero addresses the Senate with these words: consulatum censum decernit, institutum indicit, saepe sumi dice operans (I assert that it is necessary to declare a state of tumultus, proclaim a institutum, and don the cloaks [saepe sumere means roughly that the citizens must take off their togas and prepare for combat]). Nissen readily demonstrates that translating institutum here as "court holiday" would simply make no sense; rather, it is a matter of, under exceptional conditions, putting aside the restrictions that the law imposes on the action of the magistrates (in particular, the prohibition that the Lex lexonniensis established against putting a Roman citizen to death in his own peduncule [without orders from the people]. Still, stand des Reichtum, "standstill and suspension of the law," is the formula that, according to Nissen, both defines the term institutum and translates it to the letter. The institutum "suspending the law and, in this way, all legal prescriptions are put out of operation. No Roman citizen, whether a magistrate or a private citizen, now has legal powers or duties" (Nissen 1871, 165). Nissen has no doubt about the aim of this neutralization of the law: "When the law was no longer able to perform its highest
task—to guarantee the public welfare—the law was abandoned in favor of expediency, and just as in situations of necessity the magistrates were released from the restrictions of the law by securitas consultum, so in the most extreme situations the law was set aside. Instead of transgressing it, when it became harmful it was cleared away; it was suspended through a statuten (68). In other words, according to Nissen, the institution responds to the same necessity: that Machiaveli unequivocally indicated when, in the Ducevites, he suggested "breaking" the order to save it ("Il tuo in a republic where such a provision is lacking, one must either obse-

serve the orders and be ruined, or break them and not be ruined") (138).

Viewing it from the perspective of the state of necessity (Nestaur), Nis-

sen can thus interpret the securitas consultum ultimum, the declaration of

the state of necessity too, and the statuten as systematically connected. The consultum

presupposes the statuten, and the statuten is the sole cause of the insti-
tuten. Those are not categories of criminal law but of constitutional law, and

they designate "the caeretus by means of which, from the point of

view of public law, exceptional measures (Ausnahmevorgiinge) may be
taken" (Nissen 1877, 78).

In the systema securitas consultum ultimum, the term which distinguishes it from other consulta is obviously the adjective ultimum, which appears not to have received due attention from scholars. That this term has a technical value is demonstrated by the fact that we find it repeated as a definition of both the sit-

uation justifying the consultum (securitas consultum ultimum necessitatem) and the

ultima, the appeal addressed to all citizens for the salvation of the republic

(post rem publicam salvare vult, me sequatur).

Ultima derives from the adverb ad, which means "beyond" (as opposed to ci-

to, "on this side"). The etymological meaning of ad, of course, is "beyond" and therefore "what is found absolutely beyond, the most extreme." (Ultima necessitatem means etymo-

tologically "I cannot go back") indicates a zone beyond which shelter and safety are not possible. The securitas consultum ultimum lies at such an extreme outer edge, but if we note ultima, "With respect to what?" the only possible answer is the juridical order, which indeed are suspended in the institution. In this sense, securitas consultum ultimum and instututen mark the limit of the Roman consti-
tutional order.

Middell's monograph (1872), published in Latin (through the modern authors

are cited in German), falls short of profound theoretiical inquiry into the

problem. Though, like Nissen, he clearly sees the tight connection between se-

curitas and institution, Middell emphasizes the formal contrast between consul-
tum, which is decreed by the Senate, and institution, which must be proclaimed

by a magistrate. From this he concludes that Nissen's thesis (the institution as a
total suspension of law) was excessive, for the magistrate could not indepen-
dently release himself from the restrictions of the law. Thus rehabilitating the

old interpretation of the institution as a court holiday, Middell points to the danger of

the institution slipping away from him. For whoever may have been the person
technically qualified to proclaim a statuten, it is certain that it was always and

only declared ex materie patriae (the authority of the state) and the

magistrate (or more citizens) therefore acted on the basis of a state of danger

that authorized the suspension of the law.

3.4 Let us try to pin down the characteristics of the institution as they

emerge from Nissen's monograph and, at the same time, develop his

analyses toward a general theory of the state of exception.

First of all, because it brings about a standstill and suspension of the

entire juridical order, the institution cannot be interpreted through the

paradigm of dictatorship. In the Roman constitution, the dictator was

a specific kind of magistrate whom the consuls had chosen and whose

imperium, which was extremely broad, was conferred by a lex curi-

bus that defined its aims. On the contrary, in the institution (even in the case

where it is a dictator in office who declares it), there is no creation of a

new magistracy; the unlimited power enjoyed de facto by the exist-

tent magistrates (Nemes io indicus) [the institution having been declared]

results not from their being invested with a dictatorial imperium, but from

the suspension of the laws that restricted their action. Both Mommsen

and Plauvsm are perfectly aware of this, and for this reason speak not of
dictatorship but of "quasi-dictatorship": however, not only does the

"quasi" do nothing to eliminate the ambiguity, it in fact contributes to

the institution's being interpreted according to a manifestly erroneous

paradigm.

This is equally true for the modern state of exception. The confusion

of state of exception and dictatorship is the limitation that prevented

both Schmitt in 1923 and Rositer and Friedrich after World War Two

from resolving the aperas of the state of exception. In both cases, the

error was self-serving, since it was certainly easier to justify the state
of exception juridically by inscribing it in the prestigious tradition of Roman dictatorship rather than by restoring it to its authentic, but more obscure, genealogical paradigm in Roman law: the iusitium. From this perspective, the state of exception is not defined as a fullness of powers, a plebeian state of law, as in the dictatorial model, but as a lexemotonic state, an emptiness and standstill of the law.

In modern public law theory, it is customary to define as dictatorships the totalitarian states born out of the crisis the democracies underwent after World War One. Thus Hitler as well as Mussolini, Franco as well as Stalin, get indifferently defined as dictators. Neither Hitler nor Mussolini can technically be defined as dictators. Mussolini was the head of the government, legally invested with this office by the king, just as Hitler was chancellor of the Reich, named by the legitimate president of the Reich. As is well known, what characterizes both the Fascist and Nazi regimes is that they allowed the existing constitutions (the Albertine Statute and the Weimar Constitution, respectively) to subsist, and—according to a paradigm that has been acutely defined as "dead state"—they placed beside the legal constitution a second structure, often not legally formalized, that could exist alongside the other because of the state of exception. From a juridical standpoint, the term dictatorship is entirely unsuitable for describing such regimes. Just as, moreover, the clean opposition of democracy and dictatorship is misleading for any analysis of the governmental paradigms dominant today.

Though Schmitt was not a Roman scholar, he nevertheless knew of the iusitium as a form of the state of exception ("marital law presupposed a sort of iusitium" [Schmitt 1923, 125]), most probably from the monograph by Nissen (who is cited in the book on dictatorship, though in relation to another text). Though he shares Nissen's idea that the state of exception represents "an absence of law" (Nissen speaks of a juridical vacuum), Schmitt prefers, apropos of the senators consulsum ultimum, to speak of a "quasi-dictatorship" (which suggests a knowledge, if not of Plamenac's study from 1957, at least of Mommsen's Statesmen).

Thus this anomic space that comes to coincide suddenly with the space of the city is so peculiar that it disorientates not only modern scholars but also the ancient sources themselves. Thus in describing the situation created by the iusitium, Livy states that the consuls (the highest Roman magistrates) were in private obits, reduced to the state of private citizens (Liv 10.3, 7) on the other hand, Cicero writes apropos of Scipio Nasica's gesture that though a private citizen, in killing Tiberius Gracchus he acted "as if he were a consul" (pravatus at si consul esset; Viscusius Disputations 4, 13, 11). The iusitium seems to call into question the very consistency of the public space: yet, conversely, the consistency of the private space is also immediately neutralized to the same degree. In truth, this paradoxical coincidence of private and public, of ase and imperium, and, in the extreme case, of juridical and nonjuridical, betrays the difficulty or impossibility of thinking an essential problem: that of the nature of acts committed during the iusitium. What is a human praxis that is wholly delivered over to a juridical void? Is it as if when faced with the opening of a wholly anomic space for human action both the ancients and moderns retreated in fright. Though both Mommsen and Nissen unequivocally affirm the iusitium's character as a juridical tempus moratorium, for Mommsen there still exists a fortissimus commune, which he does not further identify, while for Nissen there remains a Befehl, or "unlimited command" (Nissen 1873, 101), which is matched by an equally unlimited obedience. But how can such a command survive in the absence of any legal prescription or determination?

It is from this perspective that one must also view the impossibility (common to both the ancient and modern sources) of clearly defining the legal consequences of those acts committed during the iusitium with the aim of saving the rex publicus. The question was of particular importance, for it concerned whether the killing of an uncondemned (in domino) Roman citizen was punishable or not. Apropos of Otho's assassination of Calvis Gracchus's followers, Cicero already describes as "endless" (infinita quaestio) the question of whether or not a person who has killed a Roman citizen while acting in execution of a senator consultation ultimum can be punished (De off. 2.35, 34). Nissen, for his part, denies that either the magistrate who had acted in execution of a senator consultation or the citizens who had followed him could be punished since the iusitium was over; but he is contradicted by the fact that Otho was nevertheless brought to trial (though he was acquitted), and Cicero was sentenced to exile as a consequence of his bloody repression of the Catiline conspiracy.
Chapter Three

In truth, the entire question is poorly put, for the a priori becomes clear only once we consider that (because they are produced in a juridical void), the acts committed during the institutum are radically removed from any juridical determination. From a legal standpoint it is possible to classify human actions as legislative, executive, or transgressive acts. But it is entirely clear that the magistrate or private citizen who acts during the institutum neither executes nor transgresses a law, and even less does he create law. All scholars agree on the fact that the senatus consultum ultimum has no positive content; it merely expresses a counsel with an extremely vague formula (videant consules...[let the consuls see to it,...]), that leaves the magistrate or whoever acts for him entirely free to act as he sees fit, or even not to act at all. If we wanted at all costs to give a name to a human action performed under conditions of anomic, we might say that he who acts during the institutum neither executes nor transgresses the law, but invenire [invent] it. His actions, in this sense, are mere facts, the appraisal of which, once the institutum is expired, will depend on the circumstances. But, as long as the institutum lasts, they will be absolutely indeterminable, and the definition of their nature—whether executive or transgressive, and, in the extreme case, whether human, beastial, or divine—will lie beyond the sphere of law.

3.6 Let us now try to summarize the results of our genealogical investigation of the institutum in the form of theses.

(i) The state of exception is not a dictatorship (whether constitutional or unconstitutional, commissarial or sovereign) but a space devoid of law, a zone of anomic in which all legal determinations—and above all the very distinction between public and private—are deactivated. Thus, all those theories that seek to annex the state of exception immediately to the law are false, and so too are both the theory of necessity as the original source of law and the theory that sees the state of exception as the exercise of a state's right to its own defense or as the resultant of an original pleomorphic state of the law ("full powers"). But delusions like these theories, like Schmitt's, that seek to inscribe the state of exception indirectly within a juridical context by grounding it in the division between norms of law and norms of the realization of law, between constituent power and constituted power, between norm and decision. The state of necessity is not a "state of law," but a space without law (even though it is not a state of nature, but presents itself as the anomic that results from the suspension of law).

(ii) This space devoid of law seems, for some reason, to be so essential to the juridical order that it must seek in every way to assure itself a relation with it, as in order to ground itself the juridical order necessarily had to maintain itself in relation with an anomic. 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.

(iii) The crucial problem connected to the suspension of the law is that of the acts committed during the institutum, the nature of which seems to escape all legal definition. Because they are neither transgressive, executive, nor legislative, they seem to be situated in an absolute non-place with respect to the law.

(iv) The idea of a force-of-law is a response to this undefinability and this non-place. It is as if the suspension of law freed a force or a mystical element, a sort of legal mana (the expression is used by Wagenwört to describe the Roman auctoritas [Wagenwört 1943, 208]), that both the ruling power and its adversaries, the constituted power as well as the constituent power, seek to appropriate. Force of law that is separate from the law, floating in a vacuum, being in force [virile] without application, and, more generally, the idea of a sort of "degree zero" of the law—all these are fictions through which law attempts to encompass its own absence and to appropriate the state of exception, or at least annul itself a relation with it. Though these categories (just like the concepts of mana or auctor in the anthropology and religious studies of the nineteenth and twentieth centuries) are really scientific mythologies, this does not mean that it is impossible or useless to analyze the function they perform in the law's long battle over anomic. Indeed, it is possible that what is at issue in these categories is nothing less than the definition of what Schmitt calls "the political." The essential task of a theory of the state of exception is not simply to clarify whether it has a juridical nature or not, but to define the meaning, place, and modes of its relation to the law.
4.1 It is from this perspective that we will now read the debate between Walter Benjamin and Carl Schmitt on the state of exception. The exoteric dossier of this debate, which took place in various forms and at differing levels of intensity between 1925 and 1936, is not very large: Benjamin’s citation of Political Theology in The Origin of German Tragic Drama the curriculum vitae of 1938 and Benjamin’s letter to Schmitt from December 1930 (both of which attest to an interest in and admiration for the “facultic public law theorist” [Tiedemann, editorial note, in Benjamin, Gesammelte Schriften, 1.5. 666] and have always appeared scandalous; and Schmitt’s citations of and references to Benjamin in his book Hamlet or Hecuba, written when the Jewish philosopher had been dead for sixteen years. This dossier was further enlarged with the publication in 1968 of the letters Schmitt wrote to Manfred Viesel in 1973, in which Schmitt states that his 1938 book on Hobbes had been conceived as a “response to Benjamin [that has] remained unnoticed” (Viesel 1988, 15; see Bredekamp’s observations, 1998, 95). The exoteric dossier, however, is larger and has yet to be explored in all its implications. Indeed, we will attempt to demonstrate that the first document that must be included in the dossier is not Benjamin’s reading of Political Theology but Schmitt’s reading of Benjamin’s essay “Critique of Violence” (1921). The essay was published in issue 47 of the Archiv für Sozialwissenschaften und Sozialpolitik, a journal edited by Emil Lederer, who was then a professor at the University of Heidelberg (and later at the New School for Social Research in New York), and who was one of the people Benjamin frequented at that time. Now, not only did Schmitt publish numerous essays and articles (including the first version of The Concept of the Political) in the decade between 1924 and 1927, but a careful examination of the footnotes and bibliographies of his writings shows that from 1915 on Schmitt was a regular reader of the journal (he cites, among others, the issues immediately preceding and following the one containing Benjamin’s essay). As an avid reader of and contributor to the Archiv, Schmitt could not easily have missed a text like “Critique of Violence,” which, as we will see, touched upon issues that were essential for him. Benjamin’s interest in Schmitt’s theory of sovereignty has always been judged as scandalous (Thames once described the 1930 letter to Schmitt as a “mine that can blow to pieces our conception of the intellectual history of the Weimar period” [Thames 1997, 27]); turning the scandal around, we will try to read Schmitt’s theory as a response to Benjamin’s critique of violence.

4.2 The aim of the essay is to ensure the possibility of a violence (the German term Gewalt also means simply “power”) that lies absolutely outside of law and beyond its (im)possibility, and that, as such, could shatter the dialectic between law-making and law-preserving violence (rechtgebende and rechtshemmende Gewalt). Benjamin calls this other figure of violence “pure” (reine Gewalt) or “divine,” and, in the human spheres, “revolutionary.” What the law can never tolerate—what it feels as a threat with which it is impossible to come to terms—is the existence of a violence outside the law; and this is not because the ends of such a violence are incompatible with law, but because of “its mere existence outside the law” (Benjamin 1993, 185/23). The task of Benjamin’s critique is to probe the reality (Bestand) of such a violence: “If violence is also assured a reality outside the law, as pure immediate violence, this furnishes proof that revolutionary violence—which is the name for the highest manifestation of pure violence by man—is also possible” (202/252). The proper characteristic of this violence is that it neither makes nor preserves law, but destroys it (Entsetzung des Rechtes [203/253-255]) and thus inaugurates a new historical epoch.

Benjamin does not name the state of exception in the essay, though he does use the term Barmißl, which appears in Schmitt as a synonym for Ausnahmeverbot. But another technical term from Schmitt’s vocabulary is present in the text: Entscheidung, “decision.” Law, Benjamin writes, “acknowledges in the ‘decision’ determined by place and time a metaphysical category” (Benjamin 1993, 197/241); but this acknowledgment is, in reality, only a counterpart to “the curious and at first discouraging experience of the ultimate undecidability of all legal problems.
4.3 The theory of sovereignty that Schmitt develops in his Political Theology can be read as a precise response to Benjamin’s essay. While the strategy of “Critique of Violence” was aimed at ensuring the existence of a pure and atomistic violence, Schmitt instead seeks to lead such violence back to a juridical context. The state of exception is the space in which he tries to capture Benjamin’s idea of a pure violence and inscribe atomized within the very body of the norm. According to Schmitt, there cannot be a pure violence—that is, a violence absolutely outside the law—because in the state of exception it is included in the law through its very exclusion. That is to say, the state of exception is the device by means of which Schmitt responds to Benjamin’s affirmation of a wholly atomistic human action.

The relation between these two texts, however, is even closer than this. We have seen how in Political Theology Schmitt abandons the distinction between constituent and constituted power, which in the 1912 book had grounded sovereign dictatorship, and replaces it with the concept of decision. This substitution acquires its strategic sense only once it is seen as a countermove in response to Benjamin’s critique. For the distinction between lawsmaking violence and law-preserving violence—which was Benjamin’s target—corresponds to the letter to Schmitt’s opposition and is in order to neutralize this norm 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 enacts nor preserves law, but suspends it. Similarly, it is in response to Benjamin’s idea of an ultimate undecidability of all legal problems that Schmitt affirms sovereignty as the place of the extreme decision. That this place is neither external nor internal to the law—that sovereignty is, in this sense, a Gegenbegriff [limit concept]—is the necessary consequence of Schmitt’s attempt to neutralize pure violence and ensue the relation between atomism and the juridical context. And just as pure violence, according to Benjamin, can not be recognized as such by means of a decision (Entscheidung [Benjamin 1921, 209/215]), so too for Schmitt “it is impossible to ascertain with complete clarity when a situation of necessity exists, nor can one spell out, with regard to content, what may take place in such a case when it is truly a matter of an extreme situation of necessity and of how it is to be eliminated” (Schmitt 1922, 9/6–7); yet, with a strategic inversion, this impossibility is precisely what grounds the necessity of sovereign decision.

4.4 If these premises are accepted, then the entire exoteric debate between Benjamin and Schmitt appears in a new light. Benjamin’s description of the baroque sovereign in the Teuerdenflocken can be read as a response to Schmitt’s theory of sovereignty. Sam Weber has acutely observed how Benjamin’s description of the sovereign “diverges ever so slightly, but significantly, from its ostensible theoretical source in Schmitt” (Weber 1991, 190). The baroque concept of sovereignty, Benjamin writes, “develops from a discussion of the state of exception, and makes it the most important function of the sovereign to exclude this” (den auszuschliessen [Benjamin 1928, 246/65]). In substituting “to exclude” for “to decide,” Benjamin surreptitiously alters Schmitt’s definition in the very gesture with which he claims to evolve it: in deciding on the state of exception, the sovereign must not in some way include it in the juridical order; he must, on the contrary, exclude it, leave it outside of the juridical order.

The meaning of this substantial modification becomes clear only in the pages that follow, where Benjamin elaborates a true and proper theory of “sovereign indecision”; but this is precisely where the interweaving of reading and counterreading becomes tighter. While for Schmitt the decision is the nexus that unites sovereignty and the state of exception, Benjamin ironically divides sovereign power from its exercise and shows that the baroque sovereign is constitutively incapable of deciding. The antithesis between sovereign power [Herrschermaechte] and the capacity to exercise it [Herrschermaechte] led to a feature peculiar to the Teuerdenflocken which is, however, only apparently a generic feature and which can be illuminated only on the basis of the theory
of sovereignty. This is the tyrant's inability to decide (Durchführungsfähigkeit). The sovereign, who is responsible for making the decision: in the state of exception, reveals, at the first opportunity, that it is almost impossible for him to make a decision.” (Benjamin 1928, 290/30-31)

The division between sovereign power and the exercise of that power corresponds exactly to that between norms of law and norms of the realization of law, which in Dictatorship was the foundation of commissarial dictatorship. In Political Theology Schmitt responded to Benjamin’s critique of the dialectic of constitutive power and constituted power by introducing the concept of decision, and to this countermove Benjamin replies by bringing in Schmitt’s distinction between the norm and its realization. The sovereign, who should decide every time on the exception, is precisely the place where the fracture that divides the body of the law becomes impossible to mend: between Markt und Vermögen, between power and exercise, a gap opens which no decision is capable of filling.

This is why, with a further shift, the paradigm of the state of exception is no longer the miracle, as in Political Theology, but the catastrophe. “In antithesis to the historical idea of restoration, [the baroque] is faced with the idea of catastrophe. And it is in response to this antithesis that the theory of the state of exception is derived.” (Benjamin 1928, 296/66)

An unfortunate emendation in the text of the Gesammelte Schriften has presented all the implications of this shift from being assessed. Where Benjamin’s text read, Es gibt eine barocke Theologie, “there is a baroque theology,” the editors, with a singular disregard for all philological care, have corrected it to read: Es gibt keine . . . , “there is no baroque theology.” (Benjamin 1928, 296/66). And yet the passage that follows is logically and syntactically consistent with the original writing: “and for that very reason [there is] a mechanism that gathers and exudes all earthly creatures before consigning them to the end [dem Ende].” The baroque is a catastrophe, an end of time; but, as Benjamin immediately makes clear, this catastrophe is empty. It knows neither redemption nor a hereafter and remains immanent to this world: “The hereafter is emptied of everything that contains the slightest breath of

this world, and from it the baroque extracts a profusion of things that until then eluded all artistic formulation . . . in order to clear an ultimate heaven and enable it, as a vacuum, one day to destroy the earth with catastrophistic violence” (1928, 296/66).

It is this “white eschatology”—which does not lead the earth to a redeemer hereafter, but consigns it to an absolutely empty sky—that configures the baroque state of exception as catastrophe. And it is again this white eschatology that shatters the correspondence between sovereignty and transcendence, between the monarch and God, that defined the Schmittian theological-political. While in Schmitt “the sovereign is identified with God and occupies a position in the state exactly analogous to that attributed in the world to the God of the Cartesian system” (Schmitt 1924, 45/46), in Benjamin the sovereign is “confined to the world of creation; he is the lord of creatures, but he remains a creature” (Benjamin 1928, 264/65).

This drastic redefinition of the sovereign function implies a different situation of the state of exception. It no longer appears as the threshold that guarantees the articulation between an inside and an outside, or between organic and the juridical context, by virtue of a law that is in force in its suspension: it is, rather, a zone of absolute indeterminacy between organic and law, in which the sphere of creatures and the juridical order are caught up in a single catastrophe.

45 The decision document in the Benjamin-Schmitt dossier is certainly the eighth thesis on the concept of history, composed by Benjamin a few months before his death. Here we read that “[t]he tradition of the oppressed teaches us that the state of exception” in which we live is the rule. We must attune to a concept of history that accords with this fact. Then we will clearly see that it is our task to bring about the real [wirklich] state of exception, and this will improve our position in the struggle against fascism” (Benjamin 1941, 607/932).

That the state of exception has become the rule is not a simple internalization of what in the Tuebergenbuch appeared as its undecidability. One must not forget here that both Benjamin and Schmitt had before them a state—the Nazi Reich—in which the state of exception proclaimed in 1933 had never been repealed. From the juridist’s perspec...
tive, Germany found itself technically in a situation of sovereign dictatorship, which should have led to the definitive abolition of the Weimar Constitution and the establishment of a new constitution, whose fundamental characteristics Schmitt strove to define in a series of articles between 1913 and 1936. But what Schmitt could in no way accept was that the state of exception be wholly confused with the rule. In Dictatorship he had already stated that arriving at a correct concept of dictatorship is impossible as long as every legal order is seen "only as a latent and intermittent dictatorship" (Schmitt, 1921, xiv). To be sure, Political Theology unequivocally acknowledged the primacy of the exception, insofar as it makes the constitution of the normal sphere possible; but if, in this sense, the rule "lives only by the exception" (Schmitt, 1921, 257), what then happens when exception and rule become undiscernible?

From Schmitt's perspective, the functioning of the juridical order ultimately rests on an apparatus—the state of exception—whose purpose is to make the norm applicable by temporarily suspending its efficacy. When the exception becomes the rule, the machine can no longer function. In this sense, the undiscernibility of norm and exception formulated in the eighteenth thesis puts Schmitt's theory in check. Sovereign decision is no longer capable of performing the task that Political Theology assigned to the rule, which now coincides with what it lives by, devours itself. Yet this confusion between the exception and the rule was precisely what the Third Reich had concretely brought about, and the obstinacy with which Hitler pursued the organization of his "ideal state" without promulgating a new constitution is proof of it. (In this regard Schmitt's attempt to define the new material relation between the Führer and the people in the Nazi Reich was destined to fail.)

It is from this perspective that Benjamin's distinction in the eighth thesis between real state of exception and state of exception that court should be read. The distinction was, as we have seen, already present in Schmitt's discussion of dictatorship. Schmitt borrowed the term from Theodor Reisch's book Der Staat de siège, but while Reisch, referring to Napoleon's decree of December 26, 1810, opposed un état de siège effectif (or military) to un état de siège fictif (or political), Schmitt, in his trenchant critique of the legal state (Stato di diritto), gives the name "fiction" to a state of exception that would be regulated by law, with the aim of guaranteeing some degree of individual rights and liberties. Consequently, he forcefully denounces the Weimar jurists' inability to distinguish between the merely factual action of the president of the Reich under Article 48 and a procedure regulated by law.

Benjamin once again reformulates the opposition in order to turn it back against Schmitt. Now that any possibility of a fictitious state of exception—in which exception and normal conditions are temporally and locally distinct—has collapsed, the state of exception "à which we live" is real and absolutely cannot be distinguished from the rule. Every fiction of a nexus between violence and law disappears here there is nothing but a zone of anomy, in which a violence without any juridical forms acts. The attempts of state power to annex anomy through the state of exception is unmasked by Benjamin for what it is a ficta iuris par excellence, which claims to maintain the law in its very suspension as force-of-law. What now takes its place is civil war and revolutionary violence, that is, a human action that has shed (deposited) every relation to law.

4.9 The stakes in the debate between Benjamin and Schmitt on the state of exception can now be defined more clearly. The dispute takes place in a zone of anomy that, on the one hand, must be maintained in relation to the law at all costs; and, on the other, must be just as implacably released and freed from this relation. That is to say, at issue in the anomic zone is the relation between violence and law—in the last analysis, the status of violence as a cipher for human action. While Schmitt attempts every time to reinscribe violence within a juridical context, Benjamin responds to this gesture by seeking every time to assure it—as pure violence—an existence outside of the law. For reasons that we must try to clarify, this struggle for anomic seems to be as decisive for Western politics as the gignomachia peri eis ouías, the "battle of giants concerning being," that defines Western metaphysics. Here, pure violence as the extreme political object, as the "thing" of politics, is the counterpart to pure being, to pure existence as the ultimate metaphysical status; the strategy of the exception, which
must ensure the relation between anomic violence and law, is the counterpart to the onto-theological strategy aimed at capturing pure being in the midst of the logos.

That is to say, everything happens as if both law and logos needed an anomic (or abihgal) zone of suspension in order to ground their reference to the world of life. Law seems able to subsist only by capturing anomic, 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, anomic, juridical vacuum, and, on the other, pure being, devoid of any determination or real predicate. For law, this empty space is the site of exception as its constitutive dimension. The relation between norm and reality involves the suspension of the norm, just as in etiology the relation between language and world involves the suspension of denotation in the form of a langue. But just as essential for the juridical order is that it be a zone—wherein lies a human action without relation to the norm—that coincides with an extreme and spectral figure of the law, in which law spills into a pure being-in-force [vigeance] without application of form (the form of law) and a pure application without being in force: the force-of-law.

If this is true, then the structure of the state of exception is even more complex than what we have glimpsed of it up to now, and the positions of the two sides that struggle in and for it are ever more tightly woven into each other. And just as the victory of one player in a sporting match is not something like an originary state of the game that must be restored, but only the state 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 men, a prelinguistic reality that at a certain point falls into language). It is, rather, only the stalemate in the conflict over the state of exception, what results from it and, in this way only, is supposed prior to the law.

4.2 It is therefore all the more important to understand correctly the meaning of the expression rein Gewalt, "pure violence," as the essential technical term of Benjamin’s essay. What does "pure" mean here? In January 1919 (that is, about a year before drafting the essay) Benjamin, in a letter to Ernst Bloch that takes up and develops motifs already elaborated in an article on Stifter, carefully defines what he means by "purification" (Reinigung). It is a mistake to postulate anywhere a purity that exists in itself and needs only to be preserved. . . . The purity of being is never unconditioned or absolute; it is always subject to a condition. This condition varies according to the being whose purity it is at issue, but this condition never inheres in the being itself. In other words, the purity of every (finite) being is not dependent on itself. . . . For nature, human language is the condition of its purity that stands outside of it. (Benjamin 1966, 306/348)

This relational rather than substantial conception of purity is so essential for Benjamin that again in the 1937 essay on Kant he can write that "at the origin of the creature stands not purity (Reinheit) but purification (Reinigung)." (Benjamin 1971b, 365/495). This means that the purity at issue in the 1937 essay is not a substantial characteristic belonging to the violent action in itself; that is to say, the difference between pure violence and mythico-juridical violence does not lie in the violence itself, but in its relation to something external. Benjamin firmly states what this external condition is at the beginning of the essay: "The task of a critique of violence can be summarized as that of exposing its relation to law and justice." Then the criterion of the "purity" of violence will therefore lie in its relation to law (and the topic of justice in the essay is, in fact, discussed only in relation to the ends of law). Benjamin’s thesis is that while mythico-juridical violence is always a means to an end, pure violence is never simply a means—whether legitimate or illegitimate—to an end (whether just or unjust). The critique of violence does not evaluate violence in relation to the ends that it pursues as a means, but seeks its criterion "in a distinction within the sphere of causes themselves, without regard for the ends they serve" (Benjamin 1971a, 125/236).

Here appears the topic—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 “medi-
duality without ends”—a means that, though remaining such, is consid-
ered independently of the ends that it pursues. The problem, then, is not 
that of identifying just ends but that of “individualizing a different kind of 
violence that certainly could not be either the legitimate or illegitimate 
means in those ends but is not related to them as means at all but in 
some different way [nicht als Mittel zu ihnen, vielmehr (geradezu anders, 
nicht verhalten würde]” (Benjamin 1921, 996:47).

Who can this other type of relation to an end be? It will be useful to 
apply the considerations that we have just developed concerning the 
meaning of Benjamin’s term “pure” to the concept of “pure” medium as 
well. The medium does not owe its purity to any specific intrinsic 
properties that differentiate it from juridical means, but to its relation 
to them. In the essay on language, pure language is that which is not an 
instrument for the purpose of communication, but communicates itself 
immediately, that is, a pure and simple communicability; likewise, pure 
violence is that which does not stand in a relation of means toward an 
end, but holds itself in relation to its own mediacy. And just as pure 
language is not another language, just as it does not have a place other 
than that of the natural communicative languages, but reveals itself in 
these by exposing them as such, so pure violence is attended to only as 
the exposure and deposition of the relation between violence and law. 
Benjamin suggests as much immediately thereafter, evoking the image 
of violence that, in anger, is never a means but only a manifestation 
(Manifestation), While violence that is a means for making law never de-
poses itself relative with law and thus instates law as power (Macht), 
which remains “necessarily and intimately bound to it” (Benjamin 1921, 
992:22) pure violence exposes and serves the nexus between law and 
violence and can thus appear in the end not as violence that governs or 
executes (die schaltet und treibt) but as violence that purely acts and manifests 
(die waltet und). And if the connection between pure violence and ju-
risdictional violence, between state of exception and revolutionary violence, is 
thus made so tight that the two players facing each other across the 
cheesecake of history seem always to be moving a single pawn—force-
of-law, or pure means—what is nevertheless decisive is that in each case 
the criterion of their distinction lies in the dissolution of the relation 
between violence and law.

4.8 It is from this perspective that we must read Benjamin’s statement 
in the letter to Scholem on August 11, 1934, that “the Scripture without 
its key is not Scripture, but life” (Benjamin 1936, 648:45), as well as 
the one found in the essay on Kafka, according to which “(the law which 
is studied but no longer practiced is the gate to justice”) (Benjamin 1934, 
437:85). The Scripture (the Torah) without its key is the cipher of the 
law in the state of exception, which is in force but is not applied or is 
applied without being in force (and which Scholem, not at all suspecting 
that he shares this thesis with Schmitt, believes is still law). According to 
Benjamin, this law—or, rather, this force-of-law—is no longer law but 
life, “life as it is lived,” in Kafka’s novel, “in the village at the foot of the 
hill on which the castle is built” (Benjamin 1966, 601:49). Kafka’s most 
proper gesture consists not (as Scholem believes) in having maintained 
the law in that no longer has any meaning, but in having shown that it ceases 
to be to law and blurs at all points with life.

In the Kafka essay, the emblematic image of a law that is studied but no 
longer practiced corresponds, as a sort of remnant, to the unmasking of 
mythico-juridical violence entailed by pure violence. There, therefore, 
still a possible figure of law after its nexus with violence and power has 
been deposited, but it is a law that no longer has force or application, like 
the one in which the “new attorney,” leaping through “our old books,” 
haunts himself in study, or, like the one that Foulcault may have had in 
mind when he spoke of a “new law” that has been freed from all disci-
pline and all relation to sovereignty.

What can be the meaning of a law that survives its deposition in such a 
way? The difficulty Benjamin faces here corresponds to a problem that 
can be formulated (and it was effectively formulated for the first time in 
primitive Christianity and then later in the Marxist tradition) in these 
terms: What becomes of the law after its metanic fulmination? (This is 
the controversy that opposes Paul to the Jews of his time.) And what 
becomes of the law in a society without clause? (This is precisely the de-
bate between Vysinsky and Pashukanish.) These are the questions that
Benjamin seeks to answer with his reading of the "new attorney." Obvi-
ously, it is not a question here of a transitional phase that never achieves its
end, nor of a process of infinite deconstruction that, in main-
aining the law in a spectral life, can no longer get to the bottom of it. The
decisive point here is that the law—no longer practiced, but studied—
is not justice, but only the gate that leads to it. What opens a passage
toward justice is not the creation of law, but its deactivation and inactivity
(immaterial)—that is, another use of the law. This is precisely what the
force-of-law (which keeps the law working in the sense beyond its formal
suspension) seeks to prevent. Kafka’s characters—and this is why they
interest us—have to do with this spectral figure of the law in the state of
exception; they seek, each one following his or her own strategy, to
"study" and deactivate it, to "play" with it.

One day humanity will play with law just as children play with dis-
used objects, not in order to restore them to their canonical use but to
free them from it for good. 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 constituted by law, must
also be freed from this own value. This liberation is the task of poetry
or of play. And this ludic 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 (Benjamin 1991, 45).
temporary substitution of order by disorder, of culture by nature, of known by chaos, of atomism by physiology of anomie by anomic, has implicitly characterized the period of mourning and its manifestations" (Verzelni 1981b, 954–85). According to Verzelni, who here cites the analyses of the American sociologists Berger and Luckman, "All societies are constructions in the face of chaos. The constant possibility of atomic terror is actualized whenever the legitimations that obscure the powerlessness are threatened or collapse" (65).

Here, not only is the institution's evolution from the state of exception to public mourning explained by the resemblance between the manifestations of mourning and those of anomie (which simply begs the question), but the ultimate reason for this resemblance is then sought in the idea of an "atomic terror" said to characterize human societies as a whole. Such a concept (which is as inadequate to account for the specificity of the phenomenon as Marburg theology's schema of "tendenz" and "zustimmung" were to select a correct understanding of the divine) refers, in the last analysis, to the darkest spheres of psychology:

The total effects of mourning (especially for a chief or king) and the complete phenomenology of cyclical transitional crises . . . conform completely to the definition of anomie. . . . Everywhere there is a (temporary) reversal of the human to the non-human, the cultural to the natural (viewed as its negative contrast), of known to chaos and of economy to anomie. . . . The feelings of grief and desacralization and their individual and collective expressions are not restricted to one culture or to one type of cultural pattern. Apparently there are intrinsic features of humanness and the human condition, which manifest themselves above all in marginal or liminal situations. I would, therefore, agree with W. Turner, who, speaking of "unnatural—or rather, anti-cultural and anti-structural—events" in liminal situations, suggests that "perhaps Freud and Jung, in their different ways, have much to contribute to the understanding of these nonrational, non-rational (but not irrational) aspects of liminal situations" (Verzelni 1980b, 66x–s).

In this neutralization of the juridical specificity of the institution by means of an untechnical psychologistic reduction, Verzelni had been preceded by Durkheim.

who in his monograph entitled Suicide (1897) had introduced the concept of anomie into the human sciences. In setting out the category of "anomic suicide" alongside the other forms of suicide, Durkheim had established a concomitance between the diminution of society's regenerative influence on individuals and a rise in the suicide rate. This was tantamount to postulating (as he does without providing any explanation) a need of human beings to be regulated in their activities and passions. "What is characteristic of man is to be subject to a restraint that is not physical but moral; that is social. . . . But when a society is disturbed by some painful crisis or by benefit but abrupt transitions, it is momentarily incapable of exercising this influence; hence come the sudden rises in the curve of suicides which we have pointed out. . . . Anomic, therefore, is a regular and specific factor in suicide in our modern societies" (Durkheim 1897, 259–60; 254–56).

Thus, not only is the correspondence between crises and anxiety taken for granted (while, as we will see, etiological and folkloristic research above the contrary), but the possibility that anomie has a more intimate and complex relation to law and the social order is also ruled out in advance.

5.2 Equally inadequate are the conclusions of the study published by Sexton a few years later. The author seems to be aware of the possible political significance of the institution as public mourning, insofar as he stages and dramatizes the funeral of the sovereign as a state of exception: "In imperial funeral there survives the memory of a moulization. . . . Framing the funerary ritual within a sort of general mobilization, with all civil affairs stopped and normal political life suspended, the postmation of the institution tended to transform the death of a man into a national catastrophe, a drama in which each person was involved, willingly or not" (Sexton 1965, 171–72). This intuition, however, comes to nothing, and the nexus between the two forms of institution is accounted for by once again presupposing that which was to be explained, that is, an element of mourning implicit in the institution from the start (123–27).

It is Augusto Fraschetti's achievement to have underscored, in his monograph on Augustus, the political significance of public mourning, showing that the link between the two aspects of the institution lies not in a presumed character of mourning in extreme situations or anomie but in the taut that the sovereign's funeral can cause. Fraschetti recovers its origins in the violent riots that had accompanied the funerals.
of Caesar, which were significantly described as "seditionus funerals" (Frassetti 1990, 57). Just as the institutio was the natural response to tumult in the Republican era, "it is clear how the institutio comes to be identified with public mourning through a similar strategy, by which the deaths in the domus Augustae are likened to civic catastrophes. . . . The upshot of this is that the domus and the ruralia of a single family come to be the concern of the res publica" (57). Frassetti readily shows how, in conformity with this strategy, Augustus, beginning with the death of his nephew Meccecellus, would proclaim a institutio every time the family mausoleum was opened.

It is certainly possible to see the institutio (in the sense of public mourning) as nothing other than the sovereign's attempt to appropriate the state of exception by transforming it into a family affair. But the connection is even more intimate and complex.

Take, for example, Suessione's famous description of Augustus's death at Nicia on August 19 of the year 14 CE. The old sovereign, surrounded by friends and couriers, has a mirror brought to him and, after having his hair combed and his sagging cheeks made up, seems solely concerned to know whether he has acted the mimus vitus, the "force of his life", well. And yet, alongside this insistent theatrical metaphor, he stubbornly and almost insolently continues to ask (identidem quaerere)—what is not simply a political metaphor—an idem de se tumulatur, a fictis factis; "if there was now a tumult outside that concerned him." The correspondence between amotum and mourning becomes comprehensible only in the light of the correspondence between the death of the sovereign and the state of exception. The original nexus between tumulus and institutio is still present, but the tumult now coincides with the death of the sovereign, while the suspension of the law is integrated into the funeral ceremony. It is as if the sovereign, who had absorbed into his "Augustus" person all exceptional powers (from the tribunicia potestas perpetua (perpetual tribunicial power; to the imperium proconsulare maxius at inflation Ignatius and endless praecexitur imperium)) and who had, so to speak, become a living institutio, showed his intimate amonic character at the moment of his death and saw tumulus and amonius set free outside of him in the city. As Nissen had insisted in a limp formula (which is perhaps the source of Benjamin's thesis according to which the state of exception has become the rule), "exceptional measures disappeared because they had become the rule" (Nissen 1877, 140). The constitutional novelty of the principio enm thus be seen as an incorporation of the state of exception and amonius directly into the person of the sovereign, who begins to free himself from all subordination to the law and asserts himself as legis solus (unbound by the law).

51. The intimately amonic nature of this new figure of supreme power appears clearly in the theory of the sovereign as "living law" (nomos emarribh), which is elaborated among the neo-Pythagoreans in the same years that see the rise of the principate. The formula mensus nomos emarribh is found in Diogenes's treatise on sovereignty, which was partially preserved by Stobaeus and whose relevance to the origin of the modern theory of sovereignty must not be underestimated. The usual philological cmytia has prevented the modern editor of the treatise from seeing the obvious logical connection between this formula and the amonic character of the sovereign, even though this connection is unequivocally stated in the text. The passage in question—corrupt 78 part, yet nevertheless perfectly consistent—(3) divided into three points: (1) "The king is the most just (deinitio) and the most just is the most legal (anticlimax)." (2) "Without justice no one can be king, but justice is without law (secundum nomen diffiniunt). Delatte's proposed insertion of the negative before diffiniunt is totally unjustified philologically." (3) "The just is legitimate, and the king, having become the cause of the just, is a living law" (L. Delatte 1943, 37).

That the sovereign is a living law can only mean that he is not bound by it, that in him the life of the law coincides with a total amonic. Diogenes explains this a little later with unequivocal clarity. "Because the king has an irresponsibleness (secundum antinothesmata) and is himself a living law, he is like a god among men" (L. Delatte 1942, 50). And yet, precisely because he is identified with the law, he is held in relation to it and is indeed posited as the amonius foundation of the juridical order. The identification between sovereignty and law represents, that is, the first effort to assert the amonius as the essential element to the juridical order. The nomos emarribh is the original form of the nexus that the state of exception establishes between
sovereign is a tyrant, the magistrate is not in conformity with the law and the community is unhappy. (A. Deleuze 1922: 84)

By means of a complex strategy, which is not without analogies to Paul's critique of the Jewish roots (this prominence also at times nourished Romans 3:12 the law is the mirror of humanity); in Pseudo-archetypus the law is defined as a "letter" (gramma), exactly as in Paul, some elements are introduced into the into the person of the sovereign, with evidently no effect on the primacy of the letter (the sovereign is, indeed, "living law").

The secret solidarity between amicitia and law comes to light in another phenomenon, which represents a symmetrical and in some ways inverse figure to the imperial institution. Philologists and anthropologists have long been familiar with those periodic festivities (such as the Anthestesia and Saturnalia of the classical world and the carnaval of the medieval and modern world) that are characterized by suspended license and the suspension and overturnings of normal legal and social hierarchies. During these festivities (which are found with similar characteristics in various epochs and cultures), men dress up and behave like animals, masters serve their slaves, males and females exchange roles, and criminal behavior is considered licit or, in any case, not punishable. That is, they inaugurated a period of amicitia that breaks and temporarily subverts the social order. Scholars have always had difficulty explaining these sudden amicitia exploitations within well-ordered societies and, above all, why they would be tolerated by both the religious and civil authorities.

Contrary to those interpretations that traced the amicitia festivities back to agrarian cycles tied to the solar calendar (Mannhardt, Prateri) or to a periodic function of purification (Westerwinkel), Karl Meuli, with a brilliant intuition, instead related them to the state of suspended law that characterized some archaic juridical institutions, such as the Germanic Friedesfeier or the prosecution of the wargers in ancient English law. In a series of exemplary studies, he showed how the disturbances and violent acts meticulously listed in medieval descriptions of the charivari and other amicitia phenomena precisely replicate the different phases of the cruel ritual in which the Friedes and the bandits were expelled
from the community, their houses unroofed and destroyed, and their wells poisoned or made brackish. The hantenundes described in the unprecedented châtiment of the Roman de Fauvel ("L'un montre son cul au vent, / L'autre montre la mer à la mer, / L'un croyoit freuster et kyst, / L'autre geomet le sol en pays, / L'un geomet le fores aux visages, / Trep estestent les et survage / One showed his ass to the wind, / The other smashed a roof, / One broke windows and doors, / Another threw salt in the wells, / And another threw filth in the face, / They were truly horrible and savage) / cease to appear as parts of an innocent pandemonium, and one after the other find their counterparts and their proper context in the Lex Baiuvariorum or in the penal statutes of the medieval cities. The same can be said for the acts of harassment committed during masked feasts and children's begging rituals in which children punished whoever denied their obligation to give a gift with acts of violence that the Halloween only distantly recalls.

Chariavari is one of the many names (which vary from country to country and region to region) for an ancient and widely diffused act of popular justice, which occurred everywhere in similar, if not identical, forms. Such forms are also used as ritual punishments in the cyclical masked feasts and their extreme offshoots, the traditional children's begging rituals; one may therefore immediately draw upon these for an interpretation of chariavari-like phenomena. A closer analysis shows that what at first sight seemed simply to be rough and wild acts of harassment are in truth well-defined traditional customs and legal forms, by means of which, from time immemorial, the ban and prescription were carried out. (Menul 1979, 473)

If Menul’s hypothesis is correct, the “legal anarchy” of the anomic feasts does not refer back to ancient agrarian rites, which in themselves explain nothing; rather, it brings to light in a parodic form the anomic within the law, the state of emergency as the anomic drive contained in the very heart of the norm.

That is to say, the anomic feasts point toward a zone in which life’s maximum subjection to the law is reversed into freedom and license, and the most unbridled anomic shows its parodic connection with the norm. In other words, they point toward the real state of exception as
6 R Auctoritas and Potestas

6.1 In our analysis of the state of exception in Rome, we neglected to ask what was the motivation the Senate’s power to suspend the law by means of the senatus consultum ultimum and the consequent proclamation of a tutelum. Whoever may have been the subject qualified to declare a tutelum, it is certain that it was always declared ex auctoritate potestatis. Indeed, it is well known that in Rome the term designating the Senate’s most proper prerogative was neither imperium nor potestas, but auctoritas: auctoritas potestas is the syntagma that defines the specific function of the Senate in the Roman constitution.

In both the history of law and, more generally, philosophy and political theory, all attempts to define this category of auctoritas—particularly in contrast to potestas—seem to run into almost insurmountable obstacles and aporias. "It is particularly difficult," wrote a French legal historian at the beginning of the 1990s, "to bring the various juridical aspects of the notion of auctoritas back to a unitary concept" (Magelain 1990, 685); and, at the end of that decade, Hannah Arendt could open her essay "What Is Authority?" with the observation that authority had "vanished from the modern world" to such an extent that in the absence of any "authoritative and indisputable" experience of it, "the very term has become clouded by controversy and confusion" (Arendt 1966, 91). There is perhaps no better confirmation of this confusion—and of the ambiguities that it entails—than the fact that Arendt undertook her reevaluation of authority only a few years after Adorno and Erich Fromm—Brunswik had conducted their frontal attack on "the authoritarian personality."] On the other hand, in forcefully denouncing "the liberal identification of totalitarianism with authoritarianism" (97), Arendt probably did not realize that she shared this denunciation with an author whom she certainly disliked.

Indeed, in 1935, in a book bearing the significant title Der Führer der Verfassung (The guardian of the constitution), Carl Schmitt had tried to define the president of the Reich’s neutral power in the state of exception by dialectically opposing auctoritas and potestas. After recalling that both Bodin and Hobbes were still able to appreciate the meaning of the distinction, Schmitt lamented (in words that anticipate Arendt’s argument) "the lack of tradition of the modern theory of the state, which oppresses authority and freedom, authority and democracy . . . to the point of confounding authority with dictatorship" (Schmitt 1928, 137). Already in his 1910 treatise on constitutional law, through without defining the opposition, Schmitt evoked its "great importance in the general theory of the state," and referred back to Roman law to describe it ("the Senate had auctoritas on the contrary, potestas and imperium derive from the people") (Schmitt 1928, 132).

In 1968, in a study of the idea of authority published in a Festschrift for Schmitt’s eightieth year, a Spanish scholar, Jesus Freyo, noted that the modern confusion of auctoritas and potestas ("two concepts that express the original sense through which the Roman people conceived their communal life") (Freyo 1968, 213) and their convergence in the concept of sovereignty "was the cause of the philosophical inconsistency in the modern theory of the state," and he immediately added that this confusion "is not only academic, but it is closely bound up with the real process that has led to the formation of the political order of modernity" (217). What we shall now try to understand is the meaning of this confusion" that is bound up with the reflection and political praxis of the West.

R It is a commonly held opinion that the concept of auctoritas is specifically Roman, just as it is a double to refer to Dio Cassius in order to demonstrate its transhistoricality into Greek. But despite what is repeatedly claimed, Dio Cassius, who had an excellent knowledge of Roman law, does not say that the term is impossible to translate: he says, rather, that it cannot be translated kathkopis, "since and for all" (De gentibus et rebus gestis 55.7-5). The implication here is that it must be rendered in Greek with a different term each time, depending on the context, which is obvious, given the wide reach of the concept. What Dio has in mind, therefore, is not something like a Roman specificity of the term but the difficulty of lending it back to a single meaning.

6.2 The definition of the problem is complicated by the fact that the concept of auctoritas refers to a relatively broad juridical phenomenol-
ogy, which concerns both private and public law. It will be best to begin our analysis with the former, and then to see if it is possible to lead the two aspects back to unity.

In the sphere of private law, auctoritas is the property of the auctor, that is, the person sui iuris (the pater familias) who intervenes—pronouncing the technical formula auctor fin [I am made auctor]—in order to confer legal validity on the act of a subject who cannot independently bring it about. Thus, the auctoritas of the tutor makes valid the act of one who lacks this capacity, and the auctoritas of the father "authorizes"—that is, sanctions—the marriage of the son in potestate. Analogously, the seller (in a manuscriptus) is bound to assist the buyer in confirming his title of ownership in the course of a claim proceeding involving a third opposing party.

The term derives from the verb augeo: the auctor is is qui aget, the person who augments, increases, or perfects the act—or the legal situation—of some other, for one's own benefit, a "creative act." (Bovoniste 1960, § 348/422). In truth, the two meanings are not contradictory to all in classical law. Indeed, the Greco-Roman world does not know creation ex nihilo; rather, every act of creation always involves something else—formless matter or incomplete being—that must be perfected or made to grow. Every creation is always a recreation, just as every author is always a coauthor. As Magdelaine has effectively written, "Auctoritas is not sufficient in itself: whether it authorizes or ratifies, it implies an extra-legal activity that it validates." (Magdelaine 1990, 615). It is, then, as if for something to exist in law there must be a relationship between two elements (or two subjects): one endowed with auctoritas and one that takes the initiative in the act in the strict sense. If the two elements or two subjects coincide, then the act is perfect. However, if there is a gap or incongruity between them, the act must be completed with auctoritas in order to be valid. But where does the "force" of the auctor come from? And what is this power to augment?

It has been rightly noted that auctoritas has nothing to do with representation, whereby the acts performed by a mandator or by a legal representative are imputed to the mandator. The auctor's act is not founded upon some sort of legal power vested in him to act as a representative (of the minor or the incompetent): it springs directly from his condition as pater. In the same way, the act of the seller, who intervenes as auctor to defend the buyer, his nothing to do with a right of guarantee in the modern sense. Pierre Noailles, who had sought to the last years of his life to outline a unitary theory of auctoritas in public law, could therefore write that it is "an attribute attached to the person, and originally to the physical person, . . . the privilege, the right that belongs to a Roman, under the required conditions, to serve as a foundation for the legal situation created by others." (Noailles 1948, 254). "Like all the powers of archaic law," he adds, "belong familial, private or public, auctoritas too was originally conceived according to the unilateral model of "law simple, without obligation or sanction" (254). And yet we must only reflect on the formula auctor fin [and not simply auctor sum [I am auctor]] to realize that it seems to imply not so much the voluntary exercise of a right as the actualization of an imperssonal power [potestas] in the very person of the auctor.

6.3 As we have seen, in public law auctoritas designates the most proper prerogative of the Senate. The active subjects of this prerogative are therefore the partes auctoritatis patrum and partes auctoritatis suorum [the fathers are made auctores] and so express the constitutional function of the Senate. Legal historians have nevertheless always had difficulty defining this function. Mommsen observed that the Senate does not have an action of its own but can act only in concert with the magistrates or to complete the decisions of popular comitia by ratifying laws. The Senate cannot express itself without being questioned by the magistrates and can only request or "counsel"—consulturn is the technical term—without this "counsel" ever being absolutely binding. The formula of the senatus consultum is si est voluntas, "if it seems right to them [i.e., the magistrates];" in the extreme case of the senatus consultum ultimum, the formula is slightly more emphatic: videmus consulsum [let the consuls see to it]. Mommsen expresses this peculiar character of
autoritas when he writes that it is "less than an order and more than a counsel" (Mommessen 1956, 5: 1024).

It is clear, in any case, that autoritas has nothing to do with the potestas or the imperium of the magistrates or the people. The senator is not a magistrate, and we nearly never find the verb inferre [to order], which defines the decisions of the magistrates or the people, used for his "con. mort." And yet, with a strong analogy to the figure of the auxor in private law, the auxor or parent intervenes to ratify the decisions of the popular comitia and make them fully valid. A single formula (auxor fide) designates both the action of the tutor that completes the act of the minor and the senatorial ratification of popular decisions. The analogy here does not necessarily mean that the people must be considered as minors under the tutelage of the patron; rather, the essential point is that in this case there is that duality of elements that is in the sphere of private law defines the perfect legal action. Autoritas and potestas are clearly distinct, and yet together they form a binary system.

It the plebeians among scholars who tend to unify the auxor and patrium the auxor private law under a single paradigm are easily resolved if one considers that the auxor does not concern the individual figures, but the very structure of the relation between the two elements whose integration constitutes the perfect act. In a study from 1953 that had a strong influence on Roman scholars, Richard Hoare described the common element between the minor and the people with these words: "The tutor and the people are determined to bind themselves in a certain direction, but their bond cannot come into being without the collaboration of another subject" (Hoare 1953, 59). That is to say, it is not that scholars need to "depict public law in the light of private law" (Biscardi 1981, 279), but that there is a structural analogy that, as we will see, concerns the very nature of the law, juridical validity is not an original characteristic of human actions but must be conveyed to them through a "power that grants legitimacy" (Maggelshin 1980, 660).

6.4 Let us try to better define the nature of this "power that grants legitimacy" in its relation to the person of the magistrates and the people. When previous authors understood this relation as a union into account precisely that extreme figure of autoritas that is at issue in the status consultum ultimum and the institutum. As we have seen, the institutum produces a true and proper suspension of the juridical order. In particular, the consuls are reduced to the condition of private citizens (in privato abditis), while every private citizen acts as if he were invested with his imperium. With an inverse symmetry, in 211 BCE, at Hannibal's approach, a senate consultum rescinds the imperium of the former dictators, consuls, and censors (placet omnes qui dictatores, consules certernen faciunt ut imperio suo, hanc reciprocat n umeri hostis [It was decreed that all who had been dictators, consuls, or censors should have imperium, until the enemy had withdrawn from the walls] [Livy 26.10.9]). Under extreme conditions (that is to say, under the conditions that best define it, if it is true that a legal institution's truer character is always defined by the exception and the extreme situation) autoritas seems to act as a force that suspends potestas where it took place and reactivates it where it was no longer in force. It is a power that suspends or reactivates law, but is not formally in force as law.

This relation—at once one of exclusion and supplementation—between autoritas and potestas is also found in another institution in which the auxor patrium once again shows its peculiar function: the interregnum. Even after the end of the monarchy, when, because of death or whatever other reason, there remained no consul or other magistrate in the city (except the representatives of the plebs), the patriae auxores (that is, the group of senators who belonged to a consular family, as opposed to the patriae conscrips [conscription fathers]) named an interrex who ensured the continuity of power. The formula used was ex publica ad patres exspectat [The republic returns to the fathers] or auxoepia ad patriae rednent [The auxores return to the fathers]. As Magglelins has written, "During the interregnum, the constitution is suspended. . . The Republic is without magistrates, without Senate, without popular assemblies. Then the senatorial group of the patriae meets, and sovereignty names the first interrex, who in turn sovereignly names his own succesor" (Magglelshin 1980, 339-40). Here too, autoritas shows its connection with the suspension of potestas and, at the same time, its capacity to ensure the functioning of the Republic under exceptional circumstances. Once again, this prerogative rests immediately with the patriae auxores as such. Indeed, the first interrex is not invested with the imperium of a magistrate, but solely the auxoepia (1368) and in asserting
against the plebeians the importance of the auspices. Appius Claudius states that they belong personally and exclusively to the patres primi-
tem: "nobilis aedes propriae sunt auspices, at . . . privatum auspicii habere-
num [The auspices belong as properly as is that . . . we have them as
private citizens]" (Livy 6:41.6). The power to reactivate vacant potestas
is not a legal power received from the people or a magistrature but springs
immediately from the personal condition of the patres.

6.5 A third institution in which auctoritas shows its specific function of suspending law is the hostis indicatus. In exceptional situations where a
Roman citizen threatened the security of the Republic by conspira-
cy or treason, he could be declared hostis, "public enemy" by the Senate. The
hostis indicatus was not simply likened to a foreign enemy, the hostis
alienigena, because the latter was always protected by the is ius gentium
[law of peoples] (Nœxien 1877, 27); he was, rather, radically deprived of
any legal status and could therefore be stripped of his belongings and put
to death at any moment. What auctoritas suspends here is not simply the
juridical order, but the ius civitas, the very status of the Roman citizen.

The relation—at once antagonistic and supplementary—between
auctoritas and potestas is finally shown in a terminological peculiarity
that Memmianus was the first to notice. The syntagma senator auctoritas
is used in a technical sense to designate a senator consultum that, be-
cause it has been opposed by an interrex, is without legal effects and
cannot therefore be executed (even if it was entered as such among the of-
ficial acts, auctoritas præcepta). That is, the auctoritas of the Senate
appears in its purest and most perspicuous form when it has been in-
validated by the potestas of a magistrate, when it lives as mere writing in
absolute opposition to the law being in force (vigitentia). For a moment
here auctoritas shows its enervate the power (potestas) that can at once "grant legitimacy" and suspend law exhibits its most proper character
at the point of its greatest legal inefficacy. It is what remains of law if
law is wholly suspended (in this sense, in Benham’s reading of Ratier’s
allegory, not law but life—law that blurs at every point with life).

6.6 It is perhaps in the auctoritas principis—that is, in the moment
when Augustus, in a famous passage of the Res gestarum, claims auctor-
tas as the foundation of his status as princeps—that we can better un-
derstand the meaning of this unique prerogative. It is significant that
the rebirth of modern studies of auctoritas coincides precisely with the
publication in 1944 of the Monumentum Antichorum, which allowed a
more accurate reconstruction of the passage in question. The issue here
concerned a series of fragments of a Latin inscription containing a pas-
sage from chapter 54 of the Res gestarum, which was extant in its entirety
only in the Greek version. Memmianus had reconstructed the Latin text in
these terms: "post id tempus praetoris annonis dignitatem (auctoritatem),
potestas autem ubi amplius habebat quem qui fuerat sibi quoque in magistratu consulere. [After that time I surpassed all in dignity, although
I had no more potestas than those who were my colleagues in each mag-
istracy]." The Antiochene inscription showed that Augustus had written
d not dignitatem but auctoritatem. Commenting in 1925 on the new infor-
mation, Heineeur, "We philologists should all be ashamed for having
blindly followed Memmianus’ authority: the only possible antithesis to potestas—that is, to the legal power of a magistrature—was, in this pas-
sage, not dignitatem, but auctoritatem" (Heineuer 1925, 348).

As often happens—and moreover, as scholars did not fail to ob-
serve—the rediscovery of the concept (no fewer than fifteen important
monographs on auctoritas appeared in the following ten years) kept pace
with the growing weight that the authoritative principle was as-
suming in the political life of European societies. "Auctoritas," wrote a
German scholar in 1927, "that is, the fundamenta concept of public law
in our modern authoritarian states, can only be understood—not only
literally but also as regards the content—starting from Roman law of the
time of the princeps" (Wenger 1929, 117). And yet it is possible that this
relation between Roman law and our own political experience is precisely
what still remains for us to investigate.

6.7 If we now return to the passage from the Res gestarum, the decisive
point is that here Augustus defines the specificity of his constitutional
power not in the certain terms of a potestas, which he says he shares
with those who are his colleagues in the magistracy, but in the vaguer
terms of an auctoritas. The meaning of the term "Augustus," which the
Senate conferred on him on January 16, 27 BCE, accords entirely with
this claim: it comes from the same root as anger and auctus and, as Dio Cassius notes, "does not mean a potius [manumittam] ... but shows the splendor of auctus [cum potius auctum appetuisset]" (Roman History 55.8.4).

In the edict of Justinia of the same year, in which he declares his intention to reverse the republican constitution, Augustus defines himself as auctor etrex auctor (auctor of the highest standing). As Magdalain has aptly observed, the term auctor here does not have the generic meaning of "founder," but the technical meaning of "guarantor in a municipium." Because Augustus conceives of the restoration of the Republic as a transfer of the res publica from his hands to those of the people and the Senate (see Res Gestae 54.1), it is possible that "in the formula auctor optimi status ... the term auctor has a rather precise legal meaning and refers to the idea of the transfer of the res publica. ... Augustus would thus be the auctor of the rights rendered to the people and the Senate, just as, in a municipium, the municipia dux is the auctor of the power acquired by the municipio accusatis over the transferred object" (Magdalain 1967: 57).

In any case, the Roman principate—which we are used to describing with a term (temper) that refers back to the institution of the magistracy—is not a magistracy, but an extreme form of auctoritas. Heinze has described this contrast perfectly: "Every magistracy is a preestablished form, which the individual enters into and which constitutes the source of his power; auctoritas, on the other hand, springs from the person, as something that is constituted through him, lives only in him, and disappears with him" (Heinze 1914: 356). Though Augustus acquires all magistrates from the people and the Senate, auctoritas is instead bound to his person and confers on him as auctor optimi status, as he who legitimates and guarantees for whole of Roman political life.

Hence the peculiar status of his person, which manifests itself in a fact whose importance has yet been fully appreciated by scholars. Dio Cassius informs us that Augustus "made all of his house public [timon etrex eadem posuit] ... so as to live at once in public and in private [vivisset et in eum idem auctori potius adesse]" (Roman History 55.12.5). It is the auctoritas that he embodies, and not the magistracies with which he has been invested, that make it impossible to isolate in him something like a private life and domus. This is also the sense in which one must interpret the fact that a augurium to Venus is dedicated in the house of Augustus in the Palatine. Manucci has rightly observed that, given the close connection between the cult of Venus and the cult of the public Penates of the Roman people, this meant that the Penates of Augustus's family were identified with those of the Roman people and that therefore "the private cults of a family . . . and presumably communal cults in the abode of the city and of Venus and the public Penates of the Roman people would seem in fact to become homo logical in the house of Augustus" (Manucci 1900, 90). Unlike the life of the common citizens, the "augur" life can no longer be defined through the opposition of public and private.

It is in this light that Krentzovic's theory of the king's two bodies should be read, so that we can make sense of his theory. Krenzovic (who generally overrates the importance of the Roman precedent to the theory that he seeks to reconstruct for the English and Jewish monarchies) does not make the distinction between auctoritas and potius to the problem of the king's two bodies and the principle dignitas est mare montanum [dignitas does not die]. And yet it is precisely because the sovereign was first and foremost the embodiment of an auctoritas, and not only a potius, that auctoritas was so closely bound to his physical person, thus requiring the complicated ritual of constructing a new body of the sovereign in the focus magi. The end of a magistracy as such does not entail a problem of bodies at all: One magistracy succeeds another without having to presuppose the mortality of the office. Only because, from the Roman princeps on, the sovereign expresses an auctoritas in his very person, only because in "augur" life public and private have entered into a zone of absolute indistinction, does it become necessary to distinguish two bodies in order to ensure the continuity of dignitas (which is simply a synonym for auctoritas).

To understand modern phenomena such as the Westfalen Deal and the Nizh Faktor, it is important not to forget their continuity with the principle of the auctoritas principle. As we have already observed, even though Manucci held the office of head of the government and Hitler that of chancellor of the Reich (just as Augustus held imperium etrex or potius tribunici) neither the Deal nor the Faktor represents a constitutionally defined public office or magistracy. The qualities of Deal or Faktor are immediately bound to the physical
person and belong to the biopolitical tradition of *auctoritas* and not to the legal tradition of *potestas*.

6.8 It is significant that modern scholars have been so ready to uphold the claim that *auctoritas* inheres immediately in the living person of the *pater* or the *principis*. What was clearly an ideology or a felo intended to ground the preeminence *ex* in any case, the specific rank of *auctoritas* in relation to power, was between a figure of law’s transcendence to life. It is not by chance that this should happen precisely in the years when the authoritarian principle saw an unexpected rebirth in Europe through fascism and National Socialism. Though it was obvious that there cannot be some sort of eternal human type periodically embodied in Augustus, Napoleon, or Hitler, and that there are only more or less similar legal apparatuses (the state of exception, the *ius trium*, the *auctoritas principis*, *Führerstat*) that are put to use under more or less different circumstances; the power that Weber called “charismatizing” was nevertheless linked in 1928 Germany (and elsewhere) to the concept of *auctoritas* and elaborated in a theory of *Führerstat* as the originary and personal power of a leader. Thus in 1933, in a short article that seeks to outline the fundamental concepts of National Socialism, Schmidt defines the principle of *Führerstat* through “the ancestral identity between leader and followers” (note the use of Weberian concepts). 1938 saw the publication of the Berlin jurist Heinrich Triepel’s book *Die Hegemonie*, which Schmitt quickly reviewed. In its first section, the book expounds a theory of *Führerstat* as an authority founded not on a preexisting order but on a persona-charism. The *Führer* is defined through psychological categories (energetic, conscious, and creative will), and his unity with the social group and the originary and personal character of his power are strongly underscored.

Then in 1942, the elderly Roman scholar Pietro De Francisci published *Arsana imperii*, in which he dedicates a good deal of space to an analysis of the “primary type” of power that he (seeking to distance himself from those with a sort of euphemism) defines as *dux* (and the leader in which it is embodied as *doctus*). De Francisci transforms the Weberian tripartition of power (traditional, legal, charismatic) into a dichotomy drawn on the opposition of authority and power (*potestas*). The authority of the *dux* or the *Führer* can never be derivative but is always originary and springs from this person; furthermore, in its essence it is not coercive, but is rather founded, as *Triepel* had already shown, on consent and the free acknowledgment of a “superiority of value.”

Though both Triepel and De Francisci had fascist and Nazi techniques of government before their eyes, neither appears to have been aware that the power they describe attains an appearance of originality from the suspension or neutralization of the juridical order—that is, ultimately, from the state of exception. “Charismatizing”—its reference to Paul’s *khris* (grace) (which Weber knew perfectly well)—could have suggested—coincides with the neutralization of law and with new originary figure of power.

In each case, what the three authors seem to take for granted is that authoritarian-charismatic power springs almost magically from the very person of the *Führer*. Law’s claim that it coincides at an eminent point with life could not have been affirmed more forcefully. In this regard, the theory of *auctoritas* converged at least in part with the traditions of juridical thought that saw law as ultimately identical with—or immediately articulated to—life. Savigny’s maxim (“Law is nothing but life considered from a particular point of view”) finds a counterpart in the twentieth century in Rudolph Schröder’s thesis that “the norm receives the grounds of its validity (Gehorsamgrund), the quality of its validity, and the content of its validity from life and the sense attributed to it, just as, inversely, life must be understood only in relation to its assigned and regulated vital sense (Lebenssinne)” (Schröder 1956, 300). Just as, in Romantic ideology, something like a language became fully comprehensible only in its immediate relation to a people (and vice versa), so law and life must be tightly implicated in a reciprocal grounding. The dialectic of *auctoritas* and *potestas* expressed precisely this implication (and in this sense, one can speak of an originary biopolitical character of the paradigm of *auctoritas*). The norm can be applied to the normal situation and can be suspended without totally annulming the juridical order because in the form of *auctoritas*, or sovereign decision, it refers immediately to life, it springs from life.

6.9 It is perhaps possible at this point to look back upon the path traveled thus far and draw some provisional conclusions from our investigation of the state of exception. The juridical system of the West appears...
as a double structure, formed by two heterogeneous yet coordinated elements: one that is normative and juridical in the strict sense (which we can for convenience inscribe under the rubric potestas) and one that is anomie and metaphysical (which we can call by the name autocracia).

The normative element needs the anomie element in order to be applied, but, on the other hand, autocracia can assert itself only in the validation or suspension of potestas. Because it results from the dialectic between these two somewhat antagonistic yet functionally connected elements, the ancient dwelling of law is fragile and, in striving to maintain its own order, is always already in the process of ruin and decay. The state of exception is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine by instituting a threshold of undecidability between anomie and norm, between life and law, between autocracia and potestas. It is founded on the essential fiction according to which anomie (in the form of autocracia, living law, or the force of law) is still related to the juridical order and the power to suspend the norm has an immediate hold on life. As long as the two elements remain correlated yet conceptually, temporally, and subjectively distinct (as in republican Rome’s contrast between the Senate and the people, or in medieval Europe’s contrast between spiritual and temporal powers) their dialectics—though founded on a fiction—can nevertheless function in some way. But when they tend to coincide in a single person, when the state of exception, in which they are bound and blundered together, becomes the rule, then the juridico-political system transforms itself into a killing machine.

6.10 The aim of this investigation—in the urgency of the state of exception “in which we live”—was to bring to light the fiction that governs this anomie (aspiring to power) pur elenon of our time. What the “stick of power” contains at its center is the state of exception—but this is essentially an empty space, in which a human action with no relation to law stands before a norm with no relation to life.

This does not mean that the machine, with its empty center, is not effective; on the contrary, what we have sought to show is precisely that it has continued to function almost without interruption from World War One, through fascism and National Socialism, and up to our own time. Indeed, 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 governmental violence that, while ignoring international law externally and producing a permanent state of exception internally—nevertheless still clings to applying the law.

Of course, the task at hand is not to bring the state of exception back within its spatially and temporally defined boundaries in order to then reaffirm the primacy of a norm and of rights that are themselves ultimately grounded in it. From the real state of exception in which we live, it is not possible to return to the state of law (stato di diritto); for at issue now are the very concepts of “state” and “law”. But if it is possible to attempt to halt the machine, to show its central fiction, this is because between violence and law, between life and norm, there is no substantial articulation. Alongside the movement that seeks to keep them in relation at all costs, there is a countermovement that, working in an opposite direction in law and in life, always seeks to loosen what has been artificially and violently linked. That is to say, in the field of tension of our culture, two opposite forces act, one that institutes and makes, and one that deactivates and deposes. The state of exception is both the point of their maximum tension and—as it coincides with the rule—that which threatens today to render that order indiscernible. To live in the state of exception means to experience both of these possibilities and yet, by always separating the two forces, ceaselessly to try to interrupt the working of the machine that is leading the West toward global civil war.

6.11 If it is true that the articulation between life and law, between anomie and norm, that is produced by the state of exception is effective through fiction, one can still not conclude from this that somewhere either before or beyond juridical appearances there is an immediate access to something whose fracture and impossible unification are represented by these appearances. There are not first life as a natural biological given and anomie as the state of nature, and then their implication in law through the state of exception. On the contrary, the very possibility of distinguishing life and law, anomie and norm, coincides with their articulation in the biopolitical machine. Bare life is a product of the
machine and not something that predetermines it, just as law has no court in nature or in the divine mind. Life and law, atomistic and normative, constitutes and potentiates, exist from the fracture of something to which we have no other access than through the fiction of their articulation and the patient work that, by unmasking this fiction, separates what it had claimed to unite, but disenchantment does not restore the enchanted thing to its original state: According to the principle that purity never lies at the origin, disenchantment gives it only the possibility of reaching a new condition.

To show law in its corollary to life and life in its corollary to law means to open a space between them for human action, which once claimed for itself the name of "politics." Politics has suffered a lasting eclipse because it has been contaminated by law, seeing itself at best, as constitutive power (that is, violence that makes law), 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. And only beginning from the space thus "opened" will it be possible to pose the question of a possible use of law after the de-territorialization of the device that, in the state of exception, tied it to life. We will then have before us a "pure" law, in the sense in which Benjamin speaks of a "pure" language and a "pure" violence. To a word that does not bind, that neither commands nor prohibits anything, but says only itself, would correspond an action as pure means, which shows only itself, without any relation to an end. And, between the two, not a lost as magical state, but only the use and human praxis that the powers of law and myth had sought to capture in the state of exception.

References

Cohen, S. M. 1991. "The Concept of Religion." In Towar...